LSLAP Manual

Law Students' Legal Advice Manual

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Introduction

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Chapter One - Criminal Law

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

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

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Resources

1. Annotated Criminal Codes:

- Edward Greenspan, Marc Rosenberg, & Marie Henein, eds, *Martin's Annual Criminal Code*, 2023 ed (Toronto: Thomson Reuters, 2022).
- Alan D. Gold, *The Practitioners Criminal Code*, 2024 ed (Toronto: LexisNexis Canada, 2023).
- The Honourable Mr. Justice David Watt, The Honourable Madam Justice Michelle Fuerst, *The 2023 Annotated Tremeear's Criminal Code*, 2023 ed (Toronto: Thomson Reuters, 2022).

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

2. Other Criminal Law Resources:

- The Honourable Mr. Justice Eugene Ewaschuk, *Criminal Pleadings and Practice in Canada*, 3d ed (Toronto: Canada Law Book, 2022).
- The Honourable S Casey Hill, David Tanovich, & Louis Strezos, *McWilliam's Canadian Criminal Evidence*, 5th ed (Toronto: Canada Law Book, 2013).
- David Watt, *Watt's Manual of Criminal Evidence*, 2023 ed (Toronto: Carswell, 2022).
- Robert Paul Nadin-Davis & Clarey B Sproule, eds, *Canadian Sentencing Digest Quantum Service* (Toronto: Carswell, 1989) (also available on e-carswell).
- Francis Lewis Wellman, *Art of Cross-Examination with the Cross-Examinations of Important Witnesses in Some Celebrated Cases* (New York: Collier Books, 1903).
- Earl J Levy, *Examination of Witnesses in Criminal Cases*, 3d ed (Toronto: Carswell, 1994).
- Thomas A Mauet, Donald G Casswell, & Gordon P MacDonald, *Fundamentals of Trial Techniques* (Toronto: Little, Brown, 2001).
- Christopher Bentley, *Criminal Practice Manual: a Practical Guide to Handling Criminal Cases* (Scarborough, Ont: Carswell, 2000).

3. Relevant Statutes:

- *Criminal Code* [1], RSC, 1985, c C-46.
- *Controlled Drugs and Substances Act* [2], SC 1996, c 19 (if drug offence).
- *Canada Evidence Act* [3], RSC, 1985, c C-5.
- *Canadian Charter of Rights and Freedoms* [4], Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 (particularly ss 7 – 14, 24 (1) and (2)).
- *Identification of Criminals Act* [5], RSC, 1985, c I-1.
- *DNA Identification Act* [6], SC 1998, c 37.

4. Legal Aid:

Legal Aid BC (LABC), previously the Legal Services Society of BC, is the only source of criminal legal aid in British Columbia (BC). LABC's purpose is to provide free representation for financially eligible accused persons (low-income individuals), who are charged with certain offences. LABC will provide a retainer to a lawyer in private practice requested by or assigned to the eligible client who will provide legal assistance on a contract basis.

A wide range of free resources covering various legal problems and legal rights are also available online [7] and at LABC offices.

If appropriate, the client should be advised to contact Legal Aid directly at (604) 408-2172 or 1 (866) 577-2525. See **Chapter 23: Referrals**, or the blue pages of the phone book, for more information.

a) Financial Eligibility

LABC will grant a letter of referral to applicants who meet the financial eligibility requirements. These can be found at https://legalaid.bc.ca/legal_aid/doIQualifyRepresentation.

There is some flexibility in the requirements, subject to the discretion of the intake legal assistant assessing the application. Clients will be required to complete a means test indicating household size, income, and assets; certain expenses; and level of education. Information on how to apply can be found at https://legalaid.bc.ca/legal_aid/howToApply.

b) Eligible Offences and Conditions

Legal Aid lawyers may be able to represent an accused person in their criminal case if, after conviction (or a guilty plea) the accused would:

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

Legal Aid lawyers may also represent an accused person if the accused person:

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

c) Reviewing a Decision

An accused who has been denied Legal Aid can have the decision reviewed where circumstances warrant it. Requests for review must be in writing, must set out the reasons for disagreeing with the decision, and must include copies of supporting documentation. Legal Aid does not consider any requests received after 30 days from the date of the intake legal assistant's decision. Information on how to apply for a review can be found at https://legalaid.bc.ca/about/applyForReviewOfDecision.

5. Lawyer Referral Service

The accused may call (604) 687-3221 or 1 (800) 663-1919 (for those outside the Lower Mainland) to reach the service, where an operator will provide the name of a lawyer who practices criminal law. The client should then call the lawyer to make an appointment to receive a free 15-minute consultation. The client will have to negotiate the fee for subsequent sessions at their first meeting with the lawyer. See **Chapter 23: Referrals** for more information.

6. Everyone Legal Clinic:

The Everyone Legal Clinic provides fixed-fee criminal defence at a lower cost to individuals facing summary conviction offences. Clients can request a consultation appointment with an articling student online at https://app.qase.net/create_elc_referral. More information, including rates, can be found at https://everyonelegal.ca/services-for-everyone/criminal-defence.

7. Duty Counsel:

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

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

References

[1] https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html?autocompleteStr=criminal%20code%20&autocompletePos=1
[2] https://www.canlii.org/en/ca/laws/stat/sc-1996-c-19/latest/sc-1996-c-19.html?autocompleteStr=%E2%80%A2%09Controlled%20Drugs%20and%20Substances%20Act&autocompletePos=1
[3] https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-5/latest/rsc-1985-c-c-5.html?autocompleteStr=%E2%80%A2%09Canada%20Evidence%20Act&autocompletePos=1
[4] https://www.canlii.org/en/qc/laws/stat/cqlr-c-c-12/latest/cqlr-c-c-12.html?searchUrlHash=AAAAAQAHY2hhcnRlcgAAAAAB&resultIndex=2
[5] https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-1/latest/rsc-1985-c-i-1.html?autocompleteStr=%E2%80%A2%09Identification%20of%20Criminals%20Act&autocompletePos=1
[6] https://www.canlii.org/en/ca/laws/stat/sc-1998-c-37/latest/sc-1998-c-37.html?autocompleteStr=%E2%80%A2%09DNA%20Identification%20Act&autocompletePos=1
[7] https://legalaid.bc.ca/publications

III. Etiquette

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Courtroom Procedure for Self-Represented Litigants

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

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

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

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

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

1. Interacting with Crown

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

2. Courtroom Demeanour & Etiquette

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

3. Appearing Remotely

Since the COVID-19 Pandemic an increasing number of court appearances are conducted remotely, both by legal representatives and accused persons. In BC, the Provincial Courts have chosen to use Microsoft Teams ("MS Teams") for remote court appearances. The defence/self-represented accused can either dial in to the MS Teams meeting using a phone or join via a computer with a working internet connection and appear via video call.

If the defence/accused wishes to attend the appearance remotely, determine at which courthouse and in which courtroom the appearance is taking place, using Court Services Online [1]. Call the court registry for that courthouse, tell them the courtroom, date and time of the appearance, and ask for either the dial in number or the e-mail link for MS Teams for that courtroom on that day. The defence/accused may also wish to ask for the conference number to ensure they attend the correct courtroom.

If the defence/accused intends to appear remotely, and knows which Crown Counsel is assigned to the court file, it is a good idea to email or call that Crown Counsel and let them know that they will be appearing remotely, specifying whether they expect to attend by telephone or MS Teams. All technology is prone to breakdowns and interruptions. If Crown Counsel knows that the defence/accused intends to appear by MS Teams, they will be slow to seek a bench

warrant if the defence/accused is not present on the phone or on MS Teams at the correct time.

If appearing on MS Teams, the camera and microphone should be kept off until the accused's matter is called. The defence/accused should use the chat function of MS Teams to let Crown Counsel and the court know for which matter they are present in court to address (last name and number of matter). Once the matter is called, turn on the camera. Only unmute the microphone when it is the defence's turn to speak.

Please note, that if appearing remotely, it is likely that the matter will be called later than if the defence/accused had attended in person. Please also note, that law students are encouraged to attend appearances in person (unless ill) to observe the workflow of the active court.

For further information about appearing remotely and official court rules please refer to the memorandum produced by the Provincial Court of British Columbia, NP 21 Remote Attendance in the Provincial Court: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https:/ / www. provincialcourt. bc. ca/ downloads/ Practice%20Directions/NP%2021%20Guide%20to%20Virtual%20Proceedings.pdf.

References

[1] https://justice.gov.bc.ca/cso/esearch/criminal/partySearch.do

IV. Criminal Charges

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Arrest

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

B. Informing an Accused of the Charge and Compelling Appearance

A person may learn that they are accused of committing a criminal offence in one of several ways. They may:

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

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

1. Appearance Notice

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

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

2. Promise to Appear

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

3. Summons

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

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

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

4. Judicial Interim Release (Bail)

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

A detained person must be brought before either a judge or a justice without unreasonable delay or, where a justice is not available within a period of 24 hours after the person has been arrested, the person shall be taken before a justice as soon as possible (see *Criminal Code*, s 503). When the accused is brought before a judge or a justice and the Crown is seeking the continued detention of the accused, the onus is on the Crown to show cause as to why the continued detention of the accused is necessary (see *Criminal Code*, s 515(10)), except for the offences listed under section 515(6) of the *Criminal Code*. Section 515(6) includes very serious offences such as murder and treason and less serious matters where special considerations apply such as when violence was allegedly used against an intimate partner and the accused has been previously convicted of an offence. For these offences, the onus is reversed, and it is on the accused to show why they can be safely released on bail.

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

- Primary—to ensure attendance in court (a possible flight risk).

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

Often during the show-cause hearing, the focus becomes the conditions upon which an accused person can be released and the adequacy of the accused's bail plan. This is particularly the case where an accused, by virtue of section 515(6) of the Criminal Code, has the onus of establishing that the court can safely release them from custody. A release plan may include sureties, a cash deposit, or restrictive conditions such as a curfew or an area restriction. A surety is a person who agrees to be responsible for an accused and agrees to pay a sum of money to the court if they are not successful in making sure the accused follows their bail conditions and attends court as required. Sureties can only be imposed when less onerous forms of release are inadequate. The Crown will usually have specific concerns about an accused's behaviour.

Since the addition of sections 493.1 and 493.2 to the Criminal Code, all participants in the Bail process, including police officers releasing accused persons on a promise to appear, peace officers, judges, and justices, should release accused persons on the least onerous conditions possible and at the earliest opportunity. Particular attention must be paid to Aboriginal accused and other accused persons belonging to vulnerable populations that are over-represented in the criminal justice system.

5. Warrant in the First Instance

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

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

6. Fingerprinting and Photographing

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

The police commonly fix the date for fingerprinting prior to the date of the first appearance and prior to any charge approval decision by Crown Counsel. If the accused has already been fingerprinted and the Crown does not approve the charges or stays the proceeding, the accused can apply to the police force who collected the fingerprints to have those fingerprints destroyed.

7. Varying Conditions of Interim Release (Bail Variation)

Sometimes an accused is disagrees with one or more of their bail conditions and wants those conditions changed. Bail conditions can only be changed in Provincial Court with consent of the Crown or by application before a judge who is in conduct of an ongoing trial or preliminary inquiry. If a Provincial Court trial has not started and there is no consent by the Crown, the only way to vary a bail term is to make an application to the Supreme Court of British Columbia (see below).

To convince the Crown to vary bail conditions, an accused person must explain why less restrictive conditions are sufficient to meet the concern addressed by the conditions or that the conditions are no longer necessary. For example, on a spousal assault file, an accused is usually released on a condition that they do not contact their spouse. It is not uncommon that the complainant will desire contact with the accused following an incident. In these circumstances, the Crown will interview the complainant in order to determine what, if any, no-contact conditions remain necessary for the protection of the complainant.

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

8. Charge Approval by Crown Counsel

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

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

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

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

C. Appearance Requirements

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

For indictable offences, the self-represented accused must appear in person or remotely via MS Teams (see **section III** for further information on appearing remotely). However, if the accused person is unable to attend, anyone can appear with leave of the court (permission of the court) to explain why the accused is unable to attend. If the court is satisfied with the explanation, the court can note the accused person's non-appearance and delay the issuance of a warrant for their arrest.

For more information on summary vs. indictable offences see **section V**.

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

D. Initial Appearance(s)

Matters are generally set for the Initial Appearance Room if the accused has not previously appeared in court for this matter, has not yet obtained counsel, or has not set a date for trial or guilty plea. An accused can have multiple initial appearances. If the accused person has not yet made their first appearance in court, they should attend their initial appearance, and obtain the particulars and the Initial Sentencing Position (ISP) from Crown.

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

1. Procedure at Initial Appearance

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

Before the accused is asked to decide how they will plead, counsel should ensure that the accused fully understands their legal rights, the consequences of a guilty plea, the conditions under which the court can accept a guilty plea (see *Criminal Code*, s 606(1.1)), and the Crown's burden of proof to prove all elements of the offence beyond a reasonable doubt. Counsel should also discuss any possible defences, mitigating factors, and any possibility of being found guilty for lesser included offences if guilt is not established for the original charge.

E. Obtaining Particulars

Accused persons are entitled to the particulars. Crown Counsel will often delay printing a physical copy of the particulars until after they know whether or not the accused has counsel, as defence counsel is usually provided with the particulars electronically. An unrepresented litigant should request a physical copy of particulars at the first appearance and adjourn until they receive said particulars.

Law students and self-represented litigants can request particulars by emailing the Crown. Crown email addresses can be obtained by calling the Crown Counsel office in the city in which the charge was laid.

F. Review the Particulars

The particulars should include the following documents:

1. The Information

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

a) Review the Information

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

The defence/self-represented accused should review all aspects of the Information to ensure that it has been laid properly. Particularly, they should ensure that the Information has been laid within twelve months of the alleged offence for all summary conviction offences. They should also ensure that the date of the alleged offence and the names of the accused and complainant are correct.

b) Content of the Information

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

c) Obtaining the Information

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

d) Striking down an Information

Provisions exist for a motion to be made to quash the Information (or a count therein) before the plea or, with leave of the court, afterwards (see *Criminal Code*, s 601(1)). Although this is rare, situations in which an Information might be struck down include if it does not adequately state the charge, does not include the date of the offence, or contains an unclear description of the circumstances of the alleged offence. To remedy the defect, the court may quash the Information or order an amendment. Amendment powers are considerable, and the Information may be amended at any time during the trial so long as the accused is not prejudiced or misled. The court will generally amend an Information if the defects are in form only. https:/ / www. canlii. org/ en/ bc/ bcca/ doc/ 1979/ 1979canlii2989/ 1979canlii2989. html?searchUrlHash=AAAAAQAXciB2IHN0ZXdhcnQgMTk3OSA0NiBjY2MAAAAAAQ& resultIndex=1 (1979), 46 CCC (2d) 97 (BCCA) makes it clear that courts tend to focus on substantial wrongs, not mere technicalities. There are generous provisions in the Criminal Code that allow technical defects in form and style to be disregarded (ss 581(2) and (3), and s 601(3)).

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

e) If the Information is Struck Down

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

f) Limitation Periods and the Information

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

2. The Initial Sentencing Position (ISP)

The Crown's Initial Sentencing Position should be reviewed. This will sometimes indicate whether the Crown is seeking jail time, or it can specify the sentence the Crown is seeking.

A request for a more detailed initial sentencing position can be made. See **Appendix A** for a sample ISP.

3. Report to Crown Counsel (RTCC)

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

What should usually be in the RTCC:

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

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

4. Release Conditions (Contained within the Bail Document)

Release documents can be obtained from the court registry if the accused has misplaced the copy they should have been given upon release. The accused should review the release conditions and ensure that they understand all of the conditions and the importance of abiding by the conditions of release regardless of how unfair or difficult those conditions are to abide. In a case of domestic assault, there will almost always be no-contact conditions and area restrictions. The accused may encounter situations where the complainant and the accused wish for contact and there is a no-contact bail condition. In such cases, the accused and their counsel could look into bail variations (see **section IV** above for Bail Variations).

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

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

G. Assessing the Strength of the Case

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

1. Things to Consider when Assessing the Crown's Evidence

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

a) Is the Evidence Direct or Circumstantial?

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

b) Is the Evidence Testimonial?

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

c) Is the Evidence Physical Evidence?

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

d) Is there a Possible Charter Challenge

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

e) Are there any other Exclusion Rules

Consider whether there are other exclusionary rules that could be used to exclude any key pieces of evidence that the Crown needs to prove its case. Generally, if a piece of evidence has more prejudicial effects than probative value, the evidence will be excluded (*R v. Seaboyer* [1] [1991] 2 SCR 577).

Consider whether there are other exclusionary rules that could be used to exclude any key pieces of evidence that the Crown needs to prove its case. Generally, if a piece of evidence has more prejudicial effects than probative value, the evidence will be excluded (R v Seaboyer [1991] 2 SCR 577 [1]).

References

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V. Substantive Law

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Provincial Offences

All offences created by provincial statute are prosecuted as summary conviction offences. Examples of provincial offences are those created by the *Motor Vehicle Act* [1], RSBC 1996, c 318, *Liquor Control and Licensing Act* [2], SBC 2015, c 19, *Family Law Act* [3], SBC 2011, c 25, *Employment Standards Act* [4], RSBC 1996, c 113, and the *Residential Tenancy Act* [5], SBC 2002, c 78. Other summary conviction offences are established by municipal bylaws (i.e., parking violations and lodging-house violations). Note that *Criminal Code* offences, though stemming from a federal statute, are prosecuted provincially.

B. Federal Offences

A federal statute may create an offence that is an indictable offence only, or is punishable on summary conviction only, or is either indictable or summary (i.e., hybrid) depending on the Crown's approach. Examples of federal offences are found in the *Criminal Code* [6], RSC 1985, c. C-46, the *Controlled Drugs and Substances Act* [7], SC 1996, c.19, the *Income Tax Act* [8], RSC 1985 (5th Supp), c 1 of the *Customs Act* [9], RSC 1985, c 1 (2nd Supp), and the *Fisheries Act* [10], RSC 1985, c F-14, and the Quarantine Act [11], SC 2005, c. 20. Although the federal government regulates *Criminal Code* offences, the provincial Attorney General administers the law in this area. This distinction is important in determining who will prosecute the offence. Federal Crown prosecutors handle drug, tax-related, fisheries, and quarantine offences.

C. Penalties and Punishment

1. Summary Offences

Provincial Offences

The *Offence Act* [12], RSBC 1996, c 338, provides that offences created under a provincial enactment (often called "regulatory offences") are punishable by summary conviction. The *Offence Act* establishes the maximum penalties that may be imposed upon conviction of a provincial summary offence. These provisions apply except where a provincial statute creating an offence provides for some other penalty. Under the Act, the maximum fine that may generally be imposed is $2,000; the maximum term of imprisonment is six months. The court may impose either or both of these penalties.

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

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

Criminal Code and Other Federal Summary Offences

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

2. Indictable Offences

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

References

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[2] https://www.canlii.org/en/bc/laws/stat/sbc-2015-c-19/latest/sbc-2015-c-19.html?autocompleteStr=Liquor%20Control%20and%20Licensing%20Act&autocompletePos=2
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[11] https://laws-lois.justice.gc.ca/eng/acts/q-1.1/page-1.html
[12] https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-338/latest/rsbc-1996-c-338.html?autocompleteStr=Offence%20Act&autocompletePos=3

VI. Resolving Prior to Trial

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

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

A. Stay of Proceedings

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

B. Diversion / Alternative Measures

This option allows for a first-time offender to be "diverted away" from the court system. Although referred to as "diversion," the program's official name is Alternative Measures (*Criminal Code*, s 717).

The accused or the accused's counsel may make a request to the Crown Counsel office to be "diverted". In some cases, Crown Counsel may also recommend diversion. This program takes the accused out of the court system. The application itself may be made before or after a charge is laid. The diversion program is primarily designed for first-time offenders who are prepared to admit their culpability and remorse in the matter. It is advised to call Crown in advance of sending the diversion application to make sure they are open to it. Include the following in the application:

1. that the letter is Without Prejudice;
2. the circumstances of the offence, including a clear admission of all the essential circumstances of the offence;
3. the background of the accused;
4. the effect that a criminal record would have on the accused; and
5. the accused person's feelings of remorse or repentance for the offence.

The accused must understand the concept of diversion and be prepared to speak openly and honestly to a probation officer. The accused must clearly admit to the offence and express remorse for their commission. They should offer in the diversion letter where applicable, to write a letter of apology, undergo anger or stress management counselling, or make restitution. These options should be considered with the Crown, if possible.

The Crown will consider whether the accused and the nature of the offence are such that diversion is appropriate. If the Crown decides the accused is a good candidate for diversion, the file will be sent to a community worker who will review the circumstances and then discuss the matter with the accused. The accused is entitled to have legal counsel present at this meeting. If the accused admits their culpability, and the probation officer is satisfied that the accused is an appropriate candidate for diversion, the Crown will be so advised. The criminal matter will likely be adjourned to allow the accused to complete the diversion process. The Crown will either enter a stay of proceedings or withdraw the charges once diversion has been completed.

The diversion process does not directly affect the ordinary procedure for remand and fixing a trial date. There is nothing inconsistent with both fixing a trial date and writing a letter of application for diversion. Where an accused has not yet

been determined to be an appropriate candidate for diversion, the court is unlikely to grant an adjournment for the purpose of considering diversion. That is, unless Crown Counsel opines that they believe diversion if likely to occur.

See **Appendix C** and **D** for an example of an application for diversion.

C. Peace Bond (s 810)

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

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

Occasionally, such as when the Crown wishes to impose a peace bond and the accused does not agree, there will be a full hearing on the issue. The Crown often considers peace bonds in cases of spousal assault because of a victim's reluctance to go to trial. At the hearing, the Crown must prove on a **balance of probabilities** that there are reasonable grounds for the fear. **Hearsay evidence is allowed, as it goes to the informant's belief that there are grounds for the fear** (*R v PAO*, [2002] BCJ No 3021 (BC Prov Ct) [1]). Since there is no criminal standard of proof, the judge must look at **all** the evidence, and not focus merely on the absence of the offending conduct (*R v Dol*, 2004 BCSC 1438 [2]).

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

D. Pleading Guilty

A guilty plea is appropriate only when all of the below are true:

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

Section 606 of the *Criminal Code* outlines the conditions that need to be met for a court to accept a guilty plea. These include that:

- the accused is making the plea voluntarily;
- the accused understands that the plea is an admission of the essential elements of the offence, the nature and consequences of the plea, and that the court is not bound by any agreement made between the accused and the prosecutor; and
- the facts support the charge.

The court has an obligation to ensure that section 606 has been canvassed with the accused before accepting any guilty plea and should canvass these matters directly with the accused, unless the accused is represented by legal counsel who assures the court that section 606 has been canvassed. Legal counsel should canvass these matters with the client prior to the guilty plea and take detailed notes of this interaction, if there is any doubt about the clients understanding of this interaction counsel should have the court canvass section 606 directly with the accused.

Applying to Strike an Entered Guilty Plea
Legal counsel should bear in mind that accused persons sometimes desire to change their plea after entering a guilty plea and may blame counsel for failing to advise them about the consequences of their plea. An accused may retain new counsel and make an application to set aside the entered guilty plea. In such a situation, solicitor client privilege will usually be set aside, and the lawyer may be forced to take the stand and explain why they believed the client understood the consequences of the guilty plea (see *R v Lam*, 2020 BCCA 276 (CanLII) [3]).

The sentencing hearing can either proceed immediately after a guilty plea is entered or be adjourned to permit the parties to prepare for the sentencing hearing. For self-represented litigants, duty counsel can assist with a sentencing negotiation with the Crown. It is generally a good strategy to talk to Crown before pleading guilty, about the possibility of a joint submission where both sides agree on a sentence. Most Crown Counsel will agree to a reasonable joint sentencing position and will often stay some charges on a multi-count Information in exchange for a guilty plea on others. It is important to know that the judge is not bound by a joint submission (see *R v Anthony-Cook*, 2016 SCC 43 [4]). See **Appendix E: How to Prepare for and Conduct and Sentencing Hearing** for the process of entering a guilty plea.

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

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

E. Sentencing Hearing

The statutory range for all sentences is in the *Criminal Code*. Always check the statutory range that existed at the time of the offence, as well as at the time of sentencing, as the accused is entitled to the more favourable of the two. Ensure the minimum sentence has not been struck down by a successful Charter challenge or is about to be abolished by an act of Parliament.

Prior to the sentencing hearing the accused and their counsel should review the Report to Crown Counsel to determine whether they agree with the circumstances of the offence as set out in that document. The Report to Crown Counsel is typically the document from which Crown Counsel will read/summarize the facts of the offence. If the accused disagrees with a material aggravating fact summarized in the Report to Crown Counsel, or if the accused has substantial mitigating facts that are not contained in the Report to Crown Counsel (i.e., duress, significant intoxication, or mental illness), the disputed facts should be canvassed with Crown Counsel. Where the parties cannot agree, the party seeking to establish the particular (aggravating or mitigating) fact must present evidence of the disputed facts (see *Criminal Code*, s 724 for how the court determines disputed facts). **Note:** Sometimes this will occur in the moment where Crown Counsel summarizes an aggravating fact during their sentencing submissions and the accused and their counsel realizes only then that an aggravating fact was not agreed upon. This may also occur in the process of the defence's submissions when a mitigating circumstance is summarized.

For serious offences, prior to the actual sentencing hearing, the accused or their counsel should consider whether the guilty person would benefit from seeking a Pre-Sentence Report (PSR) under section 721 of the *Criminal Code*. A PSR can only be ordered after a guilty plea or finding is made. It is prepared by a probation officer and is considered a "neutral third party" report. It is a formal report and can help or harm the interests of the accused. If the accused is experiencing mental health issues, the PSR can include a psychological report. A favourable psychological report can reduce an accused's eventual prison sentence. A psychological disorder that makes a person more likely to lose control of their emotions or impulses mitigates the moral culpability of an offender for offences where that emotion or impulse contributed to the occurrence of the offence. Where an accused person desires to obtain a psychological opinion, they should consider obtaining a private psychological report from a psychologist of the guilty person's choosing instead of a PSR with a psychological component. A private psychological report commissioned by the accused person or their counsel has the advantage of being legally privileged and is only disclosed if it helps the accused. This avoids the possibility that exists with a PSR that the contents of the report will suggest that the offender has limited prospects of rehabilitation, thereby supporting a lengthier custodial sentence.

Crown presents their submissions in the sentencing hearing first. Assuming that there is no substantial disagreement on the facts of the offence, Crown Counsel will simply blend together their summary of the facts of the offence and their position on the appropriate sentence, and the accused or their accused will do the same in reply.

After hearing Crown recommendations and defence submissions, the judge will invite the accused person to comment or speak personally. Law students should alert their client to the fact that they will be invited to speak after the law student finishes their submissions, and that the only thing that can help them at that point is a heartfelt expression of remorse thought there is no obligation to say anything. Following the accused's opportunity to personally speak to the court, the judge will give a sentence. For more on the substance and procedure of speaking to sentence, see **Appendix E: How to Prepare for and Conduct a Sentencing Hearing**.

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

There are two common strategies for presenting the circumstances of an accused. One strategy is to present the lead-up to the offence as a unique set of unusual circumstances that caused a momentary and exceptional loss of control and explain what has changed in the accused's life to avoid a similar set of unusual and exceptional circumstances. This establishes that the problem has already been resolved and will not recur, and that a harsh sentence is unnecessary. Another strategy is to highlight the disadvantageous life circumstances, such as lack of family support, lack of employment or educational opportunities, mental illness, or addiction, which contributed to the commission of the offence. This lessens the accused's moral culpability for their conduct.

In cases where there are two or more charges, a judge may order that sentences be served consecutively (one after the other) or concurrently (at the same time). The default is consecutive. However, if the offences were sufficiently distinct from each other Crown may seek concurrent sentences. The legal test is whether or not the two criminal acts were part of a linked series of acts within a single endeavour. See *R v Li 2009* BCCA 85 at para 43 [5].

In cases where a judge finds it appropriate to impose consecutive sentences, they must ensure that the entirety of the sentence is not excessive, in keeping with the Totality Principle. According to this principle, the global sentence imposed by the judge must be proportionate to the gravity of the offences and the degree of responsibility of the offender. The sentence must also respect the principle of parity, which requires that similar sentences are imposed for similar offences committed by similar offenders in similar circumstances. For the Supreme Court's recent position on consecutive vs. concurrent parole ineligibility periods, which speaks to the Charter issues in sentencing, see *R v Bissonnette*, 2022 SCC 23 [6].

The judge must also consider any pretrial time spent in custody as a result of the charges and will usually credit such time towards the proper sentence at a ratio of 1.5 days credited for every 1 day spent in pretrial custody.

Gladue Reports

For cases where the offender is Indigenous, reference must be made to section 718(e) of the **Criminal Code** and the principles laid out in *R v Gladue*, [1999] 1 SCR 688 [7]. Section 718(e) of the *Criminal Code*, which states that judges must pay attention to the circumstances of Aboriginal offenders, was implemented in 1996 in an attempt to address the over representation of Indigenous Peoples within Canadian prisons. *Gladue* followed shortly thereafter in 1999, and established that judges must consider Gladue principles when making decisions in cases with Indigenous offenders. This means that a judge must consider the personal and unique circumstances of the accused as well as the particular hardships they have faced, resilience they have demonstrated, and ways to support them that would address their challenges. The judge should consider the accused's life experience and what has happened to them, their friends, family and community. The Supreme Court in *Gladue* specifically outlined that sentencing judges must pay attention to:

1. The unique systemic or background factors which may have played a part in bringing the particular Indigenous person before the courts; and
2. The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the person because of his or her particular Indigenous heritage or connection.

The Crown, defence counsel, and the Indigenous individual must give the judge the information they need to make an assessment based on Gladue principles. This can be done through a Gladue report, which is a report that lays out a holistic profile of an Indigenous individual and how they have come to be before the court. These reports are based on interviews with the individual, friends, family, and community members as well as information about their family background and the effect of colonization. A Gladue report is different than a Pre-Sentencing Report and should be prepared by someone with experience preparing these reports and insight into Indigenous communities. The BC First Nations Justice Council has provincial responsibility for Gladue services and offers the opportunity to request a Gladue report from a roster of experienced Gladue report writers: https://bcfnjc.com/information-for-the-public/.

It is important to note that, even if there is no Gladue report present, lawyers still have an obligation to bring information relevant to Gladue principles before the court in every case and judges have an obligation, not just to reference those principles, but provide an explanation of how they applied them when it comes to sentencing. Gladue principles apply to **all** offences under the *Criminal Code*.

For further information on Gladue principles and reports see the Gladue Report Guide published by the Legal Services Society in collaboration with the BC First Nations Justice Council: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https:/ / pubsdb. lss. bc. ca/ pdfs/ pubs/ Gladue-Report-Guide-eng.pdf.

F. Types of Sentences

1. Absolute and Conditional Discharges

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

- Discharges are available if the accused is not subject to a minimum penalty and the offence is not one punishable with a maximum sentence of 14 years of imprisonment or more.
- A discharge means that there has been a finding of guilt rather than a conviction. At the end of the discharge period, the accused has no criminal record.
- The discharge must be in the best interests of the accused and not be against the public interest.
- An **absolute** discharge means that the accused has no criminal record immediately upon being sentenced.
- A **conditional** discharge means that the accused is on probation, with certain conditions, for a period of time. If the accused follows the rules, at the end of the probation period they are treated as if there were no conviction and will not have a criminal record.
- An absolute discharge is granted immediately without terms or conditions, whereas the effect of a conditional discharge is that the accused is on probation for a period of time. This can involve a number of various conditions by which the accused must abide. If the accused successfully completes the period of probation with no breaches or further criminal offences, the conviction is discharged, and the offender can say they have no prior convictions. It is important to note however that an absolute or conditional discharge still requires a finding of guilt.
- Both an absolute discharge and a conditional discharge (as well as the probation order that accompanies it) will be visible on some background checks, including vulnerable sector checks, for several months after they are entered into/the probation order ends. However, the guilty party still does not have a criminal record.

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

2. Suspended Sentences and Probation

If the judge believes, having regard to the age, character, and personal circumstances of the individual, that the accused can rehabilitate themselves, the judge can suspend the passing of sentence and release the accused subject to the terms of a probation order of up to three years (*Criminal Code*, s 731(1)(a)). This does not mean that the accused has been acquitted; **the accused will have a criminal record**.

This sentence is only available if the accused is not subject to a minimum penalty. Probation means that the accused has to follow certain conditions that the judge sets. For example, the accused will have to stay out of trouble, report to a probation officer (someone who keeps track of the accused), and obey other court-imposed conditions. An order for a suspended sentence means that the courts suspend the passing of a sentence for the duration of the probation period. If a person breaches the conditions of a suspended sentence the court may extend the length of the probation period or (in

rare cases) revoke the suspension of sentence and substitute a jail sentence for the suspended sentence. In addition, the breach is a new criminal offence, and the accused may be charged with a breach of the probation conditions.

3. Fines

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

A fine can be ordered on its own or in addition to probation or imprisonment (but not both). An accused may be fined up to $5,000 for summary conviction offences (or a hybrid offence whereCrownelectstoproceedsummarily),or any amount for indictable offences. Before a court imposes a fine, it must inquire into the ability of the accused to pay the fine.

4. Restitution and Compensation

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

5. Conditional Sentence Order (CSO)

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

6. Imprisonment (Jail)

Unless otherwise stated by statute, if the offence is a summary conviction offence (or Crown elects to proceed summarily), the maximum sentence of imprisonment is two years less a day; and if the offence is an indictable offence (or the Crown elects to proceed by indictment), the maximum sentence of imprisonment is 5 years. There are many offences where the maximum sentence available is in excess of 5 years. A judge has the discretion to order a sentence to be served concurrently (at the same time) or consecutively (one after the other) with any other sentence the accused is serving, or any other sentence arising out of the same transaction.

If the total sentence is two years or more, the accused will serve their sentence in a federal penitentiary. If the total sentence is less than two years, the accused will serve their sentence in a provincial jail. An accused should note that "two years" includes time already served before trial. So, a person who is sentenced to two years less a day of imprisonment, but has served one year in jail, while awaiting their trial, will be sent to a provincial penitentiary. If the jail sentence is provincial, a sentence of probation of up to 3 years can be added. If the jail sentence is federal, the court cannot add a probationary order to that sentence.

If a judge imposes a sentence not exceeding 90 days, they may order that the sentence be served intermittently on certain days of the week or month. The accused is released on the other days, subject to conditions of a probation order.

G. Matters Ancillary to Sentencing

1. DNA Data Bank

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

The court may also consider the criminal record of the offender, the nature of the offence, and the circumstances surrounding its commission. The court may also, at its discretion, make a DNA order upon conviction or discharge of a "secondary designated offence" – such as assault (s 265) – but the threshold for obtaining a DNA order is higher for these offences. Once the substance is analyzed, it is then entered into the Convicted Offender Index of the national DNA Data Bank. The data bank is widely used for many different types of crimes ranging from violent crimes to fraud involving impersonation.

2. Victim Fine Surcharge

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

In *R v Boudreault*, 2018 SCC 58 [8], the Supreme Court of Canada considered the constitutionality of section 737 of the *Criminal Code*, which removed any judicial discretion to waive the Victim Fine Surcharge. The court ruled that a mandatory victim surcharge amounted to cruel and unusual punishment contrary to section 12 of the *Charter* and that "its impact and effects create circumstances that are grossly disproportionate to what otherwise would be a fit sentence, outrage the standards of decency, and are both abhorrent and intolerable." The court decided that section 737 was not justified under section 1 of the *Charter* and declared that section 737 was of no force or effect. As a result, the courts have discretion to waive the surcharge in appropriate circumstances. The primary reason for waiver of the surcharge is lack of ability to pay.

The current section 737 of the *Criminal Code* re-introduces the requirement that judges apply the victim surcharge to all convictions and discharges. However, the court has the discretion to waive the victim surcharge in the event that it would cause undue hardship on the offender, or would be disproportionate to the gravity of the offence or the degree of responsibility of the offender. Where the surcharge is waived, the court must provide reasons for doing so.

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VII. Pleading Not Guilty/Trial

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Arraignment Hearing

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

1. Arraignment Hearing (Fix Date Procedure)

At the arraignment hearing, a plea is entered and the time estimate for the trial or sentencing is confirmed. The Crown will provide the court with its time estimates and the number of witnesses. It is essential for the self-represented accused or their counsel to note this information.

The judge or Justice of the Peace will then ask the self-represented accused (or defence counsel) for their position on the time estimate and decide how much time is appropriate to set aside for the trial or sentencing. The clerk will provide counsel with a form to take to the Judicial Case Manager (JCM) to set a trial date. It is important that the accused attends the JCM to receive a trial date.

B. Appearance for Trial - Elections as to Mode of Trial

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

1. Summary Conviction Offences

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

2. Hybrid Offences and Indictable Offences

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

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

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

3. Electable Offences

For a list of electable offences, see sections 536(4), 554, 558, 565 and 471 of the *Criminal Code*. For an offence not listed in sections 469 or 553, the accused may elect to be tried by:

1. Provincial Court trial with a judge, without a jury;
2. Supreme Court trial with a judge, without a jury; or
3. Supreme Court trial comprised of a judge and jury.

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

If an accused/defence elects a Supreme Court trial and at least one of the charges on the indictment is punishable by imprisonment of 14 years or more, they have the right to test the Crown's case in a Preliminary Inquiry (see below). This right to a Preliminary Inquiry can be waived by the accused/defence, but rarely is waived.

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

4. Preliminary Inquiry

A Preliminary Inquiry is held before a Provincial Court judge. The primary purpose of a preliminary inquiry is to determine whether or not there is sufficient evidence to put the accused on trial. Whether or not there is sufficient evidence is measured on a low threshold. The test is "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty" (*USA v Shephard* [1977] 2 SCR 1067 [1]). If the judge determines that there is sufficient evidence then the accused will be ordered to stand trial; if the judge finds that there is not sufficient evidence, the accused will be discharged.

Although the primary purpose of the Preliminary Inquiry is to determine if there is sufficient evidence to meet the threshold test for committal, the historical secondary purpose of defence counsel using the Preliminary Inquiry process to discover and test the case remains important. See *R v Rao* 2012 BCCA 275 [2] at paras 96-98.

C.The Trial

1. Conduct of the Trial

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

1. The Crown calls the case and introduces itself.
2. The defence/accused stands and introduces themselves. This will be done by the defence counsel if the accused has a lawyer.
3. Usually, Crown asks for an order excluding witnesses, which excludes any witnesses about to testify in the matter from the courtroom until such time as they are called. If Crown fails to do so and there are any witnesses in the courtroom, defence should remind the court of the need to make such an order.
4. Crown will call its witnesses (called **direct examination**), and defence may **cross-examine** each witness as they are called.
5. Crown indicates that their case is closed.
6. Defence/accused makes a “no evidence” motion if appropriate.
7. If no “no evidence” motion is brought or any such motion is dismissed, defence/accused either chooses not to call any evidence or calls defence witnesses.
8. If a defence is called, witnesses are called by defence. If the accused is going to testify they should start with their own evidence so as the evidence of the accused should not be tainted by hearing the evidence of other defence witnesses. Crown may cross-

examine each witness as they are called.

1. If a defence was called, defence counsel makes closing submissions, then Crown.
2. If a defence was not called, Crown makes closing submissions first, and then defence counsel.
3. Thejudgewillconsiderthefactsandlaw,makefindingsoffactandgivetheirdecision

and reasons. If the accused is found guilty, sentencing may or may not be adjourned. Consider if there is a need for an adjournment to order a Pre-Sentence Report or otherwise gather evidence relative to sentencing before conducting the sentencing. For relatively minor offences the court may expect the accused or their lawyer to be prepared to make sentencing submissions immediately after the decision on guilt.

2. Nature of the Trial

The goal of the defence at trial is rarely to find the truth. There is a wide rift between proven innocent and not guilty beyond a reasonable doubt. The goal of defence counsel (or the accused if self-represented) is to test the Crown’s case and to present evidence, where appropriate, to either show that the evidence as a whole fails to prove the accused’s guilt beyond a reasonable doubt, or to raise a reasonable doubt as to the guilt of the accused. Keep in mind that one way to reach reasonable doubt is to convince the trier of fact that, based on the evidence presented, they simply cannot know definitively what happened. Our criminal justice system sets a high standard of proof to obtain a criminal conviction. The goal of this standard is to prevent wrongful convictions.

3. Presentation of Prosecution's Case

Once a plea has been entered, witnesses will be excluded, and the trial begins. The Crown may start with an opening address, then call witnesses for examination and introduce any real evidence (objects, documents, etc.). Next, the accused, or defence counsel if they are represented, may cross-examine the Crown witnesses. The Crown may then re-examine their witness; however, this re-examination is limited to clarifying or explaining answers given during cross-examination. During re-examination, any new material can only be entered with leave of the Court. If leave is granted, and new material is entered during re-examination, the defence will be given an opportunity to recross-examine on the new evidence (See: Earl J Levy, *Examination of Witnesses in Criminal Cases*).

The goal in cross-examination is to both secure any helpful, defence-supporting evidence to which the witness may agree, and to challenge the unhelpful evidence to which the witness has testified. Often, cross-examination is used to challenge the reliability and/or credibility of the witness's evidence. The defence/accused is entitled to cross-examine a witness on any issue that is relevant or material to the case and is entitled to substantial leeway in their manner of conducting cross-examination. The rule from *Browne v Dunn* (1893) 6 R 67, H.L [3], provides that the defence/accused must put its case to each witness on cross-examination. This means that if there is a good possibility that the accused will testify in their own defence or the accused has a specific defence theory that they will argue at the end of their case, they must present the anticipated defence evidence or theory to each Crown witness and provide them the opportunity to comment upon that evidence or theory. Typically, this is done at the end of the defence/accused's cross-examination of each witness with a number of "I suggest to you that..."

Reliability refers to a witness's ability to perceive an event accurately, and later recall and describe that event with detail and precision. Reliability challenges can focus on the scene, lighting, visibility, intoxication, and any obstructions or distractions which may have affected the witness's perception.

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

- a motive based on personal animus towards the accused;
- a motive based on a personal bias towards the complainant or victim of the alleged crime;
- a motive based on a perceived advantage from the police arising from providing evidence to the police; and
- a witness's character is such that they simply cannot be trusted (history of perjury, fraud, or lying to the police).

Practice Recommendation - Prior Inconsistent Statements

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

> **NOTE**: Note: There are times when the defence may not want to put a prior statement to a witness, even if there are inconsistencies (i.e., if the previous version is much worse than the version the witness presented in court).

Procedure for putting a prior inconsistent statement to a witness:

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

a) Common Objections

When the Crown is in the process of examining its witnesses, it is the defence/accused's job to ensure the Crown is doing so properly. Below are some common actions that lead to objections in a trial. In order to raise an objection, the defence/accused must rise from their seat, face the judge, say "objection," and then state the reason for the objection. At that point, the Crownwilleitheragreeordisagreewiththeobjection. IftheCrowndisagrees, the judge will make a ruling on the spot regarding the objection. The defence/accused should also consider whether the witness should be excused from the courtroom prior to stating the reason for the objection or at any point in the discussion about the objection.

Leading Questions:

A leading question is one where the answer is suggested in the question. For example: "Did you see Joe punch Steve?" The party calling the witness cannot ask leading questions. However, on cross-examination, the practice is allowed and encouraged. A common exception to the rule against leading questions in direct is when leading questions are used in order to introduce matters to the court. For example: "Your name is John Doe and you reside at 555 University Drive?" Leading questions may also be used in direct examination if they relate to non-contentious issues. (Note: it is good practice to let Crown Counsel know what the contentious issues are ahead of time in order to prevent an objection of leading a witness during trial).

Hearsay:

Witnesses are expected to tell the court what they personally observed, heard or did. Hearsay is a common objection that arises because witnesses are often told things by other people about the event.

Hearsay is generally defined as an out of court statement, offered in evidence, to prove the truth of the matter asserted. The key factor in determining if a statement is, in fact, hearsay is the purpose for which the statement is being used. For example, if the witness on the stand states "the passenger in the car told me that the light was red" this is hearsay if it is being used to prove that the light was actually red. It is unobjectionable if being used for a non-hearsay purpose, like if the colour of the light is not a contentious fact, and the statement is instead being used as evidence that the passenger was alert and responsive.

There are some categorical exceptions to the hearsay rule where evidence, even though introduced for a hearsay purpose, will generally be admissible if the prerequisites for that exception are met. These are called the "traditional" exceptions to the hearsay rule and include:

1. voluntary confessions;
2. dying declarations;
3. declarations against the interest of the declarant;
4. records made in the usual course of business and in the course of a duty which are admissible under the *Canada Evidence Act* (for example, hospital medical files);
5. declarations of a state of mind or bodily condition as evidence of the state reported, but not of its cause (for example, using the declaration "I'm cold" to establish that the person making the statement was cold, but not using it for the assumption that the weather outside was cold that day);
6. statements of intention (used to increase the probability that the person who made the statement actually performed that intended action);
7. spontaneous declarations (*Res Gestae* - statements made so closely to the event that they are connected to it); and
8. Past Recollection Recorded.

Each "traditional" exception has its own requirements that must be met. In addition to (and as a potential exception to) the traditional common law exceptions, courts have developed the "principled approach" to determining the admissibility of hearsay. See *R v Starr*, [2000] 2 SCR 144 [4]. This approach considers the necessity and reliability of the hearsay statement and can be used where there is no traditional hearsay exception engaged or to argue that evidence should be inadmissible despite a traditional hearsay exception. The two requirements that must be met before hearsay evidence is admitted are:

1. Necessity: whether the benefit of the evidence would be lost in its entirety if it was not entered (i.e., the declarant, the person who originally made the statement, is unavailable, or there is no other source by which the evidence can be admitted and have similar value); and
2. Reliability: this test is essentially the judicial determination of what would have been gained by cross-examination. In some cases, the circumstances in which the statement was made suggest its trustworthiness and reduce the danger of admitting evidence without an opportunity for cross-examination.

For a thorough discussion of the rules of hearsay admissibility, see *Watt's Manual of Criminal Evidence* and "R v Khelawon*, [2006] 2 SCR 787* [5].

Speculation:

When people witness behaviour in everyday life, they often reach conclusions regarding why they think that other person was behaving in that manner. Witnesses are expected to tell the court what they saw a person say and not to speculate as to why they think that person did what they did. For example, if one sees someone jumping up and down and swatting at the air one may speculate that the person is being bothered by an insect.

Opinions from Non-Experts:

As a rule, witnesses should not make any inferences or state their opinion about what that evidence proves in their testimony (for example, "I think Steve was going grocery shopping because I saw him with an empty fabric grocery bag"). Instead, the witness should simply state "I saw Steve and, in his hands, he was holding an empty fabric grocery bag." Conclusions drawn from what is seen or heard is for the trier of fact to draw, not the witness to opine. There are exceptions to these exceptions. For example, although generally the court does not permit non-expert opinion evidence, someone who is intimately familiar with a person's appearance can, in certain situations, provide evidence that they recognise that person from surveillance photographs or video.

4. *Challenging the Admissibility of Evidence*

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

Since rules of admissibility of evidence tend to be complex issues that require a critical analysis of the law followed by an application of the law to the facts, a self-represented accused should consult legal advice when challenging the admissibility of Crown's evidence. Some challenges to the admissibility of evidence are simply made through objections and legal arguments at the time the Crown seeks to adduce the evidence, while others will require the court to hear

additional evidence that is relevant to its admissibility.

5. *Voir Dires*

A *Voir Dire* is a "trial within a trial". It is usually held during the Crown's case, where evidence is required in order to determine the admissibility of evidence. For example, *Voir Dires* can be held to determine whether a confession is voluntary and admissible, or whether it should be excluded under section 24(2) of the *Charter*. If the evidence heard in the *Voir Dire* is deemed to be admissible, counsel can agree that evidence on the *Voir Dire* will form part of the evidence at trial. Care should be taken to ensure that the evidence that is considered on the trial proper, from the *Voir Dire*, is properly identified and admitted from the *Voir Dire* into the trial proper.

Two common *Voir Dire* challenges are a challenge to the admissibility of items seized in a search and a challenge to the admissibility of an accused's confession to the police.

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

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

If an accused testifies at a *Voir Dire*, they can only be cross-examined on the issues raised in thee *Voir Dire*.

6. Directed Verdict/ No Evidence Motion

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

1. The time and date of the offence;
2. The location and jurisdiction of the offence (e.g.: it happened in Surrey, British Columbia);
3. The identity of the accused;
4. That the crime actually happened (*Actus Reus*); and
5. That the accused intended to commit the crime (*Mens Rea*).

If the Crown failed to lead *any* evidence on any of the above, the defence/accused should make a no-evidence motion. This asks the judge to direct the acquittal of the accused on the ground that there is absolutely no evidence of some essential element of the offence. The test was articulated by Ritchie, J. in 'USA v Shephard *[1977] 2 SCR 1067* [1] and *R v Charemski*, [1998] 1 SCR 679 [6]. Arguments by the Crown and defence will be heard. If the defence/accused's "no evidence" motion fails, the defence/accused may then call its own evidence.

7. Presentation of Defence Case

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

Although the decision for the accused to take the stand and testify in their own defence does not have to be made until Crown has closed its case, the defence/accused needs to know their potential defences before the trial begins. Where the accused has identified a defence for the crime, it is often a good idea to structure the entire defence case around

highlighting that defence. However, the defence/accused should pay careful attention to capitalize on any Crown failure to present sufficient evidence on any element of the offence. The defence/accused should also remember that a no-evidence motion may be brought and decided before the accused must decide whether or not to testify or not.

The defence/accused will be invited to make closing submissions once all evidence has been heard. If the defence/accused has called evidence, the defence closes first. If the defence/accused does not call evidence, Crown closes first. The three main sections of closing submissions are i) the facts, ii) the law, and most importantly, iii) applying the law to the facts that the judge should find. The judge can accept all, part, or none of a witness' testimony. If the accused testifies, the *W(D)* [7] principles (from *R v W(D)*, below) should also be discussed.

Practice Recommendation - Entering Exhibits

An exhibit should be entered through the witness who made (or found) the exhibit so they can validate it. Exhibits may be a photograph, a written document such as an email, or physical evidence such as an assault weapon. In the case of a photograph, the person who took the actual photograph is the one likely to enter the exhibit. It is also possible for the person identified in the photograph to enter the exhibit.

Example of an exhibit being entered by someone who took the photograph:

- "You have previously provided me with a photograph. Did you take this photograph? When did you take this photograph? And this is a true and accurate depiction of the scene as depicted on the date you took the photograph?" "Your Honour, I ask that this photograph be entered as the next exhibit."

Example where an individual depicted in the photograph enters the exhibit:

- "You have provided me with a photograph of some injuries. Who is depicted in this photograph? When was this photograph taken? And is this a true and accurate depiction of your injuries as of the date this was taken?" "Your Honour, I ask that this photograph be entered as the next exhibit."

The court will number each exhibit as they are entered. Either place the appropriate number on your copy of each exhibit or keep an exhibit list so that you may refer the court or other witnesses to them later.

Note: When entering an exhibit such as a statement that defence wants to rely on for its truth, it is important to have the witness confirm the truth of that statement.

a) Common Defences

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

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

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

Consent:

If an accused is charged with assault, Crown must prove beyond a reasonable doubt that the other person did not consent to the assault. A consensual fight is not an assault as the parties are consenting to the physical contact. Consent can be negated or vitiated where the force causes bodily harm and was intended to be caused, or the force was applied recklessly and the risk of the bodily harm was objectively foreseeable. See *R v Paice*, 2005 SCC 22 [8] and *R v Jobidon*, [1991] 2 SCR 714 [9].

Lack of *Mens Rea*:

Mens Rea deals with the mindset of the accused at the time of the incident and means "guilty mind." *Mens Rea' of the offence must be proven by the Crown beyond a reasonable doubt. If the accused person did not intend to commit the offence, they can raise a reasonable doubt as to whether they had the proper Mens Rea to commit the offence, particularly where the offence has a subjective Mens Rea requirement. Mens Rea is not a defence, but merely lack of an essential element that the Crown needs to prove.*

Examples:

One commonly occurring offence is a Breach of a Court Order. Until recently there was some uncertainty about whether or not a Breach of a Court Order had to be established subjectively (the accused knew or was reckless about whether or not they were breaching) as opposed to objectively (a reasonable person in the position of the accused would have known that they were breaching). The Supreme Court of Canada resolved this issue, finding that breaches require proof of subjective Mens Rea (*R v Zora*, 2020 SCC 14 [10]).

The main *Mens Rea* components to the charge of theft are that the action was without colour of right and the individual had intent to steal. Colour of right refers to an individual's belief that they had entitlement to the property. If the court finds there is reasonable doubt as to the intention of the accused to steal, the accused will not be found guilty.

The main *Mens Rea* components of the charge of Personal Possession of a Controlled Drug or Substance includes knowledge of the substance; the possessor must know the nature of the item. An accused has a *Mens Rea* defence to possession if:

1) the accused did not know they had the item on them; or

2) the accused did not know the nature of the item and was not reckless or wilfully blind as to the nature of the item (for example, the accused reasonably thinks the substance is baking soda and not cocaine).

Intoxication:

When considering the defence of intoxication, it is important to note that there are two types of offences divided by the requisite mental fault. General intent offences merely require that the accused intended to carry out the act or omission, while specific intent offences require the accused to carry out the act or omission and intend for the specific consequence to come about.

There are two levels of intoxication that are considered to be legally relevant: advanced intoxication and extreme intoxication (a level akin to automatism). Note that these are both very high levels of intoxication, and mild intoxication is never a defence. The accused bears the burden of proving that they had reached the point of advanced or extreme intoxication which are very high bars and requires expert evidence at trial.

For general intent offences, advanced intoxication is not a defence. Extreme intoxication can negate general intent or physical voluntariness of Actus Reus for some offences if the accused can show that they did not commit the act with conscious mind and controlled body. Previously the defence may have been denied under section 33.1 of the *Criminal Code* if the intoxication was self-induced, the accused made a marked departure from the standard of care, and it was a violent offence. However, the Supreme Court recently ruled, in *R v Brown*, 2022 SCC 18 [11], that denying this defence, in cases where extreme intoxication is present, for the above reasons is unconstitutional. General intent

offences include assault causing bodily harm, manslaughter, sexual assault, and arson.

For specific intent offences, advanced intoxication can negate subjective mental fault (*Mens Rea*). Specific intent offences include conspiracy, solicitation, embezzlement, and theft.

8. Accused Testifying

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

If the accused has a criminal record, and particularly if the accused has convictions for crimes that are similar to the crime alleged, and plans on testifying in their own defence, the defence/accused should be prepared to argue a *Corbett* application (see *R v Corbett* [1988] 1 SCR 670 [12]). This should be presented at the end of Crown Counsel's case and before a final decision is made as to whether to have the accused testify. If successful, a *Corbett* application prevents the Crown from using the accused's criminal record during cross-examination for the purpose of attacking the accused's credibility.

If the accused testifies, the judge must consider the instructions set out in *R v W(D)* [1991] 1 SCR 742 [13]:

1. if the judge believes the accused, they must acquit;
2. if the judge does not believe the accused, but is still left with a reasonable doubt from the testimony, they must acquit; and
3. even if the judge does not believe the accused and is not left with a reasonable doubt from the testimony, the Crown must still prove its case beyond a reasonable doubt.

9. Presence of the Accused

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

10. Witnesses

a) Privilege and Compelling Attendance of a Witness

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

A witness may be compelled to attend trial to give evidence and bring documents by means of a subpoena processed through the court registry that is personally served on them (ss 699 and 700 of the *Criminal Code*). An arrest warrant may be issued for non-compliance (s 705). Unless the witness is served with a subpoena, they are under no legal obligation to attend court proceedings. Crown Counsel will often agree to subpoena witnesses who have provided a police statement whom Crown Counsel does not intend to call in its case but whom defence counsel wants to have called. Other defence witnesses are typically known to the accused (such as alibi witnesses) and attend voluntarily. The defence/accused should obtain subpoenas for witnesses if (1) they are important, (2) they are not under Crown subpoena, and (3) they are not likely to attend voluntarily.

Witnesses must answer all questions put to them unless the information that Crown Counsel/defence is asking is legally privileged. Some examples of legal privilege are:

1. discussions between a client and their lawyer in situations when the lawyer was acting in a professional capacity;
2. any information tending to reveal the identity of a confidential police informant, unless disclosure is the only way to establish the innocence of the accused; and
3. communication between spouses.

b) Preparing a Witness

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

c) Testimony of a Witness

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

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

d) Admission or Confession (to a Person in Authority)

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

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

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

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

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

e) Leading a Witness

Counsel is generally not permitted to lead its own witness (i.e., suggest answers), with the exception of preliminary matters such as the witness's identity, residence, age, and other matters that are not at issue, and that merely help to set the stage. However, **leading questions are proper and encouraged for cross-examination.**

f) Expert Opinion Evidence

Opinion evidence is permitted where it assists the trier of fact to draw conclusions from the evidence. There are two types of opinion evidence: non-expert and expert. Non-expert opinion evidence is generally not permitted. Expert evidence is not permitted where the trier of fact is capable of reaching a conclusion without such evidence. Expert opinions are necessary where the trier of fact would be unable to draw a conclusion with respect to the evidence. Experts

must first be established as such – the determination is made in a *Voir Dire*. For a more complete explanation of the law on opinion evidence see *R v Mohan* [1994] 2 SCR 9 [14].

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

11. Conclusion of the Trial

a) Closing Argument and Submissions

The defence/accused and the Crown will make closing arguments that summarize their view of the facts and the pertinent law. The judge or jury may then retire to consider a verdict. If the defence has called evidence, it must make submissions first. Often a case will be decided based on the credibility of the witnesses. If the accused takes the stand, then the case is likely to hinge on a credibility issue, with rules as described in *R v W(D)* [13], above.

b) Verdict

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

- all, some, or one of the offences charged;
- a lesser included offence of an offence charged; and/or
- an attempt of an offence charged.

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

c) Post-Conviction

There are certain arguments that can only be made post-conviction. One example of this is entrapment. In entrapment a conviction is entered but not recorded until the court determines whether or not allowing the conviction to stand would constitute an abuse of court process because the commission of the offence was the result of police conduct which induced the accused to commit the offence. See *R v Ahmad*, 2020 SCC 11 [15] for more information.

d) Sentencing

Thejudgewillsentencetheaccusedafteraconvictionorguiltyplea. However, the judge will ask for submissions on sentencing from both sides regarding the offence and the offender. The defence/accused be prepared to address sentencing immediately following a trial. This is more brief than sentencing submissions for a guilty plea. Alternatively, the Crown or defence/accused may adjourn the matter for sentencing on application. However, such an application will only be granted if there are valid reasons for counsel to ask for more time to prepare or if a Pre-Sentence Report is requested.

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

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VIII. Other Issues

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Accused Suspects They May Be Charged with an Offence

An accused may have been stopped by the police or observed doing "something wrong," but has not yet received a summons. To see if one has been officially charged, they can contact the Vancouver Police or the RCMP to see if a report to Crown Counsel has been made. It is also possible to check with the court clerk, the police, or the Crown Counsel office to see if an Information has been laid and forwarded to Crown Counsel. If there is an outstanding warrant for the person's arrest, the accused must turn themself in immediately. This is a critical time for an accused to learn and note their legal rights, including the right to remain silent.

B. Staying a Charge

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

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

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

Any person who wishes to have a stay of proceedings entered should do so with the advice of a lawyer. Complainants should be careful with regards to what is said to Crown. If the complainant wishes to have the charges dropped, they should contact the Crown to discuss the matter. It is important to note that an accused person **MUST NOT** and **CANNOT** attempt to persuade the complainant to drop the charges, as to do so is a criminal offence.

C. Appeal

The accused has a right to appeal a conviction, sentence or both. Appeals must be filed **within 30 days** of the sentence. An accused person who believes that they have a strong case for an appeal should be referred to Legal Aid BC or the Lawyer Referral Service.

D. Default in Payment of Fine or Non-Compliance with Order

1. Provincial Offences

A convicted person may not be jailed for defaulting on payment of a fine, except as under the *Small Claims Act*, RSBC 1996, c 430 [1] (*Offence Act*, s 82). Failure to pay a fine can result in the Crown obtaining a court Judgment Order by filing the conviction and entering the amount of the fine. The order has the same effect as a judgment in a civil case. The Crown can collect the fine by a Garnishing Order, Warrant of Execution, or other means, just as a judgment would be enforced in a civil case.

2. Federal Summary and Indictable offences

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

E. Criminal Records

1. What is a Criminal Record?

The answer is not straightforward as different people will use the term “criminal record” to mean different things. To the courts, a criminal record is limited to criminal convictions. This includes suspended sentences, fines imposed after criminal convictions, and any form of incarceration such as house arrest (conditional sentence) or jail time. This does ***NOT*** include discharges, stays of proceedings, or withdrawn charges.

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

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

2. What Information Can a Third Party Find Out About?

It is very important that people read and understand what they are signing when signing a consent to have their criminal record disclosed (i.e., expanded criminal record check). Often employers will simply ask; “Do you have a criminal record?”. However, “criminal records” can encompass suspended sentences, fines imposed after criminal convictions, and any form of incarceration. In this case, all other information does not have to be disclosed. If a more thorough check is done, the information that is disclosed depends on the agreement signed by the individual. It should be noted that the BC Human Rights Code (RSBC 1996, c 210, s 13) [2] makes it illegal to discriminate based on being convicted of a criminal or summary conviction offence that is unrelated to the employment or intended employment of that person.

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

1. Level 1: Records of criminal convictions which have not been suspended following an application for a criminal record suspension.
2. Level 2: Level 1 + outstanding charges about which the police force is aware.
3. Level 3: Level 2 + records of discharges which have not been removed (all charges regardless of disposition).
4. Level4: Level 3 + check on local police databases, court and law enforcement agency databases (also known as "Police Record Check").

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

3. How Will a Criminal Record Affect My Ability to Travel?

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

Inadmissibility to the United States

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

Admissibility to the US is determined in accordance with the *Immigration and Nationality Act* (1952), Public Law No 82-414, 66 Stat 163) ["INA"] [3]. Section 212(a)(2)(A) of the INA states that a person is inadmissible if they commit a crime involving "moral turpitude" (i.e., shocks the public conscience; see *Wing v United States* 46 f2d 755 (7th Cir 1931) for a detailed definition), or violates any law relating to a controlled substance (as defined in section 102 of the *Controlled Substances Act* (21 USC 802)). A person is also inadmissible to the US if they commit two or more criminal offences whose convictions have a combined sentence of five years or more. Finally, an immigration officer can deny entry into the US if they have "reason to believe" that the individual has committed drug trafficking, prostitution, or money laundering offences.

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

4. Elimination of Records

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

The time calculation under this section of the Youth Court Justice Act is complicated. As such, occasionally, mistakes are made and if one sees a Youth Record as part of an accused's criminal record, the time requirements for re-opening that youth record should be double-checked.

5. Record Suspension

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

- 5 years (after the sentence is completed) for a summary offence (or a service offence under the *National Defence Act* [4]).
- 10 years (after the sentence is completed) for an indictable offence (or a service offence under the *National Defence Act* [4] for which the person was fined more than $5,000, detained or imprisoned for more than 6 months).

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

As of January 2022, the Parole Board of Canada (PBC) charges $50 to process a record suspension application. Payment can be made by credit card through the payment form, certified cheque, bank draft, or money order, payable to the Receiver General of Canada. The applicant is also responsible for additional fees related to getting the following: fingerprints, a copy of their criminal record, court documents, and local police record checks.

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IX. Charter of Rights and Freedoms

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Impact of the *Charter*

Procedural and substantive criminal law has been shaped and expanded by the *Canadian Charter of Rights and Freedoms* [1] since its introduction in 1982. Consideration of sections 7 to 15 of the *Charter*, in addition to the remedial section 24, is required to properly understand the constitutional guarantees that profoundly influence criminal law. A compilation of *Charter* decisions is available at the UBC Law Library, and includes decisions in areas such as arrest procedures, the right to counsel, the admissibility of illegally obtained evidence at trial, search and seizure, and the right to be presumed innocent until proven guilty.

The *Charter* provides for three types of relief from *Charter* violating conduct of government agencies. First, where a law is found to violate the *Charter*, section 52 of the *Constitution Act* [2] applies to render the law "of no force or effect". Second, where an individual's right or freedom has been infringed upon, not by impugned legislation but by the acts of an agent for the state (e.g., the police), the aggrieved person may apply under section 24(1) of the *Charter* for an appropriate remedy. Third, if the case of evidence was obtained in contravention of the *Charter*, that evidence could be excluded from a judicial proceeding by the operation of section 24(2).

Section 8 of the *Constitutional Question Act*, RSBC 1996, c 68 [3], requires that 14 days' notice be given to opposing counsel where the constitutional validity of a law is challenged or where an application is made for a constitutional remedy under section 24(1) of the *Charter*. **Note: To challenge legislation or seek a remedy under section 24(1), separate notice must be given to both provincial Crown Counsel and the federal government.** For an application to exclude evidence under section 24(2) of the *Charter*, notice is not required by the *Constitutional Question Act*, but a failure to alert the Crown in a timely manner to an application to exclude evidence under section 24(2) of the *Charter* has been met in a number of decisions with the court applying its considerable powers to control its own processes with remedies adversely affecting the party who failed to provide adequate notice to the other party.

B. Section 1 of the *Charter*

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

Section 1 primarily arises in cases where a litigant is seeking to have a law declared of no force or effect. In order for the *Charter* infringement to be justified, the government has to prove to a court that its actions satisfy the steps in a section 1 analysis. The standard of proof is the civil standard – on a balance of probabilities.

The Oakes Test (*R v Oakes*, 1986 1 SCR 103 [4]) is the legal test to be applied to Section 1 *Charter* analysis. The Oakes Test sets out the following criteria that must all be satisfied to justify a *Charter* violation:

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

C. Right to a Trial Within a Reasonable Time: s. 11(b)

Section 11 – Any person charged with an offence has the right: (b) to be tried within a reasonable time. In addition to the right to make full answer and defence, any person "has the right to be tried within a reasonable time". The decision by the Supreme Court of Canada in *R v Jordan*, 2016 SCC 27 [5], has addressed the issue of what constitutes a "reasonable time". *R v Jordan* created presumptive ceilings, beyond which any delay is presumed to be unreasonable, of 18 months for matters proceeding in provincial courts, and 30 months for matters proceeding in superior courts.

The remedy for the state's breach of one's section 11(b) rights is a judicial stay of proceedings pursuant to section 24(1) of the *Charter*. As previously mentioned, notice is required.

D. Lawful Arrest

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

An unlawful arrest may vitiate the authority of a search or may be the basis of a *Charter* argument that the accused was arbitrarily detained contrary to section 9 of the *Charter*. This may result in exclusion of evidence such as items seized during the arrest.

1. Police Powers

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

However, a police officer must not arrest a person for a summary offence, hybrid offence, or indictable offence, listed under section 553 of the *Criminal Code* unless they are also satisfied that:

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

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

An accused who is not arrested should be released with an appearance notice. Note that there are instances where, even though an arrest was unlawful, the person's detention will not be deemed arbitrary. See sections 8, 9, 10, and 11 of the *Charter* for relevant constitutional provisions.

Regular citizens also have the same rights to detain people pursuant to the criminal code. Under section 494(1) of the *Criminal Code*, anyone can arrest a person without warrant if they find the person committing an indictable offence, have reasonable grounds to believe the person has committed an indictable offence, or if they see a person being pursued by anyone who has lawful authority to arrest the person. Section 494(2) gives store detectives the authority to arrest shoplifters. Under this section, a property owner or an agent working on the owner's behalf may arrest, without warrant, any person who is committing a criminal offence in relation to the owner's property.

2. The *Criminal Code*: The Law of Arrest and Release

Some of the relevant sections of the *Criminal Code* are:

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

Sections 7, 10, and 24 of the *Charter* have some measure of effect on arrest procedure, particularly in relation to the conduct of arresting officers and the admissibility of evidence (see *R v Stevens* [6], [1988] 1 SCR 1153). There is also well-developed case law on arrest procedure. See *Christie v Leachinsky*, [1947] AC 573 (HL) and section 29 of the *Criminal Code*.

E. Finding Legal Counsel and Other Assistance Where Person is Arrested and Detained: s 10(b)

Section 10 – Right on arrest or detention: (b) to retain and instruct counsel without delay and to be informed of that right. If an accused has been denied bail (detained), it is usually a sign that the offence is serious. It is important to have some knowledge of *Charter* issues relating to arrest and detention.

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

- To be informed promptly of the reasons for that arrest or detention;
- To be informed of the right to remain silent;
- To retain and instruct counsel without delay and to be informed of that right; and
- To be informed of the existence and availability of the applicable systems of duty counsel and Legal Aid in the jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel (*R v Brydges* [7], [1990] 1 SCR 190).

The *Charter* right to counsel is thus triggered where a person is arrested or detained. Detention under sections 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with a restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that they had no choice but to comply. See *R v Grant*, [2009] 2 SCR 353 [8], for more details.

Under section 10(b), the arresting officer has a duty to cease questioning or otherwise attempting to elicit evidence from the detainee until the detainee has had a reasonable opportunity to retain and instruct counsel (*R v Manninen* [1987] 1 SCR 1233 [9]). The arrested person has both the right to Legal Aid counsel and the right to be informed of this right: see *R v Brydges* [1990] 1 SCR 190 [7] and *R v Prosper* [1994] 3 SCR 236 [10]. Some exceptions regarding the timing and access to these rights exist.

Issues may arise at trial when an accused gave a statement to the police or provided bodily samples of some sort without being given the opportunity to retain and instruct counsel. In such cases, an application should be made to have the evidence excluded under section 24(2) of the *Charter*.

> **NOTE: Brydges Line** is a province-wide service that is available for arrested persons 24 hours a day, 7 days a week. A lawyer is always available to speak to the person for free. It is available toll-free at 1 (800) 458-5500.

F. Search and Seizure: s 8

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

A breach of an accused's rights against unreasonable search and seizure may result in the exclusion of evidence obtained during a search.

1. Lawful Police Searches without a search warrant

In general, police must have a search warrant to search a person's premises, vehicle, or person (see *R v Feeney*, [1997] 2 SCR 13 [11]). However, there are exceptions where exigent circumstances exist to allow warrantless searches. In addition, there is a recognized police power to conduct a search incidental to a valid arrest of an arrested person and the area around where that person was arrested.

a) Search After Valid Arrest and Search of Person

At common law, upon a lawful arrest, an officer acquires an attendant right to search the arrestee for officer safety and evidence (see *R v Klimchuk*, [1991] 67 CCC (3d) 385 (BCCA) [12]). Note: Such a search requires a lawful arrest and is subject to a challenge if the arrest was not lawful. (See **Section E** on Lawful Arrest above).

Where no arrest has taken place, a peace officer may also acquire a more limited right to search for officer safety. If an officer has reasonable grounds to suspect that an individual has a specific connection to a crime and detains that individual for further investigation then, incidental to this investigative detention, the officer may engage in a limited pat-down search confined in scope to locate weapons (see *R v Mann*, [2004] 3 SCR 59 [13]).

For more information on searches of the person, see "R v Debot *[1989] 2 SCR 1140* [14], *R v Ferris* [1998] BCJ No 1415 (CA) [15], and *R v Simmons* [1988] 2 SCR 495 [16].

A warrantless search is presumed to be unreasonable and the onus is on the party seeking to justify the search and seizure to rebut this presumption (see *Hunter v Southam Inc*, [1984], 2 SCR 145 [17]). The Supreme Court, however, has recognised several situations where authorities may conduct a search without warrants – for example, where evidence of the offence is in plain view, or where the occupant of the premises has consented to the search.

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

A search warrant should only be issued if the police have reasonable grounds to believe that evidence of a criminal offence will be located at the place to be searched. To obtain a search warrant, a police officer will swear an affidavit setting out why they believe there are reasonable grounds and make an ex parte application for the warrant to a judge or justice.

Practice Recommendation - Challenging a Search Warrant

To challenge a search warrant, the defence/accused should first seek disclosure of the Information to Obtain (ITO), which is the affidavit sworn in support of obtaining the search warrant.

There are three ways to challenge the validity of a warrant issued on the strength of the ITO:

1. Facially Invalid: If the contents of the ITO do not establish reasonable grounds to believe items relevant to an offence will likely be found in the search location, then an application may be made as a facial validity challenge to the ITO.
2. Facially Valid, but with insufficient factual grounding: If the ITO does not reflect the true state of the police investigation at the time the ITO was drafted, and those omissions or mistakes were material to the issuance of the warrant, an application can be made.
3. Facially Valid with Sufficient Grounds, but the police engaged in an abusive process in obtaining the ITO.

When assessing the ITO, first determine if the affidavits filed in support of the warrant establish reasonable grounds for searching the location, based on the contents of the ITO (assuming the contents are true). If the ITO, on its face, provides sufficient grounds to issue a warrant then the ITO must be compared to the information the police had available at the time they applied for the search warrant to assess whether the police made full, fair, and frank disclosure of all material relevant to the request to search that location. The ITO as an ex parte application should provide full, fair, and frank disclosure of all material facts relevant to the police investigation and knowledge of the place searched at the time the ITO was sworn. If there are important errors or omissions in the facts stated in the ITO then an application can be made to cross-examine the affiant of the ITO as a sub-facial challenge to the ITO, in an effort to show either that, had the true state of affairs been disclosed in the ITO the warrant would not have been issued, or that the police intentionally misled the authorising justice.

See "R v Garofoli *[1990] 2 SCR 1421* [18] and *R v Araujo* [2000] 2 SCR 992 [19] for more information on challenging search warrants.

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G. Right to Remain Silent: s 7

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

1. General Right of Silence

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

An accused has the right to remain silent when questioned after arrest. This silence cannot be used in court to imply guilt. An accused is protected from self-incrimination by silence. The police must inform the accused of the right to remain

silent and that anything they do say may be used as evidence.

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

It is best for an accused to say nothing to the police. This applies even when an accused plans to plead guilty because there may be a valid defence to the charge about which the accused does not know. For further information, see *R v Hebert* [1990] 2 SCR 151 [20].

2. The Modern Confessions Rule: *Oickle*

The modern confessions rule is outlined in *R v Oickle* [2000] 2 SCR 3 [21]. A confession or admission to a police officer (or other authority figure like transit police or private security officers) by an accused will not be admissible if it is made under circumstances that raise a reasonable doubt as to its voluntariness. The burden of proving the voluntariness of a confession falls on the Crown to prove beyond a reasonable doubt. However, if it appears that the Crown can satisfy that burden, the accused should consider calling evidence regarding the voluntariness of the confession so as to cast doubt on the voluntariness of that confession.

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

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

3. Exceptions to the General Right of Silence

a) Motor Vehicle Drivers

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

b) Pedestrian Offence

A person who commits a pedestrian offence must state their name and address when asked by a police officer or that person may be subject to arrest (City of Vancouver, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://bylaws.vancouver.ca/2849c.PDF|By-Law No 2849, *Street and Traffic By-Law* (June 13, 2023])).

The decision of the Supreme Court of Canada in *Moore v The Queen* [1979] 1 SCR 195 [22] suggests that the same is true for offences committed while riding a bicycle. While the police have no power to arrest a person for this type of summary conviction offence, the police may do so lawfully if it is necessary to establish the identity of the alleged violator.

c) Federal Statutes

Various federal statutes have provisions requiring that questions be answered in specific situations: see *Canada Evidence Act*, RSC 1985, c C-5 [23]; *BC Evidence Act*, RSBC 1996 c 124 [24]; *Excise Act*, RSC 1985, c E-14 [25]; *Income Tax Act*, RSC 1985, c 1 (5th Supp.) [26]; "Immigration and Refugee Protection Act*, SC 2001, c 27* [27]; and *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [28].

4. Exception to Right Against Self-Incrimination: Breathalyser Sample

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

H. Admission of Evidence Obtained in Contravention of *Charter*: (24(2))

> **NOTE:** It is good practice to advise the Crown ahead of time before making a *Charter* argument even if the only remedy sought is under section 24(2). In the *Charter* notice, the accused should provide the Crown with sufficient particulars of the argument, including the alleged breach, the remedy sought, and the witnesses required for the application (*Voir Dire*). The accused should also cite cases on which they intend to rely.

S. 24 (2) a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute

Section 24(2) of the *Canadian Charter of Rights and Freedoms* provides a remedy to those whose *Charter* rights have been violated and are later in a proceeding where evidence obtained related to that *Charter* violation is sought to be introduced. The burden lies on the applicant to establish a *Charter* violation. The standard is based on a balance of probabilities. Once the *Charter* violation is proven, the focus shifts to matters concerning the possible effects on the fairness of the trial if the evidence was permitted to be used in a trial against the person whose *Charter* rights were breached. The three factors to be balanced in order to determine if the evidence should be excluded are (1) the seriousness of the *Charter* infringing state conduct, (2) the impact of the *Charter* breach on the accused's interest, and (3) society's interest on the adjudication of the case on its merits (see *R v Grant* 2009 SCC 32). The burden is on the accused to establish on a balance of probabilities that evidence should be excluded under section 24(2). See *R v Harrison* 2009 SCC 34 for more information on the section 24(2) test.

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

Section 24(1) permits a court to craft any remedy it considers appropriate and just in the circumstances. One commonly sought remedy is a judicial stay of proceedings under section 24(1) for an abuse of process. However, such a remedy is only provided in the clearest of cases and is rarely granted other than for delay. Recent case law has somewhat reinvigorated the doctrine of abuse of process and examined the potential for alternate remedies to judicial stays of proceedings where police conduct was abusive. See *R v Hart* 2014 SCC 52 [29].

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[16] https://www.canlii.org/en/ca/scc/doc/1988/1988canlii12/1988canlii12.html?searchUrlHash=AAAAAQALciB2IHNpbW1vbnMAAAAAAQ&resultIndex=1

[17] https://www.canlii.org/en/ca/scc/doc/1984/1984canlii33/1984canlii33.html?searchUrlHash=AAAAAQAQaHVudGVyIHYgc291dGhhbQAAAAAB&resultIndex=1

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[19] https://www.canlii.org/en/ca/scc/doc/2000/2000scc65/2000scc65.html?searchUrlHash=AAAAAQAKciB2IGFyYXVqbwAAAAAB&resultIndex=1

[20] https://www.canlii.org/en/ca/scc/doc/1990/1990canlii118/1990canlii118.html?searchUrlHash=AAAAAQAKciB2IGhlYmVydAAAAAAB&resultIndex=1

[21] https://www.canlii.org/en/ca/scc/doc/2000/2000scc38/2000scc38.html?searchUrlHash=AAAAAQAKciB2IG9pY2tsZQAAAAAB&resultIndex=1

[22] https://www.canlii.org/en/ca/scc/doc/1978/1978canlii160/1978canlii160.html?searchUrlHash=AAAAAQARbW9vcmUgdiB0aGUgcXVlZW4AAAAAAQ&resultIndex=1

[23] https://laws-lois.justice.gc.ca/eng/acts/c-5/

[24] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96124_01

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[26] https://laws-lois.justice.gc.ca/eng/acts/i-3.3/

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X. LSLAP Policies

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Who LSLAP Can Help

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

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

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

B. What We Can Do for Our Clients

1. If the Client Meets LSLAP Requirements

LSLAP clinicians may provide assistance to clients including:

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

2. If the Client Does Not Meet LSLAP Requirements

LSLAP clinicians may assist the client solely by providing the client with a referral. No advice can be given. If the client wishes to review a decision denying Legal Aid BC, LSLAP may be able to assist with this review.

3. What to Do if LSLAP Cannot Represent a Client

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

XI. Information for LSLAP Students

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Determine the Status of the File

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

> **NOTE:** For further information on a client's upcoming appearance, including the date, time, and stated purpose of the appearance, view the client's file on CSO. See **Part (7): Court Services Online** for further information.

1. Client Comes to the Clinic Before the First Appearance Date

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

2. Client is on Probation or Otherwise Serving a Sentence

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

3. Client Has Already Appeared in Court

If the client has only appeared in court once, they have likely already been granted an adjournment to retain counsel. If the client has appeared in court on a number of occasions, the justice of the peace (JP) might not grant another adjournment, and a trial date may be set at the next appearance. A judge, however, has discretion to allow further adjournments when there are extenuating circumstances, like LSLAP black-out dates.

If the client has already obtained particulars and the Initial Sentencing Position, and the clinician needs time to review the particulars and to discuss the client's options, the client should be instructed to attend the Initial Appearance and inform Crown that they are being represented and ask that the matter be adjourned for one to two weeks. The client may also request an adjournment if there are significant outstanding disclosure issues.

4. The Trial Has Already Been Set

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

> **NOTE:** Several pamphlets available from Legal Aid BC may help a client prepare for their own trial. These include: "Representing Yourself in a Criminal Trial," "Speaking to the Judge Before you are Sentenced," and "If you are Charged with a Crime".

5. Common Courtrooms

Jurisdiction	First Appearance Court (Judge/JP)	Arraignment / Plea Court (Judge/JP)
Vancouver	307	101
Vancouver DCC	1	1
Surrey	100/104	102 (Prov) / 103 (Fed)
North Vancouver	003	002
Richmond	101	106
New Westminster	IAR	2-6
Port Coquitlam	003	001

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

6. Client Failed to Appear

Failure to appear for a scheduled court appearance is an offence (*Criminal Code* [1], ss 145(4) and (5)) usually punishable by summary conviction. If the client did not appear, there is probably a bench warrant out for their arrest. This can be verified online on the CSO website (see below). The client must be advised to report to the courthouse and apply to "vacate the warrant". The client must be advised to turn themselves in immediately.

B. Discuss LSLAP File Procedures and Policies with the Client

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

1. The client will attend all court appearances. LSLAP clinicians will not appear as agents for their clients.

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

C. Guide to Court Services Online (CSO)

Court Services Online is BC's electronic court registry. It is an initiative of the Court Services Branch of the Ministry of the Attorney General and British Columbia Judiciary. Using the online directory at https://justice.gov.bc.ca/cso/index.do, clients and legal representatives are able to search court files and file court documents, 24 hours a day, online. It can be an incredibly useful tool for establishing details about a client's case about which they, themselves, may be unaware.

Searching and viewing provincial criminal and traffic court files on CSO is free. Civil cases and court of appeals files can also be searched on CSO but require that users pay either a nominal fee ($6.00 as of 2023) per file viewed or have a subscription account with CSO.

1. eSearch

Clients, legal representatives, and the public at large can use the eSearch function on CSO to view provincial criminal and traffic court files in BC. Locate a file by searching the participant's name or file number. Additional information such as location, level, and class can be added to narrow down results returned. Once the search has been entered, a list of returned results will appear providing an overview of each file that matches the search criteria, and information such as: court location, first and last name, date and time of the next/most recent court appearance, the result of the last appearance, and the reason for the next.

> **NOTE**: The eSearch function has an option for an 'Exactly' or 'Partial' match. If the client's file is not appearing, try switching from an exact match search to a partial match search.

Select a file by pressing 'View'. The page for that court file will be headed by the court file number and will provide tabs for documents, participants, charges, appearances, sentences/dispositions, and releases.

For LSLAP Students, the charges, participants, and appearances tabs will be especially helpful. The participants tab lists the birth year of the accused person which can be helpful in confirming that this is, in fact, the client, not merely someone with the same name. The charges tab lists all the charges with which the client has been charged under this particular court file, as well as the date and location of the alleged. The Criminal Code provision or other legislation under which the client has been charged will be listed. The appearance tab lists all the appearance that have occurred with respect to this file, as well as any upcoming appearances. It will list the date, times, and location of any past and upcoming court dates. Students can chart the progress of the file by looking at the reason for each appearance and its result. By hovering the cursor over the codes under 'Reason' and 'Result'anexpandedmeaningofthethreeletterswillappear. Foraguidetosomeofthemost common codes used, see below.

For a more extensive list of the codes used on CSO see this article published by the British Columbia Provincial Court: https://www.provincialcourt.bc.ca/enews/enews-06-01-2021

Common Appearance Reasons

Code	Description	Explanation
AHR	Arraignment	Used when the anticipated event is an arraignment before an adjudicator.
APP	Application	Used when an Application is scheduled before the Court.
APW	Application for Warrant	Used as the next appearance reason when an application for a warrant is made after the non appearance of the accused is noted.
AVB	Application to Vary Bail	Used as the "Appearance Reason" for the scheduled appearance when an Application is made by defence/accused to vary bail.
CLC	To Consult Counsel	Used when the matter has been adjourned to another date to give the accused an opportunity to consult with counsel.
CTD	Confirm Trial Date	Used when the accused is adjourned/scheduled to attend to confirm trial date.
DSP	For Disposition	Used when there is an indication that the matter is for disposition.
FA	First Appearance	Used when the accused is not in custody and the accused will be appearing for the first time on a specific matter.
FT	For Trial	Used for the first day of a trial on an Information or Indictment when a case is set before a Judge/Justice.
FXD	To Fix a Date	Used when a matter is adjourned for the purpose of setting a trial or hearing date.
JIR	Judicial Interim Release	Used to indicate an appearance by an accused who is in custody on the matter before the court and is used until bail has been granted or denied or the accused has chosen to remain in custody by consent.
PAR	For Particulars	Used when a case has been adjourned for the purpose of defence receiving particulars of the case from the Crown.
PTC	Pre Trial Conference	Used when the Court requires the parties to attend a conference to discuss issues prior to commencement of hearing/trial.

Common Appearance Results

Code	Description	Explanation
END	Concluded	Indicates that the issue has been concluded.
IBC	Initiated by Consent-adjournment	Used as the appearance result when an adjournment to a future court date is consented to by all parties.
IBD	Initiated by Defence-adjournment	Used as the appearance result when an adjournment to a future court date is initiated/requested by the accused or their counsel.
IBJ	Initiated by Judge/Justice - adjournment	Used as the appearance result when an adjournment to a future court date is initiated by an adjudicator, for example: adjourned to give judgment/sentence/disposition /continuation.
SBD	Scheduled (Defence/Accused)	Used when an accused is scheduled by a Judicial Case Manager to another appearance as requested by the defence/accused.
SBS	Scheduled by a Trial Scheduler	Used when the accused is scheduled back to another appearance before a Judicial Case Manager.
SL	Struck from List	Used for cases that are struck from list when new process is issued.
WI	Bench Warrant Issued	Used when a warrant for the accused is issued by an adjudicator, usually after the accused does not appear for a scheduled hearing.

Common Findings

Code	Description	Explanation
ACQ	Acquitted	Used when the accused is found not guilty and the charge against them is dismissed.
DND	Deemed Not Disputed	Used when an accused does not appear at their scheduled hearing date therefore is convicted.
DSM	Dismissed	Used when an adjudicator makes a finding to dismiss the charge.
G	Guilty	Used when the adjudicator makes a determination of guilt after a plea has been entered, and may be made with or without a trial/hearing.
GLI	Guilty of lesser included or other	Used when the accused pleads not guilty to the offence they were charged with and the adjudicator finds them guilty of a lesser/included or other offence arising out of the same incident.
SOP	Stay of proceedings directed by Crown	Used when a stay of proceedings is directed by Crown i.e. the Crown has decided to no longer pursue the charge.

2. Daily Court Lists

The daily court lists are also available on CSO. These lists, which are posted at 6 am daily, list all criminal matters scheduled for court appearances that day by courthouse, then courtroom, then alphabetically by last name, for both the morning and afternoon sessions. The client's file matter number and other information about the file, such as bail status and if the accused is in custody, is also available on the daily court list. There are no archives of daily court lists. Small claims court, the Supreme court, Appeal court, Justice Interim Release list, and the Provincial Criminal Courts all have daily court lists. Files with restricted access like divorce and family files only display the file number.

References

[1] https://laws-lois.justice.gc.ca/eng/acts/c-46/

XII. Etiquette for Law Students

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Courtroom Etiquette for Law Students

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

The student should endeavour to find out the matter number of their client's file. This can be found on the physical copy of the daily court list often present in the court room or online on CSO where PDFs of the daily court lists are posted. When the matter is called or when the student is asked what matter they are here to speak to, they should reference the client's last name and the matter number. This makes it easier for the judge and other court officials to locate the correct matter on list of matters to be called that day.

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

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

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

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

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

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

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

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

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

B. Interacting with Crown

When interacting with the Crown (or anyone else for that matter), students should always be pleasant and polite. They are people a student will continue to work with for many years. There are times when students need to be more assertive, but there is no place for rude or dismissive behaviour. Students should be firm, but polite. Remember when disagreeing with Crown Counsel in any individual case that in a long legal career the relationship one crafts with Crown Counsel will benefit all of one's clients.

XIII. Practice Recommendations

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Ensuring the Crown Can Prove Its Case

Prior to asking an accused what happened from their perspective, some counsel want to review the nature and character of the charges and the possible defences with the accused. Even if the client admits their guilt, an accused must be advised regarding the strength of the Crown's case. A criminal defence lawyer has an ethical obligation to pursue any viable defence, even if only as a negotiation tactic. There is nothing unethical about running a trial with regards to a client who admits their guilt. Successful defence work can result in a factually guilty client being acquitted because Crown Counsel does not present evidence to prove guilt beyond a reasonable doubt. It is unethical however, to counsel a client to lie under oath or knowingly have a client testify to a falsehood.

B. Explaining a Client's Options

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

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

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

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

C. Common Ethical Situations Arising in Assisting a Client with their Options

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

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

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

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

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

D. Contacting Crown Witnesses

If, while preparing for trial, the defence must contact a Crown witness for whatever reason, the defence must be extremely careful in its approach and speak to a supervising lawyer before contacting the witness.

There is no property in a witness and the defence may contact Crown witnesses. However, the witness is not required to speak with the defence, and this must be made clear to the Crown witness.

It should also be made clear to the Crown witness that the law student is representing the client, and as such may be in conflict with the witness' interests, and is in no position to provide the witness with legal advice.

If a student chooses to interview a Crown witness, they should **never do so alone**. Another student should attend and should take notes of the conversation in case a dispute develops about what was said in the interview or the circumstances in which the interview took place. The witness may be required to give evidence as to what happened. If interviewing the Crown witness by telephone, a witness should be present via conference call or speakerphone.

The student must be careful to avoid any appearance of impropriety or witness tampering, and **must never, either explicitly or implicitly, advise a Crown witness to not attend court when summoned.**

Note: if there is a no-contact order in place, the clinician can contact the witness to discuss the trial, but the client cannot.

E. Challenging the Admissibility of Evidence

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

Challenging the admissibility of evidence is perhaps the most important work that the defence can perform as an advocate for the client, as lay litigants are ill-equipped to recognize and challenge inadmissible evidence. Rules of

admissibility of evidence tend to be complex issues that require a critical analysis of the law followed by an application of the law to the facts. Diligent preparation would allow the student to present challenges to the admissibility of evidence and have inadmissible evidence excluded from the court's consideration. Some challenges to the admissibility of evidence are simply made through objections and legal arguments at the time Crown seeks to adduce the evidence, while others will require the court to hear additional evidence that is relevant to its admissibility.

F. Setting the Trial Date

LSLAP clinicians are encouraged, but are not required, to appear in court to set a trial date. The trial date must be set with the approval of the supervising lawyer and according to LSLAP's trial supervising lawyer availability. Before attending court to set a trial date, confirm the length of time needed by the defence with the LSLAP supervising lawyer.

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

G. Pre-Trial Conference

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

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

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

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

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

Appendix A: Initial Sentencing Position

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

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

Appendix B: Sample Information

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

This appendix is available on Clicklaw Wikibooks for download in PDF.
A permanent archive version is also available at https://perma.cc/EZ69-WTLP
Readers of the print edition please see the "Supplementary Documents for Appendices" section.

Appendix C: Diversion Application

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Diversion Application

This appendix is available on Clicklaw Wikibooks for download in PDF.
A permanent archive version is also available at https://perma.cc/WTP6-YS2L
Readers of the print edition please see the "Supplementary Documents for Appendices" section.

B. Sample Diversion Letter

"12 January 2013

By Fax

Crown Counsel
Provincial Court
Court Address Location

WITHOUT PREJUDICE

Dear Crown Counsel,

Re: B. Bird

Court File Number: 12345

Next Court Date: March 13, 2013, Courtroom 2

Request for Diversion

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

Mr. Bird's Background

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

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

continues to do casual work for Sesame Village Neighbourhood House. He has been on Employment Insurance for two months.

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

Circumstances of the Offence

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

Consequences of the Offence

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

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

Mr. Bird works in the non-profit sector. All jobs available within this field require a criminal record check. If Mr. Bird receives a criminal record as a result of this incident he will likely be unable to find work in his field.

Furthermore, he will be obligated to reveal this charge to Sesame Village Neighbourhood House, which is providing him with occasional employment, and he will likely lose this small amount of income. This will have a serious impact on Mr. Bird's ability to provide support for himself and his son.

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

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

Please find the following attached documents:

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

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

Thank you for your consideration of this letter.

Sincerely,

Kermit T. Frog
Law Student
Attachments"

Appendix D: Sentencing Hearing

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

1. Determine the available sentence and the appropriate range of sentence. Review sections 720-729 of the Criminal Code and, in particular, section 718.

2. Determine the Crown's position on sentence – consider whether:

- There is anything the accused could demonstrate to cause the Crown to soften its position; and / or
- A delay of the hearing would be advantageous to the accused.

3. Consider any mitigating or aggravating factors. The following are some mitigating factors:

- Early plea of guilt;
- Pre-trial custody attributed to this offence;
- Restrictions placed upon the client pursuant to the release (bail) order; and
- Loss of employment or loss of license (if there was a driving offence) or other events which have caused hardship to the accused.

4. Consider the facts of the offence as it relates to our client:

- The accused person's role in the offence (i.e., follower or under the influence of others);
- Offence was the result of a spontaneous event;
- Incident was an isolated occurrence;
- Absence of property loss;
- Absence of injuries or full recovery from injuries;
- Motive (i.e., for property offences, the items obtained were necessities);
- Previous and/or subsequent positive relationship with the victim;
- Accused person's state of mind at the time of offence;
- Mental illness short of not criminally responsible;
- Alcohol or drug involvement, particularly if addiction present;
- Accused person's limited or diminished intelligence or emotional instability; and
- Any changes made by the accused such as counselling or other treatment.

5. Collect reference letters or letters of employment. Make 2 copies of each and **confirm with the writers of the letter that the letters are authentic. The letters must state that the writer is aware of the criminal charges.**

Procedure (After the Crown has made Submissions)

1. Tell the judge what the defence is seeking in terms of a sentence.

2. Tell the judge whether the defence is in agreement with the Crown's sentencing position in terms of the sentence, the length, and conditions.

3. If the defence is not in complete agreement with the Crown position tell the judge:

- Which additional facts are relevant to the client; and
- Which portions of the Crown sentencing position are in dispute (such as the sentence, length & conditions). Note: Formal fact disputes are to be made through s. 721 of the Criminal Code.

4. Briefly review the accused person's background.

5. Briefly discuss the effect of the crime on the accused and the changes made as a result.

6. Review why some of the conditions sought by Crown may not be necessary.

7. Tell the judge that the accused is extremely remorseful and embarrassed by the incident (if you have instructions from the client to say that).

8. Review what the defence is seeking and why it satisfies the principles of sentencing as set out in section 718 of the Criminal Code.

Sentencing Submissions Script for Law Students

1. Crown calls the case.

2. Introduce oneself– go up to the counsel table (and motion for the accused to stand beside you) – "Your Honour, my name is Jane Doe, last name spelt D-O-E. I am a law student and with the court's leave I represent John Smith, who is present before the court." – Get the accused to stand up from where they are seated. If they are in the gallery get them to cross the bar to stand beside the counsel's seat.

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

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

5. Continue on and say, "and Mr. Smith wishes to enter a guilty plea to Counts 2 and 3 of the Information.

6. If there are concerns about the accused person's ability to understand the process, the student should instead state, "I ask that the charge be formally read to Mr. Smith".

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

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

9. Defence submissions – The student should stand when making submissions and the accused can remain seated. It depends on one's style, and each case and each submission is different, but they should have the following contents and in approximately this order:

- a) Defence sentencing position – tell the judge right away what the defence wants.
- b) Facts – Does defence have a different take on the facts of the offence. Is there further information or facts you wish to submit? Note: actual facts disputes are to be made through s. 721 of the Criminal Code, not here.
- c) Circumstances of the accused – the student should tell the judge everything that is on the background questionnaire.
- d) Go through the defence's proposed conditions and why. Link the condition you are proposing back to a specific principle of sentencing.
- e) Summarize and conclude and tell the judge again what you are asking for and why.

Please review **Section III** and **VI** with respect to court etiquette and guilty plea-sentencing.

Appendix E: Trial Books

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

TRIAL BINDER

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

You should have a separate binder or notebook to make notes of the evidence during trial. Make a 2 inch margin on the right of each page. Use the margin to star or highlight areas you will want to return to during your cross-examination.

Appendix F: Glossary

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Absolute Discharge

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

Accused

- The person whom the Crown charges with a criminal offence.

Actus Reus

- An essential element of the criminal offence; what the accused physically did to commit the crime.

Adjournment

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

Admission

- A statement made by an accused to a civilian witness.

Agent

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

Alternative Measures

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

Appeal

- Formally contesting the verdict or sentence.

Appearance Notice

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

Arraignment Hearing

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

Bail

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

Bail Conditions

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

Bench Warrant

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

Complainant

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

Conditional Discharge

- Similar to an absolute discharge except that, after a guilty plea is entered, a period of probation is imposed on an accused. After the period is complete, no convictions will appear on a criminal record.

Conditional Sentence

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

Confession

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

Cross-Examination

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

Crown Counsel

- Lawyers appointed by the government who prosecute criminal cases.

Custodial Sentence

- A sentence served in jail.

Detention

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

Direct Examination

- Where the defence or Crown questions its own witnesses.

Disposition

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

Duty Counsel

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

Election

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

Ex Parte

- Proceeding without the accused present.

Hearsay

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

Hybrid Offence

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

Judicial Case Manager

- A Justice of the Peace who controls the calendar for the court and sets trial dates.

Justice of the Peace (JP)

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

Indictable Offence

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

Information

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

Initial Appearance(s)

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

Initial Sentencing Position

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

Insufficient Evidence Motion

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

K-File

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

Mens Rea

- An essential (mental) element of the criminal offence (an intention to commit the crime).

No Evidence Motion

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

Particulars

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

Preliminary Inquiry

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

Pre-Sentence Report

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

Report to Crown Counsel

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

Sentence

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

Summary Conviction Offence

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

Summons

- A written order by a judge or Justice of the Peace requiring the accused to attend court at a certain date and time.

Suspended Sentence

- Where a judge has decided to suspend the passing of a sentence for one to three years and release the accused subject to a probation order. Unlike a conditional discharge, when the probationary period is up the accused's criminal record will show a conviction.

The Bar of the Court

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

Vacating a Warrant

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

Verdict

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

Voir Dire

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

Witness

- Anyone called to give evidence at a trial.

Chapter Two - Youth Justice

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Recent History

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

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

1. Preventing youth crime by addressing underlying causes;
2. Meaningful consequences for offences; and
3. Increased focus on rehabilitation and reintegration for youth returning to the community.

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

Victims play a significant role in the process. While victims have no rights *per se* as they are not a party to criminal proceedings, the *YCJA* holds that victims will be heard and treated with courtesy, compassion, and respect for their privacy, and be minimally inconvenienced. Also, consequences will include educating the offender about the impact of the crime and focusing on repairing the damage or paying back society in a constructive manner. In some respects, BC legislation dealing with victims of crime has already incorporated a number of these principles, particularly in the *Victims of Crime Act*, RSBC 1996, c 478 [1]. In 2015, Parliament enacted the *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2 ("*CVBR*"). The Act guarantees victims of crime various rights, including the right to information about the criminal justice system, their rights as victims of crime, and their right to have their security and privacy considered by the appropriate authorities in the criminal justice system. For more information on victims' rights, and resources for victims of crime see **Chapter 4: Victims**.

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

The *YCJA* was further amended by Bill C-75, passed on June 21, 2019. On September 19, 2019, the first amendments to the *YCJA* came into force. Firstly, it repealed sections 64(1.1) and (1.2) of the *YCJA*, which required the Attorney

General to determine whether to seek an adult sentence in certain cases. It further required the Attorney General to advise the Youth Justice Court (bill section 376) if they decide not to make an application. Secondly, it repealed sections 75 and 110(2)(b), which required the court to decide whether to lift a ban on publishing the identity of a young person who is convicted of a violence offence (bill ss 377 and 379). The changes that came into effect on December 18, 2019 mainly decrease the number of charges for administration of justice offences (e.g., breach of conditions) and incarceration rates related to those offences when no harm to society has been done. The changes include a new assumption of the appropriateness of extrajudicial measures in certain breach of condition/failure to appear charges and an increase in the threshold for holding young offenders in custody for breach of conditions. In cases where extrajudicial measures may not be appropriate, judicial referral hearings at the bail stage or judicial reviews of youth sentences are recommended. Bill C-75 also includes changes that explicitly require imposed bail conditions to be appropriately related to the nature of the offence, the protection or safety of the public, victims, witnesses and that the offender will be reasonably able to comply with them, and that they not be a "substitute for appropriate child protection, mental health or other social measures".

References

[1] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96478_01#:~:text=2%20All%20justice%20system%20personnel,orientation%2C%20political%20belief%20or%20age.

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Legislation and Web Links

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

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

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

- Note: Bill C-75 amended parts of *YCJA* in 2019 (http://canlii.ca/t/53rgg)

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

B. Books

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

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

Lee Tustin and Robert E. Lutes. *A Guide to the Youth Criminal Justice Act, 2012*, updated yearly, (LexisNexis Canada Inc: 2020).

C. Websites

Directory of Youth Justice Resources [5]

Youth Criminal Justice Act FAQs [6]

Department of Justice *YCJA Overview* [7]

Youth Justice Fact Sheets [8]

References

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

III. Youth Criminal Justice Act

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Applicable Age

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

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

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

B. Applicable Court

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

C. Declaration of Principle

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

1. The youth criminal justice system is intended to protect the public by:
    1. Holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
    2. Promoting the rehabilitation and reintegration of young persons who have committed offences, and
    3. Supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour.
2. The criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability, and must emphasize the following:
    1. Rehabilitation and reintegration,
    2. Fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
    3. Enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
    4. Timely intervention that reinforces the link between the offending behaviour and its consequences, and
    5. The promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time.

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

D. Right to Counsel

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

E. Right to Notice

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

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

When the whereabouts of the parents of a young person are unknown, notice may be given to an adult relative or to any other adult, who is known by the young person and who is likely to assist the young person (s 26(4)). When notice has not been given, the court may adjourn the proceedings until notice is given or may dispense with notice if the court thinks it would be appropriate (s 26(11)).

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

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

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

1. Extrajudicial Measures

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

However, it may also be appropriate even if there has been a prior use of EJM's or a prior finding of guilt. The addition of section 4.1(1) to Bill C-75 sets out the direction that EJM's are also presumed to be adequate to hold a young person accountable in certain cases of breach of sentencing conditions or failure to appear at court, subject to the violations not having caused harm or safety concerns to the public or the young person having a history of failures or breaches. Section 4.1(2) of Bill C-75 sets out that EJM's should be used if they are adequate to hold the young person accountable for their failure to appear or refusal. If EJM's are inadequate, the next measures the court should consider before proceeding with a charge are 1) issuing an appearance notice for a judicial referral hearing, or 2) applying for a review of the youth sentence. Only once these measures are deemed inadequate should the court proceed with a charge.

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

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

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

Forms of EJM available:

- To a police officer are (s. 6):
  - to take no further action
  - to warn the young person
  - to administer a caution, or
  - to refer the young person to a program or agency in the community (with the consent of the young person).
  - *Bill C-75 states that a police officer must consider whether one of these EJM's will be sufficient before taking any other action.*
- To Crown Counsel are (s. 8):
  - to administer a caution.

Section 6 of the Act requires police officers to consider extrajudicial measures and to refer cases to community agencies and programs when appropriate. Community Accountability Programs (CAPs) are funded by the Province of British Columbia and offer alternatives to the traditional justice system.

Many CAPs accept criminal case referrals from the police as well as the community. The programs use Restorative Justice principles. Restorative Justice is a philosophy that aims to address the harms caused by criminal acts and work towards a resolution for the offender, victim, and community. While approaches may vary across programs, many use one-to- one facilitation, talking circles, and conferences to work towards a confidential resolution that does not result in a criminal record for the young person who has caused harm. To participate, the youth offender must take responsibility for their actions. The participation of other parties, such as victims, parents, and community members may depend on the

case and the CAP.

2. Extrajudicial Sanctions

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

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

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

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

G. Court Process

1. Compelling a Young Person's Appearance in Court

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

If the young person does not appear when they are supposed to or fails to comply with an undertaking, they can be charged with failure to comply. If the original charge for which they made the Promise to Appear/Undertaking is dismissed, withdrawn, or stayed, or the young person is acquitted, the Attorney General must review the charge for failure to comply before that prosecution can proceed (Bill C-75 s 24.1).

The Ontario Court of Appeal in *R v Oliveira*, 2009 ONCA 219 [1] held that a Promise to Appear and an Undertaking serve two distinct and separate purposes. The Court went on to explain that the purpose of the Promise to Appear is to secure the initial attendance of the Accused in Court. The Undertaking, in contrast, constitutes a promise by the Accused to comply with certain conditions in exchange for their release from custody pending the resolution of the charges.

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

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

2. Time Limitations

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

3. Proof of Age

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

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

4. Proof of Notice

It must be shown that a young person's parent or guardian has been notified of the charges against the young person.

- If detained, a police officer must contact the parents (in writing or orally) as soon as possible and tell them the location where the young person is being held and the reason for their arrest.
- If released on a Promise to Appear or an Undertaking, the police officer must give written notice to the parents as soon as possible.
- If given a ticket under the *Contraventions Act* (SC 1992, c 47) [2] (other than a parking ticket), the parents should be given written notice as soon as possible.
- If the parents cannot be located, notice can be given to another relative or adult who is likely to assist the young person and is deemed appropriate.

5. Pre-Trial Detention and Conditions

The rules of pre-trial detention are set out in sections 28 and 29 of the *YCJA*. A young person cannot be detained in custody or have conditions included in an undertaking as a substitute for appropriate child protection, mental health, or other social measures.

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

- The condition is needed to ensure their court appearance or keep safe or protect the public;
- The condition is reasonable to the circumstances of the offending behaviour; and,
- The young person will reasonably be able to comply with the condition.

A young person may only be detained in custody where the Crown has proven, on a balance of probabilities, that (s 29(2)):

1. The young person has either:
    - been charged with a serious offence (as defined in s. 2, *YCJA*), or

- has a history that indicates a pattern of either outstanding charges or findings of guilt.

2. There is either:
   - a substantial likelihood that the young person will not appear in court, or
   - evidence that detention is necessary for the protection of the public having regard to all the circumstances including a substantial likelihood that the young person will commit a serious offence, or
   - evidence that the young person has been charged with a serious offence and detention is necessary to maintain confidence in the administration of justice having regard to the declaration of principle and all the circumstances, including: the strength of the prosecution's case, the gravity of the offence, circumstances surrounding the commission of the offence, and the young person is liable for a potentially lengthy custodial sentence.
3. There are no conditions that would:
   - reduce the likelihood that the young person would not appear in court, or
   - offer adequate protection to the public, or
   - maintain confidence in the administration of justice.

Bill C-75 added the requirement that if a young person is charged with a summary offence (or the Crown is proceeding summarily), the need for detention must be reviewed every 30 days.

A young person may be placed in the care of a responsible person instead of being held in custody if a Youth Justice Court is satisfied that (s 31(1)):

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

If the young person would otherwise be detained in custody, the Youth Justice Court is obligated inquire as to the availability of a responsible person and the young person's willingness to be placed in the care of the person (s 31(2)).

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

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

6. Pleas

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

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

1. a pre-sentence report (s 40), or
2. a medical, psychiatric, and/or psychological report (s 34). The Judge may also convene a section 19 Conference.

Where a not guilty plea is entered a Trial Date is set.

7. The Trial Process

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

Admissibility of Statements

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

In *R v AD*, 2010 BCSC 1715 [3], the statement of the 15-year-old accused was found inadmissible for non-compliance with section 146(2)(d) of the *YCJA*. In that case, Justice Stromberg-Stein notes that "[i]nforming a young person they are entitled to have a lawyer or third party with whom they have consulted present, rather than phrasing this as a requirement, is 'deficient' and 'not completely accurate', as s 146 draws an important distinction between the rights of the young person and the requirements placed upon the police." (R v AD, at para 24). In that case, counsel for the accused was out of town and unable to immediately come to the police station where the accused was detained. Although the police informed AD of his right to have his lawyer present during the interview, it was clear that they were going to interview him that same day, regardless of his lawyer's availability.

The *YCJA* does not specify the standard of proof the Crown must meet to show compliance with section 146. In *R v LTH*, 2008 SCC 49 [4] (CanLii) the Supreme Court of Canada stated each component of section 146 must be proven beyond a reasonable doubt. If a young person has been interviewed, Crown must prove the person taking the young person's statement took reasonable steps to ensure the young person understood their rights (*Ibid*, at para 6). Simply reading a standardized form will likely not fulfill the caution requirement of section 146(2)(b). The person in authority must make reasonable efforts to determine the level of comprehension of the specific young person to ensure their explanation is appropriate. In *R v LTH*, the majority of the Court found the police officer, when reading the accused his rights, failed to take into account that the accused had a learning disability, and, as a result, found the statement inadmissible. In *R v LTH*, the Court also notes that Crown Counsel does not have to prove the young person actually understood the rights explained to them. If the judge is satisfied beyond a reasonable doubt that the young person's rights and options were explained as required by section 146, the judge may infer the young person understood those rights and the consequences of waiving them. The burden then shifts to the defence to point to evidence showing the young person did not, in fact, understand their rights or the consequences of waiving those rights (*Ibid*, at para 48).

Children and Young Persons as Witnesses

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

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

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

8. Section 19 Conferences

Section 19 conferences are a proceeding unique to Youth Justice Court. Conferences can be an effective means of coordinating services, broadening the range of perspectives on a case, and arriving at more creative and appropriate resolutions. Conferences can be composed of a number of different people, including the victim, the accused, their parents, community resource professionals, and members of the justice system including a judge or justice of the peace, police officer, and Crown Counsel. Conferences are non-adversarial and collaborative, and may elicit advice on decisions such as a suitable extrajudicial measure, a condition for release from pre-trial detention, appropriate sentencing (see below) and plans for reintegrating the young person back into the community after release from custody.

H. Sentences

1. Youth Sentences

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

a. the sentence must not result in a punishment greater than would be appropriate for an adult convicted of the same offence committed in similar circumstances,
b. the sentence must be similar to that which would be imposed in other regions,
c. the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence,
d. all available sanctions other than custody should be considered, with particular attention to the circumstances of Aboriginal young persons,
e. subject to paragraph (c) the sentence must:

- e.1. be one that is the least restrictive, the most likely to rehabilitate

and that will promote a sense of responsibility in the young person and an acknowledgement of the harm done to the victim(s) and society. None of these factors should be considered in isolation from each other, the other principles in 38(2), or the purposes and objectives of the act as a whole.

f. any condition imposed as a part of the sentence can only be imposed if it is necessary to achieve the purpose set out in 38(1), if the young offender would reasonably be able to comply with it, and if it is not used as a substitute for appropriate child protection, mental health, or other social measures.

g. Subject to paragraph (c), the sentence may have the objective to denounce unlawful conduct and deter the young person from committing offences.

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

Although all elements listed under section 38(2) should be taken into consideration during sentencing, the BC Court of Appeal has indicated that there is a hierarchy within that section. In *R v SNJS*, [2013] BCJ No 1847, the court noted that "to the extent that there is any hierarchy within the principles laid down in s. 38(2), it is (c) which is at the top of that hierarchy". In *R v SNJS* at paragraphs 26-29 the Court reviewed the interplay between sections 38(2)(d) and (e) with section 38(2)(c), and indicated that section 38(2)(e) is subject to section 38(2)(c). The court also indicated that the need to impose a sentence proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence is at the top of the hierarchy. Further, the court indicated that in respect of the criteria within section 38(2)(e), there is no hierarchy between the three principles, and there is no reason for a judge to treat (e)(i) as trumping (e)(ii) or (iii). The judge must consider all of those requirements, along with the other principles laid down in section 38(2), and the principles set out in section 3, in determining a sentence. Additionally, the court opined that the *YCJA* is not entirely "offender-centric"(para 28).

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

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

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

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

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

Upon a finding of guilt, a Youth Justice Court judge may order that the young person be discharged absolutely or conditionally (42(2)(b) and (c)). The two-part test for discharges outlined in section 730 of the *Criminal Code* that applies to adult offenders (that a discharge is in the best interest of the accused and not contrary to public interest), only applies to absolute discharges for youths (*R v RP*, 2004 ONCJ 190 [5]). The test is not applicable when considering a conditional discharge for youths (*R v CSW*, 2004 ABCA 352 [6]).

Under the *Criminal Code*, adult offenders who receive a conditional discharge are "deemed not to have been convicted" (s 730(3)), while youths are "deemed not to have been found guilty or convicted upon the expiry of the sentence or order" (s 82 *YCJA*). Moreover, section 42(11) of the *YCJA* provides that unlike conditional discharge for adult offenders, a probation cannot be combined with a conditional discharge for youths (*R v RP*). However, the access period for records flowing from a conditional discharge is longer than an absolute discharge (see Records: Access and Disclosure).

Where a fine or an order for compensation or restitution is imposed, a court must consider the present and future means of the young person to pay. If a fine is imposed, the *YCJA* allows for the lieutenant governor in council of the province to order a percentage of any fine imposed on a young person to be used to assist victims of offences (s 53(1)). In BC, an Order in Council has set this at 15%. Where a conditional discharge, probation or ISSO is imposed, the court must ensure that any conditions included complying with the requirements in section 38(2)(e.1) of the *YCJA*.

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

a. The young person has committed a violent offence,
b. The young person has previously been found guilty of an offence under section 137 in relation to more than one sentence and, if the court is imposing a sentence for an offence under subsections 145(2) to (5) of the *Criminal Code* or section 137, the young person must have caused harm, or a risk of harm, to the safety of the public in committing that offence,
c. The young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than 2 years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt, or
d. In exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

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

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

Custodial sentence options include:

a. **Deferred Custody and Supervision Order (s 42(2)(p))**: This is a custodial sentence served in the community. It is not available where a young person has committed an offence that causes or attempts to cause serious bodily harm. The maximum duration of this sentence is 6 months. If the young person breaches a condition of the DCSO, a warrant may be issued and, after a hearing, the DCSO may be converted to a Custody and Supervision Order (see below).
b. **Custody and Supervision Order (s 42(2)(n))**. The maximum duration of a CSO is two years, or three years if an adult maximum sentence is life imprisonment. Two-thirds of the sentence must be served in custody while the remaining one-third is served under a community supervision order. The level of custody (open custody or secure custody) must be specified by the Youth Justice Court (s 88 and Order in Council 267/2003). The provincial director

sets the mandatory and optional condition of the community portion of the CSO (s 97). In R v RRJ, 2009 BCCA 580, the BC Court of Appeal held that pre-sentence detention is not part of the sentence imposed. The Court explained that the judge must consider time already served in custody when sentencing a young person but that the judge may still choose to impose the maximum period of custody and supervision available under the statute.

c. **Custody and Supervision Order (s 42(2)(o))**: A custody term of a maximum of three years can be imposed where a young person is convicted of either attempted murder, manslaughter, or aggravated sexual assault. There is no minimum time period that must be spent in custody. The time spent in custody is left up to the judge's discretion.
d. **Custody and Supervision Order (s 42(2)(q))**: Young persons convicted of murder can be committed to custody for longer periods of time. A young person convicted of first-degree murder can serve a custodial sentence of 10 years (no more than 6 years can be served in continuous custody). In the case of second-degree murder, a sentence of 7 years can be imposed (no more than 4 can be served in continuous custody).
e. **Intensive Rehabilitative Custody and Supervision Order (s. 42(2)(r) and 42(7))**: TThese orders are rare and are usually imposed when a young person has serious mental health issues. The *YCJA* allows for a delay in the imposition of a custody order where appropriate. In these instances, the probation order commences prior to the custody order and stipulates that the custody sentence begin immediately after the designated period of delay (s 42(12)).

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

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

Section 19 Conferences

A Youth Justice Court may convene a conference under section 19 for insight on the young person's circumstances and recommendations as to an appropriate sentence (ss 41 and 19).

2. Adult Sentences

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

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

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

Although youths can be sentenced as adults the sentencing guidelines are not strictly the same as those that would be utilized in sentencing an adult. In *R v Pratt*, 2007 BCCA 206 [7], the BC Court of Appeal recognized that the court must consider the principles of sentencing in section 3 *YCJA* when sentencing a youth, including a youth who receives an adult sentence.

3. Reintegration Leave

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

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

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

4. DNA Sample

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

The *DNA Identifications Act*, SC 1998, c 37 [8], has been amended so as to limit the retention of DNA samples taken from a young person. DNA samples taken from young persons can be retained for shorter periods of time than those taken from adults (s 9.1) and shall be promptly destroyed when the record relating to the offence is expunged (s 10.1).

I. Review of Sentences

1. Custodial Sentences

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

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

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

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

2. Non-Custodial Sentences

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

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

A progress report may be ordered for the purposes of such a review (s 59(3)). A Youth Justice Court, after conducting a review, may confirm the youth sentence, terminate the youth sentence or vary the youth sentence (s 59(7)). Section 59(8) states that the varied sentence cannot be more onerous than the original youth sentence unless the young person consents or more time is required to comply with the youth sentence (s 59(9)). The time to complete a community work service order or a restitution order may be extended for up to one year (s 59(9)). Further, the new section 59(10) allows for more onerous conditions to be added onto a sentence made under section 42(2) or (1) if they would either better protect the safety of the public from the risk of harm by the young offender, or if it would assist the young offender to comply with any conditions previously imposed as part of the sentence.

J. Appeals

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

K. Special Concerns

1. Public Hearings

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

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

2. Publication of a Young Person's Identity

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

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

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

Once a young person attains the age of 18 years they may apply to lift the ban on publication for the purpose of permitting that person to publish information that would identify them as having been dealt with by the *YCJA*. The ban will only be lifted if the Youth Justice Court is satisfied that the publication would not be contrary to the young person' best interests or the public interest (s 110(6)).

3. Fingerprints and Photographs

The "Identification of Criminals Act*, RS 1995* [9], c I-1, applies to young persons. Fingerprints and photographs of a young person can only be taken in circumstances in which an adult would be subject to the same procedures (*YCJA*, s 113).

4. Records: Access and Disclosure

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

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

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

Who has access to these records is set out in sections 117 to 124 *YCJA*. Except as authorized by the *YCJA*, no person is to be given access to a record kept under sections 114 to 116 and no information contained in it may be given to any person, where to do so would identify the young person as a person dealt with under the Act (s 118(1)). Section 119(1) and (2) list the persons to whom access to records may be granted and the period of time within which access can be granted, respectively. These periods of access vary in duration depending on the type of offence and the treatment of the young person by the court (s 119(2)):

- if an extrajudicial sanction is used, the period ends two years after the young person consents to be the subject of the sanction;
- if the young person is acquitted not by reason of a verdict of not criminally responsible on account of mental disorder, the period ends two months after the expiry of time allowed for the taking of an appeal or, if an appeal is taken, the period ends three months after all proceedings regarding the appeal have ended;

- if the charge against the young person is dismissed not by reason of acquittal, is withdrawn, or the young person is found guilty, the period ends two months after the dismissal, withdrawal, or finding of guilt;
- if the charge against the young person is stayed, the period ends once no proceedings have been taken against the young person for one year;

d.1. if an order is made under section 14(2) or 20(2), which include recognizance orders under sections 83.3, 810 to 810.02, and 810.2 of the Criminal Code, the period ends six months after the order expires;

- if the young person is found guilty and the sentence is an absolute discharge, the period ends one year after the finding of guilt;
- if the young person is found guilty and the sentence is a conditional discharge, the period ends three years after the finding of guilt;
- if the young person is found guilty of a summary conviction offence, the period ends three years after the young person has completed the sentence imposed, subject to (i) and (j) and subsection (9);
- if the young person is found guilty of an indictable offence, the period ends five years after the young person has completed the sentence imposed, subject to (i) and (j) and subsection (9);
- subject to subsection (9), if the young person is found guilty of an offence punishable on summary conviction committed when they were a young person during the original access period (per (g) or (h)), the access period will be the later of (i) the original period of access (per (g) or (h), as applicable), or (ii) three years after the youth sentence imposed for that offence has been completed.
- subject to subsection (9), if the young person is found guilty of an indictable

offence committed when they were a young person during the access period (per (g) or (h)), the period ends five years after the young person has completed the sentence imposed for that indictable offence.

119(9) If the young person is convicted of an offence committed when they were an adult during the access period under paragraphs (2)(g), (h), (i) or (j),

- section 82 (effect of absolute discharge or termination of youth sentence) does not apply to the young person in respect of the offence for which the record is kept under sections 114 to 116;
- the record shall be dealt with as a record of an adult; and
- the finding of guilt in respect of the offence for which the record is kept is deemed to be a conviction.

During the period of access, individuals not expressly named in section 199(1) can make an application under subsection (s) by to access a young person's court records. A Youth Justice Court judge may grant access where they are satisfied that access to the record is (i) desirable in the public interest for research or statistical purposes, or (ii) desirable in the interest of the proper administration of justice (s 119(1)(s)).

After the applicable access period has ended, a person must apply to a Youth Justice Court judge to gain access to the records and the application must meet the requirements set out in section 123(1). The group of persons to whom access will be granted with respect to extrajudicial sanctions has special limitations (s 119(4)).

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

- the young person to whom the record relates,
- the young person's counsel,
- a government of Canada employee for statistical purposes,
- any person with a valid interest in the record if a judge is satisfied that access is desirable in the public interest for research or statistical purposes,
- the Attorney General or a peace officer for the purpose of investigating an offence,

- the Attorney General or a peace officer to establish the existence of an order in any offence involving a breach of an order, and
- any person for the purposes of the Firearms Act.

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

5. Mental Health Provisions

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

Pursuant to section 34, at any stage of the proceedings, the Court may order an assessment of a young person by a qualified person who is required to report the results of the assessment in writing: i) with the consent of the young person and the Crown, or ii) on its own motion or on application of the young person or the Crown if the court believes a report is necessary and:

- the Court has reasonable grounds to believe that the young person is suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability, or a mental disability,
- the young person has a history of indicating a pattern of offences, or
- the young person is alleged to have committed a serious violent offence.

In practice, the threshold for meeting 34(a) is broader than it appears. In *R v DP* (6 July 2017), Vancouver 23695-2-C, 23664-1 (BC Youth Div) the Youth Division of the BC Provincial Court clarified that to order a report under section 34 (1) the court does not need to conclude or even suspect that the evaluation would indicate that a person has a "diagnosed condition". Instead, section 34(1) is satisfied if there is some indication that there is information relating to the young person's medical condition that would assist the court in carrying out its purpose.

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

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

Section 34(2)(a) seems to significantly narrow the purposes for which an assessment can be ordered and restricts it to instances where the court is reviewing a previous decision via a section 33 application. In practice, however, the courts suggest that section 34(2)(a) should be read to include bail hearings in the first instance. In *R v CL* (27 February 2014), Vancouver 22805-2-C (BC Youth Div) the Youth Division of the BC Provincial Court noted that restricting section 34 applications to a youth applying to release from detention "leads to an absurd result" because the same considerations apply before there has been a detention. Similarly, in *R v CB* (13 May 2014), Vancouver 23236-1; 23236-2-A (BC Youth Div) the court recognized that section 34(2), if read narrowly, is inconsistent with other parts of the act. In *CB*, the court

notes that section 34(2) should be read "expansively" so that it applies to "a release from or detention in custody of a young person who is before the court, whether it is by s.33 or by the more general process of arrest". Both cases indicate that section 34(2)(a) is not limited to applications under section 33.

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

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

6. Victims

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

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

7. Sex Offenders Information Registration Act

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

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

8. Forfeiture

Forfeiture amounts may have been set out in an Undertaking or release order. Applications to follow through on the forfeiture are made to the Youth Justice Court (s 134 *YCJA*). A judge will arrange a hearing to decide if the forfeiture should be allowed or not.

References

[1] https://www.canlii.org/en/on/onca/doc/2009/2009onca219/2009onca219.html
[2] https://laws-lois.justice.gc.ca/eng/acts/c-38.7/index.html
[3] https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1715/2010bcsc1715.html
[4] https://www.canlii.org/en/ca/scc/doc/2008/2008scc49/2008scc49.html
[5] https://www.canlii.org/en/on/oncj/doc/2004/2004oncj190/2004oncj190.html
[6] https://www.canlii.org/en/ab/abca/doc/2004/2004abca352/2004abca352.html
[7] https://www.canlii.org/en/bc/bcca/doc/2007/2007bcca206/2007bcca206.html
[8] https://laws-lois.justice.gc.ca/eng/acts/d-3.8/page-1.html
[9] https://laws-lois.justice.gc.ca/eng/acts/I-1/FullText.html

IV. Youth Justice (British Columbia) Act

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

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

A. Definition of Young Person

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

B. Notice to Parents

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

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

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

C. Sentencing

1. General

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

The possible sentences available to the court are:

- an absolute or conditional discharge, if there is no minimum penalty required for an adult convicted of that offence, and if it is in the best interest of the young person and not contrary to the public interest;
- a maximum fine of $1,000;

- community work service hours to a maximum of 240 hours and to be completed within a specified period no longer than one year;
- probation for a maximum of 6 months;
- custody not exceeding 30 days for specified offences under s. 8(2)(e) (for example, trespassing on school grounds under section 177(2) of the *School Act*);
- custody not exceeding 90 days for other offences specified under section 8(2)(f) (for example, driving while prohibited or suspended under sections 95(1), 102, or 234(1) of the *Motor Vehicle Act*); and/or
- a driving prohibition for an offence under the Motor Vehicle Act.

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

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

2. Sentence Review

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

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

D. Special Concerns

1. Publication of a Young Person's Identity

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

2. Records

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

Appendix A: Glossary

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Adult

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

Adult Sentence

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

Attorney General/Crown Counsel

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

Child

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

Conference

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

Extrajudicial Measures

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

Extrajudicial Sanction

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

Offence

- means an offence created by an Act of Parliament.

Parent

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

Pre-sentence Report

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

Publication

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

Serious Offence

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

Serious Violent Offence

- means an offence under one of the following provisions of the *CC*:

- s 231 or 235 (first degree murder or second degree murder),
- s 239 (attempt to commit murder),
- s 232, 234, or 236 (manslaughter), or
- s 273 (aggravated sexual assault).

Violent Offence

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

Young Person

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

Youth Custody Facility

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

Youth Sentence

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

Chapter Three - Family Law

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 7th, 2023.

A. Note on the Family Law Act and this Manual

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

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

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

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 7th, 2023.

A. Resources in Print

1. Continuing Legal Education Society of British Columbia, *Family Law Sourcebook for British Columbia* (Vancouver: Continuing Legal Education Society of British Columbia, 2022).
   - This loose-leaf sourcebook contains a thorough overview of all aspects of family law, with cites to the relevant authorities for each statement of law.
2. Continuing Legal Education Society of British Columbia, *Annotated Family Practice 2023 - 2024* [regular updates]. (Vancouver: Continuing Legal Education Society of British Columbia, 2008).
   - This is an essential resource for many family law lawyers, and is updated each year.
3. Continuing Legal Education Society of British Columbia, *British Columbia Family Practice Manual, 5th ed.* [regular updates] (Vancouver: Continuing Legal Education Society of British Columbia, 2011).
   - Loose-leaf manual providing a solid how-to approach to common family law problems and processes.
4. Continuing Legal Education Society of British Columbia, *Desk Order Divorce—An Annotated Guide* (Vancouver: Continuing Legal Education Society of British Columbia, 2013).
   - Annotated guide to divorce, with regular updates.
5. Trudi L Brown, QC, *British Columbia Family Law Practice, 2023 Edition + E-Book* (LexisNexis Canada, 2022).
   - This loose leaf guide contains annotated legislation and judicial consideration of statutes pertaining to family law. Remember, it will only contain amendments up to the date of publication.

Library References:

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

B. Resources on the Internet

1. Ministry of Justice – Family Law Legislation

Government website for the Family Law Act [1]

Resources that are particularly relevant include:

- Table of Concordance [2] – allows for quick cross-referencing from the *FRA* sections to the *FLA* sections.
- The Family Law Act explained [3] – Explains the meaning and intention of each section of the FLA as it was implemented in 2013 and provides information on where each section replaced, changed or carried over a section of the FRA.
- The Ministry of Attorney General - Provincial Court Family Rules Explained [4] - A document developed by the Ministry of Attorney General to support the transition to the new Provincial Court Family Rules, last updated January

2022.

- Questions and Answers [5] – perhaps the best and most concise introduction to the changes that can be found on this website.

2. Online Help Guide Supreme Court BC – Family Law

Website: https://supremecourtbc.ca/family-law

- This service provides accurate and easy to understand information to help users prepare the procedural aspects of a family or civil case. This is an educational online resource.

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

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

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

4. BC Family Maintenance Enforcement Program (FMEP)

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

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

5. Legal Aid BC Family Law in British Columbia

Website: https://family.legalaid.bc.ca/

- This site has general information on family law, including self-help materials, forms a client needs to file for an uncontested divorce, and step-by-step instructions for filling out the forms. It also houses web versions of Legal Services Society family law publications. *Living Together, Living Apart: Common-Law Relationships, Marriage, Separation and Divorce* [6] is very useful. This publication is available in English.

6. British Columbia Vital Statistics Agency

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

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

7. Ministry of Attorney General

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

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

8. Department of Justice Canada

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

About Child Support/Federal Child Support Guidelines, P.C. 1997-469: https://www.justice.gc.ca/eng/fl-df/child-enfant/index.html

9. Support Calculator

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

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

10. British Columbia Supreme Court

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

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

11. Divorce Registry of Canada

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

Telephone: (613) 957-4519

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

12. MOSAIC

Website: http://www.mosaicbc.com

Telephone: (604) 254-0244

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

13. Interjurisdictional Support Orders

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

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

14. Children and Travel

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

15. Ministry of Justice Dispute Resolution Office

Website: https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/mediation

Phone (Lower Mainland): (604) 684-1300

Toll-Free (Rest of BC): 1-877-656-1300

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

16. Collaborative Divorce

Website: http://www.collaborativepractice.com

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

Website: http://www.bccollaborativerostersociety.com

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

17. Clicklaw

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

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

18. BC Hear the Child Society

Website: http://www.hearthechild.ca

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

C. Resources by Telephone

1. Family Justice Centres

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

Note: The Family Justice Centres are not legal resources.

Location	Telephone
Abbotsford	(604) 851-7055
Campbell River	(250) 286-7527 or 1-(800) 757-9406
Chilliwack	(604) 795-8257
Courtenay	(250) 897-7556 or 1-(800) 371-0799
Cranbrook	(250) 426-1660 or 1-(888) 518-8822
Chilliwack	(604)-795-8257
Kamloops	(250) 828-4688 or 1-(888) 764-3663
Kelowna	(250) 712-3636 or 1-(888) 227-7734
Langley	(604) 501-3100
Maple Ridge	(604) 466-7345
Nanaimo	(250) 741-5447 or 1-(800) 578-8511
Nelson	(250) 354-6433 or 1-(888) 526-2229
New Westminster	(604) 660-8636
North Vancouver	(604) 981-0084 or 1-(888) 837-1116
Penticton	(250) 487-4030 or 1-(888) 201-0045
Port Coquitlam	(604) 927-2217
Prince George	(250) 565-4222 or 1-(888) 668-1602
Richmond	(604) 660-3511
Sechelt	(604) 740-8936 or 1-(888) 245-1903
Surrey	(604) 501-3100 or 1-(800) 663-7867
Terrace	(250) 638-6557 or 1-(888) 800-1433
Vancouver – Commercial Drive	(604) 660-6828 or 1-(800) 663-7867
Vancouver – Hornby Street	(604) 660-2084 or 1-(800) 663-7867
Vernon	(250) 549-5644 or 1-(888) 282-2283

Victoria	(250) 356-7012 or 1-(800) 663-7867

2. Provincial Court Vancouver Registry

Family Court Registry: (604) 660-8989

3. Provincial Court Vancouver Family Duty Counsel Service

Telephone: (604) 601-6086

- Duty counsel is also available in other cities, contact Legal Aid BC for a current list
- Legal Aid BC, general inquiries telephone line: (604) 601-6000
- Family duty counsel services are provided primarily in person, with phone-only services available at specific locations. For contact information and hours, please call the general inquiry line above or visit: https://legalaid.bc.ca/legal_aid/familyDutyCounsel.

4. Supreme Court Vancouver Registry

Administration: (604) 660-2847

Family Law Registry: (604) 660-2486

Courthouse Library: (604) 660-2841

Scheduling: (604) 660-2853

5. Supreme Court New Westminster Registry

Civil Registry: (604) 660-0571

Criminal Registry: (604) 660-8517

Divorce: (604) 775-0671

Courthouse Library: (604) 660-8577

Family Law Duty Counsel: (604) 775-0628

D. Relevant Legislation

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

This is the federal legislation that provides for both divorce law and the determination of corollary relief (support, parenting time, and access). Support orders under the Act have effect throughout Canada. All actions under the *Divorce Act* are generally heard in BC Supreme Court. However, if the Attorney General has designated a Provincial Court registry as a Supreme Court Registry under s 4 of the *Provincial Court Act*, then that Provincial Court may decide interlocutory applications made under the *Divorce Act*.

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

An amendment to the DA came into effect on March 1, 2021. These amendments include:

- Increasing focus on the best interests of the child;
- Bringing definitions into alignment with the Family Law Act and focusing them on the relationship with the child. For instance, the amendments remove terms such as custody/custody order and add new terms such as parenting

time/parenting order;
- New provisions defining family violence and compelling courts to consider family violence in divorce proceedings.

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

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

3. Family Maintenance Enforcement Act, RSBC 1996, c 127 [FMEA]

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

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

The *FRA* has been replaced by the *FLA* The *FLA* is no longer in force except for actions that began before March 18, 2013, and only in respect of property and pension division. If your case still involves the *FRA*, please view an older version of the LSLAP manual.

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

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

Some of the main changes in the *FLA*,when compared to the *FRA*, include:

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

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

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

Website: https://canlii.ca/t/55vcd

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

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

7. British Columbia Supreme Court Family Rules, BC Reg. 168/2009

Website: https://canlii.ca/t/55vfd

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

8. British Columbia Provincial Family Court Rules, BC Reg. 417/98

Website: https://canlii.ca/t/54vs0

These are the procedural rules that govern family law cases brought in the Provincial Court. New rules took effect May 17, 2021, which altered the procedures for BC Provincial Family Court. Please see Provincial (Family) Court Proceedings (i.e., "The Rules") under section XV Court Procedures for specific requirements and step-by-step information.

- Legislation regarding the Provincial Family Court Changes: Court Rules Act BC Reg. 121/2020. Website: https://canlii.ca/t/55fqs

E. Referrals

1. The Non-Legal Problem

Many clients will have problems that are not strictly legal. If the client has a personal problem, refer the client to an appropriate social service agency in the lower mainland. The Red Book [7] is a very useful resource for this purpose. Often, even when a client does have a legal problem, the legal remedy will not resolve all issues for that person. Be aware of this and try to get clients the help they need.

2. The Legal Problem

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

References

[1] http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act
[2] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/concordance.pdf
[3] https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act/the-family-law-act-explained
[4] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/family-civil/pcfr-explained.pdf
[5] https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act/family-law-act-questions-and-answers
[6] https://legalaid.bc.ca/publications/pub/living-together-or-living-apart
[7] http://www.bc211.ca/

III. Marriage

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

III. Marriage

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

1. Legal Requirements and Barriers

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

a) Sex

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

b) Relatedness

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

c) Marital Status

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

d) Age

Both spouses must be over the age of majority (19 in BC; see the *Age of Majority Act*, RSBC 1996, c7, s 1 [4]). In BC, a minor between the ages of 16 and 19 can marry only with the consent of both of their parents (see the *Marriage Act*, RSBC 1996, c 282, s 28 [5]). A minor under the age of 16 can marry only if permission is granted in a Supreme Court order (s 29). However, a marriage is not automatically invalid if the requirements of sections 28 and 29 have not been

met at the time of marriage (s 30); the Court may preserve the marriage if it is in the interests of justice to do so (e.g., if parties have grown up and have lived as spouses for some time).

e) Mental Capacity

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

f) Residency

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

g) Foreign Marriages

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

h) Sham Marriages

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

i) Customary Marriage

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

B. Common-Law Relationships

1. General

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

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

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

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

2. Estate Considerations

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

WESA is available online at CanLII: https://canlii.ca/t/55nwv

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

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

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

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

Available online at: hhttps://laws-lois.justice.gc.ca/eng/acts/c-8/index.html

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

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

Available online at: https://canlii.ca/t/55qlz

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

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

Available online at: https://canlii.ca/t/5571q

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

C. Marriage and Cohabitation Agreements

1. General

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

resolution procedures mandated by statute.

Those interested in drawing up marriage, cohabitation, or pre-nuptial contracts on their own can be directed to the self-help kit. However, contracts drawn up using self-help kits are often overturned in Court. Independent legal advice is extremely important to have enforceable marriage or cohabitation agreements, and persons wishing to rely on a cohabitation or marriage agreement are strongly encouraged to seek the advice of a lawyer.

2. Legislation: Family Law Act [FLA]

The new *FLA* attempts to increase the enforceability of marriage and cohabitation agreements, and to provide clearer guidelines for the circumstances under which they can be binding. Agreements will be binding on the parties regardless of whether a family dispute resolution professional has been consulted and/or the agreement has been filed with a court. Agreements will be binding on a person who is under 19 years of age if they are parents or spouses (Part 2, s 6).

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

- a) Spouses fail to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
- b) One spouse takes improper advantage of another's vulnerability;
- c) One spouse does not understand the nature or consequence of the agreement; and/or
- d) Other circumstances that would cause, under common law, all or part of the contract to be voidable.

The above concerns are often addressed by having the parties obtain independent legal advice.

Section 93(5) of the *FLA* states that the courts can also set aside an agreement if they find the agreement significantly unfair after considering these factors:

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

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

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

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

3. Substance of Contract

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

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

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

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

a) Parenting Arrangements

Parenting arrangements are generally never in cohabitation or marriage agreements.

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

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

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

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

b) Child Support

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

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

The primary objective is to ensure, so far as practicable, that the children will enjoy a reasonably consistent, and reasonably adequate, standard of living, unaffected, so far as is practicable, by changes in the relationships among their parents and step-parents (See *B (C) v B (M)*, [2014] CarswellBC 1212 (BCPC)). It is also important to note that any term purporting to exclude support obligations is likely to be found invalid on public policy grounds. The Court will seldom uphold an amount lower than the guidelines, even if the parties agree on it, unless there is an appropriate reason to

approve it, such as some other arrangement that directly benefits the child. It is important to note that the Court may refuse an application for a Divorce Order if the Court is not satisfied that appropriate arrangements have been made for the support of the parties' children. See Section X: Spousal and Child Support.

c) Spousal Support

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

d) Void Conditions

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

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

References

[1] http://canlii.ca/t/1jdhv
[2] http://canlii.ca/t/7w02
[3] http://canlii.ca/t/7vq2
[4] http://canlii.ca/t/5224c
[5] http://canlii.ca/t/52pxh
[6] http://canlii.ca/t/26v81
[7] http://canlii.ca/t/1dz3n
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[17] http://canlii.ca/t/fxnqv
[18] http://canlii.ca/t/1d921

IV. Divorce

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

A. Legislation

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

B. Jurisdiction

1. Supreme Court

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

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

Note that as of March 1, 2021, the term 'custody' under the *DA* was repealed, and the term 'parenting time' is used in its place.

2. Provincial Court

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

C. Requirements for a Divorce

1. Jurisdiction

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

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

There must not be another divorce proceeding involving the same parties in another jurisdiction. If two actions are pending and were commenced on different days (divorce, corollary relief or variation), the court in which a divorce proceeding was commenced first has exclusive jurisdiction unless the first proceeding is discontinued (DA s 3(2)). As of March 1, 2021 there is no requirement that the first proceeding be discontinued within a certain amount of time to instead move forward with the second proceeding.

If two proceedings were commenced on the same day, the parties have 40 days to discontinue one of such proceedings (divorce, corollary relief, or variation) (DA s 3(3), 4(3), 5(3)). If neither proceeding is discontinued within the allotted time, an application can be made by either or both of the parties to have the Federal Court determine which court retains jurisdiction by applying the following:

- a. If either proceeding includes parenting order application, the court that retains jurisdiction is the court in the province in which the child is habitually present;
- b. If no parenting order, the court in the province the spouses last maintained habitual residence in common retains jurisdiction; and
- c. In any other case, the court that the Federal Court determines most appropriate retains jurisdiction.

Parties must submit a clearance form, filled out online and printed, at the time of filing the Notice of Family Claim and Marriage Certificate.

2. A Valid Marriage: Proof of Marriage

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

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

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

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

3. Grounds for Divorce

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

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

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

1. Separation - One Year

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

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

2. 90-Day Reconciliation Period

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

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

3. Living Under the Same Roof

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

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

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

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

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

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

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

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

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

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

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

F. Why a Divorce Application May Be Rejected

1. Collusion

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

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

2. Condonation

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

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

3. Connivance

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

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

4. Discretion of the Court

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

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

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

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

G. Separation Agreements

1. General – Family Law Act

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

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

The overarching test for any agreements made regarding Part 4 of the *FLA* (guardianship, parenting arrangement contact) is the best interest of the child test in section 37 of the *FLA*.

A separation agreement between spouses can also deal with division of family property and family debt, as well as any assets excluded from division.

Section 85 of the FLA excludes the following from the division of family property:

- Property acquired by a spouse before the relationship between the spouses began;
- Inheritances to a spouse;
- Gifts to a spouse from a third party;
- A settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
  - Loss to both spouses, or
  - Lost income of a spouse;
- Money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
  - Loss to both spouses, or
  - Lost income of a spouse;
- Property referred to in any of the paragraphs above that is held in trust for the benefit of a spouse;
- A spouse's beneficial interest in property held in a discretionary trust
  - To which the spouse did not contribute, and
  - That is settled by a person other than the spouse;
- Property derived from property or the disposition of property referred to in any of the above paragraphs.

Each spouse must be aware of the potential influence of any agreement on future expectations, and the legal implications of the agreement on questions of ownership and title in family property. Each spouse should have independent legal advice, even in cases where the parties seem to be in agreement on the terms of a separation agreement. If a separation agreement has been signed and one party did not have independent legal advice this may go towards evidence of unfair contracting and it may be possible to overturn the contract.

It is possible that a separation agreement containing provisions for support may be regarded by the Court as evidence of liability on the part of the supporting spouse. While the agreement does not usurp the Court's jurisdiction in support, guardianship or parenting arrangements, the Court will consider the terms of the agreement when making the order. Whether the Court will uphold the terms of the agreement changes depending on the subject matter of the agreement. See sections of the *FLA* that apply to each subject matter. Note also that any orders respecting agreements are subject to s 214

of the *FLA*.

In addition to property settlements, guardianship or parenting arrangements, and support, the separation agreement may embrace any other matters the parties wish to include in it, and often includes estate provisions, releases, penalties for breach of the contract, etc. A separation agreement can be more flexible than a Court order. For example, a Court order cannot contain contingent terms, but a separation agreement can.

> **NOTE:** Because of the complicated nature of separation agreements, clients who wish to make a separation agreement should be given family law referrals.

H. Other Points to Note

1. Jurisdictions to Vary Proceedings

Section 5(1) of the *DA* allows a Court in a province other than the Court of original jurisdiction (that is, the Court which originally made an order) to vary an order made under the *DA* if:

- One of the former spouses is ordinarily resident in the province at the commencement of the proceeding; or
- Both former spouses accept the jurisdiction of the Court.

2. Adjournment for Reconciliation under the DA

Where at any stage in a divorce proceeding it appears to the Court from the nature of the case, the evidence, or the attitude of either or both spouses that there is a possibility of the reconciliation of the spouses, s 10(2) of the *DA* allows the Court to adjourn the proceedings to give the spouse an opportunity to reconcile. The Court can also, with the spouses' consent, nominate a marriage counselor, or in special circumstances, some other suitable person to assist a reconciliation.

3. Alteration of Effective Date of Divorce

Under s 12 of the *DA*, a divorce takes effect on the 31st day after the day on which the judgment granting the divorce is rendered. The 31 days allow for the appeal period to expire. The Court may order that the divorce take effect before this if it is of the opinion there are special circumstances and the spouses agree that no appeal from the judgment will be taken. The impending birth of a child and remarriage are generally not considered compelling reasons to shorten the appeal period. However, one may file an appeal waiver to remarry sooner.

4. Support Order After Divorce Has Been Granted

Under s 2(1) of the current DA “spouse” means two persons who are currently married to each or were formerly married to one another. As such, a former spouse may be able to get a support order after the divorce has been granted. **The amended DA has repealed s 15 and updated the definition of “spouse” under s 2(1) to reflect the sections under which the meaning of “spouse” is inclusive of “former spouse.” This change came into effect March 1, 2021.**

5. Mediation

A form of mediation for separating couples is provided by the Family Justice Counsellors of the Ministry of Attorney General. It is intended to steer people out of the Court system. Similar to the small claims process, if the two parties come to an agreement through mediation they may choose to sign a binding contract after the process. Should either party choose not to sign, the agreement will not be binding. There are offices throughout BC, which can be located using the blue pages of the telephone book under BC Corrections Branch, or Family Court: Probation and Family Court Services. The service is confidential and free. Family Justice Counsellors cannot deal with property and debt division.

There is also the Family Mediation Practicum Program which aims to provide affordable mediation services to participants while also offering practical training to new mediators (along with an experienced mentor mediator). See II.B. Resources on the Internet.

Parties may wish to retain a private family law mediator to assist them in mediating a resolution to their family law matter. They may contact the British Columbia Mediator Roster Society for names of family law mediators. See II.B. Resources on the Internet. Not all family law mediators are listed on the roster, and there are many family lawyers who are specifically trained and accredited in family law mediation.

The new *FLA* favours out of Court resolution of issues, and even gives courts the authority to refer parties to counselling and mediation (s 224 *FLA*). It also formally recognizes the role of and duties of family dispute resolution professionals (Section 8), family justice counsellors (Section 10), and parenting coordinators (Part 2, Division 3).

6. Collaborative Divorce

Another option for parties dealing with family law matters is the Collaborative Divorce Model. This offers an option for parties to resolve disputes respectfully and without going to Court. Parties work out a negotiated settlement with the help of collaboratively trained professionals including (as needed) lawyers, divorce coaches, child specialists and financial specialists. This allows the parties to negotiate a settlement without the threat of Court. If the parties are unable to resolve matters through the Collaborative process, the Collaborative professionals will not be involved in Court proceedings. See the websites listed in II.B. Resources on the Internet for more information.

7. Rule 7-1: Judicial Case Conferences

In cases where relief other than a simple divorce is sought in the Supreme Court, Rule 7-1 of the Supreme Court Family Rules (British Columbia) requires that a judicial case conference (JCC) be held before a party to a contested family law proceeding delivers a notice of application or affidavit in support of an interlocutory application to the other party There are exceptions to this rule. A party may file and serve a notice of application and supporting affidavits in any of the following applications even though a JCC has not yet been conducted:

- An application for an order under section 91 of the FLA restraining the disposition of any property at issue;
- An application for an order under section 32 or 39 of the Family Homes on Reserves and Matrimonial Interests or Rights Act (Canada) or a First Nation's law made under that Act with respect to an equivalent matter;
- An application for a consent order;
- An application without notice;
- An application to change, suspend or terminate a final order;
- An application to set aside or replace the whole or any part of an agreement;
- An application to change or set aside the determination of a parenting coordinator.

The purpose of a JCC is to help the parties come to an agreement on some or all of the matters at issue, to identify the issues that are in dispute and those that are not, to explore alternatives to litigation, to schedule disclosure, discoveries, and the exchange of documents, and to schedule interim applications and the trial date. JCCs may be heard by either judges or masters and are set for approximately an hour and a half. Parties can set more than one Judicial Case Conference.

8. Divorce Law and First Nations People

Special concerns arise in cases involving First Nation People registered under the *Indian Act*, RSC 1985, c I-5 [8]. The *Indian Act* sets out guidelines for and definitions of Aboriginal people, and defines who is eligible for "status". Only "status" people are affected by the legislation under the *Indian Act*. One spouse's treaty payment may be directed to the other "where the Ministry is satisfied he deserted his spouse or family without sufficient cause, conducted himself in such a manner as to justify the refusal of his spouse or family to live with him, or has been separated by imprisonment from his spouse and family" (*Indian Act*, s 68). As well, reserve land allocated by a certificate of possession cannot be dealt with in the same manner as a matrimonial home because the rules in the *FLA* do not apply to reserve land. However, in such cases, the Court may ask that the spouse in possession of the reserve land pay cash compensation to the other spouse (*George v George* (1997), 30 BCLR (3d) 107). Keep in mind that most provincial laws apply to Aboriginal people and reserve land unless they are in direct conflict with the *Indian Act*. Further, courts will almost always take the cultural identity of the children into consideration when making an order for parenting time; see e.g. *D.H. v H.M.*, [1999] SCJ No 22 [9], and see *Van de Perre v Edwards*, [2001] SCJ No 60 [10].

Furthermore, for First Nation Peoples living on reserves, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (S.C. 2013, c. 20) applies and can affect the division of assets in the case of divorce or separation (see ss 43, 46).

9. Other Procedural Options

There are many other procedural options available to parties in Family Law disputes. Section 8 of the *FLA* requires counsel and other Family Dispute Resolution Professionals to discuss the advisability of the various types of family dispute resolution, which include those listed above as well as the following:

- Family Law Arbitration. For more information see https://family.legalaid.bc.ca/visit/arbitrators
- Med/Arb, which is a combination of both Mediation and Arbitration.
- Judicial Settlement Conferences pursuant to Rule 7-2 of the *Supreme Court Family Rules*
- Family Management Conferences pursuant to Rule 7(1) of the *Provincial Court Family Rules*
- The use of a Parenting Coordinator to address ongoing parenting and communication issues between the parties after an order or agreement has been reached for the parenting arrangement. For more information see http://www.bcparentingcoordinators.com/

I. Availability of Divorce Services in BC

1. Legal Aid

Legal Aid [11] will provide extremely limited assistance to those who meet their income requirements. Clients must also have a risk or history of family violence, or a risk or history of child abduction, to be eligible for this service. Legal Aid will not assist with divorces.

2. Lawyers

All lawyers will expect an initial payment from their client. The amount of the initial retainer will vary depending on the lawyer's hourly rate and their estimation of the complexity of the case. The cost of a simple and uncontested divorce begins at approximately $1,500 and up. We advise clients to use the Lawyer Referral Service (604) 687-3221 or 1-800-663-1919. The 15 minutes of the initial consultation with the lawyer are free and conducted over the phone, with the lawyer charging a fee after the 15 minutes have elapsed.

To minimize costs when retaining a lawyer, clients should be advised to:

- Negotiate the cost of legal services in advance, so they do not come as a surprise;
- Collect all necessary documentation personally rather than paying the lawyer to do it;
- Call the lawyer only when imparting necessary information (every phone call costs money);
- Use Family Court and Supreme Court resources (such as Family Justice Counsellors) if appropriate;
- Ask for regular or scheduled billing to monitor escalating legal costs;
- Carefully read all correspondence sent by the lawyer; and
- Treat the lawyer as a professional.

References

[1] http://canlii.ca/t/8q7k
[2] http://www.parl.gc.ca/legisinfo/BillDetails.aspx?billId=5387766&Language=E&Mode=1
[3] http://canlii.ca/t/840j
[4] https://www.vs.gov.bc.ca/marriage/certificate.html
[5] http://canlii.ca/t/4zgl
[6] http://canlii.ca/t/fw3t1
[7] http://canlii.ca/t/g14fn
[8] http://canlii.ca/t/7vhk
[9] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1699/index.do
[10] http://canlii.ca/t/51z8
[11] http://www.legalaid.bc.ca/

V. Uncontested Divorce

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

A. Required Documents

If the spouse is trying to do the divorce on their own, the following information details the basic documents that they will need. A person handling their own divorce is advised to get a copy of the documents and instructions from Self-Counsel Press.

1. Marriage Certificate

Any official, **government-issued** form of marriage certificate or registration of marriage can be accepted. Importantly, it **cannot** be a church-issued document, marriage license, or slip of paper attesting to the celebration of the marriage. In some areas of the world, it may be difficult to obtain an official government document.

If the marriage certificate is in a language other than English, an official certified translation must be provided. Claimants who require translation can be referred to Mosaic Translations [1], which can be reached at (604) 254-0469, or to the Society of Translators and Interpreters of BC [2], at (604) 684-2940. Marriage certificates in French must also be translated.

Claimants who were married in Canada can request a copy of their marriage certificate for about $27 (in BC) from the Department of Vital Statistics [3].

2. Photograph of the Spouse

Claimants must have a recognizable photograph of the spouse. The photograph is for service purposes and will not be returned immediately. The process server usually returns the photo with the affidavit of personal service. They should also provide information about how to locate the spouse (i.e. their address, their employer's address, the make and model of their vehicle).

3. Copies of Any Court Orders or Separation Agreements

These documents can be attached to the divorce affidavits as exhibits.

If the client or spouse had previously started a divorce action, they must provide a filed copy of the Notice of Discontinuance that authorized discontinuance of that action.

If a separation agreement is the only document signed between the parties that involves guardianship, parenting arrangements, and consent and support of the children (i.e. if there are no court orders), the agreement may be filed in either the Provincial or the Supreme Court and enforced as a court order. Section 44 of the FLA allows for written agreements respecting parenting arrangements, section 148 allows for written agreements respecting child support and section 163 allows for written agreements respecting spousal support. The separation agreement does not need to be filed in Court to obtain a divorce order. However, if there are children of the marriage, the agreement should be attached to the affidavit regarding child support as evidence of the parties' agreement.

B. Joint or Sole Application

For joint applications, in addition to the original Notice of Joint Family Claim, two additional copies will be required—the original is filed at the registry and the two copies as personal records. See Section H: Service, below, regarding sole applications.

A joint application is quicker, less expensive, and less complicated than a sole application because a Notice of Joint Family Claim need not be served (Supreme Court Family Rules, r. 2-2). However, if lawyers or a mediator is preparing the joint claim, the lawyer needs to advise each of the clients that:

- The lawyer is acting for both parties;
- No information received in connection with the matter from one client can be treated as confidential from the other client;
- If a conflict develops that cannot be resolved, the lawyer cannot continue to act for both of them and may have to withdraw completely; and
- Both parties will need to seek out independent legal advice.

C. Filling Out the Notice of Family Claim

The Registry is extremely scrupulous, and documents containing inconsistencies or omissions will be rejected. This could cost the client valuable time. Clients should be advised to check and re-check every document, especially dates and the spelling of names.

Do not use abbreviations, even common abbreviations such as "n/a", "a.k.a.", and "BC". Answer every paragraph in full.

If at any time, one party is aware of errors in the supporting documents (such as the certified copy of registration of marriage), the pleadings must be amended to show the true facts as that party knows them. This is because the party requesting the divorce must swear an affidavit as to the correctness of the documents and the statements contained therein.

D. Style of Proceedings

The style of proceedings should use the names of both parties as they appear on the certificate or registration of marriage. The previous surname on the marriage certificate is not an alias and you need not use “also known as” or add it to the style of proceedings. If the certificate shows a typographic error, you may wish to include in the style of proceedings the name the party presently uses and “also known as” (or “formerly known as,” as appropriate) the name on the certificate.

E. Backing Sheets

The backing sheet is the last page of the entire document, placed backwards so the documents can be easily identified when folded. Orders filed at the Registry for entry require backing sheets. Some Registries may also require backing sheets on all documents filed.

F. Notice of Family Claim

The Notice of Family Claim will include general information about the parties, the spousal relationship history, prior court proceedings and agreements, as well as what is being sought by the claimant. The appropriate schedules should be completed and attached to the Notice of Family Claim.

Follow the directions outlined on the forms carefully.

Under Part 2 of the Notice of Family Claim, when the parties began living in a marriage-like relationship is usually (though not always) when the parties first began cohabiting. Conversely, the date of separation is the date the parties stopped living in a marriage-like relationship, even though they may have continued to live together under the same roof. If the breakdown of the marriage is due to separation, the date of commencement of the separation should be noted.

Under Part 3 of the Notice of Family Claim, any separation agreement or financial agreements determining any matters related to the dissolution of the marriage, any orders from the Courts, and/or other proceedings in the Courts should be noted. Details such as the date of the agreement, the matters resolved, and whether or not the agreements are still in effect should be set out, but the more specific details of the agreements do not need to be set out.

If the claimant is only seeking a divorce and has settled all other corollary matters without the need for court orders, they need only fill out the Notice of Family Claim, Schedule 1 – Divorce, and, if applicable, Schedule 5 - Other Orders if they want an order changing their name under the *Name Act* [4].

The forms must include an address for service. This address must be within 30 km from the courthouse. It can include a fax number and/or an email address. The address must be kept up to date with the Court and opposing party.

1. Schedule 1: Divorce

Place a check for each applicable box and fill in the form accordingly. Addresses must be accurate. Do not use post office boxes. A government-issued certificate of marriage or certificate of registration of marriage must be filed where the party intends to seek an uncontested divorce.

2. Schedule 2: Children

Place a check for each applicable box and fill in the form accordingly. Under the *DA* and the *FLA* s 146, children who are over the age of majority but whose illness leaves them unable to leave the care of a parent or whose attendance of a post-secondary institution leaves them financially dependent on their parent may be considered a dependent child. **With the *FLA* now enacted, which Act you are seeking an order under (the *DA* or *FLA*) can have an impact on the parties’ rights. Before checking one box or the other where it specifies the Acts, seek legal advice from a lawyer.**

3. Schedule 3: Spousal Support

Place a check for each applicable box and fill in the form accordingly. A lawyer should be consulted for advice on entitlement to spousal support. **With the *FLA* now enacted, which Act you are seeking an order under (the *DA* or *FLA*) can have an impact on the parties' rights. Before checking one box or the other where it specifies the Acts, seek legal advice from a lawyer. The test for awarding spousal support is the same, however, there are different limitation dates for the two.**

4. Schedule 4: Property

Place a check mark for each applicable box and fill in the form accordingly. If one of the parties wishes to obtain unequal division of family property and family debt, details and reasons should be set forth here. **Only a lawyer should deal with property issues.**

5. Other Orders

Place a check mark for each applicable box and fill in the form accordingly. If the claimant is seeking a name change, they should indicate the full current and new names here.

G. Child Support Affidavits

Whenever there are children of the marriage and the requisition for a Desk Order Divorce is ready to be submitted, a Child Support Affidavit must be filed. Even if the matter of guardianship, etc. is to remain in the jurisdiction of the lower court, a judge is still required to satisfy themselves that reasonable arrangements have been made for the care of the children, hence the requirement for financial information. It is imperative that all income of both the child support claimant and the respondent be listed on the affidavit.

H. Service

Personal service is only required if the client is making a sole application.

Claimants **must** have a third party, over the age of 18, serve their Notice of Family Claim. Clients who choose to use a professional service should provide the server with a photograph of the spouse. The server should be told to take down the spouse's driver's licence number. Taking these steps will ensure that the Court does not question the validity of the service.

> **NOTE:** If the process server serves the Notice of Family Claim based on a photograph and does not, or is not able to obtain the spouses' driver's license number, the client must swear an additional affidavit confirming the identity of their spouse in the photograph used.

If the respondent's address is not known, the claimant should write letters to friends and family members to try to locate him or her. The client might also want to consider hiring the services of a skip tracing agency. This takes extra time, but will avoid the additional costs associated with a substitute service application.

In a substitute service application, the claimant must make an extra application to obtain permission to serve the respondent in a way other than that normally required by the *Supreme Court Family Rules*. The client may also incur the cost of publishing notices in a local newspaper and/or the Gazette [5], which could cost anywhere between approximately $111 and $315, depending on the order given. Other options include posting a copy of the substitution service order and the pleadings in the Court Registry, mailing them to the respondent's last known address by registered mail, or serving an adult in the house where the respondent is believed to reside, or serving the respondent through e-mail, Facebook, or

other online methods.

I. Costs

Claimants should always double-check the following court fees because they tend to change:

- Ordering a marriage certificate or registration of marriage: $27 for couples married in BC. It can be ordered by mail or in person. Refer to https://ecos.vs.gov.bc.ca/for more information.
- Court fee to file the Notice of Family Claim for divorce: $210 ($200 for filing the Notice of Family Claim and $10 for filing the registration of divorce).
- Fee for Serving the Notice of Family Claim on the respondent: varies depending upon where the respondent lives. The average fee is $100. Process Server Fees for the Lower Mainland can run from $69 plus $20 for an affidavit, or $70 to $100 all inclusive. For other parts of BC or Canada, it can cost $200 or more for all attempts.
- Notarization: between $25 and $50, if the affidavit is already completed.
- Final application fee: $80 (for requisition for the Desk Order Divorce).
- Fee to apply for a certificate of divorce: $40. (Note that there is no requirement to apply for a certificate of divorce. Once the Order for divorce has been made and is effective, the parties are divorced.)

    NOTE: There is no fee to file a separation agreement in Provincial Court. There is a fee of $90 to file a separation agreement in the Supreme Court.

J. Approximate Length of Time for Divorces

Simple divorces, with or without children, take approximately three to four months to complete, or one to two months in the case of joint applications. Substitute service divorces take longer, an additional one or two months depending on the terms of the order for substitute service. Please note that these time estimates do not account for delay caused if the Court rejects some portion of the material filed and it needs to be redone.

References

[1] http://mosaicbc-lsp.org/
[2] http://www.stibc.org/
[3] http://www2.gov.bc.ca/gov/content/life-events
[4] http://canlii.ca/t/8481
[5] http://www2.gov.bc.ca/gov/content/governments/services-for-government/bc-bid-resources/goods-and-services-catalogue/bc-gazette

VI. Simple Divorce Procedure

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

The following are steps to help applicants through the process.

> **NOTE:** If an individual is self-representing, they are responsible for purchasing the Self-Counsel Press divorce guide and forms. The instructions and steps for filling out the forms and filing them, etc. are included in the kit.

A. Sole Application

Step 1: Collect all necessary documents: i.e. the marriage certificate, copies of court orders or agreements regarding parenting time, access, and support of the children.

Step 2: The client fills in the Notice of Family Claim and relevant schedules.

Step 3: The client fills in the Registration of Divorce form, only available online.

Step 4: The client should then go to the nearest Supreme Court, and bring the original and three copies of the Notice of Family Claim, the original marriage certificate or the certified copy of the marriage registration, and $210 in cash, debit, money order, or cheque, payable to the Minister of Finance.

Step 5: In the sole application process, the client must then arrange for the court-stamped Notice of Family Claim to be personally served on the respondent.

Service by a friend: The friend should know the respondent, but not be involved in the divorce in any way. When the friend serves the respondent, the friend should ask whether the respondent is Mr./Ms. X, and ask for identification. It would be helpful, although not mandatory, to give the friend a picture of the respondent. The friend will then have to swear an affidavit of personal service and say how they identified the spouse (*Supreme Court Family Rules*, R. 6-3).

Service by a Process Server: Process Servers are listed in the Yellow Pages. They require the home and business addresses of the respondent, the telephone numbers, and a photograph of the respondent. They will also need two copies of the Notice of Family Claim, one for the spouse, and one to staple to the affidavit of personal service.

Substitute Service: Evidence of efforts to find the respondent will be required before an order for substitute service can be granted. Some methods of finding the respondent are:

- Calling or writing to relatives (usually the most successful);
- Advertising in a local newspaper;
- Writing to the Superintendent of Motor Vehicles [1] to see if any vehicles have been registered in their name. The client should ask whether any fees will be incurred before proceeding;
- Asking the local police if they have any information on their whereabouts, although they are usually reluctant to help;
- Using a credit bureau or collection agency;
- Asking friends of the respondent about their current address; or
- Searching on Google and social media sites such as Facebook.

Step 6: Once the time for the respondent to file a Response to Family Claim has expired, the spouse applying for the divorce must swear an affidavit. The affidavit will need to be sworn before a notary public, the registry staff ($40), or a lawyer. The time limit for filing a Response to Family Claim orCounterclaim is 30 days or, in the case of a substitution service order, such time as the order provides for the filing of a Response to Family Claim or Counterclaim.

Step 7: If there are any children, a child support affidavit must be filled out and sworn before a notary public, the registry staff, or a lawyer.

Step 8: The claimant applies for the divorce order. This requires:

- a) A requisition in Form F35 requesting an order that the parties be divorced;
- b) A draft of the order sought;
- c) The original of the affidavit of service complete with all exhibits and any supplementary affidavits confirming the identification of the respondent;
- d) A certificate of the registrar in Form F36;
- e) A requisition requesting a search for any Response to Family Claim;
- f) An affidavit, sworn within 30 days of the date on which the application is made, in support of the application (Form F38). This affidavit must be sworn after the time for the respondent to file a Response to Family Claim has expired (no earlier than one year after the date of separation if the ground of divorce is that the spouses have lived separate and apart for one year). The affidavit must include proof of the allegations made regarding the breakdown of the marriage or (in the case where the only ground of divorce is that the spouses have lived one year separate and apart) a sworn statement that the facts in the Notice of Family Claim are true;
- g) A child support affidavit in Form F37, if there are children; and
- h) The filing fee.

When the divorce is based on adultery or cruelty, proof of the adulterous or cruel conduct must be filed in affidavit form. Proof of adultery might consist of the respondent admission to the adulterous conduct. Proof of cruelty will usually consist in the affidavits of third parties, or letters from treating physicians, psychologists or psychiatrists attached to an affidavit as exhibits.

> **NOTE:** If a Response to Family Claim has been filed, the respondent has chosen to contest all or some of the relief sought and a lawyer's advice should be sought immediately.

Step 9: If the Court is prepared to make the order sought, the order will be available at the Court registry some time after the application is filed. Clients should simply call the registry to see whether their order is ready rather than attending in person. Clients will be required to show valid photo ID to pick up their divorce order.

Step 10: Thirty-one days after the divorce order has been granted (the date shown on the front of the divorce order), the client may apply to get a Certificate of Divorce by filing two copies of the requisition requesting a Certificate of Divorce. The fee is $40. Note that it is not always necessary to obtain a Certificate of Divorce.

B. Joint Application

In the joint application process, most of the required documents are filed at once. All required affidavits except one of the supporting affidavits may be sworn ahead of time. At least one of the supporting affidavits must be sworn and filed after the other materials are filed.

Step 1: Complete Steps 1 to 3 above. Both parties will be required to sign the Notice of Joint Family Claim.

Step 2: Complete all of the documents listed in Step 8 above, except for: one affidavit in support of the divorce application; the affidavit of service, and the requisition asking the registrar to search for a Response to Family Claim and Counterclaim.

Step 3: One or both parties attend Court to apply for the divorce order. This requires:

- a) A requisition in Form F35 requesting an order that the parties be divorced;
- b) A draft of the order sought;

- c) A certificate of the registrar in Form F36;
- d) One affidavit in support of the application, sworn after the Notice of Family Claim or Notice of Joint Family Claim has been filed, which includes proof of the allegations made regarding the breakdown of the marriage;
- e) A child support affidavit in Form F37, if there are children; and
- f) The filing fee.

A second affidavit in support of the application must be sworn and filed after the Notice of Joint Family Claim has been filed. That affidavit can be sworn at the court registry immediately after the filing of the other materials.

Step 4: Complete Steps 9 and 10 as listed above under "A. Sole Application".

C. Special Problems

1. Serving Divorce Papers Outside Canada

In circumstances where the respondent in a divorce action is living outside Canada **and** is willing to go to the Canadian Consulate office [2] nearest to where they live in order to accept service, the Consul will serve the respondent at that office, for a fee. However, this form of service requires the respondent's cooperation, as they must be willing to attend at the consular office personally when notified by its staff to do so.

To comply with the requirements of this form of service, the client must forward service documents to the Consulate:

1. A copy of the Notice of Family Claim ;
2. A partially completed Affidavit of Service (Form F15);
3. Exhibit "A" to the Affidavit of Service (i.e. a copy of the Notice of Family Claim); OR
4. If the country in which the respondent lives is a contracting state under the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, the respondent can be served using Forms F12, F13, and F14. See the Supreme Court Family Rule 6-5 for more details.
5. The client may then serve the documents outside of Canada. The Department of Authentication of Documents will help serve the documents. Their mailing address is:

Foreign Affairs and International Trade Canada

Legal Advisory Division (JLAC)

125 Sussex Drive

Ottawa, Ontario K1A 0G2

This office in Ottawa will in turn forward the documents to the appropriate consulate office. The charge will be billed to the client at the end, and is usually $50.

If the respondent is not willing to go to the consulate office to be served, the Department of External Affairs will not arrange service. In these cases, the client must determine if the court outside of Canada has jurisdiction to hear the family law case under section 10 of the *Court Jurisdiction and Proceedings Transfer Act [SBC 2003] c 28* [3] or section 3 of the *DA*. If the court does have jurisdiction, then the client must find a friend or relative in that country who is willing to serve the respondent. Otherwise, the client must apply to the court for leave to serve the respondent outside BC under Rule 6-4 of the Supreme Court Family Rules.

2. Foreign Language Marriage Certificates

Foreign language marriage certificates must be accompanied by a certified English translation. Certificates in French must also be translated. MOSAIC Translations will translate marriage documents. The minimum charge for this service is $35. It should be noted that foreign marriages might be considered valid if the evidence shows that the marriage is valid in the foreign country. The Society of Translators and Interpreters of BC also translates marriage certificates. They can be reached by telephone at (604) 684-2940.

3. Amending a Document

Under Rule 8-1 of the *Supreme Court Family Rules*, a party may amend their pleadings. A party may amend an originating process or a pleading issued or filed by the party at any time with leave of the Court, and, subject to Rules 8-2(7), 8-2(9) and 9-6(5):

- Once without leave of the Court, at any time before delivery of the notice of trial or hearing; and
- At any time with the written consent of all the parties.

Unless the Court otherwise orders, where a party amends a document under 8-1(1), a new document, being a copy of the original document but amended and bearing the date of the original, shall be filed.

Unless the Court otherwise orders, service on a party of an amended originating process or pleading shall be required if the original has been served on that party and no Response to Family Claim has been filed.

Unless the Court otherwise orders, where a party amends a document under 8-1(1), the party shall deliver copies of the amended document to all the parties of record within seven days after its amendment and, where service is required under 8-1(4), the party shall serve copies on the persons required to be served as soon as reasonably possible and before taking any further step in the proceedings.

Where an amended Notice of Family Claim or Counterclaim is served on an opposing party, that opposing party may amend the Response to Family Claim or Response to Counterclaim, as applicable. The opposing party may only do so if they have already delivered a Response to Family Claim or a Response to Counterclaim. In addition, the following conditions apply to the opposing party's amendments:

- The opposing party must amend the Response to Family Claim to Response to Counterclaim only with respect to any matter raised by the amendments to the Notice of Family Claim or Counterclaim; and
- The period for filing and delivering an amended Response to Family Claim or a Response to Counterclaim to an amended Notice of Family Claim or amended Counterclaim is 14 days after the amended pleading is delivered. Where a party does not serve an amended Response as provided in 8-1(5), the party shall be deemed to rely upon their original Response.

D. Contested Actions

If the claimant's action is contested, the client should retain a lawyer, or at least seek a lawyer's advice, before proceeding. However, there are some situations where it is possible for the respondent to file a Response to Family Claim without contesting the divorce application. For example, the respondent can file a Response to Family Claim regarding access to children without a contested action ensuing, but a support or parenting time issue would definitely result in a contested action, and a considerable wait for trial.

E. “Quick” Divorces

If there are special circumstances such that the parties would both agree to a quick divorce, the respondent can waive the waiting period after service by filing a Response to Family Claim. Both parties would then sign a waiver of appeal. However, waiving the waiting period will only speed up the procedure by a few weeks as the waiting period for appeal is 31 days.

The Court might not advance the date of divorce merely because of an impending birth or marriage. The Court must be “of the opinion that by reason of special circumstances the divorce should take effect earlier,” and the spouses must agree not to appeal the decision: *DA*, s 12(2). The courts have interpreted “special circumstances” very strictly, and grant a quick divorce in exceptional cases only, *e.g.* where the immigration status of the claimant's fiancée is in jeopardy. The courts tend not to consider pregnancy or ordinary remarriage to be “special circumstances.”

References

[1] http://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/road-safety-rules-and-consequences/contact
[2] https://travel.gc.ca/assistance/embassies-consulates
[3] http://canlii.ca/t/84m2

VII. Alternatives to Divorce

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

A. Annulment

An annulment differs conceptually from a divorce because a divorce terminates a legal status, whereas an annulment is a declaration that the parties' marital status never properly existed. A declaration of nullity may be obtained for two types of marriages:

- Void marriages, which are null and void *ab initio* (from the outset); and
- Voidable marriages, which are valid until a court of competent jurisdiction grants a declaration of nullity (although such a declaration has the effect of invalidating the marriage from its beginning).

The difference between a void and voidable marriage is less important in matrimonial proceedings in British Columbia than it was when the *FRA* was in effect (see s 95(2) and part 5). The *FLA* ss 21-22 also do not make any distinction. For purposes other than the *FLA*, the distinction may still be relevant.

A marriage is void *ab initio* if:

- Either of the parties was, at the time of the marriage, still married to another party;
- One of the parties did not consent to the marriage;
- The parties are related within the bonds of consanguinity (descent from a common ancestor); or
- The formal requirements imposed by provincial statute (such as the *BC Marriage Act*) are not fulfilled.

Misrepresentation is a ground for annulment only where the misrepresentation leads to a mistake about the identity of the other party or as to the nature of the marriage ceremony.

A voidable marriage is valid until one of the parties to it obtains a declaration of nullity. The declaration must be obtained during the parties' joint lives, and is not available if the parties are already divorced. In Canada, a marriage may be voidable in the following circumstances:

- Either party is impotent or otherwise unable to consummate the marriage (as opposed to unwilling to consummate the marriage, which may constitute cruelty but does not render the marriage voidable) see *Juretic v Ruiz*, 1999 BCCA 417 [1]); or
- A party is under 14 years of age.

These are common law rules.

> **NOTE:** If a marriage is found to be void, this does not affect the property claims that a party might have. Pursuant to s 21 of the *FLA*, the matrimonial regime still applies in this situation.

B. Judicial Separation

The Court can no longer grant a judicial separation. Judicial separation was formerly used to sever the legal obligations and liabilities between a married couple without terminating the marriage, when a spouse's religion forbade divorce.

References

[1] http://canlii.ca/t/54b4

VIII. Family Violence

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

A. Family Law Act

Under the FLA, a court may issue a family law protection order against a family member in a dispute when there is a likelihood of family violence. Family violence is inclusive of physical, emotional, or psychological abuse. When children are involved, both direct and indirect exposure to violence meet the definition of family violence in s 1 of the Act.

Applications for a protection order can be made alongside applications for other family court orders or on their own. The involvement of the criminal justice system is not required. Applications can be made in both Provincial Court and Supreme Court.

There is no cost to apply for a protection order in BC Provincial Court. If you are seeking a divorce, you may apply for a protection order at the BC Supreme Court for a fee ($80 for divorce proceedings that have begun, and $200 if not). It is possible to obtain an order to waive fees at the Supreme Court. The Legal Services Society publication "For Your Protection" outlines the process and the forms required to seek a protection order. https:/ / familylaw. lss. bc. ca/ publications/your-protection

Before issuing a protection order, courts will consider the history of family violence, the nature of that violence, the present relationship between the at-risk family member and the violent family member, and circumstances which increase the risk of violence or the vulnerability of the at-risk family member (s 184(1)).

Protection orders may prohibit direct or indirect communication, attending locations frequently entered by the at-risk family member, and possessing a weapon (see s 18(3) for additional prohibitions). Unless the court establishes otherwise, an order will expire one year after the date it is issued.

B. Divorce Act

Effective March 1, 2021, the amended Divorce Act will include provisions for identifying family violence and assessing its relevance to family disputes. The following provisions will come into force on that date.

Family violence is conduct by one family member which causes another family member to fear for the safety of themselves or another person. The amended DA characterizes this as threatening or violent behaviour, or a pattern of coercive or controlling behaviour (see s 2(1) of the amended DA for the definition of family violence and a list of conduct which meets this definition). These behaviours need not be criminal offences, nor are they required to meet the threshold for proof in criminal law to qualify as family violence under the updated DA. If a child is exposed to direct or indirect violence, this is considered family violence and possibly child abuse.

Under the amended Divorce Act, family violence will be a factor under consideration in establishing parenting and contact arrangements for children (s 16(3)(j) of the amended DA). The factors provided are 16(4)(a-h) of the most recent Divorce Act. Courts may consider family violence grounds to modify or waive notice requirements for changes in residence (s 16.96(3)). Family violence will also be a factor in determining whether family dispute resolution would be inappropriate (s 7.7(2) of the amended DA).

IX. Assets

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

A. General

The *FRA* only applies to proceedings started prior to March 18, 2013 and to agreements made before the *FLA* came into force. Please view an older version of this manual if the *FRA* applies to your matter.

The division of property on marriage breakdown is dealt with in Part 5 of the *FLA*. When the *FLA* replaced the *FRA*, it significantly changed the property law regime in British Columbia and reduced judicial discretion. It is a simpler model designed to help parties achieve resolutions out of Court. It operates on the presumption that spouses are equally entitled to family property and equally responsible for family debt (s 81). It also provides that unmarried spouses (who have lived together in a marriage-like relationship for at least two years) may avail themselves of the property and liability provisions of the *FLA* in Parts 5 and 6.

B. Legislation

1. Divorce Act [DA]

The *DA* does not deal with property division.

2. Family Law Act [FLA]

Section 81 of the *FLA* outlines that each spouse is entitled to an undivided, one-half interest of family property and is equally responsible for debt upon separation (Stonehouse v Stonehouse, 2014 BCSC 1057; Joffres v Joffres, 2014 BCSC 1778). However, the FLA substantially changes what is considered to be family property, essentially allowing spouses to keep property they bring into a relationship and share only in the increase in value of that property and the net value of new property obtained after cohabitation or marriage.

The FLA carves out a category of excluded property under section 85. Section 85 (1) of the FLA reads as follows: The following is excluded from family property:

- (a) Property acquired by a spouse before the relationship between the spouses began;
- (b) Inheritances to a spouse;
    - (b.1) Gifts to a spouse from a third party;
- (c) A settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
    - (i) Loss to both spouses, or
    - (ii) Lost income of a spouse;
- (d) Money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
    - (i) Loss to both spouses, or
    - (ii) Lost income of a spouse;
- (e) Property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
- (f) A spouse's beneficial interest in property held in a discretionary trust
    - (i) To which the spouse did not contribute, and
    - (ii) That is settled by a person other than the spouse;
- (g) Property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

Any increases in the value of the excluded property that occur during the relationship are considered family property and are not excluded from division. The spouse claiming that the property in question qualifies as excluded property is responsible for demonstrating that it fits the definition under s 85(1) (Bressette v Henderson, 2013 BCSC 1661).

This property division regime applies to all married spouses as well as all unmarried common-law spouses who have lived in a marriage-like relationship for at least two years. The date of separation will be the relevant date used to identify the pool of family property to be divided. However, it is the date of the hearing or agreement which determines the date of valuation of property. Spouses may choose to opt out of these property division rules but must make these different arrangements through an agreement.

Family property, is defined at s 84(1):

- (a) On the date the spouses separate,
    - (i) Property that is owned by at least one spouse, or
    - (ii) A beneficial interest of at least one spouse in property;

- (b) After separation,
  - (i) Property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or
  - (ii) A beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

3. Supreme Court Family Rules [SCFR]

The Supreme Court Family Rules contain several procedural provisions for dealing with property. For example, Rule 12-1 allows for the detention, preservation, and recovery of property that is the subject matter of a family law case. Rule 12-4 allows for a pre-trial injunction. Rule 15-8 permits the Court to order a sale of property if it appears necessary and expedient that the property be sold. Where a dispute arises, an application can be made to the Supreme Court to settle the matter, but clients should be advised that a court action is costly. Additionally, a negotiated settlement is generally to their advantage because courts have wide discretion to distribute family property. For example, a court could order the sale of property at a time when the housing market is poor, resulting in a low sale price. Sometimes, a spouse should consider selling their interest in a property to the other spouse.

C. Types of Assets

1. Family Property

Under section 84 of the FLA, family property includes all real and personal property owned by one or both spouses at the date of separation unless the asset in question is excluded, in which case only the increase in the value of the asset during the relationship is divisible. It is no longer relevant whether an asset was ordinarily used for a family purpose in deciding if it is family property.

Pursuant to section 85 of the FLA, certain property is excluded from family property, including the following:

- Property acquired by a spouse before the relationship between the spouses began;
- Gifts (from a third party) or inheritances to one spouse, unless the gift or inheritance was transferred into the parties' joint names or the other spouse's sole name, in which case there is an argument that it was gifted to the other spouse and becomes family property;
- Most damage awards and insurance proceeds, except those intended to compensate both spouses and loss of income of one spouse;
- Some kinds of trust property;
  - Under s 85(e), property that is described in s 85(a) to (d) and is held in trust for the benefit of a spouse
  - A spouse's beneficial interest in property held in a discretionary trust to which the spouse did not contribute, and that is settled by a person other than the spouse are also excluded from family property under s 85(f)

Family property is presumptively divided equally unless it would be significantly unfair to do so (ss. 81 and 95 of the FLA).

Family debt, which is new in the FLA, is divided equally, unless equal division would be significantly unfair to one spouse. The value of all property is calculated at either an agreed date, or at the date of a court hearing respecting the division of family property and family debt. Any increases in the value of the excluded property that occur during the relationship are considered family property and are not excluded from division.

2. Savings

Under the FLA, all money held by one spouse in a financial institution is considered family property and equally divisible, unless that spouse can prove that it is excluded property.

3. Pensions and RRSPs

Rights under an annuity, pension, home ownership, or registered retirement savings plan are considered family property, including each party's Canadian Pension Plan (CPP) credits.

The division of pensions is clarified in the FLA. Unless the pension is proven to be excluded property, it will be divisible. The presumption is equal division unless it would be significantly unfair based on the considerations in s 95 of the FLA. If a spouse is to receive benefits at a later date, they may become a limited member of the plan. If they cease to be a limited member then their share is transferred. A spouse can generally either choose to have a lump-sum payment of their share, to have a separate pension payment issued to them (s 115), or a hybrid of both (s 116). This decision may be made at any time (either before or after the pension commences) but the division itself will only occur after the pension has commenced (s 115).

If an agreement or order regarding the benefits of a pension provides that the benefits are not divisible or is silent on entitlement to benefits, a member and a spouse may agree to have benefits divided before the earliest of the following:

1. Benefits are divided under the original agreement or order,
2. The member or spouse dies, or
3. Benefits are terminated under the plan.

If an agreement or order provides that the member must pay the spouse a proportionate share of benefits under a plan where the member's pension commences and the member's pension has not commenced, the member and spouse may agree, by the spouse giving notice to Division 2 of Part 6 of the FLA, to divide the benefits in accordance with the Part, and unless the member and spouse agree otherwise, the original agreement or order must be administered in accordance with the regulations.

NOTE: BC is one of the few provinces that allow spouses to enter into a written agreement to waive the equalization of their pensionable credits under the CPP.

4. Real Property

It is often necessary to take early steps to secure the title to real property when there is a separation. In fact, it is recommended for clients to file as soon as possible to avoid missing any limitation dates and preserve their claim. This is particularly so where property is registered in the name of only one spouse, and there is a risk of that party disposing of or encumbering the property, or where judgments are likely to be registered against one party's interest, which might prejudice the other party. Under section 91 of the FLA and Rules 12-1 and 12-4 of the Supreme Court Family Rules, one may request an automatic restraining order to prevent the sale or disposal of family property including real property. There are several ways of protecting a spouse's interest:

a) Certificates of Pending Litigation and Caveats

Caveats and Certificates of Pending Litigation are warnings to potential purchasers and establish claim priority over the property from the day the Caveat or Certificate of Pending Litigation is filed. This document will defeat the presumption of claim priority given to the bona fide purchaser for value. Entitlement to a certificate of pending litigation is limited. See the Land Title Act, RSBC 1996, c250 and Annotated Land Title Act by Gregory and Gregory for the procedure and forms. Note that Caveats have an expiry date and are therefore a temporary measure to protect a party's interest.

b) Land (Spouse Protection) Act, RSBC 1996, c 246

This Act applies where a party has elected not to commence legal proceedings but needs to protect their interest in real property. It provides an alternative to a Certificate of Pending Litigation for a married spouse (not common law) where the "property" was the "matrimonial home". The Act allows a charge to be placed on land that will prevent disposition of the property without the written consent of the applicant for the charge (refer to the Land (Spouse Protection) Act and the Land Title Act for the registration procedure). Note that this only applies while the parties are legally married. The charge may be struck out on the death of, or final divorce from, the applicant.

Registration of a charge by one spouse under the Land (Spouse Protection) Act prevents the other spouse from selling or encumbering their share but is not protection against a creditor who could obtain an order for sale of the house. So long as one is legally married to their spouse, one may file against the property without the other spouse's notice or consent, to prevent the transfer of the property.

c) Registration of a Notice Under the Land Title Act

A spouse who is a party to a cohabitation agreement, a marriage agreement, or a separation agreement may file a notice in the Land Title Office regarding any lands to which the agreement relates (FLA s 99). This applies to married spouses and common-law spouses who have lived in a marriage-like relationship for at least two years.

The information required in the notice includes the names and addresses of the spouses, the legal description of the land, and the provisions of the agreement relating to that land. The Registrar may then register this notice in the same manner as a charge on the land.

Once the notice is registered, there can be no subsequent registration of a lease, mortgage, transfer, etc., unless both spouses or former spouses sign a cancellation or postponement notice in the prescribed form. A spouse or former spouse may apply to the Supreme Court for an order to cancel or postpone a notice where the other party to the agreement cannot be found after reasonable search, unreasonably refuses to sign a cancellation or postponement, or is mentally incompetent.

The use of this notice also extends to mobile homes.

d) Supreme Court Family Rules Rule 12-1 and 12-2 and section 91 of the Family Law Act

Section 91 of the FLA and SCFR R 12-1 and 12-2 allow for temporary orders respecting the protection of property. On application by a party, the Supreme Court can:

- Make an order restraining the other party from disposing of any property at issue under Part 5 (property) or Part 6 (pension division);
- Make an order for the detention, custody, or preservation of any property that is the subject matter of a family law case or as to which a question may arise
- Make an order to allow the whole or party of the income of the property to be paid to a party who has an interest in it
- In the case of personal property, make an order that part of the personal property be delivered to or transferred to a party; and
- Make an order for a pre-trial injunction.

5. Business Assets

Business property is family property unless it is excluded property under the FLA.

D. Use of Assets

The Court can award one spouse exclusive use of assets pending further agreement between the parties or a Court order. This can include large assets such as a home and car; or smaller assets as may be required to operate a business, or for the departing spouse's television, computer, or books, for example.

E. Unmarried Couples

Under the FLA, unmarried couples who have lived in a marriage-like relationship for at least two years are treated the same way as married couples. Unless an action was started under the FRA, the FLA now applies (as long as the time limit has not expired) and may apply even if proceedings have already been commenced.

The courts will recognize an equitable interest of a common-law spouse in all the property and assets acquired by the couple through the joint efforts of the two spouses, although registered in the name of the other spouse (i.e. a constructive trust). The scope of constructive trusts was greatly expanded in Peter v Beblow (1993), 3 WWR 337, 77 BCLR (2d) 1, in which the Court found a constructive trust arising from the contributions made by homemaking and childcare services, which allowed for the retention of money that would otherwise be paid for such services to be used as mortgage payments. Claims in trust may be constructive (as follows), resulting (implied trusts), or express. Constructive trusts are the most common type of trust claim, where the Court imposes a trust to remedy the unjust enrichment of one party at the deprivation of the other. However, there are limits, and a court will not interfere where the elements of constructive trust are not present. A causal connection must be found to exist between the contribution made and the property in question. Refer to a general text for a more comprehensive description of the elements of constructive trust. Because common law constructive trusts are relief granted by a court, spouses can make use of both the FLA requirements for equal division and common law constructive trust principles when seeking relief for unfair division of property.

F. Interim Relief

The Court may make a number of orders for interim relief under Part 5, Division 3 of the FLA. This means that prior to a trial on all the issues in the proceeding, the Court may:

- Order an interim distribution of family property that is at issue to provide money to fund (s 89):
  - Family dispute resolution,
  - All or part of a proceeding under the FLA, or
  - Obtaining information or evidence in support of family dispute resolution or an application to a court.
- Order temporary exclusive occupation and possession of the family residence by just one spouse (s 90).
- Order restraining a spouse from disposing of any property at issue under Part 5 (property division) or Part 6 (pension division) until or unless the other spouse establishes that a claim made under Part 5 or Part 6 will not be defeated or adversely affected by the disposal of property (s 91(1)).
- Order the possession, delivery, safekeeping, and preservation of property (s 91(2)(a)).
- Prohibit one spouse from disposing of, transferring, converting, or exchanging into another form, property in which the application may have an interest, or vesting all or a portion of property in, or in trust for, the application (s 91(2)(b)).

G. Limitation Period

See Section XV Part B: Limitation Dates for the limitation periods for beginning property division proceedings for married spouses and common-law spouses.

X. Spousal and Child Support

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

A. General

Support is the financial support one person provides for another person (adult or child). This is meant to provide for that person's reasonable needs (i.e. food, clothing, shelter, education, and medical care). Spousal support is intended to pay for basic living expenses and is highly discretionary. In contrast, child support is an obligation acquired through parenthood; it is mandatory with firm guidelines. Child support always takes precedence over spousal support if a party's ability to provide financial support is limited.

An application for support may be made under the *FLA* or *DA*, but it is essential to look into the standards, limitations and other important differences between the Acts. The parties may also agree on the issue of support and incorporate their agreement into a written document (a separation agreement), which may have the legal status and force of a personal contract. An agreement is not completely determinative of the issue however; the Court will make orders superseding the provisions of an agreement in order to bring the obligations of parties in line with the requirements of statute.

In making an order for spousal support, the Court will not look to the conduct (or misconduct) of the parties, but will consider the "condition, means and other circumstances of each" in making an order. Nevertheless, in *Leskun v Leskun*, [2006] SCJ No25 (SCC) [1], the Court held that the effect of spousal misconduct on the other spouse's ability to achieve self-sufficiency should be taken into consideration. In some cases, the Court will refer the matter to the registrar who holds an independent inquiry into the spouses' assets, income liabilities, etc., and then recommends a "reasonable" support payment. This recommendation does not become an order until a judge confirms it. Arrangements for spousal support can be made as part of a separation agreement, granted at the time of a divorce or, if no order for support is made or it is denied at the time of divorce, within a reasonable time thereafter. Under the *FLA*, the time limit is 2 years for both married and unmarried couples who have lived together in a marriage-like relationship for at least two years (s 198; *Meservy v Field*, 2013 BCSC 2378 [2]). The exception to this rule is if the couple have a child(ren) together (s 3(1); *CAM v MDQ*, 2014 BCPC 110 [3]).

Orders for child support are almost always fixed according to the schedule of support payments set outin the *Child Support Guidelines* [4], which are based on the payer's gross income and the number of children for whom support is being paid. There is an exception to the strict application of the Guidelines in cases where the parties share parenting time (i.e. where one parent has at least 40% of the time with the child(ren)). In those cases there is not simply a pay or spouse and a recipient, rather the support is typically calculated based on a set-off approach whereby each parent's support obligation is calculated and one is set-off against the other.

The Court will not grant a divorce if there are not reasonable arrangements made for child support (*DA*, s11). The level of child support is based on the income of the non-custodial parent and is set out in the Federal Child Support Guidelines.

Under the *FLA*, the most important changes are in wording. The following are some examples of new vocabulary from the FRA --> FLA:

- Custody --> Guardianship/Parenting Time
- Access --> Parenting Time/Contact
- Maintenance --> Support

B. Courts

Both the Supreme Court and the Provincial Court have the powers to grant or vary support orders made under the *FLA*, but only the Supreme Court can grant or vary support orders made under the *DA*. Only the Supreme Court can grant interim relief under the *DA*, but the Provincial Court can grant interim relief under the *FLA*.

1. Provincial Court

The Provincial (Family) Court is often the most accessible court to self-represented litigants. It can deal with applications for support made under the FLA, as well with variation of previous Provincial Court child or spousal support and arrears of child or spousal support orders. Applications can be made at certain Provincial (Family) Courts for a Supreme Court Hearing.

2. Supreme Court

The Supreme Court can order interim relief under the *DA* or *FLA* or make an order for support upon the granting of a divorce order. If a Supreme Court order for support is made under the *DA*, that order ousts any provincial statutory jurisdiction in that matter. While obtaining interim relief from the Supreme Court is more expensive than obtaining a Provincial (Family) Court order, it can be faster if the application is urgent or if the party wishes to proceed *ex parte* (without notice to the other side).

C. Enforcement

1. Family Maintenance Enforcement Act (RSBC 1996, c 127) [FMEA]

The *FMEA* [5], passed in 1988, gives the provincial government extensive powers to collect support arrears including:

- A Notice of Attachment (s 17);
- 12-month garnishing orders (s 18);
- Attachment Orders (s 24); and
- Attachment of money owing by the Crown (s 25) including Income Tax refunds and Employment Insurance benefits directly from the Federal Crown.

The Federal Maintentance Enforcement Program (FMEP) [6] can only enforce support orders if the payor is in its jurisdiction or sister jurisdictions that will assist in enforcing the order. For a complete list of sister jurisdictions see https:// / www. fmep. gov. bc. ca/ paying-or-receiving-maintenance/ out-of-province-orders/ other-jurisdictions/ . Any person who receives a support order or separation agreement that has been filed in court may voluntarily register with the program.

2. Reciprocal Enforcement

If properly filed in BC, a support order from another jurisdiction is enforceable under the *FMEA*. All other Canadian jurisdictions have similar legislation and will enforce BC orders on registration in their courts. Many foreign jurisdictions will also enforce BC orders; see the table of reciprocating states in the *Court Order Enforcement Act*, RSBC 1996,c 78 [7].

3. Variation of Orders

Spousal support orders may be varied where there have been changes in the needs, means, capacities and economic circumstances of each party (*DA*, s 17(4.1), *FLA* s 167). The Court may also reduce the amount of support to a spouse where it finds that the spouse or former spouse "is not making reasonable efforts" to become self-sufficient. Note that for a variation application to be successful the applicant must demonstrate that there has been a "material change in circumstances" which means circumstances that, if known at the time of the agreement or Order, would have resulted in a different outcome.

There may also be a variation in child support levels provided there is a change in circumstances per the Child Support Guidelines, which include changes in the payor parent's income (*DA*, s 17(4), *FLA* s 152). If the payor's income has changed, a variation of the child support order is virtually automatic when one makes an application in court. Provincial Court orders made in other Canadian jurisdictions and in certain reciprocating foreign states may be varied under Division 2 of the *Interjurisdictional Support Orders Act*, SBC 2002, c 29. The *Act* creates a system where an application is made through the filing of prescribed documents and filed with the Reciprocals Office in British Columbia, which is responsible for transmitting the documents to the originating jurisdiction for adjudication.

Support orders made under the *DA* may only be varied through the provisions of sections 17, 18, and 19. In this process, someone seeking to change a support order made in another Canadian jurisdiction must apply to the courts of BC for a provisional order. The provisional order is sent to the originating jurisdiction for a second hearing to confirm the order. Unless the order is confirmed, the provisional order has no effect.

As of March 1, 2021, sections 17, 18, and 19 of the DA were repealed or revised to include new language related to parenting, as well as new provisions for addressing variation, recission, and suspension of orders (s 17), interjurisdictional proceedings (s 18), and proceedings between a province and another designated jurisdiction (s 19).

4. Agreements

The Court can enforce written agreements that provide for the payment of child or spousal support, a written agreement concerning support may be filed in the Provincial Court and in the Supreme Court. Once filed, the agreement has the effect of a court order for enforcement purposes.

D. Spousal Support

The first thing that a spouse must determine regarding spousal support is whether or not they are entitled to receive it. After that, the amount and duration of spousal support can be determined. The fundamental question in determining spousal support is whether the objectives of spousal support under the *Spousal Support Advisory Guidelines* [SSAG] [8] are met. The division of assets in the divorce will impact whether or not the spouse is entitled to spousal support and will be taken into account when the court decides how much spousal support to order. Although it should be noted that if a party is entitled to compensatory support arising from the relationship, the receipt of significant assets in the division of assets may not result in a loss of entitlement to support (See *Chutter v. Chutter*, 2009 BCCA 177 [9]). Judges often base their decisions about spousal support on the Guidelines, and family lawyers often base their advice to clients on the

Guidelines. It can be found at https://www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-ldfpae.html . A "User's Guide" written by the County of Carleton Law Association can be found at https://canlii.ca/t/srtg .

1. Legislation

a) Divorce Act [DA]

Section 15.2 of the *DA* creates an obligation to support a spouse. However, s 15.3(1) directs the Court to give priority to child support in any application for child and spousal support under the *DA*. The entire gross income (guideline income) is used to calculate child support and then any Net Disposable Income that remains (as calculated based on the incomes of both parties and taking into account taxes and other charges) is apportioned between the parties based on the length of marriage. It may be that the result of the payment of child support reduces the Net Disposable Income to very little and, in those cases, child support takes priority over the sharing of the NDI and there would be little to no spousal support payable. There is no limitation date under the *DA*.

b) Family Law Act [FLA]

The *FLA* aligns support considerations with the *DA*, permits periodic reviews to allow for changing circumstances, and provides guidelines for when a deceased spouse's estate is obligated to continue payments. Considerations for posthumous support payments include the size of the estate and the need of the payee (s 171). Additionally, child support is to be prioritized over spousal support where a paying spouse has limited resources. (s 173). The *Spousal Support Advisory Guidelines* are not referred to in the Act and remain advisory, although Courts in British Columbia give them much deference.

c) Spousal Support Advisory Guidelines

The final version of the *Spousal Support Advisory Guidelines* (*SSAG*) [8] was published in July 2008. The *SSAG* do not have the force of law and are not expected to become law.

The *SSAG* set out two basic mathematical formulae for determining the quantum and duration of spousal support when a person's entitlement to receive support is established: the "with children" formula when the parties have dependent children, and the "without children" formula when child support is not being paid. The "without children" formula is relatively simple. However, the "with children" formula cannot be completed without the assistance of a computer program.

While the *SSAG* have no regulatory effect and are merely "informal", and "advisory", they are nevertheless being used by the courts and the bar and the ranges provided by the SSAG are given strong consideration by the Court after the entitlement analysis is complete (see *Yemchuk v Yemchuk*, 2005 BCCA 406 [10] and *Redpath v Redpath*, 2006 BCCA 338 [11]).

2. Principles of Spousal Support

a) General

There are three bases for entitlement to spousal support:

1. Compensatory (to compensate one spouse who was economically disadvantaged as a result of the role that spouse took on during the relationship) (*Moge v Moge*, [1992] 3 SCR 813 [12]);
2. Non-compensatory (need based) (*Bracklow v Bracklow*, [1999] 1 SCR 420 [13]); and
3. Contractual (i.e. if there was a marriage or cohabitation agreement setting out terms for support) (*Miglin v Miglin*, 2003 SCC 24 [14]).

Once a party has met the requirement of demonstrating entitlement, you move to the calculation of quantum. When determining quantum of support one factor to be considered is whether the needs of the recipient spouse have been met by the division of assets however if support is compensation based then even if the recipient receives significant assets that is not a basis to reduce support (See *Chutter v Chutter*, [2009] CarswellBC 1028 (BCCA) [9]). Typically, the way this is addressed is to determine what income a party can reasonably earn from the assets received on division and to take that into account in calculating the quantum of support.

b) Factors considered

Section 15.2(6) of the *DA* and section 161 of the *FLA* directs courts to consider the following objectives in determining entitlement to spousal support:

- To recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- To apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- To relieve any economic hardship of the spouses arising from the care of the child, beyond the duty to provide support for the child; and
- As far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Section 15.2(4) of the *DA* and section 162 of the *FLA* direct courts to consider the same factors in determining the amount and duration of spousal support, namely, the conditions, means, needs and other circumstances of each spouse, including:

- The length of time the spouses cohabited;
- The functions performed by each spouse during cohabitation; and
- Any order, agreement, or arrangement relating to support of either spouse.

3. Issues Related to Spousal Support

a) Employment and Income Assistance and Spousal Support

People can opt into this program so that the FMEP can continue to assist in collecting the support, but people can keep their support rather than having it deducted from other government assistance they are receiving, if any.

b) Taxes and Spousal Support

Spousal support is treated by the recipient as taxable income. The spouse who pays support is entitled to deduct the amount from income tax. The spouse who receives support is required to declare it as income, in contrast to child support which has no income tax consequences. Lump payments of support are not taxable. There are free online child support

and spousal support calculators on the Internet, like the Child Support Table Look-Up (http://www.justice.gc.ca/eng/fl-df/child-enfant/cst-orpe.html) and My Support Calculator (https://www.mysupportcalculator.ca/).

It is essential that support payments be identified as such in court orders and separation agreements if the payor is to be able to claim a deduction. As a rule, oral or informal agreements are not sufficient to establish the status of payments as spousal support. Parties are permitted to enter into retroactive agreements which set out the amount paid and received in prior years for the purposes of claiming income tax relief. However, any such agreement must be entered into before the end of the calendar year immediately following the year in question (i.e. if payments were made in 2012, a retroactive agreement would need to be entered into before December 31, 2013). Other tax issues can arise if payments are made through a corporate account or if the payor has a lower tax burden than usual (i.e. aboriginal spouses or U.S. residents).

4. Limitation Period

See Section XV for the limitation periods for bringing claims for spousal support for both married spouses and common-law spouses.

E. Child Support

1. Definition of "Child"

The definition of "child" varies slightly between the *DA* (s 2) and the *FLA*.

Under the *DA*, the definition of "child" is someone who is under the age of majority (19 years in B.C.) **and** who has not withdrawn from the parent's charge, or who is at or over the age of majority but unable, by reason of illness, disability or other cause, to withdraw from parental charge or to obtain necessaries of life. Therefore, under the *DA*, there may not be an obligation to pay child support to a child under 19, if the child has already withdrawn from the parent's charge.

Under the *FLA*, the definition of "child" is a person who is under 19 years of age or a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of their parents or guardians.

2. General

Child support is intended to be used to pay most of a child's day-to-day expenses. The amount of child support payable is determined under the Federal Child Support Guidelines, which set support levels based on the payor's income and the number of children to be supported and the parenting arrangements in place. Several websites, including J.P. Boyd's helpful site, offer online child support calculators (see J.P. Boyd's BC Family Law Web Resource). If the paying parent lives in B.C., child support is determined by the B.C. Child Support Tables [15]; the appropriate table is for the province where the paying parent lives, not where the child lives.

The Court may also provide for "special or extraordinary" expenses in a Child Support Order (see s 7 of the *Federal Child Support Guidelines*), in addition to the basic child support order, requiring payment for other expenses such as child care, health-related expenses (e.g. orthodontic treatment, hearing aids, prescription drugs, speech therapy, contact lenses and professional counselling), expenses for child care in order to maintain employment (see *Bially v Bially* (1997), 28 RFL (4th) 418 (Sask. QB) [16]), extraordinary educational expenses for primary and secondary education, expenses for post-secondary education, and expenses for extracurricular activities.

Expenses for extracurricular activities must be reasonable having regard to the parents' means but need not be restricted to a special talent of the child. "Extraordinary" is also determined by what would be extraordinary in a household with a similar income; it depends on the lifestyle of the family.

3. Legislation

a) Divorce Act [DA]

The *DA* provides for support orders as a corollary to divorce under s 15.1, with the discretion to extend support for a child who is over the age of majority and is unable, by reason of illness, disability or other cause, to withdraw from their charge. If the majority-age child is otherwise unable to obtain the necessaries of life – for example, if the child is a university student – support orders may also be extended (s 2(1)).

An order for child support made under the *DA* has effect throughout Canada (s 14). Under s 17(1) of the *DA*, any court of competent jurisdiction, as defined by s 5, can vary, rescind, or suspend an order.

Children born within the marriage and adopted children are treated equally under the *DA*. However, some controversy remains as to whether a stepchild, for whom the respondent stood in *loco parentis* (in place of the parent), qualifies for support under the *DA*. Child support will be assessed in light of the biological parents' support obligation.

b) Family Law Act [FLA]

Under section 147 of the *FLA*, each parent and guardian of a child has a duty to provide support for the child unless the child is a spouse or is under 19 years of age and has voluntarily withdrawn from their parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were considered intolerable. For example, a child who has been incarcerated for more than one year is considered to have voluntarily withdrawn (*MA v FA*, 2013 BCSC 1077 [17]). If the child was removed from the family by the state (*D.Z.M. v S.M. & N.E.*, 2014 BCPC 198 [18]) or refuses to visit, this is not considered voluntary withdrawal (*Henderson v Bal*, 2014 BCSC 1347 [19]). However, if this child returns to their parents' or guardians' charge, their duty to provide support to the child resumes. Additionally, section 147 of the *FLA* also states that a child's stepparent does not have a duty to provide support for the child unless the stepparent contributed to the support of the child for at least one year and a proceeding for an order under this part is started within one year after the date the stepparent last contributed to the support of the child. Qualifying step-parents have a duty to provide child support (*CLP v ND*, 2014 BCPC 154 [20]). A step-parent may also be ordered to provide support if the parents are not able to provide the child with consistent and reasonable standards of living (*CB v MB*, 2014 BCPC 75 [21]).

If parentage is at issue, section 151 of the *FLA* states that the Court may make an order respecting the child's parentage in accordance with s 31 of the *FLA* or make an order under s 33(2) of the *FLA*.

c) Child Support Guidelines

The *Federal Child Support Guidelines* are federal regulations that determine the amount of child support owing, and vary from province to province. The guidelines establish how much child support must be paid based on the payor's income and the number of children for whom support is to be paid. For more information refer to the resources listed at the end of the chapter.

d) Other Legislation

Section 215 of the *Criminal Code* places a legal duty on parents to provide their children with the necessaries of life until they reach the age of 16, unless the child is able to provide the necessaries of life independently.

4. Limitation Period

See Section XV for the limitation periods regarding child support claims.

5. Interjurisdictional Support Orders

Parents living in different provinces or countries can apply for or enforce support orders without needing to travel to the other jurisdiction. Under the *Interjurisdictional Support Orders Act*, SBC 2002, c 29, many jurisdictions have agreed to recognize family support (maintenance) orders and agreements made elsewhere. British Columbia has reciprocal agreements with all Canadian provinces and territories and with several foreign countries.

For a list of all reciprocating jurisdictions, see the Schedule in the *Interjurisdictional Support Orders Regulations*, BC Reg 15/2003 at www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/10_15_2003.

Appeals of decisions made under this Act must be made within 90 days of the ruling (s 36(5)) but, despite this, the Court to which an appeal is made may extend the appeal period before or after the appeal period has expired (s 36(6)). The Interjurisdictional Support Orders (ISO) website [22] provides a questionnaire under the heading "forms select" to determine which application forms are required for a client's specific situation. Forms can be accessed online or be mailed to you. Guides to filling out the forms can be found at the ISO website [23]. Completed forms can be submitted to:

Reciprocals Office

Vancouver Main Office Boxes

P.O. Box 2074

Vancouver, B.C. V6B 3S3

In BC, Family Justice Counsellors can track the status of Interjurisdictional Support Order (ISO) applications. If an applicant has questions on the status of their ISO application, they can talk to a Family Justice Counsellor at their local Family Justice Centre. To find the nearest Centre, contact Service BC through a phone call (1-800-663-7867 or 604-660-2421) or text message (1-604-660-2421) between 7:30 a.m. and 5:00 p.m. PDT, Monday to Friday, and ask to be transfer or directed to a Family Justice Centre.

References

[1] http://canlii.ca/t/1nmrd
[2] http://canlii.ca/t/g2gfj
[3] http://canlii.ca/t/g7cp6
[4] http://canlii.ca/t/80mh
[5] https://canlii.ca/t/5571n
[6] https://www.fmep.gov.bc.ca/
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[21] http://canlii.ca/t/g6r8f
[22] http://www.isoforms.bc.ca
[23] https://www.isoforms.bc.ca/forms-guides/

XI. Parenting Orders/Guardianship/Contact

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

A. General

Disputes over parenting time of minor children are often the most difficult issues to resolve during the breakdown of a marriage or other relationship. Parenting time decisions can always be changed; however, courts rarely make such changes. Thus, the decision about who gets interim parenting time is particularly important. Children usually stay with the parent who has provided primary care in the past and who can spend the most time with them. Sometimes, courts will order a form of shared parenting time on an interim basis so that neither parent's position is prejudiced. The best interest of the child is the only consideration in determining parenting time, contact, and parenting arrangements (DA, s 16(1)). The primary consideration in determining the child's best interest will be given to the child's physical, emotional, and psychological safety, security, and wellbeing (DA, s 16(2)). For all further factors please see XI(B)(c)(i) Factors in Awarding Parenting Time or s 16(3) of the Divorce Act.

The best interests of the child is the **only** consideration in determining parenting time, contact, and parenting arrangements.

In addition to parenting time, courts can also make decisions regarding guardianship of minor children. Guardianship gives a parent or other person "a full and active" role in determining the course of a child's life and upbringing (see *e.g. Charlton v Charlton*, [1980] BCJ No 22 [1]). There is considerable overlap between the two, but it is useful to note that while having parenting time usually includes having guardianship, the reverse is often not true. This distinction is impacted somewhat by the *FLA* as the term "Guardianship" subsumes all the rights and responsibilities of a parent and there is no longer reference to "Custody".

The case law on parenting time and guardianship has developed to the point where there is a presumption in favour of joint parenting time or both parents being guardians(although there is no legislative presumption). A parent seeking sole parenting time will generally have to show that there is a serious defect in the other person's parenting skills, that the other person is geographically distant, or that the parents are utterly unable to communicate without fighting before the Court will consider granting such an application, and in the last case, the Court may explore other options such as Parenting Coordination or parcelling out decision making and responsibilities to address the communication issue instead of granting sole parenting time to one parent.

B. Legislation

1. Divorce Act

The *DA* only speaks of contact and parenting time. Under s 16, the Supreme Court may make an order for parenting time. This order will supersede any existing *FLA* orders, which cover parenting time, contact, and guardianship, and can be registered for enforcement with any other Superior Provincial Court in Canada. The Supreme Court can also grant interim parenting time before a divorce action is heard.

The *DA* applies only to married couples. Under the Act, the person making the application for parenting time must have been "habitually resident" in the province for at least one year prior.

The court will only consider the best interest of the child in the course of making a parenting order or contact order and when allocating parenting time (DA s 16(1)). Subsections 16(2-6) outline the factors under consideration when "best interest of the child" is assessed. Subsection 16(4) outlines the role of family violence in assessing the best interests of the child.

Amendments to the DA will result in changes to the terms of guardianship:

- Replacing of the terms "custody" and "custody order" with "parenting time" and "parenting order".
- Using the term "contact order" to characterize time spent with someone other than a spouse, including grandparents.
- Adding the term "decision-making responsibility" to define a non-exhaustive list of areas of significant weight and how decisions about those areas must be made (with the "best interests of the child" in mind).

The aim of these changes is to emphasize the "best interests of the child" by focusing on relationships with children.

2. Family Law Act

Among a plethora of changes to the general family law in BC, the Act makes the following changes to the law surrounding guardianship:

- Replace the terms "custody" and "access" with "guardianship", "parenting time", and "contact".
- Define "guardianship" through a list of "parental responsibilities" that can be allocated to allow for more customized parenting arrangements.
- Provide that parents retain responsibility for their children upon separation if they have lived together with the child after the child's birth. (Note: this does not mean that the law presumes an automatic 50-50 split of parental responsibilities or parenting time.) If they have not, the parent with whom the child lives is the guardian.
- Under the *FLA*, the terms custody and access are no longer used – only guardianship will be considered.
- Additionally, the "best interests of the child" is no longer the paramount consideration under the *FLA*; it is the only consideration.

C. Courts

1. Supreme Court

The Supreme Court has jurisdiction to deal with all matters relating to parenting time, guardianship and access to children, pursuant to the *DA*, the *FLA*, and the *CFCSA*. The Court almost never deals with the *CFCSA* unless there is the matter of adoption to be considered. The Supreme Court also has jurisdiction over orders restraining contact or entry to the matrimonial home.

The Supreme Court has *parens patriae* jurisdiction over all children in the province. In operation, this can allow the Court to transcend the statutory letter of the law in drafting orders that best represent the best interests of the child.

A written agreement about parenting time or guardianship may be given the force of a court order under section 44 of the *FLA*.

An order made under the *DA* can be registered for enforcement in any other province's Supreme Court registry.

2. Provincial Court

The Provincial Court has jurisdiction to deal with all matters relating to parenting time, guardianship, and access to children, and the *CFCSA*. This includes restraining orders but does not include orders restraining entry to the matrimonial home. A written agreement about parenting time or guardianship may be given the force of a court order, or s 44 of the *FLA*, if it is filed in court.

D. Parenting Time

Proceedings regarding parenting arrangements or contact that have been started, but not determined, before the *Family Law Act* is in force, do not need special transition sections. Section 4 of the *Interpretation Act* [2] provides a default rule that the Act will be used upon it becoming effective, so cases started under the *FRA* will be determined under the *FLA*.

In the absence of a court order or a written agreement, parenting time of a child remains with the person with whom the child usually resides. One must bear in mind that the Act does not touch on day-to-day life until it is invoked, usually by filing a lawsuit or by making an application.

1. Factors in Awarding Parenting Time

The factors that the Court must consider in determining the "best interests of the child" are set out in, s 37 of the *FLA*:

- (a) The child's health and emotional well-being;
- (b) The child's views, unless it would be inappropriate to consider them;
- (c) The nature and strength of the relationships between the child and significant persons in the child's life;
- (d) The history of the child's care;
- (e) The child's need for stability, given the child's age and stage of development;
- (f) The ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise their responsibilities;
- (g) The impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) Whether the actions of a person responsible for family violence indicate that the person may be impaired in their ability to care for the child and meet the child's needs;
- (i) The appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the

child or other family members;

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

and at s 16(1-6) of the DA:

- (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.
- (2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional, and psychological safety, security and well-being.
- (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including
  - (a) The child's needs, given the child's age and stage of development, such as the child's need for stability;
  - (b) The nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
  - (c) Each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
  - (d) The history of care of the child;
  - (e) The child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
  - (f) The child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
  - (g) Any plans for the child's care;
  - (h) The ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
  - (i) The ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
  - (j) Any family violence and its impact on, among other things,
    - i. The ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
    - ii. The appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
  - (k) Any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security, and well-being of the child.
- (4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:
  - (a) The nature, seriousness and frequency of the family violence and when it occurred;
  - (b) Whether there is a pattern of coercive and controlling behaviour in relation to a family member;
  - (c) Whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
  - (d) The physical, emotional and psychological harm or risk of harm to the child;
  - (e) Any compromise to the safety of the child or other family member;
  - (f) Whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
  - (g) Any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and

- (h) Any other relevant factor.
- (5) In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.
- (6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

These factors should not be viewed like a checklist. Rather, the discretionary, contextual, and complex nature of parenting time cases makes it more appropriate for the factors to be viewed holistically. Similarly, these factors do not necessarily form an exhaustive list of the factors to be considered. The best interest argument is often expansive, considering a range of factors illuminated at both the statutory and common-law level.

The Court will generally consider the child's health and emotional well-being, their education and training and the love, affection and similar ties that exist between the child and other persons such as relatives and family friends. If appropriate, the views of the child will be considered. For a parenting order relating to a teenager to be practical, it must reasonably conform to the wishes of the child (*O'Connell v McIndoe* (1998), 42 R.F.L. (4th) 77 (BCCA) [3], *Alexander v Alexander* (1988), 15 R.F.L. (3d) 363 (BCCA) [4]).

Other factors have emerged through the common law, including a preference that siblings remain together and a willingness to look into the character, personality and moral fitness of each parent. However, there is no presumption against the separation of siblings (*P (AH) v P (AC)*, 1999 BCCA 203 [5]). The welfare of the child is not determined solely on the basis of material advantages or physical comfort, but also considers psychological, spiritual, and emotional factors (*King v Low*,(1985), 44 R.F.L. (2d) 113 (SCC) [6]). The Court will take into account the personality, character, stability, and conduct of a parent, if appropriate (*Bell v Kirk* (1986), 3 R.F.L. (3d) 377 (BCCA) [7]).

Agreements between parties regarding parenting time do not oust the Court's jurisdiction. An agreement is important, but only one of several factors to be taken into consideration when determining the best interests of the child. The degree of bonding between child and parent is also taken into consideration. The biological link does not outweigh other considerations, but when all other factors are equal, the parenting time of the child is best served with the biological parents (*L (A) v K (D)*,2000 BCCA 455 [8]; *H (CR) v H. (BA)*, 2005 BCCA 277 [9]).

Race and aboriginal heritage are relevant considerations, but neither is determinative of parenting time alone. The importance of race differs in adoption cases, where it may be given more weight because the Court is making a decision about the child's exposure to their race or culture (*Van de Perre v Edwards*, 2001 SCC 60 [10]). Aboriginal heritage is to be weighed along with other factors in a determination of a child's best interests (*H (D) v M (H)*, [1997] BCJ No 2144 (QL) (SC) [11]).

Clients may wish to vary a parenting order. The threshold for a variation of a parenting or access order is a material change in the circumstances affecting the child. There is no legal presumption in favour of the custodial parent, although that parent's views are entitled to respect. The focus is on the best interests of the child, not the interests and rights of the parents (*Gordon v Goertz*, [1996] 2 SCR 27 [12]).

Section 211 of the *FLA* allows the Court to order an assessment by a psychologist of each party's parenting abilities and relationship with the child. These reports are particularly important where the dispute over parenting time is bitter and unlikely to settle. An assessment provides the Court with an independent and neutral expert opinion. Where expert evidence would assist the Court, the Court can order an *FLA* Section 211 report (*Gupta v Gupta*, 2001 BCSC 649 [13]).

2. Types of Parenting Orders

Parenting orders refer to orders made under s 16.1(1) of the DA regarding parenting time and decision-making responsibilities.

> **NOTE:** "Parenting time" is a term that only appears in the *DA* and so only applies to claims that are proceeding in Supreme Court under the *DA*.

a) Interim Orders

An interim order is a temporary order made once the proceedings have commenced but before the final order is pronounced. Courts will usually make interim parenting orders while an action in divorce is underway, with an eye to the child's immediate best interests. Courts tend to favour stability, so an interim order is likely to favour the party with parenting time at the time of the marriage breakdown. This presumption toward stability can give an interim order substantial weight in determining a final parenting order.

b) Sole Parenting Time

Sole parenting time, in which one parent provides the primary residence and is mostly responsible for day-to-day care, can be granted in cases where the parents request such an arrangement, where they live far apart, or where relations between the parties are so poor as to preclude cooperation.

> **NOTE:** The concept of "full parenting time" does not exist. A parent using this term is most likely referring to sole parenting time.

c) Joint Parenting Time

In joint parenting time, both parents have parenting time with the child. While the child may reside primarily with one parent, the parents cooperate in raising the child, acting as both joint custodians and guardians of the child. In British Columbia, there is a presumption toward joint parenting time.

d) Shared Parenting Time

"Shared parenting time" is a term used by the *Federal Child Support Guidelines*, but not by either the *DA* or the *FLA*. Shared parenting time is a form of joint parenting time in which the child spends an almost equal time with each parent. Typically, the child would be switching homes on a frequent basis, such as every few days or once a week. This usually requires that the parents live near one another and have good communication skill. It also requires that the child is able to adapt to living in two homes. Any agreement for shared parenting time will affect child support.

e) Split Parenting Time

"Split parenting time" is a term used by the *Federal Child Support Guidelines*, and not by either the *DA* or the *FLA*. On rare occasions, courts will order siblings to live with separate parents. This is usually a drastic solution, ordered only after an *FLA* section 211 report (a court-ordered report respecting the needs of a child, the views of a child, and the ability and willingness of one of the parents to satisfy the needs of a child) is submitted to the Court. A split parenting timeorder will affect child support.

3. Other Parenting Time Issues

a) Consent Orders

Where there is agreement on the terms of support or parenting time provisions, but no written agreement, a consent order may be made by the Court under s 219 of the *FLA* if the written consent of the party against whom the order is to be enforced has been obtained. The order can extend only to the terms consented to.

b) Enforcement of Parenting Time Orders

Where a parenting time order is in force, the Court may make an order prohibiting interference with a child. The Court may further order sureties and/or documents from the person against whom the order is made, and require that person to report to the Court for a period of time (*FLA*, s 183).

Under the *FLA*, police officer enforcement clauses can only be granted when there has been a breach of an order (s 231).

A child abducted and taken elsewhere within the province will be returned to their rightful custodian. Abduction is an offence under the *FLA*, s 188 that carries a possibility of criminal proceedings (*Criminal Code*, RSC 1985, c C-46 [14], ss 280-281). The *Criminal Code* makes it an offence for a non-custodial parent to abduct a child. Where a parenting order is in effect, abduction amounts to contempt of Court.

c) Parental Mobility (Under the FLA, this is referred to as Relocation which has separate considerations from that of Mobility under the DA)

Relocation is defined and explained under Division 6 of the *FLA*. It considers relocation of a child that can reasonably be expected to have a significant impact on the child's relationship with his/her guardian(s) or other adults with which the child has a significant relationship (s 65). The guardian intending to relocate with the child must provide 60-day written notice to all other guardians and persons having contact with the child (s 66). The notice must include the date of the relocation, and the name of the proposed location. Exemptions to these requirements can be granted by the Court if they are satisfied that the notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child or there is no ongoing relationship between the child and the other guardian or the person having contact with the child (s 66(2)).

The child's other guardian(s) can object to the relocation within 30 days of receiving the notice. If an objection is made, the guardian requesting the relocation must satisfy the court that (s 69(4)(a)):

- (i) The proposed relocation is made in good faith, and
- (ii) The relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life.

When considering the good faith requirement, the Court must consider (s 69(6)):

- (a) The reasons for the proposed relocation;
- (b) Whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;
- (c) Whether notice was given under section 66 [notice of relocation];
- (d) Any restrictions on relocation contained in a written agreement or an order.

Issues of parental mobility may arise in conjunction with parenting time issues. That is, one parent may wish to relocate away from another parent with whom they share parenting time . In *Gordon v Goertz*, [1996] 5 WWR 457 (SCC), the Supreme Court of Canada set out the basic principles for the *DA*. Once the parent applying for the change meets a threshold requirement of demonstrating a material change in the circumstances affecting the child, the Court is required

to begin a fresh inquiry into what is in the best interests of the child. Factors to be considered include: the desirability of maximizing contact between the child and both parents, the disruption to the child, and the child's views.

One v One, 2000 BCSC 1584 [15], also a *DA* case, identifies the following list of factors to be considered in determining whether a proposed move is in a child's best interests:

1. The parenting capabilities of and the child's relationship with parents and their new partners;
2. Employment, security and prospects of the parents and, where appropriate, their partners;
3. Access to and support of extended family;
4. The difficulty of exercising the proposed access and the quality of the proposed access if the move is allowed;
5. The effect of the move on the child's academic situation;
6. The psychological and emotional well-being of the child;
7. The disruption of the child's existing social and community support and routine;
8. The desirability of the proposed new family unit for the child;
9. The relative parenting capabilities of either parent and the respective ability to discharge parenting responsibilities;
10. The child's relationship with both parents;
11. The separation of siblings;
12. The retraining or educational opportunities for the moving parent.

E. Contact

"Access" is the term used under the *DA*. As of March 1, 2021, the term "access" will be removed from the DA, and the term "contact order" will be used to describe arrangements for non-guardians. Under the *FLA*, the terms are "parenting time" for guardians, or "contact" for non-guardians.

To gain contact with a child, a non-guardian can either arrange it unofficially with the guardian or seek a contact order. Contact Orders are used to provide arrangements for non-guardians under the DA. Anyone who wants a contact order under the Divorce Act must seek leave to apply (DA, s. 15.5(3)). Under the FLA, the terms are "parenting time" for guardians, or "contact" for non-guardians. Some parents are not considered guardians and the law recognizes the child's right to have a relationship with both parents whenever possible.

Proceedings regarding parenting arrangements or contact that have been started, but not determined, before the *FLA* came into force (March 18, 2013), do not need special transition sections. Section 4 of the *Interpretation Act* provides a default rule that the Act will be used upon it becoming effective, so cases started under the *FRA* will be determined under the *FLA*.

Unless a parent poses a risk to the safety or well-being of the child, they will usually be allowed access or visiting rights. Courts can make an order for access and may view a custodial parent who denies access as acting against the best interests of the child.

> **NOTE:** It is important to note that contact/parenting time is a distinct and separate issue from child support. **Denial of contact/parenting time is not grounds to withhold support; nor is a failure to pay support grounds for withholding contact/parenting time.**

1. Factors Considered in Making an Contact Order

The overriding principle remains the **best interests of the child**. The courts will not be bound by the wishes of the child, although the child's views can be a powerful factor. When the **FLA** came into force, it introduced an overarching consideration "**to ensure the greatest possible protection of the child's physical, psychological, and emotional safety.**" It can be argued that this consideration is functionally in place already, however. The courts will look into several factors in making access orders. These include:

- The age of the child: older children will be allowed longer visits, but courts will also consider the wishes of children over 12 who may not wish to see the non-custodial parent;
- Distance between homes: if the distances are great, courts may order longer stays;
- Conduct of the non-custodial parent: access can be denied for reasons such as alcoholism, abuse, past attempts to abduct the child, or attempts to alienate the child from the custodial parent;
- Health of the non-custodial parent: if health problems limit the non-custodial parent's ability to care for the child, access may be limited;

2. Types of Contact Orders

a) Interim Orders

After making an interim parenting order, a court will often grant contact on an interim basis. Usually, such an order will favour the status quo, so as to minimize disruption for the child.

b) Final Orders

The final decision by the court regarding contact, although often not needed as parties can save time and money by participating in mediation instead.

c) Conditions set by the court on contact orders (Interim and Final)

- **i. Specified versus Unspecified Access**

Specified orders set out the times and places at which the non-custodial parent must have access to the child. Specified orders are generally preferred. Unspecified access is less common and is ordered when the parents are willing to accommodate one another.

- **ii. Conditional**

Courts may impose requirements, such as not smoking or using drugs or alcohol in the presence of the child. If the parent fails to meet the condition, access may be denied.

- **iii. Supervised**

Courts may order visits to be supervised by a designated third party if there are concerns about abuse, abduction, mental and physical handicaps or attempts to alienate the child from the custodial parent. It is up to the custodial parent to demonstrate that access should be supervised.

> **NOTE:** There are no filing fees nor does a person need legal representation in Provincial Court, making it a more accessible option for many clients.

3. On Orders in more than one Jurisdiction Respecting Guardianship, Parenting Arrangements, or Contact

Under the *FLA*, the Court may exercise its jurisdiction to make parenting and access orders if one of the following conditions is met:

1. The child was "habitually resident" in BC (s 74(2)(a)).
2. If the child is not habitually resident in B.C., the Court must at the commencement of the application order be satisfied that (s 74(2)(b)):
    - i. The child is physically present in British Columbia when the application is filed,
    - ii. Substantial evidence concerning the best interests of the child is available in British Columbia,
    - iii. No application for an extraprovincial order is pending before an extraprovincial tribunal in a place where the child is habitually resident,
    - iv. No extraprovincial order has been recognized by a court in British Columbia,
    - v. The child has a real and substantial connection with British Columbia, and
    - vi. On the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia;
3. The child is physically present in British Columbia and the court is satisfied that the child would suffer serious harm if the child were to (s 74(2)(c))
    - i. Remain with, or be returned to, the child's guardian, or
    - ii. Be removed from British Columbia.

B.C. courts are required to enforce extra-provincial orders (s 75) with certain exceptions (s 76). Such exceptions include situations where the child would suffer serious harm if they were returned to the guardian or leaving British Columbia (s 76(1)(a)).

If one spouse is not in BC, the only BC Court that the BC residing spouse can proceed in is the BC Supreme Court, because the Provincial Court has no jurisdiction outside of the province.

F. Guardianship

Guardianship may be the most important aspect of any legal arrangements concerning the care and control of the children. Guardianship encompasses the whole bundle of rights and obligations involved in parenting a child, including making decisions about the child's school, moral instruction, religion, health care, dental care, extracurricular activities, etc.

Under the *FLA*, guardianship is primarily governed by sections 39, 41, and 42.

Parents can also appoint a guardian in a will. If the parents are both dead or have abandoned the child, the Public Guardian and Trustee becomes the child's guardian.

While a child's parents are living together and after the child's parents separate, each parent of the child is presumed to be the child's guardian (s 39). Upon marital breakdown, this can change either by agreement or by order of the Court.

Section 39 of the FLA also provides for three other scenarios under which a parent is presumed to be a guardian. A parent who has never resided with a child is not the child's guardian unless:

- 1) There is an agreement made under section 30 of the FLA,
- 2) The parent and all of the child's guardians make an agreement providing that the parent is also a guardian, or
- 3) The parent regularly cares for the child.

Additionally, a person does not become a child's guardian by reason only of marriage or a marriage-like relationship.

At the time of birth, the two parents of a child are presumed to be its biological parents unless the child was born as a result of assisted reproduction (section 26, FLA). Assisted reproduction has, at present, always included the use of one or more of donated eggs, donated sperm, and the cooperation of a woman who is willing to carry the baby to term. Section 24 of the FLA clarifies that a donor of eggs or sperm is not the parent of a child on the basis of their biological contribution alone – donors cannot be made to pay child support unless there is some other connection to the child which justifies holding that the person is a parent under the FLA. If a donor wishes to be regarded as a parent, written agreements can be drafted and signed before the child's birth which would substantiate their parental claim under the FLA. Unlike donors, surrogates are presumed to be a parent of the child under the FLA since they are the birth parent. However, this presumption can be overcome by the intended parents and the surrogate signing a written agreement before the child is conceived which states that the surrogate will not be a parent to that child. Without such an agreement, the surrogate and sperm-providing parent would be the presumed parents.

1. Responsibilities of a Guardian

Section 41 of the *FLA* lists out the parental responsibilities with respect to a child:

- (a) Making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
- (b) Making decisions respecting where the child will reside;
- (c) Making decisions respecting with whom the child will live and associate;
- (d) Making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
- (e) Making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
- (f) Subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) Applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) Giving, refusing or withdrawing consent for the child, if consent is required;
- (i) Receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- (j) Requesting and receiving health, education or other information respecting the child from third parties;
- (k) Subject to any applicable provincial legislation,
  - (i) Starting, defending, compromising, or settling any proceeding relating to the child, and
  - (ii) Identifying, advancing, and protecting the child's legal and financial interests;
- (l) Exercising any other responsibilities reasonably necessary to nurture the child's development.

Section 42 of the *FLA* defines parenting time as time that a child is with a guardian. During this parenting time, a guardian may exercise the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.

2. Guardianship Orders

A person who is not a parent or a parent who is not a guardian may become a guardian of the child by court order, pursuant to section 50 of the FLA. The person applying to court for a guardianship order must demonstrate why it would be in the best interests of the child and provide notice to all of the child's guardians and adults with whom the child resides (s. 51). If the child is over 12, the child's written consent is also required. The evidentiary requirements to obtain a Guardianship order are set out under the Supreme Court Family Rules Rule 15-2.1 and the Provincial Court Family Rules Rules 26, 51, and 172. The applicant must provide: 1. An affidavit (The Guardianship Affidavit (Form 5) for provincial jurisdiction and a Form F101 for Supreme Court) requires the following information:

- a. The nature and length of the applicant's relationship with the child,
- b. The child's living arrangements,
- c. A detailed plan for how the applicant going to care for the child,
- d. Information about any other children in the applicant's care,
- e. Information about any incidents of family violence that may affect the child, and
- f. Information about any family or child protection court proceedings the applicant has been involved in;
    - 2. A Ministry of Children and Family Development records check;
    - 3. A Protection Order Registry records check; and
    - 4. A criminal record check.

If an application is made for guardianship of a treaty First Nation's child, the child's First Nation's government must be served notice of the application and has standing in the proceeding (ss. 208 and 209).

3. Terminating Guardianship

Sole guardianship and joint guardianship are not terms used in the *FLA*. The parents or a court may decide that one parent should be the only guardian of the child. This terminates the presumption of guardianship for the other parent. The parents may terminate one parent's guardianship via written agreement (s. 39). The court can terminate one parent's guardianship pursuant to section 51 of the *FLA*. This is an extreme step, taken only when one parent has been shown to be either uninterested in or incapable of proper parenting.

4. Both Parents are Guardians

Under the *FLA*, the standard guardianship agreement, wherein both parents are or remain guardians, is structured such that parental responsibilities and parenting time are specified in the agreement, with specific provisions which govern the allocation of parenting responsibilities. If no such provisions are included, then each party may exercise all parental responsibilities in consultation with the other guardians (*FLA* section 40(2)).

The following are standard elements typically included in guardianship agreements:

- a) Both parents equally have all of the parental responsibilities of guardians [with any exceptions listed].
- b) A guardian, after becoming aware of important information relating to the child not known to the other guardian(s), must immediately notify the other guardian(s) about that information.
- c) Subject to other clauses in the agreement, both guardians must consult about any important decisions that must be made and try to reach agreement concerning these important decisions.
- d) During parenting time, a guardian may exercise the parental responsibility of making day-to-day decisions affecting the child provided that the guardian must advise the other parent of any matters of a significant nature affecting the child.
- e) Optionally, the agreement may specify that if one guardian dies, the remaining guardian will assume all parenting responsibilities.

Also, agreements will typically include a dispute resolution clause which governs the situation where the guardians cannot reach agreement over one of their shared responsibilities. The options include:

- a) One parent has the final word; however, the other party can apply to court if they disagree with the deciding parent. In particularly high-conflict cases, giving one parent decision-making authority may be the only solution (*Friedlander v Claman*, 2015 BCSC 2409 [16]);
- b) The parties go to mediation, wherein the mediator will have the final word if the parties cannot agree;
- c) The parties go to a parenting coordinator who has decision-making authority;

- d) Other collaborative law processes; or
- e) The parties can resolve the matter in court.

5. Relocation

Division 6 of Part 4 of the new FLA states that if you are a child's guardian and you want to relocate with the child, you must give any other person who can contact the child 60 days' notice which includes both the date of the relocation and the name of the proposed location.

The Court may grant an exemption to give notice if it is satisfied that notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child or there is no ongoing relationship between the child and the other guardian or the person having contact with the child. Once notice is given, a child's guardians and persons having contact with the child must use their best efforts to resolve any issues relating to the proposed relocation. The proposed relocation may occur unless another guardian of the child files an application to prohibit the relocation within 30 days of receiving notice. The Court will make its decision based on s 37 of the FLA considering what would be in the best interests of the child.

G. Parenting Responsibilities and Parenting Time

1. Family Law Act

According to section 42 of the FLA, parenting time refers to the amount of time that a child spends under the care of a guardian, as determined by an order or agreement. When the child is under their care, guardians assume responsibility for day-to-day care and decision-making for the child (please see section 41 of the FLA for a range of parenting responsibilities). Parenting time and responsibilities may not be allocated equally amongst guardians, and guardians may or may not be required to consult with one another depending on the terms of the order or agreement.

Decisions as to parenting time and responsibilities are determined according to the best interests of the child only. Section 40 of the FLA notes that the equal division of parenting time and parenting responsibilities is not presumed to be in the best interests of the child, nor should it be presumed that it is inherently better to make decisions separately or jointly. Guardians should not expect that they are entitled to equal sharing of parenting time or parenting responsibility. The best interests of the child are determined by weighing the following non-exhaustive list of considerations set out in section 37(2) of the FLA:

- (a) The child's health and emotional well-being;
- (b) The child's views, unless it would be inappropriate to consider them;
- (c) The nature and strength of the relationships between the child and significant persons in the child's life;
- (d) The history of the child's care;
- (e) The child's need for stability, given the child's age and stage of development;
- (f) The ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) The impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) Whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) The appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

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

A person's conduct is considered only where their conduct stands to impact any of the above considerations regarding the best interests of the child.

2. Divorce Act

Under the DA, the term "parenting time" is used to refer to matters concerning the care, upbringing, and other relevant details pertaining to a child (s. 2); parenting time is designated by what is referred to as a parenting order under the current DA. The provisions of section 16 give a brief overview of how an order for parenting is decided and issued, including who may apply for an order, who may issue an order, and several of the court's considerations when issuing such orders.

As of March 1, 2021, updates to the DA mean that the term "custody" was replaced by "parenting time" and "parenting responsibilities" to emphasize the importance of the needs of the child rather than on the child as a possession of a parent. Similarly, "order for custody" was replaced by "parenting order." Section 16(1) through 16(10) were repealed and replaced with a new section entitled "Best Interests of the Child". This section includes more expansive provisions which focus on determining parenting time and responsibilities based on the best interests of the child. The new section 16(3) provides guidance as to the factors to be considered, including:

- (a) The child's needs, given the child's age and stage of development, such as the child's need for stability;
- (b) The nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
- (c) Each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
- (d) The history of care of the child;
- (e) The child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- (f) The child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g) Any plans for the child's care;
- (h) The ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- (i) The ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
- (j) Any family violence and its impact on, among other things,
  - i. The ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
  - ii. The appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
- (k) Any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

The updated DA also sets out the required contents of a parenting order (16.1(4)). A parenting order allocates parenting time—and, correspondingly day-to-day decision-making responsibilities—and may include a schedule and permitted means of communication between a child and a person with parenting responsibilities. Parenting orders submitted by the parties must be mutually agreed to when submitted, though a court may modify according to the best interests of the child.

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XII. Children and the Law

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

A. Relevant Ages

1. Age of Majority

The *Age of Majority Act*, RSBC 1996, c 7 [1], s 1 states that the age of majority in B.C. is **19** years. Section 1 also applies to private documents, such as wills. A person's age is determined by the provisions set forth in s 25(8) of the *Interpretation Act*, RSBC 1996, c 238 [1].

2. Other Relevant Ages

a) Sexual Consent

As of 1890, the age of consent for sexual activity was set at 14 years. Recently, the age of consent in Canada has been changed from 14 to **16 years** (*Tackling Violent Crime Act*, Bill C-2, An Act to amend the *Criminal Code* and to make consequential amendments to other Acts, 39th Parliament, 2nd Session, October 2007, effective May 1st, 2008 [2]). However, if the sexual activity involves exploitative activity, such as prostitution, pornography or where there is a relationship of trust, authority or dependency, the age of consent is 18 years.

Section 150.1(3) of the *Criminal Code* provides what is often referred to as a "close in age" or "peer group" exception: a 12 or 13-year-old can consent to engage in sexual activity with another person who is less than two years older and with whom there is no relationship of trust, authority or dependency. A 14 or 15-year-old can consent to engage in sexual activity with a partner who is less than five years older with whom there is no relationship of trust, authority or dependency. An exception is also available for pre-existing marriages and equivalent relationships.

b) Marriage

Both parties to the marriage must be at least 19 years old. However, the *Marriage Act*, RSBC 1996, c 282 [3], provides that individuals between the ages of 16 and 19 may marry without the consent of anyone if they are a widower or widow (s 28(1)), and that other persons between the ages of 16 and 19 may marry **if they have the consent of**:

- a) Both parents or of the parent having sole guardianship, or the surviving parent (s 28(1)(a);
- b) A lawfully appointed guardian of that person (s 28(1)(b));
- c) The Public Guardian or the Supreme Court if both parents are dead and there is no lawfully appointed guardian (s 28(1)(c)); or
- d) A judge of the Supreme Court where the person whose consent is required cannot be located, or where their consent is unreasonably withheld (s 28(2)).

No person under the age of 16 can marry unless the marriage is shown to a Supreme Court judge to be expedient and in the interest of the parties (s 29). If the parent or guardian "unreasonably or from undue motives refuses or withholds consent to the marriage," a minor may apply to court for a declaration to allow the marriage (s 28(2)).

Section 28(6) provides that a marriage of a minor must not be solemnized, and a license must not be issued, unless a birth certificate or other satisfactory proof of age has been produced to the issuer of marriage licenses or to the religious representative.

However, s 30 provides that failure to comply with ss 28 or 29 will not invalidate a marriage that has taken place. In other words, if someone manages to get married at 15 and obtains a valid marriage license, the marriage is valid.

B. Child Abduction

1. Criminal Code

Sections 280 to 285 of the Criminal Code deal with the offences of abduction. Section 282(1)provides that:

Everyone who, being the parent, guardian or person having the lawful care or charge of a person under the age of 14 years, takes, entices away, conceals, detains, receives or harbours that person in contravention to the parenting time provisions of a parenting order in relation to that person made by a court anywhere in Canada with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person of the possession of that person is guilty of an indictable offence (maximum 10 years imprisonment)... or an offence punishable on summary conviction.

Section 283 creates a similar offence for circumstances in which there is no parenting order.

> **NOTE:** One should be especially careful when giving advice in parenting time disputes to avoid inadvertently giving advice that may lead to the commission of these offences. If there is evidence that a parent may abduct a child, or if there is evidence that visits are very "disturbing and harmful", access may be denied. See *Re Sharp* (1962), 36 DLR (2d) 328 (BCCA).

2. Child Abduction Convention

The *Hague Convention on the Civil Aspects of International Child Abduction* [4] enables a person whose parenting time rights have been violated to apply to a "Central Authority" (each party to the convention must create such a body) for the voluntary return of the child, or to apply for a court order. Keep in mind that not every country is a signatory to the *Hague Convention*. Applications can be made either in the person's jurisdiction or in the jurisdiction to which the child has been abducted.

Each Central Authority has several tasks:

- i) To discover the whereabouts of the child;
- ii) To take precautions to prevent harm to the child;
- iii) To encourage voluntary return of the child or some other agreeable arrangement;
- iv) To facilitate administrative processes; and
- v) To arrange for legal advice where necessary.

It appears that the Convention applies where the parents are formally separated and the child has been in the sole parenting time of one parent.

Finally, it should be noted that the Central Authority does not decide the merits of any parenting order. It is merely an enforcement agency.

A federal coordinator of the Department of Justice deals with abductions to France, Switzerland, Portugal, and Canada. The contact number is (613) 995-6426.

If the child has been taken to another jurisdiction, contact the Department of External Affairs, 125 Sussex Drive Ottawa, K1A 0G2. Attention: J.L.A. The contact number is (613) 995-8807.

A further resource in the case of abductions and violations of parenting time orders is the office of the Child Youth and Family Advocate, 600-595 Howe Street, Vancouver, BC. The contact number is (604) 775-3203.

C. Discipline

The *Criminal Code* (s 43) allows a parent, a person standing in the place of a parent, or a school teacher to discipline a child, by way of correction, provided that only reasonable force is used. However, section 76(3) of the *School Act*, RSBC 1996, c 412 [5] requires that teachers ensure the discipline is similar to that of a kind, firm, and judicious parent, and must not include the use of corporal punishment.

The Supreme Court of Canada examined s 43 in *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] SCC 4, 16 C.R. (6th) 203 [6]. The Court held that section 43 does not violate the constitutional rights of children. The discipline must be “by way of correction” meaning “only sober, reasoned uses of force that address the actual behaviour of the child and are designed to restrain, control or express some symbolic disapproval of their behaviour” (para 24). Furthermore, the Court provided a comprehensive definition of “reasonable force”:

Generally, section 43 exempts from criminal sanction only minor corrective force of a transitory and trifling nature. On the basis of current expert consensus, it does not apply to corporal punishment of children under two or teenagers. Degrading, inhuman, or harmful conduct is not protected. Discipline by the use of objects or blows or slaps to the head is unreasonable. Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment. Coupled with the requirement that the conduct be corrective, which rules out conduct stemming from the caregiver's frustration, loss of temper or abusive personality, a consistent picture emerges of the area covered.

D. Child Protection

Under the *Child, Family and Community Service Act* [*CFCSA*] [7], a Director or member of the municipal or provincial police forces can apprehend any child under the age of 19 years when the child is believed to be in need of protection or care. Section 6 lists conditions justifying temporary protective custody under this Act.

Within seven days after the child's removal, a Director must attend Supreme or Provincial Court for a presentation hearing. The Director must, if possible, inform the child, if 12 years of age or over, and each parent of the time, date, and place of the hearing. If the situation warrants it, a hearing may result in temporary (or permanent) custody of the child being given to the Director or some other agency.

1. Principles

The *CFCSA* codifies child protection remedies available in B.C. It also gives specific rights to children in care under the Act (section 70). The *Representative for Children and Youth Act*, SBC 2006, c 29 [8] s 6 provides that it is the responsibility of the Representative to:

- Support, assist, inform and advise children and their families respecting designated services;
- Monitor, review, audit and conduct research on the provision of a designated service by a public body or director for the purpose of making recommendations to improve the effectiveness and responsiveness of that service, and comment publicly on any of these functions
- Review, investigate and report on the critical injuries and deaths of children as set out in Part 4

The guiding principles in section 2 of the *CFCSA* provide that:

1. Children are entitled to be protected from abuse, neglect, harm, or threat of harm;
2. The family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
3. If, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
4. The child's views should be considered when decisions relating to that child are made;
5. Kinship ties to extended family should be maintained;
6. The cultural identity of Aboriginal children should be preserved; and
7. Decisions relating to children should be made and implemented in a timely manner.

B.C. Children and Youth Review: An Independent Review of B.C.'s Child Protection System (April 7, 2006) recommends a number of changes to the sections discussed in this chapter, including the appointment of a Representative for Children and Youth. The full report can be viewed online at https:/ / cwrp. ca/ sites/ default/ files/ publications/ en/ BC-HuguesReviewReport.pdf.

2. Best Interests of the Child

Section 4 of the *CFCSA* defines "best interests of the child" somewhat differently than does the *FLA*. Factors that must be considered under the *CFCSA* include:

1. The child's safety;
2. The child's physical and emotional needs and level of development;
3. Continuity in child care;
4. The quality of relationships with parents;
5. The child's cultural, racial, linguistic and religious heritage;
6. The child's views; and
7. The effect on the child of any delays in making a decision.

Section 4(2) mandates that, in assessing the best interests of Aboriginal children, the importance of preserving the child's cultural identity must be considered.

The *CFCSA* definition of when a child needs protection includes the following (s 13):

1. Situations where there is a risk of physical or sexual abuse, harm, or exploitation;
2. Emotional harm by a parent's conduct;
3. Deprivation of necessary health care;
4. Situations where the parent is unable or unwilling to care for the child and has not made adequate provision for the child's care; and
5. Where the child has been abandoned and adequate provision has not been made for the child's care.

See s 13 for a complete enumeration of circumstances where children need protection.

3. Duty to Report Need for Protection

The *CFCSA* s 14(1) requires that someone who believes a child is being or is likely to be physically harmed, sexually abused, or exploited to report the matter to the Ministry of Children and Family Development [9]. The Helpline for Children [10] (310-1234) provides 24-hour access to social workers in case of an emergency.

Reports to the Ministry are anonymous. No action lies against a person making a report unless it is made maliciously or without reasonable grounds. Failure to report cases of abuse or exploitation constitutes an offence (s 14(3)), even when the information was confidential or privileged, except for when the information was obtained through a solicitor-client relationship (s 14(2)). The Director under the *CFCSA* must assess the information reported (s 16). Case law has demonstrated that the duty of the director to act is actually broader than the legislated duty: see *BS v British Columbia* (Director of Children, Family, and Community Services), [1998] 8 WWR 1 (BCCA) [11].

4. Removal

Under the *Child, Family and Community Service Act* [*CFCSA*], the Ministry for Children and Families has different options to deal with an unattended child (s 25), or a lost or runaway child (s 26). Pursuant to these sections, the Ministry can take the child for up to 72 hours without formally removing the child from their parents. Furthermore, the Ministry can take a child away to provide essential health care without legally removing the child, provided that the Ministry first obtains a court order under s 29 of the *CFCSA*. In situations where there are reasonable grounds to believe that the child's health or safety is in immediate danger, a police officer may take charge of the child (s 27).

5. Removal Procedure

Under the *CFCSA*, Directors are appointed to enforce the Act. A Director may, without a court order, remove a child if there are reasonable grounds to believe that the child needs protection and that the child's health or safety is in immediate danger, or no other less disruptive measure that is available is adequate to protect the child (s 30). When removing a child, a Director must make all reasonable efforts to notify each parent of the child's removal (s 31). Practically speaking, the Director delegates their duty to social workers who then carry out the removal procedure.

6. Presentation Hearing

The Director must attend a presentation hearing within seven days of the removal (*CFCSA*, s 34) and present a written report that includes:

1. The circumstances of the removal;
2. Information about less disruptive measures considered before removal; and
3. An interim plan of care for the child, including, in the case of an Aboriginal child, the steps to be taken to preserve the child's aboriginal identity (s 35).

A child who is removed under the *CFCSA* is put under the care of the Director until the Court makes an interim order about the child, the child is returned, or until the Court makes a parenting or supervision order (s 32). A presentation hearing is a summary hearing and must be concluded as soon as possible (normally within 30 days) (s 33.3).

If the parents consent to the interim removal, an order will be made that the child remain in the custody of the Director pending a protection hearing (see below). If the parent(s) disagree with the removal, a presentation hearing will be scheduled as soon as possible (s 33.3) to determine where the child should live pending the full protection hearing. The presentation hearing may proceed by way of affidavits or viva voce evidence. At the conclusion of the presentation hearing, the child may stay in the custody of the Director, may be returned to their parent(s) or may be returned to their parent(s) under supervision(s 35(2)). It is important to note that the notice of the presentation hearing need not be formally served, and informal notice is adequate.

7. Protection Hearing

A protection hearing must start within 45 days after the conclusion of the presentation hearing (*CFCSA*, s 37(2)). The purpose of the protection hearing is to determine whether the child needs protection (s 40(1)). The Director must return the child to the parent(s) as soon as possible if it is determined that the child does not need protection (s 40(2)). A child can be returned and still be under minimum supervision of the Director, or returned without supervision. If the child is returned without supervision, the proceedings are at an end (s 37(1)).

8. Orders

Section 41 of the *CFCSA* outlines orders that can be made at a protection hearing:

1. An order to return the child to the custody of the parents while being under the Director's supervision for a period of up to six months;
2. An order that the child be placed in the custody of a person other than the parent (e.g. a relative) with the consent of that other person and under the Director's supervision for a specified period of time;
3. An order that the child remain or be placed in the custody of the Director for a specified period of time; or
4. An order that the child be placed in the continuing (permanent) custody of the Director. Continuing (permanent) orders should be made under s 49.

1. The parents may consent to or oppose the order. If the parents oppose the order, a Rule 2 case conference is scheduled as soon as possible and a judge will attempt to resolve any issues in dispute (see *Provincial Court (Child, Family and Community Service Act) Rules*, BC Reg 533/95 [12] for a complete description). If the matter is not settled at the case conference, a date is scheduled to determine whether the child needs protection.
2. The content of supervision orders is outlined in the *CFCSA*, section 41.1. Terms and conditions that may be attached to a supervision order include:

5. services for the child's parent(s);
6. day-care or respite care;
7. the Director's right to visit the child; and
8. the Director's duty to remove the child if the person with custody does not comply with the order.

Section 43 outlines the time limits for temporary custody orders and s 47 outlines the rights and responsibilities of a Director who has custody of a child either under an interim or temporary custody order. These rights and responsibilities include:

1. consenting to health care for the child;
2. making decisions about the child's education and religious upbringing; and
3. exercising any other rights to carry out any other responsibilities as guardian of the child, except consent to adoption.

Temporary orders can be extended under section 44.

When a continuing custody order is made, the Director becomes the sole guardian of the person of the child and the natural parents' legal rights to the child are extinguished. The Director may then consent to the child's adoption. The Public Guardian becomes the sole guardian of the estate of the child. The order, however, does not affect the child's rights with respect to inheritance or succession of property (s 50(1)). In certain cases, the Director can seek a last-chance order of up to six months (s 49(7)).

Parents can apply to set aside both temporary and continuing (permanent) orders under s 54. They are also entitled to full disclosure under s 64. Temporary custody orders may also be extended where a permanent transfer of custody is planned under s 54.01. For more information, see *British Columbia (Director of Family and Child Services) v K(TL)*, [1996] BCJ No. 2554 (Prov Ct FD) (QL).

9. Access and Consent Orders

Section 55 of the Child, *Family and Community Service Act* [*CFCSA*] allows parents, or other persons, to apply for an access order at the time of or after, an interim or temporary custody order is made. Section 56 provides for applications for access by parents or other persons after a continuing custody order is made. This entitles parents to apply for access visits during any apprehension, whether interim or permanent, if the Director opposes access.

Consent orders under the *CFCSA* may be an advisable option for parents. A consent order is outlined in s 60, which provides that the Court may make any custody or supervision order without a finding of fact that their child actually needed protection, and without an admission of any of the grounds alleged by the Director for removing the child (ss. 60(4) and (5)). A consent order requires the written consent of:

- a) The Director;
- b) The child, if 12 years of age or older;
- c) Each parent of the child; and
- d) Any person with whom the Director may be placing the child in temporary custody.

Children 12 years of age or older must be given notice of the hearings, report copies, etc.

10. Rights of Children in Care of the Director

Section 70 of the *Child, Family and Community Service Act* [*CFCSA*] sets out the rights to which children are entitled while in care of the Director. Children in care have the right to be fed, clothed, and nurtured according to community standards; be informed about plans regarding their care; be consulted with respect to decisions affecting them; reasonable privacy and possession of their personal belongings; be free from corporal punishment; and receive medical and dental care when required. For a complete list of enumerated rights, see s 70.

11. Priority in Placing Children with a Relative

When deciding where to place a child, the Director must consider the child's best interests (s 71(1)). The Director must give priority to placing the child with a relative before considering a foster parent, unless that is inconsistent with the child's best interests (s 71(2)).

Children under protection can be placed in the custody of extended family or other concerned parties (s 8). This is known as a "kith and kin" agreement. The Director may also refer the matter to a familyconference co-ordinator to allow the family to reach an agreement on a 'plan of care' that serves the best interests of the child (ss 20, 21).

Until March 31, 2010, a relative caring for a child residing in their home may have been eligibleto receive monthly Child in the Home of a Relative ("CIHR") benefits from the Ministry of Social Development (previously the Ministry of Employment and Income Assistance). As of April 1, 2010, these benefits are no longer available to new applicants. In the absence of the CIHR benefits, relatives looking after a child in their home may be eligible for the child tax benefit, the B.C. family bonus, the universal child care benefit, and/or the child disability benefit. For more information, see:

https:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/ eligibility/child-in-home-of-relative.

An alternative (but not a substitute) for relatives to consider is the Extended Family Program benefits available through the Ministry of Children and Family Development (see https://www2.gov.bc.ca/gov/content/family-social-supports/ fostering/out-of-care-kinship-care-options-for-children-and-youth-in-bc/temporary-out-of-care-arrangements).

These benefits are intended to be temporary and the relative is not eligible if they have a guardianship order. The application for benefits must be initiated by the child's parent.

12. Priority in Placing Aboriginal Children with an Aboriginal Family

The Director must give priority to placing an Aboriginal child with the child's extended family within the child's Aboriginal community or with another Aboriginal family (s 71(3)). Section 39(1) mandates notification of the band. See also ss 2(f), 3(b) and (c), and 4(2) of the *CFCSA*. If a child is of mixed heritage, the Ministry will generally treat the child as an Aboriginal child and notify the band accordingly.

Certain additional considerations are provided throughout the Act for an Aboriginal, Nisga'a or treaty First Nations child.

E. Child Leaving Home or Parent Giving Up Custody of a Child

Children may leave home before the age of majority, or alternatively, parents may voluntary give up legal custody of their children. Please note that "emancipation" (a legal mechanism by which a person may be legally separated from their parents before the age of majority) is not a legal remedy for children in BC as it is in some parts of the United States.

1. Rights of the Child

Children may leave home as soon as they are able to support themselves. The following considerations should be kept in mind:

- a) Under the *School Act*, a child must attend school until age 16 (s 3(1)(b)). It would be extremely difficult for the child to go to school and maintain a job to support themselves sufficiently at a younger age than this;
- b) A child under 15 needs written permission from their parent or guardian prior to working (*Employment Standards Act*, RSBC 1996, c 113 [13], s 9(1)). Additionally, a child under 12 needs the written permission of the Director of Employment Standards prior to working (s 9(2));
- c) Pursuant to s 26(1) of the *Child, Family and Community Service Act* [*CFCSA*], a Director may take charge of a child for a period of up to 72 hours if it appears that the child is lost or has run away. If the person responsible for the child is not located by the end of the 72-hour period, the Director no longer has charge of the child (s 26(5)). (Note that "child" is defined in the *CFCSA* as a person under the age of 19 years, and includes a youth.); and
- d) A child under 19 may qualify for social assistance if they do not live with a parent or guardian, and if the ministry is convinced that no parental support is being provided.

2. Giving Up Custody of a Child

There are two basic ways that a parent can voluntarily give up legal custody of a child. This is done by transferring the rights that the parent possessed through one of the following mechanisms:

- a) By the parent(s) consenting to the adoption of the child by other persons (*Adoption Act*, RSBC 1996, c 5, s 13(1)); or
- b) By a written agreement between the parent and the Director of Child, Family and Community Service where the parent transfers their rights to the Director (s 23).

F. Child Benefits

1. Child Disability Benefit

The Child Disability Benefit (CDB) is a non-taxable supplement to the Canada Child Tax Benefit (CCTB) and Children's Special Allowance. To receive the CDB, a child must be eligible to receive the CCTB and must also qualify for the Disability Tax Credit (DTC). Not all children with disabilities qualify. For more information about eligibility visit the Canada Revenue Agency website [14] or call 1-800-387-1193.

The CDB provides up to $2,730 per year, per child who qualifies for the disability amount, for low- and modest-income families caring for children under the age of 18 who have a severe and prolonged mental or physical impairment.

2. Canada Child Benefit

In July 2016, the Government replaced the Universal Childcare Benefit (UCCB) and the Canadian Child Tax Benefit (CCTB) with the Canada Child Benefit (CCB), a benefit paid monthly to help eligible families provide child care for their children under 18 years of age. The CCB provides families up to $6,400 annually for a child less than 6 years of age, and up to $5,400 annually for a child aged 6 to 17. The CCB benefit is reduced based on the family's income and the number of children. When the family's income exceeds $30,000 or there is more than one child in a family whose income exceeds $30,000, the CCB starts being reduced, and, eventually, the CCB benefit reaches $0. The CCB benefit is tax free. One must apply for CCB through Canada Revenue Agency.

For more information on eligibility, the application process, the calculation of the amount of the benefit based on number of children and household income, and access to an online application, visit the Canada Revenue Agency website at https://www.canada.ca/en/revenue-agency.html or call 1-800-387-1193 Monday to Friday from 8am to 8pm or Saturdays from 9am to 5pm.

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XIII. Adoption

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

A. Legislation

1. Adoption Act, RSBC l996, c 5

The *Adoption Act* [1] governs adoptions in BC. The Act provides for the licensing of adoption agencies. These agencies, in addition to the Director of Adoption, have exclusive authority for facilitating adoptions, matching birth families with adoptive parents, adoption planning, pre-placement assessment, placement services, and post-placement counselling and assessments for non relative adoptions in BC. The *Adoption Act* enables any adult person to apply to adopt a child, or to adopt another adult person. Under ss 5 and 29, one or two adults may apply to adopt a child. This allows unmarried couples, including same-sex couples, to apply to adopt.

The *Adoption Act* says that a child may be placed for adoption by the Director of Child, Family and Community Service; an adoption agency; a parent or guardian of a child by direct placement; or a parent or guardian of a child, if the child is placed with a relative of the child. A direct placement means the placing of a child by a parent or other guardian with one or 2 adults who are not a relative of the child. According to section 37(c), biological parents may also apply to adopt with a third party.

Section 37 of the *Adoption Act* states the effect of the adoption order. For all purposes, an adopted child becomes the child of the adopting parent(s) and the biological parents cease to have any parental rights or obligations with respect to the child.

Two legal exceptions under the Act are:

- a) An adopted First Nations child does not lose status, rights, privileges, disabilities, and limitations acquired under the *Indian Act* and other Acts (s 37(7)); and
- b) Adoption adds a prohibited degree of consanguinity for the purpose of marriage or laws relating to incest (s 37(4)).

The adopted person takes the given names specified in the adoption order, and the surname of the adopting parents, unless the court orders otherwise at the request of the applicant (s 36).

Furthermore, openness agreements are recognized by statute (s 59) and may be entered into by the adoptive parents, the birth parents, and others with a relationship to the child, after consents to adoption have been signed.

An adoption effected under the law of a jurisdiction other than BC is valid in BC as though it had been made under BC's adoption legislation (s 47). Part 4 of the *Adoption Act* deals with interprovincial and intercountry adoptions. Before a person brings a child into the province for adoption they must obtain the approval of a director or an adoption agency (s 48(1)). Part 4 Division 2 deals with intercountry adoption of children from countries that are signatories to the Hague Convention on Intercountry Adoption [2]. To complete an adoption from a foreign country, whether that country is a “Hague Country” or not, a person needs the approval of the British Columbia Central Authority [3].

Under the *Adoption Act*, ss 63(1) and 64(1), birth records may be disclosed to both birth parents and adult adoptees. The Reunion Registry [4] facilitates reunions and disclosure of records. The Act provides for filing of non-disclosure vetoes and no-contact vetoes (ss 65 and 66).

B. Procedure

1. Consent

Section 13(1) of the *Adoption Act* states that no adoption order may be made without the written consent of:

- The child, if 12 years of age or over; children aged between 7 and 11 must be interviewed to ascertain whether they understand the meaning of adoption, and their views on the proposed name changes and a report must be filed with the court;
- The child's parents. The birthing parent cannot sign consents until the child is at least 10 days old (s 14). The consent of the other biological parent, who is not presumed to be the child's biological parent under s. 26 of the *Family Law Act*, is not required unless the biological parent acknowledges they are a parent and they are named as a parent by the child's birthing parent;
- The child's guardians;
- Where a child is a permanent ward of the Director of Child, Family, and Community Service, the Director, as guardian, must consent (s 13(5)).

The court may dispense with the need for consent from some of these parties. Parental consent may be dispensed with if it is in the best interest of the child or if the person has abandoned or deserted the child, cannot be found, is incapable of giving consent, has persistently neglected or refused to contribute to support for which they are liable, or is a person whose consent ought, in all the circumstances of the case, to be dispensed with (s 17). The consent of a child over 12 years of age can only be dispensed with if the child is not capable of giving informed consent (s 17(2)).

A person's consent must be in the form of an affidavit sworn in front of a notary or a lawyer. Each affidavit must state that the effect of the consent and of adoption was fully explained to the person consenting, and that they signed the consent freely and voluntarily.

How and when a person can revoke their consent is set out below in section 6.

2. Notifying the Director of Adoption

Within 14 days after receiving a child into their home for the purposes of adoption, the prospective adoptive parents must notify, in writing the Director of Adoptions or an adoption agency (s 12).

A person wishing to apply to adopt must notify the Director of Adoption in writing of their intention (s 31) at least 30 days before filing the application unless:

- The child has been placed in a licensed adoption agency;
- The child is related to the applicant by blood; or
- The applicant is the child's stepparent.

The Director of Adoption then makes an inquiry and files a report with the court before the hearing date. At least 30 days before the date fixed for the hearing of the application or an application to dispense with consent, the applicant must give a copy of the application with a notice of the date of hearing to the Director or licensed adoption agency.

The court may dispense with the times needed for the notices where the Director's report shows good cause that the waiting period is not necessary to protect the interests of all parties (s 6(9)).

In cases of "direct placement", potential adoptive parents must notify either the Director of Adoption or an adoption agency as soon as possible before the child is received in their home, and then in writing within 14 days after the child is received. Prior notice is required to allow the adoption agency or the Director of Adoption to receive or provide information to and from the birth and adoptive parents. Such information may include providing alternatives to the birth parents, doing a pre-placement assessment of the adoptive parents, counselling adoptive children if necessary, and

ensuring that children over 12 have given informed consent.

Under s 33, a post-placement assessment must be made by either the Director of Adoption or an adoption agency, providing a recommendation on whether the adoption should be made or not, or whether insufficient information is available to make the determination.

3. Adoption by the Child's Blood Relatives or Stepparents

The Director of Adoption does not need to be notified or make a report where one adult may apply to the court to become a parent of a child jointly with another parent, nor where a blood relative of achild applies to adopt the child.

In the case of stepparent and blood relative adoptions, the application may not be made until the child has lived with, and been in the custody of, the applicant for at least six months prior to the application, except by order of the court. The court may still order a report from the Director. Wherea report from the Director is not necessary, the material filed in support of the application should inform the court:

- In whose care the child has been since birth;
- Whether the parents have consented or proper reasons for the omission of such consent;
- How long the applicants have been married;
- The ages and occupations of the applicants;
- Whether either of the applicants have any other children living with them;
- That the applicants are able to bring up, maintain and educate the child; and
- Any unusual circumstances relevant to the application.

4. Where all Parties Have Consented to Adoption

If all of the necessary consents have been obtained, no notice need to be given and the application is made under Rule 17-1(24) of the *BC Supreme Court Family Rules*. The real application is thus the Requisition made to the registry and all other documents can be "the material on which the application is founded".

5. Where Consent is Not Obtained

Subject to circumstances where s 42 of the *Adoption Act* apply, an application under s 11 of the *Adoption Act* dispensing with notice of a proposed adoption to a birth parent and an application under s 17 of the *Adoption Act* dispensing with consent to an adoption, may be included in an application for an order for adoption under *Supreme Court Family Rule* 17-1(26). See Family Practice Direction 1: Adoption Applications at http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/family_practice_directions.aspx.

6. Revocation of Consent

Fraud, undue influence, and duress may invalidate consent. In the absence of such defect with the agreement, the court may only revoke consent if it is in the best interests of the child.

Consent may be revoked in writing before the child is placed (s 18). The birth parent may revoke their consent within 30 days of the child's birth regardless of the child's placement. The child may revoke consent at any time before the order is made (s 20). After the child has been placed, subject to the above, consent may be revoked only by court order and only if it would be in the best interests of the child. The application for revocation of consent must be made before the granting of the adoption order (s 22).

A person who consents to an adoption may revoke their consent prior to the child being placed if the revocation is in writing and received by the director or agency before placement.

7. Checklist for Filing an Adoption

The necessary documents for an adoption application can be found on the BC Supreme Court website at https://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-forms/sup-family-forms .

The applicant should include:

- The petitioners' affidavit;
- Petition to the Court (Form F73);
- Affidavit of parent's consent to adoption;
- Paternity affidavit of birth parent if no other parent is named;
- Birth parent expense affidavit, sworn by the adoptive parents;
- Requisition to have adoption heard in chambers, if necessary;
- Notice of Hearing of petition (Form F75), if necessary;
- Requisition re: Desk Order for Adoption, if the adoption is uncontested and the necessary consents have been obtained; and
- Desk Order for Adoption (no hearing necessary); and/or order after hearing in chambers.

An Adoption Package can be found at https:/ / www. bccourts. ca/ supreme_court/ self-represented_litigants/ Supreme%20Court%20Document%20Packages/Adoption%20Package.docx

References

[1] http://canlii.ca/t/84g5
[2] https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption
[3] http://www.cic.gc.ca/english/immigrate/adoption/authorities.asp
[4] http://www2.gov.bc.ca/gov/content/life-events/births-adoptions/adoptions/search-reunions-registries

XIV. Name Changes

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

A. Legislation: Name Act, RSBC 1996, c 328

The instructions for changing a surname are outlined in the *Name Act* [1]. It can be skipped if the change occurs during the marriage ceremony or divorce. The procedures for changing a first name are much less formal and are not set out in legal rules (see Section XIV.C: Changing a First Name). The Department of Vital Statistics [2] provides a name change package complete with forms and instructions. They can be reached in Vancouver at (604) 660-2937.

Note the Court decision in *Trociuk v British Columbia (Attorney General)*, [2003] 1 SCR 835 [3] which declared ss 3(1)(b) and 3(6)(b) of the British Columbia *Vital Statistics Act* [4] unconstitutional. These sections prevented a father from having the registration of the child's surname altered, violating their rights under s 15(1) of the *Canadian Charter of Rights and Freedoms* [5].

B. Changing a Surname

1. General

Any person may apply to change their own name.

a) At the Time of Marriage

At the time of marriage, a person may elect to:

- Retain the surname they had immediately before marriage;
- Use the surname they had at birth; or
- Use the surname of their spouse by marriage.

b) A Parent with Custody of an Unmarried Child

A parent with custody may change the surname of their child. They must submit written consent of:

- The child if the child has attained the age of l2 years;
- All other parents having guardianship and other guardians of the child and
- The applicant's spouse if the application is to change the child's surname to that of the applicant's spouse.

A parent with custody of an unmarried child may allow that child to informally use any surname they want, and that child may be registered in grade one under that name. No consent from the other parent is necessary in this case. A parent may apply to change a minor child's name legally. It is also possible to apply for a change of name if the other parent:

- a) Is deceased or mentally disordered;
- b) Cannot after reasonable, diligent and adequate search be located; or
- c) Is, in the option of the registrar general, unreasonably withholding their consent.

c) A Widowed Person

A widowed person may apply to change their surname. The applicant must submit a death certificate, or if the death occurred in British Columbia they may state date and place of death and name of spouse.

d) A Divorced Person

A divorced person may, upon divorce, go by the name listed on their birth certificate.

2. Eligibility

To be eligible to change their name under the *Name Act*, a person must:

- Be an adult; or if a minor, must be a parent having custody of their children; and
- Have been domiciled in British Columbia for at least 3 months or have resided in British Columbia for at least 3 months immediately before the date of the application (s 4(1)).

3. Procedure

> **NOTE:** A change of name application can be included in the Notice of Family Claim and attached Schedule 5: Other Orders filed in divorce proceedings to avoid the procedure described below.

a) When the Applicant Has Already Assumed the Name

Sometimes the name to be legally adopted is one that has already been informally assumed. The assumed name should be indicated when preparing the application form. For example: "...change my name from John Doe, known as Henry Smith, to Henry Smith".

b) Publishing Notices of Intention

A person who wishes to legally change their name is no longer required to publish a notice of intention.

c) Making the Application

When making an application for a change in their surname or given name, or both the surname and given name, the applicant must insert their name in full in the notice of application for a change of name.

Application for a legal change of name must be accompanied by:

- i) The birth certificate, landed immigrant identification card or Canadian citizenship certificate of the applicant, and others included in the application;
- ii) A marriage certificate where the change affects the name of a married man or woman (not required for persons married in British Columbia);
- iii) Any required consents, as above;
- iv) Proof of custody from applicants who have been divorced, respecting any children included in the application who were born prior to the divorce;
- v) The statutory fee of $137, and $27 for each additional individual; and
- vi) Proof of death from widowed applicants respecting any children included in the application.

> **NOTE:** Information can be obtained from the Division of Vital Statistics (Vancouver telephone: (604) 660-2937; website: https://www2.gov.bc.ca/gov/content/life-events) regarding other related procedures such as a bride's election of surname at marriage, and changes of name resulting from adoption, legitimisation of birth, dissolution of marriage, or due to improper registration of the birth originally.

C. Changing a First Name

1. Eligibility

Anyone may change their first name. However, minors should be advised that they must obtain the written consent of their parents to do so.

2. Procedure

The client does not need to go through the application procedures necessary for changing a surname. The client can start using another first name at any time.

All identification – including credit cards, driver's license, social insurance card, school records (where applicable), health care cards, bank accounts, and birth certificates – should be changed to the first name being used. This can be done by contacting the relevant organizations and filling out a Change of Name Form.

Usually, the client's former first name will become a middle name instead.

References

[1] http://canlii.ca/t/8481
[2] http://www2.gov.bc.ca/gov/content/life-events
[3] http://canlii.ca/t/1g6ph
[4] http://canlii.ca/t/84fk
[5] http://canlii.ca/t/8q7l

XV. Court Procedures

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

A. Limitation Dates

1. Child Support

There is no limitation period for making a claim to child support, provided the child is still a "child" within the meaning of the *FLA* or the *DA*, as applicable, at the time of the originating application (*de Rooy v. Bergstrom*, 2010 BCCA 5; *Crepnjak v. Crepnjak*, 2011 BCCA 177). The general rule of thumb is that the Court will not order child support retroactive to more than three years from the date of the application (*DBS v SRG*, 2006 SCC 37).

Under the *Limitations Act*, there is no limitation date for claims on arrears of child support payments payable under a judgment or an agreement filed with the court under s 148(2) or 163(3) of the *FLA*.

2. Spousal Support

2(a) Married Spouses

Divorce Act

Spousal support can be claimed under the *Divorce Act* in a divorce proceeding or in a proceeding for corollary relief alone (ss 4 and 15.2). There is no limitation period within which married spouses or divorced spouses must bring a spousal support application. A claim for spousal support can be brought before or after an order for divorce. However, the longer a party waits, the less likely they will succeed in a claim for spousal support.

Family Law Act

Under s 198(3) of the *FLA*, a claim for spousal support must be brought no later than 2 years after the judgment granting a divorce or an order declaring the marriage to be a nullity. The two-year time limit does not apply to a review of spousal support under s 168 and 169 of the FLA.

The running of time limits is suspended during any period in which persons are engaged in family dispute resolution with a family dispute resolution professional or a prescribed process.

Under s 198(3), a married spouse may make an application to set aside an order or agreement for spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

Under the *Limitations Act*, there is no limitation date for claims on arrears of spousal support payments payable under a judgment or an agreement filed with the court under s 148(2) or 163(3) of the *FLA*.

2(b) Common-Law Spouses

Divorce Act

The *Divorce Act* does not apply to common-law spouses.

Family Law Act

Under s 198(3) of the *FLA*, a claim for spousal support must be brought no later than 2 years after the date of separation. The two-year time limit does not apply to a review of spousal support under s 168 and 169 of the *FLA*.

The running of time limits is suspended during any period in which persons are engaged in family dispute resolution with a family dispute resolution professional or a prescribed process.

Under s 198(3), a spouse living in a marriage-like relationship may make an application to set aside an order or agreement for spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

Under the *Limitations Act*, there is no limitation date for claims on arrears of spousal support payments payable under a judgment or an agreement filed with the court under s 148(2) or 163(3) of the *FLA*.

3. Division of Property, Debt, and Pension

3(a) Married Spouses

Under section 198(3) of the *FLA*, a married spouse may begin a proceeding to divide property, debt, or a pension no later than 2 years after a judgment granting a divorce or an order declaring the marriage to be a nullity. The limitation period may be suspended if the spouses were engaged in family dispute resolution with a family dispute resolution professional or a prescribed process.

A spouse may make an application to set aside an order or agreement for property division no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

Once a distribution scheme for family property is set, either by the Court or by agreement, it is always enforceable subject to the relevant case law.

3(b) Common-Law Spouses

Spouses living in a marriage-like relationship may begin a proceeding to divide property, debt, or a pension no later than 2 years after the date of separation (s 198(3)). The limitation period may be suspended spouses if the spouses were engaged in family dispute resolution with a family dispute resolution professional or a prescribed process.

A spouse living in a marriage-like relationship may make an application to set aside an order or agreement for property division no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

Once a distribution scheme for family property is set, either by the Court or by agreement, it is always enforceable subject to the relevant case law.

B. Supreme Court

The Supreme Court is the only court that hears actions under the *DA*. Under the *FLA*, the Supreme Court has both statutory and inherent jurisdiction to decide all support, division of property, parenting time, and access matters. Therefore, all *FLA* issues can be incorporated into a divorce action.

All Supreme Court procedures in family law proceedings are governed by the *Supreme Court Family Rules* effective July 1, 2010. (The *Supreme Court Family Rules* replace the former *Rules of Court* in respect of family law matters). Unless a client is familiar with these rules and able to strictly adhere to the formal procedures, this person should appear in Supreme Court with representation.

Actions are started when a claimant files a Notice of Family Claim or a Petition to Court. Matters may be decided through interlocutory applications or by trial. Interlocutory applications are hearings held in chambers. No witnesses are called. Instead, all evidence is taken from sworn affidavits. If the judge or master is satisfied with the credibility and substance of the evidence presented, then an interim order can be granted. A final order may be obtained at trial or by way of a summary trial on affidavit evidence if there are no serious issues of credibility.

C. Small Claims Court

Clients can enforce agreements concerning the division of assets between persons in a common-law relationship and between those in other relationships in Small Claims Court. See Chapter 20: Small Claims Procedure for more details. Also, one may be able to make a trust claim in Small Claims Court.

D. Provincial Family Court

1. Jurisdiction

Provincial Family Court has jurisdiction under the *FLA* over matters of parenting time, access, support and guardianship, subject to the jurisdiction of the superior courts and the federal government. The *FLA* provides greater powers for the enforcement of Orders which are available to the Provincial Court. Provincial Family Court has jurisdiction over the enforcement of support orders whether made in Supreme Court or Provincial Family Court (*Butler v Butler* (1981), 27 BCLR 268 (BCCA) [1]) and has original jurisdiction to make support orders and to vary or rescind its own orders. Provincial Family Court can also make, vary, rescind, or enforce its own parenting/access orders, but does not have the power to make orders regarding occupancy of the family home (*Polglase v Polglase* [1979 [2] BCJ No 58 (QL)]). Where the Supreme Court has made an order respecting parenting time, access, support, or child support, Provincial Family Court will be unable to vary that order, although the Court can enforce the order.

The Provincial Court offers free counselling and mediation services to family members considering separation or divorce. The Family Justice Counsellors (who may also be probation officers) will try to help the parties reach agreement on contentious matters.

2. Contacting Provincial (Family) Court

Clients should phone Provincial Court (and ask for the Family Court Division) in advance to arrange an interview. An Intake Officer will speak with the client, and if the problem is something the Provincial Court deals with, the client will be assigned to a Counsellor and an appointment will be arranged.

For a list of Family Courts in the Lower Mainland, see Chapter 22: Referrals.

3. Family Justice Counsellors

Family Justice Counsellors are not lawyers and do not necessarily know what the client's rights and obligations are. Clients should seek legal advice before signing any agreement.

The Family Justice Counselling Service helps people seeking remedies for their family problems through the Court or through counselling and mediation services. The aim of the counsellors is not reconciliation. Where a couple indicates a willingness to restore the marriage, they will be referred to a marriage counsellor. There are also clerks who help clients understand and implement child support guidelines.

Counselling is non-adversarial. The counsellors are impartial third parties who will assist both spouses in coming to an out-of-court settlement, although the counsellors are not of uniform quality and expertise. After gathering minimal information, the Counsellor will normally send a letter to the other spouse to advise them of the situation and try to set up a meeting with the first spouse and the counsellor. All information received from a spouse is private and confidential and will not be given out except with the express permission of that person, or as required by law.

Counsellors attempt to avoid court disputes by obtaining a Consent Order. If this is not possible, pertinent details regarding parenting time and support will be obtained, and forms will be prepared for court.

The counsellors will:

- Provide information regarding the court processes, available options, and current legislation;
- Offer conciliation and mediation services;
- Investigate the matters under dispute;
- Help with court applications and general preparation for court; and
- Screen for family violence situations and direct parties to the appropriate services.

The client can choose to avoid the counselling service and appear in court directly. The counsellor to whom the client has been assigned will still offer assistance with the application forms, etc. The Family Justice Counsellors can through Family Justice Centres and Justice Access Centres. Please refer to Section II Part C: Resources by Telephone to find the phone number of your nearest Centre.

Family Justice Counsellors deal exclusively with issues of children and support. In limited circumstances, and for clients with assets or debt less than $25,000, a Family Justice Counsellor can mediate an agreement.

4. Provincial (Family) Court Proceedings

a) Registries (Dependent upon location)

- a. Early Resolution Registries – Surrey and Victoria
- b. Family Justice Registries – Kelowna, Nanaimo, Vancouver (Robson Square)
- c. All other BC Registries

b) Application to Obtain an Order

Most proceedings in Provincial Court are commenced by filing a Notice to Resolve a Family Law Matter (Form 1). The application commences an action in Provincial Court, and requests a specific remedy. The application can be filed at either the court registry or in a family justice registry. For procedure see Provincial Court Family Rules.

The application must be filed with the registry, and must be personally served on the respondent by someone other than the applicant unless the judge orders otherwise. The following documents must be served with the filed copy of the application when it is served on the respondent:

- A blank reply form (Form 6);
- A blank financial statement form (Form 4), if the applicant is seeking an order for child and/or spousal support or a variation of child and/or spousal support; and
- A filed copy of the applicant's financial statement and applicable documentation under Rule 3, if applicable

c) Reply

The respondent must file a reply within 30 days of being served with a copy of the application, otherwise a default judgment may be sought in favour of the applicant. If the respondent disagrees with the remedy sought, they should be advised to obtain legal counsel to dispute the applicant's claim.

The respondent must:

- Complete a reply in Form 6, following the instructions on the form;
- File that reply, together with three copies of it, in the registry where the application was filed; and
- If applicable, file the original and three copies of the respondent's financial statement and applicable documentation referred to in Rule 3.

In the reply, the respondent may:

- Consent to one or more of the orders in the application;
- Disagree with anything claimed in the application, stating the reasons for the disagreement;
- Counterclaim for a variety of relief, including but not limited to guardianship, allocation of parenting responsibilities, parenting time, child support, spousal support, or a protection order under the *FLA*; and/or
- Apply to the Court for an order to change existing orders or agreements.

d) Early Resolution Registries

The requirements for filing an application with an Early Resolution Registry include: a. Filing a notice to resolve (Form 1) (see above); b. Providing a copy of notice to all other parties (see above); c. Participating in a needs assessment (Rule 16); d. Completing a parenting education program (Rule 17); e. Participating in at least one consensual dispute resolution (Rule 18).

e) Family Justice Registries

Under Rule 89, at these registries, the parties will be obliged to comply with similar requirements outlined under Early Resolution Registries before the application is heard (unless the parties fall into the exception outlined in Rule 90). The major difference being that the consensual dispute resolution is not required under Family Justice Registries, however, both parties will meet with a Family Justice Counsellor. If a settlement cannot be reached with the assistance of the counsellors, the matter will be referred to court.

For more information, see the website: http:// www2. gov. bc. ca/ gov/ content/ life-events/ divorce/ family-justice/ who-can-help/family-justice-counsellors.

f) Parenting After Separation Program

a. Pursuant to Rule 94 of the Provincial Court (Family) Rules, both parties must complete a Parenting After Separation Program if there is a dispute over issues respecting children. Unless otherwise exempt by a local manager of the Family Justice Services Division of the Ministry of Attorney General. A party must submit a request through Form 20 and exemptions can be granted based on:

- a. The party cannot access the online version,
- b. The parenting education program is not offered in a language in which the party is fluent,
- c. The party cannot complete an online version due to literacy challenges,
- d. The party cannot complete the parenting education program due to a serious medical condition, or
- e. A consent order is filed that resolves all issue involving children

b. The program is a free three-hour session and open to all parents and others (for example, grandparents) where parenting time, guardianship, access, and support issues are involved. For more information, see Do I have to take a Parenting After Separation Course? [3]

g) Trial Preparation Conferences

The parties may be ordered to hold a trial preparation conference during which the judge may rule on any issues not requiring evidence, make an order, discuss the procedure that will be followed at trial, order that certain evidence be produced, or arrange for disclosure of one party's evidence to the other.

If a trial preparation conference is to be held, each party must file and serve a trial readiness statement in Form 22, seven days before the conference is scheduled (Rule 110). If no trial preparation conference is scheduled, then the statement must be submitted a minimum of 30 days prior to the first date of trial.

During this conference, a judge will determine whether a trial will be held and in what manner. Rule 112 provides a fulsome list of matters the judge may give direction about, including evidentiary requirements, how the views of a child will be heard, and whether family violence is at issue.

h) Family Management Conference

This will be the first step in which parties will appear in court if the above steps to find resolution fail. A judge can make an order during this conference whether or not both parties agree, and evidence can be presented. Therefore, it of the upmost importance parties have exhausted all previous opportunities to find a solution and/or prepare for their conference. The meeting is between the relevant parties and a judge and is intended to reach a settlement. More information can be found under Part 4 of the Provincial Court Family Rules within the Court Rules Act.

i) Witnesses

Witnesses are summoned to the Court by subpoena. However, a subpoena is not necessary if the witness is prepared to appear in court voluntarily. If a subpoenaed witness does not appear in court, a warrant may be issued for their arrest. To require the attendance of a witness, a party must complete a subpoena in Form 23, and serve a copy of the subpoena on the witness personally at least seven days before the date the witness is required to appear.

In Provincial (Family) Court, the person who subpoenas the witness is responsible for that witness' reasonable estimated travel expenses.

j) Affidavit Evidence

At trial, evidence may be given orally or by sworn affidavit. Evidence may be given by affidavit at a trial or hearing only if permission is granted by a judge (Rule 13) either on application brought by notice of motion under Rule 12 or under Rule 8(4)(g). This evidence must be in Form 45.

As of May 2021, Rules 145, 112 will replace the above rules under the new Provincial Court Family Rules, and Form 45 will be used in place of Form 17.

k) Notices of Motion

Three copies of a notice of motion (Rule 118) must be filed in the court registry and one copy must be served on the other parties at least seven days before the date for hearing the notice of motion in court when a party wishes:

- An interim order to be made (*FLA* s216);
- To file documents in another registry;
- To have a pre-trial conference;
- To cancel a subpoena;
- For an order to produce documents;
- For an order requiring that paternity tests be taken;
- To use another method of service (no notice required);
- To settle the terms of an order;
- To extend a time limit;
- To change or cancel an *ex parte* order;
- To have a file transferred;
- To have disclosure; or
- To obtain directions on procedures not in the *Provincial (Family) Court Rules*.

NOTE: Different Provincial Court Registries have different procedures regarding evidence at interim hearings. Some allow Affidavits and others require leave to produce and file an Affidavit and prefer viva voce (spoken) evidence. Be sure to check the procedure at the Registry in question before filing materials.

l) Trial

A Provincial (Family) Court trial is an adversarial proceeding. Clients are there to give the judge enough facts so that they can make a decision about the application. However, the judge often gets involved in the presentation of evidence, especially where one party is not represented by counsel.

m) Procedure for Enforcement of Parenting Orders

An Application Form (Form 29) and copy of the parenting order must be filed in the registry.

n) Orders

Orders come into effect on the day that they are made unless the judge orders otherwise. If the party in whose favour the order is made is unrepresented, a clerk must prepare the order. Otherwise the favoured party's lawyer will prepare the order.

If there is a dispute about the terms of an order, a party may apply to a judge to have the dispute settled. Once an order is signed and approved, it must be given to the court registry to be signed by the judge and filed with the Court. Otherwise, the order is not enforceable. At any time, a judge may correct a clerical error in an order.

o) Compliance with Provincial Court Family Rules

If any of the Provincial Court Family Rules (British Columbia) are not complied with, the judge may disregard the incorrect procedure or order, order the hearing or trial to continue as if the respondent were absent, or give any direction they think is fair. Please check the Cumulative B.C. Regulations Bulletin 2023 (https://www.bclaws.gov.bc.ca/civix/document/ id/ regulationbulletin/ regulationbulletin/ 2023cumulati)for any non-consolidated amendments to this regulation that may be in effect. The Provincial Court Family Rules replaced the Provincial Court (Family) rules in May 2021; please review the rules to ensure that you are following the updated version.

References

[1] http://canlii.ca/t/23nk0
[2] http://canlii.ca/t/24lhr
[3] https://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/who-can-help/pas/do-i-have-to-take-pas#:~:text=In%20all%20provincial%20court%20locations,about%20a%20family%20law%20matter

Appendix A: Glossary

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2023.

Alternate Service (Also known as Substitutional Service)

- When an applicant, for a good reason, cannot serve the respondent personally because that person cannot be found or is evading service, the Court may make an order providing for service in some other way (i.e. by letter, advertisement, e-mail, Facebook message, other online methods, or service on a relative).

ANNULMENT

- A judicial pronouncement declaring a marriage invalid. Although it is commonly thought that an annulment has the same effect as if the marriage never took place, it is still possible to divide property under Part 5 of the *Family Relations Act* if proceedings began prior to March 18, 2013.

APPLICANT/CLAIMANT

- A person seeking a court order. In Provincial Court, the parties are called the applicant and the respondent, but they are the claimant and the respondent under the *Family Law Act*, *Family Relations Act* and the *Divorce Act*.

CHILD

- Under the *Divorce Act*: a "'child of the marriage' is a child of two spouses or former spouses who... is under the age of majority and who has not withdrawn from their charge, or is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life".
- Under the *Family Law Act*: "a person who is under 19 years of age or a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessaries of life or withdraw from the charge of their parents or guardians.
- Under the *Adoption Act*: "an unmarried person under the age of 19 years".

DECLARATORY JUDGMENT

- A judgment given by the Court in the form of a declaration.

DEPENDANT

- Anyone who relies on another to support him or her.

FILING

- As in filing pleadings, affidavits, property, and financial statements, etc. in court. A document is filed at the court registry and forms part of the court record.

GUARDIANSHIP

- Involves the right to be consulted on matters relating to the child's upbringing, such as religion, education, extracurricular activities, social environment, etc. The *Family Law Act* states that a person cannot become a child's guardian by agreement except if the person is the child's parent or as provided under the *FLA*, *Adoption Act* or *Child, Family and Community Service Act*. Please note that the definition of guardianship varies between the *FLA* and the *Divorce Act*.

INTERIM ORDER

- An order that is granted prior to the making of a final order. The order is good until a further order of the Court or agreement between the parties is made. The final order will not automatically be the same as the interim order. An interim order to determine parenting time and asset management while the matter is still in dispute is common in many divorce proceedings.

INTERIM EX PARTE ORDER

- A temporary order made when one party is not present by reason of lack of notice. This order is usually only granted in an emergency, such as the kidnapping of a child.

IN LOCO PARENTIS

- Where someone who is not the biological parent of a child steps in and takes over all the duties and responsibilities of a parent for that child. This commonly includes stepparents.

NOTICE OF FAMILY CLAIM

- Documents that must be filed to commence most formal proceedings in the Supreme Court, for divorce and corollary relief.

PARENTING TIME

- Under the Divorce Act: “care, upbringing and any other incident of custody".

PETITIONER/CLAIMANT

- The person who presents a petition to start an action in a court or legislature. There is no longer any such thing as a divorce petition, a Writ of Summons or Statement of Claim. Now there is a specialized Notice of Family Claim and, in particular cases such as adoptions, a Petition to Court.

RESPONDENT

- A person against whom a court order is sought. In Provincial Court, the parties are called the applicant and the respondent, but they are called the claimant and the respondent under the *Supreme Court Family Rules* and the *Divorce Act*.

SERVICE

- The act of delivering a document such as a Notice of Family Claim to a person is known as personal service. There is a distinction between personal service and ordinary service in the *Supreme Court Family Rules*; see Part 6 for details. In the *Provincial Court (Family) Rules*, see Rule 3. Certain documents must be served via personal service, such as originating pleadings including a Notice of Family Claim, an application to change, suspend, or terminate an existing final order, an application to set aside or replace the whole or part of an agreement filed under the Supreme Court Family Rules Rule 2-1(2), an application for an order for contempt, etc. See Rule 6-3(1) for a full list of documents that must be served by way of personal service.

SERVICE EX JURIS

- When the person to be served is outside the province.

SPOUSE

- *Family Law Act*: 3(1): a person is a spouse for the purposes of this Act if the person(a) is married to another person, or (b) has lived with another person in a marriage-like relationship, and: (i) has done so for a continuous period of at least 2 years, (ii) except in Parts 5 [*Property Division*] and 6 [*Pension Division*], has a child with the other person.
- *Divorce Act*: : Previously, “either of two persons who are married to each other”. Note, the definition of “spouse” no longer uses the phrase “means either of two persons who are married to each other” and now includes “former spouse” for specific sections of the Act (6(1), 15.1 to 16.96, 21.1, 25.01 and 25.1). See section 2(1) of the Divorce Act.

- *Supreme Court Family Rules*: either a legally married spouse or "a man or woman not married to each other, who lived together as married spouses for a period of not less than two years" and who made an application under the Act within one year of separation. Same-sex partners are now viewed as common-law spouses provided the marriage-like relationship lasts for at least two years and the application for relief is commenced within one year of separation. The definition of "stepparent" includes a same-sex partner who also qualifies as a same-sex spouse.
- *Wills, Estates and Succession Act*: under s 2, two persons are spouses of each other for the purposes of this Act if they were both alive immediately before the date of death of one of the persons and (a) they were married to each other, or (b) they had lived with each other in a marriage-like relationship for at least 2 years. Two persons cease being spouses of each other for the purposes of this Act if, (a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the *Family Law Act*, to arise, or (b) in the case of a marriage-like relationship, one or both persons terminate the relationship.
- In British Columbia, the common law definition of a spouse evolves alongside the definition of a "marriage-like relationship". The following are considerations from Richardson Estate (Re), 2014 BCSC 2162 which arose as guiding questions in the determination of whether a couple is engaged in a marriage-like relationship, though the approach of the courts has been to treat these as considerations in a holistic determination of marriage-like relationships rather than a comprehensive checklist:
  - (1) Shelter:
    - a. Did the parties live under the same roof?
    - b. What were the sleeping arrangements?
    - c. Did anyone else occupy or share the available accommodation?
  - (2) Sexual and Personal Behaviour:
    - a. Did the parties have sexual relations? If not, why not?
    - b. Did they maintain an attitude of fidelity to each other?
    - c. What were their feelings towards each other?
    - d. Did they communicate on a personal level?
    - e. Did they eat their meals together?
    - f. What, if anything, did they do to assist each other with problems or during illness?
    - g. Did they buy gifts for each other on special occasions?
  - (3) Services: what was the conduct and habit of the parties in relation to
    - a. Preparation of meals,
    - b. Washing and mending clothes,
    - c. Shopping,
    - d. Household maintenance,
    - e. Any other domestic services?
  - (4) Social:
    - a. Did they participate together or separately in neighbourhood and community activities?
    - b. What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?
  - (5) Societal:
    - a. What was the attitude and conduct of the community towards each of them and as a couple?
  - (6) Support (economic):
    - a. What were the financial arrangements between the parties regarding the provision of or contribution towards the necessities of life (food, clothing, shelter, recreation, etc.)?

- b. What were the arrangements concerning the acquisition and ownership of property?
- c. Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

- (7) Children:
  - a. What was the attitude and conduct of the parties concerning children?

Chapter Four - Victims

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Victims of crime require a wide variety of assistance depending on their needs. This chapter will outline the avenues an individual can take to address being a victim of crime.

In 2015, Parliament enacted the *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2 [*CVBR*], which came into force on July 23, 2015. The *CVBR* recognizes that victims of crime and their families deserve to be treated with compassion and respect, and have the right to be considered throughout the criminal justice system. In particular, the *CVBR* acknowledges that victims of crime have the following rights:

- the right to information about the criminal justice system, the services and programs available to victims of crime, and the complaint procedures available to victims when their rights have been infringed or denied
- the right to information about the status of criminal proceedings and information about hearings after the accused is found not criminally responsible on account of mental disorder or is found to be unfit to stand trial
- the right to have their security and privacy considered by the appropriate authorities in the criminal justice system
- the right to protection from intimidation and retaliation
- the right to request testimonial aids
- the right to have the courts consider making a restitution order against the offender
- the right to have a restitution order entered as a civil court judgment that is enforceable against the offender if the amount owing under the restitution order is not paid

The *CVBR* provides victims of crime the right to make a complaint to the relevant federal, provincial, or territorial department, agency, or body if they believe that any of their rights under the Act have been infringed or denied (s 25). It is important to note, however, that the CVBR does not create a civil cause of action for victims (s 28) nor does it grant victims the status of party to criminal proceedings.

> **NOTE:** Sexual harassment is considered a form of gender discrimination under human rights legislation. Canadian human rights law imposes a statutory duty on employers to provide a safe and healthy work environment. Corporate employers are also liable for sexual harassment. For information concerning sexual harassment, consult Chapter 6: Human Rights; and Chapter 9: Employment Law.

II. Governing Legislation

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Legislation and Regulations

Canadian Victims Bill of Rights [1], SC 2015, c 13, s 2

Victims of Crime Act [2], RSBC 1996, c 478

Crime Victim Assistance Act [3], SBC 2001, c 38

Crime Victim Assistance (General) Regulation [4], BC Reg 161/2002

Criminal Code [5], RSC 1985, c C-46

Adult Guardianship Act [6], RSBC 1996, c 6

Immigration and Refugee Protection Act [7], SC 2001, c 27

Family Law Act [8], SBC 2011, c 25

Missing Persons Act [9], SBC 2014, c 2

B. Policy Guidelines

Ministries of Attorney General, Public Safety & Solicitor General, and Children & Family Development, Violence Against Women in Relationships Policy (British Columbia, December 2010). [10]

Criminal Justice Branch, Ministry of Justice Crown Counsel Policy Manual, Vulnerable Victims and Witnesses – Adult, Effective January 15, 2021. [11]

Criminal Justice Branch, Ministry of Justice Crown Counsel Policy Manual, Victims of Crime – Providing Assistance and Information to (1) Effective March 1, 2018 [12]

Criminal Justice Branch, Ministry of Justice Crown Counsel Policy Manual, Victim Services Programs – Providing Information to Victims (2) Effective March 1, 2018 [13]

Criminal Justice Branch, Ministry of Justice Crown Counsel Policy Manual, Sexual Services: Purchase of and Related Offences, Effective March 1, 2018. [14]

References

[1] http://laws-lois.justice.gc.ca/eng/acts/C-23.7/page-1.html
[2] https://www.bclaws.ca/civix/document/id/complete/statreg/96478_01
[3] https://www.bclaws.ca/civix/document/id/complete/statreg/01038_01
[4] https://www.bclaws.ca/civix/document/id/complete/statreg/161_2002
[5] https://laws-lois.justice.gc.ca/eng/acts/c-46/
[6] http://www.bclaws.ca/civix/document/id/lc/statreg/sup00600
[7] https://laws.justice.gc.ca/eng/acts/i-2.5/
[8] https://www.bclaws.ca/civix/document/id/complete/statreg/11025_01
[9] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/14002_01
[10] http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/vs-info-for-professionals/info-resources/vawir.pdf

[11] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/vul-1.pdf
[12] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/vic-1.pdf
[13] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/vic-2.pdf
[14] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/sex-3.pdf

III. Crime Victim Assistance Program

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

The *Crime Victim Assistance Act* [*CVAA*] is the primary piece of legislation in B.C. that governs the Crime Victim Assistance Program (CVAP).

Although the CVAA and the *Criminal Injury Compensation Act*, RSBC 1996, c 85 [*CICA*] are both in force, it is expected that the *CICA* will ultimately be repealed. The transitional provisions of the *CVAA* allow previously adjudicated claims under the old Act to be transferred to the new Act for ongoing administration and for any further reviews.

It is important to remember that, that unlike under the old Act, a person cannot be awarded damages for pain, suffering, mental trauma, etc. under the *CVAA* – although a person can be awarded a variety of benefits, such as counselling, medical expenses, and other services or expenses. The CVAP replaces the Criminal Injury Compensation Program. The Victim Services and Crime Prevention Division of the Ministry of Public Safety and Solicitor General administers this program.

The CVAP has been developed in response to the changing needs of victims and others impacted by violent crime. Benefits are available to victims of crime, their immediate family members, and those who meet the legislation's definition of "witness". One should note that the Program is **not** based on a compensation model, but rather is based on a financial assistance model. This provides eligible claimants with financial support as well as additional services and assistance to aid in their recovery from the physical and psychological effects of their victimization, and to offset the costs of the victimization.

Under the *CVAA*, a victim can still:

- initiate civil proceedings on their own
- make a claim under the Act

If a victim wishes to initiate civil proceedings after making an application under the *CVAA*, the CVAP Director must receive a copy of the notice of civil claim within 10 days of service on the defendant (*CVAA*, s 15(1)). After paying fees and disbursements, any money awarded to the victim in the civil proceedings must go toward paying back the money they received under the *CVAA*.

The fact that an accused has not been criminally charged or has been acquitted of criminal charges is not a bar to commencing civil proceedings as the legal issues and the standard of proof are different. The difficulty with recovering anything directly from the accused is that there is seldom anything to be collected.

Moreover, the procedure for making an application for assistance under the *CVAA* is less complicated than initiating a civil action.

A. The *CVAA* Does Not Apply to All Offences

The *CVAA* applies to offences involving violence, as opposed to property-related offences. The list of offences for which the *CVAA* applies is set out in the Schedule of Offences that can be found in Schedule 1 of the *Crime Victim Assistance (General) Regulations* [1]. The *CVAA* does not apply where the injury or death of the victim occurred:

- in relation to an offence that occurred on or before July 1, 1972 (this is when the *CICA* came into effect);
- as the result of a motor vehicle offence, other than an assault using the motor vehicle;
- out of, and in the course of their employment; for which compensation is payable through workers' compensation; or
- outside of British Columbia.

The *CVAA* does not apply when the applicant is a party to the prescribed offence.

B. Who is Eligible and What They May Receive

1. Victims

Under the *CVAA*, “victim” means a person who is injured or killed as a direct result of a prescribed offence (see above) or when acting as a “good Samaritan”, meaning they were assisting in the arrest of a person or preventing or attempting to prevent a criminal offence.

Victims may be eligible for the following benefits:

- medical or dental services or expenses
- disability aids
- vocational services or expenses
- repair or replacement of damaged or destroyed personal property (glasses, disability aids or clothing only - not stolen property)
- vehicle modification or acquisition for disabled victims
- maintenance for a child born as a result of the prescribed offence
- lost earning capacity (in relation to long term injuries)
- prescription drug expenses
- counselling services or expenses
- protective measures, services or expenses for high-risk victims
- home modification, maintenance or moving expenses
- income support
- transportation and related expenses
- crime scene cleaning

2. Immediate Family Members

Under this Act, “Immediate Family Members” may include the spouse, parent, child, or sibling of a victim who has been injured or died as a result of the prescribed offence. This may also include grandparents or grandchildren if they were financially dependent on the victim.

Immediate family members may be eligible for the following benefits:

- counselling services or expenses
- vocational services or expenses
- income support for dependent family members of a deceased victim
- prescription drug expenses (related to psychological trauma)
- funeral expenses
- transportation and related expenses
- earnings loss due to bereavement leave
- homemaker and child care expenses
- crime scene cleaning

3. Witnesses

"Witness" is a person who, although not necessarily related to the victim, has a strong emotional attachment to the victim and is a witness to the prescribed offence or the immediate aftermath, and subsequently suffers psychological harm.

Witnesses may be eligible for counselling, related prescription drug expenses, transportation expenses to attend counselling, and crime scene cleaning expenses.

C. Application for Benefits

The application forms are available from the CVAP (contact information is at the beginning of the chapter under **Resources**) or from any police department, victim service program, and many community agencies. They are also available on the Victim Services page of the Ministry of Justice website [2].

The CVAP staff will then obtain a police report of the incident (if the matter was reported to the police) and other supporting documents. When describing what happened on the application form, an applicant should give a general but clear statement of the event, and then make reference to the police report for additional details. They should include on the application:

- the date the report was made to the police as well as the police report number if a police report has been made (although a police report is highly advisable it is not mandatory)
- if a police report was not made, information should be provided as to why the incident was not reported and if possible, names of any witnesses, persons to whom a disclosure was made or to whom the incident was reported should be provided
- information about what occurred
- information about any physical or psychological injuries they may have received
- names of any doctors, counsellors, or anyone else that has been seen as a result of the injuries
- original receipts for expenses incurred as a result of the injuries. If the applicant has access to funding from other sources in relation to these expenses (e.g. extended health coverage, personal disability insurance, etc.) the original receipts should be sent to this funding source first and then CVAP will consider paying any remaining outstanding balance.

Minors can submit an application on their own and do **not** require a parent or guardian to apply on their behalf. However, applications for minors may also be submitted by their parent or guardian. A parent or guardian is not required because some parents or guardians may be supportive of the offender or feel that there is a stigma associated with the victimization. In addition, some children do not want to have their parents know of the offence. In cases where the offender is the victim's parent, the Ministry of Children and Family Development may take custody of the victim. In this case, a representative of the Ministry can make an application on behalf of the child.

Depending on the case, the applicant may be interviewed by the adjudicator. In rare circumstances, the applicant may be examined by the Program's consulting medical practitioner if there are questions about the long-term nature of the physical injuries sustained.

The Program will gather additional supporting information from a variety of sources such as medical, hospital, dental, employer reports, and information from CPP, Ministry of Social Development, or other sources relevant to the particular claim.

The decision regarding eligibility and entitlement to benefits involves a two-step process in which the adjudicator first determines whether the person is an eligible applicant and then determines what benefits, if any, will be provided. The decision will be made in writing and will set out the factors considered in making the determination.

D. Limitation Period

Generally, an application must be made within one year of the date of the offence or event. There are exceptions to the one-year time limit, as follows:

- if the offence involves a sexual offence, there is no time limit for making an application (other than that the offence must have occurred on or after July 1, 1972).
- if the applicant is a minor, they have one year from the date they turn 19 to make an application. There is no time limit for the victim if the offence is a sexual offence. However, a minor does not have to wait until they are 19 to make a claim. Minors can submit an application on their own and do not need a parent or guardian to apply on their behalf. A parent or guardian may also submit an application for the minor.

The Director also has discretion to extend the one-year time limit if satisfied that the application could not reasonably have been made within one year from the date of the offence or one year from the date the applicant turned 19.

E. Denials or Reductions in Benefits

Benefits can be denied if:

- the victim does not meet the eligibility criteria;
- the victim was a party to the offence that caused their injury or death; and/or
- they fail to cooperate with law enforcement authorities.

Benefits can be denied or reduced if:

- the benefits are available from another source for a same or similar purpose; and/or
- the applicant contributed to the circumstances giving rise to the injury or death.

F. Payment of Benefits

Payments can be provided directly to the service provider, such as a counsellor, or as reimbursement to the applicant for expenses that were incurred prior to the decision being completed. Some applicants are eligible for income support or lost earning capacity benefits that are provided on a monthly basis.

G. Does the Alleged Offender Have to Be Charged or Convicted?

A police report is **not** required and it is not necessary for an offender to be identified, charged or convicted in order for an applicant to be eligible for benefits. Where the victim has not reported the offence to the police, information from a witness or someone the applicant disclosed the incident to, or a report from a health care professional, counsellor, social worker or other agency may be accepted as supporting evidence of the offence.

H. Co-operation with Law Enforcement

Since the Program is part of the criminal justice system and is a publicly funded program, there is an expectation that the victim will cooperate with the police and Crown counsel in order to hold offenders accountable. There are some exceptions in relation to issues of non-cooperation, but in general, benefits may be denied or reduced if the applicant has no reasonable basis for failing to cooperate with law enforcement.

I. Prior Claims with the Criminal Injury Compensation Program (CICP)

Applications received prior to June 30, 2002 will have been adjudicated under the *CICA* by the CICP. Once a final determination was made under the *CICA*, ongoing administration of the claim transfers to the CVAP and any further reviews for reassessment or reconsideration will be conducted in accordance with the *CVAA*.

If a person was receiving a pension from the CICP, they will remain eligible for an ongoing pension, subject to the same conditions and limitations, except where there is a change in circumstance such that their injury improves or worsens. In cases where there is a change in their condition, their claim will be reviewed under the provisions of the *CVAA*.

J. Types of Reviews

Once an original adjudication is completed, there are two types of reviews available. Under s 12 of the *CVAA*, if there is new information available or there has been a change of circumstance that could affect the applicant's eligibility for benefits, a **reassessment** decision can be completed.

Under s 13 of the *CVAA*, an applicant or their legal representative may request the Director to reconsider a decision. This request must be made in writing, identifying the error made in the decision to be **reconsidered** and be delivered to the Director **within 60 days** from the date the decision was made.

The Director may extend the time limit for making the request for reconsideration if satisfied that a request for reconsideration could not reasonably have been **delivered** within the limitation period. Note that since the legislation restricts consideration to whether or not the request could have been "delivered" within the requisite time period, there are limited grounds for an extension (e.g. interruption of mail service, the applicant moved and the decision was returned to the program for re-direction, etc.).

A reconsideration decision is considered final and conclusive and is not subject to further review except by way of a **judicial review**. The legislation provides that an application for judicial review on a question of law or excess of jurisdiction must be brought not later than **60 days** after the decision is made. The application is made to the provincial or territorial Superior Court (e.g., Supreme Court of British Columbia). Once the application is accepted, the Superior

Court decides whether to set aside the adjudicator's decision and to order for a re-hearing. Winning at the judicial review hearing is not a guaranteed win at the new adjudicative hearing. For more information, consult this [3].

References

[1] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/161_2002#Schedule1/
[2] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/victim-of-crime/financial-assistance-benefits
[3] https://judicialreviewbc.ca/

IV. Avenues to Address Crime

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Pursuing the Matter Through the Criminal System

Apart from the initial report to police, the victim is not responsible for the prosecution of the offender. The burden to conduct the case is on the Crown. The crime is also against the community, and the victim is a witness to this crime. Whether the victim wants to proceed, drop charges, or testify has little bearing on the criminal case.

Police can make an **arrest** if there are reasonable grounds for the police to believe that an offence has been committed, if there is a warrant, or if they find a person committing an offence. If the Crown believes that there is a substantial likelihood of conviction and that it is in the public interest to prosecute, a **charge** is laid. However, if the police decide not to recommend charges and if the explanation is unsatisfactory, the victim may want to discuss the situation with a superior officer. In BC, the police are not responsible for laying charges; they are responsible for completing an incident report or a Report to Crown Counsel if they are recommending charges, but it is up to Crown to determine whether charges will be laid. If Crown has not approved charges and the explanation is not satisfactory, the victim may wish to discuss the matter with a more senior Crown Counsel. If still not satisfied, the victim may write to Regional Crown Counsel. Finally, it may be appropriate to write to the BC Attorney General in Victoria.

A factsheet outlining complaints processes for justice agencies has been developed for victims and is available Complaints Processes for Justice Agencies in British Columbia [1].

For individuals in situations which they believe are dangerous, but are not assaults, sexual assault, or other more common types of violent offences, there are various sections of the *Criminal Code* that may be relevant. If an individual is a victim of one of these offences, it is within their rights to contact the police and ask that charges be laid. The following is a list of some related offences:

- s 264(1): Criminal Harassment; s 264.1: Uttering Threats; s 346: Extortion; s 372(1): False Messages; s 372(2): Indecent Phone Calls; s 372(3): Harassing Phone Calls; s 423: Intimidation; s 425: Offences by Employers (Threats and Intimidation); s 430: Mischief (Damage to Property); and s 810: Breaching a Peace Bond.

If the accused is convicted of an offence, the victim may submit an application for an order that the accused pay an amount by way of compensation for loss or damage to property suffered by the applicant as a result of the commission of an offence. This is known as a restitution order and can be found under s 738 of the *Criminal Code*. The application must be made early enough for the judge to render a decision at the time of sentencing and the loss must be quantifiable.

Restitution amounts must be easily calculable and not in great dispute.

Restitution will not be ordered in all cases where there is monetary loss or damages. The judge must consider whether a restitution order should be included in the sentence and whether all aspects of the sentence reflect the purposes and principles of sentencing and are appropriate given the circumstances of the offence and the particular offender. The ability of the offender to pay a restitution order will be a consideration. Restitution cannot be ordered for pain and suffering or other damages which can only be assessed in the civil courts.

The only aspects of physical injury or psychological harm that can be covered by restitution are those that are quantifiable from a cost perspective and that take place prior to sentencing. For example, these may be:

- medications not covered by insurance
- costs related to medical treatment
- counselling expenses

This makes it distinct from the more general and less quantifiable "pain and suffering."

Although the restitution order is made by a criminal court as part of an offender's sentence, it is similar to a civil order in some respects. If the offender does not pay the amount ordered, the victim can file the order in the civil court and use civil enforcement methods to collect the money. For example, bank accounts may be seized or liens may be placed on property.

1. The Canadian Victims Bill of Rights

This Act recognizes that crime has a harmful impact on victims and on society. This Act lists out the rights of victims, as well as those who are authorized to act on their behalf. Section 3 provides that if the victim has passed away or is otherwise incapable of acting on their own behalf, another person may be able to act on their behalf.

A victim is defined as a person who has suffered physical or emotional harm, property damage, or economic loss as a result of a crime. However, if a person is charged with or convicted of the offence that resulted in the victimization, they are not defined as a victim. The same applies if a person that suffers the harm or loss is found not criminally responsible for the offence that resulted in the victimization due to a mental disorder. Furthermore, s 19(2) stipulates that a victim is entitled to exercise their rights under this Act only if they are present in Canada or if they are a Canadian citizen or permanent resident.

Adhering to this definition, victims of crime are able to exercise their rights under this Act while an offence is being investigated or prosecuted and while the offender is going through the corrections or conditional release process. The offence committed against the victim must fall under the *Criminal Code*, the *Youth Criminal Justice Act*, or the *Crimes Against Humanity and War Crimes Act*. The rights also apply to some offences under the *Controlled Drugs and Substances Act* and parts of the *Immigration and Refugee Protection Act*.

The rights apply to offences which occur in Canada. They also apply if the offence is investigated and prosecuted in Canada or if the offender is serving a sentence or conditional release in Canada.

Victims have the right to:

- request information
- have their security and privacy considered by the appropriate authorities, be protected by the criminal justice system
- participate by presenting victim impact statements
- request that their identity be protected
- have the court consider making a restitution order against the offender
- have a restitution order entered as a civil court judgment that is enforceable against the offender

A judge can order restitution for financial losses related to:

- damaged or lost property due to the crime
- physical injury or psychological harm due to the crime
- physical injury due to the arrest or attempted arrest of the offender
- costs for temporary housing, food, childcare and transportation due to moving out of the offender's household (this only applies if a victim has moved because they had been physically harmed or threatened with physical harm due to the offence, arrest, or attempted arrest of the offender)
- costs that victims of identity theft had to pay to re-establish their identity, and to correct their credit history and their credit rating

No cause of action, right to damages, or right to appeal any decision or order arises from an infringement or denial of a right under this Act.

If not satisfied by the response of the federal department, agency, or body, victims have the right to file a complaint with the relevant authority. Victims also have the right to file a complaint if they are of the opinion that their rights under this Act have been infringed or denied by a provincial or territorial department. All federal departments and agencies that have responsibilities under this Act need to provide a way for victims to file complaints. Complaints against a provincial or territorial agency, like police or victim services, will be addressed through the appropriate provincial or territorial laws.

Additional information can be found at Victims' Roles and Rights in the Criminal Justice System - Canada.ca [2].

2. Court Orientation, Preparation and Accompaniment

If a charge is laid, the victim may be asked to testify as a witness, or the victim may want to deliver a victim impact statement. They can receive help from Victim Service Workers, who can explain their rights, the type of support available and their role in the criminal justice process. Victim Service Workers can also help with CVAP applications, and provide victims with information about subpoenas, pre-trial meetings with Crown, the court process, as well as court accompaniment for victims who attend court. Victim impact statements allow the judge to determine whether a restitution order is required if the victim experiences a financial loss and any information on the statement may be used to impact the sentencing process for the offender. For more information, including guides for both child and adult witnesses, and on victim impact statements, is available at Court Support for Victims of Crime - gov.bc.ca [3].

Under s 486 of the *Criminal Code*, witnesses can receive testimonial accommodations such as testifying behind a screen, on video camera so as to not see the offender or in a closed court upon application. The Crown counsel in charge of prosecuting the offence will generally ask the victim whether or not they would like testimonial accommodation but victims can also speak with the Crown counsel to discuss the matter.

Victims can also request language assistance, including visual language assistance, if they are required to testify in court. The Ministry of Justice provides court interpreters to translate criminal and family law court proceedings in a variety of different languages. Additional language support for other court-related activities is available through outside organizations. Individuals can find a full list of language assistance services available at Translation Services - gov.bc.ca [4].

3. Things victims and witnesses should know about participating in a criminal trial

As stated, there are many resources available to witnesses to assist them during the court process and mitigate stress that arises from testifying. However, prior to agreeing to be a witness in a criminal case, a person must understand that the process may be an intrusive and uncomfortable experience. This is particularly relevant to victims, who in the process of testifying may feel retraumatized and contribute to feelings of revictimization.

All witnesses are generally compellable

Once a person agrees to provide evidence or disclose that they were involved in or witnessed a crime, a subpoena can be issued compelling them to attend court on a specific date to give evidence. Individuals who have been served with a subpoena and fail to show up to court, or later refuse to give evidence at trial, may be charged with contempt. Further, if a person provides false evidence in court, they can be charged with perjury.

Cross-examination can be stressful

Cross-examination can be a stressful experience for a witness. Defence counsel will likely challenge a witness' evidence in an attempt to show that they are not a credible witness or that the evidence they are giving is unreliable. Defence counsel will generally do this by showing: the witness's testimony is inconsistent with other independent evidence; they have made prior inconsistent statements; or their testimony has changed during direct examination and cross-examination. Defence counsel may also attempt to show that the witness has a motive to lie or mislead the court, which may include cross-examining them on any bias or prejudice they have towards the accused. Even if a witness appears credible, the defence may attempt to show that their evidence is unreliable because they are mistaken about what they saw.

Discreditable conduct of a witness can be used to challenge their credibility

S 12 of the *Canadian Evidence Act* states "a witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after a trial on an indictment." In *R v Cullen*, 52 CCC (3d) 459 [5] the Ontario Court of Appeal stated at para 9 that, "for the purpose of challenging a witness' credibility, cross-examination is permissible to demonstrate that a witness has been involved in discreditable conduct." Therefore, with the exception of the accused a witness can not only be cross-examined on any criminal record that they have, but they can also be cross-examined on the details of those convictions, any pending charges, acquittals, or any other discreditable conduct which they may not have been charged with. For example, the defence may hire a private investigator to follow a witness to gather evidence on their conduct. If the witness was participating in discerptible conduct, the defence could use this evidence during a cross-examination as a means of discrediting the witness in court.

An accused can make an application to have third-party records of witnesses such as counselling records disclosed

The defence can make an application to a trial judge for the disclosure of third-party records, which include medical, psychiatric, therapeutic, and counselling records. Although the burden is higher for sexual offences, under s 278.3 of the *Criminal Code*, the defence can make an application to a trial judge for the disclosure of such records. This also includes personal records such as a victim's journal or diary. The disclosure of these records can be traumatizing for a witness or victim, particularly victims of a sexual offence.

The process the court undergoes when deciding whether to admit the records involves "the balancing of the rights of the accused under ss 7 and 11 of the *Charter* with the privacy rights of the complainant." Unlike documents which the prosecution has in their possession, the burden is on the accused to prove that third-party records should be disclosed because the information is not part of the prosecution's case, and third-parties have no obligation to assist the defence. However, under s 278.5 if the trial judge is satisfied that the defence's application is made in accordance with s 278.3, and that they have established that the record is likely relevant to an issue at trial or to the competence of the witness to

testify, and production of the record is necessary in the interests of justice, then they may order the third-party to produce the records. The trial judge will then review the records and may order their disclosure to the accused under s 278.7.

4. Victim Travel Fund

The Victim Travel Fund provides funding to a maximum of $3 000 per family/victim to help attend and participate in interviews, hearings, and other justice-related proceedings. Funding is available to victims who have suffered significant physical or emotional trauma as a result of a serious criminal offence, and victims who require a support person to attend a proceeding. Funding is also available to immediate family members of deceased victims (e.g., parents, spouse, children, and siblings). Eligible expenses may include meals, accommodation and the most economical form of travel. Applicants for the Victim Travel Fund must also meet the following criteria:

- make the applications prior to the justice proceeding
- to be eligible, the applicant has to travel more than 100 km one way to attend the justice proceeding
- the justice proceeding must take place in BC and the proceeding is expected to impact the outcome, disposition or results of the proceeding or hearing (this excludes provincial parole and federal hearings)
- travel and related expenses are not covered by Crown counsel, the CVAP, or any other source

For more information or to request a Victim Travel Fund application form, call the Victim Safety Unit at 604-660-0316 or toll free at 1-877-315-8822, or e-mail vsusg@gov.bc.ca.

Furthermore, you may contact VictimLinkBC by phone at 604-875-0885 or email victimlinkbc@bc211.ca to ask to be connected to a victim service worker. A victim service worker may be able to help you apply for travel assistance.

5. Parole Board of Canada Hearings

If a conviction occurs, victims may still be affected later on by decisions to release the offender(s). **Victims who wish to attend Parole Board of Canada (PBC) hearings may apply for financial assistance**, including for travel, hotel, and meal expenses. In order to be eligible, victims must have registered with Correctional Service Canada (CSC). For information on registering, visit Registering as a Victim of Crime -csc-scc.gc.ca [6].

Support persons may also be eligible for funding. An eligible support person must be an adult over the age of 18 years of age who is chosen by the registered victim. Support persons may include relatives, friends or victim service workers. Support persons who wish to attend a PBC hearing with a registered victim must submit a written request to the office of the PBC in the region where the hearing will take place, once the victim has received notice from CSC/PBC of potential hearing dates. A security screening will be conducted for all visitors before they are allowed into a penitentiary. If the support person is accompanying the victim to the hearing, but does not intend to go to the hearing, then a security screening is not required. Please note, however, that if the support person should need to enter the penitentiary, the security screening would be required.

Please note that this is only available for federally supervised offenders and that applications should be submitted at least 30 days before the hearing date.

For more information, visit Attending Parole Board of Canada Hearings - justice.gc.ca [7].

B. Pursuing the Matter in a Civil (Tort) Action

Criminal courts determine whether or not the accused is guilty, and if so, what would be the appropriate punishment. However, the criminal court will do little in the way of providing compensation for the victim, other than possibly making a restitution order. In this regard, a victim may sue an alleged offender regardless of the offender's verdict at a criminal trial. Receiving financial compensation from the offender for the damages caused is one of the reasons why survivors of violence sue in civil court. Examples of applicable torts include assault, battery, trespass to the person, breach of privacy, intentional or negligent infliction of nervous shock or emotional distress, false imprisonment; trespass to land, intimidation (usually a business tort, but applicable in some cases), and defamation.

MacKay v. Buelow (1995), 11 RFL (4th) 403 [8] provides a helpful illustration of the applicability of tort law in this area. The defendant (the plaintiff's ex-husband) harassed and intimidated the plaintiff by continuously calling her, leaving notes at her home, threatening to kidnap their daughter, throwing things at the plaintiff, hanging a used condom in her home, stalking her, directly and indirectly threatening to kill her, videotaping her through her bathroom window, advising third parties about nude movies of the plaintiff, and continuously harassing her friends and colleagues. The court held that the conduct of the defendant was exceptionally outrageous and awarded the plaintiff damages based on the torts of trespass to the person, breach of privacy, and intentional infliction of emotional distress.

Pursuing the matter through the criminal justice system is best done before any civil action is taken, given that:

- in a criminal case, the investigation is conducted by the police who are public servants, which saves the victim both time and expense in gathering witnesses and other evidence;
- a criminal conviction is convincing evidence in itself; and
- in a civil suit, the opposing side has more access to the victim's personal history. If the civil suit is pursued concurrently or before the criminal trial, the information brought up in the former may leak into the latter. Furthermore, the accused could try to argue that the victim is pursuing the criminal trial only because they want to gain as much as possible in the civil action.

Previous criminal convictions are admissible in subsequent civil proceedings. While a verdict on a criminal trial has no impact on a verdict on the civil trial of the same matter, it is inevitable that a conviction gives rise to a legal presumption of wrongdoing. Moreover, the material facts underlying the conviction are presumed correct unless proven otherwise. In this sense, a defendant's criminal conviction renders the plaintiff's case in a civil litigation much stronger. Even if the accused was acquitted in a criminal matter, the plaintiff's case would be unaffected because the burden of proof in a civil case is lower than a criminal case.

The burden of proof in a civil trial is lower than in a criminal trial, but the evidence must still be clear and convincing. As a plaintiff in a civil action, a survivor of physical or sexual assault must prove on a **balance of probabilities** that the assault was perpetrated by the defendant named in the action, and that this assault resulted in damages. This is a less stringent test than that placed upon the Crown in criminal proceedings, where the case must be established **beyond a reasonable doubt**. Thus, it is possible for a victim to win a civil suit even in the event there has been a previous acquittal in criminal proceedings.

A civil suit may also give the victim access to compensation from third parties and institutional defendants (e.g. government institutions, foster homes, and residential schools) upon whom liability may be imposed. This is beneficial where the individual perpetrator has few assets or none at all.

Pursuant to the *Limitation Act*, RSBC, c 266, in most cases, there is a **two-year limitation** on initiating a claim in tort (s 6). However, there are **exceptions** to this rule. In BC, there is an exemption to the two-year time limit for cases of sexual assault (s 3(1)(j)). The *Limitation Act* also allows for an exemption for physical assault claims for minors and for adults who were living in a personal or dependent relationship with their abuser (s 3(1)(k)). The rationale for these exemptions

is that those victims may not be expected to recognize the wrongness of what has happened to them and have the ability to bring a claim within a limitation period.

Bringing a civil action may be a long process and the plaintiff should consider the personal toll it may impose on them. Some victims who go through this process feel as though their lives are on hold and are unable to get on with other parts of their lives. Remember, however, that in many cases the parties will settle, although the outcomes of negotiations are extremely difficult to predict. Some people may benefit from counselling while pursuing a civil action.

Victims should be referred to a lawyer who is experienced with this area of law. There may be issues and circumstances in each particular case that make it difficult to assess the probability of success. Some lawyers may be willing to take on a case on a contingency fee basis, which means that they will get a certain percentage of any damages, if they are awarded.

> **NOTE:** Others must not take control of the victim's decisions. A victim should be informed of their options and the potential consequences of each course of action in order to allow them to give informed instructions to counsel.

References

[1] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/bc-criminal-justice-system/if-victim/publications/complaints-process-justice-agencies.pdf
[2] https://www.canada.ca/en/services/policing/victims/rolerights.html
[3] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/the-court-case/court-support
[4] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/services-and-resources/translation-services
[5] https://www.canlii.org/en/on/onca/doc/1989/1989canlii7241/1989canlii7241.html
[6] https://www.csc-scc.gc.ca/victims/003006-0001-eng.shtml
[7] http://canada.justice.gc.ca/eng/fund-fina/cj-jp/fund-fond/attend-audience.html
[8] https://www.canlii.org/en/on/oncj/doc/1995/1995canlii17903/1995canlii17903.html?autocompleteStr=%09MacKay%20v%20Buelow%20(1995)%2C%2011%20RFL%20(4th)%20403%20&autocompletePos=1

V. Victims of Sexual Assault

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 3, 2023.

A. What is Sexual Assault?

Any sexual contact which occurs without the consent of all the people involved is sexual assault. Sexual assault ranges from unwanted touching of a sexual nature to forced sexual intercourse. It can occur anywhere – at school, at work, in a public place or at home. Sexual assault can occur between strangers or those who know each other well, including those who are married. Sexual assault is most often committed by those known to the victim, such as family members, acquaintances or people in positions of trust or authority over the victim.

If an individual has been in any of the following situations, they may have been a victim of sexual assault. This list is not exhaustive – many forms of unwanted or coerced sexualised physical contact may meet the Criminal Code definition of sexual assault:

- They have been physically touched in a sexual manner by another person which was not wanted
- Their words or actions indicated that they did not want to have or continue sexual contact, but the sexual contact continued
- They submitted to sexual contact because someone threatened or used force against them
- They were not able to give consent to sexual contact (for example, they were drugged, impaired, or have a disability)
- someone persuaded them to have sexual contact by using their position of authority or power over you

Legal age of consent The legal age of consent to sexual activity is 16. However, there are “close in age” exceptions for youth as young as 12 years old. A 12 or 13-year-old may consent to sexual activity with a partner who is less than **two years** older than them given that there is no relationship of trust, authority, dependency, or other exploitation. Similarly, a 14 or 15-year-old may consent to sexual activity with a partner who is less than **five years** older than them if there is no relationship of trust, authority, dependency, or other exploitation. Then, the following table can be tabulated:

Legal Age of Consent

		Youth's Age				
		12	13	14	15	16
Partner's Age	12	✓	✓	✓	x	x
	13	✓	✓	✓	✓	x
	14	✓	✓	✓	✓	✓
	15	x	✓	✓	✓	✓
	16	x	x	✓	✓	✓
	17	x	x	✓	✓	✓
	18	x	x	✓	✓	✓
	19	x	x	✓	✓	✓
	20	x	x	x	✓	✓
	21	x	x	x	x	✓
	22	x	x	x	x	✓

When a child is at risk or is being sexually assaulted, it is your legal duty to report the crime.

B. Legal Representation for Sexual Assault Victims

Criminal Code s. 278.4(2.1) allows for a sexual assault victim to have their own legal counsel, where the accused is attempting to get access to third-party records. This is an exception to the general rule that victims of crime are not entitled to legal representation. The defence can apply to have the court to compel a third party to produce records if they are "likely relevant." Examples of third-party records are notes taken by a counsellor, therapist, psychologist, or doctor, hospital records, records from child welfare or social services agency, records from an employer or school, and victim's personal journals. These third-party records are personal documents that have a reasonable expectation of privacy. An accused may want to apply to have these records admitted as evidence in a case, where the victim can then have a lawyer represent them to decide whether the accused will get the third-party record. A hearing will be held, where the victim is able to have a lawyer make submissions as to why the accused should not get the record. Victims are allowed to have a lawyer, but getting counsel can be a challenge, especially when the victim cannot afford to pay for one themselves. Legal aid or victim services programs can be helpful when looking for legal representation.

C. Help for Victims of Sexual Assault

If a person is, or suspects someone else is, the victim of a sexual assault, they should ensure they are in a safe place and then call the police. If they are in immediate danger or need emergency medical attention, it is important to call 911 immediately.

If a person does not want to speak to police, there are other resources available. VictimLink BC is available at 1-800-563-0808 and can provide anonymous support and referrals to local victim service programs. Nurses are available through Healthlink BC and can be reached 24/7 by calling 811. Further resources and information regarding sexual assault is available at VictimsInfo.ca [1]

If the sexual assault involves a child, the Ministry of Children and Family Development should be notified through their 24-hour emergency abuse line at 1-800-663-9122. See also: Reporting Child Abuse in BC – gov.bc.ca [2]

Even if a person does not think that they need immediate medical attention, they should still go to the hospital. If a person has been sexually assaulted within the last 7 days, there is a special team of nurses and/or doctors at the hospital who can help. A person may need medical attention, even if they do not have visible signs of injury.

Further information on sexual assault and the steps to take is available at Help starts here - Sexual Assault [3]

D. Help for Students, Faculty and Staff of Post-Secondary Institutions

The *Sexual Violence and Misconduct Policy Act* requires all public post-secondary institutions in B.C. to have a sexual violence and misconduct policy. As such, each public college and university in British Columbia will have their own sexual assault resources and information on where to access help. Resources pertaining to each post-secondary institution can be found at Safe Campuses BC [4]

References

[1] https://www.victimsinfo.ca/en/services/specific-crimes/sexual-assault
[2] https://www2.gov.bc.ca/gov/content/safety/public-safety/protecting-children/reporting-child-abuse
[3] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/bc-criminal-justice-system/if-victim/publications/hsh-english-sexual-assault.pdf
[4] https://www2.gov.bc.ca/gov/content/safe-campuses-bc

VI. Victims of Relationship Violence

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 4, 2023.

Violence within relationships can take many different forms based on the relationship between the victim and the abuser. Violence can occur to anyone within a family or intimate relationship, and as such falls within the broad spheres of family violence, domestic violence (DV) and intimate partner violence (IPV). Each classification, despite having distinct definitions, overlap in some form and are often used interchangeably given the specific circumstances. The forms of violence equally vary; a person within a relationship can be a victim of one of more forms of violence or abuse including: physical abuse, sexual abuse, emotional abuse, financial abuse, and neglect. Further, the age of victims can vary to include elder abuse and child abuse and neglect within the scope of family violence.

The *Criminal Code* does not refer to specific family violence or intimate partner violence offences; however, general application offences contained in the *Criminal Code* prohibit these forms of violence. Relevant criminal offences can be found here: Family Violence Laws - justice.gc.ca [1]

Information pertaining to family violence can be found at About Family Violence - justice.gc.ca [2] and information pertaining specifically to intimate partner violence can be found at Intimate partner violence - Women and Gender Equality Canada [3].

A. BC Government Policy

The BC Government has developed a policy for police, Crown, corrections, child welfare workers and other service providers who deal with people experiencing violence in relationships. *This is the Violence Against Women in Relationships Policy* (see Section II.2). The Policy can be accessed online at Violence Against Women in Relationships (VAWIR) Policy - gov.bc.ca [4].

1. Arrest and Charge

It is police policy that calls relating to violence within a relationship/domestic violence are to be given priority for assessment and response. This includes all reported breaches of No Contact Orders, Peace Bonds, or civil protection orders to ensure the safety of victims who may be at risk.

It is also police policy that if the officer has grounds to believe that an offence has occurred or may reoccur, the officer is to arrest the alleged offender. If the alleged offender left the scene the police will make immediate efforts to locate and arrest the suspect where grounds exist. They will also complete a Report to Crown Counsel with a request for an arrest warrant.

Police will assess the risk of violence the alleged offender presents and determine whether to release the alleged offender immediately, under conditions, or to hold the alleged offender in custody in order to have a bail hearing.

If the alleged offender is released from custody, the police will normally make every effort to notify the victim and explain any conditions prior to the accused's release.

Where there is evidence that an offence occurred, the police will submit a Report to Crown Counsel recommending a charge even if no injury has occurred and regardless of the victim's desire or unwillingness to testify. It is the responsibility of Crown Counsel and the police to pursue criminal charges, not the victims. **Victims do not need to provide a written statement**; however, the police may encourage the victim to do so.

Police should also refer all victims to victim services and arrange safe transportation to transition homes or safe shelters. In power-based crimes, such as sexual assault, police will refer victims to a community-based victim services worker or program if the program exists in the community. Please see the Victim Services Directory referred to in this chapter for a list of programs in British Columbia.

2. Requirements of Offender Diversion

The court is aware that the accused may exert influence upon the victim that affects the court process. To mitigate this, charges will not to be stayed before trial where there are threats that may affect the victim's willingness to testify, there is a history of violence, or where the victim refused to meet with Crown Counsel to assess the situation.

Similarly, diversion from the criminal justice system (known as alternative measures) in cases of violence in relationships is generally considered inappropriate. It is Crown policy that the use of alternative measures must not conflict with the protection of society. In exceptional circumstances, diversion may be considered, but only if there is no significant physical injury, there is no history of spousal violence, and there is no reason to conclude that there is a significant risk of further offences.

B. Court Orders

There are various orders available to protect a victim of violence in a relationship. Guides on both peace bonds and protection orders in English, French, Punjabi, and Chinese can be found at Protection Order Registry - gov.bc.ca [5].

1. Criminal Court Order

A peace bond, which is available under s 810 of the Criminal Code, is an order made by a judge that requires the defendant to keep the peace. This is a limited remedy that protects a victim for a period of up to 12 months. A victim seeking a peace bond should go to the Justice of the Peace at the Provincial Court Office with the police report (or at least, the report number) and lay an Information. The victim can go without a police report, but the Justice of the Peace will most likely ask for one. The victim does not need to show that they have been injured, only that they have a reasonable fear of injury to themselves or damage to their property at the hands of the defendant. This reasonable fear should be present or ongoing. Previous threats or assaults should be brought up.

A victim should be advised to ask for a no-contact order as a condition of the peace bond. A no-contact order can be varied to be permissible contact, such that a defendant and a victim can have contact up until the victim withdraws consent. Contact in this context means both direct and indirect communication, such as phone calls, emails, messages, and visits to the victim's workplace. The Justice of the Peace should also be informed if the defendant possesses or has access to firearms. Note that the police, and anyone else concerned, may also apply for a peace bond. Consult Victims Right's in Canada – No-Contact Orders - justice.gc.ca [6] for more information on no-contact orders. If the Information is accepted, a hearing date is set; approximately two weeks later. The victim will most likely be subpoenaed as a witness for the Crown. Victims should be aware that failure to appear is an offence. If the victim does not want to proceed with the Peace Bond and Crown Counsel does, the victim may have to show up to explain their decision to the judge.

A breach of the Peace Bond is a punishable crime, with a maximum penalty of $5 000 and/or six months in jail on summary conviction, or incarceration for up to four years on indictment. The actual Peace Bond, however, is not considered a criminal charge.

2. Civil or Family Court Orders

A number of orders are available pursuant to the *Family Law Act*, SBC 2011, c 25 [*FLA*]. A victim or their representative can bring an application in Provincial (Family) Court or in the British Columbia Supreme Court. Orders involving property such as exclusive use of the family home can only be obtained in Supreme Court. **However, in cases where there are urgent safety concerns, the police should be contacted before pursuing the matter in Family Court as the police will respond immediately, and the family court process takes time.**

a) Protection Orders (*FLA* Part 9)

A protection order limits contact and communication between family members where there is a safety risk. It is designed to protect "at-risk family members," defined as people whose safety and security is or is likely at risk from family violence carried out by a family member. An application for a protection order may be made by a person claiming to be an at-risk family member, by a person on behalf of an at-risk family member, or on the court's own initiative. A protection order may restrain a family member from contacting or communicating with an at-risk family member and from attending at or entering a place regularly attended by the at-risk family member (*FLA*, s 183). An application for a protection order may be made without notice, but in such applications, the court still has the option to set aside the order or change it in some respect on application by the party against whom the order is made (*FLA*, s 186). Unless otherwise stated, a protection order expires one year after the date it is made. Breach of a protection order under the FLA is a criminal offence.

b) Temporary Orders Respecting Family Residence (FLA s 90)

This order is only available from the BC Supreme Court. It gives the victim the legal right to occupy the home exclusive of the other party, or to possess and use specified personal property stored at the family residence, including to the exclusion of the other party. The victim and the other party must be spouses, meaning they must be married or have been living in a marriage-like relationship and have done so for a continuous period of at least two years, or have a child together. This order lasts as long as they **both** have a legal right to be on the property. A court does not have jurisdiction to grant this order where the family home is situated on an Indian reserve.

C. A Note on Services That May Be Harmful to Victims' Interests

Not all services that claim to be helpful or protective of victims' interests really are. For instance, some advocacy organizations have noted that some services are not healthy for women experiencing violence. Marriage counselling, couples' therapy, and mediation promote reconciliation but may not address underlying issues such as power imbalance and disrespect towards women. Some programs for offenders may not challenge the man's beliefs and attitudes towards women. However, it must also be noted that an abuser may be any gender and that the victim may also be any gender. Victims and their advocates should always make sure that the resources and services that they are considering will be beneficial to victims' interests. **An individual who is a victim of violence should also be advised that with regard to Compulsory Family Mediation, they can apply to not participate.** The victim should be advised to consult a lawyer.

References

[1] https://www.justice.gc.ca/eng/cj-jp/fv-vf/laws-lois.html
[2] https://www.justice.gc.ca/eng/cj-jp/fv-vf/about-apropos.html
[3] https://women-gender-equality.canada.ca/en/gender-based-violence/intimate-partner-violence.html#law
[4] http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/vs-info-for-professionals/info-resources/vawir.pdf
[5] https://www2.gov.bc.ca/gov/content/safety/crime-prevention/protection-order-registry
[6] https://www.justice.gc.ca/eng/cj-jp/victims-victimes/factsheets-fiches/orders-ordonnances.html

VII. Seniors or Those with Disabilities

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 4, 2023.

Abuse and neglect of seniors and adults with disabilities occur when a family member, friend, caregiver or other person financially, physically, or emotionally abuses or neglects such an individual. Elder Abuse and abuse of adults with disabilities include physical, mental or emotional harm, and damage or loss in respect of financial affairs (i.e., financial abuse). Examples include intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy, denial of access to visitors, and neglect. Many types of abuse, and some types of neglect, are criminal offences.

All types of abuse and neglect are harmful. Such abuse can occur because of lack of knowledge or understanding by a caregiver of an adult's situation, or it can be very deliberate. The person causing the harm may have mental health difficulties, alcohol or substance use, or more complex psychosocial issues. Further, individuals who have suffered years of spousal abuse may also be susceptible to further neglect and abuse, such as financial abuse, by others.

Abuse or neglect of seniors and adults with disabilities is often hidden behind inquiries about benefits, services, and wills and estates. For instance, such an individual may inquire about housing benefits available to them. A little probing may uncover that the reason for wanting housing benefits is to escape an abusive relative who has taken control of their house. Individuals should watch for subtle indications of abuse and neglect.

Some older adults may be embarrassed to reveal abuse or neglect, particularly if a family member is involved. Some may not know how to get help, or may be unsure if what they are experiencing is considered abuse or neglect. Some may worry about repercussions on their family member or caregiver. They may also fear retaliation from the person who harmed them. Or, they may fear losing services they need, losing their money, having to move, or breaking up the family. They may worry about not being believed.

The information below pertains to the many avenues victims or those acting in their best interests may chose to pursue, as well as lists available resources. Further information on how to address seniors' abuse may also be found in Chapter 15: Adult Guardianship and Substitute Decision-Making.

A. Ending the Abuse or Neglect

Upon discovering a case of abuse or neglect of a senior or individual with disabilities, clinicians should provide information about what kind of help is available. Police respond to reports of persons in immediate danger or possible criminal offences. They investigate offences and can provide information about other agencies that may be able to help. Victim Service programs are located in community agencies or police stations. They provide emotional support, justice system information, safety planning, referrals to counselling and other services, help in accessing crime victim assistance

benefits, and support to victims going to court.

Please see the end of the section for resources.

Part 3 of the *Adult Guardianship Act*, RSBC 1996, c 6 [*AGA*], has special provisions on abuse and neglect. These include physical, sexual, emotional, and financial forms of abuse/neglect. These provisions are aimed at adults unable to get help because of a physical restraint, a physical disability, or a condition that affects their ability to make decisions about the abuse or neglect.

Under Part 3 of the Act, Designated Agencies respond to reports of abuse or neglect involving adults in these circumstances and notify police if a criminal offence appears to have been committed. Designated Agencies under the *Adult Guardianship Act* include the five Regional Health Authorities, Providence Health Care Society, and Community Living BC. They can address a range of health and safety issues and help in informal or formal ways. Formal tools include gaining access to the adult in emergencies, obtaining orders or warrants, obtaining short and long-term restraining orders, and on occasion obtaining support and assistance court orders.

Designated Agencies often work with the Public Guardian and Trustee (PGT) in responding to abuse/neglect situations. Under the *Public Guardian and Trustee Act*, the PGT investigates reports of financial abuse or neglect, can restrict access to assets in emergencies where there is concern an adult may be mentally incapable, and may provide financial management services for adults incapable of managing their own affairs. The PGT makes referrals to Designated Agencies if there are concerns about physical risk or harm to the vulnerable adult. The link to the PGT's Decision Tree can be found at Public Guardian and Trustee of British Columbia | Reports and Publications [1].

For further information on supporting victims of elder abuse, see Understanding and Responding to Elder Abuse - gov.bc.ca [2].

Other BC laws aiming to protect adults in financial and health-care matters include the *Power of Attorney Act*, the *Representation Agreement Act*, and the *Health Care (Consent) and Care Facility (Admission) Act*.

Remember that the victim may depend on their alleged abuser for financial or physical assistance. If the victim wants to make a report that may lead to the laying of information, moving to a transition house, or getting a protection order (see **Section VII.B.3: Protection Order**, below), they may need to find alternate arrangements for financial or physical support that the abuser may have been providing. Some of the financial and social services available to the victim are listed below.

B. Legal Remedies

1. Criminal Charges

No BC legislation specifically addresses abuse of elders and adults with disabilities, but the following *Criminal Code* sections may apply:

- s 265: assault;
- s 215(1)(c): duty of persons to provide necessaries to a person under their charge;

Financial abuse offences:

- s 322: theft;
- s 331: theft by person holding power of attorney; and
- s 332: misappropriation of money held under direction.

Remember that a victim may be reluctant to make a report that may lead to the laying of an Information against a family member.

2. Peace Bond

Pursuant to ss 810 and 811 of the *Criminal Code*, a peace bond requires that the abusive person "keep the peace" for up to 12 months or face a possible prison sentence.

3. Protection Order

A protection order (formerly referred to as a restraining order) restricts contact between the abused and abuser and is available pursuant to s 183 of the *FLA*, but only if the abused is a spouse or family member that lives with the abuser. The *FLA* defines "spouse" as someone who is married to another person or has lived with another person in a marriage-like relationship and has done so for a continuous period of two years or has children with another person. The Act defines a "family member," with respect to a person, as that person's spouse or former spouse; a person with whom the person is living, or has lived, in a marriage-like relationship; a parent or guardian of the person's child; a person who lives with and is related to the person; or the person's child.

A restraining order can also be obtained under s 56(3)(c) of the *AGA*. It is necessary to note the defendant's date of birth when applying for the restraining order so that it is not placed against the wrong individual. Applicants should remember to include a Police Enforcement Clause so that the police are required to act on breaches. Once the order is in place, it is registered with Protection Order Registry, which is accessible by police.

4. Conditional Release or Probation

Another way to protect the victim is to contact the Crown if the abuser has been charged and, on a finding of guilt, to get conditions placed on the abuser's release or probation order restricting contact between the abuser and the victim. Keep in mind that the burden of proof is higher in criminal matters (i.e., beyond a reasonable doubt) than civil matters (i.e., on a balance of probabilities), including when proving a breach of conditions.

C. Resources and Remedies for Seniors

BC has a Parliamentary Secretary to the Minister of Health for Seniors, a Seniors' Services Branch and an Office of the Seniors Advocate.

The following list represents some non-legal solutions that may assist the abused person.

1. General Support

If an adult is in need of health or home care related services, or there are concerns about the adult's ability to seek support or their condition is impacting their ability to make decisions, the nearest health unit should be the primary point of contact. A trained nurse or social worker can investigate the situation, present options to the victim, and place them in contact with necessary assistance.

Seniors First BC [3]

Provides information, legal advocacy, support and referrals to older adults across BC who are dealing with issues affecting their well-being or rights. In addition, they assist those concerned about the welfare of older adults.

Seniors Abuse & Information Line [4]

The Seniors Abuse and Information Line (SAIL) is a confidential information line for older adults and those who care about them to speak to a professional intake worker about abuse, mistreatment and any issues that impact the health and well-being of older adults in BC.

SAIL is available on weekdays 8 am to 8 pm and weekends 10 am to 5:30 pm. If calling from the Lower Mainland, call 604-437-1940. For callers located in the rest of BC or Canada call 1-866-437-1940.

Disability Alliance BC [5]

Disability Alliance BC's mission is to support people, with all disabilities, to live with dignity, independence and as equal and full participants in the community. They champion issues impacting the lives of people with disabilities through their direct services, community partnerships, advocacy, research and publications.

BC Association of Community Response Networks [6]

A Community Response Network (CRN) is made up of a diverse group of concerned community members, community agencies, local businesses, government agencies, professionals, and others who come together to create a coordinated community response to abuse, neglect, and self-neglect in vulnerable adults. When the community cannot provide appropriate support to the adult, the Adult Guardianship Act provides designated agencies (Health Authorities and Community Living BC) with the responsibility of investigating and ensuring that the proper action is undertaken.

2. Shelter

If the alleged abuser cannot be removed from the home, the victim may need temporary shelter. Older and senior women at risk of violence may be admitted to women's transition houses if space is available. See Chapter 22: Referrals for transition houses. If all of the local transition houses are full, the Battered Women's Support Services [7] may be able to locate alternative shelter. After Hours Services (see Chapter 22: Referrals) can also provide assistance and can refer elderly men to temporary shelter or housing.

3. Home Support

The victim may depend on the alleged abuser for support within the home. Therefore, they may be reluctant to act because they fear being moved or placed in a nursing home. In these circumstances, the BC Ministry of Health Services Long-Term Care Program can determine whether the victim is eligible to receive home support services (cleaning, handyman services, etc.). A person may also contact Home and Community Care Intake Services [8] to request an assessment.

Meals on Wheels [9] is a service that delivers meals and social contact to homebound people, including seniors, caregivers, individuals with chronic or acute medical conditions, individuals recovering from surgery, illness or injury, and new mothers.

4. Seniors' Benefits

An older victim may not be receiving all of the financial benefits they are entitled to. These benefits such as Old Age Security Pension, Guaranteed Income Supplement, Canada Pension Plan, and others may provide finial independence from an abuser. Information regarding income security programs can be found at Income Security Programs - gov.bc.ca [10]

Lower income seniors who are renting may be eligible for a rent supplement through the Shelter Aid for Elderly Renters (SAFER) program. Information regarding Shelter Aid for Elderly Renters can be found at Shelter Aid for Elderly Renters [11]

References

[1] https://www.trustee.bc.ca/reports-and-publications/Pages/Decision-Tree.aspx
[2] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/vs-info-for-professionals/info-resources/elder-abuse.pdf
[3] https://seniorsfirstbc.ca/
[4] https://seniorsfirstbc.ca/programs/sail/
[5] https://disabilityalliancebc.org/
[6] https://bccrns.ca/
[7] https://www.bwss.org/
[8] https://www.vch.ca/en/service/how-to-access-home-and-community-care-services#wysiwyg--60781
[9] https://www.vch.ca/en/service/meals-wheels#short-description--6071
[10] https://www2.gov.bc.ca/gov/content/family-social-supports/seniors/financial-legal-matters/income-security-programs
[11] https://www.bchousing.org/housing-assistance/rental-assistance-programs/SAFER

VIII. Victims of Human Trafficking

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 3, 2023.

Human trafficking is a complex and multifaceted crime that can occur both domestically and internationally. The victims of human trafficking are deprived of their basic rights to freedom and movement. Thus, human trafficking is often described as modern day slavery. Each case of human trafficking varies, and subsequently differs for each individual person.

The publication Human Trafficking Indicators [1] from the United Nations Office on Drugs and Crime provides a comprehensive list of indicators that a person may be trafficked.

Despite the severity of the offence, human trafficking convictions are rare. This may be in part due to the complexity and subtleties of trafficking operations as well as reluctance on the part of victims to come forward. Victims may not come forward for a variety of reasons, including being fearful of their lives or having limited language skills.

In 2007, BC established the Office to Combat Trafficking in Persons (OCTIP). OCTIP is part of the Victim Services and Crime Prevention Division of the Ministry of Public Safety and Solicitor General. OCTIP develops and coordinates strategies to address human trafficking within the province. OCTIP takes a human rights approach that focuses on the rights and needs of trafficked persons. This approach gives back control to the trafficked person by offering information, referrals, support and assistance, but allows the trafficked person to make decisions and choices for themselves. Law enforcement and Crown Counsel prosecute human trafficking cases in BC. See the **Resources** section below for more information on OCTIP.

A. Governing Legislation and Resources

1. Legislation

Human trafficking is an offence under both the *Criminal Code* (ss 279.01-279.04), and the *Immigration and Refugee Protection Act* [*IRPA*] (Part 3).

Sections 279.01-279.04 of the *Criminal Code* make it an offence to:

1. Recruit, transport, transfer, receive, hold or hide a person, or exercise control, direction or influence over an adult or a minor's movement for the purpose of exploiting or facilitating the exploitation of that person.
2. Benefit materially from human trafficking.

Exploitation is defined in s 279.04(1) of the *Criminal Code* in the following terms:

> "a person exploits another person if they cause them to provide, or offer to provide labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service".

In order to determine whether an accused exploited another person, the court may consider whether the accused (a) used or threatened to use force or coercion; (b) used deception; or (c) abused a position of trust, power or authority (s 279.04(2)). Because of the high stigma and severe penalties resulting from a conviction, the *mens rea* for human trafficking offences is subjective fault. It is also important to note that consent is not a defence to human trafficking (s 279.01(2)).

Part 3 of *IRPA* applies to smuggling and trafficking of persons from another country into Canada. Sections 117 and 118 make it an offence to:

1. Organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of *IRPA* (s 117(1)).
2. Knowingly organize the coming into Canada or one or more persons by means of abduction, fraud, deception or use of threat of force or coercion (s 118(1)).

The penalties for the offences in Part 3 of *IRPA* include fines of up to $1,000,000 and imprisonment of up to 14 years (where fewer than 10 persons are being smuggled or trafficked) or up to life. Mandatory minimum sentences apply where the person, in committing the offence, endangered the life or safety, or caused bodily harm or death to the persons with respect to whom the offence was committed, and/or if the commission of the offence was for profit or in association with a criminal organization or terrorist group (See *IRPA* ss 117(2)-(3)).

2. Temporary Resident Permit for Victims of Human Trafficking

Many victims of human trafficking find themselves in Canada without proper documentation and at risk of deportation. To address this issue, Citizenship and Immigration Canada (CIC) can issue a special temporary resident permit to victims of human trafficking (This is referred to as the VTIP TRP – Victims of Trafficking in Persons, Temporary Resident Permit). The VTIP TRP gives presumed trafficked persons legal status in Canada and is valid for up to 180 days. Depending on the circumstances of the individual, CIC can even reissue the TRP at the end of the 180-day period. The benefits of the VTIP TRP include access to health care benefits and trauma counselling through the Interim Federal Health Program. A work permit is also issued and in BC, social assistance benefits may be available. A presumed trafficked person with a VTIP TRP is eligible to apply for social assistance benefits. Victims of human trafficking need not testify against their trafficker in order to be eligible for an initial TRP. However, immigration officers will interview an individual in order to decide whether they are eligible for the TRP.

For more information about obtaining a VTIP TRP, call CIC at 1-888-242 2100 or visit the IRCC Temporary Resident Permits webpage [2]

B. Resources

For information on the signs that a person may have been trafficked; services available to victims of human trafficking, including legal services, health care, shelter, interpretation, and counselling; and links to resources, see Human Trafficking in BC - gov.bc.ca [3]

Canadian Human Trafficking Hotline [4]

- The Canadian Human Trafficking Hotline is a confidential, multilingual service, operating 24/7 to connect victims and survivors with social services, law enforcement, and emergency services, as well as receive tips from the public.
- 1-833-900-1010

BC Crime Stoppers [5]

- Individuals with information about a crime are able to provide an anonymous tip by calling the tip line at 1 (800) 222-8477

The Office to Combat Trafficking in Persons (OCTIP) [3]

- OCTIP joins forces with key provincial ministries, federal departments, municipal governments, law enforcement agencies, community based and aboriginal organizations, in the development and delivery of an integrated and permanent response to human trafficking in B.C.

References

[1] http://www.unodc.org/documents/human-trafficking/HT_indicators_E_LOWRES.pdf
[2] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/permits/considerations-specific-victims-human-trafficking.html
[3] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime/human-trafficking
[4] https://www.canadianhumantraffickinghotline.ca/
[5] http://www.bccrimestoppers.com/leave-a-tip/

IX. Missing Persons and Abductions

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 3, 2023.

According to the National Center for Missing Persons and Unidentified Remains (NCMPUR), British Columbia records the highest number of missing persons in the country, accounting for more than 40% of the countries 29,645 cases in 2020 .

NCMPUR categorizes probable cause for missing persons into the following categories:

- Abduction by stranger
- Accident
- Wandered Off
- Parental Abduction with Custody Order
- Parental Abduction without Custody Order
- Abducted by Relative
- Runaway
- Presumed Dead
- Human Trafficking
- Unknown

In British Columbia, there is no waiting period to report someone missing and anyone can make a report. Furthermore, you do not need to be a member of the missing persons immediately family to make a report. Before contacting police, you may want to reach out to family members, friends, loved ones and next of kin prior to filing a report. However, if these attempts at gaining information on an individual's whereabouts are unsuccessful, reporting to police is the best next step. You can expect the following from police when making a report :

- Report will be taken seriously, and investigation started without delay.
- Conducting a thorough investigation, including risk assessment, focused on the safety and wellbeing of the missing person
- Offer information about supports or resources that may be available, designate a contact person within the police force to support ongoing communication, and keep you updated on the investigation, as appropriate
- Consult with the family or reportee before releasing information or photographs of the missing person to the media, unless doing so would jeopardize the missing person or the investigation, for example by creating delays.
- When a missing person has been found, attend the location in person to confirm their identity and wellbeing. To balance respect for privacy with police duty to investigate safety concerns, this may be handled differently in some circumstances.
- Not close a file until the missing person has been located and their identity has been established.
- Not share information about the location of a found missing adult without their permission. Police may also keep this information confidential in certain cases involving minors, depending on the circumstances.
- Where appropriate, work with other agencies to promote a found missing person’s ongoing safety and limit recurring reports involving the same person, or to prevent others from going missing in similar circumstances.

A. Governing Legislation and Resources

1. Legislation

The Missing Persons Act (the Act) [1] came into force June 9, 2015, setting out the provisions for accessing records that will help find missing persons, including special provisions for people who are vulnerable, youth and persons at risk.

The Act allows a member of a police force to apply to the court for records to help find a missing person. When there is a risk of serious harm to a missing person or a concern that records could be destroyed, the Act authorizes officers to make an Emergency Demand for Records without going through the court. Section 18 [2] of the Act requires that a report on the use of Emergency Demands for Records must be submitted to the Minister or his or her designate on an annual basis and must be made public.

The Act defines a missing person as an individual whose whereabouts are unknown despite reasonable efforts to locate the individual and:

(a) who has not been in contact with those persons who would likely be in contact with the individual or;

(b) whose safety and welfare are feared for given:

(i) the individuals age

(ii) the individual's physical or mental capabilities, or

(iii) the circumstance surrounding the individual's absence

2. Resources

a) The National Centre for Missing Persons and Unidentified Remains (NCMPUR)

NCMPUR is Canada's national centre that provides law enforcement, medical examiners and chief coroners with specialized investigative services in support of missing persons and unidentified remains investigations.

One of the NCMPUR's responsibilities is managing the national public website to provide information on selected cases to the public for the purposes of seeking tips on investigations.

The Canadasmissing.ca [3] website features profiles of missing persons and unidentified remains that have been published at the request of the primary investigator from either police, coroner or medical examiner agency. Furthermore, resources are provided that instruct individuals on how to submit tips, specialized services, and fact sheets.

b) Travel Reunification Services

This is a program designed to assist a parent or a legal guardian who cannot afford to return the abducted child to or within Canada, once the child is located. In order to be eligible for travel assistance, the following guidelines must be met:

1. The request for transportation must come from the investigating Police Agency or the Central Authority from the child's home province. The requesting agency is responsible for assessing the financial status of the family and determining if transportation should be provided. Assistance will be limited to child abduction situations, including situations where the child is abducted by parent or legal guardian.
2. Assistance will be provided to transport:
   - In the case of older abducted children, home; and
   - In the case of younger children, enable the left behind parent or legal guardian to travel to the jurisdiction where the child is and return home.

3. In some cases, it may be appropriate for a person other than the left behind parent or legal guardian to retrieve the child and accompany the child home.
4. If the left behind parent is travelling to retrieve the child, the requesting authority must make every reasonable effort to confirm/ensure that the parent will be able to obtain legal physical custody of the child.
5. The requesting agency must ensure that the parent or legal guardian has all the necessary documents in order to retrieve the child. Assistance will not be provided to transport the abductor, even if he or she is the person able to accompany the child home.

References

[1] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/14002_01
[2] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/14002_01#section18
[3] https://canadasmissing.ca/

X. TIP and Restorative Justice

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 3, 2023.

A. Trauma-Informed Legal Practice

Many legal professionals are moving toward trauma-informed practice legal practice (TIP). Trauma is best defined as an emotional response to a disturbing or distressing event. In this sense, TIP recognizes the role of trauma in the lawyer-client relationship. The practice strives to reduce re-traumatization by identifying both past and ongoing trauma in the client's life and by adjusting the lawyer-client relationship accordingly to enhance connections with clients for better legal advocacy.

What constitutes an appropriate TIP differs by client-and-lawyer. It is important for lawyers to first identify the client's trauma and then adjust their relationship accordingly. Frustration often stems from clients not being well-informed of their lawyers' choices. Then a general TIP may include, for example, making accommodations for client interviews or extensive preparations of a client prior to taking the stand to help reduce anxiety. For clients who experienced sexual assault, TIP may include active listening, emotional competency, and allowing for victim advocates to accompany in meetings. In any circumstance, the lawyer should take note of interpersonal and systemic violence as well as gender and cultural factors that could hinder a client from disclosing information. Furthermore, a client should feel comfortable asking their lawyer for additional support and resources. Also included at the bottom of this Chapter are some general and specific referrals.

Trauma-Informed Lawyering - acl.gov [1] lists out the expectations for TIP.

For more general victim guides/manuals, visit Publications for Victims of Crime - gov.bc.ca [2] or Information Guide to Assist Victims - publicsafety.gc.ca [3].

B. Restorative Justice

Community Accountability Programs (CAPs) are funded by the Province of British Columbia and offer an alternative to the criminal court process pursuant to s 717 of the Criminal Code and Part 1 of the Youth Criminal Justice Act. Many of these programs accept referrals from the police, the community and those impacted by crime. CAPs practice Restorative Justice, a philosophy that tries to address the needs of the victim, the offender, and the community. Restorative Justice programs look at the harms caused by crime, which may include harms to the victim, community, family, and offender. This process seeks to addresses the feeling of exclusion and isolation many victims feel in the traditional criminal court process, and instead provides them the opportunity to participate in decision making. While approaches may vary across programs, many use one-to-one facilitation, talking circles and conferences to work towards a confidential resolution that does not result in a criminal record for the person who has caused harm.

In order to participate in the Restorative Justice process, offenders must be willing to take responsibility for their actions and victims must also consent to the process and waive their ability to pursue other remedies regarding the same incident. Victims are often given a choice of whether they wish to meet with the offender face-to-face or not. Often the process only requires meetings with facilitators. The resolution can be a written acknowledgement of the impacts, a written apology, a gift, a restitution payment, and/or community service hours. CAPs also typically support each client's timely referral to counselling and support services, based on their unique and self-identified needs. Victims who feel that their needs will not be adequately addressed by the traditional criminal justice system are encouraged to learn more about the Restorative Justice programs offered in their geographic area by visiting Crime reduction through restorative justice - gov.bc.ca [4].

References

[1] https://ncler.acl.gov/Files/Trauma-Informed-Lawyering.aspx
[2] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/publications-for-victims-of-crime
[3] https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2016-gd-ssst-vctms/index-en.aspx
[4] https://www2.gov.bc.ca/gov/content/safety/crime-prevention/community-crime-prevention/restorative-justice

XI. Resources for Indigenous Victims

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 4, 2023.

Indigenous peoples are overrepresented in Canada's criminal justice system as victims of crime. Per Statistics Canada, Indigenous people are twice as likely as non-Indigenous people to have been victims of violent crime. This disproportionate rate of victimization has been linked to the repercussions of long-lasting colonization and systemic racism, such as residential schools and interaction with the child welfare system. These policies have resulted in intergenerational trauma, as well as the disruption of community and family structures – all of which are linked to violent victimization of Indigenous people.

The overrepresentation of Indigenous victims extends to homicide victims. For the period from 2015 to 2020, the rates of homicides involving an Indigenous victim was six times higher than the rate of homicides involving non-indigenous victims. Indigenous women, girls, and 2SLGBTQQIA people in particular are most at risk of violent victimization. This ultimately led to a National Inquiry into Missing and Murdered Indigenous Women and Girls, in which the findings were published in Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls [1].

A. Resources

1. Indigenous Victim Services/The Native Courtworker Program [2]

The Native Courtworker program has Indigenous Victim Services workers who provide culturally sensitive services to Indigenous victims of violence to lessen the trauma and assist in the recovery associated with being a victim of crime through the provision of counselling, support, information, referrals, and practical assistance by:

- Providing emotional and cultural support specific to clients' unique needs and concerns.
- Developing and supporting comprehensive individualized safety plans.
- Working collaboratively as part of a multidisciplinary team including team meetings with police, community-based victim services, NCCABC Family Advocate, housing agencies, transition homes, MCFD, and other key partners.
- Maintaining contact and network with other community services providers and criminal justice system personnel and to provide a referral base for clients; providing community outreach and public education to promote awareness regarding victims' issues and victim services.
- Assisting in completing and submitting forms including Crime Victim Assistance Program (CVAP) applications, Victim Impact Statements, BC Housing applications and registration with the Victim Safety Unit.
- Providing information and orientation regarding the Criminal Justice system and roles of key parties.
- Maintaining integrity and hold confidentiality as a Victim Services Worker, while collaborating with systems with differing mandates and perspectives.

2. Salal Sexual Violence Support Centre [3]

Salal's no cost Indigenous Counselling Program provides short to mid-term one-to-one counselling for Indigenous people of marginalized genders. Including trans and cis women, trans men, non-binary, and Two Spirit individuals (peoples) seeking health, safety, and wellbeing

Provides support in processing the impacts of sexualized violence, intergenerational trauma, residential school, MMIWG2S+, and loss of children and provides access to traditional healing, knowledge and medicines.

3. Aboriginal Legal Aid BC [4]

This organization aims to help Aboriginal peoples in BC understand their legal rights by providing free legal information and connecting communities to legal support. They follow the lead of their Indigenous Services division, who work to meet the legal needs of Aboriginal peoples in BC through innovative and culturally informed legal aid services.

4. Indigenous Community Legal Clinic [5]

The Indigenous Community Legal Clinic (ICLC) is an educational legal clinic of the Peter A. Allard School of Law at the University of British Columbia that provides legal services to the Indigenous community.

The ICLC may be able to provide advice, assistance and representation to eligible clients who cannot afford a lawyer and who self-identify as Indigenous persons.

5. Residential Historical Abuse Program [6]

The Residential Historical Abuse Program provides professional counselling services for BC residents who were abused while under the age of 19 and while living in a home or residential program operated or funded by the province. A counsellor who meets provincial standards will develop a personal treatment plan with the victim, which may include individual, group, or family counselling. The victim does not have to prove that they were sexually, physically, or mentally abused to receive counselling services, nor does they have to name the person(s) who abused them. The Ministry will simply verify that they were in that particular residential program at the time of the offence(s). No police complaint is necessary, but there is a legal obligation to report abuses to appropriate authorities if children are still at risk of being sexually abused. The government or the police may contact the victim for information. The contents of the application are otherwise confidential. The application process is simple and generally does not impede any legal action or application to the CVAP – although if the applicant is eligible for funding from another source for a same or similar purpose, the CVAP must deduct that funding (or those counselling sessions) when considering the application.

6. Indigenous Services Canada [7]

Indigenous Services Canada (ISC) provides health support services to survivors, family members, and those affected by the issue of missing and murdered Indigenous women and girls. ISC facilitates access to mental health counselling, emotional support, community based cultural supportservices and some assistance with transportation costs.

To access supports in BC, call: 1-877-477-0775 or visit Health support services [7]

References

[1] https://www.mmiwg-ffada.ca/final-report/
[2] https://nccabc.ca/womens-safety/#indigenous-victim-services
[3] https://www.salalsvsc.ca/
[4] https://aboriginal.legalaid.bc.ca/
[5] https://allard.ubc.ca/community-clinics/indigenous-community-legal-clinic
[6] https://www.vch.ca/en/service/residential-historical-abuse-program-rhap
[7] https://www.rcaanc-cirnac.gc.ca/eng/1548700698392/1548701361628

XII. Referrals and Follow-up

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 4, 2023.

Once a victim has been referred to another resource such as a lawyer, social service agency, or health professional, it is still important to follow up with the victim. This ensures that the victim.is being looked after. Should a person need to consult with a professional (for instance, a psychiatrist) about a victim's ongoing case, the victim must sign a written release form authorizing information to be collected on their behalf.

A. General Referrals

Crime Victim Assistance Program [1]

Provides financial assistance and benefits to victims of violent crimes, their immediate family members, and some witnesses to offset the costs of the victimization, and to promote their recovery from the physical and psychological effects of the offence. In situations where the offender represents an ongoing significant risk to the victim's safety, protective measures such as home alarm systems, security devices, and equipment and other safety measures may be available. In cases involving high-risk victims, the victim and their family may be eligible for relocation expenses where all other safety measures are considered insufficient to address the victim's safety needs. For a complete list of benefits available, see the CVAP website.

Directory of Victim Service and Violence Against Women Programs in BC [2]

Victim Services & Violence Against Women Program Directory provides contact information for service providers across British Columbia that assist victims of crime and women and children impacted by violence.

Victim Notification - Victim Safety Unit [3]

The Victim Safety Unit provides information to victims when the accused or offender is supervised by BC Corrections. Some information may also be provided to persons named in a civil protection order. Victims may be provided with ongoing information about the status of an accused or an offender, including whether or not they are currently in provincial jail, when they may get out of provincial jail, what community they may be in, and what conditions the accused or offender may have to follow. If the offender is under federal jurisdiction (under the supervision of the Correctional Service of Canada or the Parole Board of Canada), the VSU will, upon request, forward the registration form to CSC/PBC. The CSC/PBC will provide victim notification to registered victims directly.

VictimLink BC [4]

VictimLink BC provides information and referral services to all victims of crime and immediate crisis support to victims of family and sexual violence, including victims of human trafficking exploited for labour or sexual services.

Available 24/7 and can be accessed by calling or texting **1-800-563-0808**. The service is toll-free, confidential, and anonymous.

Public Guardian and Trustee of British Columbia [5]

Provides assistance to adults who need support for financial and personal decision-making and administers estates of deceased persons if there is no one else to do it. They may also administer trust funds on behalf of minors. Service is available in 130 languages.

The Public Guardian and Trustee (PGT) aids and protects the interests of those who lack legal capacity to protect their own interests. This includes the legal and financial interests of children under the age of 19; the legal, financial, personal, and health care interests of adults who required assistance in decision making; and administering the estates of deceased and missing persons.

Victim Justice Network [6]

An online-based network with links to existing networks and information hubs to promote awareness of services and supports for victims of crime in Canada. They aim to raise awareness, understanding, and support for victims of crime in a society by providing online victim-centred information, resources, and referrals.

Victimsinfo.ca [7]

An online resource for victims and witnesses of crime in BC. The website links several Key Contacts such as the Victims Information Line, Lawyer Referral Service, Youth Against Violence Line, among others.

The Victims Portal [8]

A secure online portal that allows registered victims, and/or their named representatives, to access services and information which they are entitled to under the *Corrections and Conditional Release Act* (CCRA). The portal allows a victim to access information from the CSC and PBC and request specific information concerning the offender who harmed them.

B. Referrals for Children and Youth Victims

Child Protection Services BC [9]

To report suspected cases of abuse or neglect of a child or youth under 19 phone **1 800 663-9122** at any time

Society for Children and Youth of BC (SCY) [10]

The Society for Children and Youth of BC (SCY) is a unique provincial organization dedicated to improving the well-being of children and youth in British Columbia.

SCY recognizes that adult duty-bearers need to advocate for the rights of children and youth of BC as listed in the United Nations Convention on the Rights of the Child (UNCRC) in order to improve their well-being.

Child and Youth Legal Centre [11]

Operated by the Society for Children and Youth of BC.

The Child and Youth Legal Centre provides legal representation, free to those who qualify, for young people who are experiencing problems related to family law, child protection, human rights and many other legal issues.

Appointments can be booked by calling 778-657-5544 or toll free at 1-877-462-0037

C. Referrals for Criminal Injuries Outside British Columbia

National Office for Victims [12]

Provides general information for victims and the public, referrals to the Correctional Service of Canada (CSC) and the Parole Board of Canada (PBC) for specific enquiries and works to incorporate a victim's perspective in national policy development.

Federal Ombudsman for Victims of Crime [13]

The Office of the Federal Ombudsman for Victims of Crime (OFOVC) is an independent resource for victims in Canada. Victims can contact OFOVC to learn about their rights under federal law and the services available to them, or to make a complaint about any federal agency or federal legislation dealing with victims of crime.

1) Other Canadian Provinces and Territories

Alberta: *Victims of Crime Act*, RSA 2000, c V-3 [14].
Victims of Crime Assistance Program [15]

Manitoba: *Victims' Bill of Rights*, CCSM c V55 [16].
Compensation for Victims of Crime Program [17]

New Brunswick: *Victims Services Act*, SNB 2016, c 113 [18].
Victims Services Program [19]

Newfoundland: *Victims of Crime Services Act*, RSNL 1990, c V-5 [20].
Victims Services Program, Provincial Headquarters [21]

Northwest Territories: *Victims of Crime Act*, RSNWT 1988, c 9 [22].
Victim Services [23]

Nova Scotia: *Victims' Rights and Services Act*, SNS 1989, c 14 [24].
'Department of Justice Victim Services [25]

Ontario: *Victims' Bill of Rights*, SO 1995, c 6 [26].
Ontario Victim Services (OVS) [27]
Victim Notification System (VNS) [28]

Prince Edward Island: *Victims of Crime Act*, RSPEI 1988, c V-3.1 [29].
Victim Services [30]

Quebec: *Crime Victims Compensation Act*, LRQ c I-6 [31].
Indemnisation des Victimes d'actes Criminels (IVAC) [32]

Saskatchewan: *Victims of Crime Act*, SS 1995, c V-6.011 [33].

Victim Services [34]

Yukon: *Crime Prevention and Victim Services Trust Act*, RSY 2002, c 49 [35].

Victim Services [36]

D. Finding Funding for Counselling

Crime Victim Assistance Program Funding for Counselling [1]

- The *CVAA* establishes counselling services or expenses as a benefit that may be available to victims, immediate family members of injured or deceased victims, and some witnesses. The *Crime Victim Assistance (General) Regulation* sets out the conditions or limitations for providing counselling benefits and also establishes the approved fee rate for reimbursement of counselling services. The Counselling Guidelines provide further information and clarification regarding expectations for the provision of counselling services, reporting requirements and limitations applicable to service providers requesting reimbursement for counselling services on accepted claims with the CVAP.

Child and Youth Mental Health (CYMH) [37]

- The Ministry of Children and Family Development's Child and Youth Mental Health (CYMH) teams located across B.C. provide a range of mental health assessment and treatment options for children and youth (0-18 years of age) and their families at no cost. Our clinics are staffed by mental health clinicians, psychologists, and psychiatrists.

Stopping the Violence Counselling (STV) and Community-Based Victim Services (CBVS) [38]

- STV: These programs provide essential counselling and support including information, referrals, and in some cases, system liaison services for women who have experienced sexual assault, violence in relationships, and/or childhood abuse.
- CBVS: There are several community-based counselling programs that provide counselling services to women who have experienced sexual assault, relationship violence, or childhood abuse. The range of individual and group counselling services are based on the needs of the individual women and delivered in an accessible, safe, and supportive environment.

Children Who Witness Abuse Programs [39] - Ministry of Public Safety and Solicitor General

- This community-based program provides individual and group counselling services for children who witness the abuse of a parent, who is most often a mother. Designed to help break the intergenerational cycle of violence against women, this program helps children cope with, and heal from, the trauma of living in an abusive situation. Support is also provided to the non-offending caregiver who has been abused by their partner.

References

[1] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/victim-of-crime/financial-assistance-benefits

[2] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/victim-of-crime/victim-services-directory

[3] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/victim-of-crime/victim-notification

[4] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime/victimlinkbc

[5] https://www.trustee.bc.ca/Pages/default.aspx

[6] https://www.victimjusticenetwork.ca

[7] https://www.victimsinfo.ca

[8] https://victimsportal-portailvictimes.csc-scc.gc.ca/Main/Home

[9] https://www2.gov.bc.ca/gov/content/safety/public-safety/protecting-children

[10] https://www.scyofbc.org

[11] https://scyofbc.org/child-youth-legal-centre/#1510173090398-895b5c9f-54dd

[12] https://www.publicsafety.gc.ca/cnt/cntrng-crm/crrctns/ntnl-ffc-vctms-en.aspx

[13] https://www.victimsfirst.gc.ca/index.html

[14] https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-v-3/latest/rsa-2000-c-v-3.html

[15] https://www.alberta.ca/victims-of-crime-assistance-program.aspx

[16] http://web2.gov.mb.ca/laws/statutes/ccsm/v055e.php

[17] https://www.gov.mb.ca/justice/vs/cvc/index.html

[18] https://www.canlii.org/en/nb/laws/stat/rsnb-2016-c-113/latest/rsnb-2016-c-113.html

[19] https://www2.gnb.ca/content/gnb/en/departments/public-safety/community_safety/content/victim_services.html

[20] https://www.assembly.nl.ca/Legislation/sr/statutes/v05.htm

[21] https://www.gov.nl.ca/victimservices/

[22] https://www.justice.gov.nt.ca/en/files/legislation/victims-of-crime/victims-of-crime.a.pdf

[23] https://www.justice.gov.nt.ca/en/victim-services/

[24] https://www.canlii.org/en/ns/laws/stat/sns-1989-c-14/latest/sns-1989-c-14.html

[25] https://novascotia.ca/just/victim_services/

[26] https://www.ontario.ca/laws/statute/95v06

[27] https://www.ontario.ca/page/get-help-if-you-are-experiencing-violence

[28] https://www.ontario.ca/page/victim-notification-services

[29] https://www.princeedwardisland.ca/sites/default/files/legislation/v-03-1-victims_of_crime_act.pdf

[30] https://www.princeedwardisland.ca/en/information/justice-and-public-safety/victim-services

[31] https://www.canlii.org/en/qc/laws/stat/rsq-c-i-6/latest/rsq-c-i-6.html

[32] https://www.ivac.qc.ca/Pages/default.aspx

[33] http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/V6-011.pdf

[34] https://www.saskatchewan.ca/residents/justice-crime-and-the-law/victims-of-crime-and-abuse/help-from-victim-service-units-and-agencies

[35] http://www.gov.yk.ca/legislation/acts/cpvst.pdf

[36] https://yukon.ca/en/legal-and-social-supports/supports-victims-crime/find-out-about-victim-services

[37] https://www2.gov.bc.ca/gov/content/health/managing-your-health/mental-health-substance-use/child-teen-mental-health

[38] https://endingviolence.org/about-us/programs-we-serve/

[39] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/bc-criminal-justice-system/if-victim/children-young-victim/protecting/cwwa-directory.pdf

Chapter Five - Public Complaints

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

Introduction

This chapter provides some general information that may assist in making a public application or complaint, but does not address all problems, legal or otherwise, relating to government. This chapter contains general guidelines for dealing with public bodies (e.g., the Canadian Radio-television and Telecommunications Commission, the Egg Marketing Board, or a public university). Individuals involved in the judicial review process should consult the following texts:

David J Mullan, *Administrative Law*, (Toronto: Irwin Law, 2001).

- Part of the Essentials of Canadian Law series by Irwin Law, this text provides a comprehensive review of administrative law in Canada.

Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis, 2017).

- This text provides a simple and clear review of administrative law.

Donald Brown & John M Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback Publishing, 1998).

- This regularly updated three-volume text provides a more detailed review of administrative law.

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

A. General

1. Legislation

Federal Courts Act, RSC 1985, c F-7.
Judicial Review Procedure Act, RSBC 1996, c 241.

2. Resources

- Community Legal Assistance Society: BC Judicial Review Self-Help Guide: www.judicialreviewbc.ca [1]
- The Ombudsperson of BC website: www.bcombudsperson.ca [2]
- Justice Access Centres: www.gov.bc.ca/Justice-Access-Centre [3]

B. Privacy or Access to Information

1. Legislation

Access to Information Act, RSC 1985, c A-1.
Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165.
Personal Information Protection and Electronic Documents Act, SC 2000, c 5.
Privacy Act, RSBC 1996, c 373.
Privacy Act, RSC 1985, c P-21.

2. Resources

BC Freedom of Information and Privacy Association

Online	Website [4] Email: fipa@fipa.bc.ca
Address	PO Box 8308 Victoria Main Victoria, British Columbia, V8W 3R9
Phone	(604) 739-9788 Fax: (604) 739-9788

BC Civil Liberties Association

Online	Website [5] Email: info@bccla.org
Address	306 - 268 Keefer Street Vancouver, British Columbia, V6A 1X5
Phone	(604) 687-2919 Toll-Free:1-855-556-3566 Fax: (604) 687-3045

Office of the Information and Privacy Commissioner for British Columbia

Online	Website [6] Email: info@opic.bc.ca
Address	P.O. Box 9038, Stn. Prov. Govt. 4th Floor, 947 Fort Street Victoria, British Columbia, V8W 9A4
Phone	(604) 660-2421 (Enquiry Vancouver only) 1-800-663-7867 (Enquiry BC)

Office of the Privacy Commissioner of Canada

Online	Website [7]
Address	30 Victoria Street Gatineau, Quebec, K1A 1H3
Phone	(819) 994-5444 Toll-Free: 1-800-282-1376 TTY: (819) 994-6591

C. Complaints about Police Conduct

1. Legislation

Police Act, RSBC 1996, c 367.

Royal Canadian Mounted Police Act, RSC 1985, c R-10.

2. Resources

BC Civil Liberties Association

Online	Website [5] Email: info@bccla.org
Address	306 - 268 Keefer Street Vancouver, British Columbia, V6A 1X5
Phone	(604) 687-2919 Toll-Free: 1-855-556-3566 Fax: (604) 687-3045

Pivot Legal Society

Online	Website [8]
Address	121 Heatley Avenue Vancouver, British Columbia, V6A 3E9
Phone	(604) 255-9700 Fax: (604) 255-1552

Office of the Police Complaint Commissioner

Online	Website [9] Email: info@opcc.bc.ca
Address	P.O Box 9895 Stn Prov Govt. #501-947 Fort St., P.O. Box 9895 Victoria, BC V8W 9T8
Phone	(250) 356-7458 Toll-free outside of Vancouver: Call Enquiry BC at 1-877-999-8707 and ask to be connected to the Office of the Police Complaints Commissioner Fax: (250) 356-6503

Civilian Review and Complaints Commission for the RCMP

Online	Website [10] To use the online complaint form, click on the “Make a Complaint” link Email: complaints@crcc-ccetp.gc.ca
Address	P.O. Box 1722, Station B Ottawa, Ontario K1P0B3
Phone	Telephone for Greater Vancouver: (604) 501-4080 Anywhere in Canada: 1-800-665-6878 Fax: (604) 501-4095

D. The Right to Vote

1. Legislation

Canada Elections Act, SC 2000, c 9
Election Act, RSBC 1996, c 106
Local Government Act, RSBC 2015, c 1
Vancouver Charter, SBC 1953, c 55

2. Resources

Elections British Columbia

Online	Website [11]

Elections Canada

Online	Website [12]

References

[1] http://www.judicialreviewbc.ca
[2] http://www.bcombudsperson.ca
[3] http://www.gov.bc.ca/Justice-Access-Centre
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[5] http://www.bccla.org/
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[9] http://www.opcc.bc.ca/
[10] http://www.crcc-ccetp.gc.ca/
[11] http://www.elections.bc.ca/
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III. Review of Administrative Decisions

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

A. Step One: Informal Review

Disputes with government agencies can often be resolved through informal communication. Agencies often make initial decisions based on misperceptions, without all relevant information. Sometimes the most difficult part of an advocate's job is to locate the person making the decision or in a position to review the decision. Before pursuing more drastic (and often expensive) avenues, try to locate this person and ensure that they have been provided with all relevant information.

B. Step Two: Internal Review

Most government agencies have some sort of formal review process. Some agencies have little difference between formal and informal review, while others have sophisticated, published processes that closely resemble courtroom procedure. Whatever the problem is and whichever government player is involved, be sure to research the review process before launching a formal appeal. Factors such as cost, location of the hearing, type of submissions heard, and evidence required will all affect the choice of whether to pursue a resolution through the formal review process.

Generally, powers of review and review procedures are set out in the statutes and regulations that govern a particular tribunal or court. Agencies themselves further clarify this process. Many publish handbooks for internal use that are available to the general public on the court or tribunal's websites or in law libraries. Lawyers with experience in the area may also provide valuable insight. Lawyers at the Community Legal Assistance Society can be helpful when dealing with specific problems, especially poverty law topics (EI, WCB, Income Assistance, Human Rights).

Pay attention to time limits. Many worthy cases have been lost because an advocate failed to pay proper attention to limitation periods. Some limitation periods are very short.

> **NOTE: Exhausting internal appeals before judicial review:** There is a general rule in administrative law which requires that, where tribunals or other administrative decision-makers (such as public universities) have an internal review or appeals process, applicants must exhaust these internal processes before applying for judicial review by the courts (see *Harelkin v University of Regina* [1], [1979] 2 SCR 561).
>
> **NOTE: Procedural fairness in internal review processes:** As a general rule, administrative tribunals are limited in the scope of their internal review processes to the specific grounds of review listed in their enabling legislation. This raises the question of whether an applicant is able to challenge an administrative tribunal's decision on procedural fairness grounds if the enabling legislation for the tribunal does not explicitly include procedural fairness as one of the grounds for internal review. This question was recently addressed by the BC Supreme Court in *Stelmack v Amaruso* (14 July 2017), Vancouver S175091 (BCSC) (Please note that this case is unreported). The case involved a judicial review of an internal review by the Residential Tenancy Branch (RTB) which had failed to address a procedural fairness violation from the initial hearing because procedural fairness was not one of the three listed grounds for internal review in section 79(2) of the *Residential Tenancy Act*, SBC 2002, c 78. The BC Supreme Court ruled that even if the enabling legislation does not list procedural fairness as a specific ground for internal review, arbitrators nonetheless must always consider issues of procedural fairness. The practical ramifications of this decision are currently unclear, but it opens the door to making procedural fairness arguments during all internal review processes in addition to the grounds listed in the tribunal's enabling legislation.

See **Section III.C.1.c(2): Procedural Fairness** of this chapter below for more on procedural fairness.

C. Step Three: Examining an Appeal

If launching an internal review fails to solve an issue, an individual can either apply for judicial review or contact the BC Ombudsperson. Both of these options can be pursued at the same time, but one option may be preferable to the other in certain circumstances. Generally speaking, individuals will be looking to resort to the courts through judicial review, which will render a binding decision on a case. Individuals should contact the Ombudsperson only where the individual does not have a legal cause of action, but still wants to change a part of a government body's structure that leads to unfairness.

1. Judicial Review

If an individual receives an unfavourable decision from an agency's appeal process or object to the appeal process itself, they may have recourse to the courts. Sometimes regulations give an individual a right to appeal directly to the courts. If so, one should use this direct right to appeal rather than the general judicial review procedure. However, even if an individual has no express statutory right to appeal to the courts, superior courts have inherent jurisdiction to review administrative action to ensure that administrative decision-makers do not exceed the authority granted to them by statute.

The courts have developed criteria against which to assess the adequacy of government agencies' decision-making procedures. These criteria form the heart of administrative law. It is not within the scope of this section to attempt a comprehensive overview of the basic principles of administrative law. Interested parties can find an excellent introduction to these fundamental principles in *Dunsmuir v New Brunswick* [2], 2008 SCC 9. Justices Bastarache and Lebel for the majority provide the following description at paragraphs 27-28:

> As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law... By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

Remember that judicial review should not be contemplated unless all aforementioned avenues have been exhausted.

a) BC Judicial Review Procedure Act

For matters within the jurisdiction of the BC Legislature, the *Judicial Review Procedure Act*, RSBC 1996, c 241 [*JRPA*], provides for the judicial review of the "exercise, refusal to exercise, or proposed or purported exercise, of a statutory power" (*JRPA*, s 2(2)(b)). This includes the power to review decisions "deciding or prescribing (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence..." (*JRPA*, s 1). In a proceeding under the *JRPA*, the court has broad powers to craft a suitable remedy; most often the case will be returned to the tribunal for reconsideration in light of the court's findings of law or fact (see **Section I.F.4: Available Remedies**, below). An application under the JRPA can be brought before a Supreme Court judge in Chambers. Although this is a less expensive procedure than a trial, it may still be beyond the means of many individuals.

b) Judicial Review Procedure

A party applying for judicial review must first determine whether the Federal Court or a provincial superior court has the authority to decide on the matter. As a general rule, provincial jurisdiction includes tribunals established within provincial constitutional jurisdiction and tribunals created by the province due to a delegation of powers by the federal government.

(1) Federal Court

When considering judicial review of federal tribunals, look at both the *Federal Courts Act*, RSC 1985, c F-7, and the particular tribunal's governing statute. Often the governing statute sets out important limitation periods and procedures.

The Federal Court Trial Division hears reviews of most federal tribunals. However, the 16 tribunals listed in section 28 of the *Federal Courts Act* are reviewed by the Federal Court of Appeal. Examples of federal tribunals that are reviewed by the Federal Court of Appeal include the Canada Industrial Relations Board, Employment Insurance umpires, the Competition Tribunal, and the CRTC.

The procedures for a federal judicial review are set out in s 18.1 of the *Federal Courts Act*.

(2) Provincial Superior Courts

A tribunal under provincial jurisdiction can be reviewed upon application to a judge in the BC Supreme Court. The procedural rules are described in the *BC Supreme Court Civil Rules*, BC Reg 168/2009, available in the Acts, Rules & Forms section of the BC Supreme Court website: www.courts.gov.bc.ca/supreme_court [3].

Tribunals that can be reviewed under the *JRPA* include the Employment and Assistance Appeal Tribunal, the Workers' Compensation Board, and the Residential Tenancy Branch.

(3) Standing

In general, only the parties who had standing before the tribunal or who are directly affected by the tribunal's decision may apply for judicial review.

(4) Time Limits

The time limit to apply to the Federal Court for judicial review under section 18.1 of the *Federal Courts Act* is **within 30 days after the decision or order was first communicated**, although it can be extended by the Federal Court (s 18.1(2)). However, other federal legislation may direct different timelines. For example, for decisions made pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27, appellants must look to both that statute and the *Federal Courts Act*.

For provincial tribunals, applicants must refer to the *Administrative Tribunals Act*, SBC 2004, c 45 [*ATA*] and the specific statute governing the tribunal; **within 60 days of the issuing date of the decision** is the default (*ATA* s 57). Limitation periods may be extended pursuant to section 11 of the *JRPA* unless another enactment provides otherwise or the delay will result in substantial prejudice or hardship to another person affected.

(5) Stay of Orders or Proceedings

While an application for judicial review is pending, existing orders from a tribunal must be obeyed, and the tribunal has the discretion to continue with the proceedings. However, an applicant can ask the court to stay the tribunal's order or to prohibit the proceedings from continuing.

David Mossop et al, *Representing Yourself in a Judicial Review*, 5th ed (Vancouver: Community Legal Assistance Society, 2015), online: <https://judicialreviewbc.ca/>.

(6) Evidence

The primary evidence for judicial review is the tribunal's record of the hearing. Generally, the court does not allow new evidence to be introduced at a judicial review hearing. However, there is a narrow exception to this: a party may submit new evidence speaks to the procedural fairness or jurisdictional issue [*Davies v Halligan* [4], 2013 BCSC 2549].

(7) Filing Fees and Indigency Applications

Applicants who cannot afford the filing fees for judicial review may apply for an indigency order pursuant to Rule 20-5 of the BC *Supreme Court Civil Rules.* Appendix C, Schedule 1 lists the fees payable to the Crown, unless otherwise provided by statute. Indigency status affords the applicant relief from all court fees and is available to those with low income and limited earning potential. Note that the process for indigency applications is complicated.

David Mossop et al, *Representing Yourself in a Judicial Review*, 5th ed (Vancouver: Community Legal Assistance Society, 2015), online: <https://judicialreviewbc.ca/>.

c) Scope of Judicial Review

Assuming a party can resort to the courts to review the decision of a tribunal, there are limitations as to the scope of judicial review.

(1) Substantive Errors

An administrative body has only as much power as its governing statute grants to it. This grant of authority is limited in both the context and the manner in which the exercise of authority can be applied. If an administrative decision-maker exceeds their authority, the court can step in to provide a remedy.

(i) Errors of Fact

Findings of fact are generally reviewable only if they are not supported on the evidence. The appellant courts grant just as much deference to a tribunal's findings of facts as they would to a trial court's finding of facts in a judicial review. Nevertheless, the legislature is presumed not to have intended to give an administrative body the authority to act arbitrarily or capriciously. If the tribunal makes a finding of fact that cannot reasonably be drawn from the evidence, then it is exceeding the authority granted to it, and its decision can be set aside by the court.

(ii) Errors of Law

Substantive law reviewable by the courts can be divided into two areas: statutory interpretation related to the powers of a tribunal, and interpretation related to other broader questions of law.

A tribunal can be overruled if it is acting without authority. A tribunal must generally act within the jurisdiction of the legislation that created it. Similarly, a tribunal must not misinterpret the rules that govern the way it exercises authority, since these rules represent a precondition to the exercise of that authority. The mandate of a tribunal is defined in large part by the intention of the legislature. If in the course of exercising its authority a tribunal misinterprets its mandate, a court may declare the tribunal's decision void upon judicial review.

Similarly, a tribunal can be overruled if it applies the law incorrectly in other contexts. The enabling statute which creates a given tribunal cannot grant it the authority to act illegally or to change the law.

(iii) Standards of Review

Different standards of review may be imposed depending on the issue that is under review and the nature of the tribunal. The law relating to standards of review is quite complicated and depends on which tribunal is

involved.

Recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov'* [5], 2019 SCC 65 revised the rules for determining the standard of review. Generally, for all decisions, the presumed standard of review will now be **reasonableness**, unless legislative intent or the rule of law may require a different standard of review. The court stated:

"The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies."

If a tribunal is interpreting its own enabling statute or a closely related statute with which it has particular familiarity or expertise (e.g., the Workers' Compensation Board applying the *Workers Compensation Act, RSBC 2019, c 1)*, then the court will generally show some deference to the tribunal's interpretation.

In British Columbia, the *Administrative Tribunals Act* sets a different standard of review, **patently unreasonable**, for Tribunals that are seen as "expert tribunals". The largest of these tribunals being the Residential Tenancy Branch and the Worker's Compensation Appeal Tribunal. In practice, there is often little difference between the patently unreasonable standard and a review on the reasonableness standard, as the Supreme Court of Canada noted in *Dunsmuir* that it would be illogical and potentially raise rule of law concerns to allow an irrational decision to stand because its irrationality was not "clear" or "obvious" enough.

Likewise, for questions of fact, and for exercises of discretion (e.g., with respect to the appropriate remedy), the court will usually show deference to the judgment of the administrative decision-maker who saw the evidence first-hand. A court does not usually review a tribunal's discretionary decisions unless its discretion was not exercised in good faith, was exercised for an improper purpose, was based on irrelevant considerations, or was otherwise unreasonable. The *Vavilov* case is now the leading authority on how courts should apply the reasonableness review, and the principles to follow when determining if a decision is unreasonable.

As of May 2021, a recent BCCA decision *Red Chris Development Co v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937* [6], 2021 BCCA 152 on April 15, 2021 noted that the standard of patent unreasonableness applies to tribunals governed by the *Administrative Tribunals Act* despite common law developments post-*Vavilov*.

In *Beach Place Ventures Ltd. v. Employment Standards Tribunal* [7] (CanLII) 2022 BCCA 147, at para 16 Justice Voith states that "the statutory standard of patent unreasonableness set out in s. 58 of the *ATA* is unaffected by the common law standard of reasonableness articulated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65."

In *College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board* [8], 2022 BCCA 10, the British Columbia Court of Appeal (BCCA) explained how courts should review administrative tribunal decisions subject to statutory standards of review. Citing *Red Chris Development*

Company Ltd. v. United Steelworkers, Local 1-1937 [9] 2021 BCCA 152, the court affirmed that a court may only interfere with a Board's decision when the court is satisfied said decision is patently unreasonable. That standard applies regardless of common law developments regarding standards of review.

The BCCA goes on to say that even post *Vavilov*, the statutory patent unreasonable standard in BC's Administrative Tribunals Act is still considered to be the most deferential standard of review in Canadian Law. The BCCA further clarifies that the court has not engaged in any judicial reinterpretation of the patent unreasonable standard. the standard of patent unreasonableness applies to tribunals governed by the *Administrative Tribunals Act* despite common law developments post-*Vavilov*.

However, in tribunals that are not governed by the *Administrative Tribunals Act*, recent BCCA decisions have affirmed that the reasonableness standard from Vavilov will apply For example, *1193652 BC Ltd v New Westminster (City)* [10] 2021 BCCA 176 on April 30, 2021 followed the *Vavilov* decision. In para 59, the court concluded that it should apply a reasonableness standard of review when reviewing the decision of a Chambers judge.

The BCCA decision in *lululemon athletica canada inc. v. Industrial Color Productions Inc.* [11] 2021 BCCA 428 on November 12th, 2021 held that despite *Vavilov*, *Mexico v. Cargill, Incorporated* [12] 2011 ONCA 622 remains the leading case on issues of standard of review for commercial arbitration. Justice Marchand elaborates on the applicability of *Vavilov* in this case, stating that it is not helpful as it concerns the applicable standard of review as it applies in administrative law and not commercial arbitration. The BCCA held that *Cargill* is not undermined by the *Vavilov* in this context, and that the appropriate standard of review in this case is correctness.

Therefore, recent decisions by the BCCA seem to suggest that the standard of reasonableness from Vavilov and the standard of patent reasonableness from the Administrative Tribunals Act are separate. The standard that applies on judicial review varies, and is dependent upon the tribunal, area of law and issues involved.

(2) Procedural Fairness

Generally, tribunals must follow procedural norms, although their procedures may be less formal than those of a court. Tribunals must follow any procedures required by statute or regulation. However, the legislation is often largely silent on procedural requirements, and tribunals are often given a wide discretion within which to operate. Nevertheless, the superior courts are constitutionally bound to uphold the rule of law and will not allow procedural laxity to result in unreasonable prejudice to those affected by administrative decisions. That is, the legislature is presumed to have intended that the administrative body follow certain procedural fairness minimums as a precondition to exercising its authority.

The content of the mandatory procedural fairness minimum will differ depending on the circumstances. Determining the precise procedural requirements of a given case is rarely clear cut, and an extensive body of case law exists addressing these issues in various contexts.

Fundamental procedural rights include the right to know the case that must be met and to respond, and the right to an impartial decision-maker. In some cases, procedural fairness requirements might also include the right to advanced notice, the right to an oral hearing, the right to be represented by counsel, or the right to formal written reasons. In all cases, the prejudice to the accused from denying a procedural norm must be balanced against the need to make administrative decisions efficiently.

(i) Standard of Review

Generally, the tribunal's procedural decisions will be assessed on a standard of **fairness**. The court will show deference to the administrative body's discretionary choice of procedures, provided that the selection is fair

in the circumstances. See e.g. *Baker v. Canada (Minister of Citizenship and Immigration)* [13], [1999] 2 SCR 817.

For provincial tribunals to which the *ATA* applies, the Act provides: "questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted **fairly**" (ss 58(2)(b) and 59(5)).

(ii) Duty to Act Fairly

Tribunals have a common-law duty to act fairly. At its most basic level, the doctrine of fairness requires that a party be given the opportunity to respond to the case against them. The circumstances determine whether this response is a written objection or a full oral hearing. As a corollary to the right to present one's case, the legal maxim that only the people who hear the case may decide on it applies to tribunals. The tribunal must meet quorum but need not be unanimous.

The extent of disclosure depends on what is fair to all parties involved and whether the information at issue is prejudicial to an individual's interests (i.e., failure to disclose inconsequential information may not be fatal). At the very least, a party must know which incidents and allegations will be at issue when the decision is made.

The courts will allow tribunals considerable latitude in establishing procedures; however, procedures must be consistently followed. Where a tribunal informs an individual that a certain procedure will be followed, it will generally be considered unfair to follow a different procedure.

No one has the right to an adjournment. Tribunals generally hold their hearings within a reasonable time even when their statutes have no limitation period. Nonetheless, tribunals may grant an adjournment when necessary. In deciding whether to allow an adjournment, tribunals should consider the amount of notice, the gravity of the consequences of the hearing, the degree of disclosure, and the availability of counsel.

(iii) Right to Be Heard

If there is a hearing, a party is entitled to be present while evidence or submissions are presented. The right to be present at a hearing normally includes a party's right to appear with counsel and their right to an interpreter, though normally a tribunal is not required to pay for these services. The tribunal has discretion as to whether the hearing is public or private (although there is a presumption in favour of public hearings). At any hearing, the tribunal must gather and weigh the evidence. Relevance is the primary consideration when determining admissibility. Not all administrative decisions involve an oral hearing. A tribunal may have the power to make certain decisions solely on the basis of written submissions.

(iv) Onus of Proof

The onus of proof is normally to a civil standard, i.e., that the events alleged occurred on a balance of probabilities (more than 50% likely). However, disciplinary hearings may be to a mixed standard requiring proof beyond a reasonable doubt for some elements.

(v) Duty to Act in Good Faith

All decision-makers are expected to act in good faith and not to discriminate on the basis of irrelevant criteria. Parties are entitled to a decision made by persons untainted by the appearance of bias or conflicts of interest. A tribunal has a duty to at least consider exercising any discretion it may have.

d) Remedies of Judicial Review

Several remedies are available through judicial review:

1. an order in the nature of *mandamus* that requires a tribunal to exercise certain powers;
2. an order in the nature of *prohibition* that prohibits a tribunal from exercising unlawful authority;
3. an order in the nature of *certiorari* that quashes a tribunal decision;
4. where there is an exercise, refusal to exercise, or a proposed or purported exercise of a statutory power, an injunction or declaration from the court; or
5. a court-issued declaration to clarify the law.

A party may also challenge a tribunal decision via a civil action for a declaration or injunction. For non-statutory tribunals, this is the only method of challenge. This is also the only method of challenge wherein the court may grant damages.

> **NOTE:** Justice Access Centres are now open with locations in Abbotsford, Nanaimo, Surrey, Vancouver and Victoria. The centres can help clients access and fill out the required forms to file for Judicial Review, provide information about legal issues and refer individuals to services and resources that may be helpful. Please contact the centre nearest you for additional support. For more information visit: www.gov.bc.ca/Justice-Access-Centre [14].

2. Ombudsperson

The procedures created by the BC *Ombudsperson Act*, RSBC 1996, c 340, furnish an inexpensive means for reviewing decisions and practices of **provincial** government bodies. At present, there is no federal equivalent of the provincial Ombudsperson. However, as discussed later in this chapter, there are sectional equivalents in such fields as police enforcement and official languages.

The *Act* has the following main features:

- The Ombudsperson is empowered to investigate complaints against public sector bodies including provincial ministries and provincially appointed boards, commissions, Crown corporations, and other public institutions where the majority of the board is appointed by the provincial government or is responsible to the government.
- The Schedule to the *Ombudsperson Act* also empowers the Ombudsperson to investigate complaints against such entities as provincial corporations, municipalities and regional districts, universities and colleges, hospitals, and governing bodies of professional or occupational associations established by a provincial Act.
- The Ombudsperson does **not** have jurisdiction to investigate complaints in areas where the parties are private actors or where other specialized complaint procedures have been established. Examples include complaints regarding banks, private life and health insurance, consumer inquiries, doctors, employment issues involving private companies, federal programs, landlord and tenant (residential) inquiries, municipal police, and the RCMP. For instance, the Ombudsperson may not re-evaluate the merit of the adjudicator's decision just because either the tenant or landlord is not happy with the decision. However, the Ombudsperson has jurisdiction to investigate the administrative unfairness of the Residential Tenancy Branch.
- The Ombudsperson has broad powers of inquiry and may make recommendations, but has no power to enforce those recommendations.
- The complainant must exhaust review or appeal procedures within the agency against which the complaint was made **before** turning to the Ombudsperson.
- The Ombudsperson tables an annual report in the Legislature and may publicly disclose any findings if an agency is not complying with their recommendations.

Contact the current Ombudsperson, Jay Chalke, at:

The Ombudsperson

Online	Website [15]
Address	Second Floor - 947 Fort Street Victoria, BC V8V 3K3 Mail: PO Box 9039 STN PROV GOVT Victoria, BC V8W 9A5
Phone	(250) 387-5855 Toll-free: 1-800-567-3247 Fax: (250) 387-0198

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[15] http://www.bcombudsperson.ca/

IV. Privacy or Access to Information

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

A. Introduction

Although the right to privacy is fundamental to the healthy exercise of democratic rights, recognition and practical enforcement of this right by legislators and the courts has been slow. This problem has many sources, but underlying it is the enormous difficulty jurists have found in coming to an understanding of what is meant and entailed by this right.

The right to privacy is often balanced against the right to access information since these rights frequently collide (e.g., when an employer wishes to obtain information about an employee from a government agency). In some cases, a right of access to information may determine whether or not an individual's privacy has been violated. Legislation regulating access to government information is designed to ensure an informed citizenry; when someone seeks information that may injure the privacy interests of a third party, mechanisms exist to weigh privacy interests of the individual against the public interest in disclosure. The following provides a quick survey of the relevant privacy or access to information laws.

B. At Common Law

At common law, the torts of trespass, nuisance, defamation, and invasion of privacy may discourage some of the more blatant forms of invasion of privacy. However, these civil actions retroactively provide compensation for the breach of privacy rather than ensure privacy.

C. Wiretap Legislation and Lawful Access

Individuals interested in information on wiretapping and lawful access to information should contact the BC Civil Liberties Association, who specialize in dealing in these areas. The case law in this area is very complicated, and an experienced criminal lawyer should be consulted if issues regarding a wiretap arise.

D. Federal Privacy Act, Federal Access to Information Act

1. Introduction

The federal *Access to Information Act*, RSC 1985, c A-1, and the federal *Privacy Act*, RSC 1985, c P-21, both deal with freedom of information. The *Access to Information Act* allows for access to information in records under the control of federal government institutions. The *Privacy Act* protects the confidentiality of information about an individual held by federal government institutions, and provides individuals with a right of access to information about themselves held by such institutions. What follows is only a brief outline of the main provisions of these Acts. Individuals should consult the Acts if they have a problem in this area.

2. Privacy Act

If an individual wants to obtain information relating to themselves, they should make an application under the federal *Privacy Act* and should make their application directly to the agency that has the information.

The *Privacy Act*, RSC 1985, c P-21, sets out the conditions under which a government institution may collect, maintain, and use personal information about individuals. The *Act* requires that:

1. the information collected must relate directly to an operating program or activity of the institution (s 4);
2. information used in a decision-making process that directly affects the individual should be, wherever possible, collected directly from the individual to whom it relates, or with their consent, and the institution shall inform the individual of the purpose for which the information is being collected (s 5);
3. the institution shall ensure that information used to make a decision about an individual is accurate, up-to-date and as complete as possible, that it is retained long enough for the individual to have a reasonable opportunity to obtain access to it, and that it is disposed of in accordance with the relevant regulations and ministry directives or guidelines (s 6); and
4. the information shall not, without the consent of the individual, be used for any purpose except that for which it was obtained, for a use consistent with that purpose, or for other purposes specified in the Act (s 7).

The Privacy Commissioner is authorized to oversee compliance by federal government institutions with the provisions of the *Privacy Act*. The Commissioner receives and investigates complaints from individuals, audits institutions' storage and use of information, makes recommendations to institutions and the Treasury Board regarding privacy issues, and presents an annual report to Parliament.

> **NOTE:** Per amendments made to the *Access to Information Act* and the *Privacy Act*, a ministerial advisor and a member of a ministerial staff are excluded from the definition of "personal information".

The Commissioner cannot make orders requiring bodies to comply with the *Act* but may investigate and make reports. Individuals who are refused access to their own personal information may, after the Commissioner has investigated and reported, apply to the Federal Court for an order requiring access to this information. The Privacy Commissioner may also take enforcement proceedings in Federal Court in relation to a refusal to give an individual access to their own personal information. For further information, contact:

BC Freedom of Information and Privacy Association

Online	Website [1]

Any complaints regarding your *Privacy Act* request should be submitted in writing to:

Office of the Privacy Commissioner of Canada

Online	Website [2]
Address	30 Victoria Street Gatineau, QC K1A 1H3
Phone	1-819-994-5444 Toll-Free: 1-800-282-1376 TTY: (819) 994-6591

3. Access to Information Act

This Act gives Canadian citizens, permanent residents and any individual present or corporation in Canada the right to access any record under the control of a federal government institution.

If you are seeking to obtain information about an individual person, see section IV.D.2 on the application of the *Privacy Act*.

Certain classes of information are exempt from the *Act*. These include confidential inter-governmental communications, information pertaining to law enforcement and investigations, trade secrets, personal information, and generally anything likely to be harmful to Canada's national security interest.

On June 21, 2019, an Act to amend the *Access to Information Act and the Privacy Act* received Royal Assent. Under the amended *Act*, a federal institution may decline to act on a request to access to a record for various reasons if approved by the Information Commissioner. In addition to this change, the amended Act clarifies the power of the Information Commissioner regarding the authority to refuse or cease to investigate and to examine disclosure subjected to solicitor-client privilege or professional secrecy

> **NOTE:** In the Supreme Court of Canada decision in *Ontario (Public Safety and Security) v Criminal Lawyers' Association* [3], 2010 SCC 23, the Court held that the guarantee of freedom of expression under subsection 2(b) of the *Charter* does not guarantee access to all documents in government hands. In that case, the Court adopted the test for whether freedom of expression was infringed found in *Irwin Toy Ltd v Quebec (Attorney General)* [4], [1989] 1 SCR 927, and determined that freedom of expression was not infringed by the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31. See both of these cases for more detailed information.

The procedure for obtaining a government record is as follows:

1. Go to http://canada.justice.gc.ca/eng/trans/atip-aiprp for the Access to Information and Privacy website, which offers a brochure about using the *Act*, online access to Info Source, and online forms. Alternatively, any public library provides the same information. Info Source is a directory that describes each federal government institution and the information it holds, as well as the title and address of the appropriate officer to whom requests should be sent.
2. Formally request the records by sending in the online or printed request forms, or by sending a letter. These options are available under "Options for Submitting an ATIP Request". Be as specific as possible citing subject, dates, events, and individuals. Enclose a $5.00 payment, but ask that this and any other fees be waived on the grounds that the release of records would be of "general public benefit" or that similar information has been released in the past. Note: Requests for information under the *Privacy Act* do not require a fee.
3. Once the institution receives a request, it has 30 days to give notice of whether access will be given. Senior officials can extend this time limit if they give notice of extension. If third parties are involved, the time limit is 80 days. If access is refused, they must inform the person making the request of the right to make a complaint to the Information Commissioner.

It can take up to one year to receive records to which access is given. There is no meaningful redress for delays of this nature.

> **NOTE:** The federal government has introduced changes to the *Access to Information Act* which will strengthen the powers of the Information Commissioner to make binding orders to government institutions.

Complaints should be sent in writing to:

Office of the Information Commissioner

Online	Website [5] E-mail: greffe-registry@oic-ci.gc.ca
Address	30 Victoria Street Gatineau, QC K1A 1H3
Phone	Toll-free: 1-800-267-0441 Fax: (819) 994-1768

A complaint must be made within 60 days from the date that you received a response to your request.

The Information Commissioner investigates complaints in private, and each party has the right to make representations. Similar to an Ombudsperson, the Commissioner can only make recommendations, and cannot directly compel the release of information. However, they can take the institution to Federal Court to compel the release of the information. The Commissioner is not obligated to take on a case, and if they refuse to do so, there is no right to appeal this refusal.

> **NOTE:** It is helpful to check to see if the organization you are requesting information about has a form of its own. It would cut down on time for the form to go directly to the organization.

There is, however, a right to appeal the original denial of access; this appeal must be made to the Federal Court within **30 days** of the decision of the Information Commissioner (s 41(1)). In court, the burden of proof is on the government to show that the information must be withheld.

E. Federal Personal Information Protection and Electronic Documents Act

1. Introduction

The federal *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*], is intended to remedy some of the problems encountered by consumers and by businesses when information relating to consumer habits is collected to be used internally or externally by private sector organizations. *PIPEDA* is a federal law governing:

1. the collection, protection, and disclosure of personal information; and
2. the use of electronic versions of official documents on paper, in the public and private sphere.

While *PIPEDA* is a federal act, the legislation claims to have jurisdiction over the provincially regulated private sector as well as the federal sector. However, subsection 26(2) of the Act gives the Governor-in-Council the power to exempt an organization where substantially similar provincial legislation exists. Almost all provinces have enacted their own version of the *Act*. In October 2003, BC passed the *Personal Information Protection Act*, SBC 2003, c 63 [*PIPA*], which has been declared substantially similar legislation.

For more information on *PIPEDA*, please see:

Stephanie Perrin, Heather Black & David Flaherty, *The Personal Information Protection and Electronic Documents Act: An Annotated Guide* (Toronto: Irwin Law, 2001).

F. BC Personal Information Protection Act

The BC *PIPA* is an attempt by the province to maintain jurisdiction over the regulation of private business, historically under the Province's control. The purpose of this *Act* is to govern the collection, use, and disclosure of personal information by **private** organizations. The *Act* has been in force since 2004 and has been declared substantially similar by the Governor-in-Council, thereby exempting *PIPA*-applicable organizations in British Columbia from the application of the federal *PIPEDA*.

G. BC Freedom of Information and Protection of Privacy Act

1. Introduction

The *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 [*FIPPA*], is similar in some respects to the federal access and privacy legislation relating to **public** organizations. As a result of this provincial legislation, there is a consistent policy regarding access and privacy for BC government ministries and agencies. The *Act* is significant for two reasons:

(a) it has standardized decision-making criteria in regards to access and privacy; and

(b) has established a uniform appeal process.

This *Act* is amended from time to time. On November 25th, 2021 significant changes to FIPPA were enacted through Bill 22-2021. It is advisable to consult the Act for certainty.

The most important recent change relates to the costs associated with Freedom of Information requests. While there are no fees for personal Freedom of Information requests, a non-refundable $10 fee is now required for all general Freedom of Information requests, for each public body included in the request. A request will not be processed unless and/or until the fee is paid. There are no processing fees for the first three hours spent locating requested records or for the time taken to redact information from records. However, processing fees for requests that require additional time will vary depending on the size and complexity of the FOI request (section 71(1)). If there are costs associated with a request, the head of the public body must provide the applicant with a written estimate of the total cost before providing the associated services (section 75(4)(a)).

An individual may apply to have the fees waived if they are unable to afford them or there is a valid reason for the payment to be excused, such as the information requested is a matter of public interest (section 75(5)). However, the $10 application fee associated with all General FOI requests cannot be waived.

Indigenous Governing Entities are exempt from associated fees to prevent barriers to accessing information.

Additional information regarding costs related to FOI requests, can be found at the following link: https://www2.gov.bc.ca/gov/content/governments/about-the-bc-government/open-government/open-information/freedom-of-information/11936#:~:text=There%20are%20no%20application%20fees,body%20included%20in%20the%20request

Further information about the *Act* can be obtained from the following organization:

Freedom of Information and Privacy Association [1]

The BC Civil Liberties Association has also published a handbook on privacy that provides detailed information about various aspects of the law relating to privacy. It can be found online at http://bccla.org/privacy-handbook.

2. Scope of Freedom of Information Rights

Section 3 of the *FIPPA* provides that the Act applies to all records in the custody or control of a "public body", subject to the exceptions outlined in subjections (3) to (5). In addition to the entities defined as public bodies in Schedule 1, including BC government ministries, institutions, municipalities, hospitals, and universities and colleges, Schedule 2 lists specific organizations that are covered by the Act, including BC Hydro, ICBC, Legal Services Society, *Mental Health Act* Review Board, and the Workers' Compensation Board.

In July 1993, an amendment to the *FIPPA* expanded the scope of the legislation to include governing bodies of various professions within the scope of the Act. These professions include lawyers, accountants, engineers, teachers, doctors, and nurses (see Schedule 3).

Sections 12 to 22.1 restrict the disclosure of information. The following may **not** need to be disclosed:

1. cabinet and local public body confidences (s 12);
2. policy-oriented information (s 13);
3. legal advice (s 14);
4. information harmful to law enforcement (s 15);
5. information harmful to intergovernmental relations or negotiations (s 16);
6. financially sensitive data (s 17);
7. information harmful to heritage sites or endangered species (s 18)
8. information harmful to interests of an Indigenous people (section 18.1)
9. information harmful to individual or public safety (s 19);
10. information harmful to a third party's business interest (s 21);
11. information harmful to a third party's personal privacy (s 22); and
12. information relating to abortion services (s 22.1).

It is worth noting that some of the exceptions are mandatory (sections 12, 18.1, 21 and 22 on third-party business) and others discretionary (section 13 to 18 and 18 to 20. There is also public interest override in section 25, which requires disclosure of information about risk of significant harm to the environment, or public health or safety, or in other circumstances where disclosure is clearly in the public interest.

> **NOTE:** In *Re South Coast BC Transportation Authority* [6], [2009] BCIPCD No 20, it was decided that Translink was a public body. Thus, public disclosure of employment records for Translink employees would not be an unreasonable invasion of third party privacy. However, this was based on a rebuttal of the presumption that a disclosure of personal information is an unreasonable invasion of a third party's personal privacy if the personal information describes the third party's finances, income, etc. A change of circumstances could change the outcome. In *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component* [7],[2009] 2 SCR 295, Translink was found to be a government entity under section 32 of the *Charter of Rights and Freedoms* [*Charter*], and thus subject to *Charter* scrutiny.

3. Scope of Privacy Rights

Apart from allowing for access to information, *FIPPA* also has provisions restricting the collection, protection, and retention of personal information.

"Personal information" is defined in Schedule 1 of the Act as all recorded information about an identifiable individual other than contact information. The recorded information includes the individual's name, race, colour, religious or political beliefs, age, sex, sexual orientation, marital status, fingerprints, blood type, health care history, educational, financial, criminal or employment history, anyone's opinion about the individual, and the individual's personal views or opinions, except if they are about someone else.

Public bodies can collect personal information only when authorized by legislation, for law enforcement purposes, or when necessary to the operation of a program administered by the public body, when necessary to reduce the risk that an individual will be a victim of domestic violence, when the information is collected by observation at a public event with voluntary individual participation or with the individuals consent. (section 26).

In general, a public body must collect personal information directly from the individual (s 27). Notable exceptions include: when an alternative method is authorized by the individual, by the Privacy Commissioner, or under another statute; and when the information is used for the purpose of collecting a debt or fine or making a payment. Except where the information is collected for law enforcement purposes, the public body must also tell the individual from whom it collects personal information the purpose and the legal authority for collecting it.

The public body has a duty to ensure the information it collects is accurate and complete (s 28). An individual has the right to request correction if they believe there is an omission or error in the personal information (s 29).

Heads of public bodies must protect personal information by reasonable security arrangements against unauthorized access, collection, use, disclosure, or disposal (s 30). Section 30.3 provides whistle-blower legislation to protect employees fulfilling this obligation.

A public body can only use personal information in its possession for the purpose the information was obtained or a use consistent with that purpose, if the individual the information is about has identified the information and has consented to its use, or for a purpose for which the information may be disclosed to the public body under section 33 (section 32).

Sections 33 to 34 deal with disclosure of personal information by a public body. These sections empower a public body to disclose personal information only under certain circumstances, such as where there is the consent of the individual; where the information is used for a consistent purpose or for the purpose of complying with another enactment; enactment; where the information may reduce the risk that an individual is likely to be a victim of domestic violence if domestic violence is reasonably likely to occur otherwise; where the information is used for collecting a debt, payment, or fine owed by the individual to the provincial government or a public body; where the information is used in an audit; and where the information is used by a public body or a law enforcement agency to assist in an investigation in which a law enforcement proceeding is intended or likely to result.

4. Process of Making a Disclosure Request

a) Step One: Requesting Disclosure or Correction

An individual can send a letter to a public body asking for disclosure of information pertaining to that individual or for a correction of information. If the request is for access to information, the head of the public body then has 30 days to respond (this time limit can be extended under section 10) (s 7(1)). Section 8(1) requires that any response must either (a) inform the applicant if they are entitled to access some or all of the requested documents, (b) inform the individual of where, when, and how the record will be disclosed, or (c) detail the reasons the request was denied.

If the request is for a correction of information held by the public body, the head of the public body must either correct the record (section 29(1)),or annotate the information with the correction that was requested (section 29(2)). The head If the request is for a correction of information held by the public body, the head of the public body must either correct the record (section 29(1)), or annotate the information with the correction that was requested (section 29(2)). The head of the public body must next notify all other parties to whom the information in question has been disclosed within the past year (section 29(3)).

Always check with the organization itself to see if it has its own forms for requests; this makes the process much faster.

To obtain a copy of a police report, complete the form provided by the "Information and Privacy" section of the police department from which you are requesting the records (for the VPD, you will find the form here: http://vancouver.ca/police/assets/pdf/forms/vpd-form-foi-request.pdf). Include a copy of the person's driver's licence if possible and a cover letter explaining the details of the report you are looking for. If you are asking to receive documents on someone's behalf you will also need them to sign an authorization or release. Typically there is no charge if you are requesting documents that relate to an interaction you had with police.

If a person has been a victim of property crime, their insurance company might require them to obtain a copy of the police report. Sometimes the insurer will make the request for you. To obtain this record, fill out the Request for Property Report Form [8], or send in a written request with the following information: police file number, full name, current address, telephone number, location of incident, type of incident, and any other helpful details. There is a fee for this service, and the letter and payment ($55.00 including applicable taxes) should be placed in an envelope and mailed to the following address:

ATTENTION: Correspondence Unit

Vancouver Police Department

3585 Graveley St.

Vancouver, BC V5K 5J5.

See here for full details: vancouver.ca/police/organization/support-services/request-police-report.html

For further information on the process of making a disclosure request, contact:

Office of the Information and Privacy Commissioner for British Columbia

Online	Website [9] Email: info@oipc.bc.ca
Address	PO Box 9038, Stn. Prov. Govt., 4th Floor, 947 Fort Street, Victoria, British Columbia, V8W 9A4
Phone	(250) 387-5629 Fax: (250) 387- 1696

NOTE: The public body to which a request is made may charge to provide a copy of the record and its shipping and handling, and for the time spent locating the record and preparing it for disclosure (*FIPPA*, s 75(1)). They cannot charge, however, for the first 3 hours spent locating and retrieving a record and time spent severing information (s 75(2)). Likewise, these fees do not apply to a request for the applicant's own personal information (s 75(3)). If a request for payment is made, send a letter explaining that the fee should be waived because:

(i) you cannot afford payment (s 75(5)(a));

(ii) it is fair to excuse payment (s 75(5)(a)), or;

(ii) the record relates to a matter of public interest (e.g., the environment, public health and safety, etc.) (s 75(5)(b)).

b) Step Two: Filing a Complaint with the Information and Privacy Commissioner

If the public body refuses to disclose the information or make the requested correction, the next step is to file a complaint with the Information and Privacy Commissioner. Under section 42, the Commissioner oversees the administration of the *Act*. An individual can ask the Commissioner to review any decision pertaining to access or correction within 30 days of notification of the decision (s 53(2)(a)) (although section 53(2)(b) allows the Commissioner to extend this limitation period). Please refer to the *FIPPA* and its regulations for a detailed description of the review process.

The Commissioner has significant power to enforce a judgment (much more so than the equivalent federal official). Generally, the burden is on the public body to justify its refusal to disclose information (although there are notable exceptions pertaining to third-party interests (see s 57). The head of a public body must comply with an order of the Commissioner unless an application for judicial review is brought within 30 days (s 59). A person other than the head of a public body who is dissatisfied with a decision of the Commissioner may seek judicial review pursuant to the *Judicial Review Procedure Act*.

H. The BC Privacy Act

BC *Privacy Act*, RSBC 1996, c 373, makes it a "tort, actionable without proof of damages, for a person, wilfully and without claim of right, to violate the privacy of another" (s 1(1)). Subsection 1(2) of the *Act* entitles a person to the nature and degree of privacy that is "reasonable in the circumstances", but the *Act* itself gives limited guidance to the courts on what particular circumstances are deemed to be an unreasonable invasion of privacy. However, section 2 does set out a number of exceptions.

Most of the reported cases brought under the *Act* have been unsuccessful, largely because the courts have been reluctant to accept a broad view of what type of expectations of privacy are reasonable. One difficulty with the *Act* is that a person offended by an invasion of privacy is unlikely to seek redress through a public process that will have the effect of further airing the private matter.

Actions under the *Privacy Act* must be brought in the BC Supreme Court (s 4).

I. Police Information Checks (Criminal Record Checks)

Police information checks, also known as criminal record checks, consist of information which may be required by a potential employer or volunteer organization, in the later stage of their hiring process. Police information checks are conducted and provided by individual local police departments and the RCMP, who are supposed to play a neutral role in the hiring process.

Employment or volunteer candidates who are asked by their potential employer or volunteer organization to provide a police information check should be aware that potential employers and volunteer organizations may only use relevant information to determine the suitability of a candidate. In particular, the *BC Human Rights Code*, RSBC 1996, c 210, section 13 makes it illegal for employers to discriminate based on having been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of a person.

The British Columbia Provincial Policing Model Policy Guidelines [10] operate to ensure that policies and practices align among police agencies in British Columbia so that citizens, employers, and volunteer organizations receive consistent Criminal and Police Information Checks. The following is a summary of the Guidelines.

If working with vulnerable persons, employment or volunteer candidates may be asked by their potential employer or volunteer organization to provide a vulnerable sector check. Vulnerable persons are individuals who, because of their age, disability, or other circumstances, whether temporary or permanent, are (a) in a position of dependence on others or

(b) are otherwise at a greater risk than the general population of being harmed by a person in a position of authority or trust relative to them, as defined by the *Criminal Records Act*, RSC 1985, c C-47, s 6.3(1).

Vulnerable sector checks consist of screening designed to protect vulnerable persons from dangerous offenders by uncovering the existence of a criminal record, adverse police contact, and/or pardoned (or record suspension) sexual offence conviction. This level of screening is restricted to applicants seeking employment and/or volunteering with vulnerable persons.

The Guidelines stipulate that the board, chief constable, chief officer, or commissioner should ensure that:

Job applicants who work with the vulnerable sector will, at the request of their employer, receive a check that:

(a) includes a search of, at a minimum, Canadian Police Information Centre (CPIC), Police Information Portal (PIP), Justice Information (JUSTIN), and Police Records Information Management Environment (PRIME) records;

(b) discloses to the applicant all warrants, outstanding charges, convictions and adverse contact;

(c) does not include the disclosure of apprehensions under section 28 of the *Mental Health Act*;

(d) does include adverse contact involving the threat or actual use of violence directed at other individuals, regardless of, but without disclosing, mental health status;

(e) does not include youth offences unless provided for under the *Youth Criminal Justice Act*;

(f) does include information on a sexual offence conviction where a pardon or record suspension has been granted;

Those who are not working with vulnerable persons may be asked instead to provide a non-vulnerable sector check. The Guidelines stipulate that applicants who are not working with the vulnerable sector will, at the request of their employer, receive a check that:

(a) includes a search of, at a minimum, CPIC, PIP, JUSTIN, and PRIME records;

(b) discloses to the applicant all warrants, outstanding charges, and convictions;

(c) does not disclose adverse contact;

(d) does not include the disclosure of apprehensions under section 28 of the *Mental Health Act*;

(e) does not include youth offences unless provided for under the *Youth Criminal Justice Act*;

In cases where non-disclosable information indicates a significant threat to public safety, police agencies may either refuse to complete the check or take action under their duty to warn responsibilities noted below.

Nothing in the Guidelines prevents a police agency from disclosing information under either a statutory or common law duty to provide warnings where the health, safety or wellbeing of an individual or individuals is at risk of significant harm.

Further information regarding the Guidelines, including a full list of information which should or should not be included in a Police Information Check, may be found at: http://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/publications-statistics-legislation/publications/police-information-checks-guidelines-for-police

Because police information checks are provided by individual police departments or the RCMP, one should consult the website of the particular police department or that of the RCMP to discover specific information, such as that pertaining to fees, accepted forms of identification, and further information on what will or will not be included in the police information check.

The following is a link to information on police information checks conducted by the Vancouver Police Department: http://vancouver.ca/police/organization/records-checks-fingerprinting/index.html

Please consult Chapter 1: Criminal Law, located in the Law Students' Legal Advice Program's manual for information explaining the importance of consenting to disclosure, what information third parties may find out, the impact of having a criminal record, the elimination of records, and record suspensions: https://www.lslap.bc.ca/manual.html

If an individual disagrees with a decision of the police officer, such as to not provide a police information check or with the information provided on the police information checks, the individual can appeal the decision internally within the police department. The individual can submit a request to the head of the records check department within the police department where they made the initial information check request for a review of the decision. If the individual still disagrees with the appealed decision, then the next avenue of appeal, if one is available, remains unclear. It is possible that an applicant may file for Judicial Review of the police department's decision (see **III.C.1 on Judicial Review**). The Privacy Commissioner's Office may possibly have jurisdiction over these matters, although their current position is that a police information check is different than a request for release of information, and is not covered by their legislation.

References

[1] http://fipa.bc.ca/home/
[2] http://www.priv.gc.ca
[3] https://www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html?autocompleteStr=Criminal%20Lawyers'%20Association%20v%20Ontario%20(Public%20Safety%20and%20Security)%2C%202010%20SCC%2023&autocompletePos=1
[4] https://www.canlii.org/en/ca/scc/doc/1989/1989canlii87/1989canlii87.html?resultIndex=1
[5] http://www.oic-ci.gc.ca/eng/
[6] https://www.oipc.bc.ca/orders/995
[7] https://www.canlii.org/en/ca/scc/doc/2009/2009scc31/2009scc31.html?resultIndex=1
[8] https://vpd.ca/wp-content/uploads/2021/06/vpd-form-1713-request-for-property-report.pdf
[9] http://www.oipc.bc.ca/
[10] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/publications/police-information-checks/model_policy_guidlines.pdf

V. Complaints against the Police

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

A. Introduction

Individuals may be dissatisfied with the level of service given by the police. The following section outlines some of the informal and statutory procedures governing citizen complaints against police officers.

There are two main categories of police forces in BC: municipal police forces, which are governed by the BC *Police Act*, RSBC 1996, c 367, and the RCMP, which is governed by the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [RCMPA]. The RCMP is the policing agency in all parts of BC not served by a municipal police force. Their status as the provincial police force is authorized under section 14 of the BC *Police Act*. Municipal police forces and the RCMP will be dealt with separately, as the complaint process for each is significantly different.

In 2012 the province opened the Independent Investigations Office ("IIO"), an independent body that reviews police incidents of severe bodily harm or death. To begin an investigation, complaints are to be filed with the Police Complaint Commissioner, who forwards it to the IIO. For further information, please see: http://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/complaints-against-police and http://iiobc.ca/

> **NOTE:** In the fall of 2023, the Legislative Assembly of British Columbia will be tabling initial reforms to the Police Act to address police governance and oversight. The proposals for reform are based on a report from April 2022 recommending sweeping reforms to the Police Act. It is still unclear which of the recommendations will be acted upon in the fall, but it is important to note that significant changes related to systemic racism in policing, relations with Indigenous communities and how officers respond to mental health calls may result in the near future. To access the April 2022 report in its entirety, visit: https:/ / www. leg. bc. ca/ content/ CommitteeDocuments/42nd-parliament/3rd-session/rpa/SC-RPA-Report_42-3_2022-04-28.pdf

B. Complaints Against a Member of a Municipal Police Force

1. General Information

Filing a police complaint against a municipal police officer is different from filing a lawsuit against a municipal police officer. Generally speaking, complaints against a municipal police officer can only lead to the officer being disciplined and do not compensate an individual for any loss they have suffered. Filing a lawsuit against the police in civil court can lead to compensation if a person's rights were violated, but does not necessarily lead to the officer being disciplined. Parallel actions can be launched if an individual desires both compensation and disciplinary consequences for the officer involved in the incident.

Part 11 of the *Police Act* sets out a framework for dealing with public complaints about municipal police forces in BC. The Office of the Police Complaints Commissioner (OPCC) was created as a body independent from all municipal police forces and government ministries. Complaints continue to be investigated by police departments, but the Police Complaints Commissioner monitors how police departments investigate and conclude complaints throughout all the municipal police areas. The process is outlined below. For further information and a more detailed description of the complaint process, please refer to the OPCC website at http://www.opcc.bc.ca, or see Part 11 of the *Police Act*.

NOTE: Filing a police complaint, or waiting for the conclusion of criminal charges, does not extend the limitation period for filing a civil claim. If an individual wants to start a civil claim, it must be done **within two years** from when the harm was suffered or discovered. Before beginning a civil claim for police misconduct, the individual must write a letter to the City Clerk's office relating the time, location, and nature of the alleged misconduct. This letter must be sent within 60 days of the cause of action (*Vancouver Charter*, SBC 1953, c 55, s 294). The letter provides the city with notice that a civil action will be filed, and allows a complainant to add the city as a party to the civil action at a later date. This letter does not start a complaint or a civil action in itself but is a necessary first step that must be taken before launching a civil claim. If a letter has been sent to the City Clerk's Office within 60 days, the limitation date for filing a civil complaint is **2 years** after the cause of action.

For a more detailed discussion on launching civil claims against the police see **Section V.D.2**.

NOTE: If an individual is seeking a copy of their police report, they should make this request before filing a complaint. Otherwise, they must wait until after the matter has been investigated.

NOTE: Based on recommendations made in the February 2007 Report on the Review of the Police Complaint Process in BC by Josiah Wood, the *Police Act* was amended and the new *Police Act* came into force on March 31, 2010. The OPCC website now provides an online complaint form to make the filing of complaints easier.

2. The Complaint Process

A member of a municipal police department engages in misconduct when they commit an offence under any provincial or federal act that would render them unfit to perform their duties or that would discredit the reputation of the municipal police department. For an exhaustive definition of misconduct, see section 77 of the *Police Act*, which governs policing standards for every police officer in BC regardless of department.

Additionally, each municipal police department will have its own policies regarding appropriate conduct by their police officers. Some departments, such as the Vancouver Police Department (VPD) will have their policies available online. The VPD's Regulations and Procedure Manual and other policies can be found online at the following link: http://vancouver.ca/police/about/major-policies-initiatives/index.html.

Individuals can make complaints about alleged misconduct by municipal police to the police complaint commissioner. Individuals do not need to have directly witnessed the misconduct; complaints can be brought on behalf of someone or even by third-party complainants. The complaint must generally be made within **12 months** of the misconduct (*Police Act*, s 79(1)), but if good reasons exist, and it is not contrary to the public interest, the police complaint commissioner can extend that period (*Police Act*, s 79(2)).

Step 1: Making a Complaint

There are two types of complaints: registered and non-registered. When someone submits a registered complaint, they will be kept informed about the investigation and its outcome, and they have a right to appeal the result. By contrast, someone submitting a non-registered complaint does not participate any further in the process and cannot appeal the outcome.

An individual can register a complaint by submitting it either directly to the OPCC or to an on-duty police member at the station who is assigned to receive *Police Act* complaints (*Police Act*, s 78(2)). A non-registered complaint can be submitted orally to any on-duty member in the station or on the road.

Both types of complaints can be made through the online complaint form on the OPCC website.

Step 2: Admissibility

Before investigating a complaint, the Commissioner must first determine whether it is admissible (*Police Act* s 82). A complaint is admissible if it is made **within 12 months** of the incident, is not frivolous or vexatious, and contains at least one allegation that, if proved, would constitute misconduct under section 77 of the *Police Act*. Complainants will be contacted to tell them whether their complaint is admissible or not (*Police Act*, ss 83(1) and (2)). The Commissioner's determination of admissibility cannot be appealed.

Once the Commissioner determines a complaint is admissible, they will send a notice of admissibility to the complainant and to the chief constable of the department involved (*Police Act* s 83(2)). The chief constable must notify the member or former member of the complaint that has been made against them (*Police Act*, s 83(3)), appoint an investigator and, depending on the circumstances of the misconduct alleged, determine whether the matter is suitable for informal resolution.

> **NOTE:** Complaints about a municipal police department's policies or about the services it provides, rather than about a particular incident of misconduct, may still be admissible but should be submitted under a different process. Contact the OPCC office directly about these complaints.

Step 3: Informal Resolution or Mediation

A complaint may be resolved informally at any time before or during an investigation if the matter is suitable and the complainant and the police officer agree in writing to the resolution. Informal resolution or mediation is a voluntary, confidential process that provides a non-confrontational opportunity for both parties to talk to each other and hear how their actions affected the other. If a complainant does not want to meet the police officer face to face, a neutral third party or professional mediator can facilitate and help the parties reach an agreement. Within **10 business days** after agreeing to the proposed informal resolution, either party may revoke the agreement by notifying the relevant discipline authority or the Commissioner in writing (*Police Act*, s 157(4)).

If a complainant strongly objects to their complaint being informally resolved and would prefer it be investigated immediately, they should let the OPCC know and provide reasons. Common reasons include fear of intimidation by the officer, the wish to have it formally investigated and substantiated, and a lack of time to participate in an informal process due to economic or other circumstances. Usually this objection is sufficient to move the complaint directly to the investigation step.

A complaint may also be resolved by mediation (*Police Act*, s 158(1)). If the Police Complaint Commissioner agrees, a professional mediator may be appointed to assist the complainant and the officer in resolving the complaint. The mediator is selected by the administrator of the BC Mediator's Roster and is completely independent from any police department or the OPCC.

Step 4: Investigation

An investigation into a misconduct complaint is usually conducted by the originating department's Professional Standards Section. The Commissioner may, if the circumstances require, order that an external police agency conduct the investigation. The OPCC will assign the file to an analyst, who will oversee the investigation conducted by the Professional Standards investigator and ensure that the investigation is thorough, impartial, and completed in a timely manner. All investigations must be completed within six months (*Police Act*, s 99(1)). During the investigation, the complainant and member will be periodically updated about the investigation's progress. At the conclusion of the investigation, the investigator will submit a final investigation report to the discipline authority, who will then decide whether the allegations are substantiated and, if so, propose corrective or disciplinary measures.

What happens next in the process depends on whether the allegations are substantiated or not.

If the Complaint Is Substantiated

(1) Pre-Hearing Conference

If the discipline authority decides that the allegation of misconduct is substantiated and merits disciplinary or corrective measures, the discipline authority may conduct a confidential prehearing conference with the police officer, if doing so is not contrary to the public interest (*Police Act*, s 120(2)). At the hearing, the officer has an opportunity to admit the misconduct and accept disciplinary or corrective measures. If the officer and the discipline authority at the prehearing conference agree on disciplinary measures, and the Commissioner gives their approval, the matter is considered resolved. This resolution is final and cannot be reviewed by a court on any ground.

(2) Disciplinary Proceeding

If a prehearing conference is not held, or if it does not result in a resolution of each allegation of misconduct against the police officer, the discipline authority must convene a disciplinary proceeding to determine appropriate disciplinary or corrective measures within 40 business days of receiving the final investigation report (*Police Act*, s 118(1)). However, the discipline authority must cancel this proceeding if the Commissioner arranges a public hearing about the impugned conduct (*Police Act*, s 123(3)).

The complainant must receive at least 15 days' notice of a disciplinary proceeding (*Police Act*, s 123(1)(c)(i)). The complainant may provide written or oral submissions in advance of the hearing but cannot actually attend the proceeding.

The discipline authority must, if appropriate, choose measures to correct and educate officers rather than measures intended to blame and punish. Unless the Police Complaints Commissioner orders a public hearing, the resolution is final.

If the Complaint Is Not Substantiated

(1) Retired Judge

Previously, only a police commissioner would review the file. However, complainants can now request that the Commissioner appoint a retired judge to review the file and determine whether or not the decision was correct (*Police Act*, s 117(1)). The complainant must make the request in writing within **10 business days** of receiving the discipline authority's decision (*Police Act*, s 117(2)). It is rare to have a retired judge review the file in less serious cases due to limited resources. There is a more realistic chance of success when the Commission appoints a retired judge.

For further information, please see http://www.opcc.bc.ca.

Public Hearing

The Office of the Police Complaint Commissioner ("OPCC") can order public hearings into matters involving misconduct by municipal police officers in British Columbia. After the investigation into the complaint has concluded, the complainant or the police officer may request a public hearing within 20 business days of receiving notice of the decision (*Police Act*, s 136(1)), or the OPCC may initiate a public hearing itself if a public hearing is necessary in the public interest (*Police Act*, s 138(1)(d)). In *Florkow v British Columbia (Police Complaint Commissioner)* [1], 2013 BCCA 92, the BC Court of Appeal found that under the current *Police Act* the OPCC can only hold a public hearing after certain stages of the complaint process — after the discipline authority has concluded its investigation, after the retired judge has reviewed the file, or after the disciplinary proceeding.

(1) Test for Ordering a Public Hearing

In deciding whether such a hearing is necessary in the public interest, the Police Complaints Commissioner must consider all relevant factors, including:

- the nature and seriousness of the complaint;
- the nature and seriousness of the alleged harm caused by the police officer, including whether the officer's conduct has undermined public confidence in the police or its disciplinary processes;
- whether a public hearing would assist in ascertaining the truth;
- whether a case can be made that the investigation was flawed, the proposed disciplinary measures are inappropriate, or the discipline authority incorrectly interpreted the law.

After a public hearing takes place, the judge's decision is communicated to all interested parties. The parties can appeal questions of law, but not questions of fact, to the BC Court of Appeal.

For help writing a letter of complaint against the Police Department, please pick up an informational brochure from:

BC Civil Liberties Association

Online	Website [2]
Address	306 - 268 Keefer Street, 2nd Floor Vancouver, BC V6Z 1B3
Phone	(604) 687-2919 Toll-Free: 1-855-556-3566 Fax: (604) 687-3045

C. Complaints Against a Member of the RCMP

In December 2014, the *Enhancing Royal Canadian Mounted Police Accountability Act*, SC 2013, c 18 [*ERCMPAA*], came into force. This legislation has significantly reformed the RCMP complaint process. The *ERCMPAA* made amendments to the *Royal Canadian Mounted Police Act* [*RCMPA*], which governs complaints against RCMP members.

1. General Information

Though the RCMP functions as provincial police in BC, the complaint process is governed by the Federal *RCMPA*. Under the Act, a Civilian Review and Complaints Commission has been established to monitor complaints against members, to conduct its own investigations into allegations of misconduct, and to hold public inquiries into such allegations where it deems them appropriate. All members of the Commission are civilians.

During an informal resolution attempt, or a formal investigation, the complainant will likely make oral or written statements. It is unclear whether such statements could be used against the complainant in other proceedings. If a complainant is facing criminal charges or a civil action regarding the same matter, the complainant should get the advice of counsel before making any statements.

The Commission can only make recommendations to the Commissioner of the RCMP regarding disciplinary action. However, if the Commissioner of the RCMP does not act on these recommendations, the Commissioner must give reasons for not doing so in writing to the Commission. Complaints against the RCMP in BC should be directed to:

Civilian Review and Complaints Commission for the RCMP

Online	Website [3] E-mail: complaints@crcc-ccetp.gc.ca
Address	National Intake Office P.O. Box 1722, Station B Ottawa, Ontario K1P 0B3
Phone	1-800-665-6878

2. The Complaint Process

Step 1: Making a Complaint

Individuals can make complaints orally or in writing to the relevant RCMP detachment, or to the Commission. The complaint will be acknowledged in writing. A member of the detachment will contact the complainant, and may attempt an informal resolution of the complaint. The most effective method is generally to send a written complaint to the Commission's regional office.

Generally, a complaint must be made within one year after the day on which the conduct is alleged to have occurred (*RCMPA*, s 45.53(5)). However, the Commission may extend the time limit for making a complaint if the Commission is of the opinion that there are good reasons for doing so and that it is not contrary to the public interest (s 45.53(6)).

Step 2: Informal Resolution

If no attempt is made to resolve the complaint informally, or if the attempt is unsuccessful, a formal investigation of the complaint will be carried out. The complainant must be informed in writing of the results of the investigation.

Under section 45.53 of the *RCMPA*, the Commission may refuse to deal with the complaint for certain reasons. If they refuse, the complainant may appeal this decision to the Commission for Public Complaints.

Step 3: Formal Resolution

A complainant who is not satisfied with the results of the investigation may request that the Commission review the handling of the complaint within 60 days of receiving notice of the decision or report (*RCMPA*, s 45.7(1)). As a result of this review, the Commission may refuse to conduct a further investigation, or may conduct a public inquiry into the complaint. There is no further appeal from the Commission's decision.

D. Civil or Criminal Proceedings

Other approaches to dealing with misconduct by the police force are:
(a) Asking for a criminal investigation and acting as a witness; or
(b)Suing in tort to get compensation for loss.

1. Criminal Proceedings

The *Criminal Code* [*CC*] limits the criminal liability of public officers who, in the course of conducting investigations or law enforcement activities, commit acts or omissions that would otherwise constitute offences. Under sections 25.1 to 25.4 of the *CC*, a public officer would be justified in committing an act or omission, or in directing another person to do so, that would otherwise constitute an offence, so long as the public officer (s 25.1(8)):

1. Is investigating criminal activity or an offence under an Act of Parliament, or is enforcing an Act of Parliament;

2. Is designated as a public officer for the purposes of sections 25.2 to 25.4 by the competent authority (the Solicitor General of Canada in the case of RCMP officers; the provincial Minister responsible for policing in the case of police forces constituted under provincial laws); and
3. Believes on reasonable grounds that committing the act or omission, given the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances.

In deciding whether the officer's act or omission is reasonable and proportional, and therefore justifiable, the courts will look at the nature of the act or omission, the nature of the investigation, and the reasonable availability of other means for carrying out the public officer's law enforcement duties (s 25.1(8)(c)).

If the public officer's act or omission is likely to cause loss or serious damage to property, the public officer would need authorization from a senior law enforcement official who believes on reasonable grounds that the act or omission is reasonable and proportional (s 25.1(9)(a)).

However, these provisions do not permit officers to cause death or bodily harm to another person either intentionally or through criminal negligence, nor do they justify conduct that violates someone's sexual integrity (s 25.1(11)).

Individuals should consult the *Criminal Code* (sections 25.1 to 25.4) for further details on the limited criminal liability of public officers.

Typically speaking, the only time a police officer will be charged is either if an internal investigation is launched, or a police complaint is filed and during the course of that investigation charges are recommended.

2. Civil Proceedings

Individuals may be able to sue police officers civilly, even when they have also made a complaint. Section 179(1) of the BC *Police Act* specifically states that the complaint proceedings outlined above do not preclude a citizen from taking, or continuing, civil or criminal proceedings against an RCMP officer or a municipal constable for misconduct. Outside of BC, the Supreme Court of Canada ruled in *Penner v Niagara (Regional Police Services Board)* [4], 2013 SCC 19, that the result of the police complaint process calls for a case-by-case review of the circumstances to determine whether it would be unfair or unjust to prevent further litigation.

Typical actions that are launched against peace officers include tort actions in assault, battery, false imprisonment, or malicious prosecution. This could be helpful to individuals who have been mistreated or suffered monetary loss because of police misconduct. These actions may now be brought in Small Claims Court.

When suing the police, the complainant would usually want to sue both the police officer and the government body responsible for the officer (see ss 11 and 20 of the *Police Act*). For a municipal police force this is the municipality; for the RCMP it is the Minister of Justice of British Columbia.

EXAMPLE: An action brought by a complainant named John Smith could read "John Smith vs City of Vancouver, Constable Jane Doe, and Constable Richard Roe."

> **NOTE:** If the complaint is against a municipal police force, **special limitation periods** apply. The municipality must be informed by notice letter to sue within **60 days** (**NOTE:** filing a police complaint does **not** constitute notifying the municipality), and the notice of claim should be filed within **2 years** of the incident (see *Gringmuth v The Corporation of the District of North Vancouver* [5], 2002 BCCA 61). The regular Small Claims Court limitation periods apply if you are suing the RCMP or a private security guard.

Even if a complainant has not sent a notice letter to the municipal government, the municipal government should still be named as a party. At trial, the claimant can argue they had a reasonable excuse for failing to deliver a notice letter to the city, and that the municipality has not been prejudiced by the failure to write the letter.

NOTE: Even if the 60 day limitation period has expired, a complainant should still send a notice letter to the Clerk. If the municipality was provided with notice shortly after the 60 day period expired, it will be more difficult for them to argue that they were prejudiced by the failure to send the notice letter within 60 days.

NOTE: If a municipal government or Minister of Justice is willing to accept liability on behalf of its officers where liability is proven, they may ask that the individual officers' names to be removed from the lawsuit. While there may be reasons to keep the individual officers on the lawsuit, if the court finds they were left on unnecessarily, costs may be awarded against the complainant.

Both municipal police and RCMP officers are partially immune from civil liability under subsection 21(2) of the *Police Act*. However, subsection 21(3)(a) provides that this defence does not apply if the police officer has "been guilty of dishonesty, gross negligence or malicious or wilful misconduct". In *Vancouver (City) v Ward* [6], 2010 SCC 27, it was held that intentional torts do not qualify as wilful misconduct for the purposes of subparagraph 21(3)(a).

For detailed step-by-step information on suing the police (as well as private security guards), please see David Eby & Emily Rix, *How to Sue the Police and Private Security in Small Claims Court* (Vancouver: Pivot Legal Society, 2007).

References

[1] https://www.canlii.org/en/bc/bcca/doc/2013/2013bcca92/2013bcca92.html?autocompleteStr=Florkow%20v%20British%20Columbia%20(Police%20Complaint%20Commissioner)%2C%202013%20BCCA%2092&autocompletePos=1
[2] http://www.bccla.org
[3] http://www.crcc-ccetp.gc.ca
[4] https://www.canlii.org/en/ca/scc/doc/2013/2013scc19/2013scc19.html?resultIndex=1
[5] https://www.canlii.org/en/bc/bcca/doc/2002/2002bcca61/2002bcca61.html?resultIndex=1
[6] https://www.canlii.org/en/ca/scc/doc/2010/2010scc27/2010scc27.html?autocompleteStr=Ward%20v%20Vancouver%20(City)%2C%202010%20SCC%2027&autocompletePos=1

VI. Complaints against Security Guards

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

A. Introduction

Complaints against licensed security guards can be filed with the Registrar of Security Programs Division, Ministry of Justice. Complaints can relate to the licensing of a security business or security employee, about the conduct or behaviour of a security employee, or about the use of equipment. Filing a complaint is free. Complaining against an unlicensed guard should be done directly to the employer. Most security guards in BC are now required to be licensed under the *Security Services Act*, SBC 2007, c 30 *[SSA]*.

B. Filing the Complaint

Complaints must be made in writing within one year of the incident. Complaint forms can be obtained by contacting the Ministry or online.

Ministry of Justice - Policing and Security Branch, Security Programs Division

Online	Website [1] Email: securitylicensing@gov.bc.ca
Address	PO Box 9217 Stn Prov Govt Victoria, BC V8W 9J1
Phone	1 (855) 587-0185 Fax: (250) 387-4454

Once a complaint has been filed, the Registrar will determine whether the matter is within its jurisdiction. If it is, then an investigator will be assigned. The complainant will be notified of the investigation by letter. Complaints can result in a warning notice, a violation ticket, or reconsideration of the officer's licence status.

The Registrar may decide not to investigate a complaint if there has been more than one year of time between when the complaints knew about the facts and when the Registrar receives the complaint (*SSA*, s 34(2)(a)). Section 34(2) also enumerates other factors that may lead the Registrar to refuse to investigate a complaint.

Like police, licensed and unlicensed security guards can be sued civilly.

> **NOTE:** The BC Court of Appeal recently reversed a human rights decision by the BC Supreme Court regarding alleged discriminatory conduct by security guards on the basis of social condition. The Vancouver Area Network of Drug Users (VANDU) filed a complaint to the BC Human Rights Tribunal against the Downtown Ambassadors, a program for private security guards hired by the Downtown Vancouver Business Improvement Association to patrol public spaces, alleging that the Ambassadors had engaged in a discriminatory program intended to remove individuals with no fixed address from public spaces in Downtown Vancouver. As social condition is not a protected ground under the *BC Human Rights Code*, VANDU presented statistical information to demonstrate that Indigenous persons and persons with disabilities are disproportionately represented amongst individuals with no fixed address and submitted that the Ambassadors' actions were therefore discriminatory on the basis of race, colour, ancestry, and physical and mental disability, contrary to section 8 of the *BC Human Rights Code*.

In *Vancouver Area Network of Drug Users v. British Columbia Human Rights Tribunal* [2], 2018 BCCA 132, rev'g 2016 BCSC 534, the BC Court of Appeal restored the BC Human Rights Tribunal's initial dismissal of VANDU's claim, finding that the statistical correlation provided by VANDU was insufficient to establish a causal link between membership in a protected group under the BC Human Rights Code (namely Indigenous persons and persons with disabilities) and the adverse treatment by the Downtown Ambassadors against individuals with no fixed address. The Court of Appeal's decision reversed the previous decision of the BC Supreme Court, which had quashed the Tribunal's dismissal on the grounds that the Tribunal had used too high a standard in finding a human rights violation, and that the statistical information presented by VANDU was sufficient to show discrimination on the prohibited grounds of race and disability.

BC's Office of the Human Rights Commissioner published a report in May 2020 on adding social condition as an enumerated ground. Please see the report for further information: https:/ / bchumanrights. ca/ publications/ social-condition/.

Individuals should be cautioned that this complaint process may not achieve satisfactory results. The Security Programs Division is limited in its ability to successfully review the conduct of security guards, both because of statutory limitations to its powers and budget constraints.

References

[1] https://www2.gov.bc.ca/gov/content/employment-business/business/security-services/security-industry-licensing
[2] https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca132/2018bcca132.html?resultIndex=1

VII. The Right to Vote

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

A. Introduction

The right to participate in the selection of their elected representatives is a basic right enjoyed by the citizens of any democracy. While this has always been recognized to some extent in Canada, in 1982 the right to vote was entrenched in the constitution by section 3 of the *Canadian Charter of Rights and Freedoms*. Under section 3, "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein".

While this right is qualified by section 1 of the *Charter*, it is not subject to the overriding power provision (the "notwithstanding clause") of section 33. As a result, any government wishing to place restrictions on the right to vote must do so in a manner that is reasonable and demonstrably justified in a free and democratic society under section 1.

In this chapter, the discussion of voting rights will focus primarily on the requirements a person must meet to be eligible to vote in provincial, federal, and municipal elections.

B. British Columbia Provincial Elections

Eligibility requirements for BC provincial elections are outlined in the *Election Act*, RSBC 1996, c 106. Individuals should consult this *Act* for a specific problem as the *Act* is too lengthy to be discussed in detail in this chapter.

1. General Information

The province is divided into various electoral districts, each represented by an elected Member of the Legislative Assembly (MLA). Each district has a registrar of voters whose duty is to ensure that the election of candidates in that district is carried out properly. The elections process is supervised by the Chief Electoral Officer. Elections BC can be contacted at:

Elections British Columbia

Online	Website [1] Email: electionsbc@elections.bc.ca
Address	P.O. Box 9275 Stn Provincial Government Victoria, BC V8W 9J6
Phone	Toll-free: 1-800-661-8683

2. Who Is Eligible to Vote

Section 29 of the *Election Act* sets out who is eligible to vote in provincial elections. It states that in order to be eligible to vote in an electoral district, an individual must be a Canadian citizen over the age of 18, must be a registered resident of the electoral district, must have been a resident of British Columbia for at least six months, and must not be otherwise disqualified.

Although the requirement for individuals to be resident in British Columbia for six months seems to constitute a violation of section 3 of the Charter, case law has held similar provisions to be constitutional. In *Re Yukon Election Residency Requirements* [2], [1986] 2 BCLR (2d) 50 (CA), the BC Court of Appeal sitting as the Yukon's Court of Appeal upheld a 12-month residency requirement imposed by the territorial government. The court found that this was a reasonable limit that was justified because of the desirability of having only persons familiar with local conditions voting for local representatives.

Section 30 disqualifies the following individuals from voting: the chief electoral officer, the deputy chief electoral officer, and anyone prohibited from voting under Part 12 of the *Election Act*.

Keep in mind that this is just a general guide and is not meant to be an exhaustive list. Consult the *Election Act* for more detailed and extensive information.

Section 32 of the *Election Act* provides that individuals may only vote in an electoral district in which they are resident. The *Act* defines a residence as the place where a person's habitation is fixed, and to which, if they are absent, they intend to return. Note the following additional considerations:

- Leaving one's home temporarily does not affect one's residency status, but if a person leaves with the intention to remain away either indefinitely or permanently, that person loses their status as a resident in BC.
- Persons entering the province temporarily are not considered to be resident for election purposes.
- Generally, a person's residence is the place where their family resides, but if a person moves out of the family home and does not intend to return, the person's residence will be the new place they have moved to.
- Single people reside where they sleep, regardless of where they eat or work.

- A change of residence occurs only if a person moves to and intends to remain in another place.
- Canadian military personnel who reside in BC do not lose their resident status by leaving the province for extended periods of time in the course of their employment. Spouses and children who accompany military personnel may also retain their BC residence status.

3. Registration and Voting Procedures

Eligible voters who are not presently on the voters' list in their district may obtain an application form from the registrar of the Electoral District in which they reside. Occasionally the Registrar General will hire Deputy Registrars to visit residences to obtain new applications.

Upon receiving an application and being satisfied that the application is valid and correct, the District Registrar will add the applicant's name to the voters' list. That person is then eligible to vote in the next provincial election.

An eligible voter may also register at a voting place on the day of the election. Amendments to the *Election Act* enacted in 2008 require that the applicant produce identification in the form of either (s 41(3)):

- one document, issued by the Government of British Columbia or Canada, that contains the applicant's name, photograph, and place of residence;
- one document, issued by the Government of Canada, that certifies that the applicant is registered as an Indian under the *Indian Act* (Canada);or
- at least 2 documents of a type authorized by the chief electoral officer, both of which contain the applicant's name and at least one of which contains the applicant's place of residence.

Alternatively, section 41.1 allows eligible voters without documentation to be "vouched" for by a voter registered in the applicant's electoral district with documentation, a family member, or "a person having authority under the common law or an enactment to make personal care decisions in respect of the applicant."

> **NOTE:** In the 2013 provincial election, prescription pill bottles or inhalers with the applicant's name were accepted as a valid form of identification. This was done to address the unique challenges individuals with no fixed address and those without government-issued identification face when exercising their right to vote.

When an election writ is issued, the District Registrar will advertise in newspapers announcing the closing day for applications to register.

According to the court in *Hoogbruin v BC (Attorney General)* [3] (1985), 70 BCLR 1 (CA), individuals have a constitutional right to use absentee ballots. The procedure for absentee balloting is outlined in section 105 of the *Election Act*. Section 27 requires that general voting day for an election is the 28th day after the date on which the election is called. If that day is a holiday, the election will be on the next day that is not a holiday. On election day itself, polls are open from 8:00 a.m. to 8:00 p.m.

If a voter does not understand English, subsection 269(3) states that a sworn interpreter may be used to translate the required oath to the voter. Under subsection 269(4), before acting as a translator under subsection (3), an individual must make a solemn declaration that the person will be able to make the translation and will do so to the best of their abilities.

Section 109 deals with special circumstances whereby voters with physical disabilities or difficulties in reading or writing are able to get assistance in marking their ballots.

Employees are entitled by section 74 to four **consecutive hours** off during poll hours to attend a polling station, without loss of wages. However, the employer is entitled to choose which four hours are most convenient.

Upon arrival at the polling station, the voter must sign their name in a voting book (s 274), and confirm their present address. Refusing to comply with this demand will disqualify the voter. Upon receiving a ballot, the voter proceeds to a

screened compartment, marks the ballot, and returns the ballot to the Returning Officer, who, in full view of the voter, must place the ballot in the ballot box. The voting must be by a secret ballot as per section 90. Each individual present at a voting place, including people such as voters and ballot counters, must not interfere with an individual marking a ballot, attempt to discover how an individual voted, or communicate information regarding how another person voted or marked their ballot. The voter is then required to leave the premises.

4. Complaints about Elections BC

If you have a complaint about contraventions of the *Election Act*, RSBC 1996, c 106, *Local Elections Campaign Financing Act*, SBC 2014, c 18, or the *Recall and Initiative Act*, RCBC 1996, c 398, you may make a complaint in writing by:

- Mail: PO Box 9275 Stn Prov Govt, Victoria BC, V8W 9J6; or
- Email: investigations@elections.bc.ca

Please see the Elections BC website here for information to include in your complaint: https:// elections. bc. ca/ resources/investigations/how-to-make-a-complaint/ [4].

C. Federal Elections

The rules and regulations governing federal elections are set out in the *Canada Elections Act*, RSC 2000, c 9, and its subsequent amendments. Many of these rules and regulations are similar to those applicable to BC provincial elections discussed above. A brief survey of the federal Act is included below.

Canadian citizens who are 18 years of age or older on election day are generally eligible to vote in federal elections (s 3).

While federal residency requirements do exist, they are more relaxed than those applicable to BC provincial elections. A person may vote only once, in the area in which they are "ordinarily resident" (s 8(1)). This is defined in much the same way as "resident" is defined in section 32 of BC's *Election Act*. A person who moves between the enumerator's visit and the day of the election could be forced to vote in the former riding if ordinarily resident there when the enumeration occurred.

All voters must present one piece of government-issued ID with a photograph and residential address before being allowed to vote (s 143(2)(a)). If a voter cannot provide the required photo ID, they may still be allowed to vote if they do one of two things (s 143(2)(b) and s 143(3)):

> (a) Provides two pieces of acceptable identification to establish the voter's identity, at least one of which establishes the voter's residence (a list of "acceptable identification" is to be published by the Chief Electoral Officer); or
>
> (b) Provides two pieces of identification that establish the voter's name, and then establishes their residence by swearing an oath in writing that attests to where they live. The voter must also be accompanied by an individual who is **registered to vote in the same polling division**, has **proper identification**, and vouches for the person without ID under oath and in the prescribed form. An individual can only vouch for one person at an election, and an individual who has been vouched for cannot vouch for someone else.

These requirements pose significant challenges to low-income individuals who may have no form of official identification. Further difficulties are created by the rule that an individual may only vouch for one other individual and the requirement that the voucher lives and is on the elector's list in the same polling station as the intended vouchee.

The provisions relating to vouching, as described above, were brought into force by the *Fair Elections Act* in December 2014. Under these provisions, voters who have identification but cannot prove residence will be allowed to sign an oath

attesting to where they live, which must then be corroborated by the oath of another voter. However, this leaves voters who have no identification whatsoever with little recourse. This controversial measure could significantly inhibit the ability of low-income citizens and students to vote.

The constitutionality of these requirements was challenged in the British Columbia Supreme Court and the BC Court of Appeal in *Henry v Canada (Attorney General)* [5], 2014 BCCA 30. In that case, the court found that the legislation was inconsistent with the electoral rights guaranteed in section 3 of the *Charter*, but constituted a reasonable limit prescribed by law and was demonstrably justifiable in a free and democratic society under section 1 of the *Charter*. In Ontario, the Council of Canadians and the Canadian Federation of Students have challenged this legislation in the Ontario Superior Court on the grounds that it violates section 3 of the *Charter*.

Many other provisions of the *Canada Elections Act*, such as an employee being entitled to receive time off work to cast a ballot, provisions for people with disabilities, and balloting procedures are very similar to BC provincial regulations and thus are not repeated here. Further inquiries and/or complaints can be sent to Stéphane Perrault, the current Chief Electoral Officer, at:

Elections Canada

Online	Website [6]
Address	350 Victoria Street Gatineau, Quebec K1A OM6
Phone	1-800-463-6868

Please see the following link for more information on making complaints about federal elections: https:/ / www. elections.ca/content.aspx?section=vot&dir=faq&document=faqgen&lang=e#gen3 [7].

> **Note:** Major changes to the *Canada Elections Act* in June 2014 included provisions intended to increase penalties for offences, reduce voter fraud, and empower political parties to drive voter turnout. Specific changes include removing vouching in favour of an oath system where a voter has identification but cannot prove current residence; moving investigations from Elections Canada to the Director of Public Prosecutions; limiting the powers of Elections Canada; increasing donation limits; adding constraints on robocalls; and some changes to third-party advertising.

The Supreme Court of Canada struck down previous prohibitions preventing inmates from voting in *Sauvé v Canada (Chief Electoral Officer)* [8], 2002 SCC 68. A key consideration in this decision was that, by denying the vote to all prisoners, the *Act* failed to balance the right to vote against the seriousness of the conduct of prisoners.

D. Municipal Elections

Municipal election procedures in BC are outlined in the *Local Government Act*, RSBC 1996, c 323, beginning at section 33. Please note, however, that elections in the City of Vancouver are governed by a separate provincial act, the *Vancouver Charter*, SBC 1953, c 55.

To be eligible to vote, a person must normally be a Canadian citizen and 18 years of age or older on the day the election is held. A person qualified in such a way must be a Canadian citizen and a resident of BC for six months immediately before election day. Furthermore, to be qualified, the person must have been a resident of the jurisdiction (as per s 64) for at least 30 days immediately before election day.

A person who qualifies as outlined above with the exception that they do not reside in the municipality may still vote in an election if they are the owner or tenant of property in that municipality (s 66). The general residency rules are similar

to those outlined in the *BC Election Act*.

Applications to register should be made to the clerk of the municipality.

Voters who are not yet registered on election day may apply to have their name added to the list on election day in a manner similar to that used in provincial elections (see sections 72-73).

A person who is unable to produce identification can be registered as a voter. In order to do so, the individual must complete an application for registration and be accompanied by someone who is a registered voter in the applicant's electoral district, an adult family member, or someone who has the authority to make personal care decisions in respect of the applicant. The applicant and the voucher must both make a solemn declaration, in writing, as to the applicant's identity and place of residence. A person can only vouch for one person, and an individual who has been vouched for cannot vouch for another person.

> **NOTE:** A literal interpretation of both the *Canada Elections Act* RSC 2000, c 9, and the *BC Election Act*, RSBC 1996, c 106, suggests that it is practically impossible for individuals with no fixed address to vote. However, the provincial electoral officer facilitates voting by homeless people through an administrative policy of allowing a flexible definition of "residence".

References

[1] http://www.elections.bc.ca
[2] https://www.canlii.org/en/yk/ykca/doc/1986/1986canlii3944/1986canlii3944.html?autocompleteStr=Re%20Yukon&autocompletePos=4
[3] https://www.canlii.org/en/bc/bcca/doc/1985/1985canlii335/1985canlii335.html?autocompleteStr=Hoogbruin%20v%20BC%20(Attorney%20General)%20(1985)%2C%2070%20BCLR%201%20(CA)&autocompletePos=1
[4] https://elections.bc.ca/resources/investigations/how-to-make-a-complaint/
[5] https://www.canlii.org/en/bc/bcca/doc/2014/2014bcca30/2014bcca30.html?autocompleteStr=Henry%20v%20Canada%20(Attorney%20General)%2C%202014%20BCCA%2030&autocompletePos=1
[6] http://www.elections.ca
[7] https://www.elections.ca/content.aspx?section=vot&dir=faq&document=faqgen&lang=e#gen3
[8] https://www.canlii.org/en/ca/scc/doc/2002/2002scc68/2002scc68.html

VIII. Complaints regarding UBC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

The Alma Mater Society (AMS) Ombuds Office and the AMS Advocacy Office work hand-in-hand to assist students who are in conflict with the University of British Columbia.

A. The AMS Ombuds Office

The AMS Ombudsperson can assist both graduate and undergraduate students who feel that they have been treated unfairly or need to approach the University or the AMS to resolve a conflict. The Ombudsperson acts impartially, is independent of any administrative body, and provides confidential service. The Ombuds office is an excellent resource for resolving disputes with the university and university authorities such as Campus Security, Campus RCMP, the Dean's Office, and Booking Services. The office provides the following services:

- Conflict management services to AMS clubs and constituencies undergoing internal conflicts;
- Facilitating and negotiating resolutions between students and the University;
- Receiving and investigating complaints about the AMS;
- Preparing students for meetings with university representatives;
- Helping students with appeals;
- Providing conflict resolution workshops;
- Advising students about their options and resources;
- Assisting students with academic disputes (disputing grades, disputes between graduate students and supervisors, withdrawals, quality of instruction, etc.); and
- Assisting students with non-academic disputes (housing appeals, financial aid, and registration issues).

Appeals may be filed at the office or online. The current Ombudsperson is Oluwakemi Oke. The Ombuds Office is staffed 30 hours per week and may be contacted at:

The AMS Ombuds Office

Online	Website [1] Email: ombudsperson@ams.ubc.ca
Address	NEST 3119 - 6133 University Boulevard Vancouver, BC V6T 1Z1
Phone	(604) 822-4846

B. The AMS Advocacy Office

In situations where a student needs to appeal a final decision made by a department, faculty, or University representative, the AMS Advocacy Office can provide assistance by giving the student advice on their rights and responsibilities, assisting them with drafting letters and documents and representing students who must go before formal hearings at the University. Some of the specific issues the Advocacy Office helps with are:

- Student discipline cases (plagiarism, cheating, and non-academic discipline);
- Academic appeals;
- Residence or other UBC housing issues;
- Parking disputes;
- Requests for information under the *Freedom of Information and Protection of Privacy Act*; and
- Library fine appeals.

The Advocacy Coordinator, Amy Ko, can be contacted at:

The AMS Advocacy Office

Online	Website [2] Email: advocate@ams.ubc.ca
Address	AMS NEST 3118 Vancouver, BC V6T 1Z1
Phone	(604) 822-9855

References

[1] https://www.ams.ubc.ca/support-services/ombuds/
[2] https://www.ams.ubc.ca/support-services/student-services/advocacy/

IX. Complaints regarding SFU

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

A. The SFU Office of the Ombudsperson

Similar to the AMS Ombudsperson at the University of British Columbia, and performing most of the same functions, the SFU Office of the Ombudsperson can assist students in resolving conflicts with Simon Fraser University.

Contact the current Ombudsperson at:

The SFU Office of the Ombudsperson

Online	Website [1] E-mail: ombuds@sfu.ca
Address	2266 Maggie Benston Centre Burnaby, BC V5A 1S6
Phone	(778) 782-4563

References

[1] http://www.sfu.ca/ombudsperson.html

X. Complaints Regarding Other Colleges and Universities

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

Each individual community college and university has its own complaints process regarding bullying, harassment, human rights, academic integrity, and general student and faculty conduct. Visit each institution's websites regarding their policies and procedures on resolution in these areas.

XI. Complaints against Doctors

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

All licensed physicians and surgeons who can practice in British Columbia must register with the College of Physicians and Surgeons of British Columbia (CPSBC). As of August 31, 2020, the CPSBC amalgamated with the College of Podiatric Surgeons. Both are now considered under CPSBC. The CPSBC also amended their Bylaws to reflect these changes. You may see more information about the amalgamation here: https:/ / www. cpsbc. ca/ news/ amalgamation-college-podiatric-surgeons-british-columbia [1].

If you wish to file a complaint against your doctor, there are four options:

1. Talk to your doctor
2. File a complaint with the CPSBC
3. Speak to a lawyer or the police for advice if you believe your doctor has violated a criminal law
4. Speak to a lawyer for advice about suing the doctor (i.e., medical malpractice)

Even if you file a complaint with the College, you are still able to take steps 3, 4, or both. There is no specific time frame in which to file a complaint; however, the sooner it is filed, the easier it will be to investigate.

To file a complaint, there are three steps:

1. Complete and submit a Complaint Form (found on the College's website [2]).
2. Make the complaint in writing; include your name, address, telephone number, the name and address of the doctor, the facts of the incident, and permission to send a copy of the complaint to your doctor.
3. Send the written complaint via mail, fax or email to:

Complaints Department - College of Physicians and Surgeons of BC

Online	complaints@cpsbc.ca
Address	300– 669 Howe Street Vancouver BC V6C 0B4
Phone	604-733-3503 (fax)

Once the College reviews the written complaint, it will begin an investigation. This includes obtaining further relevant information and, potentially, relevant medical records. The physician will respond to the complaint. The College's Inquiry Committee (made up of senior doctors and members of the public) will conduct a review of your complaint. If the College finds the complaint is valid, the physician may be expected to change aspects of their practice or undertake further education. The College may also issue remedial advice or reprimand the physician if there is a significant departure from the CMA Code of Ethics. In extreme cases, the College may prohibit a physician from practicing medicine.

Please note that there is a special procedure for sexual misconduct complaints. You can either phone the College immediately at 604-733-7758 or submit a letter outlining the incident.

For further information:

Canadian Bar Association
https://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts/Health-Law/423

College of Physicians and Surgeons of British Columbia
https://www.cpsbc.ca/for-public/file-complaint

> **NOTE:** There are a number of professional colleges that regulate healthcare professionals in BC. Each college may have its own policies and procedures for complaints against their respective healthcare professionals. For a full list of the current professional colleges, visit https:/ / www2. gov. bc. ca/ gov/ content/ health/ about-bc-s-health-care-system/partners/colleges-boards-and-commissions.

References

[1] https://www.cpsbc.ca/news/amalgamation-college-podiatric-surgeons-british-columbia
[2] https://www.cpsbc.ca/public/complaints

XII. Complaints against Lawyers

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

The Law Society of British Columbia is the regulatory body for the legal profession in British Columbia. They have authority to review the conduct and competence of lawyers practicing in BC, including lawyers in private practice, legal aid lawyers, government lawyers and Crown prosecutors.

Prior to lodging a complaint, a client should first talk to the lawyer or another member of the lawyer's firm about the issue. If speaking directly with the lawyer fails, a complaint may be filed. This can be done by filling out a Complaint Form and emailing it to professionalconduct@lsbc.org. Alternatively, the Complaint Form can be sent by Canada Post or courier to the following address:

Attention: Intake Officer, Professional Conduct

Law Society of British Columbia

845 Cambie Street

Vancouver BC V6B 4Z9

The link to the Complaint Form is as follows: https://www.lawsociety.bc.ca/Website/media/Shared/docs/forms/ProfCon/Complaint.pdf

After receiving the complaint, the Law Society will send back a letter advising that they have received the complaint. It will be reviewed and assigned to a staff lawyer, who may request further information, including supporting documents, before commencing an investigation.

The Law Society discipline hearings are similar to court hearings. A hearing can lead to a reprimand of the lawyer, a fine up to $20,000, conditions set upon the lawyer, suspension of the lawyer, or disbarment of the lawyer. Law Society decisions are not always final and can be appealed.

For further information on the complaint process, phone the Law Society at 604-669-2533 or 1-800-903-5300.

If it is the lawyer's fee that is the problem, there are two solutions:

1. Consult the Registrar of the BC Supreme Court to review the bill. If you have not already paid for it, you have one year from the date of the bill to apply to the registrar. However, if you have paid for it, you only have three months to apply. The registrar will hold a hearing where you and your lawyer are present. The registrar will decide the fee.
2. Use the Law Society's free mediation service. The mediator will help all parties reach a settlement.

The Law Society cannot help with disputes over money or property. If you believe your lawyer has acted negligently, you can seek legal advice from another lawyer about your options.

The Law Society of BC
https:/ / www. lawsociety. bc. ca/ complaints-lawyer-discipline-and-public-hearings/ complaints/ https:/ / www. lawsociety.bc.ca/complaints-lawyer-discipline-and-public-hearings/faq-complaints-and-discipline/

Canadian Bar Association
https://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts/Lawyers-Legal-Services-and-Courts/436

There are a number of professional colleges that regulate healthcare professionals in BC. Each college may have its own policies and procedures for complaints against their respective healthcare professionals. For a full list of the current professional colleges, visit:
https:/ / www2. gov. bc. ca/ gov/ content/ health/ about-bc-s-health-care-system/ partners/

colleges-boards-and-commissions

Appendix A: Glossary

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

Certiorari

- a formal request to a court challenging a legal decision of an administrative tribunal, judicial official, or organization, in which the requester alleges that the decision has been irregular or incomplete, or that there has been an error of law

Indigency

- lack of ability to pay; it is a legal reason to have certain fees waived for the purpose of fairness

Mandamus

- a writ which commands an individual, organization, administrative tribunal, or court to perform a certain action, usually to correct a prior illegal action or failure to act

Ombudsperson

- a person who acts as a trusted intermediary between an organization and its body of citizens or constituents

Onus of proof

- one’s duty or responsibility to prove one’s case

Appendix B: Sample Notice Letter

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

[Date]

Reply to: [Your Name]

Direct Line:

E-mail:

City of Vancouver

453 West 12th Avenue

Vancouver, BC V5Y 1V4

Attention: City Clerk

Dear Sir/Madam,

Re: [YOUR NAME] – Incident with VPD – [DATE OF INCIDENT]

I am writing this letter to give you notice of the time, place, and manner of damages caused to me by Vancouver Police Department officers pursuant to section 294(2) of the Vancouver Charter.

On [DATE OF INCIDENT] at approximately [TIME OF DAY] .. [enter a brief description of the events]

Because of the actions of the VPD officers, I have suffered the following injuries:

1.

2.

3.

I am now contemplating a civil suit against the officers involved and the City of Vancouver for [enter a brief description of the legal cause of action, i.e. assault and battery, negligence, or breach of Charter rights].

The VPD incident number in this matter is [ENTER INCIDENT # IF KNOWN – IF UNKNOWN THEN DELETE THIS LINE]

Sincerely,

[YOUR NAME]

Chapter Six - Human Rights

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

When faced with a human rights issue, the first step is to determine whether the provincial legislation, the BC Human Rights Code, RSBC 1996, c 210 (HRC or the "Code"), applies or whether the problem falls within federal jurisdiction under the Canadian Human Rights Act, RSC 1985, c H-6 (CHRA).

Section 91 of the Constitution Act, 1867 30 & 31 Victoria, c 3 (UK), reprinted in RSC 1985, App II, No 5, lists the matters that fall under federal jurisdiction. If the complaint is covered by federal legislation, the matter would be handled under the CHRA by the Canadian Human Rights Commission (CHRC). The limitation date under the federal legislation is 1 year. If the complaint against the respondent (the party who is being alleged to have contravened the Code) is based on an action they undertook in their capacity as an agent or employee of a body that falls under federal jurisdiction, then that complaint could be governed by federal legislation. However, a complaint involving a federally regulated employee who is alleged to have discriminated against a provincially regulated employee in a shared workspace may possibly be brought under the provincial HRC, depending on the circumstances. For more information, see the Supreme Court of Canada's decision in British Columbia Human Rights Tribunal v Schrenk, 2017 SCC 62 in which the court confirmed that discrimination in the employment context "may include discrimination by [the complainant's] co-workers, even when those co-workers have a different employer": para 3.

Examples of some industries that are federally regulated and therefore fall within federal human rights jurisdiction are:

- Banking – but not most credit unions (note Coast Capital Savings is now under federal regulation).
- Telecommunications (internet, television and radio) – but not call centres.
- Transportation that crosses provincial or international boundaries (airlines, trains, moving companies, couriers).
- First Nations governments (but not necessarily all businesses or services provided on reserves)
- RCMP

The CHRC has a useful assessment tool that can assist in determining if an entity falls under federal jurisdiction. It can be found at https://www.chrc-ccdp.gc.ca/en/complaints/make-a-complaint.This tool is not always accurate, so if an entity is not found there but you have reason to believe that it is federal, follow up with further inquiries and analysis. See Section IV of this chapter for more on matters under federal jurisdiction.

Section 92 of the Constitution Act, 1867 lists the matters that fall under provincial jurisdiction, including property and civil rights in the province, as well as generally all matters of a merely local or private nature in the province. If a complaint is covered under the HRC, the matter will come before the British Columbia Human Rights Tribunal (BC HRT). Human rights violations that have taken place in BC will usually fall under the provincial legislation. In 2018, the limitation date under provincial jurisdiction was extended to one year from the previous six-month limitation period.

In either case, because human rights legislation is considered to be "quasi-constitutional" in nature, the legislation must be given a liberal and purposive interpretation to advance the broad policy purposes underlying it.

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Legislation

Human Rights Code, RSBC 1996, c 210, as amended [HRC or the Code]

Canadian Human Rights Act, RSC 1985, c H-6, as amended [CHRA]

Civil Rights Protection Act, RSBC 1996, c 49 [CRPA].

B. Resources

B.C. Human Rights Tribunal

An independent, administrative tribunal created by the *BC Human Rights Code*, responsible for accepting, screening, mediating and adjudicating provincial human rights complaints. The website is very helpful. Their Guides and Information Sheets provide thorough procedural information in English, Chinese, and Punjabi. The Tribunal's decisions dating back to 1997 are available online through the BC HRT website, and are also available on CanLII BC at http://www.canlii.org/en/bc/bchrt.

Online	Website [1] E-mail: BCHumanRightsTribunal@gov.bc.ca
Address	1270 - 605 Robson Street Vancouver, B.C., V6B 5J3
Phone	(604) 775-2000 TTY: (604) 775-2021 Toll-free in B.C.: 1-888-440-8844 Fax: (604) 775-2020

The B.C. Human Rights Clinic

The BC Human Rights Clinic is operated by the Community Legal Assistance Society (CLAS) and is funded by the BC Ministry of the Attorney General. The Clinic provides free legal representation to low-income claimants or those unable to represent themselves before the BC Human Rights Tribunal due to lack of capacity or disability. It also provides a free Short Service Clinic on Mondays between 9:00 am and 4:30 pm, and Wednesdays between 5:00 pm and 8:00 pm.

Online	Website [2]
Address	300 – 1140 West Pender Street Vancouver, B.C., V6E 4G1
Phone	(604) 622-1100 Toll-free in Canada: 1-855-685-6222 Fax: (604) 685-7611

The B.C. Civil Liberties Association (BCCLA)

If the client's legal issue also extends to *Charter* rights, the BCCLA may provide assistance.

Online	Website [3] E-mail: info@bccla.org
Address	550 - 1188 West Georgia Street Vancouver, B.C. V6E 4A2
Phone	(604) 630-9748 Fax: (604) 687-3045

The Canadian Human Rights Commission

The Commission can independently initiate federal human rights complaints, but normally assists in their drafting and investigates complaints lodged by individuals or organizations. If insufficient evidence of discrimination is presented, the Commission can dismiss the complaint. If the Commission finds that the allegations of discrimination warrant mediation or adjudication, it can refer the case to conciliation or to the Canadian Human Rights Tribunal for a hearing.

Online	Website [4]

Western Region

Address	Canada Place, Suite 1645, 9700 Jasper Avenue P.O. Box 21, Edmonton, Alberta T5J 4C3
Phone	(780) 495-4040 Toll-Free: 1-888-214-1090 TTY: 1-888-643-3304 Fax: (780) 495-4044

National Office

Address	344 Slater Street, 8th Floor Ottawa, Ontario K1A 1E1
Phone	(613) 995-1151 Toll-free: 1-888-214-1090 TTY: 1-888-643-3304 Fax: (613) 996-9661

The BC Office of the Human Rights Commissioner

The *Human Rights Code Amendment Act* recently re-established a Human Rights Commission in British Columbia. The province's previous human rights commission was dismantled in 2002.

Kasari Govender was appointed as BC's first Independent Human Rights Commissioner on September 3, 2019. The Commission will promote human rights, undertake research, and offer public education and outreach. It will also examine human rights implications of policies, programs or legislation and make recommendations if aspects of policies, programs or legislation are inconsistent with the human rights protections. Finally, although the Commission will not have the power to file human rights complaints, it will have the power to intervene in complaints before the Human Rights Tribunal. See s 47.12 of the BC *Human Rights Code* for a full list of the Commissioner's powers.

Online	E-mail: info@bchumanrights.ca
Address	#750, 999 Canada Place Vancouver, B.C. V6C 3E1
Phone	1-844-922-6472 (voicemail box)

References

[1] http://www.bchrt.bc.ca/
[2] http://www.bchrc.net
[3] http://www.bccla.org/
[4] http://www.chrc-ccdp.gc.ca/en

III. BC Human Rights Code

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

The *BC Human Rights Code* (HRC or the *Code*) protects people from discrimination in certain protected areas and provides a mechanism for filing a complaint regarding discriminatory treatment. It is administered by the BC Human Rights Tribunal. The HRC applies to matters within the jurisdiction of the province (as established by s. 91 of the Constitution Act, 1867) and covers both public and private bodies, as well as individuals. For example, the HRC applies to provincially regulated employers, unions, professional associations, most commercial businesses, Crown corporations, landlord-tenant relationships, and the provincial government itself.

The Tribunal's decisions are available online at http://www.bchrt.bc.ca/law-library/decisions.They are indexed by year dating back to 1997 and searchable based on a variety of criteria. They are also available on CanLII BC at http://www.canlii.org/en/bc/bchrt.

A. Framework of a Discrimination Complaint

1. Complainant's Case

As outlined in *Moore v British Columbia (Education)* [1], 2012 SCC 61 at para 33, the complainant must prove the following three elements on a balance of probabilities to establish their case:

1. That they have a characteristic that is protected under the HRC;
2. That they experienced an adverse impact in an area protected by the HRC; and
3. That their protected characteristic was a factor in the adverse impact they experienced.

Direct discrimination occurs when a person or group is singled out for differential treatment based on their protected characteristic(s) (M. v H., [2] 1999 2 SCR 3). Racial slurs, sexual harassment, and homophobic comments are all examples of "direct discrimination."

Indirect or "adverse effect" discrimination occurs when laws or policies do not overtly discriminate, but produce a disproportionate negative impact on members of groups sharing a protected characteristic *(Fraser v. Canada (Attorney General)* [3], 2020 SCC 28). Many complaints of discrimination on the basis of disability involve adverse effect discrimination because they relate to a facially neutral rule, standard, policy or practice that creates a disadvantage for someone in connection with their disability.

If any one of the three elements of the complainant's case is missing, there is no discrimination. If the complainant proves the three elements of their case, then the burden shifts to the respondent to justify its conduct. If the respondent proves its conduct was justified, then there is no discrimination. If the respondent's conduct is not justified, discrimination will be found to have occurred.

2. Respondent's Case

In the employment context, a respondent can justify its conduct by proving on a balance of probabilities that the rule, standard, practice, or requirement being challenged is a bona fide occupational requirement (BFOR). In *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union* [4], [1999] 3 SCR 3 at para 54 [Meiorin], the Supreme Court of Canada (SCC) set out a three-step analysis for determining whether a standard is a BFOR:

1. The employer adopted the standard for a purpose rationally connected to the performance of the job;
2. The employer adopted the particular standard with an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. The standard is reasonably necessary to fulfil its purpose. The employer must show that it could not accommodate individual employees with the protected characteristic without experiencing undue hardship.

In *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [5], [1999] 3 SCR 868 [Grismer] at 881, the Supreme Court of Canada considered the application of the *Meiorin* test to a public services complaint and set out the three-stage analysis for determining whether the respondent had a *bona fide* and reasonable justification for its conduct:

1. The respondent's behaviour was for a purpose or goal that is rationally connected to the function being performed;
2. The respondent behaved in good faith; and
3. The respondent's behaviour was reasonably necessary to accomplish the purpose or goal, in the sense that the respondent cannot accommodate the complainant without undue hardship.

Note that most legal disputes arise in regard to the third part of the test – that is, whether the respondent reasonably accommodated the complainant to the point of undue hardship.

B. Protections and Exemptions

The HRC provides protection against discrimination in several different areas, which are listed in sections 7–14. These sections will be further detailed in order below. Please refer to **Section III.A.1-7**. However, for many of these protected areas, the HRC provides certain exceptions for which discrimination is not prohibited.

Additionally, section 41, commonly referred to as the group rights exemption, allows non-profit organizations to engage in what might otherwise be deemed prohibited discriminatory conduct. It allows charitable, philanthropic, educational, and other not-for-profit organizations to give a preference to members of the identifiable group or class of persons they serve. For more information, please see *Vancouver Rape Relief Society v Nixon* [6], 2005 BCCA 601 at paras 43-59 [*Nixon*]. (Please note that this case involves a sex-binary-focused discussion of transgender identity that may be troubling for some readers).

Furthermore, under section 42, it is not discriminatory to plan, advertise, adopt, or implement an employment equity program that has the objective of ameliorating the conditions of individuals or groups who are disadvantaged because of Indigenous identity, race, colour, ancestry, place of origin, physical or mental disability, sex, sexual orientation, or gender identity or expression, and achieves or is likely to achieve that purpose. Section 42 also gives the Human Rights Commissioner jurisdiction to approve special programs that are aimed at improving the situation of individuals or groups that have suffered historical disadvantage. If pre-approved, a special program is deemed not to contravene the Code.

1. Discriminatory Publication

Section 7 deals with forms of discrimination against individuals or groups of individuals, which are published, displayed, or made public. This section prohibits hate literature and other such communications that expose or are likely to expose someone in a protected group to hatred or contempt, as well as publications that indicate discrimination or intent to discriminate against a protected group. Please refer to *Oger v Whatcott* [7] (No 7), 2019 BCHRT 58 at paras 93—97 for the former, and Li v Mr B [8], 2018 BCHRT 228 at paras 95—97 [*Li*] for the latter.

Exception: Section 7 does **not** apply to communications that are intended to be private or are related to activities otherwise permitted under the *HRC*, see s. 7(2) and *Li* at paras 98–104.

2. Discrimination in Accommodations, Services and Facilities "Customarily Available to the Public"

Section 8 states that a person may not deny or discriminate against any person or class of persons regarding an accommodation, service, or facility customarily available to the public because of that person's Indigenous Identity, race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression and/or age.

University of British Columbia v Berg [9], [1993] 2 SCR 353 at 384–387 [Berg] explains the concept of "customarily available to the public". A service is customarily available to the public if the nature of the relationship is public. Courts and tribunals look at the relationship between the facility and the complainant, as well as the nature of the service itself. In *Berg*, the court found that a university has its own public and that the relationships between students and professors, who present the public face of the university, are public in this context. Please refer to *HMTQ v McGrath* [10], 2009 BCSC 180 at paras 89–93 for a more recent case that discusses when a service is "customarily available to the public".

Additionally, courts have found that services provided to members of a group who come together as a result of a private selection process, based on their personal attributes do not qualify as services "customarily available to the public", and are therefore not subject to section 8 of the HRC. Please refer to *Marine Drive Golf Club v Buntain et al and BC Human Rights Tribunal* [11], 2007 BCCA 17 at paras 48–56.

While there is no enumerated list of relationships that count as "customarily available to the public," locales such as pubs, night clubs, hotels, theatres, transportation services, education facilities, insurance, medical treatment in hospitals and clinics, strata council and property management services in condominiums, services provided by police, access to sidewalks and public space, government services, and participation in sporting events have all been found to entail public relationships. Licensing services and facilities may also involve public relationships. For example, discrimination prohibited by section 8 was ultimately found when the BC Motor Vehicle Branch maintained a blanket refusal to issue driver's licenses to those with certain visual impairments regardless of actual driving ability: *BC (Superintendent of Motor Vehicles) v BC (Council of Human Rights)* [12], [1999] 3 SCR 868 [*Grismer*].

Legislation is not a "service customarily available to the public" and bare challenges to legislation can't proceed at the HRT, see e.g. *Phillips v BC Ministry of the Attorney General* [13], 2019 BCHRT 76 at paras 11–12.

For a recent case setting out the three-part test for prima facie discrimination in a services context, see *Moore v British Columbia (Education)* [1], 2012 SCC 61, a Supreme Court of Canada case about a school district that cancelled a special education program, requiring a dyslexic student to enroll in specialized private school. The Supreme Court of Canada reviewed whether the school district discriminated against the student by failing to provide necessary accommodation, and ultimately upheld the BC Human Rights Tribunal's finding of discrimination.

Moore confirmed the test for prima facie discrimination, also known as the "complainant's case" (on the move away from Latin in human rights cases, see *Vik v Finamore (No. 2)* [14], 2018 BCHRT 9 at para. 48-50). To succeed in their complaint, a complainant must show:

1. That they have a characteristic that is protected under the HRC;
2. That they experienced an adverse impact with respect to an area protected by the HRC; and
3. That their protected characteristic was a factor in the adverse impact they experienced. This is also known as the "nexus".

Defences: If a complainant can prove the three elements of their case set out above, the burden shifts to the respondent to justify their conduct. There are a number of circumstances where adverse treatment on the basis of a protected characteristic is not discrimination, if it can be shown to be supported by a "*bona fide* and reasonable justification" (BFRJ) (as per the wording of section 8(1)). For the most authoritative perspective, see *Grismer*, which applied the

three-part *Meiorin* test from the Supreme Court of Canada in an attempt to justify a discriminatory standard by raising a BFRJ. This attempt was unsuccessful (see also Subsection 6: Discrimination in Employment and the Duty to Accommodate).

The respondent must justify the standard by satisfying three elements:

1. It adopted the standard for a purpose or goal that is rationally connected to the function being performed
2. It adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
3. The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship

Exceptions: Section 8(2) also contains certain built-in exceptions. Discrimination based on sex is permitted insofar as it relates to the maintenance of public decency. For a case on the interpretation of public decency in the context of excluding transgender peoples from public washrooms, see Sheridan v. Sanctuary Investments Ltd. (No. 3), 1999 [15] 33 CHRR 467 in which the Tribunal rejected the argument that it was necessary to exclude a transgender woman from the washroom matching her gender identity in order to maintain "public decency."

Discrimination based on sex, physical or mental disability, or age is permitted insofar as it relates to the determination of premiums or benefits under life or health insurance policies. Note that statutory exceptions to human rights legislation are to be narrowly construed (Zurich Insurance Co. v. Ontario (Human Rights Comm.), [1992 [16]] 2 SCR 321).

3. Discrimination in Purchase and Rental of Property

Section 9 provides that a person or class of persons must not be denied the opportunity to purchase real property due to their Indigenous identity, race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sex, sexual orientation and/or gender identity or expression.

Section 10 states that a person shall not be denied the right to occupy any space that is represented as being available for occupancy or be discriminated against with respect to a term or condition of the tenancy on the basis of Indigenous Identity, race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, and/or lawful source of income.

Defences: Although the text of sections 9 and 10 do not contain language specifically providing for a defence to a claim of discrimination under these provisions, like all respondents, landlords and property sellers may be able to justify *prima facie* discrimination if they can satisfy the three elements of the *Grismer/Meiorin* test. This will require that they accommodated the complainant to the point of undue hardship.

Exceptions: Section 10(2)(a) says the protection from discrimination in tenancy does not apply if the tenant is sharing the use of any sleeping, bathroom, or cooking facilities with the person making the representation (e.g. as a roommate). Furthermore, the reserving of specific residences for individuals aged 55 or older or for people with disabilities does not constitute discrimination (HRC, s 10(2)(b) and (c)).

4. Discrimination in Employment Advertisements and Interviews

Section 11 prohibits employment advertisements that express limitations, specifications or preferences based on Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sexual orientation, sex, gender identity or expression and/or age. Refer to *Anderson v Thompson Creek Mining Ltd Endako Mines* [17], 2007 BCHRT 99.

Exception: An employment advertisement that expresses a limitation, specification or preference as to a protected characteristic may be permitted if it is based on "*bona fide* occupational requirement(s)" as per the wording of section 11. There are also exceptions for non-profit organizations and employment equity programs (see Exemptions on 6-6).

For case law on discrimination during the interview process, please refer to *Khalil v Woori Education Group*, 2012 BCHRT 186 at paras 29-45. Under section 13, an employer cannot refuse to employ someone on the basis of any of the prohibited grounds of discrimination unless there is a *bona fide* occupational requirement (see Subsection 6: Discrimination in Employment and the Duty to Accommodate).

5. Discrimination in Wages

Section 12 states that wage parity between sexes is required for similar or substantially similar jobs. Please refer to *Kraska v Pennock*, 2011 BCSC 109. Most of the remedies under this section are also available under section 13, which does not have a limitation on the period of time during which wages can be claimed.

Limitation Dates: Section 12(5) of the HRC states:

> (a) "The action must be commenced no later than 12 months from the termination of the employee's services, and
>
> (b) The action applies only to wages of an employee during the 12 month period immediately before the earlier of the date of the employee's termination or the commencement of the action."

Most of the remedies under this section are also available under section 13, which does not have a limitation on the period of time during which wages can be claimed.

Exception: A difference in the rate of pay between employees of different sexes based on a factor **other** than sex is allowed, provided that the factor on which the difference is based would reasonably justify the difference.

6. Discrimination in Employment and the Duty to Accommodate

Section 13 provides that no person shall refuse to employ another person or discriminate against a person regarding employment or any term or condition of employment on the basis of Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, and/or because that person has a criminal record that is unrelated to the employment. Please refer to *Ratzlaff v Marpaul Construction Ltd* [18], 2010 BCHRT 13 for one example of an employment case. This section may extend to volunteers depending on the circumstances (*Nixon*). When determining whether a volunteer is captured by this section of the HRC, the Tribunal will consider the following:

1. If there is a formal process to recruit volunteers;
2. If there is a training process with defined tasks;
3. Whether volunteers have to agree to follow the organizations policies and practises;
4. If there are requirements about when or how often a volunteer must be available; and
5. The role of volunteers in the organization.

For more information on volunteers, see *Ferri v Society of Saint Vincent de Paul and another* [19], 2017 BCHRT 123 at paras 29-33.

Because all individuals over 19 are protected by the ground of age, individuals in both the public and private sector are able to choose the age at which they wish to retire and are protected from discrimination based on age (HRC, s 1).

Section 44(2) states that an employer is responsible for the actions of their employees, and an employer will be liable for an employee's actions when the employee is acting within the scope of their authority or job duties.

***Bona Fide* Occupational Requirement (BFOR) Defence**: If a complainant proves the three elements of their case set out in *Moore*, the burden shifts to the respondent to justify their conduct. Adverse treatment on the basis of a protected characteristic may be justified when it relates to a "*bona fide* occupational requirement" (BFOR): see s. 13(4). In *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union* [4], [1999] 3 SCR 3 at para 54 [*Meiorin*], the Supreme Court of Canada established a three-part test for establishing a BFOR.

1. The employer adopted the standard for a purpose rationally connected to the performance of the job;
2. The employer adopted the particular standard with an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. The standard is reasonably necessary to fulfil its purpose. The employer must show that it could not accommodate individual employees with the protected characteristic without experiencing undue hardship.

For a specific example of a BCHRT case that applies the BFOR test in a disability context, please refer to *Kerr v Boehringer Ingelheim (Canada) Ltd (No 4)* [20], 2009 BCHRT 196 [*Kerr*].

Undue Hardship: What may be considered "undue hardship" varies by employer and depends on the circumstances. In *Central Okanagan School District No 23 v Renaud* [21], [1992] 2 SCR 970 at 985—986, the Supreme Court of Canada held that an undue hardship is more than a minor inconvenience and that actual interference with the employer's business must be established. Factors the court may consider include financial cost, health and safety, and flexibility and size of the workplace. The burden of proving an undue hardship lies on the respondent and will require evidence that all reasonable accommodations, short of undue hardship, have been provided. For more information on the duty to accommodate, please see the BC Human Rights Clinic's *Legal Information* page at https://bchrc.net/legal-information/do-i-have-a-complaint and their blog at https://bchrc.net/tag/duty-to-accomodate.

Other Exemptions: Distinctions based on age are not prohibited insofar as they relate to a *bona fide* seniority scheme. Distinctions based on marital status, physical or mental disability, sex, or age are permitted under *bona fide* retirement, superannuation, or pension plans, and under *bona fide* insurance plans, including those which are self-funded by employers or provided by third parties (HRC, s 13(3)).

7. Discrimination by Unions, Employer Organizations or Occupational Associations

Section 14 states that trade unions, employers' organizations, and occupational associations may not deny membership to any person or discriminate against a person on the basis of Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, and/or unrelated criminal record. Please refer to *De Lima v Empire Landmark Hotel and Major*, 2006 BCHRT 440.

Since persons are not covered by section 14, protection against denial of membership has been held to apply only against an implicated union, organization, or association, and not against an individual. Please refer to *Ratsoy v BC Teachers' Federation* [22], 2005 BCHRT 53 at para 23. This differs from other protections granted by the HRC, which, in appropriate circumstances, generally do allow an action to be brought against both an organization (e.g. an employer) and its individual members (e.g. a manager).

There are two limited ways in which unions can be held liable for discrimination. The first is by creating or participating in formulating a discriminatory workplace rule, and the second is by impeding an employer's efforts to accommodate an employee (*Chestacow v Mount St Marie Hospital of Marie Esther Society* [23], [2018] BCHRT No 44 at para 32 [*Chestacow*]). In respect of the latter, a union may be required to waive seniority rights or other collective agreement obligations in order to facilitate the accommodation of an employee with a protected characteristic, such as a disability.

8. Retaliation

Section 43 of the Code protects people from retaliation for filing a human rights complaint, or for indicating that they might file a human rights complaint. It also protects from retaliation anyone who assists, or who might assist, someone to make a complaint.

The test for retaliation is set out in Gichuru v Pallai, 2018 [24] BCCA 78 at paras 50–58. To prove retaliation, a complaint must show:

a) The respondent was aware that the complainant had made a complaint;

b) The respondent engaged in or threatened to engage in conduct described in s. 43; and

c) There is a sufficient connection between the impugned conduct and the previous complaint. This connection may be established by proving that the respondent intended to retaliate, or may be inferred where the respondent can reasonably have been perceived to have engaged in that conduct in retaliation, with the element of reasonable perception being assessed from the point of view of a reasonable complainant, apprised of the facts, at the time of the impugned conduct.

In Sales Associate v. Aurora BioMed, the Tribunal interpreted the meaning of the protection for someone who "might" make a complaint. The Tribunal concluded that the protection applies where the retaliator is aware that a person might pursue some legal recourse for discrimination. It is not necessary to prove that the retaliator was specifically aware of the possibility of a human rights complaint at the Human Rights Tribunal (see paras. 151-163).

C. Prohibited Grounds of Discrimination

1. General

Prohibited grounds of discrimination include Indigenous Identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age (for those 19 and over), criminal record (that is not related to the employment, union or occupational association), and lawful source of income (in tenancy only). Note that not all of these grounds of discrimination are protected in all of the areas listed in sections 7–14 of the HRC. For example, the HRC does not prohibit landlords from discriminating on the basis of a tenant's political beliefs. The grounds of discrimination that apply depend on the section of the HRC in question. One must first decide which section is involved and then check to see which grounds are associated with that section. Please refer to the helpful chart on the following page.

To determine whether a violation of the HRC has occurred, consult the relevant section of the HRC and review recent case law. Case law can be found on the BC Human Rights Tribunal website (www.bchrt.bc.ca/law-library/decisions [25]), indexed by year, and is also available on CanLII BC.

It should be noted that a complainant might file a complaint on a combination of grounds. A prohibited ground does not need to have been the sole or primary motivating factor behind the discrimination; it need only have been one contributing factor. Please refer to *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)* [26], 2015 SCC 39 at paras 45-52.

Discrimination need not be intentional (HRC, s 2). Any policy or action that has an adverse effect on a protected group and which cannot be justified will be considered discriminatory. Please refer to *Ontario (Human Rights Commission) v Simpsons-Sears Ltd* [27], [1985] 2 SCR 536 at 549 for an example of indirect discrimination, also known as adverse effect discrimination. The policy or act does not have to affect every person in the group for it to be considered discriminatory. For example, if a policy discriminates against only people who are pregnant it could still be considered sex discrimination. It is also possible that an act or policy may affect men as well as women, but affect one sex to a disproportionate degree, in which case it could also qualify as sex discrimination.

Discrimination can also be established on an intersectional basis. This means that the discriminatory action had an adverse impact on the basis of multiple protected grounds, occurring simultaneously, which cannot easily be separated from one another. It is not always necessary to establish that each individual ground has been met where intersectional discrimination can be established. Please refer to *Radek v Henderson Development (Canada) Ltd* [28], 2005 BCHRT 302 at paras 463–467.

The Chart below illustrates how the HRC's protected grounds apply to each area of protection:

Protected Grounds	**Protected Areas**						
	Written Publications	Public Services & Accommodation	Purchase of Property	Tenancy	Employment Advertisements	Employment	Unions & Associations
Race	v	v	v	v	v	v	v
Colour	v	v	v	v	v	v	v
Ancestry	v	v	v	v	v	v	v
Place of Origin	v	v	v	v	v	v	v
Political Belief	x	x	x	x	v	v	v
Religion	v	v	v	v	v	v	v
Marital Status	v	v	v	v	v	v	v
Family Status	v	v	x	v	v	v	v
Physical or Mental Disability	v	v	v	v	v	v	v
Sex	v	v	v	v	v	v	v
Sexual Orientation	v	v	v	v	v	v	v
Gender Identity or Expression *(NEW)*	v	v	v	v	v	v	v
Age	v	v	x	v	v	v	v
Criminal or Summary Conviction	x	x	x	x	x	v	v
Source of Income	x	x	x	v	x	x	x
Indigenous Identity	v	v	v	v	v	v	v

2. Race, Colour, Ancestry, and Place of Origin

The grounds of race, colour, ancestry, and place of origin are included in the HRC as a means to combat racism and racial discrimination. Each of these grounds is protected in the HRC and may be cited individually in connection with a discriminatory incident or grouped together in order to better illustrate a particular situation. For further information on how the above grounds interact, please refer to *Torres v Langtry Industries Ltd, 2009 BCHRT 3* [29].

Discrimination on the basis of race, colour, ancestry, or place of origin can also be established where the respondent caused harm to the claimant by taking advantage of a vulnerability caused by the claimant's race, colour, ancestry or place of origin. For more information, see *PN v FR and another (No 2)* [30], 2015 BCHRT 60. In BC, the grounds of race, colour, ancestry and place of origin are protected in the following areas:

- publication
- public services such as schools, government programs, restaurants and stores
- purchase of property
- tenancy
- employment advertising and employment, and
- membership in a trade union, employer's organization, or occupational association.

For a recent case concerning discrimination on the basis of race in the employment context, please see *Francis v. BC Ministry of Justice (No. 3)* [31], 2019 BCHRT 136.

Note that the Tribunal has recognized that racism can be subtle and is sensitive to this fact. Please refer to *Mezghrani v Canada Youth Orange Network Inc* [32], 2006 BCHRT 60 at para 28.

The Tribunal has acknowledged that while anti-Black racism exists in Canada and continues to create impediments to the full and free participation of Black Canadians in the economic, social, political and cultural life of BC, there is a lack of cases dealing with anti-Black racism at the Tribunal level. Given that anti-Black racism is a "distinct form of racism," the lack of these types of cases has been a factor that supports a complaint being accepted despite being filed late; please refer to Umolo v. Shoppers Drug Mart and others, [33] 2021 BCHRT 166 at para 35.

3. Political Belief

The HRC provides protection from discrimination due to political beliefs and/or affiliations in the areas of employment advertising, employment, and membership in a trade union, employer's organization, or occupational association.

In BC, few human rights cases have been decided on the ground of political belief. The Tribunal has, however, identified two key principles in determining whether a claimant's belief should be protected under the HRC:

1. Political belief is to be given a liberal definition; it is not confined to partisan political beliefs. Hence, political beliefs are not limited to beliefs about recognized or registered political parties.
2. Political belief is not unlimited; for example, views about matters such as business or human resources decisions an employer may make do not come within its ambit.

Please refer to *Prokopetz and Talkkari v Burnaby Firefighters' Union and City of Burnaby* [34], 2006 BCHRT 462 at para 31 and Fraser v British Columbia (Ministry of Forests) [35], 2016 BCHRT 124. See *Bratzer v Victoria Police Department* [36], [2016] BCHRT No 50 for a unique example of how political belief can be framed. In this case, an officer of the Victoria Police Department successfully argued that his stance against the criminalization of illicit drugs and his involvement in a not-for profit that advocates for such views amounted to a political belief.

In *Wali v Jace Holdings* [37], 2012 BCHRT 389 at para 117, the Tribunal determined that comments regarding matters affecting the regulation of a profession could constitute a political belief. This was narrowed to the particular legislative framework and mandate of the College of Pharmacists. The Tribunal took into account that the issue was a legislative

initiative involving public welfare and was being debated in the community of pharmacists in determining that the belief was a protected political belief.

4. Religion

Religious discrimination cases have helped to define several of the fundamental ideas and standards that comprise human rights law in Canada. Matters before the courts have routinely addressed discriminatory incidents concerning religious faith, beliefs, customs, and practices. In BC, protection from discrimination based on religion is provided in the following areas:

- publication
- public services
- purchase of property
- tenancy
- employment advertising and employment, and
- membership in a trade union, employer's organization or occupational association.

Section 2(a) of the *Charter* [38] protects the freedom of conscience and religion. A claimant must show that their religious belief or practice is sincere, but is not required to show that it is objectively required or recognized by a particular religious faith. Please refer to *Friesen v Fisher Bay Seafood Limited* [39], 2009 BCHRT 1, at para 57. Atheism is encompassed within the protected ground of religion: *Mangel and Yasué obo Child A v. Bowen Island Montessori School and others* [40], 2018 BCHRT 281 at para 210: *Mouvement laïque québécois v Saguenay (City)* [41], 2015 SCC 16 at para 70; *SL v Commission scolaire des Chênes* [42], 2012 SCC 7 at para 32; *R v Big M Drug Mart Ltd* [43], [1985] 1 SCR 295 at 314)

The duty to accommodate obliges employers to accommodate the religious practices of their employees as long as doing so does not cause undue hardship. Practices requiring accommodation may be linked to customs involving prayer, dietary restrictions, clothing requirements, or time off on religious holy days. Please refer to *Renaud v Central Okanagan School District No 23* [44], [1992] 2 SCR 970 at 982.

5. Family Status and Marital Status

Family status generally refers to parent-child relationships, but can and does encompass other family relationships including those between siblings, in-laws, aunts and uncles, nieces and nephews, and cousins. For case law on the definition of family status and the test for discrimination on that basis see *Miller v British Columbia Teachers' Federation* [45], 2009 BCHRT 34 at para 17.

Marital status normally refers to couples with a spouse-like relationship. The HRC extends protection to all individuals regardless of their status (i.e. married, common-law, single, separated, divorced or widowed). Issues involving family and marital status may often overlap and may be cited concurrently to fully illustrate a certain situation.

Protections from discrimination on the basis of marital and family status also confer protection on the basis of the identity of the complainant's spouse or family member: *B v Ontario (Human Rights Commission)* [46], 2002 SCC 66.

In BC, the grounds of family and marital status are protected in the areas of publication, public services, tenancy, employment advertising, employment, and membership in a trade union, employer's organization, or occupational association. Family status is not protected in the area of purchase of property, meaning adult-only buildings and stratas are permitted.

The ground of family status also protects people from discrimination in respect of their childcare, and possibly other family care obligations. The law regarding the test that applies in the context of family status discrimination cases

involving childcare obligations is unsettled in Canada. In BC, the present test for family status discrimination in employment was most recently considered in British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd., [47] 2023 BCCA 168. Per that case, in order to establish discrimination on the basis of family status, the complainant must show that a term or condition of employment results in a serious interference with a substantial parental or other family duty or obligation of an employee, whether as a consequence of a change in the term of employment or a change in the employee's circumstances (see para. 77).

The Federal Court of Appeal set out its own four-part test for family status discrimination in *Canada (Attorney General) v Johnstone* [48], 2014 FCA 110, at para 93 [*Johnstone*]. Under *Johnstone*, a complainant must show that a child is under their care and supervision, the issue engages the individual's legal responsibility for that child as opposed to a personal choice, they have made reasonable efforts to find alternative solutions and no reasonable alternative solution is available, and the impugned workplace rule interferes with the childcare obligation in a more than trivial or insubstantial way.

In Ontario, *Misetich v. Value Village Stores Inc.* [49], 2016 HRTO 1229 [*Misetich*] is the leading authority. *Misetich* criticized both *Campbell River* and *Johnstone* as creating too narrow of a test. The *Misetich* test requires a complainant to establish a negative impact that results in a real disadvantage to the parent/child relationship, parent/child responsibilities, or to the employees' work.

In Alberta, in *SMS Equipment Inc. v. Communications, Energy and Paperworkers Union* [50], Local 707, 2015 ABQB 162, the Court of Queen's Bench upheld a labour arbitration decision rejecting the *Campbell River* test. The court held that there were problems with both *Campbell River* and *Johnstone* and ultimately concluded that the correct test for determining discrimination based on family status is the Supreme Court of Canada's general test for establishing discrimination set out in *Moore*. The *Moore* test was recently reaffirmed by the Supreme Court of Canada in *Stewart v Elk Valley Coal Corp* [51], 2017 SCC 30.

The BC Court of Appeal recently affirmed that the *Campbell River* test is the law in British Columbia: *Envirocon Environmental Services, ULC v Suen* [52], 2019 BCCA 46. Mr. Suen applied for leave to appeal to the Supreme Court of Canada; the application was dismissed.

6. Physical or Mental Disability

Disability is not defined in the HRC. However, the concept of physical disability, for human rights purposes, generally indicates a "physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life" (*Boyce v New Westminister (City)* [53] *(1994)*, 24 CHRR D/441 at para 50 [*Boyce*]). More recent cases have confirmed that a disability must have a certain level of severity, permanence or persistence: see e.g., *Li v Aluma Systems and another* [54], 2014 BCHRT 270 at para 41. In *Morris v BC Rail* [55], 2003 BCHRT 14 at para 214 [*Morris*], the Tribunal set out the following three considerations for assessing whether an individual has a physical or mental disability:

1. [T]he individual's physical or mental impairment, if any;
2. [T]he functional limitations, if any, which result from that impairment; and
3. [T]he social, legislative or other response to that impairment and/or limitations… assessed in light of the concepts of human dignity, respect and the right to equality.

Furthermore, according to *Morris* at para 207, proof of impairment and/or limitation, while relevant, will not be required in all cases. See *McGowan v Pretty Estates* [56], 2013 BCHRT 40 at paras 26-28 for more information.

The protection of the HRC extends to those who are perceived to have a disability or to be at risk of becoming disabled in the future. As such, the Tribunal has rejected the application of strict criteria to determine what constitutes a physical or mental disability. For example, protection has been specifically applied to persons with AIDS, persons who are HIV

positive, and persons believed to be HIV positive. Please refer to *McDonald v Schuster Real Estate* [57], 2005 BCHRT 177 at para 24 and *J v London Life Insurance Co* [58] (1999), 36 CHRR D/43 at para 42 [*London Life Insurance*].

As noted above, protection from discrimination due to physical disability extends to discrimination on the basis of a perceived propensity to become disabled in the future. In *London Life Insurance* at para 46, the Tribunal found that the HRC prohibited discrimination against a person based on the fact that his spouse was HIV positive. Protection under this ground has also been extended to those who are suffering from addictions issues. For example, *Handfield v North Thompson School District No 26* [59], [1995] 25 CHRR D/452 at paras 139–143 recognized alcoholism as both a physical and mental disability.

Where a behaviour or policy adversely affects a protected group or person, either directly or indirectly due to their disability (or any other protected characteristic), there is a duty to accommodate, meaning that all reasonable efforts must be taken to accommodate the group or person up to the point of undue hardship. Examples include installing wheelchair access (*Walsh v Pink* [60], 2018 BCHRT 174 at paras 104-111) and safety handrails (*Ferguson v Kimpton* [61], 2006 BCHRT 62 at para 68). The duty to accommodate may also include allowing workers to return gradually to the workplace after an injury or serious illness.

7. Sexual Orientation

The HRC prohibits discrimination based on sexual orientation. Such discrimination does not require a complainant to prove their sexual orientation nor that a given respondent believed them to have a particular orientation. In *School District No 44 (North Vancouver) v Jubran* [62], 2005 BCCA 201, Mr. Jubran was a high school student, subjected to homophobic insults and harassment from other students. This conduct was found to constitute discrimination, even though Mr. Jubran did not identify as homosexual and his harassers denied believing that they in fact thought he was homosexual. For a case regarding discrimination on this basis against patrons of a restaurant in the context of services customarily available to the public, please see *Pardy v. Earle* [63] and others (No. 4), 2011 BCHRT 101.

In BC, protection on the basis of sexual orientation is provided in the areas of publication, public services, purchase of property, tenancy, employment advertising, employment, and membership in a trade union, employer's organization, or occupational association.

8. Sex (Including Sexual Harassment, Pregnancy)

Discrimination on the basis of sex, which is prohibited under the HRC, includes sexual harassment. Sexual harassment is defined as "unwelcome conduct of a sexual nature that detrimentally affects a work environment or leads to adverse job-related consequences for the victims of the harassment" (*Janzen v Platy Enterprises Ltd* [64], [1989] 1 SCR 1252 at 1284 [*Janzen*]).

In *PN v FR* [65] *and another (No 2)*, 2015 BCHRT 60, the HRT awarded $50,000 for injury to dignity to a domestic foreign worker who was sexually harassed and assaulted. This is among the highest injury to dignity award the Tribunal has ever ordered. This case also involved allegations of discrimination based on family status, race, age, colour, and place of origin.

Sexual harassment can take a number of forms. One such form may occur when the employer or a supervisory employee requires another employee to submit to sexual advances as a condition of obtaining or keeping employment or employment-related benefits. It may also occur when employees are forced to work in an environment that is hostile, offensive, or intimidating, such as where an employer allows pornography to be posted in the workplace. It is not generally necessary for an employee to make an internal complaint to their employer before filing a complaint, although this may be relevant to the compensation the employer is ordered to pay if the complaint is successful. There is also no

requirement of continuing harassment; a single incident may be sufficient if it is sufficiently egregious.

Whether the conduct was “unwelcome” is assessed on an objective standard: would a reasonable person have known that the conduct was unwelcome? If the respondent knew or ought to have known that the conduct was unwelcome, this part of the test is made out. A target of harassment is not required to expressly object to the conduct for it to be reasonably understood to be unwelcome. The law recognizes that a person's behaviour "may be tolerated and yet unwelcome at the same time" (*Mahmoodi v. University of British Columbia and Dutton* [66], 1999 BCHRT 56 at para 140).

It must also be shown that the alleged discriminatory conduct is “reasonably perceived to create a negative psychological and emotional environment for work” (*Janzen* at 1263). The test must also take into account the customary boundaries of social interaction in the circumstances. Factors that are examined to determine the limits of reasonableness in a particular context include the nature of the conduct, the workplace environment, the type of prior personal interaction, and whether a prior objection or complaint was made. It is no defence to harassment, however, to show that harassing behaviour was traditionally tolerated in a workplace.

For a more recent case involving discrimination on the basis of sex, and more specifically sexual harassment in the employment context, see *Araniva v RSY Contracting and another (No. 3)* [67], 2019 BCHRT 97.

There are also examples of cases involving sex discrimination that did not amount to sexual harassment. Please refer to *Mottu v MacLeod* [68], 2004 BCHRT 76 at para 41, where the Tribunal found that dress code requirements based on sex could constitute discrimination on the basis of sex. In *Lund v Vernon Women’s Transition House Society*, 2004 BCHRT 26, the Tribunal found that an employer’s refusal to allow a female employee to breastfeed her child at work could also constitute sex discrimination. See also *The Sales Associate v Aurora Biomed Inc. and others (No. 3)* [69], 2021 BCHRT 5.

9. Gender Identity or Expression

This protected ground has been in force since 2016, and therefore few decisions relating to this ground are currently available.

For a recent Tribunal decision issued under the ground of gender identity or expression, please refer to *Oger v Whatcott (No 7)* [70], 2019 BCHRT 58. Please also see Li v. Mr. B, [71] 2018 BCHRT 228, where the respondent, the complainant's landlord, showed a photograph of the complainant (who was male-identifying) in a dress to the complainant's supervisor in an attempt to cause an adverse effect on the complainant's employment. The HRT found that this constituted discrimination based on gender identity and expression. For a case involving a nonbinary person, whose coworker refused to use they/them pronouns to refer to them, please see *Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria and others* [72], 2021 BCHRT 137.

Prior to the inclusion of gender identity or expression in 2016, the Tribunal had found that being transgender was a protected characteristic under the ground of sex. Please refer to *Dawson v Vancouver Police Board (No 2)* [73], 2015 BCHRT 54 [*Dawson*]. *Dawson* establishes that misgendering trans individuals (addressing a trans person using a pronoun, name, or gender marker other than that which the trans person uses to identify themselves) constitutes discrimination. Discrimination may also include the denial of trans-specific medical services (*Dawson*).

10. Age (19+)

Age can refer to an individual's legal age, membership in a specific age-category, or a generalized characterization of a specific age. In BC, age is a protected ground of discrimination in the areas of publication; public services; tenancy; employment advertising; employment; and membership in a trade union, employer's organization, or occupational association. Please refer to *Miu v Vanart Aluminum and Tam* [74], 2006 BCHRT 219 at para 18.

In each of these areas, age protection is restricted to those 19 years of age and over. However, those under 19 years are still able to bring complaints to the BCHRT based on grounds other than age.

11. Criminal or Summary Conviction

BC's HRC protects individuals with a criminal or summary conviction in the area of employment, trade unions, employers' associations and occupational associations, so long as the conviction is unrelated to the employment or the intended employment of the individual. This protection includes a perceived conviction (i.e. relating to arrests, stayed charges or acquittals). Please refer to *Purewall v ICBC* [75], 2011 BCHRT 43 at para 21, *Clement v Jackson and Abdulla* [76], 2006 BCHRT 411 at para 14; and *Korthe v Hillstrom Oil Company Ltd* [77] (1997), 31 CHRRD/82 at paras 23-28. In an effort to establish whether or not a conviction may affect an employment decision, the Tribunal makes an assessment of the relationship between the conviction and the job description. As such, employers must take into account the circumstances of the conviction in order to determine whether or not the charge relates to the employment. In *Woodward Stores (British Columbia) v McCartney* [78] (1983) 43 BCLR 314 at paras 7-9, Justice MacDonald laid out a list of criteria to be considered in making this determination. These criteria are as follows:

- Does the behaviour which formed the basis of the charge, if repeated, compromise the employers' ability to conduct business safely and effectively?
- What were the circumstances and details of the offence, e.g., what was the person's age at the time of the offence and were there any extenuating factors?
- How much time has passed since the charge? What has the individual done since that time and has there been any indication of recidivism? Has there been evidence of the individual's desire for rehabilitation?

12. Lawful Source of Income

BC's HRC protects against discrimination in tenancy on the basis of an individual's lawful source of income. It applies only in the area of tenancy. This protects the tenancy rights of individuals on social assistance or disability pensions, for example, who might otherwise be denied safe housing. Please refer to *Tanner v Vlake* [79], 2003 BCHRT 36 at paras 22–26 for further discussion on this protected ground. For a more recent case, please see Day v Kumar and another (No 3) [80], 2012 BCHRT 49.

13. Indigenous Identity

On Nov. 17, 2021, the BC government introduced, and later passed, Bill 18 which added Indigenous identity as a protected ground under the B.C. Human Rights Code. Bill 18 was intended to better reflect forms of discrimination experienced by Indigenous Peoples. Indigenous identity refers to being First Nations, Métis, or Inuit. While there are few cases that feature the Tribunal considering Indigenous identity as its own distinct protected ground, there are many more that look at Indigenous identity as being a protected ground through race, ancestry, or place of origin. One such case is Smith v Mohan (No. 2), [81] 2020 BCHRT 52, where the complainant, an Indigenous woman and member of the Tsimshian and Haisla Nations, was discriminated against by her landlord, who continually tried to evict the complainant because she was smudging in her apartment unit. See also Campbell v. Vancouver Police Board (No. 4), [82] 2019

BCHRT 275, which involved a finding of discrimination by the Vancouver Police against an Indigenous woman and mother.

D. Procedural Options for Employees

An employee who is dealing with an employment-related legal issue may have more than one procedural option to choose from. These include:

1. Employer's Internal Complaint Procedure

Assuming one exists, this is the most immediate way to obtain a resolution to a workplace issue. Consult the workplace's policies to determine whether an internal complaints process exists and, if so, whether it is likely to yield a helpful resolution of the issue. Note that employees are not required to make use of internal procedures before filing a human rights complaint or other legal proceeding.

2. Grievance and Arbitration (Union)

Unionized workers are entitled to representation by their union. Labour arbitrators have jurisdiction to apply the HRC, and grievances often move more quickly than human rights complaints. However, if the union does not pursue a grievance relating to a human rights issue, the worker may wish to file their own human rights complaint and may even decide to name the union as a party if the worker has grounds to believe the union is complicit in the alleged discrimination. Alleging that the union has failed to provide adequate representation will not be sufficient to qualify as a breach of the HRC on its own; the union must have engaged in the discrimination.

As previously stated (see **Section III.B.7**: Discrimination by Unions, Employer Organizations, or Occupational Associations), there are two ways in which a union may be found liable for discrimination. First by creating or participating in formulating a discriminatory workplace rule, and second by impeding an employer's efforts to accommodate a disabled employee (*Chestacow* [83] at para 32).

Initiating the grievance procedure can be a good starting point, and can be followed by initiating a human rights complaint. A grievance and a human rights complaint can also be filed in tandem. If the matter is not resolved during the initial stages of the union grievance procedure, an arbitration hearing may be held, and an arbitrator will determine liability and relief. The human rights complaint may be placed in deferral while the grievance process proceeds. If the grievance process resolves the worker's human rights issue, the human rights complaint will be dismissed. See *Sebastian v Vancouver Coastal Health Authority* [84], 2019 BCCA 241 for some of the risks of parallel proceedings in this context.

3. Human Rights Complaint

Another option is to file a human rights complaint with the BC Human Rights Tribunal (see above for the grounds, areas, exemptions, complaint process, etc.) or, under federal jurisdiction with the Canadian Human Rights Commission (see below for the grounds, areas, exemptions, process, etc). The Tribunal can award lost wages, expenses, and damages for injury to dignity, feelings and self-respect. However, note that if a claimant is also seeking severance pay, lost wages, or expenses in a civil suit, they will not be allowed to recover the same damages from both proceedings.

4. Employment Standards Branch

Employees may choose to file a complaint through the Employment Standards Branch (ESB) if their employer has breached the *Employment Standards Act* (see Chapter 9: Employment Law). There is a **six-month limitation period** from the date of the breach. A complainant can file claims in both the ESB and civil court (either Small Claims or Supreme Court) for employment-related issues, including wrongful dismissal. These actions do not bar the complainant from also bringing a human rights complaint relating to the same matter. Remedies awarded by the Employment Standards Tribunal are intended to make the employee "whole" financially by way of compensation rather than reinstatement. It is important to note that the ESB does not deal with alleged discrimination. If the employee recovers unpaid wages through the ESB, they cannot "double-recover" and seek these same damages in the BCHRT or another forum.

5. Civil Action

A final option is to bring a civil action for wrongful dismissal either in Small Claims Court (see Chapter 22: Small Claims of the LSLAP Manual) or the BC Supreme Court, depending on the amounts claimed. However, the Supreme Court of Canada has held that the common law will not provide a remedy for discrimination per se in the employment context. Please refer to *Keays v Honda Canada Inc* [85], 2008 SCC 39 at para 67 [*Keays*].

The court in *Keays* [85] held that breaches of the HRC must be remedied within the statutory scheme of the HRC itself. Thus, even if the reason for dismissal was discriminatory, in a civil action, the claimant will generally only be able to recover damages based on their wrongful dismissal and/or inadequate notice (severance pay). See Chapter 9: Employment Law of the LSLAP Manual. Accordingly, compensation for the discrimination itself must be awarded by the Tribunal.

The court may further compensate the claimant in a civil action if the employer has acted unfairly or in bad faith when dismissing an employee. The basis for these additional damages is a breach of the implied term of an employment contract that employers will act in good faith in the manner of dismissal (i.e. payment for such damages can be deemed to have been in the contemplation of the parties at the formation of the contract). In Keays the Supreme Court of Canada held that any such additional award must be compensatory and must be based on the actual loss or damage suffered by the employee, which can include expenses related to mental distress stemming from the manner of dismissal. Compensable conduct might include, but is not limited to, attacking the employee's reputation at the time of dismissal, misrepresentations regarding the reason for the dismissal, or dismissal meant to deprive the employee of a pension benefit or other right such as permanent resident status. However, normal distress and hurt feelings arising from the dismissal itself are not grounds for additional damages.

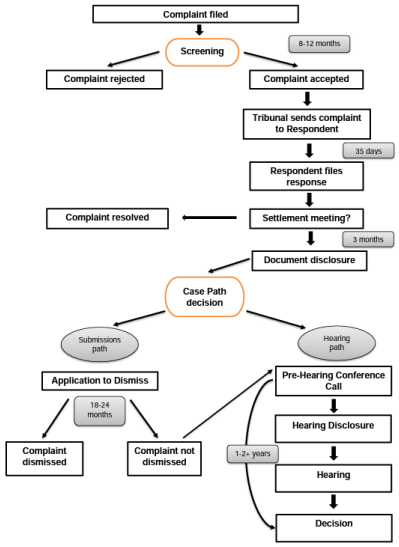
The courts are even more conservative in their approach to awarding punitive damages meant to punish the employer for their conduct in dismissal. Punitive damages will only be awarded if the employer's conduct was harsh, vindictive, reprehensible, malicious, and extreme in nature. Thus, if the claimant is primarily concerned with being compensated for injuries to their dignity and/or denouncing their employer's discriminatory behaviour, they should file a complaint with the Human Rights Tribunal alongside a civil action for wrongful dismissal.

Whatever procedural route an employee ultimately chooses to pursue, if said employee is experiencing on-going harassment on a prohibited ground of discrimination, they should maintain records or a journal with dates, times, places, witnesses, details of particular incidents, and even a description of the emotional effects of the harassment.

E. The Process for Human Rights Complaints

The BC Human Rights Tribunal handles complaints made under the HRC. The following chart depicts the process of a complaint at the Tribunal and the time in between the various stages of the process (prepared by the BC Human Rights Clinic, program of the Community Legal Assistance Society):

The first step in filing a complaint with the Tribunal is to fill out a Complaint Form, which is available at the Tribunal's head office, on its website (http://www.bchrt.bc.ca) or from other local government agent offices. It is also possible to file the complaint online on the Tribunal's website. There are helpful self-help guides to filling out Complaint and Response forms on the Tribunal's website. You should also consult the Tribunal's Rules of Practice [86] and Procedure and Practice Directions [87] for guidance on the various steps in the process.



1. Who Can File a Complaint?

A complaint may be made by an individual, on behalf of a group or class, or by someone acting as a representative of named person(s). If the Complaint Form is being filled out on behalf of another person, group, or class of persons, then a secondary form called the Representative Complaint Form must also be filled out and must accompany the Complaint Form when sent to the Tribunal. The person filling out the Complaint Form is the complainant. The person or organization who has been filed against is called the respondent. You should also consult the Tribunal's Rules of Practice [86] and Procedure and Practice Directions [87] for guidance on the various steps in the process.

2. How to File a Complaint

The Complaint Form can be filed with the Tribunal via mail or fax. The Complaint Form can also be filled out and submitted online from a computer or a smart phone. Alternatively, the Complaint Form can be submitted to the Tribunal through email. Complainants may access the Complaint Form and other valuable resources at the BC Human Rights Tribunal website (see Section II.B: Resources). There are different Complaint Forms depending on whether the complaint is being made by an individual (Form 1.1 [88]), or a group (Form 1.3 [89]). If you are filling out a Complaint Form on behalf of someone else, then the appropriate form is Form 1.2 [90].

The party filing the complaint should be aware of the time limits. There is a one-year limitation period. Complaints alleging continuing contraventions of the Code may be accepted as long as at least one incident of alleged discrimination occurred within the one-year limitation period: see Code s. 22(2). Late-filed complaints may be accepted if it is in the

public interest to do so, under certain very limited circumstances, as per s. 22(3) of the Code In order for a member of the Tribunal to accept all or part of the complaint under s. 22(3), the Tribunal must determine that a) it is in the public interest to accept the complaint, and b) no substantial prejudice will result to any person because of the delay. The Tribunal's assessment of what the public interest means in this context depends on a consideration of a number of factors including: the complainant's interest in accessing the Tribunal, the length and reason for the delay in filing, whether the complainant had access to legal advice, and the novelty or importance of the human rights issues raised: British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite, [91] 2014 BCCA 220 at paras. 53-81. It also considers "the respondent's interest in going about its activities without the worry of stale complaints": Hoang v. Warnaco and Johns, [92] 2007 BCHRT 24 at para. 26. This list of factors is not exhaustive.

The BC Court of Appeal has found it to be within the public interest to accept a complaint that was filed late if the complainant was operating off erroneous legal advice regarding the one-year limitation date: The Parent obo the Child v. The School District, [93] 2020 BCCA 333. The Tribunal has found that it can be in the public interest to accept late complaints where the delay is due to a disabling condition: Naziel-Wilson v. Providence Health Care and another, [94] 2014 BCHRT 170 at para. 21. See also Sheriff v. Fairleigh Dickenson University, [95] 2023 BCHRT 40 at para. 38, where the Tribunal discussed the impact of trauma on a person's ability to file a complaint within the one-year time limit.

The BC Human Rights Tribunal has been severely backlogged over the last couple of years. Potential complainants should be aware that it may take up to a year for a case to be screened and accepted for filing.

3. Screening

Once the Complaint Form is filed, the Tribunal will review the form to determine if it fits under the HRC and if it appears to meet the one-year limitation period. If the Tribunal believes that it may not have the power to deal with the complaint in substance or believes that the complaint has been filed out of time, the complainant will generally be given a chance to respond before the Tribunal decides whether or not to proceed with the complaint. If the Tribunal believes it can proceed, it will send the Complaint Form to the respondent for a response to the complaint.

A complainant **must** set out a case of discrimination under the HRC on their initial complaint form. If the elements are not set out, then the Tribunal might not accept the complaint. Even if accepted, it could still be vulnerable to an application to dismiss under section 27 of the HRC at a later stage. In order to set out the complainant's case, the complainant must allege facts that, on their face (that is to say, assuming they are all true), satisfy the following three elements:

1. That they have a characteristic that is protected under the HRC;
2. That they experienced an adverse impact with respect to an area protected by the HRC; and
3. That their protected characteristic was a factor in the adverse impact they experienced.

It is important to note that a complainant need not establish that their protected characteristic was the sole or primary reason for their adverse treatment. It is sufficient to establish that it was one reason for their adverse treatment.

For greater analysis of this topic please refer to *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)* [26], 2015 SCC 39; and *Moore v British Columbia (Education)* [1], 2012 SCC 61.

A complainant is not required to provide evidence at the time they file their complaint. The complaint form simply needs to tell the story, identify all of the allegations of discriminatory treatment, and satisfy the three criteria set out above.

4. Disclosure Obligations

Disclosure refers to the sharing of information with the other parties. In order for all parties to prepare for their case it is essential that information is properly shared. Information that must be disclosed includes:

1. All documents relevant to the complaint, response, as well as the remedy being requested. This must be disclosed after a complaint is filed;
2. A list of witnesses. This must be disclosed after a hearing is scheduled;
3. A detailed explanation of the remedy (for the complainant), or a response to the proposed remedy (for the respondent); and
4. Any expert evidence or opinion. All expert evidence must be presented to the other party within 90 days of the hearing.

Evidence that has not been disclosed cannot be presented at a hearing. An attempt to do so may negatively affect a party's case and may even lead to an order for costs by the Tribunal. A failure to disclose can also simply prevent a complaint from going forward, or prevent a respondent from filing an application to dismiss.

5. Settlement Meeting

Parties may agree to a settlement meeting at any time after the complaint has been filed. The Tribunal schedules an Early Settlement Meeting after accepting the complaint for filing, which the parties can opt out of if they choose. Most human rights complaints settle, either through a settlement meeting or direct negotiations between the parties or their counsel. Guides for settlement meetings and hearings are available from the Tribunal on its website.

At the settlement meeting, a neutral and impartial mediator who is knowledgeable in human rights law will work with the parties in order to help them try to reach an agreement. Generally speaking, a settlement will require both sides to compromise, whether that is a complainant accepting less compensation than they initially sought, or a respondent accepting some measure of responsibility. In a settlement meeting, it is important to listen to the other side's perspective and assess how it impacts the strength of your case, and remain open-minded regarding the remedy you are prepared to accept to resolve the complaint.

Additionally, settlements can allow for creativity in determining a resolution. While the Tribunal may be limited in its ability to address the damages, mediation can result in constructive results such as public apologies or a practical solution to the issue at hand.

This process also allows for a quicker resolution of the issue in a more informal setting, where information is kept confidential. Negotiations are without prejudice, meaning they cannot be used in future hearings, and the mediator involved will not be a part of the final hearing. The process is voluntary and the Tribunal cannot force the parties to participate in mediation or enter into a settlement agreement. If the parties do voluntarily agree to settle their dispute, as part of the terms of settlement, the complainant will file a Complaint Withdrawal Form (Form 6 [96]). A settlement agreement is a legally binding agreement, and if one side does not comply with its terms, the other party can take to steps to enforce it.

If both parties cannot agree on a resolution, the mediation will end with no settlement agreement.

6. Miscellaneous

Due to the COVID-19 Pandemic, the Tribunal developed a new process for processing complaints about mask wearing in the BC HRT. On April 20, 2022 the Tribunal paused processing complaints about mask requirements in services for one year, partly because of the sheer number of complaints about mask-wearing under s. 8 that the Tribunal was receiving. For complaints filed after March 31, 2022, the HRT will dismiss any complaint that does not include the criteria set out in the Practice Direction [97]. This criteria requires complainants to demonstrate that their protected personal characteristic, if that is a physical disability, actually inhibits the wearing of a mask. If the complainant does not provide this information in their Complaint Form then their complaint will be dismissed without an opportunity to provide more information.

The Tribunal encourages people to solve any mask wearing complaints by talking to the service provider or sending them information about the public order requiring masks, and guidance from the Office of the Human Rights Commissioner and WorkSafe BC.

BC declared a state of emergency on March 18th, 2020, due to the pandemic. This did not extend the 1-year time limit to file a complaint but someone who misses the time limit may explain that their delay was caused by the pandemic on the complaint form and the Tribunal will consider it. If the complaint is urgent, a complainant may request a fast-track process. To be eligible for a fast track, you must show that fast-tracking or changing the process will help get to a "just and timely resolution" of the complaint. The complainant may want to fast-track the process if the complainant is at risk of losing the appropriate remedy if urgent action is not taken by the HRT (for example, the complaint is about an eviction notice and the complainant will have to move out in 30 days, without a fast-tracked solution). A party may also wish to fast-track the process if they are at risk of losing the chance to prove their case (for example, the respondent's main witness is moving out of Canada soon). For more information on the fast track process, please refer to the BC HRT website: http://www.bchrt.bc.ca/law-library/guides-info-sheets/general-apps/16.htm

F. Remedies

Remedies should be considered early when deciding whether or not to pursue a claim in any administrative tribunal. Available remedies for a justified complaint are listed in section 37(2) of the HRC.

Non-pecuniary (not financial) remedies include: an order that the respondent cease the discriminatory conduct, a declaratory order that the conduct complained of is, in fact, discriminatory, and an order that the respondent take steps to ameliorate the effects of the discrimination, such as the implementation of human rights policy and training. People seeking advice on drafting should be directed to the BC Human Rights Tribunal website, which provides detailed information on the availability and applicability of specific remedies (see Section II.B: Resources).

Pecuniary (financial) remedies include: compensation for lost wages/salary, expenses incurred due to the discrimination, re-instatement of a lost benefit, and compensation for injury to dignity. Unlike severance pay, compensation for lost wages is not based on the concept of reasonable notice. A successful claimant may recover lost wages for the entire period between their dismissal and the hearing date if they can show that they have been making reasonable efforts to find new employment.

The purpose of an award for injury to dignity is to compensate a person whose rights under the *Code* have been violated. It is not to punish a respondent. Damages awarded for injury to dignity have increased over the last decade, and the tribunal has made it clear that the trend for such damages is upwards (see *Biggings obo Walsh v Pink and others* [60], 2018 BCHRT 174 [*Walsh*]). Currently the highest award in BC is $176,000 (*Francis v BC Ministry of Justice (No.5)* [98], 2021 BCHRT 16). Historically, however, most damages in this category are under $10,000. The BC Human Rights Clinic has a compiled list of awards given by the HRT, sorted by ground, updated quarterly and available at https://

bchrc.net/legal-information/remedies. It is difficult to predict what level of damages the Tribunal will award, as this determination depends on many factors, which are assessed on a case-by-case basis (see e.g. *Walsh*). The Tribunal generally consider three broad factors: the nature of the violation, the complainant's vulnerability, and the effect on the complainant: *Gichuru v The Law Society of British Columbia (No. 9)* [99], 2011 BCHRT 185 at para. 260, upheld in 2014 BCCA 396). Importantly, while injury to dignity awards commonly follow in cases where discrimination is established, this is not guaranteed, as seen in *Holt v Coast Mountain Bus Company* [100], 2012 BCHRT 28 at para 233. For further information regarding compensation for injury to dignity, feelings, and self-respect, please visit https://bchrc.net/the-trend-is-upwards-recent-injury-to-dignity-awards.

Remember, to claim any type of damage, the complainant must lead evidence. If the complainant fails to lead evidence as to the effect the discrimination had on their emotional state and dignity, the Tribunal may not award any damages. If the respondent is able to prove that the complainant has failed to mitigate their losses, a complainant may not be entitled to wage loss compensation.

The Tribunal may not award damages for lost wages/salary following a discriminatory dismissal during a period for which the claimant was medically incapable of working. Please refer to *Senyk v WFG Agency Network (No 2)* [101], 2008 BCHRT 376 at para 434. This is because, even absent the discrimination, the claimant would not have been able to earn wages or a salary. (See *Eva obo others v Spruce Hill Resort and another* [102], 2018 BCHRT 238 at para 214).

There is no maximum limit on damage awards. Note, however that if a claimant seeks a remedy at both the Human Rights Tribunal (e.g. for lost wages) and in civil court (e.g. for severance pay), and is successful with both proceedings, they must forfeit one of the awards, as they are not entitled to double recovery. There are several cases where the award for loss of wages was in the range of $300,000. See *Kelly* [103] and *Kerr* [104].

Section 37(4) of the HRC gives the Tribunal authority to order costs against either party as condemnation of improper conduct during the Tribunal processes. Additionally, section 37(2) gives the Tribunal the right to award compensation for expenses that are directly caused by the discrimination found, which may include expenses such as wage loss due to the need to attend a hearing.

A final order of the Tribunal may be registered in the BC Supreme Court so that it is enforceable as though it were an order of the court. No appeal procedure is provided for in the HRC; individuals dissatisfied with the Tribunal's decision must seek judicial review in BC Supreme Court pursuant to the Judicial Review Procedure Act, RSBC 1996, c 241 [105] (see Chapter 5: Public Complaint Procedures of the LSLAP Manual).

G. Costs

The general rule is that costs will not normally be awarded in a human rights case. Pursuant to section 37(4) of the HRC [106], the purpose of awarding costs is to penalize a party who acts improperly during a hearing, thereby interfering with the objectives of the Tribunal. In these cases, costs are awarded punitively and do not necessarily reflect the actual expenses incurred by the other party due to the improper conduct.

H. Dismissal of a Complaint Without a Hearing

As mentioned above, the Tribunal may refuse to accept a complaint for filing if it does not have jurisdiction due to the nature of the complaint or if it is late filed. Once a complaint has been filed, however, the Tribunal may nevertheless dismiss it prior to a hearing, on application from the respondent or on its own motion, for a variety of reasons (HRC, s 27 [107]). The following outlines some of the reasons why the Tribunal may dismiss a filed complaint (check the HRC for a complete list):

1. Complaint Outside the Tribunal's Jurisdiction

The Tribunal will not proceed with a complaint where it is persuaded that the complaint is not, in fact, based on a form of discrimination enumerated by the HRC, or that the complaint falls within federal jurisdiction. Even if the Tribunal accepts a complaint for filing, the respondent may still have the option to dispute jurisdiction.

2. Substance of Complaint Dealt with by Another Proceeding

Where another proceeding, such as a labour arbitration, has adequately resolved the substance of a complaint, it will usually be dismissed. A complaint may also be deferred if such an alternative proceeding is pending. The number of other proceedings capable of adequately dealing with a human rights complaint is however, quite limited.

3. No Reasonable Basis for Holding a Hearing

The Tribunal may dismiss a complaint where the Tribunal is persuaded that the complaint is made in bad faith, would be of no benefit to the complainant, would not further the purposes of the HRC, and/or has no reasonable prospect of success. The most recent Annual Report from the BCHRT indicates that applications to dismiss under section 27 of the HRC succeeded in fully dismissing the complaint 49% of the time. Please refer to *Marquez v Great Canadian Casinos* [108], 2011 BCHRT 117 at paras 29–38. No reasonable prospect of success is the most common reason for dismissing a complaint.

If you are responding to an application to dismiss a complaint, it is important in most cases to provide evidence in support of the Complainant's contention that the complaint should be allowed to proceed to a hearing. While the burden of persuading the Tribunal that the complaint should be dismissed is on the respondent, the complainant does need to provide sufficient evidence to take their complaint out of the realm of "speculation and conjecture." An affidavit attaching relevant exhibits from the client is preferable, though an unsworn statement will also likely be acceptable in most cases.

4. Complaint Brought Outside Limitation Period

As mentioned above, there is a one-year limitation period for filing a complaint. The one-year period begins from the last instance of any continuing discrimination. If at least one alleged incident of discrimination in a complaint falls within the one-year limitation period, other alleged incidents of discrimination dating back farther than one year may be accepted as a continuing contravention of the *Code*. The issue of whether, or how many, multiple instances of discrimination will be considered to constitute a "continuing contravention" (thus effectively extending the one-year limitation period) is often disputed. See *Bjorklund v BC Ministry of Public Safety and Solicitor General* [109], 2018 BCHRT 204 at paras 13-14 for a recent discussion of how to define a "continuing contravention"; see also *District v Parent obo the Child* [110], 2018 BCCA 136 at paras 46–65.

Additionally, under section 22(3) [111] of the HRC, the Tribunal has discretion to accept late-filed complaints regardless of whether there is a "continuing contravention", if it is in the public interest to accept the late complaint, and no substantial prejudice will be caused to any party because of the delay in filing: *Chartier v Sooke School District No 62* [112], 2003 BCHRT 39 at para 12. Whether it is in the public interest to accept a complaint filed outside the one-year time limit is a multi-faceted consideration, which is governed by the purposes of the HRC, and assessed on a case-by-case basis. Factors that may be important considerations in determining whether it is in the public interest to accept a late-filed complaint include the reasons for the delay, the length of the delay, the significance of the issue raised in the complaint and fairness in all the circumstances. The list of factors that the Tribunal may consider is non-exhaustive:. *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite* [113], 2014 BCCA 220; *Hoang v. Warnaco and*

Johns [114], 2007 BCHRT 24.

I. Responding to an Application to Dismiss

When faced with an application to dismiss, it is important to meaningfully engage with the reasons behind the application, providing supporting evidence when necessary. If the complainant does not provide evidence in response to an application to dismiss, it may result in a case being dismissed that did hold legal merit. Evidence can be as simple as a statement, although a sworn affidavit is preferable. The statement or affidavit should attach documents that help support the complainant's argument that the complaint should be allowed to proceed to a hearing. The respondent would then have an opportunity to respond to the arguments raised by the complainant.

If the Tribunal agrees to dismiss the complaint then it will not continue. Applications to dismiss are subject to judicial review.

J. Case Path Pilot

Unfortunately, the number of applications to dismiss filed by respondents has resulted in significant backlog and delay at the Tribunal. In response, on May 6, 2022 the Tribunal launched a one-year pilot project under s. 27 of the Human Rights Code. This pilot project is set to continue for a further six months after May 6, 2023. Under the new Case Path Pilot, the default case path will be for the complaint to proceed directly to a hearing. Only when the Tribunal determines that an application under s. 27 would further the just and timely resolution of the complaint will it permit a respondent to file an application to dismiss. See the Tribunal's Practice Direction on this new process here: http://www.bchrt.bc.ca/law-library/practice-directions/case-path-pilot-practice-direction.htm.

The Tribunal has developed a strategy to address its backlog, which it communicated to the public on June 30, 2023. Case path decisions will be suspended until November, 2023, and many hearings have been adjourned. See: http://www.bchrt.bc.ca/tribunal/news/backlog-strategy-2023-06-30.htm

K. Judicial Review

If an individual disagrees with a decision of the Tribunal, they may ask the Supreme Court of British Columbia for a "judicial review". A judicial review differs from an appeal to a higher court. In an appeal, the court has the authority to decide whether or not it agrees with a decision. In a judicial review, the BC Supreme Court simply decides whether or not there is a "ground" for review and may only disturb the Tribunal's decision if the applicant can demonstrate that the Tribunal:

- Made an "error of law", e.g., an incorrect interpretation of the HRC;
- Made a finding of fact that is unreasonable or unsupported by the evidence;
- Acted unfairly with regards to the rules of procedure and natural justice; or
- Disregarded legislative requirements; used its discretion arbitrarily, in bad faith, or for an improper purpose; or based its decisions on irrelevant factors.

The standards of review applicable to the Tribunal's decisions are set out in s. 59 of the *Administrative Tribunals Act* [115].

If the Tribunal has made any of these errors, the Court may set aside the decision and will usually direct the Tribunal to reconsider the matter. Section 57 of the *Administrative Tribunals Act* mandates that an application for a judicial review must be submitted within **60 days** of the date the Tribunal's decision was issued. In order to seek a judicial review, an individual is required to prepare a petition and affidavit, file the petition and affidavit at the BC Supreme Court, and

serve a copy of the filed petition and affidavit on the Tribunal, the Attorney General of British Columbia, and any person whose interests may be affected by the order you desire the Court to make.

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IV. Canadian Human Rights Act

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

The *Canadian Human Rights Act* (CHRA) prohibits certain forms of discrimination in areas under federal jurisdiction. As mentioned above in Section I of this chapter, that jurisdiction is set out in section 91 of the *Constitution Act, 1867* [1]. The CHRA applies to both public and private bodies, as well as individuals. It covers federal departments and agencies like federal Crown corporations, chartered banks, the broadcast media, airlines, buses and railways that travel between provinces, First Nations, and other federally regulated industries.

A. Prohibited Grounds of Discrimination

The prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability (mental or physical, including previous or present alcohol dependence), and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. These grounds apply to all activities covered by the *CHRA* [2]. Section 3(2) explicitly makes discrimination on the grounds of pregnancy illegal, and section 14(2) explicitly prohibits sexual harassment.

Note that the federal equal pay provisions are broader than the provincial ones since it is discriminatory practice to pay different wages to employees of different genders for work of equal value, even if the work itself is not similar. Factors considered when defining “equal value” include skills required, responsibilities, and working conditions. Pursuant to section 65(1), employers are liable for the discriminatory acts of their employees.

B. Activities Where Discrimination is Prohibited

The activities where discrimination is prohibited include:

1. The provision of goods, services, facilities or accommodation customarily available to the general public (CHRA, s 5)
2. The provision of commercial premises or residential accommodation (CHRA, s 6)
3. Employment, employment applications and advertising, and membership in, or benefit from, employee organizations (CHRA, ss 7-10)
4. Unequal wage payment for male and female employees unless justified under section 27(2) (CHRA, s 11)
5. Publication of discriminatory notices, signs, symbols, emblems or other representations (CHRA, s 12)
6. Harassing an individual on prohibited grounds of discrimination (CHRA, s 14)
7. Situations where an individual filed a complaint under the CHRA (CHRA, s 14.1)

C. Exceptions

Under section 15, there are general exceptions to practices considered discriminatory, comparable but not identical to those found in BC's *HRC* [3], such as those relating to *bona fide* occupational requirements, pension plans, and insurance schemes. Retirement policies are still exceptions under sections 9 & 15 of the *CHRA* [2], which now represents a significant difference from the *HRC* [3], where mandatory retirement is now generally prohibited.

Section 16 of the *CHRA* [2] (similar to section 42 of the BC HRC) states that an equity plan designed to reduce the disadvantage suffered by a group of individuals, where that disadvantage is related to one of the grounds discussed above, is not discrimination in and of itself.

Previously, section 67 of the *CHRA* [2] stated that the CHRA did not apply to the *Indian Act* [4], with the result that any action taken by band councils or the federal government under the *Indian Act* was exempt from the CHRA. Section 67 has since been repealed, but this was a contentious move amongst some First Nations leaders.

D. Filing a Complaint Under the Act

Any individual or group may file a complaint with the Canadian Human Rights Commission. If someone other than the alleged victim files a complaint, the Commission may refuse to proceed without the victim's consent. The Commission itself may lay a complaint or it may discontinue an investigation if it deems the complaint to be frivolous or if other alternative proceedings would be more appropriate.

The Commission will provide advice and assistance in proceeding with the complaint. Correspondence may be addressed to the Ottawa office, but in practice it is generally preferable to deal with the Commission's Vancouver office. Please consult the Commission's website for a detailed description of the complaint process (see Section I.B: Resources above).

1. How Complaints are Handled

Many cases are resolved through discussions leading to mutual agreement. To facilitate this, the *CHRA* [2] provides for an investigation stage and where necessary, a conciliation stage. By law, the complaint investigator cannot also be the conciliator, although in practice the investigator attempts to resolve the dispute whenever possible.

Instead of - or subsequent to these stages - the Commission may refer the complaint to the quasi-judicial Canadian Human Rights Tribunal (CHRT). The Commission has the power to assist the claimant at all stages of the process, and usually represents the claimant at the hearing stage. However, it acts in a more neutral fashion at the investigation and conciliation stages. The Tribunal may award damages and relief similar to an injunction. An order of the Tribunal is enforceable as if it were an order of the Federal Court. Any judicial review is governed by the limitation period set out in

the *Federal Courts Act*, RS 1985, c F-7 (see Chapter 20: Public Complaints Procedures of the LSLAP Manual). It is an offence, punishable by summary conviction, to obstruct any investigation under the "CHRA [2] *(s 60).*

The CHRA can award punitive damages of up to $20,000 where they believe that the discriminatory conduct was carried out recklessly or with wilful disregard. This represents a difference between the *CHRA* [2] and the *HRC* [3], as the HRC's focus is remedial rather than punitive.

2. Reasons Why Complaints May Not Proceed

Section 41 of the *CHRA* [2] lists the most common reasons for the termination of an investigation. The reasons are very similar to those discussed under the HRC, including:

(a) The complaint is beyond the jurisdiction of the Commission;

(b) The complaint could more appropriately be dealt with under another Act;

(c) The complaint is trivial, frivolous, vexatious, or made in bad faith;

(d) The complainant has not exhausted all reasonable alternative grievance or review procedures (if collective agreement or arbitration procedures are available, the complainant will be expected to pursue them); and

(e) The complaint was not filed **within one year** of the alleged act of discrimination (the Commission does retain the power to extend this period under certain circumstances).

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V. BC Civil Rights Protection Act

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

British Columbia also has a Civil Rights Protection Act (CRPA) [1], which defines prohibited acts and civil remedies or damages that may be available for victims of such acts. The prohibited acts are tortious in nature, and actions will be heard in the Supreme Court of British Columbia.

The more pertinent points of the legislation are the following:

- "Prohibited act" is defined as conduct or communications that interfere with the civil rights of a person or class by promoting hatred or contempt or by promoting the inferiority or superiority of a person or class on the basis of colour, race, religion, ethnic origin, or place of origin (CRPA, s 1),
- A prohibited act is a tort actionable without proof of damage. The action may be brought by the individual targeted by the prohibited act, or, if a class was targeted, by any member of that class (CRPA s 2),
- The Attorney General may choose to intervene in such actions, but, in any case, the Attorney General must be notified within 30 days of the start of an action (CRPA, s 3),
- Remedies include general and exemplary damages. The court may order other types of relief such as an injunction in addition to or in lieu of damages (CRPA, s 4), and
- For an offence under the CRPA, a person may be liable for a fine of up to $2,000 and/or 6 months imprisonment. A corporation or other public body may be liable for a fine of up to $10,000, and any directors or top personnel who were or should have been aware of the offending conduct may be found personally liable (CRPA, s 5).

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VI. Rights of the Child

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

In addition to any claim under the federal or provincial codes, various protections exist for children under provincial statutes and the *Criminal Code* [1], RSC 1985, c C-46, concerning educational and medical issues.

A. School

1. Compulsory Attendance and Registration

The *School Act* [2], RSBC 1996, c 412, states that all children must be enrolled by the first school day of a school year if, on or before December 31 of that school year, the child will have reached the age of 5 years (s 3(1)(a)). Parents may, however, defer enrolment until the first school day of the next school year (i.e. until age 6) (s 3(2)). Once enrolled, children must remain in an educational program until they are 16 (s 3(1)(b)). Whether children attend public or private schools, they must be registered on or before September 30 in each year either with a school or with the Minister of Education (s 13). Students must also comply with the rules, code of conduct, and policies set by the Board of Education or by their particular school (s 6).

Under section 12 of the *School Act* [2], parents are authorized to educate their children at home or elsewhere provided they register their children pursuant to section 13.

2. Discipline

Section 43 of the *Criminal Code* allows a schoolteacher to use discipline that is reasonable in the circumstances. This section refers to the use of reasonable force. The definition of reasonable force is “the substantial social consensus on what is reasonable correction supported by comprehensive and consistent expert evidence on what is reasonable” (*Canadian Foundation for Children, Youth and the Law v Canada* [3], 2004 SCC 4 at para 2). However, the *School Act* [2] specifically states that discipline of a student must be similar to that of a kind, firm, and judicious parent, and must not include corporal (physical) punishment (s 76(3)).

3. Rights of Parents and Students

Students and parents have the right to consult with a teacher or administrative officer (*School Act* [2], ss 4 and 7(2)). As well as having the right to information regarding the attendance, behaviour and progress of their children in school (s 7(1)(a)), parents may request an annual report on the general effectiveness of the program their children are enrolled in, without their children’s consent. They are also entitled to belong to a parent’s advisory council (s 7(1)(c)). The councils can be formed by application to the Board or Minister of Education, and can advise the Board and staff of the school (s 8).

4. School Records

Individual students and their parents are entitled to examine, on request, all records pertaining to that student while accompanied by the principal or a person designated by the principal (*School Act* [2], s 9). Student records identifying the student will not be released to other parties except when required by law, or if the student or parent consents to the disclosure in writing.

5. Language of Instruction

Every student in BC is entitled to instruction in English (*School Act* [2], s 5). However, under section 23 of the *Canadian Charter of Rights and Freedoms* [4], students whose parents are citizens of Canada have the right to receive primary and secondary school instruction in either English or French if:

- their parents' first language is that of the English or French-speaking minority population of the province in which they reside, and their parents still understand that language; or
- their parents received their primary school instruction in Canada in English or French and the parent resides in a province where the language in which they received that instruction is the language of the English or French-speaking minority population of the province.

6. Other Concerns

The *School Act* [2] states that public schools must be conducted on strictly secular and non-sectarian principles (s 76(1)), meaning they cannot be religiously affiliated. For a case that applies s 76(1) please see Servatius v Alberni School District No. 70, [5] 2022 BCCA 421. In this case, a mother claimed that her children's school had violated their religious freedom after an elder performed a smudging demonstration, and a hoop dancer said a prayer while performing at the children's school assembly. The BC Court of Appeal ruled that the demonstrations were not religious ceremonies but public demonstrations for the purposes of building community and teaching students about Indigenous culture, practices recommended by Article 15 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Moore v British Columbia (Education) [6], 2012 SCC 61 at para 36 determined that the BC government had discriminated against a dyslexic boy when it cut the special needs program during a financial crisis. The Supreme Court of Canada found that he was denied a service customarily available to the public. The service denied was meaningful access to education generally, not specific access to a special needs program. Discrimination was found because the cuts disproportionately affected special needs programs and there was no evidence that the BC government considered other options.

Parents are jointly and severally liable for intentional or negligent damage to school property caused by their children (s 10 of the School Act). Please see Nanaimo-Ladysmith School District No. 68 v. Dean [7] 2015 BCSC 11 for an example of parents being held liable for the negligent destruction of school property by their son. In this case, a 14-year-old student attached their friend's padlock to the head of an overhead sprinkler in their school, which caused the entire sprinkler system to become activated, resulting in extensive damage to the school. Judgement was granted against the parents for $48,630.47 worth of damage.

There is no action against a school board or its employees unless the actionable conduct included dishonesty, gross negligence, malicious or wilful misconduct, or the cause of action is libel or slander (s 94(2)). Note section 94 limits liability, but does not absolve a board from vicarious liability.

Any person who believes a child, whether registered or not, is not enrolled in an educational program can make a report to the superintendent of schools (s 14(1)). An action lies against that person only if the report is made maliciously (s 14(3)).

School boards have a duty to provide an educational environment that is free from discriminatory harassment. This rule was affirmed by the Supreme Court of Canada on October 20, 2005, when it dismissed an application for leave to appeal from a BC Human Rights Tribunal finding of discrimination against a BC school board relating to the homophobic harassment of one of its students (see *North Vancouver School District No 44 v Jubran* [8], [2005] SCCA No 260 and North Vancouver School District No 44 v Jubran [9], 2005 BCCA 201 at paras 91–102). Note that while the student was found to have been discriminated against on the basis of sexual orientation, it was irrelevant whether he identified himself as homosexual, or whether his harassers knew or believed him to be homosexual.

The Ministry of Education has developed the Sexual Orientation and Gender Identity (SOGI) 123 initiative, to guide educators on instruction about sexual orientation and gender identity. The aim of this initiative is to foster inclusion and respect for students who, because of their identity or expression, may face discrimination while attending school. In Hansman v. Neufeld, [10] 2023 SCC 14, the Supreme Court of Canada addressed the conflict between freedom of expression and the protection of one's reputation in the context of a critique of SOGI. In this case, Mr. Neufeld, a public school board trustee, made controversial online posts criticizing SOGI. Mr. Hansman, a gay man and teacher, was prominent amongst the dissenting voices and made statements to the media regarding his opposition to Mr. Neufeld's views. Mr. Neufeld subsequently filed a defamation suit against Mr. Hansman. The SCC ruled in favour of Mr. Hansman, writing that "Not only does protecting Mr. Hansman's expression preserve free debate on matters of public interest, it also promotes equality, another fundamental democratic value" (para 9). In this case, the SCC acknowledged that transgender and other 2SLGBTQ+ youth are especially vulnerable to expression like Mr. Neufeld's that reduces their "worth and dignity in the eyes of society and questions their very identity" (para 9).

B. Medical Attention

1. Obligation to Provide Treatment

The *Criminal Code* [11] (s 215) imposes criminal sanctions on parents who fail to provide their children with the necessaries of life until they reach the age of 16. This has been held to include adequate medical treatment, and a court may also extend the duty to an older child who cannot become independent of their parent(s) due to factors including age and illness. Section 218 of the *Criminal Code* [11] imposes criminal sanctions on any person who abandons or exposes a child less than 10 years of age to the risk of permanent injury, damage to their health, or risk to their life.

Under the *Child Family and Community Service Act* [12], RSBC 1996, c 46 (CFCSA), children under the age of 19 may be removed if they are deprived of necessary medical attention, but only by a court order (s 29). When a child is removed, emergency medical care can be given at the director's authorization (s 32). In cases where the only issue is the parents' refusal of necessary medical attention, the director can apply for a court order authorizing the medical care without removing the child from the parents' custody (s 29).

2. Consent to Treatment

In Canadian case law, the courts have found that a minor can consent to treatment as a “mature minor” if that particular person has the mental capacity to understand the nature and risks of that particular treatment (see the *Infants Act* [13], RSBC 1996, c 223, s 17). A minor, who is living away from home, working, or married, may be found to be autonomous, and free from parental control, and thus capable of consenting to or refusing treatment on their own behalf.

Under the *Infants Act* [13], (s 17), a minor can consent to surgical, medical, mental, or dental treatment without the agreement of their parents, so long as the health care provider has:

1. Explained to the minor and has been satisfied that the minor understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care; and
2. Has made reasonable efforts to determine and has concluded that the health care is in the minor's best interests. This includes requests for birth control advice and products, and for abortions.

A court of competent jurisdiction may order medical treatment for any child if the court is satisfied that such treatment is required, and that parental consent is being unreasonably withheld. This is part of the inherent *parens patriae* (guardian of persons under a legal disability) jurisdiction of the Supreme Court and is now codified under section 29 of the CFCSA [14].

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VII. LSLAP's Role

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

In provincial proceedings, clinicians may assist clients in completing the Complaint or Response Forms at the initial stages. We may also be able to provide full representation to clients at the BC Human Rights Tribunal but are usually limited to less complex cases where the scheduled hearing is set for two days or fewer. Where LSLAP cannot help directly, we can refer claimants to the BC Human Rights Clinic, which may be able to assist. The BC Human Rights Clinic assists hundreds of people every year. This lawyer-run program ranges from providing summary advice to full representation for hearings at the BC Human Rights Tribunal.

The BC Human Rights Clinic accepts applications for assistance made within thirty days after a complaint has been accepted for filing. However, they may be able to offer assistance for those who are applying beyond the thirty-day limit.

In the federal system, the Canadian Human Rights Commission (CHRC) has been set up to assist individuals with drafting complaints and to facilitate mediation. Students should, therefore, refer clients to the CHRC for assistance, though they can remain involved in the process by providing representation at mediation.

VIII. Indigenous Complainants

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

On January 15, 2020, the Tribunal released a report titled Expanding Our Vision: Cultural Equality and Indigenous Peoples' Human Rights. It makes recommendations for addressing the serious access to justice concerns for Indigenous Peoples that face human rights violations in BC. It seeks to bring in more Indigenous voices into the Tribunal process. The report can be found here: http://www.bchrt.bc.ca/indigenous/

First Nations, Métis, and Inuit people can now self-identify as Indigenous on the complaint form and ask the Tribunal to contact them. The Tribunal will call to explain the process and options for Indigenous complainants, such as including Indigenous protocols, such as an elder or smudge, and Indigenous ways to deal with the complaint.

Regarding the mediation process, an Indigenous party can tell the Tribunal that they want a traditional ceremony before or after the mediation, such as a smudge, prayer, or song, and they can request an Indigenous mediator, or an Indigenous dispute resolution approach.

In March 2023, in order to fulfill Recommendation 9.2 in the Report, the Tribunal hired four Indigenous Navigators. These Indigenous Navigators are there to guide and support Indigenous Peoples through the Tribunals' process, helping them to address any administrative barriers that might prevent them from protecting their human rights. Indigenous Navigators are there to work with both parties in a complaint, and are familiar with Indigenous protocols, like smudging and incorporating Elders into the dispute resolution process.

IX. Online Mediations & Hearings

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Online Hearings

1. The BC HRT

Within recent years, the BC HRT has begun conducting hearings remotely using Microsoft Teams ("Teams"). Online hearings via Microsoft Teams are set up using email addresses, and one week before the hearing, all parties must provide contact information for anyone attending the hearing on their side. This includes any party, lawyer, advocate, agent, or witness participating in the hearing. The day before the hearing begins, the Tribunal will email each person a link to join.

Each party must give copies of any document they want to have entered as an exhibit to all other parties and the Tribunal before the hearing. The Tribunal Member hearing your case will discuss this with you during the hearing readiness conference.

Typically, you will need to attend any hearing held on Teams using a computer. In exceptional cases you may use a smartphone, subject to the presiding Tribunal Member's discretion. Ensure that all participants to the hearing have a way to attend. If you have technical issues using Microsoft Teams that prevent you from joining the hearing, contact the Tribunal's designated contact person, which is stated in the email with the link to the hearing.

Hearing etiquette is similar to in person proceedings. Cameras must be on at all times, and you may only speak if you are making an argument or submission, questioning a witness, or giving testimony.

2. The CHRT

Similar to the BC HRT, hearings and mediations under the CHRT are also being conducted remotely, using videoconference or telephone. The CHRT will send a notice of the hearing or mediation to the parties as soon as practicable, with information such as the time, link, and information about the event. Regarding documentation, the mediator, the member or the panel will provide more specific instructions about electronic filing of documents for each case.

Chapter Seven - Workers' Compensation

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

This chapter covers basic legislation, policy, and procedures associated with administrative proceedings under the *Workers' Compensation Act*, RSBC 2019, c 1 [“**WCA**”]. The WCA replaced the former *Workers' Compensation Act*, RSBC 1996, c 492 (the “Former Act”) on April 6, 2020. While there was no substantive change encompassed in this act revision, the section numbers of the WCA have changed significantly.

The WCA is a provincial statute creating a regulatory body called the Workers' Compensation Board (WCA, s. 318 [Former Act, s. 81]) and is referred to as “the Board” or “WCB” in this section. Since 2003, the Workers' Compensation Board does business under the name of “WorkSafeBC.” However, legally, it is still the “Workers' Compensation Board,” and when party to a legal action, that is how it will be named. The Board has exclusive jurisdiction over compensation to injured workers for workplace injuries, amongst other duties.

Today's workers' compensation schemes, including BC's, are based on the historic trade-off: employers fund a no-fault insurance scheme for injured workers and, in return, workers give up their right to legal action against their employer for work-related injuries and occupational diseases (WCA, s. 127 [Former Act, s. 10(1)]). This approach offers several benefits: it takes workplace injury claims out of the courts, minimizing the use of scarce judicial resources and limiting cost and delay for the workers; It gives greater certainty of compensation to workers, and streamlines the compensation process, and; Like any insurance scheme, it spreads losses amongst employers, eliminates the concern about ruinous claims, and provides coverage regardless of fault.

Aside from compensation, the Board's other duties include:

- Regulation of Occupational Health and Safety (OHS): In BC, the Board is responsible for workplace health and safety regulations, investigations, and enforcement as set out in Part 2 of the WCA [Former Act, Part 3] and in the Occupational Health & Safety Regulation, BC Reg 296/97 (the “**OHSR**”). While most enforcement orders and penalties are against employers for safety violations, orders may also be issued against workers. Under the WCA, workers are entitled to refuse unsafe work and to be protected from retaliation for reporting unsafe work practices.
- Employer Assessments: The WCA grants specific powers to the Board to set rates and collect assessments from employers to create an Accident Fund. The Accident Fund must be sufficient to finance the compensation system, and each employer is assessed annually based on a complex formula. The WCA requires the Board to operate a fully funded system.

A. Scope of This Section

This section provides information to workers and their representatives on the overall structure and basic procedures of the Board and the Workers' Compensation Appeals Tribunal (“**WCAT**”). WCAT is an independent organization that workers or employers can go to if they want to appeal a decision from WorkSafeBC. This section is intended to assist in working on cases and appeals arising from Board decisions made under the WCA. The vast majority of these cases involve Board decisions denying injured and disabled workers particular compensation benefits. This is not surprising

given that Board policies are often complex, and that about 100,000 compensation claims are filed by injured workers every year, with about half of these claims involving a serious injury or disability.

Therefore, the primary focus of this material is on compensation matters which may be at issue in Board cases. Assessment and Occupational Health & Safety issues are addressed briefly at the end of the chapter. The Appendices provide information for referrals, community resources, and helpful links for finding law and policy. In particular, the WCA requires the Board, through its Accident Fund, to support the Employer's Advisers Office and the Worker's Advisers Office, which can provide employers and workers with free legal assistance. However, the extent of the assistance provided by these advisors changes from time to time and between locations.

II. Governing Legislation, Policy & Guidelines

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Legislation

The WCA is the legislation which creates and governs the Board. As set out above, the WCA replaced the Former Act on April 6, 2020. While there was no substantive change encompassed in this act revision, the section numbers of the WCA have changed significantly. As such, this chapter will refer to the section numbers of the current WCA as well as the section numbers from the Former Act. [A table of concordance is available here [1]. Note that this table refers to sections of the current WCA as they were at the time that the current WCA was passed. Future amendments may render this table inaccurate.]

There are several regulations passed under the WCA, the most important being the OHSR.

In 2004, the *Administrative Tribunals Act*, SBC 2004, c 45 (the "**ATA**") came into effect. The ATA applies to any administrative tribunals in BC that adopt the ATA (or sections thereof) in their legislation. Under the WCA, certain sections of the ATA apply to WCAT including certain procedural requirements, and a 60-day time limit for filing for judicial review from a WCAT decision. The ATA does not apply to Claims or Review Division decisions.

Citations for the WCA, key amendments, and other relevant legislation are attached in the Appendix.

B. Binding Policy

The WCA sections 303 and 339 [Former Act, ss. 250 and 99] make Board policy binding on all Board decision-makers and appeal bodies (i.e., the Review Division and WCAT) [Note that WCAT *can* choose not to apply a Board policy in specific circumstances and following specific procedures. See WCA s. 304 [Former Act, s. 251]]. The courts have determined that the effect of these provisions is to give Board policy a legal status equivalent to subordinate legislation (see below).

The key documents setting out binding Board policy are:

- The statements contained under the heading "Policy" in WorkSafeBC's *Assessment Manual*. These policies relate to Part 5: Accident Fund and Employer Assessment of the WCA [Former Act, Division 4];
- The statements contained under the heading "Policy" in WorkSafeBC's *Prevention Manual*. These policies relate to Part 2: Occupational Health and Safety of the WCA [Former Act, Part 3]; and

- *The Rehabilitation Services & Claims Manual*, Volume I and II (the "**RSCM I**" and the "**RSCM II**"), other than explanatory material and the headings "Background" and "Practice." These policies relate to Part 3: Workers' Compensation System and Part 4: Compensation to Injured Workers and their Dependants of the WCA [Former Act, Part 1].

All legislation and Board policies are available on the Board website [2].

In practice, Board policy confines, or attempts to confine, the nature of relevant evidence and provides the framework for how evidence is to be assessed and weighed. Therefore, in appeals, it is important to identify the correct applicable Board policy whether or not it is identified in the initial Board decision.

This manual focuses on claims compensation issues. As such, the most important policy documents for the purposes of this manual are the RSCM I and the RSCM II. The current RSCM I and RSCM II are available at www.worksafebc.com [2] under the "Law and Policy" section, followed by the "Compensation Policies" link under "Claims & Rehabilitation." On the sidebar, there are tabs for both RSCM Volumes I and II. The RSCM I applies to claims initiated before June 30, 2002 and the RSCM II applies to any claims initiated after June 30, 2002.

The RSCM II has eighteen chapters. Each chapter focuses on a particular entitlement issue or benefit and contains the policies relating to that issue. Each policy is numbered and dated and is typically 1–3 pages long. The RSCM II index (also available through the RSCM II link) is very helpful for locating relevant chapters and policies.

Board policies change from time to time. Each new version of a policy is passed by the Board of Directors and is published with both a specific effective date and a determination as to whether or not the changes apply to appeals. This information is set out at the end of each policy. Each new Board policy is incorporated into the electronic version of the RSCM II available on the Board website. When handling an appeal, students should determine the relevant applicable policy (especially for old claims), and should also review the electronic version of newer policy to ensure that it is still current. The Board website also contains all the former or "archived" policy manuals so that any relevant policy is accessible, even for old claims. It is important to ensure you have found the version of an applicable policy as it read at the time a particular decision was made.

If a particular Board decision quotes part of a policy, it is good practice to read the whole policy and surrounding policies to understand the full framework for that type of benefit. Also, although a particular policy may be quoted in a decision, the decision-maker may or may not have applied the correct policy. It is best to assess the worker's issue and determine whether or not alternative policies may be the correct applicable policies.

Lastly, Board policy must be consistent with the WCA. If someone considers a Board policy to be inconsistent with the WCA, they are entitled to challenge that policy in a WCAT appeal in which it is relevant. If the WCAT panel agrees that the policy is not supported by the WCA, the panel will refer the matter to the WCAT Chair. If the Chair agrees, they will refer the policy to WCB's Board of Directors for ultimate determination and possible policy change. See section 304 of the WCA [Former Act, s. 251].

C. Binding Policy: Standard of Proof and Evidence

Sections 339 (2) and (3) of the WCA [Former Act, s. 99] require that the Board "make its decision based on the merits and justice of the case, but in doing this the Board must apply the policies of the board of directors that are applicable in that case" and "if the Board is making a decision respecting the compensation or rehabilitation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the Board must resolve that issue in a manner that favours the worker." This means that, in WCB cases, there is a unique standard of proof. Where a case is 50-50, it should be resolved in favour of the worker (an "as likely as not" standard). This is less than the standard of proof used in civil claims. The civil standard is on a balance of probabilities ("more likely than not" or 50% +1).

D. Non-Binding Guidance

Both WCB and WCAT provide useful interpretive guides that combine policy, important decisions, and best practices. WCB issues Practice Directives that advise on many particularly complex issues such as chronic pain, mental disorders, and overpayments. These are accessible through the "Law and Policy" section at www.worksafebc.com [2] under the title "Practice Directives" linked under the "Claims and Rehabilitation" section.

The *Review Division Practices and Procedures* manual (the "**RDPP**") is an important document to review when dealing with a review of a Board decision. While the RDPP is not binding, it outlines standards and practices for the Review Division that may not be obvious on a reading of the relevant sections of the WCA.

WCAT's guidelines are published in the *Manual of Rules, Policy and Procedures* (the "**MRPP**"), available on the WCAT website at www.wcat.bc.ca [3].

References

[1] https://www2.gov.bc.ca/assets/gov/about-bc/workers_compensation_concordance_pre_rs2019_to_rs2019.pdf
[2] http://www.worksafebc.com
[3] http://www.wcat.bc.ca

III. Introduction to Compensation Claims for Injured Workers

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Sections 122–125 and 19–20 of the WCA [Former Act, ss. 96 and 113] give the Board exclusive jurisdiction over workers' compensation and OHS matters. The courts have historically respected these strong privative clauses.

Section 122 grants the Board the exclusive jurisdiction to inquire into, hear, and determine compensation matters under Part 4 of the *Act* [Former Act, Part 1]. Specifically, the board may determine:

- whether a worker's injury has arisen out of or in the course of an employment;
- the existence and degree of a worker's disability by reason of an injury;
- the permanence of a worker's disability by reason of an injury;
- the degree of impairment of a worker's earning capacity by reason of an injury;
- the existence, for the purposes of the compensation provisions, of the relationship of a family member of a worker;
- the existence of dependency in relation to a worker;
- the amount of the average earnings of a worker for purposes of payment of compensation;
- whether a person is a worker, subcontractor, contractor or employer within the meaning of the compensation provisions;
- the amount of the average earnings of a worker, whether paid in cash or board or lodging or other form of remuneration, for the purpose of levying assessments;
- whether an industry or a part, branch or department of an industry is within the scope of the compensation provisions, and the class to which an industry or a part, branch or department of an industry within that scope should be assigned;

- whether a worker in an industry that is within the scope of the compensation provisions is within the scope of those provisions and entitled to compensation under those provisions.

Section 19 similarly grants exclusive jurisdiction to the Board to inquire into and determine health and safety matters under Part 2 of the *Act* [Former Act, Part 3].

Once an injured worker applies for compensation, the Board will begin to assess whether or not to accept the claim. Once the claim is accepted, the Board will then adjudicate the worker's entitlement to the type of compensation benefits listed below.

The nature of the worker's injury will generally determine the relevant law and policy. The main types of injuries are:

- Personal Injury (physical or physical and psychological) – sections 134 and 146 of the WCA [Former Act, s. 5];
- Psychological Injury (mental disorder) – section 135 of the WCA [Former Act, s. 5.1];
- Occupational Disease – sections 136(1) and 137 of the WCA [Former Act, ss. 6(1) and 6(3)]; and
- Hearing Loss – section 145 of the WCA [Former Act, s. 7]

IV. LSLAP's Role at the Initial Decision Level

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

LSLAP students may only assist workers with a few formal procedures at the initial decision level. However, the student's role at this point is still important. If the initial claim is done well, appeals may be avoided. Thus, it is extremely important that students do not miss limitation dates. These types of inquiries are usually done by correspondence but may be done in person at the worker's request.

One important aspect of the "Claims Management Solutions" data management system used by the Board are the "portals" which allow workers, employers, and representatives to access claim files directly. The worker needs to call the Board and obtain an ID and PIN in order to do this. Such access allows an advocate or advisor to see exactly how the claim has been handled.

Students should get a copy of the file and review the relevant documents with the worker. They may also request that the Board provide an opportunity to make submissions prior to the final decision. Some officers will comply with these requests.

It is important to help a client prepare the best possible case at this level. For example, a projected loss of earnings assessment always includes an extensive interview between the Vocational Rehabilitation Consultant and the worker regarding the types of employment that are suitable and available to the worker. The worker should be prepared for this interview and should be ready to explain issues such as what they are capable of doing, what job activities they cannot perform, and why this is the case. The Board rarely decides that a worker is 100 percent disabled, and workers should, therefore, be discouraged from expecting such a ruling, unless there is very strong medical evidence of unemployability.

In addition to filing a review, a student can contact the officer who made the decision to request that it be reconsidered on the basis of significant new evidence, or to seek further explanation of the officer's reasoning. Note that this must take place within 75 days of the original decision unless the reconsideration addresses an obvious error or omission (WCA, s. 123 [Former Act, s. 96(4)–(6)]).

Initial decision-making at the Board level is extremely important, and very informal in its procedure. In general, if a representative does not understand how or by whom a decision will be made, or what factors will be considered, it is always possible to call the Board and ask. The Claims Manual, Workers' Advisers Office, and other sources of information mentioned in **Section I: Introduction** of this chapter can also help prepare a successful claim. See **Appendix F** for a checklist for a student conducting a client interview.

It is vital that LSLAP students assisting workers provide clear and limited scope of work letters. Given the tight deadlines, it is essential that clients understand when students are no longer providing them with assistance, so they do not miss an appeal or review date. Students should carefully consider their own availability as well as that of the supervising lawyer before promising legal assistance.

Additionally, any student providing representation must be sure to inform the Board and/or WCAT if they are no longer representing a client. Section 6.3.1 of the MRPP establishes a presumption in WCAT that a worker's representative will remain as their representative until they either declare otherwise or at the end of 2 years, whichever is earlier. This means the representative will receive correspondence related to the claim, even if it is the result of a deterioration of an Occupational Disease long after the initial claim is settled. This presumption means it is essential to be clear with the client *and* WCB/WCAT as to when LSLAP has withdrawn as counsel.

V. Limitation Periods and Timing of Decisions

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

WCB deadlines are both short and generally strict, so while there are reminders throughout this section outlining relevant deadlines, they are all collected here for quick reference. Steps 3–7 are only as applicable.

1. **Report the claim to the employer**: Do this **as soon as possible**. Even small delays can prejudice your claim. See WCA s. 149 [Former Act, s. 53].
2. **File a claim with WCB**: Any claim must be filed within **1 year** of the date of injury. If a claim is filed later than one year afterward, it may be accepted if it meets the criteria of "special circumstances" under sections 151 and 152 of the WCA [Former Act, s. 55]. One such example would be a worker who sought legal assistance and their lawyer failed to file a claim at their instruction. Another would be where a worker was either unaware of the ability to make a claim or unable to do so, so long as the lack of awareness or inability was reasonable. Note that even if a claim is accepted, if the application is filed more than three years late, the Board will only pay compensation from the date of the application forward, not from the date of the injury.
3. **Reconsideration of Board decision**: The Board may reconsider a decision for any reason within **75 days** of the date of that decision. The Board may reconsider a decision at any time if it contains an obvious error or omission. This is a significant change to the Board's reconsideration powers resulting from amendments that came into force January 1, 2021. Outside of these two exceptions, a Board decision can only be changed by an appeal body. See WCA s. 123 [Former Act, s. 96(4)–(6)].
4. **Appeal to the Review Division**: **The time limit for applying for an Internal Review with the Review Division is 90 days**. Workers seeking appeal must always file a Request for Review with the Review Division within 90 days of the date of the decision being reviewed. Workers are not required to submit arguments or evidence at the Request for Review stage, and are only required to file the Request for Review form, which includes some basic information and a

brief description of what remedy they are seeking and why. Therefore, if the 90-day limit is approaching, it is far more important to submit the Request for Review on time than it is to ensure you have fully stated your reasons for review—those can always be added later. If a worker has missed the 90-day time limit, they should file the Request for Review and request an extension, providing reasons for why they are late. The Chief Review Officer may grant an extension of time if good reasons are shown and an injustice would result if the extension is not granted. Extension of Time applications are not usually successful. See WCA s. 270 [Former Act, s. 96.2(3)–(5)]. Most Internal Review Decisions must be made **within 5 months (150 days)**. The WCA now requires that the internal review officers complete their review of the Board's decision within **150 days** of the date when the request for review was made. See WCA s. 272(6) [Former Act, s. 96.4(6)].

5. **Reconsideration by the Review Division**: The Chief Review Officer may direct a reconsideration of a Review Division Decision on their own initiative within 23 days of the initial decision. While it is the Chief Review Officer who must decide whether or not to issue this direction, a party can write to the Review Division and request a reconsideration. Once an appeal to WCAT has been filed, no reconsideration can occur. In the case of a decision that cannot be appealed to WCAT, a party may apply to the Chief Review Officer for reconsideration on the basis of new evidence. See WCA s. 273 [Former Act, s. 96.5].
6. **Appeal to WCAT**: **The time limit for appealing to WCAT is 30 days**. If a worker or employer is unhappy with the outcome of a Review Division Decision, they must appeal to WCAT within 30 days of the Review Division Decision being issued. Appeals related to prohibited action complaints may be filed within 90 days. This timeline may be extended where special circumstances prevented timely filing, and an injustice would otherwise result. See WCA s. 293 [Former Act, s. 243].
7. **Most WCAT Decisions must be made within 6 months (180 days) of receiving the Claim File from the Board**. This general time limit can be extended by the Chair due to the complexity of the matter, a request by the worker or employer, or the need to await a pending decision on another claim raising similar legal or policy issues. See WCA s. 306(5) [Former Act, s. 253(5)].

VI. Making a Claim

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

This manual proceeds chronologically through the process of making a claim for compensation with the Board, the adjudication of benefits under a claim, how claims conclude, and the available review and appeal processes. A chart showing this progression is included in the Appendices. The key phases in a claim are:

- Making a Claim – the Board determines whether or not they will accept the claim;
- Wage-Loss Benefits – the Board determines a workers' wage rate and entitlement to wage-loss benefits;
- Healthcare Benefits – the Board determines what medical care is necessary to assist the worker with their recovery;
- Permanent Disability – the Board will either decide that an injury has completely resolved (in which case the claim will end) or will decide that the worker will not improve any further and some symptoms are permanent;
- Pension Award – if a worker has a permanent disability, the Board will assess a permanent disability award;
- Vocational Rehabilitation – if a worker has a permanent disability, the Board will provide assistance as required to help the worker return to work with their new limitations.

A. Overview: Reporting the Injury and Making a Claim

1. Reporting the Injury (WCA, ss. 149–150 [Former Act, ss. 53–54])

Key policies applicable to these sections of the WCA are RSCM II, #93.10–93.12; 94.10–94.20.

All injuries occurring to a worker in the course of their employment (whether it results in time off of work or not) should be reported **as soon as possible** by the worker or, if death results, by the worker's dependants, to the superintendent, first aid attendant, or other official in charge of work where the injury occurred. Claims have been denied (at least until an appeal took place) because a worker waited even a few days, hoping the pain would go away. In all but the most minor cases, workers should also seek medical attention promptly. Details as to the type of injuries that must be reported can be found at RSCM II, #94.12.

The employer must complete a report to the Board **within three days** of receiving the worker's report, or immediately if death results. The failure to do so is an offence under the WCA.

2. Making a Claim (WCA, ss. 151–152 [Former Act, ss. 55 (1)–(3.3)]

Key policies applicable to these sections of the WCA are RSCM II, #93.20–93.25.

A worker has **one year** to make a claim for compensation under ss. 151 and 152 of the WCA [Former Act, s. 55]. If an application is made more than one year, but less than three years, after the relevant injury, the Board may pay full compensation from the date of the injury if the Board is satisfied that special circumstances precluded timely filing. If an application is made more than three years after the relevant injury, the Board may still accept the claim in special circumstances, but can only pay compensation from the date of the filing of the claim forward.

Workers can call the WCB directly to report an injury and file a claim. Teleclaim is available to workers across the province, Monday to Friday, from 8 a.m. to 6 p.m. See the Board website or the Appendix for current contact details. Teleclaim is designed to simplify the process, reduce the amount of paperwork, and provide a personalized service based on each individual's needs. Before calling the Board to report an injury, the worker should write down key information about the job, how the injury occurred, and what the doctor has said about the condition. The worker's statement during a

Teleclaim report will form part of the claim file, and could be used as evidence in future appeal proceedings. The Teleclaim transcript may be sent to the worker. If it is not sent, the worker should request a transcript.

Note that if the worker is completing a paper application, a typed signature is not acceptable (see RSCM II, # 93.25).

3. Obligations Arising Once Claim is Made (WCA, s. 153, 163–164 [Former Act, s. 57.1, 56])

Once a worker makes a claim, they are under an ongoing obligation to provide information to the Board that is necessary for the adjudication of their claim. The Board may reduce or suspend benefits if the worker does not provide requested information. See RSCM II, #93.26.

The attending physician must complete a Physician's First Report within three days of first seeing the worker, and must fill out progress reports after each visit related to the workplace injury. See RSCM II, #95.00–95.30.

B. EXCEPTION: Election to Proceed by Lawsuit (WCA ss. 127–133 [Former Act, s. 10])

Key policies applicable to these sections of the WCA are RSCM II, Chapter 16, #110.00–112.40.

Generally, a worker has no right to sue an employer or another worker in the course of their employment for a workplace injury. Instead, they are entitled to benefits from the Board. This is the "Historic Trade Off" discussed above and set out at s. 127 of the WCA [Former Act, s. 10(1)]. Note that the conduct causing the injury must arise out of and in the course of employment before this bar against litigation will apply. Actions outside of the course of employment (for example, assault or criminal negligence) do not attract this bar against litigation.

In circumstances where the s. 127 bar against litigation does *not* apply, a worker may choose to sue the person or company responsible for causing a work injury rather than making a claim for Board benefits. In order for a worker to have the right to choose (or "elect") to pursue a legal claim, there must be a party who is potentially liable for the injury and is not an employer or a worker in the course of their employment under the WCA. As set out above, this can occur when the actions of an employer or worker fall outside the scope of their employment. In addition, this can occur when a non-worker or non-employer is responsible for the injury. For example, if a worker is injured while on the property of a private citizen, the worker may be able to elect to sue the property owner under the *Occupiers Liability Act*, RSBC 1996, c 337, rather than claiming Board benefits.

Note that, as of May 1, 2021, there is no right to sue in relation to any motor vehicle accident occurring in BC pursuant to the *Insurance (Vehicle) Act*, RSBC 1966, c. 231. As a result, no workers will have any right of election in respect to injuries related to a motor vehicle accident outside of a few narrow exceptions. These exceptions include accidents involving off-road/farming vehicles, manufacturer's liability issues (e.g., faulty mechanics/repair), accidents occurring outside of BC, and accidents where the potentially liable driver has committed an offence under the *Criminal Code* (see *Insurance (Vehicle) Act*, ss. 113–116).

Where there is a potentially liable party to whom the s. 127 bar does not apply, the worker has a right of election under WCA s. 128 [Former Act, s. 10(2)–(4)]. The worker will be given the opportunity to make this election after applying for Board benefits. If the Board has accepted a claim and determines that there is a right of election, the worker will be provided with an "Election to Claim Compensation in BC" form. The worker must elect to claim compensation **within three months of the date of the injury** unless the Board allows otherwise.

If the worker elects to pursue a lawsuit, they **will not receive any benefits from the Board**. If they elect to receive Board benefits, they will not have the right to bring a lawsuit in respect of their injury.

An election is an important and complex decision and workers should be referred to the Workers' Advisors Office website at www.gov.bc.ca/workersadvisers [1] or assisted before deciding whether to claim compensation.

Where a worker elects Board benefits, the Board becomes "subrogated" to the worker's claim pursuant to s. 130 of the WCA [Former Act, s. 10(6)]. This means that the Board can step into the shoes of the worker and bring any lawsuit that the worker would be able to bring.

Board subrogation is different from the type of subrogation that occurs under insurance contracts. Insurance companies will only become subrogated to actions related to the specific type of benefits they paid out. For example, if an insurance company pays out $10,000 in relation to water damage, that company can only step into the shoes of their insured for claims specifically related to the cause of the water damage. The Board, on the other hand, is subrogated to any and all claims the worker may have connected to their injury. For example, even if the Board paid out only wage-loss benefits, the Board can still step into the shoes of the worker and bring a claim in relation to **any** loss or damage arising from their injury.

When the Board is subrogated to a claim, it has exclusive jurisdiction to decide if it will take legal action against a third party. If it does take action and recovers more than the total value of the worker's benefits, the worker receives the difference minus a 23% administration fee. If the Board recovers less than the total value of benefits, the worker will not receive any excess. A worker cannot waive or assign their right to compensation.

If a worker chooses to pursue court action and is unsuccessful, or the award is less than they would have received under the compensation regime, the worker may still be able to receive compensation. However, the original claim for compensation must have been made within the time limits outlined above. Note that the worker **must have written approval from the Board for any settlement** if they wish to apply for "top up" compensation following the settlement of a legal action (WCA, s. 129).

References

[1] http://www.gov.bc.ca/workersadvisers

VII. The Claim Acceptance Process

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

After a worker makes an application for compensation, a Board officer (typically an Entitlement Officer) issues a decision (usually in writing) accepting or denying the claim. For a compensation claim to be accepted, the Board must generally find:

- **Status**: The applicant is a "worker" covered under the *Act*.
- **Disability**: The applicant suffered a personal injury (physical or psychological) or an occupational disease, causing disability.
- **Causation**: The worker's disabling injury or disease arose out of and in the course of the worker's employment.
- **Time Limits and Procedures**: The worker submitted a timely and proper application.

If a claim is denied by the Board, it is typically because one or more of the above conditions was not met. The Board decision typically sets out the reason why the claim was denied and cites the relevant policy from RSCM II. However, the evidence on which the decision is based may or may not be summarized in the decision.

All the evidence on which the decision is based will be in the claim file, which may also include memos from Case Managers and clinical opinions from Board Medical Advisors (BMAs). The claim file may also contain detailed phone memos providing the Case Managers with a summary of the worker's evidence. The claim file evidence as a whole provides the basis for the Board's decision, and is evidence which will be available and considered by the appeal bodies, Review Division, and WCAT.

Workers are entitled to a copy of their claim file (paper or CD) on request, and will automatically be sent a copy of the claim file if they file an appeal. In addition, the worker may obtain online access to parts of their claim file by calling the Board. These matters are covered in the section below on Access to Files (7-47). Disclosure may be given directly to the worker's representative if the disclosure request or appeal notice is accompanied by a valid authorization of representation, signed by the worker. [Authorization forms are available on the Board website.]

VIII. Worker Status

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

While most people who work in BC will be covered by the WCA, not everyone is covered. No claim will be successful if it is found that an individual does not have worker status.

A. General

The WCA was amended on January 1, 1994 to expand the range of workers covered. **All workers are now covered unless specifically exempted**. Chapter 2 of the RSCM II sets out the general principles of inclusion and the exceptions. The Assessment Manual at Policy Items AP1-1-1 through AP1-1-7 sets out the principles governing coverage for employers and workers under the WCA. Even certain volunteers are covered, as are students engaged in work-study programs that are approved by the Board. Before this amendment, most office workers and other white-collar workers were not covered. Since the amendment, only a few exceptions have been recognized, such as professional athletes who have accepted a high level of risk, casual babysitters, and non-residents. Requests for exemptions may come from workers and employers or may be initiated by the Board. Decisions regarding exemption status may be appealed.

The Assessment Manual sets out certain exclusions at Policy Item AP1-4-1. Issues surrounding variances, specific industries, and personal optional protection (generally used by self-employed individuals) are discussed at Policy Items AP1-4-2 to AP1-8-1.

It is important to note that if a worker chooses to pursue compensation through WCB, it means that they forego their right to sue for damages in tort. Where the tortfeasor is not a worker or employee, WCB may pursue claims against non-workers.

Some special cases are set out below, but at all times, the most recent version of policies in Chapter 2 of the RSCM II should be consulted if “worker status” is an issue.

B. Workers in Federally Regulated Industries

While working in BC, workers in federally regulated industries are directly subject to the workers’ compensation system.

C. Federal Government Employees

Federal government employees are governed by the *Government Employees Compensation Act*, RSC 1985, c G-5 which provides that injured federal government workers in a given province are to have their claims addressed by the provincial administrative body in that province. They are then entitled to be compensated at a rate determined under the provincial workers’ compensation scheme of the province in which they are employed but paid out of a federal fund. See RSCM II, #8.10.

D. Workers Who Suffer an Injury While Working Outside BC

Workers who suffer an injury while working outside BC may be covered if

- they work in a compensable industry;
- BC is their usual place of employment;
- the extra-provincial work lasts less than six months;
- the work is a continuation of their BC employment; and
- they are working for a BC employer, or an employer located outside of BC where the Board has entered into an interjurisdictional agreement (WCA s. 335 [Former Act, s. 8.1]).

There are special requirements for trucking and transport businesses. In addition to WorkSafeBC coverage, employers must check the registration requirements with the Workers' Compensation Authority in the jurisdiction the worker will be working or travelling through. See RSCM II, #112.00–112.40

E. Workers Under the Age of Majority

Section 121 of the WCA [Former Act, s. 12] states that a worker under the age of 19 is *sui juris* for the purposes of the compensation provisions, which means that workers who are minors are under no legal disability and are considered, for purposes of the *Act*, capable of managing their own affairs as if they were adults.

F. Self-Employed Persons

If a person is a self-employed proprietor or a partner in a partnership who operates an independent business, then they are not automatically covered under the WCA. In general, they are entitled to seek coverage by purchasing optional workplace disability insurance, also known as Personal Optional Protection. Personal Optional Protection will pay health care, wage-loss, and rehabilitation benefits if the person is injured at work. See Assessment Manual Policy Item 1-4-3.

When a self-employed person with Personal Optional Protection is injured, their claim is processed as if they were a "worker" under the *Act* (s. 215 [Former Act s. 33.6]), and their wage rate is set according to their level of Personal Optional Protection coverage (See RSCM II, #67.20).

A labour contractor who does not have Personal Optional Protection and does not operate an independent business may be covered as a worker by the prime contractor. This is regardless of whether they are eligible for WorkSafeBC coverage or have declined to purchase WorkSafeBC's optional coverage.

Below are examples of situations where a contractor would likely be a worker:

- the contractor supplies only labour;
- the contractor supplies labour and minor materials such as nails, drywall tape, or putty; or
- the contractor supplies labour and a piece of major equipment but is not registered with WorkSafeBC.

The key issues in the acceptance of claims from self-employed persons tend to be the exact nature of their employment, their coverage, and the appropriate wage rate. Practice Directive #C9-1 "Coverage and Compensation for Self-Employed Persons" sets out a helpful chart on the different types of self-employment and their coverage under the *Act*.

G. Employers

Employers are also covered by and have duties under the WCA, including contributing to the Accident Fund based on compulsory assessments. The Board sets an assessment rate for each employer based on a complex system of classification relating to the type of business and previous accident rates. Employers should be referred to the Employers' Advisors Office for specialized assistance, without charge, in these matters (see Appendix on Referrals).

IX. Disability and Causation

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Types of Claims

Before a compensation claim can be accepted, the Board must find that the worker's injury, death, or disease was disabling, and that the disability occurred as a result of employment. The WCA addresses these matters differently for different types of injuries and conditions:

- Sections 134 and 146 [Former Act, s. 5]: personal injury (physical or psychological)
- Section 135 [Former Act, s. 5.1]: psychological injury only (mental disorder)
- Section 136(1)[Former Act, s. 6(1)]): occupational disease – no presumption of work causation
- Section 137 [Former Act, s. 6(3)]: occupational disease – presumption of work causation
- Section 145 [Former Act, s. 7]: hearing loss

Detailed policies regarding each of these conditions are set out in the RSCM II. Chapter 3 sets out policies for personal and psychological injuries and compensable consequences. Chapter 4 sets out policies for all Occupational Diseases, including repetitive strain injuries and hearing loss. Students handling appeals should note that most causation disputes come down to matters of evidence, and the policies provide important guidance on what evidence is required in each case.

B. Injury, Disease, or Both?

Because the statutory and policy requirements for an injury and Occupational Disease are different, it is important to consider the worker's disability under the correct relevant category. Sometimes this is not clear.

Item C3-12.00 of the RSCM II has a helpful section on the distinction between an "injury" and a "disease." Some conditions, like tendonitis or hearing loss, can be either an injury or a disease, depending on the circumstances of the injury. For example, hearing loss from a single occurrence like an explosion is treated as an injury, while gradual loss of hearing due to occupational noise is treated as a disease.

Sometimes, a worker is disabled by a combination of a slow-developing disease followed by a single event. The combination results in a significant disability, although neither event by itself would have been disabling. This is a difficult causation case. While the single event may not be sufficient to injure a healthy person, the worker is "working hurt," so a minor event is sufficient to disable them. This is the compensation version of the "thin skull" victim in tort law. The Board may not accept work causation in the initial decision and deny the claim as not meeting the causal standard under WCA ss. 134 and 146 [Former Act, s. 5]. On review or appeal, the best way to address this matter is to

have good evidence, preferably medical evidence, of the worker's medical condition prior to the single event. The key for a finding of work causation under s. 134 is "causative significance." Further, it is noted in court decisions that compensability will be denied only if personal or non-employment related factors are so dominant or exclusive that the compensable injury is not a significant causal factor (WCAT-2009-02226, affirmed by WCAT-2011-02511).

In some cases, the worker's pre-existing condition is actually a developing Occupational Disease, such as gradual onset repetitive strain or gradual hearing loss. In these cases, you may wish to ask the Board to accept the pre-existing condition as a compensable Occupational Disease under section 136 and 137 [Former Act, s. 6]. If the Board denies this aspect as well, you may appeal this denial and join the two appeals together at the Review Division or WCAT so an appeal panel may consider the "whole worker."

C. Compensable Aggravation

For both injuries and Occupational Diseases, it is also recognized that the worker can have a preexisting condition which is aggravated or activated by the compensable injury or disease. For injuries, the relevant policy is set out in RSCM II, C3-16.00; for Occupational Diseases, the policy is set out in RSCM II, C4-25.20. It is necessary to distinguish between injuries or death resulting from employment (which are compensable), and injuries resulting from pre-existing conditions or diseases (which are not compensable). There must have been something in the employment activity or situation that had **causative significance** in producing the injury or death. In adjudicating these types of claims, the Board considers:

- the nature and extent of pre-existing injury;
- the nature and extent of the employment activity; and
- the degree to which the employment activity may have affected the pre-existing injury.

If the pre-existing condition meets the test for compensable aggravation, this requires an "aggravation" decision separate from a simple acceptance "decision." For example, the Board may deny that a slip and fall was sufficient to cause a meniscus knee tear in a healthy worker; however, if the worker had pre-existing knee problems, the same claim could have a separate decision accepting an "aggravation" type injury.

If the worker has a pre-existing but non-disabling condition, and the claim is accepted, the worker's injury is dealt with like any other claim and the whole disability is compensable.

However, if the worker has a pre-existing disabling condition and becomes further disabled in the same body part through a work injury, the Board will apply section 146 of the WCA [Former Act, s. 5(5)] or "proportionate entitlement" whereby compensation is paid only for the increase in disability, rather than the whole disability.

D. Section 134: Personal Injury

Chapter 3 – Compensation for Personal Injury is the key chapter of the RSCM II that applies to s. 134 of the WCA [Former Act, s. 5]. This chapter covers the definition of a "personal injury" as well as "arising out of and in the course of employment." It goes on to cover specific circumstances that can prevent an injury from being accepted, and specific losses and consequences that can be included in a claim.

1. Did the Injury Happen at Work?

Under sections 134 and 146 of the WCA [Former Act, s. 5], personal injury or death must **arise out of** and **in the course of** employment in order to be compensable. It is important to check policies and WCAT decisions for qualifying factors, as they can change.

"Arising out of employment" relates to causation and means that the work must have **causative significance** to the injury. According to well-established jurisprudence, this means that the work does not have to be the sole or even the dominant cause of the injury; It must be only of causative significance greater than being trivial or *de minimis*: *Chima v Workers' Compensation Appeal Tribunal*, 2009 BCSC 1574 [1], *Schulmeister v British Columbia (Workers' Compensation Appeal Tribunal)*, 2007 BCSC 1580 [2], and v British Columbia (Workers' Compensation Appeal Tribunal)*, 2006 BCSC 838* [3]. Not all injuries at work are caused by work, as some are naturally occurring conditions which would have happened in any event. For example, a worker with heart disease, who is working in a sedentary job, may have a heart attack at the office. There is likely nothing in the work activity which would have causative significance to this injury.

"In the course of employment" relates to the employment relationship at the time of injury. It generally refers to whether the injury or death happened at the time and place and during an activity reasonably related to the duties and expectations of the employment. Time and place are not strictly limited to the normal hours of work or the employer's premises.

Injuries may be caused by the normal actions or movements involved in the workplace as opposed to an abnormal event. For example, injuries caused by overexertion or repetitive movements can still be grounds for compensation even when done during routine work (RSCM II, C3-12.00).

> **NOTE**: There is a statutory presumption that if an injury is caused by an **accident** at work, the injury is presumed to have occurred in the course of employment (WCA s.134(3) [Former Act, s. 5(4)]). An accident can include someone else's intentional act.

The determination of whether an injury arose out of and in the course of employment is set out in RSCM II, C3-14.00 and can be made with reference to factors such as:

- whether the injury occurred on the premises of the employer;
- whether it occurred in the process of doing something for the benefit of the employer;
- whether it occurred in the course of action taken in response to instructions from the employer;
- whether it occurred in the course of using equipment or materials supplied by the employer;
- whether the risk to which the worker was exposed was the same as the risk to which they are exposed in the normal course of production;
- whether the injury occurred during a time period for which the worker was being paid;
- whether the injury was caused by some activity of the employer or of a fellow worker;
- whether the injury occurred while the worker was performing activities that were part of their regular job duties; and
- whether the injury occurred while the worker was being supervised by the employer.

This list is not exhaustive, and alone, none of the above factors are conclusive.

RSCM II, Chapter 3 sets out further and detailed criteria for acceptance of a claim under sections 134 and 146 of the WCA [Former Act, s. 5]. Current policy states that the injury need not occur while the worker is engaged in specific productive acts, so long as it occurs within the broad circumstances of carrying out the employment duties. An injury incurred while commuting is generally not a compensable injury. However, travelling may be considered an activity in the course of employment if travel is part of the worker's duties or if the accident occurs on the employer's property or on a "captive road" provided and controlled by the employer, such as logging roads used by forestry workers.

If serious and willful misconduct on the part of the worker is the sole cause of the injury, no compensation is paid unless death or severe disability results.

2. Secondary Conditions

Where the worker suffers consequences from the injury, in addition to the injury, these may be "compensable consequences." Some common compensable consequences of injury include chronic pain and the development of psychological conditions after the initial injury (unless they arise due to the WCB process). The test for whether a secondary condition is compensable is also **causative significance**, meaning that the initial injury does not have to be the sole or dominant cause of the secondary injury. It must only be of causative significance greater than being trivial.

As discussed above, if the worker suffered from a pre-existing condition and the injury aggravates, accelerates, or activates this condition, the resulting aggravation may also be compensable. (**Note**: this policy is complex and should be consulted for specific details.)

The *Kovach v Singh (Kovach v WCB)*, [2000] SCJ No 3 [4] decision upheld the Board's policy that a worker who is undergoing treatment for a work injury remains in the course of employment, even if the treatment takes place long after the job itself has ended (even years after). This decision means that workers undergoing treatment for an injury or disease generally cannot sue negligent medical providers for medical malpractice.

See also RSCM II, C3-22.00–22.40.

E. Section 136: Occupational Diseases

1. Overview of Compensable Occupational Diseases

An Occupational Disease is a particular disease or medical condition which is recognized by the Board as likely or possibly caused by work, based on scientific evidence. The Board "recognizes" an Occupational Disease formally by listing it in a policy. These lists are updated as new scientific evidence becomes available. A "disease" is a broad category which includes exposures, cancers, poisons, repetitive strain injuries, hearing loss, and contagious and respiratory diseases.

To determine if a worker's medical condition is a recognized Occupational Disease, consult the two policy provisions listing the recognized Occupational Diseases: **Appendix 2 (RSCM II)/Schedule 1 (WCA)**, which sets out Occupational Diseases recognized as qualifying for a presumption of work causation for certain industries, and **RSCM II, C4-25.00**, which sets out additional Occupational Diseases recognized by Regulation. Each type has different tests for work causation, which must be met if the Occupational Disease is to be accepted by the Board as compensable.

2. Occupational Diseases Listed in Schedule 1 (Appendix 2 of the RSCM II)

Occupational Diseases listed in WCA Schedule 1 [Former Act, Schedule B] are matched with the particular industries in which they commonly occur. If the worker has that disease and works in the listed industry at the time of disablement, the Occupational Disease is presumed to have been caused by that work unless the contrary is proven (WCA, s. 137 [Former Act, s. 6(3)]). A presumption of work causation only arises for diseases mentioned in Schedule 1 when the worker is working in the listed industry immediately before the date of disablement. Otherwise, no presumption applies. Also,the contrary may be proven in an individual case. For example, where a worker was employed as a coal miner at or before the date of disablement, silicosis is compensable unless it is proven to have been caused by non-work factors such as smoking.

Occupational Diseases in Schedule 1 include certain kinds of cancers, respiratory diseases including asbestosis, and repetitive strain injuries. If a worker has aSchedule 1 disease but does not work in the listed industry, the worker's Occupational Disease can still be compensable if work causation can be proven under WCA s. 136(1) [Former Act, s. 6(1)]. In addition, section 139 of the WCA [Former Act, s. 6.1] sets out a special work presumption for firefighters who

suffer a heart attack on the job.

C4-25.20 of the RSCM II provides a helpful guide to the special rules for a Schedule 1 presumption.

3. Occupational Diseases Listed in C4-25.10 of the RSCM II

Additional Occupational Diseases are listed in RSCM II, C4-25.10, including many repetitive strain injuries and specific conditions such as plantar fasciitis and lyme disease. These diseases must be adjudicated under s. 136(1) of the WCA [Former Act, s. 6(1)], where work causation must be proven in each case.

Section 136(1) states that if:

- the worker has an occupational disease that disables the worker from earning full wages at the work at which the worker was employed; or
- the death of the worker is caused by an occupational disease; and
- the occupational disease is due to the nature of any employment in which the worker was employed, whether under one or more employments; then:

compensation is payable as if the disease were a personal injury arising out of and in the course of that employment. The absence of a specific incident may mean that the worker has a disease rather than a personal injury.

In addition to these statutory provisions, RSCM II, C4-25.20 sets out guidance for establishing work causation for Occupational Diseases in general, and sets out the onus of proof for non-presumptive Occupational Disease causation. This policy can be helpful guidance when framing a submission on causation for a s. 136(1) [Former Act, s. 6(1)] Occupational Disease case.

There are also particular policies applying to particular conditions, organized by type of condition, which are usually referenced in decision letters involving those conditions.

Items C4-27.00–27.40 of the RSCM II apply to particular repetitive strain injuries/activity related soft tissue disorders ("**ASTDs**"). Note that most ASTDs can be injuries or diseases, and many are listed in Schedule 1 [Former Act, Schedule B] (i.e., they may or may not qualify for the work related presumption).

- RSCM II, C4-28.00 for Contagious Diseases (e.g., mumps)
- RSCM II, C4-29.00–29.10 for Respiratory Diseases (e.g., asthma, silicosis, asbestosis)
- RSCM II, C4-30.00 for Cancers
- RSCM II, C4-31.00 for Hearing Loss
- RSCM II, C4-32.00 for Other Matters

F. Workers' Compensation in Relation to COVID-19

Along with other benefits such as CERB, CRB, CRSB, CRCB, and the BC Emergency Benefit for Workers, it possible to receive compensation from the Board for contracting COVID-19 in the course of employment. The facts required for a successful claim are:

1. There is evidence that the worker has contracted COVID-19; and
2. The nature of the worker's employment created a risk of contracting the disease

significantly greater than the ordinary exposure risk of the public at large.

It is important to note that a positive COVID-19 test is not required, as a medical diagnosis or other supporting evidence can be sufficient. That being said, some evidence of physical symptoms will be necessary without a conclusive positive test, as WorkSafeBC does not compensate workers for quarantine due to close contact.

In reference to the second factor, the risk related to employment is determined by a whether a worker will be naturally exposed to those who have been diagnosed with COVID-19, such as hospital workers, or workers who have regular close interactions with customers, such as retail workers.

More information can be found at www.worksafebc.com/covid-19. [5]

G. Special Issues for Occupational Disease Cases

1. Date of Disablement

For an Occupational Disease, **the first date of disablement is treated as the "date of injury"** for the purpose of calculating the one-year time period to submit a compensation application (WCA, s. 151 [Former Act, s. 55]). Special rules apply for late applications for Occupational Diseases and for Federal Workers (see RSCM II, C4-26.00).

2. Timely Application & Health Care

For diseases with a long latency period such as asbestosis and most cancers, a timely application may result in only receiving health care benefits at first. These healthcare benefits can include, for example, medical benefits, necessary adjustments to the residential home, and homecare. These benefits may also be claimed by dependants if the worker has died.

3. Standard of Proof

Schedule 1 diseases and the diseases recognized by regulation (RSCM II, C4-25.10) have an "as likely as not" standard of proof for causation (WCA s. 339 [Former Act, s. 99]). This means that where the evidence is equally weighted for different interpretations, the interpretation that favours the worker should be preferred. For example, the Supreme Court of Canada upheld a WCAT decision that an unusually high rate of cancer in a group of lab technicians was an Occupational Disease and therefore compensable (*Fraser Health Authority v Workers Compensation Appeal Tribunal*, 2016 SCC 25 [6]). Though experts had found little positive evidence supporting this link, the cancer rate in this group was highly unusual. Combined with the significant possibility of non trivial exposure to harmful substances in the workplace, WCAT decided that that was enough to satisfy the "as likely as not" standard.

4. Survivor Benefits

If a worker's disease causes death, the worker's spouse may be entitled to survivor benefits, even if the worker was not eligible for compensation.

> **NOTE**: WorkSafeBC has developed the Exposure Registry Program, which is designed to be a forum for workers, employers, or others to report work-related exposures. This registry is intended to track incidents of exposure to substances which are known to be harmful (such as asbestos), as well as exposures which may in the future be shown to cause disease (such as power line emissions). The information obtained through the registry will create a permanent record of a worker's exposure and will assist WorkSafeBC in establishing that the manifestation of a disease was due to the nature of the employment in which the worker was employed (a requirement under s. 136(1)(b) of the WCA [Former Act, s. 6(1)(b)]). This will simplify the adjudication of future claims for occupational diseases caused by workplace exposure.

H. Section 135: Psychological Injuries

A worker can claim for diagnosed psychological conditions which arise as a consequence of physical injuries or Occupational Diseases which are accepted under ss. 134, 135, or 146 of the WCA [Former Act, ss. 5–6]. Common psychological consequences include chronic pain and depressive disorders. In practice, psychological limitations and restrictions can often be an overlooked aspect of an injured worker's reduced employability. However, they are important to recognize, diagnose, and treat as this may be the difference between a successful rehabilitation and a failed one. When seeking acceptance of a psychological consequence of a compensable physical condition, the causal threshold is the same standard of "causative significance" – is the accepted physical injury a significant contributing cause of the psychological condition, meaning something more than a trivial or insignificant factor? If so, the psychological consequence is compensable as well, including treatment. The physical injury does not need to be the sole or even most significant cause. See RSCM II, C3-22.30.

However, a worker may suffer a psychological injury alone, with no accompanying physical condition. Common examples include Post Traumatic Stress Disorder (PTSD) or Major Depressive Disorder (MDD). In such cases, the worker can claim for purely psychological injuries from their work under section 135 of the WCA [Former Act, s. 5.1] and RSCM II, C3-24.00–24.10.

Section 135 of the WCA [Former Act, s. 5.1] provides for two types of psychological injuries, each with a different causation test. A worker can claim for a psychological injury that is either:

1. a reaction to one or more traumatic events arising out of and in the course of employment; or
2. predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of such stressors, arising out of and in the course of employment.

A psychological injury which arises from a traumatic event must meet the usual causation test that employment was "as likely as not" the cause of the condition. Additionally, determining whether an event was traumatic involves both subjective and objective elements, but the subjective element is paramount (see *Atkins v British Columbia (Workers' Compensation Appeal Tribunal), 2018 BCSC 1178 at para 78* [7]*). The objective question is only to determine if the event is "identifiable."*

A psychological injury which is caused by "stressors" (vs. "traumatic events") must meet the "predominant cause" standard. This is a significant hurdle for workers with pre-existing psychological conditions who become disabled after work stressors, such as bullying or harassment. These conditions do not have to result in an injury immediately, stressors can make up the predominate cause of a condition that takes time to manifest or be diagnosed.

Section 135 of the WCA [Former Act, s. 5.1] also requires that a psychological condition be diagnosed as a mental disorder by a registered psychiatrist or psychologist.

Section 135 also provides that a mental disorder arising from a decision by the worker's employer related to the employment (e.g., a change in job description or working conditions, or termination of employment) is specifically excluded from compensation. However, an employer may not communicate a management decision in any way it wants and communication that humiliates, intimidates, or amounts to bullying, harassment, threats, or abuse may be beyond s. 135(1)(c) [Former Act, s. 5.1(1)(c)] protection.

Psychological injuries that result from interaction with WCB and the claims process are also not compensable (see noteworthy decision WCAT-2015-01459). Though they would not happen *but for* the workplace injury, they are too remote to be compensable. Exceptions may arise in special circumstances, e.g., where the Board has acted negligently, or in bad faith.

Section 135(2) of the WCA [Former Act, s. 5.1(1.1)] creates a rebuttable presumption for eligible occupations that a worker's mental disorder is a reaction to one or more traumatic events arising out of and in the course of their

employment. The presumption applies where the worker is:

- exposed to one or more traumatic events arising out of and in the course of the worker's employment in an eligible occupation; and
- diagnosed by a psychiatrist or psychologist with a mental disorder that is recognized in the most recent DSM at the time of diagnosis, as a mental or physical condition that may arise from exposure to a traumatic event.

In making determinations regarding mental disorders, the Board must make both a subjective and objective analysis of the situation. Certain workplace interactions or events can, on the surface, seem innocent, but within the context of the work environment and the employee constitute a stressor or series of stressors that can be seen as either significant or traumatic as described by item C3-13.00 of the RSCM II.

In making this determination, a worker's general characteristics and history are relevant. For example, an employee with past trauma related to a certain incident may find related stressors more aggravating. That being said, the worker's concerns and complaints must still be grounded in reality.

The *Act* also defines an eligible occupation to mean the occupation of a correctional officer, emergency medical assistant, firefighter, police officer, or sheriff.

As of May 16, 2019, this mental health presumption was extended to emergency dispatchers and publicly funded health-care assistants.

I. Section 145: Non-Traumatic Hearing Loss

Significant hearing loss caused by exposure to industrial noise in the course of employment is compensable. The worker must submit tests showing the loss of hearing and complete a special application form listing all employment and non-employment noise exposure. See ss. 145 and 198 and Schedule 2 of the WCA [Former Act, s. 7 and Schedule D].

References

[1] https://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc1574/2009bcsc1574.html?autocompleteStr=2009%2520BCSC%25201574&autocompletePos=1
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[7] https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc1178/2018bcsc1178.html?autocompleteStr=2018%2520BCSC%25201178%2520&autocompletePos=1

X. Time Limits and Procedures

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Time Limits

As set out above, the key time limits that apply to making a claim are the **reporting time limits** and the **time limits for filing a claim**.

Injuries must be reported by workers to their employers and by employers to the Board as soon as possible. See paragraph VI.A.1 for details.

Section 151 [Former Act, s. 55] of the WCA requires that generally, a worker must apply for compensation **within one year** of the date of injury. Subsections 151(4) and (5), as well as section 152 [Former Act, s. 55(3.2)], provide several exceptions for when late applications may be accepted:

- If exceptional circumstances exist which precluded the worker from making an application within one year and the application is less than three years after the date of injury (WCA, s. 151(4) [Former Act, s. 55(3.1)]), the worker's application may be accepted. If a worker's application has been denied because of a late application, please consult Policy #93.22 of the RSCM II to assess what evidence of "exceptional circumstances" may be relevant in that case.
- Even after more than three years post-accident, the Board may still accept a claim based on "exceptional circumstances," however the Board can only pay compensation from the date of the application forward, not from the date of the injury (WCA, s. 151(5) [Former Act, s. 55(3.1)]).
- If death or disablement is due to an occupational disease but sufficient scientific evidence did not exist at the time of the application to prove this and there is new scientific evidence regarding the occupational disease causation, the application may be accepted. However, the worker must make the application no more than three years after sufficient medical or scientific evidence became available to the board (WCA, s. 152(1) [Former Act, s. (3.2)]).
- The Board may also reconsider an old occupational disease decision that meets the subsections 152(1) and (2) criteria.

B. Application Procedures

Applications to the Board must be made by submitting Form 6, which will be provided to the worker by the Board when a report is received. This form can also be found online [1]. This form can be submitted online. Workers can also call Teleclaim at 1 (888) 967-5377 from 8am to 6pm Monday to Friday.

Note that, even when submitted online, a typed or printed name is not sufficient to meet the signature requirement. The worker must either have a handwritten digital signature they can apply to the form, or they must print and sign the form before scanning and submitting. See RSCM II Policy #93.25.

Finally, the Board does have the discretion to accept and adjudicate a claim without an application in certain circumstances. See RSCM II Policy #93.23.

C. The Case Management Process

Claims procedures are governed by Chapter 12 of the RSCM II. This manual will not cover all of the policies in that chapter, so it is important to review the nature of the policies in that chapter in order to be able to spot policy related issues in a case.

Once an application has been made, it moves into the case management process where initial decision makers will consider the application and decide whether to accept or reject the claim on the criteria set out above. A case manager oversees the delivery of services for the entire life of the claim. This process may also include regular multidisciplinary team meetings, clinical care planning, site visits, and a return-to-work plan, which sets out expectations surrounding medical treatment, physical rehabilitation, and a Return-to-Work option. The worker, union or other representative, the worker's doctors, and the employer are all expected to participate.

WCB uses the Claims Management Solutions ("**CMS**") System to streamline and manage the claims process more effectively and improve service to customers. The CMS System manages all data related to previous, current, and future claims and helps integrate services throughout the life cycle of a claim. It is supposed to result in faster case handling and claim payments, more support for injured workers, and less administrative work for employers and service providers. Workers can obtain real-time access to their claim file by registering online, and can authorize a representative to have access as well.

1. Initial Decision-Making Process

Most decisions are made by frontline WCB officers. The major issues to be decided are whether the worker is covered by the WCA, whether the injury arose out of and in the course of employment, and to what benefits the worker is entitled. The most important WCB officers, and the decisions that they make, are as follows:

a) Entitlement Officers (EO)

- Accepts or rejects claims;
- Seeks and reviews required medical documentation;
- May establish initial long-term wage rates;
- Pays short-term disability benefits;
- Authorizes health care payments;
- Calculates overpayment;
- Requests refund from claimant if overpaid;
- Identifies claims requiring claim management; and
- Monitors return-to-work.

b) Case Manager (CM)

- Accepts or rejects claims;
- Approves wage-loss benefits, determines the initial wage rate, and terminates or reduces wage-loss benefits;
- Investigates and decides "long term" average earnings, which are implemented ten weeks after the injury (eight weeks for injuries before June 30, 2002);
- Approves or rejects operations or other major treatments;
- Approves workers' expenses for WCB payments;
- Determines when to terminate wage-loss benefits because the worker's disability is considered to have "plateaued"; and

- Generally, makes most decisions involving workers including whether to register the worker for vocational rehabilitation services and pension assessments.

c) Vocational Rehabilitation Consultant

- Works with the worker, employer, and union (if any) to get the worker back to work as soon as medically possible, perhaps to a modified job;
- Approves job retraining courses;
- Determines training allowances (usually paid at wage loss levels) and expenses for attending courses;
- Can agree to subsidize a new employer for a limited time;
- Determines "continuity of income" benefits to bridge the gap between termination of wage-loss benefits and determination of a permanent pension; and
- Assesses a worker's long-term employability, and the earnings they are considered capable of achieving after the worker has "maximized" their earning capacity in a suitable and available job. This assessment is the core of the Disability Awards Officer's decision concerning a Loss of Earnings pension. While the decision is made by the Officer, who can reject the recommendation of the consultant, the consultant's assessment is a crucial step in the pension process

d) Disability Awards Officer

- Determines the degree of permanent disability on a physical impairment basis; For workers whose permanent disability is considered to have occurred on or after June 30, 2002, this will determine the pension in the great majority of cases.

These WCB employees interact considerably during initial decision processes. For example, a projected loss of earnings assessment, while made by a Disability Awards Officer, is based on a report from the Rehabilitation Officer stating which jobs are suitable and available to the worker, and what earnings can be anticipated. Throughout a claim, the Board's salaried medical staff (doctors, psychologists etc.) may be consulted regarding medical issues. Furthermore, board medical advisors may be consulted where a second medical opinion is needed.

D. Procedure After Application

The family doctor plays a crucial role in the acceptance and continuance of the worker's claim as well as with their treatment. The WCA requires that the doctor file an initial report with the Board, as well as progress reports for each visit. Doctors are also required to give all necessary advice and assistance to a worker making an application for compensation, including furnishing proof that may be required. Some doctors are very helpful to injured workers, while others refuse to get involved in what they consider to be a legal issue. Such an attitude can be very harmful if there is a medical dispute between the Board and the worker.

The Board has extensive inquiry and investigative powers. It may require the worker to be medically examined by a WCB staff doctor or by independent consultants. WCB officers called Entitlement Officers, Case Managers, Disability Awards Officers, and Rehabilitation Consultants decide whether to accept the claim and what benefits, if any, should be paid. Although rarely used, the Board has the authority to conduct a formal inquiry at which the claimant and other witnesses are compelled to appear and be questioned. Important decisions occur at various times as a result of the interaction and correspondence between various WCB officers, the worker, the family doctor, and any specialist.

As set out above, making a claim to the Board results in obligations arising for the worker and for their healthcare professionals (see RSCM II Policies #93.26 and 95.00–95.40). A failure to provide information on the part of the worker can result in the claim being suspended (see RSCM II Policy #96.22).

If there is a delay in obtaining outside evidence, the Board may decide to make a preliminary determination and begin paying benefits while waiting for further information (see RSCM II Policy #96.21).

E. Evidence and Investigation

As in any legal arena, at all stages of the Workers' Compensation process it is vital to support claims with evidence. Often this can be especially challenging when dealing with medical issues for many reasons: for example, these issues require specialized knowledge, they often do not lend themselves to certainty even for professionals, and most injured workers have limited time and money to spend collecting evidence.

Conversely, WCB has salaried Board Medical Advisors (BMA) and WCAT is "presumed to be an expert in all matters over which it has exclusive jurisdiction" (*Fraser Health Authority v Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 (*Fraser Health*) [2]). Nevertheless, WCB and WCAT are not presumed to have medical or scientific expertise and, as such, they are not permitted to ignore uncontradicted expert advice (*Page v British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 493 [3]), particularly in light of the "as likely as not" standard.

While it may be useful to document subjective claims of injury, pain, and limitations, workers should bring as much objective expert evidence as possible. This may include evidence from physiotherapists, massage therapists, chiropractors, and dentists in addition to a family doctor. If necessary and possible, ask to be referred to a specialist.

Also, recall that medical diagnosis and medical causation does not need to be proven to the level of scientific certainty. The finder of fact is permitted to make common sense inferences (*Snell v Farrell*, [1990] 2 SCR 311 [4]; *McKnight v Workers' Compensation Appeal Tribunal*, 2012 BCSC 1820 [5]).

As with all evidence in the claims process, there is no onus on the worker to prove their injury. Rather, once a claim has been made, the Board gathers the relevant evidence it needs to make a sound conclusion. However, the worker *does* need to provide some basic evidence of an injury to start the process. As set out above, the standard of proof is "as likely as not," i.e., if the evidence is weighed 50/50, the tie goes to the worker. (See RSCM II, Policy #97.00.)

Workers also benefit from several evidentiary assumptions set out at RSCM II Policy #97.20. The RSCM II sets out a number of detailed policies on investigation of claims, use and weighing of evidence, and the powers that the Board has in investigating claims issues for determination. These powers are wide reaching and can be used at any stage of a claim. However, the need for extensive investigation typically occurs at the outset of a claim or when a worker seeks to have a new injury/symptom added to a claim. These policies, as well as policies governing acceptance and disclosure of information on a claim file, are set out at RSCM II Policies # 97.00–99.90, and at a number of more than 50 other policies. These policies are useful to review generally, but should always be specifically consulted when any issues around evidence/information arises on a claim file.

Also note that certain costs and expenses incurred by a worker in the course of a Board investigation/inquiry/appeal related to a claim can be reimbursed. These policies are set out at RSCM II Policies #100.00–100.83.

References

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[2] https://www.canlii.org/en/bc/bcca/doc/2014/2014bcca499/2014bcca499.html?autocompleteStr=2014%2520BCCA%2520499%2520&autocompletePos=1
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XI. Claim Benefits

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Once a claim has been accepted by the Board, the process then moves to a determination of what benefits should be paid to the injured worker.

Many RSCM II chapters apply to the adjudication of claim benefits. The most important chapters can be summarized as follows:

- Chapter 5 – Wage-Loss Benefits
- Chapter 6 – Permanent Disability Benefits
- Chapter 8 – Compensation on the Death of a Worker
- Chapter 10 – Health Care; and
- Chapter 11 – Vocational Rehabilitation Services

A. Overview: Worker Disability and Compensation Benefits

Of the 100,000 workers injured on the job in BC every year, about half suffer minor or inconvenient injuries and return to their pre-injury employment in quick order. Most of these claims are accepted by the Board for health care benefits only (medical treatment, medication, etc.).

Of those workers whose injuries are more serious, there are several common profiles of disability and recovery. After a worker makes an application for a temporary disability, the Board determines whether the worker is totally temporarily disabled and, if so, pays full wage-loss benefits under Section 191 of the WCA [Former Act, s. 29]. If the worker is only partially temporarily disabled, i.e., they can work some hours or some duties, the Board will pay partial wage loss under Section 192 of the WCA [Former Act, s. 30].

The following examples are to illustrate common compensation benefits and scenarios for disability:

- The worker suffers a broken wrist in their dominant hand and cannot perform their job duties as a result. Their doctor recommends a certain number of weeks to recover after which they are cleared to return to work, full duties. The worker makes an application for compensation. If their claim is accepted, the Board sets a short-term wage rate on their claim (based on their average earnings) and the worker is paid temporary wage-loss benefits at this rate for their days of lost work. The Board also covers any health care costs such as treatment or medication. If there are no permanent medical consequences to this injury and the worker returns to work full duties, the Board issues a decision that the injury is “resolved,” and their claim is closed. The worker is not referred for any other benefits such as Disability Awards or Vocational Rehabilitation.

- The worker suffers a more serious injury to their hand (e.g., a crush injury). If their claim is accepted, they again receive temporary wage loss for their time away from work. However, after 10 weeks, the Board issues a new long-term wage rate based on a more complex formula in law and policy. At a discretionary point, the Board considers that the worker's condition is no longer "temporary" and must make one of the following decisions about the worker's medical condition. Either:

  (a) their injury has "resolved" with no permanent impairment and they can return to work and perform full duties. In this case (as above), the Board will issue a "resolve" decision ending their temporary wage-loss benefits and their file will be closed; or

  (b) their injury is not fully resolved, and they are left with some permanent functional impairment. In this case, the Board will issue a "plateau decision," setting a date at which it considers that the worker's condition is no longer temporary, but it has reached a medical "plateau" (that is, the condition will not significantly change in the next year). This "plateau" decision also ends temporary wage-loss benefits on the plateau date, but will also refer the worker to Disability Awards to assess the nature and severity of this permanent impairment. In a separate decision, the Disability Awards will rate their impairment according to a schedule and award the worker Permanent Functional Impairment pension in a "Permanent Functional Impairment Decision." The Permanent Functional Impairment pension is awarded regardless of whether the worker returns to work or not, as it is compensation for the permanent physical impairment, not direct compensation for lost wages.

The plateau decision also sets out whether the Board thinks that the worker can return to their pre-injury job, performing full duties, with the impairment. If the worker can return to their pre-injury work, the Board does not need to retrain him and there is no referral made to vocational rehabilitation.

However, if the Board considers that the worker cannot return to full duties with their impairment, the "plateau decision" will state this and the worker will be referred to vocational rehabilitation for further help with employment.

The vocational rehabilitation process is set out below and goes through five phases:

- **Phase one**: Tries to have the worker return to the same job with the same employer.
- **Phase two**: If unable to return to the same employer, works with the worker and employer to modify the job or identify job opportunities within the same company.
- **Phase three**: If unable to return to the same company, tries to help identify suitable job options related to the worker's experience and skills.
- **Phase four**: If the worker is unable to return to the suitable work in the same or related industry, tries to help the worker to identify options in other industries.
- **Phase five**: If the worker needs additional skills in order to return to suitable work, may cover the cost of training to help develop skills.

The first phase is to see if the employer can or will accommodate the worker and their impairment. If there is no accommodation and the worker does not have a job to return to, vocational rehabilitation goes through further phases to assesses what vocational rehabilitation assistance the Board should provide to help the worker become employable, given their permanent injury. Vocational rehabilitation benefits are discretionary but typically include a vocational rehabilitation plan for the worker to re-train and/or have a job search and wage-loss benefits for this period of vocational rehabilitation time. If successful, vocational rehabilitation results in the injured worker successfully adapting to employment with a permanent injury.

It is possible that vocational rehabilitation is not successful or that a seriously injured worker is simply too disabled to ever be competitively employable.

B. Short-Term and Long-Term Average Earnings and Wage Rates

When a compensation claim is accepted, the Board sets the worker's wage rate at two different points in the claims process. All wage-loss related benefits (e.g., loss of earnings, permanent functional disability, and temporary wage loss) are paid according to these rates. If you or your client believe that the benefits do not accurately reflect the pre-injury income, it is vital that you try to correct this as soon as possible.

At the beginning of the claim, the Board sets a short-term wage rate. After 10 weeks, if the worker is still on benefits, the Board sets a long-term wage rate. Both the short-term wage rate and longterm wage rate are set at 90% of net earnings, but the calculation of these earnings are different (in most cases) for the two wage rates.

A worker's short-term and long-term wage rates are based on a determination of "average earnings" for the worker. This determination is a complicated and fact-specific process. There is an entire chapter of the RSCM II devoted to policies surrounding the determination of a worker's average earnings (RSCM II Chapter 9 – Average Earnings). See below for further details.

The general rule for determining a worker's short-term average earnings is to take the worker's earnings as of the date of the injury. For example, if a worker makes $100 per day at the date of the injury, their average earnings will be set at $100 per day. However, this is not an appropriate measure for workers who do not work regular hours. Workers with variable earnings, with more than one job, and several other specific circumstances, will have their short-term average earnings determined in respect of a certain period of time (e.g., over three months prior to the accident) rather than in respect of the date of the accident. (See RSCM II, Policies #64.00–65.05.)

The general rule for determining a worker's long-term average earnings is to obtain the worker's earning and tax status for the 12 months preceding the injury and base the average earnings for the worker on that information.

For both short-term and long-term average earnings, there are exceptions to the above general rules. The exceptions apply workers with a casual pattern of employment, self-employed workers, workers with no earnings, volunteer workers, volunteer firefighters, workers in catholic institutions, emergency services workers, apprentices, workers employed for less than 12 months, and workers in "exceptional circumstances" (see RSCM II, Policies # 67.00 – 67.60).

For example, where the Board decides that a worker has a casual pattern of employment, the short-term average earnings will be based on that worker's earnings over the immediately preceding 12 months of employment. Essentially, this means there is no "short-term" wage rate review, only the "long-term" wage rate. The result is that a "casual worker" who is earning a good wage at the time of the accident will likely be eligible for less compensation during the initial payment period than their counterpart in a "permanent" job. Where the "casual worker" designation has been made in the short-term wage rate decision but is not correct, this may be an important appeal issue.

Note that Practice Directive #C9-9 currently describes a two-step investigation procedure to determine whether a worker's pattern of employment is casual in nature. If the job at the time of injury is scheduled to last for three months or longer, the worker will not be considered a casual worker. If the job is scheduled to last for less than three months, the worker may be considered a casual worker if they have a history of short-term jobs (less than three months in length) with significant absences from employment between them (greater than the time spent employed). However, as Practice Directives are updated and changed on a regular basis, the electronic version should be consulted.

Another example is a "new" worker, defined as when the worker was permanently employed by the employer for less than 12 months before the injury. For this type of worker, section 217 of the WCA [Former Act, s. 33.3] allows the average earnings to be calculated based on what a person of similar status employed in the same type and classification of employment would earn in 12 months. However, section 217 is not applicable where the worker's employment is deemed casual or temporary.

Under section 218 of the Act [Former Act, s. 33.4], the Board may also determine average earnings differently in "exceptional" circumstances, if the one-year average would be "inequitable." This provision does not apply to cases of "casual" workers or to "new" permanent workers as described above. Practice Directive #C9-12 states that an exceptional case is one that is "truly extraordinary," "unusual," or "irregular," such that "the worker's circumstances in the year prior to the injury fail to provide any meaningful measure of their employment history." Examples might include a non-compensable illness or injury, or maternity/paternity obligations. Under this exception, an officer has discretion to seek a long-term average earnings figure that better reflects the worker's real income loss, possibly by excluding a significant atypical disruption (i.e., one lasting more than six weeks) or basing the worker's "average earnings" on a longer or shorter period of time.

Under WCA s. 208(4) [Former Act, s. 33(3.2)], EI benefits are included in the calculation of the worker's earnings for the year if the worker was, in the Board's opinion, employed in "an occupation or industry that results in recurring seasonal or recurring temporary interruptions of work." For a seasonal worker, this is an important distinction. For example, consider a worker injured at work in their first week after returning from a six-month layoff. If this worker were designated as a "casual worker," the Board would simply calculate their earnings over the last year (including the period of the long layoff, but *without* counting EI payments) to arrive at the "average earnings" over the oneyear period before the injury. This figure would set both their short-term wage rate and long-term wage rate, and the only argument for a higher rate would be through the exceptional circumstances covered by section 218 of the *Act*. However, if the worker is found to be in a "highly seasonal" occupation, their EI benefits would add to the calculations of their "average earnings," and greatly increase their long-term wage rate. In addition, their short-term wage rate (for the first 10 weeks) would be set in the usual manner as being their wages at the time of injury.

Where a worker has two jobs and is unable to work at either due to an injury at one, the worker's benefits will be calculated based on their **combined** earnings at both jobs, up to the statutory maximum. This applies even if the worker's other job is not otherwise protected by the WCA (RSCM II Policy #65.02).

In addition to determining the appropriate period of time over which to "average" earnings, the Board will also consider what income should or should not be included in that average. These policies are set out at RSCM II Policies #68.00–68.90, and include topics such as overtime, termination pay, salary increases, benefit plans, strike pay, fishers, and others.

Note also that the WCA places a cap on wage rates that is set out at Policy #69.00 of the RSCM II.

Once the appropriate averaging period and included income amounts have been determined and averaged, deductions are applied so that the worker is receiving wage rates based on their net (or take-home) pay, rather than their gross pay. To calculate the worker's average net earnings, the Board deducts probable EI premiums, probable CPP contributions, and probable income tax. These amounts are estimated, not calculated specifically for the worker (see RSCM II, Policy #71.00).

To do this, the Board establishes a schedule of deductions that apply to short-term average net earnings and long-term average net earnings (see RSCM II, Policies #71.10 and 71.20). For short-term average net earnings, the board applies the scheduled amount of CPP and EI deductions according to the worker's average earnings. The Board will then deduct income tax based on the following credits: the basic personal amounts multiplied by 1.5, and the credits for CPP and EI contributions.

This will mean that individuals who have dependents or other significant tax credits will end up with a net average earnings amount that may not accurately approximate their actual net earnings. However, this is only an issue for the short-term rate.

For long-term average earnings, the Board applies formulas that reflect federal and provincial tax rates and the level of CPP and EI contributions for the immediately preceding calendar year. CPP and EI contributions are determined in a similar manner as in the short-term calculation, and do not necessarily reflect the actual CPP and EI contributions deducted from the worker. However, in estimating tax deductions, the Board will apply the basic personal amounts, EI and CPP credits, and spousal/dependent and/or caregiver credits.

In addition to Chapter 9 of the RSCM II, there are currently 11 practice directives that apply to the calculation of a worker's average earnings and average net earnings. Rather than summarize this complexity, it is best to recognize that the Board's long-term wage rate decision is based on an "average earnings" decision, and that the "average earnings" decision is important to review on its particular facts.

Wage rates are established based on the worker's short-term or long-term average net earnings. The worker receives a wage rate based on 90% of their average net earnings. So, once the short-term or long-term average net earnings have been calculated as above, the wage rate paid to the worker will be 90% of that amount.

Once the long-term wage rate is set, the Board uses this long-term wage rate figure to calculate the amount of any awarded WCB benefits, including pensions, on that worker's claim, for the life of the claim, except in the case of "re-openings" (see below).

Finally, for ongoing benefits, such as pensions, while the initial amount is determined on the basis of the long-term wage rate, the benefit itself is adjusted annually according to inflation, at a rate 1- percent less than the actual inflation rate with a 4-percent cap on inflation adjustments, regardless of whether the actual inflation rate is higher. This applies to all workers, including those injured before June 30, 2002.

1. Recurrence or Deterioration and Wage Rates

A claim may be "re-opened" if a worker suffers a new period of temporary disability and/or an increased degree of permanent disability from a recurrence or deterioration of a previously accepted condition.

Under s. 229(1) of the *Act* [Former Act, s. 35.1(8), a recurrence of an injury is treated as a new injury for any new period of temporary disability. In addition, if the re-opening is more than 3 years after the initial injury, the Board may reset the long-term wage rate for the purpose of calculating additional benefits under the re-opening.

The applicable policy on re-setting long-term wage rates for re-openings over 3 years is Policy #70.20 of the RSCM II. This policy is complex, and it is best to consult this policy in light of the particular facts of each case. This policy affects all workers with long-term disabilities, where their condition recurs or deteriorates.

The re-opening provisions also have particular significance if the worker was injured prior to June 30, 2002, where the long-term wage rate was calculated as 75% of gross earnings and the definition of "average earnings" was different. This worker's re-opening benefits would be calculated under the new policy provisions (90% of net average earnings).

It should be noted that a "recurrence" must be distinguished from a "deterioration." In *Cowburn v Worker's Compensation Board of British Columbia*, 2006 BCSC 722 [1], the court found that it was patently unreasonable to treat a deterioration of a worker's disability as a recurrence of an injury. Accordingly, when a worker's permanent disability that began before June 30, 2002 becomes worse, the increased benefits are based on the older provisions that were in force when the disability first arose (such as pension entitlement). However, a new applicable wage rate may still have to be determined under policy #70.20.

C. Temporary Wage-Loss Benefits

The WCA does not define "disability," although it uses this term throughout the *Act*. Section 191(1) of the Act [Former Act, s. 29(1)] states that if a worker has a temporary total disability ("**TTD**"), the Board must pay full temporary wage-loss benefits (calculated according to the steps above). Section 192 of the *Act* [Former Act, s. 30] states that if a worker has a temporary partial disability ("**TPD**"), the Board must pay the difference between the worker's average net earnings before the injury and either their average net earnings after the injury or the average net earnings in some deemed "suitable" occupation.

If a worker has an injury but can perform the full duties of the pre-injury job, the claim is accepted for health care benefits only (see below). If the injury is such that the worker cannot perform full duties, the Board makes an entitlement decision on an accepted claim regarding additional benefits, especially wage loss. For most claims, the Board finds that there is some type of temporary disability:

- Temporary Total Disability: not working at all – temporary wage-loss benefits paid under s. 191 of the Act [Former Act, s. 29] (see RSCM II, Policy #34.10);
- Temporary Partial Disability: working part-time at a suitable occupation or deemed suitable occupation, and paid partial temporary wage-loss benefits under s. 192 of the Act [Former Act, s. 30] (See RSCM II, Policy #35.10); or
- Temporary Disability with Light Duties: working full-time in suitable light duties as per RSCM II Policy #34.11. In this case, the Board usually does not pay the worker any temporary wage-loss benefits, but the worker's other benefit entitlement (such as health care) is adjudicated under s. 192 of the Act. Policy #34.11 applies to any adjudication of these light duties, including where the worker refuses light duties on the grounds that they are unreasonable.

  NOTE: Light duties are meant to be a temporary arrangement during a period of temporary disability. Even though no temporary wage-loss benefit is paid to a worker, it is still an accepted period of "disability" under the *Act*. During this period, a worker is entitled not only to health care benefits, but also to a decision regarding the outcome of the accepted condition. All periods of "light duty" should conclude with a formal "resolve" or "plateau" decision.

There are a number of RSCM II policies that apply to temporary wage-loss benefits as set out in Chapter 5 – Wage-Loss Benefits. Some key issues covered by those policies include:

- a worker who, while already permanently disabled, suffers a new work injury or relapse (#34.12);
- the minimum level of compensation payable for TTD and TPD wage-loss benefits (#34.20 and #35.23);
- starting date for benefit payments (#34.30);
- strikes or lay-offs (#34.32); and
- vacation or termination pay (#34.41 and 34.42).

A temporary disability ceases when the worker's medical condition either resolves entirely or is not expected to change significantly in the next 12 months. At this point, the medical condition is said to have "plateaued" and is considered permanent (see RSCM II, Policy #34.54). In either case, the Board ceases to pay further temporary wage-loss benefits under ss. 191 or 192 of the *Act* [Former Act, s. 29 or 30] at this point.

D. Health Care Benefits

Health care benefits are payable under ss. 156–161 of the *Act* [Former Act, s. 21] for the period of the worker's disability, and thereafter to "cure and relieve from the effects of the injury or alleviate those effects." Chapter 10 of the RSCM II greatly expands the Board's regulation and control of particular health care benefits including all forms of treatment, medical investigation with specialists, medical aids, and medications. As noted above, if a worker has an impairment but can perform their full pre-injury job, the claim is accepted for health care benefits only (as long as there

is a short episode of disability: see RSCM II, Policy #33.00).

Once an injured worker has reached the "resolve/plateau" point of their injury, they then receive a permanent disability assessment. This may be an issue for workers who are able to return to work with permanent injuries, especially in accommodated positions. Such a worker may be suffering from the effects of their injury but are not considered "disabled." They are entitled to ongoing treatment under ss. 156–161 of the *Act*. Where a worker is denied but disagrees with the result, they may appeal to obtain such benefits.

The Board must pay for necessary medical treatment, including physicians and hospital bills, physiotherapy, drugs, artificial limbs, hearing aids, and special transportation. Allowances for personal care and for structural alterations to the home may also be paid to paraplegics and other severely disabled workers. Practice directive #C10-1 addresses pain medication, sedatives, and hypnotics. Compensation for prescribed opioids and other potentially addictive medications are generally limited to four weeks coverage

WorkSafeBC adjudicates coverage for cannabis in the same manner as it does other requests for health care. Payment for cannabis may be approved where the evidence supports that it is reasonably necessary to alleviate the effects of a compensable condition (Practice Directive #C10-5).

The Board has the right to supervise a worker's treatment (Act, ss. 156-161 [Former Act, s. 21]) and to authorize any surgery. If a worker decides to undergo surgery or other treatment that is not authorized by the Board, the costs may not be paid, and if the injury is worsened by the treatment, benefits may be cut off or reduced. The Board usually agrees to pay for surgery recommended by the worker's own doctor, but the doctor should ask for the Board Advisor's approval. The Board often refuses to pay for drugs or physiotherapy considered unnecessary by its advisors. Medical Aid decisions can be appealed.

E. Income Continuity Benefits

Although classified as vocational rehabilitation benefits (described below), income continuity benefits are payments to provide interim support for the worker after temporary wage-loss benefits are terminated at plateau, but before the amount of a permanent disability pension is determined. A worker's advocate should always request these benefits as they are often the only source of income that a worker will have between the time the worker's condition stabilizes and the time the pension benefits are assessed. These are short-term, temporary benefits.

If a worker refuses employment or to participate in a Board issued vocational rehabilitation plan, they may be refused income-continuity benefits. See Item C11-89.10 of the RCSM II for more information regarding the assessment of income continuity benefits.

F. Vocational Rehabilitation Benefits

The Board usually assesses whether a worker needs assistance to return to work at or near the end of their temporary disability. If the worker has a permanent impairment and is not able to safely return to work without assistance, they are referred to Vocational Rehabilitation.

If a worker is struggling or unsafe near the end of the period of wage loss, an advocate should review the file to ensure a referral to vocational rehabilitation is made. If there is no referral, the advocate may make a direct request to the Case Manager and/or appeal the "resolve" or "plateau" decision on the basis that these decisions do not contain a vocational rehabilitation referral, when one is needed. Items C11-85.00 and C11-86.00 of the RSCM II set out the principles, goals, and eligibility criteria for vocational rehabilitation benefits.

Once a vocational rehabilitation referral is made, the Board may provide a large variety of vocational rehabilitation services to injured workers. These are discretionary benefits under s. 155 of the *Act* [Former Act, s. 16], governed by the policy set out in Chapter 11 of the RSCM II. Generally, the extent of vocational rehabilitation services depends on the nature of the worker's disability.

The policy requires that the assigned Vocational Rehabilitation Consultant consult with the worker and issue a written vocational rehabilitation plan identifying a suitable occupational goal and the vocational rehabilitation services required.

In identifying a suitable vocational rehabilitation plan, the vocational rehabilitation consultant works through five vocational rehabilitation phases, set out in RSCM II, Items C11-85.00 to C11-91.00. In fatal cases, a surviving spouse may be eligible for retraining.

In brief, the phases are:

- **Phase One**: The vocational rehabilitation consultant will make an effort to assist the worker to return to the same job with the same employer (the "accident employer"). This may require some phased-in work programs such as a gradual return to work or work conditioning.
- **Phase Two**: If the worker cannot return to the same job, the vocational rehabilitation consultant works with the accident employer to make worksite accommodations and job modifications, or to provide alternative in-service placement, with a view to finding the worker a new position within the accident employer's business.
- **Phase Three**: If the employer is unable or unwilling to accommodate the worker, the vocational rehabilitation consultant identifies suitable occupational options in the same or related industry. This may require the worker to obtain additional skills or training or to be supported in periods of job search.
- **Phase Four**: If the worker is unable to return to employment in the same or related industry, the vocational rehabilitation consultant explores opportunities in all industries, with emphasis placed on the worker's transferable skills, aptitudes, and interests.
- **Phase Five**: If the worker's existing skills are insufficient, the vocational rehabilitation consultant may utilize additional training programs to help the worker acquire new skills, and may also assist the worker in a job search once training is complete.

The particular vocational rehabilitation benefits which are authorized for the worker are detailed in the formal vocational rehabilitation plan, which should be provided to the worker. The worker's vocational rehabilitation plan is first published as a document, discussed with the worker, and then is set out in a formal appealable decision.

Vocational rehabilitation services can include:

- monthly compensation (in the same amount as wage-loss benefits) to support a worker during a rehabilitation program;
- payment of tuition, books, and other costs of the course itself;
- employability assessments;
- a job search allowance (also in the same amount as wage-loss benefits) to support the worker while looking for suitable employment if they cannot return to the pre-injury job; and
- a training on the job allowance or wage subsidy to encourage an employer to allow the worker to learn new employment skills or gain experience in a new field.

In practice, the Board will only issue one vocational rehabilitation plan and ask the worker to agree to it. The plan must be reasonable. If the worker thinks a vocational rehabilitation plan is not reasonable, they should appeal the vocational rehabilitation decision setting out the vocational rehabilitation plan and ask for a new plan, being as specific as possible as to why the vocational rehabilitation plan is unreasonable, and if possible, what a reasonable vocational rehabilitation plan may be.

If a worker is cooperating with vocational rehabilitation re-training, they should continue to receive benefits at the full wage-loss rate. If a worker is appealing a vocational rehabilitation plan as unreasonable, the worker may wish to keep cooperating with the challenged vocational rehabilitation plan during the appeal period in order to continue receiving benefits.

Vocational rehabilitation benefits, under a formal vocational rehabilitation plan, may be terminated for reasons set out in Item C11-88.00 of the RSCM II. These reasons include if the worker is not cooperating, if they withdraw for personal reasons, if they refuse suitable employment, or if they are prevented from participating by non-compensable medical, psycho-social, or financial problems. If the worker believes that the Board's reasons for terminating vocational rehabilitation benefits are inaccurate or wrong, the termination decision should be appealed. This is particularly important if the worker is failing in vocational rehabilitation due to some aspect of their medical condition.

At the end of the vocational rehabilitation process, the vocational rehabilitation consultant issues a decision about the worker's future earning capacity in a suitable occupation, and whether vocational rehabilitation has restored it to near its pre-injury level. Based on this decision, the Board then determines whether the worker should be considered for a loss of earnings pension.

Only the WCB's Review Division can review rehabilitation decisions; The Review Division decisions on vocational rehabilitation cannot be appealed to the Workers' Compensation Appeal Tribunal (WCA, s. 288(2) [Former Act, s. 230(2)]).

While the Board routinely relies on the vocational rehabilitation consultant's decision regarding the worker's employability, WCAT may not consider these vocational rehabilitation decisions as binding on them when adjudicating a loss of earnings pension issue on appeal. For example, a vocational rehabilitation consultant may find that a worker can adapt to working full-time in a particular occupation. If the worker disagrees about this decision, the worker may raise this issue and provide evidence about disability in their appeal of a denial of a loss of earnings pension, both at the Review Division and WCAT. WCAT does, on occasion, make decisions that essentially overturn a Review Division finding as to the employability of a particular worker. However, on judicial review, this may lead to difficulties as it can be argued that WCAT's decision was made without jurisdiction.

> **NOTE**: Many difficulties in this area arise from different concepts of disability and employability. The Board tends to assess a worker's permanent disability in terms of impairment and to limit its assessment of impairment to "medical restrictions and limitations" ("R&Ls"),i.e., specific activities which the worker cannot do or should not do at all because of potential harm. R&Ls may or may not include other aspects of limited ability such as tolerance or endurance (such as an inability to sit for more than 10 minutes) which are key elements of work function. Also, disabled workers often face discrimination and other barriers to employment. Court decisions have been clear that vocational rehabilitation processes must address the whole worker, including any pre-existing disabilities or factors affecting employment (*Young v WCAT*, 2011 BCSC 1209 [2]), but this remains a contentious area and one that the Board does not consider part of the "compensable" condition

G. Permanent Disability Pensions

Once a worker's condition has stabilized or "plateaued," i.e., is not likely to get significantly better or worse in the next 12 months, temporary wage-loss benefits will cease. If the worker continues to have some disability, they will be assessed for a permanent disability pension. A disability pension is possible if WCB determines that the worker has been left with a permanent disability.

A case manager will determine which conditions or injuries are permanent and refer the worker for assessment. Decisions not to refer a worker at all or to exclude certain injuries or conditions are appealable to the Review Division and, if necessary, to WCAT.

A WCB "pension" is how the Board compensates an injured worker for a permanent disability. There are two possible methods for calculating a pension – compensation for permanent functional impairment, or compensation for loss of earnings (detailed below). If a permanent partial disability is accepted, WorkSafeBC will consider **both** methods and select the method which will provide the **larger award**.

Workers who also qualify for Canadian Pension Plan (CPP) disability benefits will have one-half of those benefits deducted from their WCB pensions (this could amount to as much as $577 per month, half of the $1153 maximum currently payable by CPP). This deduction represents the employer's share of the benefits paid for the same disability as the WCB claim. If a CPP pension is partly based on non-compensable disabilities, no deduction will be made for that portion of the CPP (See RSCM II, Item C6-36.10).

1. Permanent or Partial Total Disability Benefits

When the Board determines that a worker has a permanent functional impairment, the Board must determine whether the functional impairment is a Permanent Total Disability ("**PTD**") or aPermanentPartial Disability ("**PPD**"). Sometimes, this will be obvious, such as in cases of paraplegia or blindness. In other cases, the Board must conduct an assessment to determine the degree of impairment. If the impairment is 100%, the worker has a PTD. If it is anything less than 100%, the worker has a PPD. This is an important distinction, as PTD and PPD benefits are calculated under different sections of the *Act* and have different minimum payable amounts.

There are two methods used to calculate a worker's degree of impairment: the functional impairment method – often referred to as the loss of function method ("**LOF**") – or, the loss of earnings method ("**LOE**").

The Board will consider both methods and will use the method that provides the highest award to the worker (Act, s. 195–196 [Former Act, s. 23]).

2. Loss of Function Method

The LOF method compares the worker's degree of physical impairment to that of a totally disabled person. The percentage of impairment is usually based on the RSCM's Permanent Disability Evaluation Schedule (PDES). It is important to note that this is an objective measure, i.e., the amputation of a thumb would result in the same degree of impairment for a carpenter as for an accountant under the LOF method, even though it may be a far more disabling injury for the carpenter.

Generally, only disabilities that could reduce earning capacity receive compensation, and there are no payments for pain and suffering or loss of enjoyment of life. The Board's policy manual contains detailed schedules of percentage of impairment for different types of disabilities. Types not listed are estimated, and there is usually some degree of discretion in the process.

Item C6-39.00 of the RSCM II says that the PDES is meant to be a guideline and not a rigid formula. The WCB is free to apply other variables in arriving at a final award, but they must relate to degree of impairment and not social or economic

factors, or rules established in other jurisdictions. In practice, the PDES is applied with little discretion.

Note that loss of function awards for chronic pain are capped at 2.5% per area of pain (RSCM II, Item C6-39.10).

As stated above, if the LOF method leads to a finding that the worker is 100% disabled, they will be paid PTD benefits pursuant to s. 194 of the *Act* [Former Act, s. 22]. If the LOF method leads to a finding that the worker is less than 100% disabled, they will be paid PPD benefits pursuant to s. 195–196 of the *Act* [Former Act, s. 23].

Note that even if a worker is found to be 100% unemployable pursuant to the LOE method described below (i.e., their loss of earnings is complete), it does not necessarily make them 100% functionally disabled, because the LOE method may incorporate personal information about the worker (such as a criminal history) that makes the worker unemployable even though the injury did not cause a 100% functional impairment. As such, a 100% unemployable worker will still be paid benefits pursuant to s. 192 of the *Act* [Former Act, s. 30(2)].

3. Loss of Earnings Method

The LOE method compares the long-term wage rate that a worker was able to earn per year before the injury to what the worker is able to earn after the injury, based on occupations that are suitable for and reasonably available to that worker. Unlike the objective LOF method, the subjective LOE method takes into account the specific worker. I.e., the LOE method would likely find that the loss of earnings related to an amputated thumb is greater for the carpenter than it is for the accountant, because the accountant can likely return to their pre-injury job, but the carpenter cannot.

Where workers are unable to replace their pre-injury earnings, the WCB often "deems" them capable of earning significantly more post-injury than they are actually earning or can earn following an injury. For example, a worker who cannot return to a pre-injury job that paid $4000 per month may find new employment for $2000 per month. Instead of accepting the worker's own experience, the Board may decide that, over the long term, the worker can find a different kind of job that pays $3000 per month, and calculate the benefits accordingly. Instead of getting a loss of earnings pension representing the actual $2000 per month the worker is losing, they would receive a pension based on the $1000 the Board "deems" them to be losing.

Workers may disagree with Board decisions. Common situations are that the worker believes the Board has underestimated the extent of physical or psychological limitations they have due to their injury and/or pre-injury background, or underestimate the demands of the deemed occupations the Board says they can perform. Workers may also disagree with the assessment of what they are capable of earning over the long term in the deemed occupations, therein deeming them capable of theoretical earnings that exceed what is reasonably suitable and available for them. If a worker appeals a loss of earning decision, then they should provide evidence of why the decision should be changed.

H. Benefits After Age 65

Item C6-41.00 of the RSCM II states that payments for permanent disability pensions end at age 65 unless the WCB is satisfied that the worker would have retired at a later date. WCA s. 201(3) states that a determination as to whether a worker would have worked passed the age of 65 can be made by the Board after the individual reaches the age of 63. Note that this change was introduced in 2021 and, before that time, retirement age was assessed as of the date of the injury, regardless of the age of the worker.

At age 63, the worker is asked to provide independent verifiable evidence that they had plans to work beyond age 65. Elements that make up a plan would include a concrete pathway towards continued employment, as well as a financial need to remain in the workforce. This evidence can include the following:

- Names of the employer or employers the worker intends to work for after age 65, along with confirmation from the employer;

- A description of the type of employment the worker is going to perform, along with evidence showing the worker actually has the capacity to perform the work;
- Evidence from other professionals that it is normal to continue work beyond 65 in that profession. This would include retirement age set by unions; and
- Financial obligations of the worker or family, such as a mortgage or other debts.

I. Benefits in Fatality Cases

When a worker is killed as a result of a workplace injury, dependants of that worker can apply to the Board for benefits. Dependants include family members that are dependent on the worker's earnings, as well as a spouse, child, or parent that had a reasonable expectation of pecuniary benefit from the continued life of the worker (see RSCM II, Item C8-53.00).

A child eligible for compensation includes a child less than 19 years of age, a child of any age who had, at the date of the worker's death, a physical or mental disability that resulted in the child being incapable of earning, and a child less than 25 years of age who attends a school.

Spousal benefits are not lost upon re-marriage, and survivors' pensions are not terminated when the worker would have reached age 65 (see WCA, s. 168, as well as s. 225 for death before July 1, 1974; [Former Act, s. 19.1]).

Where death results from a compensable injury or industrial disease, the surviving dependents may receive lump-sum payments or monthly pensions based on the deceased worker's earnings. These pensions cannot exceed the statutory maximum and are adjusted in accordance with changes in the Consumer Price Index. The amount of the pension for spouses without dependent children depends on the surviving spouse's age (WCA, s. 170 [Former Act, s. 17(3)(d)]).

A separated spouse may receive benefits based on the amount of support the deceased worker would likely have contributed had they survived (s. 178; previously 17(9)). A common-law spouse is entitled to benefits after three years of cohabitation or after one year if there are children. However, compensation may not be paid, or may be reduced, if there is a separated spouse as well.

Benefits in fatality cases can be complex, particularly if any apportionment between dependants is required. Chapter 8 – Compensation on the Death of a Worker of the RSCM II should be consulted.

J. Suspension of Benefits

Benefits may be suspended if:

- a worker persists in unsanitary or injurious practices, which tend to **prevent or slow recovery**;
- a worker refuses to submit to medical or surgical treatment, which, in the opinion of the WCB, is **reasonably essential** in promoting recovery;
- a worker fails to attend a medical examination arranged by the Board; or
- a worker is in prison, in which case benefits will cease, or be paid to their dependents.

The Board may also divert compensation from a worker for the benefit of their dependents if the worker is not supporting them.

Under s. 153 of the WCA [Former Act, s. 57.1], the Board may withhold or reduce benefits for any period the worker does not provide the requested information (unless the Board finds that it was unclear in communicating the requirement, or erroneously concluded that the worker was being uncooperative). However, such benefits will be paid when the worker provides the necessary information.

K. Emergency Assistance

Many workers need immediate income if they are waiting to be accepted, or their benefits have been disallowed or terminated. They should consider alternate sources: social assistance, which may provide a crisis grant for immediate temporary relief or longer-term relief if a decision is being appealed, EI sickness benefits, CPP disability pensions, any plans available through their place of work or union, ICBC (if an automobile was involved), or private disability insurance.

L. "Resolved/Plateau" Decision Letters

There are other key decisions in a worker's claim including the initial decision to accept or deny a claim and any vocational rehabilitation or pension decision. Additionally, it is important to note the decision that is issued at the end of a period of temporary disability. This decision, referred to as a "resolved/plateau" decision, usually includes several key decisions, each of which may be appealed. Briefly, the decisions usually embedded in the "resolve/plateau" decision include:

1. Has the Worker's Injury/Occupational Disease Stabilized?

The first key issue is an accurate medical assessment of the worker's compensable condition at the critical point of a "resolve/plateau" decision. As noted above, if a work injury or Occupational Disease has resolved entirely, the Board issues a "resolve" decision and the claim file is closed. If the injury has only stabilized, then the Board issues (or should issue) a "plateau" decision. If the injury has not yet stabilized, the Board should continue to treat it as a temporary disability with temporary benefits (wage-loss and/or health care benefits).

An appealable matter arises if the Board issues a "resolve" decision but the worker or the medical evidence indicates that there are ongoing effects, conditions, or impairments from the injury (e.g., chronic pain). In this case, both the medical evidence and the Board's adjudication should be assessed. The medical evidence should be assessed to determine if the compensable conditions are still temporarily disabling (i.e., the worker is not able to fully return to pre-injury work) so that the worker continues to be entitled to temporary ongoing benefits, or if the compensable conditions have reached a "plateau" as defined by RSCM II Policy #34.54 and the worker is entitled to a referral to Disability Awards and (sometimes) Vocational Rehabilitation.

The issue of "fully resolved" vs. having reached a plateau is a medical issue. "Fully resolved" means that there is no permanent or ongoing residue or impairment from the injury. If the claim is concluded on the basis that the compensable condition has "fully resolved," then no further benefits flow and it will be very difficult to reopen the claim later. If the injury is not fully resolved medically,the file should not be closed. Just because a worker returns to pre-injury employment (with no disability so no wage loss), it does not mean that the injury is "fully resolved"; The injury may have stabilized into a permanent impairment that is not disabling. If the worker is issued a "resolve" letter and there are ongoing medical issues or symptoms, the "resolve" decision should be appealed.

If the condition has not resolved but you are unsure whether it is still a temporary or permanent disability, RSCM II Policy #34.54 gives the criteria for making a determination between temporary and permanent conditions in this context. Basically, the policy states that a medical condition is "stabilized" when there is little potential for improvement or where any changes are in keeping with the normal fluctuations for that condition. Most doctors know the term "plateau" in this sense, and the worker's GP may well address this matter in the last report on the claim file (found in the medical section).

2. Plateau Date

If the worker has plateaued, there should be a particular date identified in the decision letter as being the date of "stabilizing," "maximum medical recovery" (MMR) or "plateau." You can assess whether this date is appropriate by considering:

- Have all the compensable conditions been considered?
- Is it appropriate given the criteria in RSCM II Policy #34.54 and the medical evidence?

Example: If further treatment (physiotherapy or surgery) is likely to make a significant change in the worker's condition within three months, then the condition should continue to be temporarily disabling and the worker should get temporary wage-loss benefits until then.

3. Which Permanent Conditions are Accepted or Denied?

In the plateau decision letter, the Case Manager sets out which exact conditions are accepted as permanent. These permanent conditions may be somewhat different than those originally accepted on the claim. For example, if a worker falls and suffers multiple injuries, some of the injuries are likely to fully resolve (e.g., sprains) while others can potentially leave a residual impairment (e.g., broken leg which mostly heals but leaves the worker with a limp). Other injuries will leave a very significant permanent impairment (e.g., mild brain injury). It is also possible that the worker has developed additional conditions during the temporary period (e.g., infections, psychological conditions, chronic pain, addiction, etc.).

Typically, as a worker nears plateau, the Case Manager refers the claim to a Board Medical Advisor (BMA) to assess whether the worker has reached plateau, and to determine the likely plateau date and what permanent conditions should (and should not) be accepted on the claim. The BMA assessment may or may not be explicitly referenced in the plateau decision. The complete BMA opinion can be found as a "Clinical Opinion" in the medical section of the claim file.

4. Accepted and Denied Conditions

It is **very** important to carefully assess which conditions are accepted and denied as permanent on the claim, as these conditions will likely govern all future benefits. All plateau decisions should include a referral to Disability Awards for assessment of the permanent disability.

The plateau decision may also set out why certain medical conditions are denied as compensable permanent conditions. For example, if the Board finds that the identified conditions have resolved and the worker disagrees, this is a very important appeal. Sometimes the medical evidence on the claim file is sufficient to establish that the condition has not resolved; If not, the worker will likely need additional medical evidence.

Another common reason for denying permanent conditions is that the Board considers that the conditions pre-existed the injury, and were not permanently aggravated by the injury, even if there was a temporary aggravation. There are two distinct types of pre-existing conditions:

- The pre-existing condition or disease was **non-deteriorating**:

  As set out in RSCM II Item C3-16.00 for injury and Item C4-25.20 for Occupational Disease, if the post-plateau condition is not significantly worse than before the injury, then the condition was not permanently aggravated by the work injury/Occupational Disease. This is an issue for which medical records are important.

- The pre-existing condition or disease was **deteriorating**:

  If the worker had a pre-existing deteriorating condition, the test is whether the work injury "accelerated, activated, or advanced" the condition more quickly than would have occurred in the absence of the work injury (RSCM II

Item C3-16.00). The Board commonly denies permanent disability on the basis that it arises from a natural degeneration of a pre-existing condition such as degenerative disc disease or osteoarthritis.

5. Missing Conditions

The plateau decision (accepted and denied conditions) may not fully encompass the medical conditions which are noted by the worker or by the medical practitioners. This is best seen by comparing the decision letter with the medical evidence. If the decision is silent on a medical condition, you can ask for a new or additional decision from a case manager. Alternatively, if you are appealing the plateau decision on other grounds, in the appeal you can ask for a remedy that additional conditions be accepted on the claim.

6. Can the Worker Return to the Pre-Injury Job?

A case manager's decision that a worker can return to their pre-injury job is considered to be a finding of fact and not an appealable decision. In the context of a plateau decision, this return-to-work finding means that the Board considers that the accepted permanent conditions do not impair or disable the worker from their pre-injury job.

If this is not the case, this is a very important issue to challenge. Since an appeal of a plateau decision often involves seeking additional temporary wage-loss benefits, a new plateau date, additional permanent conditions, etc., the return-to-work finding of fact can be addressed in the context of these additional issues.

However, if there are no other issues in the plateau decision other than this return-to-work finding, the plateau decision should be appealed on the grounds that the worker cannot return to their pre-injury job and is entitled to additional vocational rehabilitation benefits. Framing the appeal issue in this way ensures that the Review Division has an entitlement decision to address.

7. Referral to Vocational Rehabilitation

If the Board finds that the worker cannot return to their pre-injury job, then the case manager will most often refer the case to vocational rehabilitation for vocational rehabilitation benefits.

References

[1] https://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc722/2006bcsc722.html?autocompleteStr=Cowburn%2520v%2520Worker%25E2%2580%2599s%2520Compensation%2520Board%2520of%2520British%2520Columbia%252C%2520autocompletePos=1

[2] https://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1209/2011bcsc1209.html?autocompleteStr=2011%2520BCSC%25201209&autocompletePos=1

XII. Appeals

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

If the worker (or the employer) disagrees with a Board decision, they may appeal the decision to the Review Division ("**RD**") **within 90 days** of the Board's decision. The RD is a review body internal to the Board. Links to RD material, including RD appeal forms, are available on the Board website (www.worksafebc.com/en/review-appeal [1]). The RD must issue a decision **within 180 days** of the appeal being filed. The RD decision may then be appealed to an independent tribunal, the Workers' Compensation Appeal Tribunal ("**WCAT**") **within 30 days** of the RD decision. WCAT appeal forms are available on the WCAT website: www.wcat.bc.ca [2].

Section 123(1) of the *Act* [Former Act, s. 96(4)] does allow the Board to "reconsider" **any** past decision, on its own initiative, but s. 123(2) of the *Act* [Former Act, s. 96(5)] prohibits it from doing so if a decision is more than **75 days old**, unless there has been fraud or misrepresentation (such as when video evidence may show that the worker is less disabled than claimed) or if there is a clear error or omission. The Board interprets this to mean that the reconsideration **must be completed**, not just initiated, by the 75th day.

Please note that once a request for a review has been filed, the CM is no longer allowed to proceed with a reconsideration.

A. Internal Review: Workers' Compensation Review Decision

A worker, a deceased worker's dependant, or an employer may request a review of any of the following decisions of the Board:

- a decision respecting a compensation or rehabilitation matter (e.g., denial of benefits, or quantum of benefits);
- a decision levying payment by the employer for failure to comply with the statute;
- a decision respecting an occupational health or safety matter; or
- a decision respecting an application to reopen a matter because of a recurrence of injury or significant change in a compensable medical condition.

The Review Division may also reconsider its own decisions in some cases. It can only undertake such a reconsideration during the first **23 days** after the decision is made, and only if no appeal has yet been filed to WCAT. Once a reconsideration is directed by the Chief Review Officer, the Review Division can change a decision on the basis of new evidence that didn't exist or couldn't have been presented previously with "due diligence" on the part of the applicant.

Once the period for directing a reconsideration has passed, the matter must be appealed to WCAT. For decisions that cannot be appealed to WCAT, like vocational rehabilitation issues and many pension amounts, there will be no way for anyone in the system to change an incorrect decision based on new evidence, even if it could not possibly have been presented earlier and shows conclusively that the decision was wrong. The matter must be taken to judicial review.

1. Appeal Procedure: Workers' Compensation Review Decision

A complete account of the review process goes beyond the scope of this chapter. A good starting point in preparing a review of the Board's decision is to go to www.worksafebc.com [3] and look for the "Manage a Claim" section found under the "Claims" menu. Follow the link under the heading "If you disagree with a claim decision." There is a Policy and Procedures Manual that describes the process in detail, as well as provides the necessary forms and applications. Limitations as to what kinds of decisions can be appealed, and what persons can appeal them, are clearly stated within

this section.

To request a review, the worker must complete and submit a two-page Request for Review form (available online). This form may be submitted by mail or by fax. See **Appendix G: Checklist for Review Division Appeals**.

B: Appeal to Workers' Compensation Appeal Tribunal (WCAT)

A worker, a deceased worker's dependant, or an employer may appeal most decisions of the Review Division to WCAT. The following classes of decisions may **not** be appealed to WCAT (WCA, s. 288 [Former Act, s. 239] and *Workers Compensation Act Appeal Regulations*, BC Reg 321/2002):

- a response to a workers complaint respecting prohibited action or failure to pay wages (Act, s. 50 [Former Act, s. 153]);
- decisions respecting vocational rehabilitation (Act, s. 155 [Former Act, s. 16]);
- amount of a functional pension if the possible range is 5% or less, and commuting a pension into a lump sum payment (WCA, ss. 195, 230 and 231 [Former Act, ss. 23 and 35]);
- decisions applying procedural time limits specified by the Board under s. 338 of the Act [Former Act, s. 96(8)];
- decisions refusing to allow an extension of time to file a request for review (Act, s. 270(2) [Former Act, s. 96.2(4)]);
- decisions relating to the conduct and procedural policies implemented by the Review Division for the internal review (Act, ss. 272(2) to (5) and (8) [Former Act, s. 96.4(2) to (5) and (7)]);
- orders by the chief review officer as to whether or not to suspend the operation of a decision pending completion of the review (Act, s. 270(3) [Former Act, s. 96.2(5)]);
- decisions about whether or not to refer a decision back to the Board following completion of the Review Division hearing (Act, s. 272(9)(b) [Former Act, s. 96.4(8)(b)]); or
- decisions respecting the conduct of a review in respect of any matter that cannot be appealed to WCAT under s. 288(2)(b)–(e) of the Act [Former Act, s. 239(2)(b)–(e)].

As an administrative tribunal, WCAT is subject to the expectations of procedural fairness common to all such bodies (i.e., an appellant's right to be heard, right to a decision from an unbiased decision maker, right to a decision from the person who hears the case, and a right to reasons for the decision). As an independent body, WCAT is not bound by any WCB findings and has exclusive jurisdiction to make any findings of fact it deems relevant to the appeal (pre-revision WCA s. 254 as interpreted in *Preast v Workers' Compensation Appeal Tribunal*, 2015 BCCA 377 [4] – this likely applies to its revised equivalent, the current s. 308). Additionally, WCAT is not bound by its own previous decisions unless departing from them is clearly irrational (*Macrae v Workers' Compensation Appeal Tribunal*, 2016 BCSC 133 [5]).

WCAT's *Manual of Rules of Practice and Procedure* (MRPP) is accessible online at www.wcat.bc.ca [2], as are appeal forms, guidelines, and information about filing appeals.

1. Appeal Procedure: Workers' Compensation Appeal Tribunal

The best starting point to prepare an appeal to WCAT is to go to the website: www.wcat.bc.ca [2]. The "Resources" section provides access to various appeal forms, as well as an info sheet with further information on the appeals process. The WCAT site also contains a detailed manual. Parties applying for reconsideration must write to the Tribunal Counsel Office. WCAT will not accept applications for reconsideration by telephone. After WCAT makes a decision to allow an appeal, WCB implements it into its decision. Note that WCAT can reimburse workers for the cost of acquiring medical reports that are reasonably useful to the hearing.

2. Clarifications, Corrections, or Missed Issues

WCAT may correct accidental errors or omissions (such as typographical or numerical) if the appellate requests corrections. The appellate should request clerical corrections as soon as possible and WCAT aims to have them amended within 90 days. WCAT may **clarify** their decision if it is not clear. The appellate must request clarification in writing **within 90 days** of the date the decision was served, and the panel will decide if clarification is necessary. If WCAT did not **decide** on an issue in the appeal, the appellate must request this in writing to the Tribunal Counsel Office. If the panel that made the decision agrees that they did not decide on an issue in the appeal, then they will complete the decision by writing an addendum to the decision.

3. Reconsideration of WCAT Decisions

WCAT may reconsider a final decision for very limited reasons after its reconsideration powers were considered by both the BCCA and the SCC in the *Fraser Health Authority* [6] case, supra.

Under the WCA, a WCAT panel may change the outcome of a WCAT decision if there is new evidence. In addition, WCAT may still reconsider a WCAT decision under common law grounds if there is procedural unfairness or a true **jurisdictional error**.

> **Note**: A "true jurisdictional error" is an argument that should be used with caution, as the SCC has ceased recognizing jurisdictional questions as a separate category of questions separate from any other type of question on judicial review. See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [7], at paras 65–68.

On these grounds, WCAT may rehear all or part of the appeal and come to a different conclusion. However, WCAT **cannot** change the outcome of a WCAT decision because it is incorrect, unreasonable, or patently unreasonable. In this respect, the WCAT decision is final, reviewable only by a court on judicial review, with a time limit to apply for judicial review of **60 days** under the *Administrative Tribunal Act*.

Information regarding reconsideration of WCAT decisions is available on the PostDecision Information Guide on the WCAT website. There is **no time limit** on applying for reconsideration. To apply for reconsideration, a worker may fill out the Application for Reconsideration form and send it in to the Tribunal Counsel Office. A worker can also apply for reconsideration by writing a letter to the Tribunal Counsel Office explaining how they meet the grounds for reconsideration.

WCAT makes a **jurisdictional error** if it:

- decided on something it had no power to decide (e.g., if WCAT tried to make a binding decision on a residential tenancy issue when it only has authority to make decisions on workers' compensation issues);
- failed to decide on something it was supposed to decide (e.g., a worker properly appealed a decision and WCAT refused or failed to make a decision);
- was procedurally unfair (e.g., WCAT was unfair in its decision-making process, such as refusing to allow a worker to make submissions for an appeal).

Section 310(3) of the WCA [Former Act, s. 256(3)] allows for a party to a completed appeal to apply for reconsideration of a decision based on new **evidence** which:

1. is substantial and material to the decision, and
2. did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

If you apply for reconsideration based on new evidence, **you must explain**:

- why the new evidence is substantial (i.e., how it has weight and supports a different conclusion);
- how it is material (i.e., how it is relevant to the decision);
- whether or not the evidence previously existed; and
- if it did exist previously, why you did not discover (and submit) it at the time of the original hearing.

A claimant can only apply once for reconsideration on each ground, so it is important that they are ready. This can be done at the same time or separate times for each ground. If applying for reconsideration of evidence, include the new evidence in the application. You will not be able to re-apply multiple times for any new evidence that might become available in the future.

The first stage of reconsideration results in a formal written decision, issued by a WCAT panel, determining whether there are grounds for reconsideration. If the panel concludes that there are no grounds for reconsideration, WCAT will take no further action on the matter. If a panel decides that there are grounds for reconsideration, the original decision will then be found void (in whole or in part) and the application will proceed to the second stage at which a WCAT panel will hear the appeal once again. WCAT will decide whether the second stage will be conducted by oral hearing or written submission.

WCAT has the authority to reconsider both WCAT and the former Appeal Division decisions. WCAT does not, however, have the authority to reconsider decisions by the former Review Board or the current Review Division. Objections to those decisions will be treated as appeals or applications for extensions of time to appeal. Additionally, WCAT cannot reconsider its own decisions for unreasonableness, patent unreasonableness, or error (*Fraser Health* [6], supra).

In view of the finality of these provisions, especially where a decision has not been appealed, any worker who is not completely satisfied with a decision should request a review by the Review Division and, if allowed, an appeal to WCAT. This will preserve a residual right to present new evidence in the future, even if the appeal is unsuccessful.

WCAT decisions are accessible on the website under “prepare your case,” which is listed under “appeal a decision.” To view previous WCAT decisions made on applications for reconsideration, you can select “Search past appeal decisions [8]” under “review decisions for appeals that are similar.”

C. Judicial Review (JR)

A party may apply for judicial review at the same time that they apply for a reconsideration of a decision from WCAT. A party must apply for judicial review of a WCAT decision by the British Columbia Supreme Court **within 60 days** of the date on which a decision is issued. Under certain circumstances, the court may extend the time for applying. Due to clear language in the *Administrative Tribunal Act*, Judicial Review of WCAT decisions are held to the standard of patent unreasonableness on most questions (constitutional issues and questions of so-called true jurisdiction are exceptions). This is the highest level of judicial deference and limits the court's ability to interfere unless the decision was “openly, evidently, clearly wrong” (*Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 S.C.R. 748 [9]; *Fraser Health* [6], supra).

Possible judicial review cases should be referred to lawyers, as it is very difficult to file and conduct a judicial review case without a lawyer’s assistance. See **Chapter 5: Public Complaints Procedures** for more information about judicial review.

Note that if Judicial Review and reconsideration are both possible, it is advisable for the worker to file their paperwork for Judicial Review within the 60-day time limit and then apply for reconsideration. This ensures that they will still be able to pursue Judicial Review if their reconsideration is denied.

According to *Denton v British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 40 [10], where an appeal raises constitutional issues, those issues must be raised prior to the JR stage at the British Columbia Supreme Court. Both the Review Division and WCAT have the authority to hear constitutional issues.

D. Access to Files

Under the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 (FIPPA), all workers have the right to receive a copy of their file. Employers have the right to obtain a copy of the Board's file if an appeal is pending or if a decision is made. The *Act*, however, limits an employer's ability to use this information in non-employment related issues. An employer, for example, may not use the information contained in the worker's file for disciplinary purposes.

A worker's WCB claim file that is disclosed for purposes of an appeal or a Freedom of Information request should contain all of the information pertaining to the Board's decision, as well as copies of any decisions regarding the claim.

Prior to May 2009, a file was divided into various sections such as Claims, Medical, Accounts, and Memo. Usually, the papers were filed in chronological order. Files are organized differently under the CMS data management system. Now, the preferred method of disclosure is by way of an encrypted .pdf file on a CD. The first disclosure will be a complete copy of the file, not just an update.

Overall, the adoption of electronic (e-file) rather than paper files has reduced administrative delays due to files being in use by other departments at the WCB or WCAT, but it has also decreased the detailed information explaining how decisions were reached, as handwritten notes and other documents are sometimes omitted. A request for disclosure under the FIPPA usually results in a more thorough search for such records and is occasionally advisable in cases where all information is needed. At times, the Board may not disclose all of the relevant evidence in its possession. Some of the missing information may be helpful for appeals, such as the actual observations of the Board's staff during a functional evaluation, rather than just a final report.

References

[1] http://www.worksafebc.com/en/review-appeal
[2] http://www.wcat.bc.ca
[3] http://www.worksafebc.com
[4] https://www.canlii.org/en/bc/bcca/doc/2015/2015bcca377/2015bcca377.html?autocompleteStr=Preast%2520v%2520Workers%25E2%2580%2599%2520Compensation%2520Appeal%2520Tribunal%252C%25202015%2520BCCA%25203&autocompletePos=1
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[7] https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18078/index.do
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XIII. Health and Safety Regulations in the Workplace

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

The WCB is also responsible for enacting and enforcing health and safety regulations under Part 2 of the *Act* [Former Act,Part 3] through WCB's *Occupational Health and Safety Regulation*, BC Reg 296/97 (OHS). These regulations can be found online [1]. Workers or employers interested in the regulations can be referred to the Board's Health and Safety Department. The date of enactment should always be checked to determine which version was in effect at the time of injury.

A. A Worker May Refuse Unsafe Work

Under the existing OHS, Part 2, a worker may refuse work that is unsafe. The worker must not carry out any work process if they have reasonable cause to believe that it would create an undue hazard to the health and safety of any person.

The right to refuse continues until the employer has taken remedial action to the satisfaction of the worker, or an officer has investigated the matter and advised the worker to return to work.

A worker who has exercised their right to refuse unsafe work must immediately report the refusal and the reasons for it to their supervisor or to the employer. The worker must remain available at the workplace during normal working hours until the investigation is complete. The employer may give the worker different duties to perform until the matter is resolved, and it may assign another worker to the job in question if the risk is specific to the worker (such as a person with a bad back being told to lift heavy boxes, or an untrained person being told to operate equipment).

B. Prohibition Against Discriminatory Action

Section 48 of the WCA [Former Act, s. 151] states that an employer or union must not take or threaten any retaliatory action against a worker for exercising any of their rights under Part 2 of the *Act* [Former Act, Part 3]. A non-exhaustive list of such discriminatory actions is provided in s. 47 of the *Act* [Former Act, s. 150]. This list includes: suspension, layoff or dismissal; demotion; reduction in wages; transfer of duties or of location; coercion or intimidation; and the imposition of any discipline, reprimand, or penalty.

Note that the "bare filing of a claim," that is, filing a claim that is a request for compensation only and does not allege OHS violations, does not engage the protection of s. 48 of the Act (WCAT2015-01946).

Complaints should be made in writing to the Board within the time limits set out in s. 49 of the *Act* [Former Act, s. 152]. Section 49(4) of the *Act* [Former Act, s. 152(2)] places the burden of proving that the alleged discriminatory action did not occur on the employer or union as applicable. The Board has been given a wide range of remedies under s. 50 of the *Act* [Former Act, s. 153]. It is important to note that this section is not for human rights complaints, but only for retaliation against a worker for exercising the rights provided by the WCB system.

References

[1] https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-regulation

XIV. Assessments of Employers

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

The theory behind the workers' compensation system is that the risk of loss through occupational disease or injury resulting from the workplace should be borne by the industry as a cost of doing business. The WCA is administered by the WCB, which is an independent administrative agency created by the provincial government. The program is funded by compulsory assessments on employers, which make up the Accident Fund. These assessments must be paid by the employer and cannot be deducted from the employee's pay (WCA, s. 118 [Former Act, s. 14]). The Board gets preferential treatment in its power to collect from an employer. An employee whose employer is subject to the WCA is covered by the WCA regardless of whether or not the employer pays premiums.

Industries are divided into classes and sub-classes. The total assessments for each class are fixed according to the principles of collective liability. The Board is to collect sufficient money to cover the past and estimated future costs of all the claims from workers in each sub-class. Each employer then pays its share, based on the size of its payroll and adjusted for the number of claims against the employer under the Board's "experience rating" scheme. One negative effect of the experience rating system is that employers obviously have an economic interest in contesting their workers' claims. This makes the system more adversarial, which might be seen to contradict the principles of Workers' Compensation.

Some self-employed contractors are considered employers under the *Act* and are therefore assessed as such. These self-employed workers can purchase "personal optional protection" ("POP") to cover their own risk of injury, in addition to the assessments they are required to pay to cover their risk as employers. This arrangement is common in the logging, transportation, and construction industries.

XV. The WCB Fair Practices Officer

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

The WCB has a Fair Practices Officer (formerly “Chief Complaints Officer”) who has been assigned to deal with issues of alleged unfairness related to the WCA. A claimant who has a complaint about a decision must first pursue all available routes of appeal. The Fair Practices Officer may investigate a complaint after all routes of appeal are exhausted. Individuals or groups with complaints about the fairness of WCB decisions, recommendations, actions, procedures, practices, or regulations may contact the WCB Complaints Officer by phone, fax, mail, or in person.

The WCB Fair Practices Officer should not be confused with the BC Ombudsperson, who still has authority to investigate complaints against the WCB. The BC Ombudsperson’s policy is to suggest that all complaints go first to the WCB Fair Practices Officer, but a worker may ask that the provincial Ombudsperson intervene immediately if the Fair Practices Officer is unable to resolve the problem. Advocates are beginning to make more complaints to the BC Ombudsperson recently, and students can insist that this be done if the complaint process seems ineffective. See **Chapter 5: Public Complaints Procedures.**

Appendix A: Abbreviations

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

- ASTD: Activity-Related Soft Tissue Disorder
- ATA: Administrative Tribunals Act, SBC 2004, c 45
- BMA: Board Medical Advisor
- CM: Case Manager
- CMS: Claims Management Solutions
- DA: Disability Awards
- EI: Employment Insurance
- EO: Entitlement Officer
- FPO: Fair Practices Officer
- LOE: Loss of Earnings Pension
- LTWR: Long-Term Wage Rate
- MMR: Maximum Medical Recovery
- MRPP: Manual of Rules, Policy and Procedure
- OHS: Occupational Health and Safety Regulation, BC Reg 296/97
- PD: Practice Directives
- PDES: Permanent Disability Evaluation Schedule

- PFI: Permanent Functional Impairment
- POP: Personal Optional Protection
- R&L: (Medical) Restrictions and Limitations
- RSCM: Rehabilitation Services and Claims Manual (Volumes I and II)
- RTW: Return to Work
- STWR: Short-Term Wage Rate
- TPD: Temporary Partial Disability
- TTD: Temporary Total Disability
- TWL: Temporary Wage-Loss Benefits
- VR: Vocational Rehabilitation
- VRC: Vocational Rehabilitation Consultant
- WCA: Workers' Compensation Act, RSBC 2019, c 1
- WCAT: Workers' Compensation Appeal Tribunal
- WCB: Workers' Compensation Board/the Board/WorkSafeBC

Appendix B: List of Cases

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

- *Albert v British Columbia (Workers' Compensation Appeal Tribunal)*, 2006 BCSC 838 [1]
- *Atkins v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCSC 1178 [2]
- *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 S.C.R. 748 [3]
- *Chima v Workers' Compensation Appeal Tribunal, 2009 BCSC 1574*, 2007 BCSC 1580 [4]
- *Cowburn v Worker's Compensation Board of British Columbia*, 2006 BCSC 722 [5]
- *Denton v British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 40 [6]
- *Fraser Health Authority v Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 [7]
- *Kovach v Singh (Kovach v WCB)*, [2000] SCJ No 3 [Kovach] [8]
- *McKnight v Workers' Compensation Appeal Tribunal*, 2012 BCSC 1820 [9]
- *Macrae v Workers' Compensation Appeal Tribunal*, 2016 BCSC 133 [10]
- *Page v British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 493 [11]
- *Preast v Workers' Compensation Appeal Tribunal*, 2015 BCCA 377 [12]
- *Schulmeister v British Columbia (Workers' Compensation Appeal Tribunal)*, 2007 BCSC 1580 [13]
- *Snell v Farrell*, [1990] 2 SCR 311 [14]
- *Worker's Compensation Appeal Tribunal v Fraser Health Authority*, 2016 SCC 25 [15]
- *Young v WCAT*, 2011 BCSC 1209 [16]

References

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[3] https://www.canlii.org/en/ca/scc/doc/1997/1997canlii385/1997canlii385.html?autocompleteStr=Canada%2520(Director%2520of%2520Investigation%2520and%2520Research)%2520v%2520Southam%2520Inc.%252C%2520%255B1997%255D%25201%2520S.C.R.%2520748&autocompletePos=1
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Appendix C: Referrals

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Unions

Unions provide more representation for injured workers than all other sources combined. If a worker was engaged in employment under a collective agreement when injured, their union or former union should be the first resource. Some unions will even help former members with claims arising out of injuries suffered in non-union employment.

Workers' Advisers Office (WAO)

Website: www.gov.bc.ca/workersadvisers [1]
Telephone: (604) 335-5931; Toll-free: 1 (800) 663-4261

Lower Mainland Regional Offices:
260A - 4600 Jacombs Road, Richmond, BC V6V 3B1
Fax: (604) 713-0311

Unit A250a 20161 86th Avenue, Langley, BC V2Y 2C1
Fax: (778) 705-1106

This is the primary resource for non-union workers having difficulties with the Board. The advisors have direct access to the claim file and can provide workers with detailed and confidential advice about the claim. They also offer very accessible written information for claimants.

The WAO only takes referrals by internet. Claimants must fill out the online inquiry form [2]. They will be contacted within 2 business days to set up a telephone appointment with an Intake Administrator.

Employers' Advisers Office

Telephone**: 1 (800) 925-2233**
Fax: 1 (855) 664-7993
Email: eao@eao-bc.org

The Employers' Advisers Office (EAO) is a branch of the Ministry of Labour. Independent of WorkSafeBC, the EAO is a resource for employers in British Columbia, providing complimentary advice, assistance, representation educational seminars to employers, potential employers and employer associations concerning workers' compensation issues.

Community Legal Assistance Society (CLAS)

300 – 1140 West Pender Street, Vancouver, BC V6E 4G1
Telephone: (604) 685-3425
Fax: (604) 685-7611
Toll-free: 1-888-685-6222

CLAS may be able to help if a client has lost their appeal to the Workers' Compensation Appeal Tribunal (WCAT) and wants WCAT to reconsider their decision, or a court to overturn the decision, and if the advocate who helped the client at WCAT can no longer assist.

WCB Main Inspection Office

6951 Westminster Highway, Richmond, BC V7C 1C6
Telephone: (604) 273-2266
Toll-free: 1-800-661-2112

Complaints about violations of health & safety regulations should be directed here.

WCB Fair Practices Office

P.O. Box 5350 Stn. Terminal, Vancouver, BC V6B 5L5
Telephone: (604) 276-3053
Fax: (604) 276-3103

This office can be contacted when all internal remedies have been unsuccessful, or if the worker has a complaint about matters that are not subject to appeal, such as rude conduct by WCB staff, failure to answer letters, or unfair procedures.

> **Note**: Most lawyers who do WCB applications or WCAT appeals require payment in advance. For more information, please see the lawyer referral section in Chapter 22.

References

[1] http://www.gov.bc.ca/workersadvisers
[2] https://wao-preiq.labour.gov.bc.ca/

Appendix D: Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

1. Print Resources

Heather MacDonald and Marguerite Mousseau, *Workers' Compensation in British Columbia*, (LexisNexis Canada, 2009).

- *A comprehensive overview of the workers' compensation system in British Columbia, written by two members of WCAT.*

2. Internet Resources

WorkSafe BC

Website: www.worksafebc.com [1]

- The Board's website contains a wealth of material, including the complete Claims Manual, Appeal Division decisions (since January 1, 2000), and the complete Reporter series of decisions. It also has decisions of the old Appeal Division and the Review Division, statistics, and resources.
- A policy and legislation page is located at www.worksafebc.com/en/law-policy [2] with links to an online version of the Act, recent amendments, and various policy and practice materials. This is the most practical way to research current policies and practices, including the Board's two-volume compensation policy manual, which has the force of law.
- To keep updated with changed WCB policies, visit the "Table of Effective Dates & Application of Published Compensation Policy" at www.worksafebc.com/en/lawpolicy/claims-rehabilitation/compensation-policy-dates. [3]

Workers' Advisers Office

Website: www.gov.bc.ca/workersadvisers [4]

- This site contains excellent plain language summaries of the key aspects of the system written for the average claimant, and other material as well. This service is free for anyone who is not represented by a union

Workers' Compensation Appeal Tribunal

Website: www.wcat.bc.ca [5]

- This site provides information about WCAT and various aspects of Workers' Compensation appeal matters. The "How to Appeal" section provides information on how to appeal, enables access to various appeal forms, and provides internet links to WCAT publications as well as other resources that can assist in the appeal process.

3. Organizations

BC Federation of Labour

Website: www.bcfed.com [6]
406 - 4370 Dominion Street Burnaby, BC V5G 4L7
Telephone: (604) 430-1421
Email: bcfed@bcfed.ca

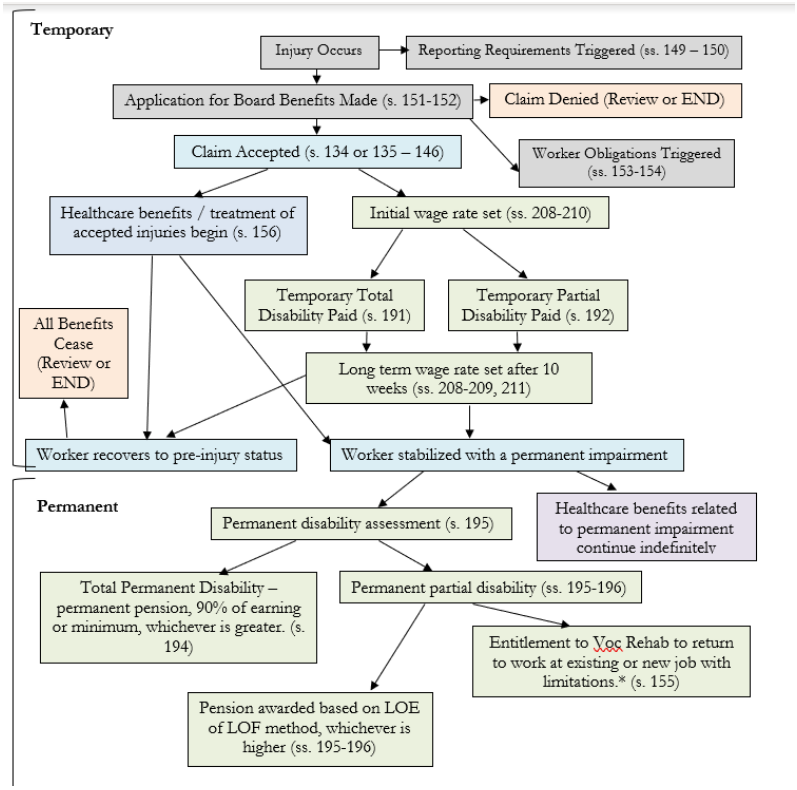
- The BC Federation of Labour represents more than half a million workers through affiliated unions across the province, working in every aspect of the BC economy. The Federation is a member of the Canadian Labour Congress (CLC) and works with the CLC to further the interests of working people across the country.

References

[1] http://www.worksafebc.com
[2] http://www.worksafebc.com/en/law-policy
[3] http://www.worksafebc.com/en/lawpolicy/claims-rehabilitation/compensation-policy-dates.
[4] http://www.gov.bc.ca/workersadvisers
[5] http://www.wcat.bc.ca
[6] http://www.bcfed.com

Appendix E: Claims Process

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.



Note: While officially vocational rehabilitation does not begin until a permanent partial impairment that prevents return to the pre-injury job is accepted, where it is clear that this will occur, vocational rehabilitation interventions such as training and job search assistance often begin during the temporary disability phase.

Appendix F: Checklist for Interviews

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

- ☐ Obtain basic client information
- ☐ Note WCB claim number
- ☐ Determine worker's claim status:
  - (a) Present benefits
  - (b) On what basis
  - (c) Pending changes
  - (d) Relevant decisions
  - (e) Pending appeals
- ☐ Review worker's claim in full detail:
  - (a) Date of injury
  - (b) Nature of injury
  - (c) Circumstances of injury
  - (d) Client's job
    - (i) Remuneration
    - (ii) Duties - job description
    - (iii) Length of Employment
- ☐ If claim was accepted, determine:
  - (a) Initial benefit rate
  - (b) Did benefit rate change after 10 weeks?
    - (i) Evidence of long-term earnings given to WCB
    - (ii) Client's actual work and earnings history
- ☐ Any medical treatment and diagnosis
  - (a) Client's position
  - (b) Doctor's advice
  - (c) Board's position
- ☐ Permanent disability
  - (a) Return to previous job
  - (b) Return to another job with same employer
  - (c) Retraining
- ☐ Long-term loss of earnings?
  - (a) Other advisor or representatives

(b) Workers' advisor? Trade Union? Other?

Appendix G: Checklist for Appeals

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

☐ Interview client

☐ Review their documents

☐ Immediately take note of time limits applicable – they are always to be adhered to

☐ Contact the WCB for necessary clarification, reconsideration based on new evidence, etc.

☐ Advise client on alternatives such as an application for reconsideration based on new evidence, keeping in mind that the decision is not more than 75 days old since that would prohibit a Board from reconsidering it

☐ File Request for Review application form if instructed by client. Ensure the time limit is met.

☐ Request copy of file from Board (this can be done before an appeal is filed if time permits)

☐ Review client's file with them

(a) Any correspondence

(b) Medical file

(c) Memoranda

☐ Identify key issues leading to the decision - examine all aspects

☐ Research important issues

(a) Medical - consult family doctor, specialist, etc.

(b) Policy - read Claims Manual, relevant Reporter decisions, etc.

☐ Decide on the basic grounds for appeal and relief sought

☐ Apply for permission to make a late appeal of a related decision, if necessary

☐ Prepare and gather the evidence

(a) Client's testimony

(b) Other witnesses

(c) Documents:

(i) Medical legal reports

(ii) Affidavits or letters from unavailable witnesses

(a) Ask Review Division to subpoena non-cooperative witnesses

(iii) Income tax returns, etc.

☐ Prepare submissions - do this in writing, as with a trial book

- ☐ Hearing
- ☐ Receive and review Review Division findings with client
- ☐ Consider further appeal to Workers Compensation Appeal Tribunal

Appendix H: Sample Authorization Form

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

This appendix is available on Clicklaw Wikibooks for download in PDF.
A permanent archive version is also available at https://perma.cc/7P94-38TQ
Readers of the print edition please see the "Supplementary Documents for Appendices" section.

Chapter Eight - Employment Insurance

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Keeping Up to Date on Changes to Employment Insurance

When working with an Employment Insurance claim, always ensure that you are working with the most updated information. Consult Service Canada's Employment Insurance website before proceeding.

B. General

Employment Insurance ("**EI**") is a federal social insurance scheme that operates on a contributory basis. It provides benefits to eligible workers who experience job loss or are unable to work due to reasons such as illness, pregnancy, or caring for a newborn/newly adopted child or an ill family member (or someone considered to be like a family member). Service Canada and the Canada Employment Insurance Commission ("the Commission") administer and act as the registry for the system.

In accordance with the *Employment Insurance Act*, SC 1996, c 23 [the "***EI Act***"], both employees and employers are required to contribute to the payment of premiums. It is important to note that payment of premiums alone does not automatically guarantee entitlement to benefits for job loss. Before benefits can be granted, specific criteria (outlined in **Section III: Qualifying for EI**) must be satisfied.

The appeal process for Employment Insurance operates as a multistage system. The progression of decisions and appeals under the Employment Insurance regime is as follows:

1. a decision is made by an agent of the Commission affecting the claimant, employer, and the Commission itself;
2. a party applies to the Commission for reconsideration of the Commission's decision;
3. a party appeals to the Employment Insurance section of the General Division of the Social Security Tribunal of Canada (the "**SST**");
4. a party applies for leave to appeal and then, if leave is granted, appeals the decision of the General Division to the Appeal Division of the SST;
5. in exceptional cases, the claimant applies to the Federal Court of Appeal for Judicial Review;
6. in rare instances, the claimant appeals the court's decision to the Supreme Court of Canada ("**SCC**") – cases will usually only proceed to the SCC if the disputed issue is of **national significance**.

A separate appeal structure exists for cases concerning the insurability of employment. This structure is set out in Section **XII.B.1 – Insurability Decisions.**

C. Deadlines for Appeals

- Requests for Reconsideration: **30 days.**
- Appeals to the *General Division*: **30 days** from the date the reconsideration decision was communicated to the applicant.
- Appeals to the *Appeal Division*: **30 days** from the date the General Division decision was communicated to the applicant.
- Judicial Review to theFederal Court of Appeal: **30 days** from the date the Appeal Division decision was communicated to the applicant (*Federal Courts Act*, RSC 1985, c F-7, s 18.1).
- Requests for Rulings to the Canada Revenue Agency ("CRA"): By **June 29th** of the year *after* the year to which the question relates.
- Appeals to the Minister of National Revenue from a CRA Decision: **90 days** from the date of the notification of the ruling (*EI Act*, s. 91).

Note: For all deadlines, requests for an extension of the deadline may be made to the applicable governing body.

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Employment Insurance Act, SC 1996, c 23 and Employment Insurance Regulations (SOR/96-322)

Ensure that you are working with the most recent version of the Act. The Act can be found online [1], as well as the regulations [2].

B. Carswell's Annotated Employment Insurance Statutes

T. Stephen Lavender, *The 2023 Annotated Employment Insurance Act*, (Carswell, 2023).

Updated every year, Carswell's Annotated Employment Insurance Statutes is an excellent tool for detailed legal research. It contains the entire *EI Act* and Regulations, accompanied by thorough annotations following each provision. These annotations provide detailed insights into the historical context of the section, as well as the interpretations and applications of the law through various legal decisions.

C. EI Jurisprudence Online

The EI homepage at https://www.canada.ca/en/services/benefits/ei.html provides Employment Insurance and leave information for workers, families, fishers, and sickness, as well as information on how to apply and how to submit a report. This website is a good starting place when researching EI information.

When preparing an appeal, it is helpful to read decisions on cases that are similar to yours. The Social Security Tribunal ("SST") has an online library of past decisions. These decisions can be searched via a search engine located at https://decisions.sst-tss.gc.ca/sst-tss/ei-ae/en/nav_date.do.

CanLII also has a database of SST decisions located at http://www.canlii.org/en/ca/sst/.

Note that the SST *does not* have to follow previous SST decisions, but these could influence their decision. A prior decision may be at most persuasive, especially where the facts are similar. The tribunal must, however, follow rulings of theFederal Court, Court of Appeal, and theSupreme Court of Canada.

The Jurisprudence Library is a search tool that provided access to a database of significant and relevant decisions. Now replaced by the SST library of decisions listed above, the Jurisprudence Library housed decisions by the Umpires, the Federal Court of Appeal, and the Supreme Court of Canada. Last updated in 2022, these decisions can be searched via a search engine located at https://jurisprudence.service.canada.ca/search/index.html.

> **Note**: The Umpires were the highest level of appeal in the EI system before being replaced by the appeal division of the SST. Canadian Umpire Benefit (CUB) decisions are decisions made by the Umpire.

A useful resource can be found in the "Employment Insurance Appeal Decisions Favourable to Workers" decisions database. The database makes available a collection of Employment Insurance jurisprudence where decisions were favourable to workers. One should be aware, however, that this section has not been updated to reflect some recent rulings favourable to workers. **At the time of writing, this section was last updated in September 2012**. The database can be found at: https:/ / jurisprudence. service. canada. ca/ eng/ board/ favourable_jurisprudence/ favourable_decisions_toc.shtml.

D. Tax Court Decisions

There is a separate site for Tax Court decisions (on insurability issues, etc.). The search page is located at https://decision.tcc-cci.gc.ca/tcc-cci/35/en/nav_su_date.do.

E. Digest of Benefit Entitlement Principles

This two-volume policy manual is published by the Commission and is amended periodically. It contains a summary of general law and policy for each subject matter, with references to the relevant sections of the *EI Act* and Regulations, and refers to many decisions of the Umpires and Federal Court. However, it is written by the Commission, and many chapters do not accurately describe the cases. It must, therefore, be used with caution, and **not** as a sole reference. However, the online version is the most reliable source, as few printed versions are fully up to date. The manual can be found online [3].

F. Employment and Social Development Canada

Employment and Social Development Canada ("ESDC") maintains an extensive website with many tools, which is located at https://www.canada.ca/en/employment-social-development.html.

For general information regarding EI claims, contact:

Vancouver Service Canada Centre

1263 West Broadway

Vancouver, BC V6H 1G7

Telephone: 1 (800) 206-7218

References

[1] https://laws-lois.justice.gc.ca/eng/acts/E-5.6/
[2] https://laws-lois.justice.gc.ca/eng/regulations/sor-96-332/index.html
[3] https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest.html

III. Qualifying for EI

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Insurable Employment

Sections 5(1) and (2) of the *EI Act* set out what is and what is not insurable employment. Please note that s. 5(2) outlines specific instances of employment that are not insurable (e.g., employment in Canada by an international organization, by a foreign government, or by His Majesty in right of a province). When in doubt, the reader should consult s. 5 of the *EI Act* and s. 3 of the *EI Regulations.*

Generally, if the employer has deducted EI premiums, then the employment is insurable. However, it is the **nature of the employment**, and not the premiums paid, that is determinative.

Some disputes are determined *solely* by the Canada Revenue Agency ("**CRA**"). These disputes concern s. 90(1) of the *EI Act*, and include:

(a) whether an employment is insurable;

(b) how long an insurable employment lasts, including the dates on which it begins and ends;

(c) what is the amount of any insurable earnings;

(d) how many hours an insured person has had in insurable employment;

(e) whether a premium is payable;

(f) what is the amount of a premium payable;

(g) who is the employer of an insured person;

(h) whether employers are associated employers; and

(i) what amount shall be refunded under s. 96(4) to (10).

Appeals of decisions by the CRA are made first to the Minister of National Revenue (within 90 days of being informed of the decision), and then to the Tax Court of Canada (*EI Act*, s. 103). Tax Court decisions can be appealed to the Federal Court of Appeal under s. 27 of the *Federal Court Act*, RSC 1985, c. F-7.

B. Qualifying Period

1. General

To qualify for EI benefits, a claimant must have worked a certain number of hours of insurable employment during the claimant's qualifying period. The required number of hours may vary according to the location of the claimant, and the unemployment rate in the region they live in. The definition of qualifying period is set out in s. 8(1) of the *EI Act*. This is usually the shorter of either:

(a) the 52-week period immediately before the benefit period commences under s. 10(1);

(b) the period that begins on the first day of an immediately preceding benefit period and ends with the end of the week before the beginning of a benefit period under s. 10(1) – i.e., the period between the beginning of a prior claim and the beginning of the present claim.

2. Extensions of the Qualifying Period

The qualifying period may be extended (i.e., the Commission will look further back in time) up to a maximum of 104 weeks, as set out in s. 8(7) of the *EI Act*. It may be extended if the claimant can prove that they were unable to work during any of the weeks of the qualifying period because of:

(a) illness, injury, quarantine, or pregnancy;

(b) confinement in a jail, penitentiary, or other similar institution and was not found guilty of the offence for which the person was being held or any other offence arising out of the same transaction;

(c) receiving assistance under employment benefits; or

(d) the claimant has left the job due to hazardous work or working conditions. This covers situations where the claimant has ceased to work because to continue would have entailed danger to the worker, the worker's unborn child, or a child whom the worker was breast-feeding (*EI Act*, s. 8(2)).

Note: The extension under subsection (d) is limited to situations where a worker would receive payments under provincial law. Many provinces, including BC, do not yet provide for such payments. Consequently, **BC workers cannot use (d) as a ground to extend the qualifying period.**

The absolute **maximum extension** of a qualifying period is **104 weeks** (two years). After 104 weeks, no extensions can be made to the claimant's qualifying period.

It is worth noting that the same insurable hours cannot be used for two separate claims.

C. Minimum Hours of Employment Required

1. Required Hours

The number of hours needed to establish a claim for EI regular benefits is based on the regional variable entrance requirements for all claimants. This is based on the regional rate of unemployment in the region where the claimant ordinarily resides.

A claimant will need to have accumulated between 420 and 700 hours of insurable employment during their qualifying period to be eligible to receive EI regular benefits (*EI Ac*t, s. 7(2)).

Unemployment rates for EI Economic Regions can be found online at https://srv129.services.gc.ca/ei_regions/eng/rates_cur.aspx.

You can find your economic region by searching your postal code at the following link: https://srv129.services.gc.ca/ei_regions/eng/postalcode_search.aspx.

The number of hours that an insured person needs under s. 7 to qualify for benefits is increased to the number shown under s. 7.1(1) of the *EI Act* if one or more violations have occurred in the 260-week period prior to the initial claim (see **Section IX: Keeping Out of Trouble**).

> **Note**: Due to COVID-19, for EI claims established between September 26, 2021 and September 24, 2022, claimants only needed 420 hours of insurable employment to qualify for regular benefits, regardless of where they lived in Canada. These were temporary measures enacted during the COVID-19 pandemic and have since reverted to the regular entrance requirements.

2. Youth and EI

When a minor is engaged in insurable employment and is making contributions to the plan, they are eligible for EI benefits in the **same manner as an adult.**

D. Interruption of Earnings

To establish a claim, the worker must have an "interruption of earnings." An interruption of earnings is defined in *EI Regulations* s. 14 as occurring when:

> an insured person is laid off or separated from an employment and has a period of **seven or more consecutive days** during which **no work is performed** for that employer and **no earnings are payable** from that employment.

Layoff, the end of a contract, and dismissal can all be causes of an interruption of earnings.

A substantial reduction in work hours, such as transitioning from full-time employment to one day a week or less, **does not** meet the criteria for an interruption of earnings for regular benefits. Therefore, an individual whose work hours are substantially reduced cannot file a claim unless they experience a complete week of unemployment. Special benefits may be an exception to this rule. However, if there is an interruption of earnings from one of two part-time jobs with the same employer, the claimant may be eligible.

> **Note**: In the case of special benefits, an interruption of earnings is deemed to have occurred when a worker experiences a reduction in earnings exceeding 40% of their normal weekly earnings.

1. Weeks of Unemployment

A "week of unemployment" is defined in s. 11(1) of the *EI Act* as "a week in which the claimant does not work a full working week." However, the subsequent subsections of s. 11 describe situations which *do not* amount to an interruption of earnings as defined in s. 14.

E. Record of Employment

Typically, the record of employment ("**ROE**") serves as the primary proof to establish an interruption of earnings. Employers have an obligation to issue an ROE for an insured individual when there is an interruption of earnings (*EI Regulations*, s. 19(2)).

An employer who completes a paper form must provide an employee with an ROE within five days of the first day of the interruption of earnings, or the day on which the employer becomes aware of the interruption of earnings.

However, when the ROE is completed in electronic form, it must be submitted to the Commission no later than five days after the end of the pay period in which the first day of the interruption of earnings occurred. The rules governing this process are outlined in s. 19(3.1) of the *EI Regulations*. If there are thirteen or fewer pay periods within a year, the ROE must be submitted to the Commission no later than fifteen days after the first day of the interruption of earnings. It is important to note that when an employer completes an ROE in electronic form, they are not required to provide a copy to the employee.

The ROE contains crucial information for an EI claim. It sets out the first and last dates of employment, the total hours worked, and the total earnings. These details are utilized to calculate the eligible amount of benefits. Additionally, the ROE indicates the reason for separation. In cases where it states that the claimant resigned or was terminated, the Commission is obligated to investigate the circumstances and reasoning. Based on the Commission's findings, the claimant may be disqualified from receiving regular benefits entirely (see Section **VI.C: Effect of Earnings**).

If the claimant disagrees with statements in the ROE, they can ask the employer to correct them. The claimant should also bring the errors to the Commission's attention at the time of application.

> **Note**: It is crucial for claimants who have held multiple jobs during the qualifying period to retain the ROEs from each employer.

F. Filing an Application

Applications should be filed during the first full week of unemployment (see **Appendix A: Checklist for Initial Application for EI Applications**). However, as a matter of policy, applications will be automatically "antedated" (see Section **V.B: Antedating**) for up to four weeks following the week of the interruption of earnings. If the claimant delays longer than this, they may lose benefits unless they are able to show "good cause" for the delay. Because of this, if a claimant cannot get an ROE immediately, they should still go to the nearest Canada Employment Insurance Commission office and complete an application. Usually, the Commission will want to have an ROE before they process the claim. However, claimants should always ensure they apply on time even if they do not yet have their ROE. The Claimant should make efforts to get the ROE from the employer. If the Claimant is unsuccessful, the Commission will contact the employer if the record is not completed on time. If necessary, a claimant may prove their employment history and insurable earnings by filing an application supported by pay slips and cheque stubs, etc.

> **Note**: Applications may be filed online through the ESDC website. Applicants filing online must still submit their ROE(s) by mail or in person. If the claimant's ROE has a "W" or "S" serial number, their employer has provided the ROE electronically to the local office and the claimant is not required to submit the paper copy. Claimants may

review and edit their claim information online by using their My Service Canada Account (“MSCA”).

For general information about filing an application and about the EI system, visit: https://www.canada.ca/en/services/benefits/ei/ei-apply-online.html.

IV. Types of Benefits

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Regular Benefits

EI benefits are calculated using your **highest weeks of earnings** over the qualifying period (*EI Act*, s. 14(4)). This applies to both regular and special benefits.

Regular EI benefits are payable during the benefit period to a claimant who:

- was employed in insurable employment;
- lost their job through no fault of their own;
- has had an interruption of earnings from employment;
- has worked the required number of insurable employment hours during the qualifying period;
- is ready, willing, and capable of working each day;
- has made “reasonable and customary efforts” to find employment; and
- is unable to find suitable employment.

The maximum number of weeks of regular benefits available to a claimant varies according to the claimant’s hours of insurable employment in the qualifying period and the regional rate of unemployment. See Schedule I and s. 12(2) of the *EI Act*.

B. Special Benefits

Special benefits are available in special circumstances where the claimant has not lost their employment. Under the *EI Act*, self-employed Canadians and permanent residents – those who work for themselves – are able to apply for EI special benefits if they are registered for access to the EI program.

A claimant requires 600 hours of insurable employment to qualify for special benefits.

There are six types of EI special benefits: maternity, parental, sickness, family caregiver benefit for children, family caregiver benefit for adults, and compassionate care (s. 12(3)). More than one type of special benefit can be claimed within one benefit period. Similarly, special and regular benefits claims can be combined. However, s. 12(6) sets out the maximum for such a combination.

If a claimant has not collected any regular benefits and is just combining different special benefits to which they are entitled, the maximum number of weeks the claimant can collect is the combined maximum for each of the special benefits they are collecting. To ensure they have time to collect all these combined weeks, their benefit period will also be extended to the combined maximum number of weeks of special benefits they can collect.

If the claimant has collected regular benefits but is also entitled to collect special benefits during their benefit period, then the claimant can combine weeks of benefits, but the maximum number of combined weeks cannot be higher than 50.

C. Sickness Benefits

1. Entitlement

A person who becomes incapable of work by reason of illness, injury, or quarantine may receive sickness benefits (*EI Act*, s. 21). This normally requires that the claimant obtain a medical certificate completed by a doctor or medical practitioner stating the expected duration of incapacity (*EI Regulations*, s. 40(1)). The claimant must also show that they would have been available to work if they had not fallen ill, gotten injured, or placed in quarantine. The illness, injury, or quarantine must be that of the claimant personally.

The number of weeks of benefits you could receive depends on the date your claim begins:

- before December 18, 2022: up to **15 weeks**
- on or after December 18, 2022: up to **26 weeks**

2. Illness, Injury or Quarantine

Sickness benefits are only available for any "illness, injury, or quarantine that renders a claimant incapable of performing the duties of their regular or usual employment or of other suitable employment" (*EI Regulations*, s. 40(4)). The onus is on the claimant to prove entitlement. A medical certificate is usually required, and the Commission may also require a claimant to undergo a medical examination at their direction pursuant to s. 40(2) of the *EI Regulations*. In such situations, the Commission must pay travel and other expenses for the examination (*EI Regulation*, s. 40(3)).

Note: For more information on claiming sickness benefits, please refer to the ESDC website [1].

D. Compassionate Care Benefits

Compassionate Care Benefits allow an eligible claimant to receive income support while absent from work to provide care or support for a family member with a serious medical condition and a significant risk of death within 26 weeks. The benefits for compassionate care must be claimed within a 52 week period. This 52 week window during which 26 weeks of compassionate care benefits may be payable is determined by the issuance of a medical certificate.

Unemployed persons on EI can also apply for this type of benefit.

To be eligible for Compassionate Care Benefits, a claimant must show that:

- their regular weekly earnings from work have decreased by more than 40% for at least one week because they need to take time away from work to provide care or support to the person; and
- they have accumulated at least 600 insured hours of work in the 52 weeks before the start

of their claim, or since the start of their last claim, whichever is shorter.

A family member includes immediate family as well as other relatives and individuals considered to be like family, whether or not related by marriage, common-law partnership, or any legal parent child relationship. The claimant needs to demonstrate that they are a family member of the person who is needing end-of-life care, or they are ***considered to be like a family member***. If they are not a family member, either the person needing care or their legal representative must complete an attestation form to confirm that they consider the claimant to be like family. For a child, the parent or legal guardian must sign the form to confirm.

To establish a claim for compassionate care benefits, medical proof is required. This includes an Authorization to Release Medical Certificate form signed by the ill person or their legal representative and a Medical Certificate for Employment Insurance Compassionate Care Benefits form signed by the medical doctor.

1. Sharing Compassionate Care Benefits

The 26 weeks of compassionate care benefits in relation to a seriously ill family member can be shared by one or more claimants, and the weeks are to be divided as agreed to by those claimants (*EI Act*, s. 23.1(8)).

There is still a one-week waiting period before benefits can be claimed. However, if the benefit is to be shared with other family members, only the first family member to claim the compassionate care benefit has to serve the one-week waiting period.

> **Note**: For more information on claiming compassionate care benefits, please refer to the ESDC website [2].

E. Family Caregiver Benefit for Children

Eligible family members who take leave from work to provide care or support to a child with a life threatening illness or injury can receive up to 35 weeks of benefits. The benefits must be collected in the 52-week window beginning on the day a medical certificate is issued showing that the child is critically ill or, if the claim is made before the certificate is issued, from the date a specialist medical doctor certifies that the child is critically ill or injured. The child must be under the age of 18 at the time of the beginning of the benefits window – if the child turns 18 at any time during the benefits window besides the beginning, the claimant will remain eligible to claim the benefits.

As with other special benefits, the claimant must have an interruption of earnings (for special benefits, a greater than 40% reduction in earnings) and have 600 hours in their qualifying period.

These benefits are not available to family members of a child with a chronic illness or condition that is their normal state of health. There must be a significant change from the child's normal or baseline state of health at the time they are assessed by a specialist medical doctor.

These benefits can be shared between eligible family members. Eligible family members can claim for these benefits at the same time or at different times, as long as the sum of the weeks claimed does not exceed the 35 weeks.

> **Note**: For more information on claiming Family Caregiver Benefits for Children, please refer to the ESDC website [3].

F. Family Caregiver Benefit for Adults

Eligible family members who take leave from work to provide care or support to an adult family member with a life-threatening illness or injury can receive up to 15 weeks of benefits. The benefits must be collected in the 52-week window beginning on the day a medical certificate is issued showing that the adult is critically ill or, if the claim is made before the certificate is issued, from the date a specialist medical doctor certifies that the adult is critically ill or injured. The adult must be over the age of 18 at the time of the beginning of the benefits window.

As with other special benefits, the claimant must have an interruption of earnings (for special benefits, a greater than 40% reduction in earnings) and have 600 hours in their qualifying period.

These benefits are not available to family members of an adult with a chronic illness or condition that is their normal state of health. There must be a significant change from the adult's normal or baseline state of health at the time they are assessed by a specialist medical doctor.

These benefits can be shared between more than one eligible family member. Family members can claim for these benefits at the same time or at different times, as long as the sum of the weeks claimed does not exceed the 15 weeks.

Note: For more information on claiming these benefits, please refer to the ESDC website [4].

G. Maternity Benefits

Maternity benefits are available to a person who is away from work because they are pregnant or have recently given birth. Maternity benefits cannot be shared between parents. The person receiving maternity benefits may also be entitled to parental benefits. Like sickness benefits, pregnancy and parental benefits can be distinguished from regular EI benefits, because they are paid even though the applicant is not available for work.

1. Entitlement

A claimant for maternity benefits must:

a) have 600 hours in their qualifying period;

b) have an interruption of earnings; and

c) provide evidence/proof of pregnancy.

Note: Pursuant to s. 40(5) of the *EI Regulations*, a claimant who terminates their pregnancy within the first 19 weeks is entitled to collect sickness benefits.

2. Benefit Period and Duration

Benefits can only be paid for a maximum of 15 consecutive weeks. The period can start no more than 12 weeks before the week when the claimant's due date is expected or the week when the birth actually occurs, whichever is earliest (*EI Act*, s. 22(2)).

Benefits must be collected within 17 weeks after the birth or due date, whichever is later. If the child born from the pregnancy is hospitalized, the benefit period shall be extended by the number of weeks during which the child is hospitalized (*EI Act*, s. 22(6)). However, benefits may last no longer than 15 weeks total, even if extensions have been granted. As with claims for regular benefits, there is a one-week waiting period after the claim is made before benefits become payable.

3. Pregnancy Benefit Rate

The pregnancy benefit rate is the same as the regular benefit rate. However, no proof of availability is necessary. For a comprehensive list of what is and is not regarded as earnings, see s. 35 of the *EI Regulations*. See also Section **VI.C: Effect of Earnings**.

Note: For more information on claiming maternity benefits, please refer to the ESDC website [5].

H. Parental Benefits

Parental benefits are available to the parents of a newborn or newly adopted child. There are two options available to parents: They may choose to get 55% of their wages for 40 weeks (standard parental), or they may choose to receive 33% of their wages for up to 69 weeks (extended parental). These benefits are available to any parent, including adoptive parents, who experience an interruption of earnings to care for their new child. However, birth mothers can collect parental benefits in addition to their maternity benefits.

Should parents elect to receive benefits for up to 40 weeks, parents can share the 40 weeks of benefits between them. However, each parent cannot individually claim more than 35 weeks. For example, if one parent claims 35 weeks of benefits, then the other parent may claim a maximum of 5 weeks.

Should parents elect to receive benefits for up to 69 weeks, parents can share the total benefit between them as they choose. However, no parent may receive more than 61 weeks of benefits individually.

In either case, only parents who are eligible claimants can qualify. In other words, each parent must qualify individually, and one parent cannot qualify on behalf of the other.

Although you don't have to take weeks of parental benefits consecutively, you must take them within specific periods, starting the week of your child's date of birth or the week your child is placed with you for the purpose of adoption. These periods are:

- standard parental: within 52 weeks (12 months)
- extended parental: within 78 weeks (18 months)

I. Provisions for Low-Income Families

If your annual net family income does not exceed $25,921, you have children, and either you or your spouse receives the Canada Child Benefit, you are classified as a member of a low-income family and are eligible to receive the family supplement. The family supplement has the potential to enhance your benefit rate, potentially raising your benefit rate to a maximum of 80% of your average insurable earnings.

It is important to note that if both you and your spouse claim EI benefits simultaneously, only one of you can receive the family supplement.

J. Employment (Training) Benefits

The EI budget includes discretionary funding for retraining. Eligibility for these benefits is determined by the criteria in s. 58 of the *EI Regulations*, and includes anyone whose benefit period ended within the last 60 months (see s. 76.11 of the *EI Regulations*).

To reduce the dependency on unemployment benefits, the *EI Act* establishes employment benefits and support measures to help individuals obtain or keep employment. This includes benefits to encourage employers to hire them, encourage them to accept employment by offering incentives such as temporary earnings supplements, help them start businesses or become self-employed, provide them with employment opportunities through which they can gain work experience to improve their long-term employment prospects, and to help them obtain skills for employment (*EI Act*, s. 59).

Once a claimant is referred to a course or program of instruction, they are deemed to be unemployed, capable of and available for work for the duration of their participation in the course or program of instruction (*EI Act*, s. 25). This is an exception to the general rule set out in the sections dealing with capability, availability, and the state of being unemployed.

References

[1] https://www.canada.ca/en/services/benefits/ei/ei-sickness.html
[2] https://www.canada.ca/en/services/benefits/ei/caregiving.html
[3] https://www.canada.ca/en/services/benefits/ei/family-caregiver-children.html
[4] https://www.canada.ca/en/services/benefits/ei/family-caregiver-adults.html
[5] https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental.html

V. Benefit Period

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Introduction

When a claim is established, the claimant's "benefit period" will begin. Under s. 10(1) of the *EI Act*, the benefit period begins on the Sunday at the beginning of the week in which the interruption of earnings occurs, or on the Sunday of the week in which the initial claim for benefit is made, whichever is later.

Benefits will only be paid during the benefit period.

B. Antedating

If an application for EI benefits was not filed within the first four weeks after the week in which the claimant experienced their interruption of earnings, they can ask that the claim be antedated back to the first date when it could have been filed under s. 10(4). The claimant must establish that good cause existed for the delay in filing. "Good cause" must be demonstrated for each day until the date the application was actually made. If the claim is filed within the first four weeks, it is automatically antedated to the first date of eligibility.

> **What is "Good Cause"?** Good cause has typically been interpreted narrowly. Simple ignorance of the requirements of the EI Act has not been considered good cause, though reasonable reliance on bad advice from the employer, union, a legal advisor, or the Commission itself usually meets the requirements.
>
> In *Attorney General v Burke*, 2012 FCA 139 [1], a claimant asked for his application to be backdated because he had expected to be rehired and hence did not apply for EI until after the regular deadline. The Federal Court of Appeal upheld the previous decisions granting an antedate on the basis that the claimant had done what a reasonable person would do.

C. Income That is Treated as Earnings

Section 35(2) of the *EI Regulations* defines what will be considered earnings for EI purposes.

Income that counts as "earnings" includes, but is not limited to:

a) wages, salary, or commission;

b) retirement pension;

c) bonuses and gratuities;

d) severance pay;

e) vacation pay;

f) workers' compensation payments;

g) group wage-loss insurance.

It is important to note that some income, while generally considered as earnings, will not prevent an interruption of earnings. For example, receiving severance pay or vacation pay following a layoff will not delay the occurrence of an interruption of earnings. The claimant should still apply for EI as soon as possible after they stop working to make sure their application is not late, even if the money they get from the employer due to the layoff may delay the start of their actual EI benefits.

Although the claimant will need to wait until the received funds are exhausted before being eligible to receive benefits, **they must still apply for EI immediately**. In such cases, the benefit period will be extended to make up for the weeks it takes to use up these earnings.

D. Income That Is Not Treated as Earnings

Section 35(7) of the *EI Regulations* exempts certain sources of income from being regarded as earnings. These include:

- disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;
- payments under a sickness or disability wage-loss indemnity plan that is not a group plan;
- relief grants in cash or in kind;
- retroactive increases in wages or salary;

For more details, see section 35(7) of the *EI Regulations*.

Cases suggest that in certain circumstances some earnings may not delay the start of an EI claim. In *Attorney General of Canada v Bielich*, 2005 FCA 363 [2], the court allowed a $24,000 payment to be exempted from the claimant's allocation of earnings because the purpose of the payment was to compensate the claimant for giving up his right to seek reinstatement, not to compensate for lost pay.

> **Note**: Retirement pensions are generally considered income and are deducted from EI benefits. However, if the claimant accumulates all the hours needed to qualify for EI after the date their pension starts, then their pension money will not be deducted from their EI benefits (see *EI Regulations*, s. 35(7)(e)).

E. The Waiting Period

Before receiving any EI benefits, a claimant must serve a one week "waiting period" during which they are unemployed and otherwise eligible for benefits (*EI Act*, s. 13).

This waiting period also applies to maternity, parental, caregiver, and sickness claims. For caregiver benefits, it can be deferred for the second family member if benefits are split, but the first person must serve it. If a claimant works during the waiting period, 100 percent of their earnings will be deducted from the first three (and no more than three) weekly benefit cheques.

F. Length of Benefit Period

The benefit period for regular EI benefits is 52 weeks (*EI Act*, s. 10(2)). However, this period can sometimes be extended to more than 52 weeks. The criteria for this is set out in s. 10(10) of the *EI Act*. The benefit period can be extended when a claimant proves that, for any week during that benefit period, the claimant was not entitled to benefit by reason of:

- being confined in a jail, penitentiary, or other similar institution and they were not found guilty of the offence for which they were being held or any other offence arising out of the same transaction;
- receiving earnings paid because of the complete severance of their relationship with their former employer (i.e., "using up" severance pay, vacation pay, etc.);
- receiving workers' compensation payments for an illness or injury; or
- receiving payments under a provincial law on the basis of having ceased to work because continuing to work would have entailed danger to the claimant, their unborn child, or a child they are breast-feeding. **BC residents are not entitled to these payments, this does not apply**.

The length of any benefit period extended for these reasons cannot exceed 104 weeks (*EI Act*, s. 10(14)).

G. Payment of Regular Benefits

Where a benefit period for **regular benefits** has been established for a claimant, benefits may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximum benefit periods established in the *EI Act*, section 12.

The maximum number of weeks for which benefits may be paid in a benefit period (other than special benefits) are determined in accordance with the table in Schedule I of the *EI Act* by reference to the regional rate of unemployment that applies to the claimant and the number of hours of insurable employment of the claimant in their qualifying period.

Refer to Canada's EI Economic Region map [3] to determine whether the claimant was living in one of the economic regions.

H. Termination of Benefit Period

Once a benefit period is established, it continues to run, regardless of whether the claimant has resumed employment (although full benefits will not be paid in this case), unless the benefit period is terminated.

Section 10(8) of the *EI Act* states that a benefit period terminates when:

a) no further benefits are payable to the claimant in their benefit period;

b) the benefit period would otherwise end under this section; or

c) the claimant

- requests that their benefit period end,
- makes a new initial claim for benefits, and
- qualifies as an insured person to receive benefits, or qualifies as a self-employed person to receive benefits, under the *Act*.

Note: The calculation of benefit rates under the *EI Act* makes the timing of the decision to conclude one claim and initiate a new one crucial.

References

[1] https://www.canlii.org/en/ca/fca/doc/2012/2012fca139/2012fca139.html?resultIndex=1
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[3] http://srv129.services.gc.ca/eiregions/eng/canada.aspx

VI. Quantifying Benefits

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Benefit Rate

Section 14 of the *EI Act* outlines the benefit rate, which is typically 55% of the claimant's weekly insurable earnings, subject to a maximum limit. The current maximum weekly benefit ceiling stands at $650 per week. It is always important to verify this information on Service Canada's "Employment Insurance Regular Benefits" webpage [1] to ensure its accuracy, as it may be subject to updates.

As of January 1, 2023, the maximum yearly insurable amount has been set at $61,500.

B. Weekly Insurable Earnings

A claimant's weekly insurable earnings are their insurable earnings in the calculation period divided by the number of weeks in the calculation period.

1. The Calculation Period

The calculation period is the number of weeks, consecutive or not, determined based on the applicable regional rate of unemployment as below, in which the claimant received the highest insurable earnings.

Regional Rate of Unemployment	Number of Weeks
not more than 6%	22
more than 6% but not more than 7%	21
more than 7% but not more than 8%	20
more than 8% but not more than 9%	19
more than 9% but not more than 10%	18
more than 10% but not more than 11%	17
more than 11% but not more than 12%	16
more than 12% but not more than 13%	15
more than 13%	14

C. Effect of Earnings

The benefit payable to a claimant may be reduced if the claimant has "earnings" during the benefit period. It may be possible both to work part-time and receive EI benefits at the same time, but all income must be reported on the report cards.

The "EI Working While on Claim" project is a way to help claimants stay connected with the labour market (*EI Regulations*, ss 77.95-77.96). With "Working While on Claim," you can keep receiving part of your Employment Insurance benefits and all earnings from your job. You can qualify if you receive any type of EI benefits.

As soon as a claimant completes the one-week EI waiting period, the Working While on Claim project will automatically apply to any money the claimant earns while the claimant is collecting EI benefits.

How It Works

The Commission sets a threshold which is 90% of the claimant's weekly insurable earnings. Below this threshold, for every dollar a claimant earns, 50 cents will be deducted from their benefits. Above this threshold, EI benefits are deducted dollar-for-dollar.

Example from Service Canada Website

Melissa was laid off when the construction company where she worked lost a major contract. Her weekly earnings averaged $800, so her weekly EI benefits rate is $440 (55% of $800). She has found a part-time job at another construction company where she works one day and earns $160.

Automatically, 50 cents of her EI benefits are deducted for every dollar she earns. Since she earned $160, her benefits are reduced by $80 ($160 ÷ 2). This brings her total EI benefits to $360 ($440 - $80). So, Melissa takes home $520 per week in combined EI benefits and wages ($360 of EI benefits + $160 in wages).

Note: Claimants do not have to apply to the Working While on Claim project as it will automatically be applied to their claim.

What if the claimant works or lives outside Canada?

If the claimant is living in the United States and works in Canada, or if the claimant crossed the Canada–United States border between the claimant's residence and workplace and the claimant is receiving EI benefits, the Working While on Claim project will apply. Visit the Employment Insurance and Workers and/or Residents outside Canada Webpage [2] for more information.

1. Earnings During the Waiting Period

All earnings during the waiting period are deducted dollar-for-dollar from the benefits payable in respect of the first three weeks for which benefits are otherwise payable. There is thus little incentive to work during the waiting period.

2. Earnings of Sick or Pregnant Claimants under Supplemental Unemployment Benefit Plan

Amounts paid to the claimant during periods of illness or pregnancy under an approved Supplemental Unemployment Benefit plan will not be deducted from EI benefits. These plans allow the employer to "top up" the regular EI benefits without reductions.

Individual Supplemental Unemployment Benefit plans must be approved by the Commission, which ensures that they meet the requirements of s. 37(2) of the *EI Regulations*.

An employee normally benefits from these plans while drawing EI benefits. If the worker is ineligible for EI, they may still qualify for Supplemental Unemployment Benefits that do not count as earnings for the purpose of determining waiting periods.

References

[1] https://www.canada.ca/en/services/benefits/ei/ei-regular-benefit/benefit-amount.html
[2] https://www.canada.ca/en/services/benefits/ei/ei-outside-canada.html

VII. Benefit Entitlement

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Once a claim is established, the basic requirement for receiving weekly benefits is that the claimant be "capable of and available for work and unable to obtain suitable employment." To prove this in the event of a dispute, the claimant should keep a "job search record" (see **Section IX.A: Job Search Record**).

A. Capable and Available

A claimant will be disentitled if the Commission has evidence (often supplied inadvertently by the claimant) to show that the claimant was not capable and available for work during a given period. For example, if a claimant volunteers the fact that they are only applying for jobs paying $20 per hour or more, the Commission could disentitle the claimant if there are few if any such jobs for which the claimant would be suitable. For an example of how unforeseen events can affect availability, see *Canada (Attorney General) v Leblanc*, 2010 FCA 60 [1]. In this case, a desire to work was insufficient to establish availability because the claimant lacked proper clothing and a means to get to work as the result of a house fire.

1. Vacation and Travel

A claimant cannot collect benefits for times they are on vacation, as they must be ready for work to collect benefits. However, they can collect up to the day they leave, and from the day they return, if they become immediately available again. To avoid potentially onerous penalties, vacations – including short ones – **must** be properly recorded and reported.

The Customs Match program allows ESDC to match data from Canada Customs and Revenue Agency's Customs Declaration form to determine whether an EI claimant has been out of Canada without notifying ESDC. Under the *EI Act*, a claimant is **not allowed to collect regular or sickness benefits while not in Canada**, except under certain circumstances.

2. Sickness

A claimant may receive up to 15 weeks of sickness benefits where they can prove that they were "incapable of work by reason of prescribed illness, injury, or quarantine on that day and that they would otherwise be available for work" (*EI Act*, s. 12(3)(c)). In theory, if the claimant is already receiving regular benefits from EI and is ill for even one day, that day must be recorded as a day on which they are not capable of or available for work.

3. Attending Courses

Most claimants taking a full-time course will be considered unavailable for work unless the Commission or an agency authorized by the Commission specifically referred the claimant to the program. Even if the course is part-time and improves the claimant's chances of finding employment, the claimant may still be disentitled because they are considered unavailable for work. In these circumstances, a claimant may attempt to prove availability, if the course does not interfere with the job search and they would immediately be able to accept an offer of employment.

According to s. 25(2) of the *EI Act*, a decision refusing to refer a claimant to a course is not reviewable under s. 112. However, a claimant who takes a course without the Commission's approval can still appeal a finding that they are disentitled for not being available for work while taking the course.

Persons attending full-time courses not approved by the Commission may still be entitled to EI benefits if they have established their eligibility by working part-time while attending classes and if they are still available for their previous hours of work on virtually no notice.

4. Starting a Business

Claimants who are trying to start a business are generally considered to be working full time, regardless of whether they are receiving any income from the business. They are therefore not eligible for any benefits. The only escape for such claimants is to convince the Commission, or the SST in an appeal, that the self-employment was so minor in extent that a person would not normally rely upon it as a principal means of livelihood.

5. Working Part Time

A claimant who worked part time may be able to claim an earnings exemption. If the claimant receives any benefits at all, the week counts toward the maximum number of weeks that can be paid under that claim. Thus, it may be in a claimant's interest not to claim benefits for a week in which only a small amount would be paid.

B. Suitable Employment

A claimant must accept suitable work but is not required to take work considered not suitable. Most of the criteria that defines "suitable work" is contained in the *EI Regulations* s. 9.002(1). The criteria is as follows:

a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;

b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and

c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.

1. Proof of Search for Suitable Employment

Section 50(8) of the *EI Act* requires that a claimant prove they are making "reasonable and customary" efforts to obtain suitable employment. Again, this emphasizes the importance of keeping a job search record, which the claimant should update daily. The criteria are further elaborated in *EI Regulations*, s 9.001:

a)the claimant's efforts are sustained;

b) the claimant's efforts consist of

- assessing employment opportunities,
- preparing a resume or cover letter,
- registering for job search tools or with electronic job banks or employment agencies,
- attending job search workshops or job fairs,
- networking,
- contacting prospective employers,
- submitting job applications,
- attending interviews, and
- undergoing evaluations of competencies; and

c) the claimant's efforts are directed toward obtaining suitable employment.

C. Disqualification

Disqualification can be imposed under s. 27(1) through s. 30(1) of the *EI Act*. The effects of disqualification differ depending on what category the disqualification falls into:

Section 27(1) and 28(1) of the *EI Act* state that a claimant is disqualified from receiving benefits for 7 to 12 weeks if, without good cause, they:

- refuse a suitable employment offer; or
- refuse to apply for suitable employment when aware that a position is vacant or is becoming vacant.

A claimant will be disqualified from receiving benefits for up to 6 weeks if the claimant:

- neglected to avail themselves of an opportunity for suitable employment directed to them by the Commission;
- failed to attend an interview recommended by the Commission; or
- failed to attend a course of instruction or training referred to by the Commission.

The disqualification will be deferred if the claimant is otherwise entitled to special benefits. In other words, a disqualification under section 27(1) of the *EI Act* will disqualify a claimant from receiving regular benefits, but the claimant may still collect any special benefits to which they are entitled.

> **Note**: In these cases, the length of disqualification is appealable.

Section 30(1) of the *EI Act* states that a claimant is disqualified when they are fired due to their own misconduct or when they quit without just cause. However, s. 35 states that s. 30(1) does not disqualify a claimant from receiving benefits if remaining in or accepting employment would interfere with the claimant's membership in a union or ability to observe a union's rules.

The effect of a s. 30 disqualification is a cut-off of all regular benefits in a benefit period. Such a disqualification is imposed if the claimant has lost any job in the qualifying period for the reasons set out in s. 30, even if the claimant had other work before applying for EI (*EI Act*, s. 30(5) and (6)). Only if the claimant has worked enough hours since the disqualifying loss of employment to meet the hourly requirements to establish a claim will the disqualification not be imposed. For example, if a worker is employed in a job for five years, and gets fired for misconduct, the worker would be totally disqualified under s. 30 from all regular benefits. If the worker subsequently finds a second job and gets laid off from that second job after 10 weeks, the total insurable employment would be calculated as the number of hours worked during those 10 weeks **after** the earlier s. 30 disqualification. The worker's previous five years of insurable employment would not count unless the worker had enough hours in the 10-week period to qualify under the s. 7 table. In that case, the previous hours would count toward the number of weeks of payable benefits.

A disqualification under section 30(1) of the *EI Act* is suspended for any week the claimant qualifies for special benefits. In other words, the claimant will be disqualified from receiving regular benefits if they leave their employment without just cause or lose their job due to their own misconduct, but the disqualification will not prevent the claimant from collecting special benefits to which they are entitled.

1. Just Cause for Voluntarily Leaving Employment

"Just cause" is defined under s. 29(c) of the *EI Act* as follows: "having regard to all the circumstances, the individual had no reasonable alternative to leaving or taking leave." Where an employee had "just cause" for leaving their employment, they will not be disqualified. The onus is on the worker to show "just cause." The Commission must show that leaving was voluntary and that the claimant took the initiative in severing the employer-employee relationship; The worker must then prove just cause.

The Decisions of the Umpires and the SST provide examples of what is and is not considered voluntary. When the evidence of the employee and the employer contradict one another, and the evidence is evenly balanced, s. 49(2) of the *EI Act* provides that the claimant shall receive the benefit of the doubt.

a) Statute & Case Law

Whether the employee had "just cause" for leaving their employment is decided with statutes and case law.

Section 29(c) of the *EI Act* provides a list of circumstances that can constitute "just cause." This list is **neither exhaustive nor conclusive**. In other words, circumstances not described in s. 29(c) can also be considered just cause if they satisfy the main definition in s. 29(c). On the other hand, circumstances listed in s 29(c) will not be considered "just cause" if the conditions in s. 29(c) are not met (if, for example, the claimant had a reasonable alternative).

> **NOTE**: To date, the only prescribed circumstance under s. 29(c)(xiv) is *EI Regulations* s. 51.1.

For a claimant to prove just cause, they must show:

> a) a genuine grievance or other acceptable reason for leaving the employment;
>
> b) proof of taking all reasonable steps to alleviate the grievance; and
>
> c) proof of a search for alternate employment before the termination, unless circumstances are so immediate that a proper search is impossible.

In *Canada v Hernandez*, 2007 FCA 320 [2] the claimant was disqualified for quitting his job after a public health nurse advised him that the silica dust which was a main material in the factory was a carcinogen. The court decided he did not exhaust his alternatives because he should have asked the employer to change its business or find him a new job somewhere else. While this case is an aberration, it shows the importance of being able to prove that the worker did everything possible to avoid quitting.

There are thousands of decisions by the Umpires, SST, and Federal Court of Appeal addressing "just cause" issues that may help determine whether just cause existed. CUB 21681 (23 Sept. 1992) confirms that just cause may result from all of the circumstances together, although no single factor would be sufficient: "When the statute says 'having regard to all the circumstances,' it imposes a consideration of the totality of the evidence." Thus, if the claimant's reason for leaving is not one of the listed factors under s. 29 but the claimant feels that they had no reasonable alternative to quitting or that they were fired without committing intentional misconduct, a case could still be made that the totality of the claimant's circumstances gives rise to just cause.

b) Importance of Evidence

Detailed evidence like records or diaries is exceptionally important in the determination of a claim. An employee should try to remember as many specific incidents, dates, and times as they can. Though the older Umpire decisions or SST decisions may provide an indication of what "just cause" means, they are not determinative.

c) Returning to School

The Federal Court of Appeal continues to find that voluntarily leaving one's employment to return to school, except for programs authorized by the EI Commission, does not constitute "just cause" and is a ground for disqualification from benefits under ss. 29 and 30 of the *EI Act*. Please refer to this webpage [3] for the rules and the form for declaring your training.

In the case of *Attorney General of Canada v Mattieu Lamonde*, 2006 FCA 44 [4], the court held that the claimant should be disqualified from benefits because he took a yearlong leave from his full-time job to attend school in another community, although he immediately found part-time work when he arrived there.

Note: While nothing in the legislation indicates that improving one's qualifications can never be just cause, the Court of Appeal continues to set aside decisions on this basis.

2. Misconduct

Section 30(1) of the *EI Act* states that a claimant is disqualified when they are fired due to their own misconduct.

a) Determining Misconduct

"Misconduct" is not defined in the *EI Act*, but previous decisions have stated that the word must be given its dictionary meaning.

The Federal Court of Appeal in *Mishibinijmia v Canada (Attorney General)*, 2007 FCA 36 [5] provided a definition stating: "there will be misconduct where the conduct of a claimant was wilful, i.e., in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility." The alleged misconduct must be the real or the actual and direct cause for the dismissal, not merely an excuse for it. An employer cannot invoke previously forgotten or forgiven incidents to justify a dismissal.

The alleged misconduct must be the real or the actual and direct cause for the dismissal, not merely an excuse for it. An employer cannot invoke previously forgotten or forgiven incidents to justify a dismissal.

The onus of establishing a misconduct allegation rests on the party alleging it. The Commission or employer must prove positively the existence of misconduct and must prove the misconduct caused the loss of employment. Refer to the Umpire and SST decisions for examples of what constitutes misconduct justifying lawful dismissal.

b) Dishonesty

In its decision in *McKinley v BC Tel*, [2001] 2 SCR 161 [6], the Supreme Court of Canada held that an employee's dishonesty does not automatically constitute a blanket grounds for dismissal. Dishonesty is only grounds for dismissal "where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to [their] employer." This decision places a duty on the trial judge to determine whether the dismissal was warranted by the nature and degree of the dishonesty, or alternatively, whether lesser sanctions were appropriate. It is likely that the same principle could be applied to EI appeals. For an example of a situation where dishonesty did not amount to just cause, see *Fakhari v Canada (Attorney General)*, [1996] F.C.J. No. 653.

c) Theft

In the case of *Attorney General of Canada v Linda Caul*, 2006 FCA 251 [7], the court decided that the claimant stealing from her employer, particularly given that the employee was in a position of trust, amounted to misconduct even though the employee acted foolishly or in desperation and the employer's response was "overkill."

d) Addiction

In *Mishibinijima v Attorney General of Canada*, 2007 FCA 36 [5], the court examined whether an addiction has the element of willfulness necessary for a finding of misconduct. The court found that the applicant's evidence was too weak to support the claim that he was not acting willfully. The court left open the possibility that with stronger evidence of compulsion due to addiction, a claimant might succeed in rebutting misconduct.

See also *Attorney General of Canada v Brent Pearson*, 2006 FCA 199 [8] where, despite his addiction, the claimant was disqualified for misconduct. In that case, the employee knew that his absences were unacceptable and notwithstanding his employer's offers to help with the addiction, the employee refused to take any such measures.

In *Canada v McNamara*, 2007 FCA 107 [9] the claimant was fired from his job because he failed a random drug test due to trace amounts of marijuana. As a result of the test, the company operating the worksite refused to allow the claimant access to the worksite because he was in violation of a drug and alcohol policy. The court declined to overturn the disqualification, despite the argument that such illegal conduct – smoking marijuana on the previous weekend – could not amount to misconduct for EI purposes. The case leaves open the question of whether there would have been misconduct because he had tested positive for marijuana, or that this amounted to misconduct because of the zero-tolerance policy denying him access to the worksite.

In *Nelson v. AGC*, 2019 FCA 222 [10], the claimant was fired for consuming alcohol outside of her work, which was a violation of a reservation by-law and a violation of the employer's policies, which were considered implied terms of the employment.

> **Note**: **Determinations of "just cause" and "misconduct" by the Commission can be appealed** and where disqualification is imposed, a client should be advised to appeal. Many claimants mistakenly believe that they are automatically disqualified from EI if they have been fired, however unfairly. Unfortunately, many such claimants do not apply for EI benefits at all, or if disqualified do not realize that they can challenge the Commission's decision until their **30-day period to appeal** expires.

D. Disentitlement

Disentitlement means that the claimant is not eligible to receive benefits. This may be due to any number of reasons, including:

- illness of a minor attachment claimant (s. 21(1));
- the claimant is an inmate of a prison or similar institution, except when on parole (s. 37(a));
- the claimant is absent from Canada, unless they fall within the category set out in s. 55 of the *EI Regulations* (s. 37(b));
- the claimant does not have childcare in place; or
- loss of employment due to a labour dispute (i.e., a strike or lockout (s. 36)).

However, the most common basis for disentitlement is that the claimant failed to prove that they are "capable of and available for work and unable to find suitable employment" (s. 18(a)). As such, claimants should understand that they **must keep a job search record**.

Disentitlements can last indefinitely until the situation is remedied. Further, a disentitlement can be retroactive, which can lead to decisions of overpayment (see below). The *EI Act* places the onus on the claimant to prove entitlement on the balance of probabilities (s. 49). In cases where the evidence as a whole indicates that the claimant's availability was doubtful, it might be held that the claimant had failed to prove that they were available for suitable employment. For example, if a person is disentitled because they have no childcare arrangements, they may need to give the Commission the name of a relative or friend who will care for the child until a permanent arrangement can be made.

As discussed above, the longer the period of unemployment, the less "picky" the claimant can be in their employment search (see **section VII.B** for details). When claimants fill out EI application forms, they should not be too restrictive, especially about the wages they are willing to accept, or the distances they are willing to commute. Further, the Commission is likely to disentitle a claimant who is searching for a job that is virtually non-existent in the area the claimant is searching. Also, a former employee searching for a job in a field where the wages were atypically high can be

disentitled if they restrict the search to jobs with similar wage levels. This can often be the case with formerly unionized workers.

Ultimately, the Commission will make a judgment call about whether the claimant genuinely wants to find work and whether their current strategy maximizes the chances of success.

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VIII. Penalties, Violations, and Offences

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Imposing Penalties

Sections 38 and 40 of the *EI Act* allow the Commission to impose a penalty of up to three times the rate of weekly benefits on a claimant who **knowingly** makes a false or misleading representation to the Commission in relation to their claim for benefits. The claimant must actually know that the statement is false or misleading, and the onus of proving this is on the Commission.

The court applies a subjective knowledge test to decide whether the claimant intended to make false statements to the commission. Following *Canada v Gates (1995)*, 125 D.L.R. (4th) 348 [1], the Court in *David Moretto v AG Canada*, [1998] F.C.J. No. 438 [2] confirmed that even if a claimant's statement is found to be false, no penalty should be levied unless the finder of fact is satisfied that the claimant "subjectively knew" the statement was false. It is not enough to say that they should have known, or should have asked someone, or that a reasonable person would have known.

B. Types of Penalties

Types of penalties include warning letters, penalties, monetary penalties, prosecutions, and violations (discussed below). Most often, the Commission chooses to issue a monetary penalty (a fine). For relatively minor cases, they may issue a warning letter.

Alternatively, a claimant could be prosecuted criminally (summarily). Section 135(3) of the *EI Act* sets the minimum fine at $200 for fraud relating to a person's employment and Record of Employment. The maximum fine is $5,000 and where appropriate, twice the amount of benefits falsely obtained, or the fine plus imprisonment for a term of up to six months (s. 135(3)). The Commission need only write a decision letter to the claimant to impose a very large penalty, which is much simpler than proceeding with a court case, and the standard of proof is much higher in a criminal court than for the Commission.

1. Appealing a Decision to Impose a Penalty

If the Commission imposes a **penalty under s. 38** (or s. 39 in the case of employers), **a claimant should be advised to appeal** in all but the clearest of circumstances. Regardless of what the Commission says, it has the burden of proving that the claimant knew that the statement was false or misleading at the time it was made. If the claimant has a reasonable explanation (e.g., confusion regarding the intent of the question), the appeal should be allowed.

> **Note**: The Commission cannot impose a penalty under ss. 38 or 39 if 36 months have elapsed since the act or omission. For a case that discusses when time limits start to run, see *Attorney General of Canada v Kos*, 2005 FCA 319 [3]. The key issue here was whether file notes by an insurance officer constituted a "decision" that triggered the time limit. The court ruled that it did not, in part because the notes were not communicated to the claimant.

2. Appealing the Amount of a Penalty

The SST has jurisdiction over the amount of penalty assigned. While the amount of penalty can also be appealed, a penalty cannot be reduced simply because the SST considers it a bit too high. However, they can reduce a penalty if the decision is unreasonable, e.g., where the Commission erred by ignoring relevant circumstances such as the claimant's ability to pay, health problems, or where it took irrelevant circumstances into account. It is not necessary to prove that the Commission was unfair, just that it was not made aware of all the relevant circumstances.

C. The Violation System

Section 7.1 of the *EI Act* outlines the increased qualifying requirements for claimants who are found to have committed fraud after June 30, 1996. These requirements increase depending on how the violation is classified (minor, serious, or very serious).

1. Increased Number of Hours Required to Qualify

Section 7.1(1) provides that an insured claimant must have a greater number of hours to qualify if that person has accumulated one or more violations in the 260 weeks before making their claim. This adds a significant barrier to receiving benefits. The increased hours required to qualify after a violation are outlined in the table below:

Section 7.1(1) Table

Regional Rate Of Unemployment	Violation Severity			
	Minor	**Serious**	**Very Serious**	**Subsequent**
6.0% and under	875	1050	1225	1400
over 6.0% to 7.0%	831	998	1164	1330
over 7.0% to 8.0%	788	945	1103	1260
over 8.0% to 9.0%	744	893	1041	1190
over 9.0% to 10.0%	700	840	980	1120
over 10.0% to 11.0%	656	788	919	1050
over 11.0% to 12.0%	613	735	858	980
over 12.0% to 13.0%	569	683	796	910
over 13.0%	525	630	735	840

2. Issuing Violations

Pursuant to s 7.1(4), the Commission may issue a violation notice for:

- one or more penalties imposed under ss. 38, 39, 41.1 or 65.1, as a result of acts or omissions mentioned in ss. 38, 39 or 65.1;
- a finding of guilt for an offence under ss. 135 or 136; or
- a finding of guilt of one or more offences under the Criminal Code as a result of acts or omissions relating to the application of the *EI Act*.

3. Classifying Violations

If a violation is found to have occurred, as determined by the above criteria, it must be classified for purposes of the **s. 7.1(1) Table**. The *EI Act* classifies violations in the following manner under s. 7.1(5)(a):

a) **minor violation**: if the value of the violation is less than $1,000;

b) **serious violation**: if the value of the violation is less than $5,000, but more than $1,000;

c) **very serious violation**: if the value of the violation is over $5,000.

Under s. 7.1(6), the value of a violation for purposes of classification is the amount of overpayment of benefits resulting from acts on which the violation is based. If the claimant is disqualified or disentitled, the amount is determined by multiplying the claimant's weekly rate benefit by the average number of weeks of regular benefits.

References

[1] https://www.canlii.org/en/ca/fca/doc/1995/1995canlii3601/1995canlii3601.html?autocompleteStr=Canada%20v%20Gates%20(1995)%2C%20125%20D.L.R.%20(4th)%20348&autocompletePos=1
[2] https://www.canlii.org/en/ca/fca/doc/1998/1998canlii7566/1998canlii7566.html?autocompleteStr=moretto%20v&autocompletePos=8
[3] https://www.canlii.org/en/ca/fca/doc/2005/2005fca319/2005fca319.html?autocompleteStr=2005%20FCA%20319&autocompletePos=1

IX. Keeping Out of Trouble

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Job Search Record

Once a claim is established, the basic eligibility requirement to receive regular EI benefits is that claimants be able to prove that they are "capable of and available for work and are unable to find suitable employment." To help prove this, the claimant should keep a job search record. This may make disentitlement less likely and improve the chances of success should an appeal be necessary. In fact, the Commission may send to the claimant a form that is essentially a job search record. This is called an "active job search statement." The statement will require the claimant to provide:

- names of the businesses applied to and the names of the persons who interviewed the claimant;
- type of employment applied for;
- date of the application or contact;
- results of application.

Potential employers need not sign the statement or record. They, however, may be contacted by the Commission to confirm the facts reported. If the form is not returned, disentitlement may follow.

Even though an "active job search statement" may not be required, the claimant should keep a job search record with this same information. The job search record should include everything done to look for work. It should be made clear that every attempt or type of attempt counts (including such things as contacting family members about employment opportunities, "cold calling," etc.). The difficulty is that many claimants do not keep such records even though they have been warned to do so. In such cases, the claimant's representative can only do the following:

- advise the claimant to keep such lists in the future; and
- (if true) argue that the claimant did not know that they had to keep such a list, and that any list now composed from memory is not a complete one, as the claimant cannot remember the details of all the employment opportunities they pursued.

Every regular benefit claimant must also register with the Commission. Claimants should visit the job board at least once a week and record these visits. Many EI offices now maintain electronic job boards that can be accessed from computer kiosks in the offices, or from home, like the Canada Job Bank.

Claimants should also keep a record of all telephone calls and any other kind of contact for further evidence of job searching. Below is an example of a "job search record":

> June 12 – 15: Checked *The Sun* and *The Province* ads every day.
>
> June 12: Phoned Ajax Plumbing - George Brown, Manager, said not to send in a written application, but to call back in a month.

June 13: Checked bulletin board at the Canada Employment Centre and copied down one possible job: phoned XYZ Deliveries, but position already taken.

June 14: Wrote letter to Acme Amigos - no response.

June 15: Searched Internet job sites from Frank's house. Printed out some likely prospects.

The claimant should make the job search record as detailed and complete as possible. Include friends contacted regarding job openings, and **all efforts** made to look for a job. The claimant must at all times try to convince the Commission that they are making a great effort to find a job.

B. Interviews with an Investigation and Control Officer

At some point, the claimant may be summoned to the local EI office for an interview regarding their job search. Typically, the Investigation and Control Officer asks the claimant questions and makes a "Report of Interview," which is later reviewed by an Insurance Officer who will, on the basis of the Report, decide whether or not benefits are to continue. The claimant does not need to sign or affirm the report, though it is supposed to be read to them, and a copy should be provided for the claimant's records.

The Commission can disqualify a claimant for 7–12 weeks if the claimant fails to attend, without good cause, an interview the Commission asks them to attend (*EI Act*, s. 27(1)(d)). The claimant must either attend the interview or phone to make a new appointment and confirm the new appointment in writing.

1. Keeping the Record Straight

To protect against a potentially misleading report, the claimant should try to be as general as possible in their report. However, telling the truth during the interview is imperative. For example, the client should state, if true, that they would accept the going rate rather than stating their desired wage.

If the claimant decides, after the Report is read to them, that it is incorrect or misleading, the claimant should tellthe Officer immediately, because the Officer may correct the report immediately. If the Officer refuses or if the claimant later decides that they disagree, the claimant should write a letter stating their position. This is important since an appeal may be necessary and such an immediate reaction by the claimant may convince the Board of their honesty and integrity. It may also lead to the earlier reinstatement of a claimant who is disentitled for unreasonably restricting their job search.

2. Disputing the Report at an Appeal

If there is a disentitlement based on the Report of Interview and an appeal follows, the SST may be willing to accept explanations and modifications of the report. There must be evidence to support these modifications. Further, their usual position will be that since the statement was read to the claimant, it must be true. There is an established principle supported by several court decisions to the effect that "statements made before disentitlement are to be believed more than statements made after disentitlement," the latter suspected of being self-serving. One effective way for a claimant to demonstrate willingness to accept wages lower than the figure stated on the application form or in an interview report is to prove that they actively pursued a job possibility paying a lower amount after learning what the salary was.

C. Reporting

In order to receive continued benefits, individuals must send in reports on a regular basis. They are usually due and cover every two calendar weeks (from Sunday to Saturday).

There are three ways to send in these reports:

- By telephone at 1 (800) 531-7555
- Online: https://srv265.hrdc-drhc.gc.ca/interdec/ouverturedesession-login/ouverturedesession-login.aspx?lang=eng
- By mailing a paper report

The timing and due dates of these reports depend on each individual claim. This information will be available to each claimant shortly after applying to EI when the Benefit statement and Access Code is received in the mail.

> **Note**: The paper "Report Card" method is only available to a claimant who cannot otherwise transmit their report online or by phone. The standard ways of processing and paying EI benefits are the Reporting Service by Internet and the Telephone Reporting Service.

1. What to Include in Reports

Be careful to include the following in each report:

- indicate dates and hours worked and earnings before deductions;
- provide the contact information of any employers;
- enter hours spent at school or in a training course and any training allowance received;
- indicate whether you were available for work;
- report other money earned, even if you'll receive it later.

The information given must be accurate, otherwise the claimant could be accused of a false or misleading statement. If the claimant needs to update a report, for example to change the amount of earnings reported, they should call the Telephone Reporting Service immediately. The Commission has a policy that they will not charge or prosecute a claimant for giving false or misleading information if the claimant volunteers the correct information before an investigation begins.

X. Timing for Reporting

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Individuals should pay special attention to report due dates. Each claim has its own due date, and the specific timing for meeting these due dates can differ between the telephone, internet, and paper systems. For example, all Telephone Reporting Service reports made on the weekend are processed at 3:00 p.m. Sunday

Claimants must complete their reports throughout the claim period whether or not they are receiving benefits (for example, during the waiting period or a period of disqualification). When an appeal is pending, reports must continue to be made because, if the appeal is successful, the claimant may find that there will be no payments for any week which no report had been made (*EI Regulations*, s. 26).

Individuals on maternity, parental, and sickness benefits have a responsibility to report if they earn anything, but they do not have a responsibility to make routine reports.

> **NOTE**: Workers whose weekly income amounts tend to fluctuate (e.g., trade workers) should try to estimate as carefully as possible when providing an income figure. Those claimants who either err on the side of caution by declaring an amount that is too high or those who under-declare their actual income may be deemed by the Commission as providing “false or misleading information” and may incur penalties. The best way to avoid penalties is to always inform the Commission of the exact amount as soon as it is known to be correct. Also, an appeal should be filed immediately if a claimant is penalized for an inaccurate estimate of weekly earnings. The test for a penalty is that the claimant **knew** that the information they were giving was false. Honest attempts to predict actual earnings should not lead to penalties, even when it results in an overpayment of benefits.

A. Documents

It is generally a good idea to fill in all the documents the Commission requires and to return them immediately, since failure to do so may involve delay, if not disentitlement. **Keep copies of all documents in chronological order**.

B. Delay

One of the greatest difficulties with EI is delay. Often the delays are related to report cards, and, in certain cases, it is possible to get the insurance officer to use their “backup manual pay system” rather than waiting for the computer. If this is done, the claimant may get their money quickly.

Another solution to delay may often be to hassle the Commission. In extreme cases, you may wish to consider writing to the Minister (Employment and Immigration) with copies to the claimant’s Member of Parliament, or to opposition critics. See **Chapter 5: Public Complaints Procedure**.

C. Self-Employment While Claiming EI

Unlike employees, self-employed people and independent contractors are not automatically covered by the EI system. These workers have the option of opting into the EI system, in which case they may be entitled to receive certain special benefits, but not regular benefits.

Even though self-employed individuals and independent contractors are not automatically covered by the EI system, claimants may get into trouble if they try to start up a business while collecting EI after losing their job. Contrary to many claimants' beliefs, self-employment amounts to "working" within the meaning of the question on the weekly reports, even if the person has no expectation of receiving any income from it. Section 30 of the *EI Regulations* provides that, in most cases, a claimant engaged in self-employment is deemed to have worked a full week, unless the self employment is "so minor in extent that a person would not normally follow it as a principal means of livelihood." Failure to report such activity will usually lead to overpayments and penalties, or charges for misrepresentation. Decisions by the Commission on overpayment and/or the imposition of penalties should always be appealed.

If a claimant wishes to start a business while on EI, they should contact the Commission **before** doing anything to pursue self-employment. Special benefits may be available if the claimant enters an approved self-employment agreement for the development and implementation of a business plan.

XI. Overpayment and Collections

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Overpayments

If the Commission pays a claimant more than that claimant is entitled to, whether through the claimant's fault or the Commission's, the Commission is entitled to recover the overpayment (*EI Act*, s. 43). The Commission may deduct the overpayment from any benefit payable to the claimant, or the Commission's Collections Branch may contact the claimant to recover the overpayment (s. 47). The Commission must send written notice, stating the existence of the overpayment and why it occurred, as well as explaining the right to appeal within 30 days.

If the overpayment results from a reconsideration of a decision involving an element of judgment or discretion by the Commission (often as part of a random "audit"), an appeal should be filed. Umpires have ruled that the Commission does not have the right to second-guess its previous determination of such questions (such as just cause, misconduct, and availability) unless there are significant new facts it could not have learned about when the initial decision was made.

1. Interest Regulation

EI claimants are required to pay interest on outstanding overpayments and penalties arising from what the Commission considers fraud or misrepresentation.

No interest will be charged on debt that arises from the Commission's errors in benefit payments. Where the claimant has appealed the decision that establishes the overpayment or penalty, no interest will be charged during the appeal process, and claimants will be reimbursed interest payments made before the appeal if the Referees or Umpire decide that there was no fraud or misrepresentation.

B. Time Limits

The statutory limitation on collection of overpayments is six years after declaring the overpayments, excluding the periods during which an appeal is pending. The Commission has three years to discover the debt. Periods of appeal do count in this assessment. If an overpayment is due to fraud, the Commission has six years to discover and six years to recover the amount. However, the Commission is not allowed to impose a penalty more than 36 months after the offence.

C. Write-off of Overpayment or Other Amounts Owed

Section 56 of the *EI Regulations* specifies various circumstances in which a benefit wrongly paid may be written off and not be recollected. The provision in s. 56(1)(f) allows a write-off when, in all circumstances:

- the sum is not collectable; or
- repayment would result in undue hardship to the debtor, or
- the administrative costs of collecting the penalty or amount, or the interest accrued on it, would likely equal or exceed the penalty, amount or interest to be collected.

Regulation 56(2) provides for an almost automatic write-off of benefits received more than 12 months before the Commission notifies the debtor of the overpayment and that were resulting from the Commission or employer's error.

Claimants seeking information about the amount of repayment debt may contact Service Canada.

Service Canada Information Line

1-800-206-7218

For information about collections and repayment, claimants can contact the CRA:

CRA

1-866-864-5823

A claimant may not apply for reconsideration of a decision refusing to write-off an overpayment. However, according to the Digest of Benefit Entitlement Principles, the claimant or their representative may ask for an appraisal of the situation when a write-off is not granted, or a further appraisal at a higher level in the case of further complaint (20.8.0). This does not amount to a formal reconsideration and the decision cannot be appealed to the SST.

D. Benefit Repayment

Under s. 145(1) of the *EI Act*, a claimant whose income for the taxation year exceeds 1.25 times the maximum yearly insurable earnings is liable for the repayment of the lesser of:

- 30% of the total benefits, other than special benefits, paid to the claimant in the taxation year, or
- 30% of the amount by which the claimant's income for the taxation year exceeds 1.25 times the maximum yearly insurable earnings.

The benefit repayment scheme is administered and enforced by the Minister of National Revenue (s. 148 of the *EI Act*). A claimant will estimate on their tax form the amount of benefit repayment payable by them (s. 147).

E. Refund – Insurable Earnings up to $2,000

If a person has insurable earnings of not more than $2,000 in a year, the Minister shall refund to the person the aggregate of all amounts deducted as required from the insurable earnings, whether by one or more employers, on account of the person's employee's premiums for that year (*EI Act*, s. 96(4)).

XII. Reconsideration

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Before appealing to the Social Security Tribunal, a claimant must first submit a Request for Reconsideration to the *EI Commission* within 30 days. Upon receipt of a Request for Reconsideration, a Service Canada employee, other than the one who made the original decision, will review your case, including any new information provided in the Request. The Service Canada employee will also conduct any additional investigation that may be required, including clarifying the circumstances, and obtaining relevant documents related to the employment. The Service Canada employee will use this information to make the EI Commission's final decision on the claimant's claim.

The Request for Reconsideration form can be found at the following link: https://catalogue.servicecanada.gc.ca/content/EForms/en/Detail.html?Form=INS5210.

This request must be submitted to Service Canada within **30 days** of the date the decision was communicated to the claimant. If the 30-day period has passed, a claimant may still submit a request for reconsideration with an explanation for the delay. The EI Commission will consider the reasons for the delay and decide whether to allow the request. This process is **free of charge**.

The Commission will not provide a copy of the claimant's EI file when a Request for Reconsideration is submitted. Instead, the claimant must make a request for their file under the *Privacy Act*. This can be done in one of the following ways:

By mail: http://www.tbs-sct.gc.ca/tbsf-fsct/350-58-eng.asp

Online: https://atip-aiprp.apps.gc.ca/atip/welcome.do

Obtaining a copy of the claimant's file may be the only way to see material submitted by the employer, which will be especially important in cases where misconduct or just cause for leaving employment is the subject of the appeal.

The claimant will be informed in writing of the decision following the reconsideration. If the decision is unfavourable to the claimant, a Service Canada employee will provide a verbal explanation.

A. What can be Reconsidered (and Later Appealed)

Most decisions of the Commission may be reconsidered. For example, claimants are eligible to request a reconsideration if the original decision:

- refused EI benefits;
- ordered that EI benefits received be repaid;
- issued a warning letter or notice of violation; and/or
- imposed a penalty.

B. What cannot be Reconsidered (and Later Appealed)

The following issues cannot be reconsidered:

- certain discretionary benefits, such as training courses, employment (training) benefits, and work-sharing, *EI Act* ss. 24, 25, and 64;
- insurability issues, which are subject to a separate decision-making and appeal process that must be appealed to the Minister of National Revenue at the Tax Court. (see Section **III.A: Insurable Employment**, and ss. 90–105 of the **EI Act**);
- decisions concerning the write-off of debt from overpayment or penalty (*EI Act*, s. 112.1)

1. Insurability Decisions

Certain decisions concerning “insurable employment” must be appealed to the CRA or the Minister of National Revenue. These appeals can be found in s. 90(1) of the *EI Act*.

For an example of the appeal process, consult *McPhee v Minister of National Revenue*, 2005 TCC 502 [1]. In deciding whether the claimant was an employee or an independent contractor, the court allowed a consideration of the parties' intentions.

It is crucial to analyze the dispute and file the correct type of appeal. In doubtful cases, it can be wise to do both – file an appeal and ask the CRA for a ruling.

References

[1] https://www.canlii.org/en/ca/tcc/doc/2005/2005tcc502/2005tcc502.html?resultIndex=1

XIII. Social Security Tribunal

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

If the claimant is unhappy with the decision following the reconsideration, the claimant may file an appeal to the SST. General information about the Tribunal appeal process can be found online [1].

A comprehensive guide to appeals to the General Division and Appeals Division called "Challenging A Decision About Your Employment Insurance Claim: Reconsideration and the Social Security Tribunal" can be found on the Community Legal Assistance Society website [2].

A. General Division

The SST must receive a claimant's appeal **within 30 days** of the claimant's becoming aware of the reconsideration decision. There are two ways to file an appeal:

- **Option 1**: Fill out the Notice of Appeal to the SST General Division – Employment Insurance Form, and e-mail, mail or fax it to the SST. The form can be filled out on the computer and then printed, or printed and filled out by hand. This form is accessible online [3].

  If the claimant is unable to print the form, the claimant may contact the SST and the Tribunal will send the form to the claimant.

- **Option 2**: Write the SST a letter of appeal containing all the information required in the form. If the claimant fails to provide all of the information required, the appeal may not be accepted.

  Upon receiving an incomplete appeal, the Tribunal will send a letter to the applicant asking them to file all missing information within 30 days of the date of the letter. If the applicant does this, the Tribunal will consider the appeal to have been filed the date of the original incomplete application for the purposes of meeting the deadline to file an appeal.

  Once the SST receives a completed notice of appeal, it will notify Service Canada of your appeal.

  If a claimant submits an appeal form after the 30 days, the claimant can request an extension in the form. However, the decision is ultimately up to the Tribunal's discretion as to whether to grant the extension.

  When a Notice of Appeal is received, a Tribunal Member will be assigned to the claimant's file. The Member will review the file and will **dismiss any file which the Member decides has no reasonable chance of success**. The SST will notify the claimant if they are considering summarily dismissing an appeal and provide the claimant with an opportunity to make additional submissions before the appeal is dismissed.

  If the appeal is proceeded with, there are several types of hearings available:

- Written: the Member will ask the claimant questions and request a written response by a certain date
- Telephone
- Videoconference
- In-Person

The Member will choose the type of hearing to be used. The Tribunal will telephone or write to the claimant to arrange the hearing. Following the hearing, the Member will send the claimant a copy of the decision.

1. Discretionary Decisions

Discretionary decisions such as the Commission's refusal to extend time, or its decision regarding the length of disqualification, can only be reversed if it is decided that the original decision:

a) ignored or failed to consider a relevant factor, including something the Commission was unaware of, such as health problems or other information;

b) acted on an irrelevant factor;

c) committed a jurisdictional error; or

d) acted against the principles of natural justice, such as acting with bias or bad faith.

The issue is whether the Commission's exercise of discretion in the original decision was reasonable. However, where the Commission has failed to consider relevant evidence, or where there is new evidence presented for the first time by the claimant, the reviewer can exercise remedial authority by making the decision that should have been made. It is rarely difficult in a deserving case to show that the Commission has disregarded some relevant fact.

2. Amount of Penalty

Courts have also determined that the *amount* of a penalty for making false statements may also be appealed only to the extent that in coming up with the amount of penalty, the Commission committed an error, such that the decision or the decision-making process was unreasonable. That being said, as stated above, one can often find some relevant "fact" that the Commission failed to consider.

Keep in mind that the decision to apply a penalty can always be appealed.

B. Re-opening a Decision

A claimant can apply to the Commission or the SST to rescind or amend a decision if there are new facts or the decision was made without knowledge of, or was based on a mistake as to, some material fact. This application can only be made once and must be submitted within one year of the decision.

C. Appeal Division

The Appeal Division of the SST must receive a claimant's appeal **within 30 days** of the claimant's receipt of the General Division's decision. There are two ways to file an appeal:

- **Option 1**: Fill out the Application to the Appeal Division – Employment Insurance Form, and mail or fax it to the SST. The form can be filled out on the computer and then printed or printed and filled out by hand. This form is accessible online [4].

  If the claimant is unable to print the form, the claimant may contact the SST and the Tribunal will send the form to the claimant.

- **Option 2**: Write the SST a letter of appeal containing all the information required in the form. It is important to ensure that all the required information is included.

  If a claimant submits an appeal form after the 30 days, the claimant can request an extension in the form. However, the decision is ultimately up to the Tribunal's discretion as to whether to grant the extension. When a Notice of Appeal is received, a Tribunal Member will be assigned to the claimant's file to decide whether to grant permission to allow the appeal to proceed. The grounds for appeal to the Appeal Division are:

- the General Division failed to observe a principle of natural justice or otherwise acted beyond, or refused to exercise, its jurisdiction;
- the General Division erred in law in making its decision; or,
- the General Division based its decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the evidence before it.

A claimant will be informed in writing if their application for permission to appeal is dismissed. Permission is not required when appealing a General Division decision to summarily dismiss the appeal.

If permission is granted for the appeal, the parties have 45 days to provide submissions. If no submissions are received, the Member will decide whether to allow the appeal to proceed based on the documents or submissions on file.

In some cases, the Appeal Division will decide solely on the basis of the written record and submissions, and the Member will decide if a hearing is necessary. The hearing process used is the same as the General Division.

Following the hearing, the Member will send the claimant a copy of the decision. The decisions of the Appeal Division are subject to review under the *Federal Courts Act*.

References

[1] http://www.canada.ca/en/sst/index.html
[2] https://clasbc.net/resources/self-help-guides/
[3] https://www1.canada.ca/en/sst/forms/noa-gd-ei-en-v2.pdf
[4] https://www1.canada.ca/en/sst/forms/lta-ad-ei-en-v1.pdf

XIV. Appeals

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Appeal Docket

The Commission receives and reviews the appeal letter and, unless convinced to reverse its decision by the information contained in it, will set the place and date of appeal and send the claimant and the employer an “Appeal Docket.” The docket contains all documents from the Commission’s file regarding the claim that it considers relevant to the issue. The docket is given to the claimant, the General Division, and to the employer if the employer asks to participate.

The docket should be carefully reviewed, as the appeal must meet the Commission’s argument and evidence. The docket includes the “Representations of the Commission to the General Division,” which is basically the Commission’s written argument supporting its decision. Otherwise, the Commission usually does not appear at the hearing.

B. Preparation for Appeal to the General Division

When reviewing the docket and preparing for the appeal, the claimant and their representative should consider the:

1. "Representations of the Commission to the General Division" (this is the Commission's justification for its decision);
2. Evidence relied upon by the Commission; and
3. Umpire decisions (now SST Appeal Division decisions) cited by the Commission.

The docket contains most of the relevant documents and summarizes all statements made by the claimant to the Commission, as well as the Insurance Officer's decision and comments. Read the docket carefully and be prepared to comment on it.

In many cases, the claimant may have to explain that the statement does not accurately reflect what they really intended to say. For example, the claimant did not mean to say that they would only work for $20 per hour and no less. Rather, the claimant meant that they would prefer $20 per hour but would work for the going rate. The claimant will have to overcome the SST's inclination to believe what the claimant said in their statement as opposed to what is being said now, after disentitlement. The claimant must convince the SST of their honesty.

Under the *Privacy Act*, R.S, 1985, c. P-21, a claimant has a right to access the entire claim file, whether there is an appeal pending or not. This may include the documents that are not part of the docket because the Commission did not consider them relevant. If details of the Commission's record may be important to the outcome, the advocate should ask for full disclosure of all relevant files.

The jurisprudence on EI includes more than 80,000 decisions of the Umpire, along with perhaps a thousand or so decisions of the Federal Court of Appeal and the Supreme Court of Canada. Most of these decisions can be found (and searched by keywords) on CanLII or the Social Security Tribunal Website [1]. A claimant or representative should always read the cases upon which the Commission is relying. Often the quoted excerpt is taken out of context, and the facts are so different that the case can be easily distinguished, or even used to support the appeal.

Any exhibits, cases, or written arguments should be submitted to the General Division ahead of the hearing date, if possible. This will give the Tribunal a chance to familiarize themselves with the materials, and make more efficient use of the hearing. The Tribunal will accept new evidence at the hearing but may adjourn if the material is lengthy

C. Hearings Before the General Division

1. Claimant's Preparation

The claimant should be neat in appearance, be prepared to submit a job search if relevant, and be prepared to present the facts of their situation. The claimant should also be prepared to answer questions directly and clearly.

In cases where credibility is crucial, claimants may consider preparing a sworn affidavit or statutory declaration of the evidence if the facts are in dispute, since sworn evidence carries greater weight. The affidavit or declaration can also form a useful "record" of the claimant's case, and is especially useful in cases where there are contradictory statements.

2. Representative's Preparation

The representative should also be neatly dressed, which in the case of LSLAP clinicians means courtroom clothing. The representative should:

- prepare a legal basis to allow the appeal, using the *EI Act*, *EI Regulations*, Digest, and jurisprudence;
- spend some time before the hearing with the claimant reviewing facts, explaining legal arguments, and anticipating questions;
- meet with witnesses, explain Tribunal procedure, and review with them the questions that will be asked of them at the hearing;
- prepare a written list of points to be made in the claimant's favour. This is to ensure that if and when "sidetracked" by the General Division, none of the points will be forgotten. It will also be helpful in "making a record" to give to the General Division; and
- prepare a written submission summarizing the main points of evidence and arguments. This fills in the gaps in the oral arguments and becomes part of the "record" for later appeals to the Appeal Division or the Federal Court.

3. Procedure at the Hearing

The General Division generally takes a "common sense" approach rather than a highly legal approach to the proceedings and is usually interested primarily in the evidence. The claimant's appearance, attitude, and presentation of facts are all important. An hour spent familiarizing the claimant with the procedure and preparing them for the types of questions the General Division will ask is usually more valuable than an hour spent mulling over the nuances of the *EI Act*. That being said, the Tribunal will not allow an appeal if they do not believe they have the authority to do so, whatever sympathy they may have for the worker.

Rules of evidence generally do not apply to General Division hearings. An objection on a "technicality" may upset the General Division and jeopardize the claimant's success. However, the General Division will agree that the hearing is only to decide the questions placed before it and may accept an objection that a question is irrelevant to the issue before the Tribunal. Often, decision-makers find that the evidence of a claimant that appears before them is entitled to more weight than the hearsay statement of the employer to an EI agent in a telephone conversation.

In most cases, the hearing will be recorded. In the absence of a request to not record the hearing, the General Division will typically have the hearing recorded. The claimant may request to have the hearing recorded if the General Division chooses not to. It is **strongly advised** that every claimant ensure that the hearing be recorded, as this provides a record of the evidence, and also shows whether the General Division gave a fair hearing.

4. Evidence at the Hearing

a) Claimant's Evidence

The claimant should then be asked to tell the General Division their version of the relevant facts. The advocate may ask leading questions (requiring a simple "yes" or "no" answer) for all matters not really in dispute, or relate the non-controversial facts directly to the General Division members. However, it is important to let claimants tell crucial facts in their own words. At any point, the General Division itself may ask questions of the claimant or witnesses, or may query parts of the legal argument that it does not understand. A well-prepared claimant can make a good impression if answers are given in a clear, straightforward manner. The claimant should be sure to make eye contact with the General Division members when addressing them.

Ryan v Attorney General of Canada, 2005 FCA 320 [2] is a useful case, as the court reconsidered the weight of some claimant evidence. The court contradicted the general line of reasoning that evidence given by a claimant in response to

the Commission's accusations is inherently less believable.

b) Submissions: Disputing the Commission's Case

Following the presentation of documents, the claimant's evidence, and any other witnesses, the representative should summarize the facts and evidence in the client's favour and make legal arguments if applicable. The representative should point out fallacies in the Commission's argument and distinguish the cases relied upon by the Commission.

c) Payment of Benefit Pending Appeal: Not Recoverable

Benefits are not payable in accordance with a decision of the General Division if, within 21 days after the day on which a decision is given, the Commission makes an application for leave to appeal to the Appeal division on the ground that the General Division has erred in law, according to s. 80 of the *EI Regulations*. If benefits are paid to the claimant and the Appeal Division allows the Commission's appeal, the benefits cannot be recovered. In practice, however, when the Commission appeals, it always alleges an error of law, and files within 21 days. This avoids the need to pay benefits while the appeal is pending.

References

[1] https://decisions.sst-tss.gc.ca/sst-tss/en/nav.do
[2] https://www.canlii.org/en/ca/fca/doc/2005/2005fca320/2005fca320.html?autocompleteStr=2005%20FCA%20320&autocompletePos=1

XV. Judicial Review

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

If a claimant disagrees with the decision of the Appeal Division of the Social Security Tribunal, the claimant can file a Notice of Application in the local Federal Court Registry for judicial review by the Federal Court of Appeal, on grounds set out in ss. 28 and 18.1(4) of the current *Federal Court Act*. These are very similar to the grounds for appeal to the Appeal Division of the Social Security Tribunal.

The application must be made within **30 days** of the time that the decision was communicated to the applicant, or within such further time as the Court of Appeal may allow. At this stage, qualified counsel is almost essential. Contact the Community Legal Assistance Society if this situation arises. See **Chapter 5: Public Complaint Procedure** for more information regarding judicial review.

XVI. LSLAP's Use of This Chapter

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. What LSLAP Can Do

The following is a summary of what LSLAP students can help with:

- Assist a client with an initial application;
- Assist a client with an application for training benefits or write-off of debt;
- Assist a client with an application for reconsideration;
- Appeal any unfavourable decision by the Commission;
- Write a Notice of Appeal;
- Prepare for an appeal to the General Division;
- Appear at a hearing before the General Division;
- Assist a client with an appeal to the Minister of National Revenue;
- Appeal unfavourable decisions by the General Division to the Appeal Division; and
- Help clients cut off from EI benefits write a letter of complaint to their MP.

B. What LSLAP Cannot Do

LSLAP cannot represent clients seeking judicial review of decisions made by the Appeal Division, because these are argued in the Federal Court of Appeal (and then, in the event of a further appeal, the Supreme Court of Canada). LSLAP students cannot appear before these courts. Clients can be referred to the Community Legal Assistance Society (CLAS), as qualified legal counsel will be required.

C. Authorization for Representatives

If a student plans to act for a claimant, or obtain information from the Commission on their behalf, the student should have the claimant sign an authorization form:

EMPLOYMENT INSURANCE COMMISSION:

I, _____, SIN# ____ ____ ____, hereby authorize you to release any and all information required by _____, or the (University of British Columbia) Law Students' Legal Advice Program, which they may request of you.

DATE:

In addition, the claimant should complete a Personal Information Request Form (available from LSLAP's office) to obtain all documents, memos, notes, e-mail messages, and other records pertaining to the EI claim. An electronic copy of the form is also available online [1].

References

[1] https://www.tbs-sct.gc.ca/tbsf-fsct/350-58-eng.asp

Appendix A: Initial Application Checklist

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Advice if Client Has Not Yet Applied for EI

1. Apply Immediately

- Apply during the first full week of unemployment when possible.
- Do not miss your deadline to apply simply because you do not have the ROE. If necessary, apply without the ROE.
- If the application was not filed in the first week, then the claimant should ask for the claim to be “antedated” to the date it should have been filed. “Good cause” must exist to justify each day it was delayed prior to applying (see **Section V: The Benefit Period**).

2. Warning

Statements made unwittingly over the phone can be used to disqualify the claimant.

3. How Long Does It Take To Process The Application?

- Generally around four weeks, depending on administrative delay. Benefits can be retroactive if there is an administrative delay.
- **Emergency financial support** can be obtained from income assistance: this **must be repaid** when the client receives EI.

4. Reason for Leaving

a) Did You Leave Voluntarily?

- Why did the claimant leave?
- Was there “just cause” (see **Section VII.C.1: Just Cause for Voluntarily Leaving Employment**)?
- The Commission’s determination of “just cause” can be appealed to the General Division.

b) Were You Fired?

- Why was the claimant fired?
- Was there “misconduct” by the claimant (see **Section VII.C.2: Misconduct**)?
- The determination of “misconduct” can be appealed to the General Division.

5. Qualifying for EI

a) Availability

- Are you available for work?
- Caring for others may mean you are not available for work. What arrangements for childcare, for instance, have you made for when you obtain work?
- Studying full time will likely mean you are not available for work.
- Studying part time may also mean you are not considered available for work. You will have to prove availability, i.e., that a course does not interfere with the job search (see Section VII: Benefit Entitlement).
- You cannot be on vacation.
- Narrowly restricting your salary expectations, the type of work sought, the work location, or your work schedule can result in a determination that you are not available for work.

b) Capability

Are you capable of working?

- You cannot be ill or injured or otherwise incapable of working to qualify (see **Section IV.C: Sickness Benefits and IV.G: Maternity Benefits**).

c) Unable to Find Suitable Employment

- Were you offered employment that was unsuitable?
- Were you offered employment in the same occupation for **lower pay** in **poorer working conditions**?
- Were you offered employment in a different occupation, but at **lower pay** in **poorer working conditions**?

Keep a Job Search Record (see Section **IX.A: Job Search Record**)

- Where have you sent resumes? Write down the date, and the names, addresses, and phone numbers of companies contacted.
- What dates did you check the job postings board?
- Have you participated in any job search clubs?

6. Appeal Any Unfavourable Decision

- Begin with a request for the unfavourable decision to be reconsidered by the CEIC.
- If the reconsideration decision is still unfavourable, submit a written application to the General Division of the SST. Appeal applications must be submitted within 30-calendar days of receipt of the reconsideration decision (see **Section XIII: The Social Security Tribunal (SST) Overview**).

Chapter Nine - Employment Law

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

This chapter is intended as a basic guide to outline some of the most common issues faced by employees. Each jurisdiction has its own legislation governing employment standards and human rights, and this chapter focuses on the laws of British Columbia. Nothing in this chapter is legal advice; only a lawyer can advise an employee on their specific situation.

Most employment related legal claims fall into one of the three categories discussed in this chapter:

- Human Rights claims;
- Violations of the Employment Standards Act; and
- Common law breaches of employment contracts.

In many cases, there are potential claims in two or even three categories. Consider and explore the potential for claims under each category.

Begin by going through Section III: Checklist.

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Employment and Wrongful Dismissal Legislation

1. Federal Legislation

- *Canada Labour Code*, RSC 1985, c L-2, sets out minimum employment standards for federal employees including standards governing collective bargaining and occupational health and safety. There are three general parts to the Act: Part I: Industrial Relations, Part II: Occupational Health and Safety, and Part III: Standard Hours, Wages, Vacations and Holidays. Website: https://laws-lois.justice.gc.ca/eng/acts/l-2/
- *Canadian Human Rights Act*, RSC 1985, c H-6, covers discrimination in the workplace and the procedure for adjudication before the Canadian Human Rights Commission. Website: https://laws-lois.justice.gc.ca/eng/acts/h-6/
- *Employment Equity Act*, RSC 1995, c 44, helps achieve equality in the workplace with particular attention to inequalities that exist for women, Aboriginal peoples, persons with disabilities, and visible minorities. Website: https://laws-lois.justice.gc.ca/eng/acts/E-5.401/index.html
- *Employment Insurance Act*, RSC 1996, c 23, outlines the requirements and qualifications for Employment Insurance. Website: https://laws-lois.justice.gc.ca/eng/acts/e-5.6/
- *Personal Information Protection and Electronic Documents Act*, RSC 2000, c 5, protects personal information collected and distributed electronically for employees in federal jurisdiction. Website: https://laws-lois.justice.gc.ca/ENG/ACTS/P-8.6/index.html

2. Provincial Legislation – Employees

- *Employment Standards Act*, RSBC l996, c 113, (*ESA*) sets out minimum employment standards for provincial employees. On May 30, 2019, the Employment Standards Amendment Act received Royal Assent, and amendments set out therein are now in force. Website: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96113_01
- *Employment Standards Regulation*, BC Reg 396/95, includes provisions on scope of coverage and the penalty regime. Website: http://www.bclaws.ca/civix/document/id/loo97/loo97/396_95
- *Wills, Estates, and Succession Act*, ss 175-180 deals with deceased workers' wages. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/09013_01#division_d2e13620
- *Human Rights Code*, RSBC l996, c 210, deals with discrimination in employment, among other things. Website: http://www.bclaws.ca/Recon/document/ID/freeside/00_96210_01
- *Labour Relations Code*, RSBC 1996, c 244, deals with union membership, collective bargaining, and the role of the Labour Relations Board. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/96244_01
- *Workers' Compensation Act*, RSBC 2019, c 1, governing Act of the Workers' Compensation Board. Website: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19001_00
- *Personal Information Protection Act*, SBC 2003, c 63, sets out ground rules for how private sector and not-for-profit organizations may collect, use, or disclose information about an individual. Website: http://www.bclaws.ca/Recon/

document/ID/freeside/00_03063_01

- *Apology Act*, SBC 2006, c 19, addresses some circumstances where a claimant is seeking an apology from their former employer. Employers can be cautious about making an apology in case the apology attracts liability. This concern can be addressed by providing an apology in accordance with the Apology Act, which specifically separates an apology from an acknowledgement of liability. Website: http://www.bclaws.ca/civix/document/id/consol18/consol18/00_06019_01

3. Provincial Legislation – Contractors

- *Builder's Lien Act*, SBC l997, c 45, provides that a builder may file a lien against property for work and materials put into that property and sets out the procedure for filing a lien. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/97045_01
- *Repairers Lien Act*, RSBC l996, c 404, states that a repairer may put a lien on chattel for work and materials put into that chattel. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/96404_01
- *Woodworker Lien Act*, RSBC l996, c 491, states that a woodworker may put a lien on logs or timber for work done or services performed. Website: http://www.bclaws.ca/civix/document/id/consol26/consol26/00_96491_01

B. Resources

1. Books

- Howard A Levitt. *The Law of Dismissal in Canada*, (Aurora, Ont: Canada Law Book, 2003). This textbook is used by Employment Standards Branch staff.
- Malcolm Mackillop. *Damage Control: An Employer's Guide to Just Cause Termination*, (Aurora, Ont: Canada Law Book, 1997).
- Ellen E Mole. *The Wrongful Dismissal Handbook*, Second Edition (Scarborough: Butterworths, 2005).

2. Other Resources

- The Continuing Legal Education Society of BC holds an Employment Law conference each year. Papers are published on topics of current interest, and can be found at most law libraries, or online for those with a subscription at: http://online.cle.bc.ca/
- The Employment Standards Branch publishes the Employment Standards Act Interpretation Guidelines Manual. The Manual sets out the ESB`s interpretation of the Act and Regulations. The manual is published online at: https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm
- Lexis Advance Quicklaw publishes Canada Wrongful Dismissal Quantums, which summarizes wrongful dismissal awards organized according to occupation and duration of employment. The Quantums are available online to those with a subscription at https://advance.lexis.com/api/permalink/0d69f961-3512-4e11-a43e-15a0e8f7cdf7/?context=1505209
- Carswell hosts an online Wrongful Dismissal Database. The database calculates average notice period awards from precedential cases. Reports can be purchased individually or by subscription. The database is accessible online at: http://www.wrongfuldismissaldatabase.com

- vLex Canada provides a free Bardal factor calculator. By inputting your employment information, the service will provide you with some caselaw similar to your circumstances and estimate a range of reasonable notice periods. The tool can be found here: Website: http://www.bardalfactors.ca/whats-reasonable

C. Referrals

Employment Standards Branch (Employees in Provincial Jurisdiction)

Online	Website [1]
Address	Lower Mainland Regional Office 250 – 4600 Jacombs Road Richmond, B.C. V6V 3B1
Phone	(604) 660-4946 Fax: (604) 713-0450

The other Branch in the Lower Mainland is located in Langley.

Employment Standards General Inquiry Line

Online	Website [2]
Phone	**(Prince George):** (250) 612-4100 (Rest of B.C.): 1-800-663-3316 Fax: (250) 612-4121

Labour Relations Board

Online	Website [3]
Address	(Union Enquiries: Provincial Jurisdiction) Suite 600 Oceanic Plaza 1066 West Hastings Street Vancouver, B.C. V6E 3X1
Phone	(604) 660-1300 Fax: (604) 660-1892

Employment and Social Development Canada, Labour Program

Online	Website [4]
Address	11 – 300 West Georgia Street Vancouver, B.C. V6B 6G3
Phone	(604) 872-4384 Toll-Free: 1-800-641-4049 Emergency: 1-800-641-4049 Fax: (604) 666-3166

Canada Industrial Relations Board

Online	Website [5]
Address	(Union Enquiries: Federal Jurisdiction) Western Region Office Suite 501, 300 West Georgia Street Vancouver, B.C. V6B 6B4
Phone	(604) 666-6002 Toll-free: 1-800-575-9696 Fax: (604) 666-6071

Employment Standards Tribunal of British Columbia

Online	Website [6] E-mail: registrar.est@bcest.bc.ca
Address	Suite 650 Oceanic Plaza 1066 West Hastings Street Vancouver, B.C. V6E 3X1
Phone	(604) 775-3512 Information Line: (250) 612-4100 Toll-free: 1-800-663-3316 Fax: (604) 775-3372

B.C. Human Rights Tribunal

Online	Website [7] E-mail: BCHumanRightsTribunal@gov.bc.ca
Address	1170 – 605 Robson Street Vancouver, B.C. V6B 5J3
Phone	(604) 775-2000 TTY: (604) 775-2021 Toll-free (in B.C.): 1-888-440-8844 Fax: (604) 775-2020

Workers' Compensation Board of B.C. (WorkSafeBC - Head Office)

Online	Website [8]
Address	Main Building 6951 Westminster Highway Richmond, B.C. V7C 1C6
Phone	604-276-3143

Canadian Human Rights Commission – British Columbia and Yukon

Online	Website [9]
Phone	Toll-free: 1-888-214-1090

Migrant Workers Centre

Online	Website [10] E-mail: info@wcdwa.ca
Address	302 – 119 West Pender Street Vancouver, B.C. V6B 1S5
Phone	604-669-4482 Toll-free: 1-888-669-4482 Fax: (604) 669-6456

References

[1] http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards
[2] http://www.labour.gov.bc.ca/esb
[3] http://www.lrb.bc.ca
[4] https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour.html
[5] http://www.cirb-ccri.gc.ca
[6] http://www.bcest.bc.ca
[7] http://www.bchrt.bc.ca
[8] http://www.worksafebc.com
[9] https://www.chrc-ccdp.gc.ca/en
[10] https://mwcbc.ca/

III. Checklist

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Preliminary Matters

☐ **Jurisdiction:** Determine whether the employee falls within provincial or federal jurisdiction and make a list of which statutes apply to the employee.

- See Section IV.A: Determine Federal or Provincial Jurisdiction

☐ **Unionized or Non-Unionized**: Determine whether the employee is working in a union environment, and if so, whether the employment relationship is governed by a collective agreement, and whether the employee is in the bargaining unit covered by the collective agreement.

- See Section IV.C: Determine if the Employee is Unionized or Non-Unionized

☐ **Employee or Contractor**: Determine whether the worker is an actual “employee” or an “independent contractor”.

- See Section IV.D: Determine if the Worker is an Employee or Independent Contractor

B. Determine the Issue

☐ Read through the common employment law issues and determine which issue(s) the employee is experiencing.

- See Section V: Employment Issues.
- If the issue respects termination of employment, complete the checklist located at Section V.C.1: Termination of Employment Checklist before returning to this list.

C. Determine the Remedy

☐ Determine the employee’s legal remedy based on the legal basis for the employee’s complaint: A breach of the Employment Standards Act will lead to a claim at the Employment Standards Branch; a breach of the Human Rights Code will lead to a complaint at the Human Rights Tribunal; and a breach of the employment contract, or one of its implied terms, will lead to a claim in Small Claims Court (for claims under $35,000 as of June 1, 2017) BC Supreme Court (for claims over $35,000 as of June 1, 2017), or the Civil Resolution Tribunal (for claims $5,000 or under). As of June 1, 2017, with several exceptions, civil claims of up to $5000 will no longer be dealt with in Small Claims Court –

instead, they will be resolved in B.C.'s online Civil Resolution Tribunal.

- See Section VI: Remedies.
- See Chapter 20: Small Claims.

☐ Determine the claim's limitation date. Ensure that you file the appropriate application on time. If you have missed the limitation date, look at what options you may have for late filing.

- See Section VI.D: Limitation Periods.

☐ Determine whether there are any written contracts, employment policies, or other written terms of employment that apply to the worker, including any release agreements the employee may have signed.

- See Section VII.H: Defeating Signed Release Agreements.

☐ Consider other strategies and tips offered.

- See Section VII: Strategies and Tips.

Forums for Employment Law Disputes					
	Employment Standards Branch	**Human Rights Tribunal**	**Civil Resolution Tribunal**	**Small Claims Court**	**BC Supreme Court**
Filing Costs	None	None	$100 for claims up to $3,000; $150 for claims over $3,000 (waivers may be available)	$100 for claims up to $3,000; $156 for claims over $3,000	$200 to file, plus additional costs for applications and trials exceeding 3 days
Maximum Awards	No maximum dollar amount, but generally award limited to amounts owed for past 12 months only (extended collection may be possible for vacation pay owing) - See ESA s.80	No maximum	$5,000	$35,000 (as of June 1, 2017)	No maximum
Type of Claim	Statutory entitlements in the ESA (i.e. minimum wage, overtime, vacation pay, etc.)	Discrimination in employment or hiring or dismissal	Any term express or implied in the contract; wrongful dismissal	Any term express or implied in the contract; wrongful dismissal	Any term express or implied in the contract; wrongful dismissal

IV. Preliminary Matters

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Determine Federal or Provincial Jurisdiction

Employees are subject to either federal or provincial employment legislation. This section will help you determine whether the employee is covered by federal or provincial jurisdiction, and therefore which statutes apply.

1. Federal Jurisdiction

Employees will fall under federal jurisdiction if they are employed in connection with any federal work, undertaking, or business that is within the legislative authority of Parliament, or if they work for certain federal crown corporations. This can be a complicated constitutional question, but generally, areas of business that are federally regulated include:

- Shipping and navigation, including the operation of ships and transportation by ship anywhere in Canada;
- Interprovincial or international transportation (for example, truck, rail, ferry, or shipping routes that cross a provincial or international border);
- Telecommunications companies, such as cell phone, cable, or internet providers;
- Airports and air transportation, including any airline companies;
- Radio broadcasting stations;
- Banks (but not credit unions);
- Businesses located on First Nations reserves; and
- Other areas listed in section 91 of the *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

To determine jurisdiction, look to the type of work done, as well as the employer's area of business. It is important to note that a single employer could have both federally and provincially regulated employees. Although an employer may be subject to federal jurisdiction, it does not mean all of that employer's employees will be governed by federal law. In some cases, additional research must be done to determine the employee's jurisdiction. For additional details to assist in determining jurisdiction if a difficult case arises, see *Actton Transport Ltd v British Columbia (Director of Employment Standards)*, 2008 BCSC 1495 paras. 23 - 32 https://canlii.ca/t/21dvl.

Performing a BC Online company search may help determine jurisdiction. While not always determinative, a company search will provide information regarding whether the company is provincially registered, which may help determine jurisdiction. In addition, a company search will usually provide the company's director and registered office information: http:/ / www2. gov. bc. ca/ gov/ content/ governments/ organizational-structure/ ministries-organizations/ ministries/ technology-innovation-and-citizens-services/bc-registries-online-services

2. Provincial Jurisdiction

Employees who are not within the scope of federal legislation generally fall under provincial jurisdiction and accordingly their employment is governed by provincial legislation.

B. Determine Applicable Legislation

The following section contains statutes that may apply to an employee with an employment-related legal issue. Once you have determined the jurisdiction, make note of which statutes apply to the employee, and then continue on to the next step in the checklist: Section IV.C: Unionized vs. Non-Unionized Employees.

Note that this chapter focuses on provincial legislation. In cases where the employee is federally-regulated, this chapter can still be of assistance as the provincial and federal statutes have many similarities, but it will be necessary to read the federal statutes to determine whether a particular provision is similar.

1. The Employment Standards Act

Provincially regulated employees are generally covered by the *Employment Standards Act* [ESA] as updated by the Employment Standards Amendment Act.

Be aware that certain professions and employees are exempt from the *ESA*, or parts of the *ESA*. Review the *Employment Standards Regulations* to determine if the employee is covered by the *ESA*.

See V.A.10: Professions with Special Provisions and Limited Exemptions under the Employment Standards Act to determine whether the *ESA* applies to the employee in question. See V.A.6: Hours of Work and Overtime Pay to determine if the employee is exempt from overtime.

2. The Labour Relations Code and Canada Labour Code

Provincially regulated employees who belong to a union are covered by the *Labour Relations Code* in addition to the *ESA*. However, some parts of the ESA do not apply to unionized employees.

Federally regulated employees are covered by the *Canada Labour Code* [CLC]. A significant difference between the CLC and the ESA is that the CLC confers a special right: If the employee is non-managerial, worked for at least one year, and was unjustly dismissed, their job can be reinstated (CLC, ss 240-246). This right exists alongside several other discretionary remedies for unjust dismissal under the CLC. A complaint must be filed within 90 days (CLC, s 240(2)).

For a discussion on the significance of the discretionary remedies for unjust dismissal available under the CLC, see the Supreme Court of Canada's decision in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29.

3. The Human Rights Code

Provincially regulated employees are covered by the British Columbia *Human Rights Code HRC*. Federally regulated employees are covered by the Canada *Human Rights Act*. For more information on Human Rights claims: See Chapter 6: Human Rights.

4. Common Law and Contract Law

In addition to statutory entitlements, provincially and federally regulated employees have common law employment entitlements. Causes of action, such as breach of contract due to wrongful dismissal, remain the same whether the employee is provincially or federally regulated.

Employees will also often have written contractual entitlements or workplace policies. Review any written employment contract or workplace policy carefully to both clarify the terms of employment and to determine whether the contract is enforceable. See Section V.C(d) and (c): Invalid Contracts.

Unionized employees may have common law or contractual entitlements, but generally these entitlements must be acted upon by the union that is party to the collective agreement. See Section IV.C: Unionized vs. Non-Unionized Employees.

C. Determine if the Employee is Unionized or Non-Unionized

Determine whether the employee belongs to a union. If the employee does not belong to a union, continue to the next step in the checklist: Section IV.D: Determine if the Worker is an Employee or Independent Contractor.

Issues regarding unionized employees can be complex, and unionized employees should therefore generally be referred to their union representative or a lawyer. However, the following paragraph provides basic information for unionized employees.

If an employee is a union member and has a complaint regarding the employer, they must first advise the union's representative. The employee can contact either the shop steward at the workplace, or an external union representative, to see what the union can and will do. The *ESA* provides minimum standards that generally must be met, but collective agreements will contain other critical guidelines that the employer must follow. Usually, union contracts contain different or more onerous terms than the *ESA* provisions, and union members in their collective agreements can contract out of *ESA* limitations (*ESA*, s 3) regarding such matters as hours of work, overtime, statutory holidays, vacations, vacation pay, seniority retention, recall, and termination of employment or layoff. Whole sections of the *ESA* might not apply under a collective bargaining agreement if they have been addressed by the agreement. The collective agreement does not necessarily have to meet minimum guidelines for certain sections of the *ESA*. For more information consult the Employment Standards Keyword Index: https:/ / www2. gov. bc. ca/ gov/ content/ employment-business/ employment-standards-advice/employment-standards/forms-resources/igm/keyword-index#C

Unions have a duty to represent their workers fairly. An employee who feels their union has not fairly represented their interests or advanced a grievance can bring a complaint under section 12 of the *Labour Relations Code*. These complaints are seldom successful, and so it is very important to have the employee document all requests for help to the union and document the union's response.

D. Determine if the Worker is an Employee or Independent Contractor

Most workers are considered "employees", but some are considered "independent contractors", and some fall under an intermediate category sometimes referred to as "dependent contractors".

The distinction is important because independent contractors are generally not protected by the *Employment Standards Act*, the *Human Rights Code*, the *Canada Labour Code* or the *Canada Human Rights Act*. Additionally, independent contractors may not be entitled to reasonable notice if they are dismissed, as many employees are, although the law on this can be complex (see below).

Note that different statutes have different objectives and definitions, and as a result, "employee" and "independent contractor" may be interpreted differently under each statute. These interpretations are generally similar and sometimes follow the same tests; however, the *ESA* and particularly the *HRC* may define "employee" more broadly than the common law tests would – see Sections IV.D.2 and IV.D.3, below. As a result, those who would be categorized as dependent or independent contractors under the common law may sometimes be categorized as employees under the *HRC*.

1. Employees vs. Contractors - Common Law

When considering an employment-related claim, it will be important to determine if the claimant is or was an employee, dependent contractor, or an independent contractor.

This classification will determine which statute laws apply. It will also change what entitlements are available for breach of contract (including wrongful dismissal) at common law. For example, employees can make claims for severance pay in lieu of notice, a common-law entitlement that is not available to contractors.

In *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39 https://canlii.ca/t/g6xlp, the Supreme Court of Canada affirmed that the key to a determining whether an individual is an employee or an independent contractor" is the degree of control and dependency. The Court in *TCF Ventures Corp v The Cambie Malone's Corporation*, 2016 BCSC 1521 https://canlii.ca/t/gt1j2, noted that the 'dichotomy' between independent contractors and true employees is best practically assessed on a spectrum that exists between the two extremes; persons (both natural and unnatural) can find themselves on that spectrum and can bring an action for breach of an entitlement to notice of termination of their contracts, and the true nature of the relationship should be assessed on a case-by-case basis.

An employee is typically highly controlled by the employer: the employer might set the employee's hours, provide training, decide how work should be performed, require adherence to policies such as dress codes, and discipline the employee for misconduct. The employer would also typically make Canada Pension Plan (CPP) and Employment Insurance (EI) deductions, provide Worker's Compensation coverage, and pay for any business expenses and equipment. Employees tend to rely on their employment with a single employer or business as their primary or sole source of income.

An independent contractor is generally not significantly controlled by the employer: the independent contractor might set their own hours, determine how to perform the work, make their own payments for CPP, EI, and Worker's Compensation coverage, pay for their own business expenses and equipment, determine whether to hire their own employees or subcontractors to assist in performing the work, and invoice the employer for work performed. Independent contractors often contract with more than one business, and as a result are less dependent on a single business to earn their living.

A dependent contractor is an intermediate category, falling somewhere in the middle of the scale. A dependent contractor might set their own hours and hire their own employees, but derive most of their income from a contract with one business, and thus be more dependent on that business to earn their living than an independent contractor would be.

None of the factors listed above can alone determine the categorization of the worker. One of the leading tests to apply to determine how to categorize the worker is set out in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983, https://canlii.ca/t/51z6:

"[…]The central question is whether the person who has been engaged to perform the services is performing them as a person in business on [their] own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides [their] own equipment, whether the worker hires [their] own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of [their] tasks."

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case. Although this is one of the leading tests, it should be noted that there are other tests that courts would consider as well.

Some additional examples of conditions that are not, by themselves, enough to ensure someone is considered a contractor are:

- The worker signs an agreement that identifies them as a contractor. (Section 4 of the *ESA* states that you cannot contract out of the Act. If you sign an independent contractor agreement, you still must meet that definition);
- The worker charges sales tax (the worker may or may not be in a lawful position to charge sales tax);
- The worker is incorporated (per *Marbry Distributors Limited v Avrecan International Inc*, 1999 BCCA 172). However, the worker may wish to see an accountant or tax lawyer if they are an incorporated employee as they may not be entitled to all of the same tax benefits of other corporations;
- No deductions are taken from the worker's paycheque (this may simply mean that the employer is in violation of both the *ESA* and the *Income Tax Act*);
- The worker submits a "bill" for labour (it may be nothing more than a time card); and
- The worker uses their own vehicle or provides their own tools (it may simply be considered a condition of employment. Note that employment related expenses are recoverable and cannot be charged to the employee).

All of the above factors will be considered, but do not determine the issue.

In some cases, a worker may fall into the category of dependent contractor. Those who fall under this intermediate category are entitled to reasonable notice. Some of the factors that are considered in determining whether a worker falls under this category are (*Marbry Distributors Limited v Avrecan International Inc*, 1999 BCCA 172, https://canlii.ca/t/546j):

- Duration or permanency of the relationship
- Degree of reliance and closeness of the relationship
- Degree of exclusivity

In the case of *Marbry*, the incorporated company, Marbry Ltd., distributed Avrecan's products almost exclusively for 11 years. Marbry Ltd. employed Mr. Marbry as well as one salesperson. Considering the above factors, the court found that the contractual relationship between Marbry Ltd. and Avrecan required reasonable notice to terminate. See also *Zupan v Vancouver (City)*, 2005 BCCA 9, https://canlii.ca/t/1jk91; *1193430 Ontario Inc v Boa-Franc Inc*, 2005 78 OR (3d) 81, 260 DLR (4th) 659, https://canlii.ca/t/1lwkv; *Hillis Oil & Sales v Wynn's Canada*, [1986] 1 SCR 57.

The BCSC has adopted Alberta's ruling that dependent contractors are also entitled to reasonable notice (*Pasche v. MDE Enterprises Ltd.*, 2018 BCSC 701, https://canlii.ca/t/hrs4z).It appears there may also be a judicial shift away from the notion that dependant contractors could be entitled to a lesser degree of reasonable notice than a regular employee. In Liebreich v. Farmers of North America, 2019 BCSC 1074, https://canlii.ca/t/j196n, the BCSC found there was no "principled basis to automatically give less notice to a dependent contractor than an employee".

For additional discussion of intermediate contracts, see "Intermediate Contracts of Employment", Stephen Schwartz, Employment Law Conference 2010, Paper 4.1, CLE BC. For additional discussion of the tests used to determine whether a worker is an employee or an independent contractor, see the Canada Revenue Agency publication: *Employee or Self-Employed* (RC4110). This useful publication lists a number of indicators to help determine whether a worker is an employee or an independent contractor but note that it does not consider the category of dependent contractor. It can be found at: http://www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-16e.pdf

Cases where the worker may be considered a dependent or independent contractor, rather than an employee, can be quite complex. Although this chapter includes some information regarding dependent and independent contractors, its focus is towards the rights and responsibilities of employees. Ensure that you thoroughly research case law if you have a case involving dependent or independent contractors.

If the worker appears to be a dependent or independent contractor, and the worker has a legal issue that may be covered by the *ESA* or the *HRC*, see Sections IV.D.2 and IV.D.3 below to determine whether these statutes' broader definitions of "employee" include the worker in question. If the worker appears to be an employee, continue to the next step of the

checklist.

2. Employees v. Contractors - Employment Standards Act

The distinction between employees and independent contractors under the *Employment Standards Act* is quite similar to that under the common law. The following test for distinguishing between employees and contractors should be used when pursuing a claim at the Employment Standards Branch.

"Employee" is defined in the *ESA*, s 1. The Employment Standards Branch has published a factsheet to assist in determining the difference between employees and independent contractors. It can be found at:

https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/employee-or-independent-contractor

The Employment Standards Interpretation Guidelines also offers a plain language explanation of how employees and contractors are distinguished. This can be found in section 1 of the Guidelines under the "Employee" definition tab. https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/definitions#esa

Additionally, Employment Standards Branch staff sometimes use Levitt's discussion of the control test, four-fold test, and integration or organization test in his book *The Law of Dismissal in Canada* (Aurora, Ont: Canada Law Book, 2003).

As previously mentioned, an independent contractor is not protected by the *ESA*. However, just because an employer calls someone an independent contractor does not make them one. Generally, at the Employment Standards Branch, the onus is on the company to show that someone is an independent contractor. If there is a disagreement, the Employment Standards Branch will use the common law tests. Generally, the longer and more continuous the relationship, and the less control the contractor has over their employment, the more likely it is to be considered an employment relationship.

Generally speaking, the ESA is to be given a wide and liberal interpretation (per *Interpretation Act*, RSBC 1996, c 238, s 8; see also *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986, https://canlii.ca/t/1fsd2 and *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, https://canlii.ca/t/1fqwt). The legislation is always construed broadly when determining whether someone is or is not an employee.

3. Employees v. Contractors - Human Rights Code

The distinction between employees and independent contractors under the *Human Rights Code* should be used when pursuing a claim at the Human Rights Tribunal.

Employment is more broadly defined under the *HRC* compared to the common law and the *ESA*. It includes the relationships of master and servant, master and apprentice, and some principals and agents. In some cases it may extend to include workers who would, under the common law, be defined as dependent or independent contractors. Additionally, some volunteering relationships could potentially be considered employment relationships, or alternately could be covered under s 8 of the *HRC* (provision of services).

The four factors that most strongly determine whether a worker is an "employee" for the purpose of the *HRC* are (*Ismail v British Columbia (Human Rights Tribunal)*, 2013 BCSC 1079, at para 265):

- Whether the employer utilized, or gained some benefit, from the worker
- The amount of control exerted by the employer over the worker
- Whether the employer bore the burden of financial remuneration of the worker
- Whether the employer has the ability to remedy any discrimination

The Canadian Human Rights Tribunal also uses a broader definition of employment compared to the common law; see *Canadian Pacific Ltd v Canada (Human Rights Commission)*, [1991] 1 FC 571 (CA), at paras 9-15.

4. Employees v. Contractors – Workers Compensation

The Supreme Court of Canada recently upheld a British Columbia decision extending employer occupational health and safety obligations to contractors. See *West Fraser Mills Ltd. v. British Columbia (Workers Compensation Appeal Tribunal)* 2018 SCC 22, https://canlii.ca/t/hs39j. If a contractor has been injured in the workplace, explore whether employee occupational health and safety regulations may apply to the contractor.

V. Employment Issues

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

This section is geared towards identifying the most common employment law issues for provincially regulated non-unionized employees (see Section IV: Preliminary Matters to determine whether the worker in question is a provincially regulated non-unionized employee). However, many issues will apply in a similar fashion to federally regulated employees, and some issues will also apply to unionized employees.

Generally, employment issues arise as a breach of the *Human Rights Code*, the *Employment Standards Act*, or an employment contract. Take note of which of these legal protections applies for the issue that you identify, and then see Section VI: Remedies to find out how to proceed.

A. Employment Standards Act Claims

The ESA sets the minimum standards for various conditions of employment. The ESA applies to provincially regulated employees. The ESA addresses some of the most basic employee entitlements, such as wages, vacation pay, holiday pay, overtime, pregnancy and other leaves, and termination standards.

The *Canada Labour Code* sets these minimum standards for federally regulated employees. This section primarily discusses the *ESA*, but the *Canada Labour Code* has many similar provisions.

Make sure the individual considering starting a claim is not exempt from the ESA. Be aware that certain professions and employees are exempt from the ESA, or parts of the ESA. Review the *Employment Standards Regulations* to determine if the employee is covered by the ESA. See *ES Regulation*, Part 7.

See IV.C.5: Exceptions to the General Rule (Specialty Professions) to determine whether the *ESA* applies to the employee in question. See V.A.6: Hours of Work and Overtime Pay to determine if the employee is exempt from overtime.

1. Hiring Practices

An employer may not induce a person to become an employee or to make themselves available for work by deceptive or false representations or advertising respecting the availability of a position, the nature of the work to be done, the wages to be paid for the work, or the conditions of employment. If this occurs, the employee could file a complaint at the Employment Standards Branch per section 8 of the ESA.

Apart from ESA entitlements, an employee who was hired because of false representations could potentially sue for the tort of misrepresentation. For more information about this tort, see *Queen v Cognos Inc*, [1993] 1 SCR 87, https://canlii.ca/t/1fs5s.

2. Employment Agencies

An employment agency is any person or company that recruits employees for employers for a fee. All employment agencies must be licensed and they must keep records. An employment agency may not receive any payment from a person seeking employment either for obtaining employment or for providing information respecting prospective employers. Any payment wrongfully received can be recovered under the ESA, s 11.

3. Talent Agencies

Several of the more recent amendments to the ESA deal with talent agencies and impose minimum standards on what was previously an unregulated industry. A talent agency must be licensed annually under the Act. Once an agency is licensed, it may receive wages on behalf of clients who have done work in the film or television industry. Section 38.1 of the ES Regulation provides that wages received by a talent agency from an employer must be paid to the employee within a prescribed period: five business days from receipt of payment if payment is made within B.C. and twelve business days from receipt of payment if payment is made from outside of B.C.

Talent agencies can charge a maximum of 15 percent commission, and must ensure that the employee receives at least provincial minimum wage after this deduction. The only other fee a talent agency may charge is for photography, and this charge must not exceed $25.00 per year. This fee may only be deducted from wages owed to the employee. When a talent agency is named in a determination or order, unpaid wages constitute a lien against the real and personal property of the agency. A 1999 amendment to section 127 of the Act gives the Lieutenant Governor in Council the power to regulate these agencies and, accordingly, the ES Regulation should be consulted for further information. Information on licensed talent agencies, including a list of talent agencies currently licensed in B.C. is available at http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/licensing/licensing-talent-agencies.

4. Child Employment

Employing a child is an offence for which both the employee and the employer are liable. The ESA does not apply to certain types of employment such as babysitters and some students (*ES Regulation*, s 32).

Section 9 of the ESA states that children under the age of 15 cannot be employed unless the employer has obtained written permission from a parent or guardian. The employer must have this written consent on file indicating that the parent or guardian knows where the child is working, the hours of the work, and the type of work. No person shall employ a child under the age of 12 years unless the employer has obtained permission from the Director of Employment Standards. In cases where permission from the Director is required, the Director may also set conditions of employment for the child. See *ES Regulation*, Part 7.1. For complete details of conditions, see www.labour.gov.bc.ca/esb or call 1-800-663-7867.

Common forms of allowable employment for those under 12 are found in the film and television industries. For more information on the employment of young people in the B.C. entertainment industry, consult the Employment Standards Branch fact sheet [1]

If an employer is accused of illegally using child employment they will carry the onus in proving that it was either justified, or that the child was of legal age.

5. Wages

a) Minimum Wage and the Entry Level Wage

As of June 1, 2022, the minimum wage in British Columbia is $15.65/hour. Minimum wage information from the Employment Standards Branch can be found at https:/ / www2. gov. bc. ca/ gov/ content/ employment-business/ employment-standards-advice/employment-standards/wages/minimum-wage

For liquor servers (and normally other positions that receive tips) the employees must be paid at least minimum wage in addition to any tips or gratuities they receive, since tips and gratuities are not wages for Employment Standards Act purposes. However, note that tips may be considered in the assessment of an employee's entitlement to common law severance – refer to the common law severance paragraphs in this chapter.

Please note that there are other exceptions under Part 4 of the *ES Regulation*, which include live-in home support workers, resident caretakers, and farm workers. See ss 16–18 of the *ES Regulation*.

Federally regulated employees are entitled to the minimum wage of the province that they work in (*Canada Labour Code*, s 178).

b) Wage Clawbacks

Section 16 of the ESA deals with the issue of "claw-backs". This term refers to an employer who gives an employee an advance on future wages or commissions. Section 16 states that when the employer re-claims such advances, they must not take back an amount that would leave the employee under the minimum wage rate for the hours worked. Employers who claw-back wages from commission workers must ensure that the amount of wages clawed back does not cause the worker to ultimately receive less than minimum wage.

c) Payment of Wages

Timing

Employers must pay wages- at least semi-monthly and no later than eight days after the end of the pay period (ESA, s 17). This section does not apply to public school teachers and professors (*ES Regulation*, s 40). Wages, as defined in Part 1, include salaries, commissions, work incentives, compensation for length of service (ESA, s 63), money by order of the tribunal, and money payable for employees' benefit to a fund or insurer (in Parts 10 and 11 only). The definition does not include, for instance, expenses, penalties, gratuities, or travel allowance. Travel time is considered time worked for which wages are payable, whereas commuting time is generally not.

No Deductions for Business Costs

An employer cannot require an employee to pay any of the employer's business costs, nor may they deduct any portion from the employee's wages.

Wage Statements

Every payday, employees must be given a statement showing hours worked, wage rate/overtime wage rate, deductions, method of wage calculation, gross/net wages, and time bank amounts (ESA, s 27). Electronic statements can be provided

instead under certain conditions (s 27(2)).

Wage Payments on End of Employment

If an employee quits, all wages and vacation pay owed must be paid within six days of the last day worked. When the employer terminates the employment, all wages (and vacation pay) must be paid within 48 hours of termination (ESA, s 18). Certain notice requirements dictated by the ESA are set out later in this chapter.

Enforcement

To enforce the payment of wages, the ESA provides that the Director can arrange payment of wages to the employee, or to the Director, if they are satisfied that wages are owed to the employee. Under the ESA, only the Canada Customs and Revenue Agency has priority over the Employment Standards Branch. Finally, Section 87 of the ESA provides that unpaid wages in a determination, settlement agreement or an order constitute a lien on real property owned by the employer. The enforcement mechanisms available to the Employment Standards Branch are such that the lien often gets priority over other claims against the property (see also *Helping Hands Agency Ltd v British Columbia (Director of Employment Standards)*, [1995] BCJ No 2524 (BCCA), https://canlii.ca/t/1ddv6).

If an employee has not been paid wages, and the limitation date under the ESA has passed, the employee may still be able to file a claim in Small Claims Court or the Civil Resolution Tribunal, as it is a term of any employment contract that the employee is paid for their labour. See Chapter 20: Small Claims and Section VI.D Limitation Periods.

d) Allowable Deductions

Only certain deductions can be made from an employee's wages (*ESA*, ss 21 and 22). There must be a written assignment of wages.

Allowable deductions include EI, CPP, income tax, charitable donations, maintenance order payments (such as spousal or child support), union dues, pensions, insurance (medical and dental), and payments to meet credit obligations. Benefit packages often allow a whole range of deductions from employee wages. In the case of an employer who fails to remit these deductions, the Employment Standards Branch will collect from the employer the premiums the employee paid. However, the Branch is not able to collect costs incurred by an employee who believed they had benefits coverage (i.e., actual cost of dental work done). If an employee has suffered a loss such as this, they should consider whether they have a contractual agreement with the employer, and whether it has been breached; if so, they may be able to recover the loss in Small Claims Court or the Civil Resolution Tribunal.

Section 22(4) of the *ESA* allows the employer to deduct money from the employee's paycheque to satisfy the employee's credit obligation (for example, if the employer has loaned the employee money, or if the employee has agreed to pay the employer a monthly sum for personal use of the employer's car). To do this, the employee must make a written assignment of wages to the employer.

e) Business Expenses Charged to An Employee

An employer cannot require employees to pay any business costs – as either a deduction from their paycheque or out of their pockets or gratuities. Examples of business costs include loss due to theft, damage, breakage, or poor quality of work, damage to employer's property, or failure to pay by a customer (e.g. dine-and-dash). If an employer deducts business costs from an employee's wages they can be required to reimburse the employee for the amount, and can be fined by the Employment Standards Branch for failing to follow the *ESA*.

6. Hours of Work and Overtime Pay

Under the *ESA*, employees are generally entitled to be paid at overtime rates if they work over 8 hours in a day, or over 40 hours in one week. See the *ESA*, Part 4 which sets out overtime rates and entitlements.

a) Regular Hours and Rest Periods

An employer must not require or permit an employee to work more than eight hours per day or 40 hours per week as a rule, unless the employer pays overtime wages (*ESA*, s 35). An exception to this overtime rule is made for workers who have written averaging agreements under s 37 (see the next section for more information on averaging agreements). An employer must ensure that no employee works more than five consecutive hours without a half-hour meal break (s 32). Such eating periods are not included in hours of work. There is no entitlement to coffee breaks.

Employees are also entitled to at least 32 consecutive hours free from work each week or 1.5 pay for the time worked during that period, and eight hours free from work between shifts, except in the case of an emergency (s 36).

Federally regulated employees cannot work more than eight hours per day or 40 hours per week as a rule, but unlike provincially regulated employees there is a 48 hours a week maximum, even with overtime rates being paid (*Canada Labour Code*, s 171). Averaging agreements are allowed under the federal legislation. There are no specifications for meal breaks. Employees are entitled to one day off from work each week (Sunday if possible). There is no requirement for time off between shifts.

b) Overtime

Daily Overtime: Unless they have an averaging agreement, an employee must be paid overtime wages if they work more than eight hours in any one day. Employees are to be paid one and a half times their regular wage rate for time worked beyond eight but less than 12 hours in one day, and two times their regular wage rate for any time worked beyond those 12 hours in one day (*ESA*, s 40(1)).

Weekly Overtime: Unless part of an averaging agreement, overtime must also be calculated on a weekly basis. For any time over 40 hours per week, an employee will receive one and a half times their regular wage (s 40(2)). When determining the weekly overtime, employers must use only the first eight hours of each day worked (s 40(3)). This means that if an employee works six days out of the week, eight hours each day, eight of those hours must be paid at one and one half times the regular rate. However, if an employee works 10 hours a day for four days a week, it would be calculated under daily overtime as the weekly hours still add to 40.

c) Overtime Banks

Section 42 of the *ESA* allows for the "banking" of overtime hours on a written request from the employee if the employer agrees to such a system. Hours are banked at overtime rates. The employee may ask at any time to be paid the overtime hours as wages, or to take these hours as paid time off work at on dates agreed to by the employer and employee (s 42(3)). The employer may close the employee's time bank with one month's notice to the employee at any time (s 42(3.1)), and within six months of doing so, must either pay the employee for the hours in the time bank, allow the employee to take time off with pay equivalent to the amount in the time bank, or some combination of the two (s 42(3.2)). If the employee requests the time bank be closed, or if the employment relationship is terminated, the employer must pay the employee for the hours in the time bank on the next payday.

Many of the problems encountered by the Employment Standards Branch involve conflicts between the records of employers and the claims of employees regarding regular and overtime hours worked. **Employees should always keep consistent records of the hours they work.**

Federally regulated employees cannot opt for time off in lieu of overtime pay. All overtime hours must be paid at one and a half times the regular rate of pay (*Canada Labour Code*, s 174).

d) Employees and Occupations Exempt from Overtime

Part 7 of the *ES Regulation* excludes certain groups of employees from the following rules under Part 4 of the ESA. They may be excluded from Part 4 of the Act as a whole, or excluded from certain sections only. Please check the Regulation for more details.

An employer may attempt to exclude an employee from overtime eligibility by calling the employee a "manager." The Employment Standards Branch uses the definition of manager as set forth in section (1) of the Regulation. It is the nature of the job, and not an employee's title, that makes that person a manager.

Be aware that even though an employee is considered a manager (or falls within another overtime exemption), the employee is still entitled to be paid for all hours worked.

Entitlement to overtime pay may be affected by an employment contract. Review the manager's contract, and see if there is a clause that deals with hours of work. If a manager or other exempt employee works more hours than set out in their employment contract, they may be entitled to additional pay for those hours at the worker's regular wage rate. If the employment contract specifies that an annual salary is in exchange for a set number of hours over 40, this may impact the employee's entitlement to be paid at an overtime rate.

If the manager does not have a contract, collect any evidence you can regarding an agreement on the manager's hours of work, and evidence on historical hours worked.

The *ESA* Interpretation Guidelines provides some helpful discussion on overtime, and can be found at http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/esa-part-4-section-35.

e) Minimum Daily Hours

When workers report for work as required by an employer, irrespective of whether they start to work, they are entitled to two hours of pay unless they are unfit for work or do not meet Occupational Health and Safety Regulations. Whether or not an employee starts work, if an employer had previously scheduled an employee to work for more than eight hours that day, they are entitled to a minimum of four hours pay, unless inclement weather or other factors beyond the employer's control caused the employee to be unable to work, in which case the worker is entitled to just two hours' pay (*ESA*, s 34).

f) Shift Work

An employee is entitled to at least eight hours free between shifts unless there is an emergency. Split shifts must be completed within a 12-hour period (*ESA*, s 33).

g) Variance

It is possible for an employer to apply for a variance to exclude employees from certain provisions of the *ESA*. To apply for a variance, the employer must write a letter to the Director of Employment Standards, and must have the signatures of at least 50 percent of the employees who are to be affected. When reviewing the application, the Director must consider whether the variance is inconsistent with the purpose of the *ESA* and the Regulation, and whether any losses incurred by the employees are balanced by any gains.

For more information see: https:/ / www2. gov. bc. ca/ gov/ content/ employment-business/ employment-standards-advice/employment-standards/forms-resources/igm/esa-part-9-section-72.

h) Averaging Agreements

Under s 37 of the ESA, an employee and employer can agree to average an employee's hours of work over a period of up to four weeks for the purposes of determining overtime. These agreements must be in writing and be signed by both parties before the start date of the agreement and must specify the number of weeks over which the agreement applies. It must also specify the work schedule of each day covered by the agreement and specify the number of times if any that the agreement can be repeated. The employee must receive a copy of this agreement before the agreement begins. The work schedule in such an agreement must still follow conditions outlined from ss 37(3) – (9). The employer and employee may agree at the employee's written request to adjust the work schedule (s 37(10)). The Employment Standards Branch will not get involved unless a complaint is made.

7. Flexible Work Legislation

Employees working for federally regulated companies now have the right under the Canada Labour Code to request flexible working arrangements. This includes requests to change number of hours worked, schedule of work, location of work, and other terms and conditions of employment. Similar provincial legislation has yet to be adopted in BC, but if an issue in relation to this topic is identified, be sure to check for any legislative updates.

8. Vacation and Vacation Pay

Employees are entitled to both a minimum amount of annual vacation and to vacation pay under Part 7 of the *ESA*. Vacation time and vacation pay are separate entitlements under the *ESA*. Employees are entitled to both vacation pay and actual time away from work.

Employment contracts must provide at least the minimums vacation and vacation pay entitlements as set out in the *ESA* (ss 57-60). Employees can be entitled to vacation and vacation pay entitlements above the *ESA* minimums if agreed to in an employment contract.

a) Annual Vacations

After each year worked, employees are entitled to an annual vacation of at least two weeks. After five years employment, this entitlement increases to three weeks. Employees must take at least their minimum vacation time off work each year within the year or up to one year thereafter (s.57(2) *ESA*).

Annual vacation is without pay, but the employee should receive vacation pay either in advance of his vacation, or on each paycheck. See Vacation Pay explanation below.

b) Vacation Pay

After 5 days of work, the employer is required to pay the employee 4% of their wages as vacation pay. After 5 years of employment, this increases to 6%.

Employers are required to bank vacation pay for an employee, and then pay the employee their banked vacation pay 7 days before the employee's annual vacation. Alternatively, with written consent the employer can pay the employee their vacation pay on each paycheck.

If the employee is terminated, the employer is required to pay out any vacation pay owing to the employee. Based on the timing of when vacation pay is earned and payable, this can result in some circumstances where employees will have claims for years of vacation pay owing.

For a detailed explanation of vacation and vacation pay entitlement and calculation examples, see Part 7 of the ESA, and the ESA Interpretation Guidelines found at: https:/ / www2. gov. bc. ca/ gov/ content/ employment-business/

employment-standards-advice/employment-standards/forms-resources/igm/esa-part-7-section-58

9. Statutory Holidays and Statutory Holiday Pay

Employees are entitled to ten paid holidays a year: New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, B.C. Day, Labour Day, Thanksgiving Day, Remembrance Day, and Christmas Day (*ESA*, Part 5). A recent amendment to the Employment Standards Act (*ESA*, V.A.9) added the National Day for Truth and Reconciliation as a statutory holiday. Boxing Day, Easter Sunday, and Easter Monday are not statutory holidays in B.C. Federal employees are entitled to Boxing Day and National Day for Truth and Reconciliation, but not to B.C. Day or Family Day.

For a provincially regulated employee to be entitled to a statutory holiday under the Employment Standards Act, the employee must have been employed by the employer for at least 30 calendar days before the statutory holiday and must either have worked under an averaging agreement within this period or have worked or earned wages for 15 of these 30 calendar days.

Employees who work on a statutory holiday receive one and one-half times their regular rate of pay for the first 12 hours worked. Any further time worked should be paid at twice the regular amount of pay. Where a statutory holiday falls on a non-working day, the employer must give the employee a regular working day off with pay. An employee who is given a day off on a statutory holiday or a day off instead of one must be paid statutory holiday pay equal to at least an average day's pay.

An average day's pay is the employee's gross earnings in the past 30 days, divided by days worked, where:

- **Amount paid** is the total amount paid or payable to the employee for the work done and wages earned during the 30 calendar day period preceding the statutory holiday including vacation pay for any days of vacation within that period, less any amounts paid or payable for overtime; and
- **Days worked** are the number of days the employee worked or earned wages within the 30 calendar day period.

10. Leaves of Absence

Part 6 of the *ESA* regulates leaves of absence. Again, Part 7 of the *ES Regulation* should be consulted to determine if an employee is covered by this part of the Act. Those employees who are not protected by the *ESA* may have protection under the governing statutes of their specific profession.

An employee who is on leave under any of the following categories maintains several of the same protections they received while working. The employment is deemed to be continuous for the purposes of calculating annual vacation entitlement and any pension, medical, or other plan beneficial to the employee (*ESA*, s 56). At the time of reinstatement, employees on leave are entitled to return to their previous position or to a comparable one, and are also entitled to any wage and benefit increases that they would have received had they remained at work (s 54).

An employer may not terminate an employee for taking a leave they are entitled to take under the *ESA*. In the case of an alleged contravention of Part 6 by the employer, the burden is on the employer to prove that the reason for the termination was not a pregnancy, jury duty or other leave allowed by the Act (s 126(4)(c)). When there is an infraction of this section of the Act, the Director of Employment Standards can order that the employee be reinstated (s 79). However, this almost never occurs (see Section VI: Remedies for more details). Section 79(2) is a very powerful "make whole remedy" which allows the Director to reinstate the employee and pay them any wages lost due to the contravention of the Act. Termination during a leave may also give rise to a cause of action before the Human Rights Tribunal.

If an employee was dismissed due to a leave of absence but the limitation date to file a claim with the Employment Standards Branch has passed, consider whether the employee may have a Human Rights Code claim or wrongful dismissal claim; see section V.C: Termination of Employment.

NOTE: The protections offered under ss 54 and 56 of the *ESA* do not apply if the leave taken by the employee is greater than that allowed by the Act (s 54).

a) Pregnancy and Parental Leave

Pregnancy leave is protected under the ESA and the HRC. An employee dismissed while on pregnancy leave may also be entitled to a larger common law severance.

Under ss 50 and 51 of the ESA, a birth mother is entitled to take up to 17 consecutive weeks of unpaid pregnancy leave if the leave starts before birth or termination of the pregnancy. In addition, the birth mother can take a further 61 weeks of parental leave where pregnancy leave was taken, or 62 consecutive weeks of parental leave where pregnancy leave was not taken. Although the employer does not have to pay wages during a pregnancy or parental leave, Employment Insurance may cover a portion of the wages during this period if the person qualifies. Please refer to Chapter 8: Employment Insurance for more information. Birth fathers and adoptive parents are entitled to up to 62 weeks of parental leave. Employees must give their employer four weeks written notice of pregnancy or parental leave, but even if they do not, they are still protected by the ESA.

The employer may request a medical certificate to verify an anticipated birth date or the date of pregnancy termination. Pregnancy leave may commence up to 13 weeks prior to the estimated date of birth, and no later than the actual birth date of the child; it ends no later than 17 weeks after the leave begins. To request pregnancy leave for a period shorter than six weeks following the birth of the child or termination of the pregnancy, an employee must provide one week written notice to the employer and may have to supply a medical certificate confirming the employee's ability to return to work. Parental leave can begin at any time within 78 weeks after the birth or adoption of the child and need not conclude within that period; however, it must all be taken in one block.

Pregnancy leave can be extended by six weeks with a doctor's certificate outlining reasons related to the birth or termination. Parental leave can be extended by five weeks where the child has a psychological, physical, or emotional condition that requires such an extension.

An employer has a duty to allow the employee the leave they request under the provisions of the ESA. Furthermore, upon the employee's return from leave, the employer has a duty to place the employee in the same or comparable position to the position they held before the leave. The employer must not terminate employment because of leave taken, or change a condition of employment without the employee's written consent.

Maternity rights are being quickly developed by the courts. Supreme Court decisions such as *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219, https://canlii.ca/t/1ft72, should be reviewed before giving advice to individuals with this type of grievance. This case says that pregnancy, while not considered a sickness or accident, is a valid health-related reason for absence from work.

If an employee has a dispute with their employer regarding pregnancy or parental leave, they may also be able to file a complaint for discrimination based on sex or family status with the Human Rights Tribunal. Additionally, where an employer offers compensation benefits for health conditions and then excludes pregnancy as a ground for claiming compensation, the employer may have acted in a discriminatory fashion.

If an employee has been terminated while on leave, in some cases they may be able to make a claim for wrongful dismissal in Small Claims Court or the Civil Resolution Tribunal. The employee should at minimum be entitled to a regular severance. Consider whether the circumstances of dismissal in breach of protected leave provisions might be grounds for aggravated or punitive damages in civil court. See Section VI: Remedies for further details. If there are anti-discrimination provisions in an employment contract, employees may have the possibility of a claim for failure to enforce such clauses (see *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63, https://canlii.ca/t/hxmf4)

An employer can terminate the employment of a pregnant person if the termination is part of legitimate downsizing (s 54).

b) Family Responsibility Leave

An employee is entitled to up to five days of unpaid leave each year to meet responsibilities related to the health of an immediate family member or the educational needs of a child in the employee's care (*ESA*, s 52). These days need not be consecutive, and their use is not restricted to emergencies. They may be used for meetings about a child's schooling, meetings with a social worker, or other similar commitments.

c) Bereavement Leave

An employee is entitled to up to three days of unpaid leave on the death of a member of the employee's immediate family (*ESA*, s 53). "Immediate family" is defined in the *ESA* as "the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee, and any person who lives with an employee as a member of the employee's family."

d) Compassionate Care Leave

The ESA was amended to allow an employee to take up to 27 weeks of unpaid leave to care for a family member who is gravely ill and faces a significant risk of death within 26 weeks (s 52.1). The employee must provide a certificate from a medical practitioner stating that the family member faces significant risk of death. The eight weeks do not have to be taken consecutively, but they must be used within the 26-week period. If the family member is still alive after 26 weeks but still gravely ill, a further eight weeks can be taken; however, a new medical certificate must be provided by a medical practitioner. While on compassionate leave the employment is considered to be continuous. An employer must not terminate the employee, or change the conditions of employment while an employee is on compassionate leave unless they obtain their written consent to do so. An employee may also qualify for a maximum of six weeks of pay through Employment Insurance for compassionate leave. For more information please refer to Chapter 8: Employment Insurance.

e) Jury Duty

An employee is entitled to unpaid leave to meet the requirements of being selected for jury duty (*ESA*, s 55).

f) Reservists' Leave

Under certain circumstances the *ESA* now allows unpaid leave for reservists in the Canadian Armed Forces (*ESA*, s 52.2).

g) Leave Respecting Disappearance or Death of a Child

An employee is entitled to up to 52 weeks of unpaid leave relating to the disappearance of a child, and up to 104 weeks relating to the death of a child (see ESA s. 52.3 and 52.4)

h) Leave Respecting Domestic or Sexual Violence

An employee is entitled to unpaid leave of up to 10 days, plus an additional 15 weeks, if required because of domestic or sexual violence to either the employee or an eligible person (i.e. a child under the employee's care) (see ESA s. 52.5)

i) Critical Illness or Injury Leave

An employee is entitled to up to 36 weeks of unpaid leave to provide care to a critically ill family member under 19 years of age, or up to 16 weeks of unpaid leave to provide care for a critically ill family member who is over 19. (see ESA s. 52.11)

j) Illness or Injury Leave

After 90 consecutive days of employment, an employee is entitled to 5 days of paid sick leave and 3 days of unpaid sick leave per calendar year (see ESA s. 49.1).

k) Covid-19 Related Leave

An employee is entitled to unpaid leave for Covid-19 related reasons as defined in section 52.12 of the ESA, for as long as the circumstances giving rise to the leave apply to the employee (see ESA s. 52.12). An employee is entitled to Covid-19 related paid leave in accordance with section 52.121 of the ESA and leave for Covid-19 vaccination in accordance with section 52.13 of the ESA. See section 11 for more details on Covid-19 related ESA issues.

11. Professions with Special Provisions and Limited Exemptions under the Employment Standards Act

Some professions remain excluded from the requirements of the *ESA*. However, this does not always mean an employer is fully excluded; they may only be exempted from parts of the legislation. Employers not commonly covered can apply to the Employment Standards Branch for a variance, making them fully exempt from the requested parts of the *ESA*. Check the legislation directly, and any appropriate case law on the matter.

a) Independent Contractors

See Section IV.D: Determine if the Worker is an Employee or Independent Contractor to determine whether the worker in question is an employee or an independent contractor. The *ESA* applies only to employees.

b) Commissioned Salespeople

Commissioned salespeople are entitled to most of the protection the *ESA* has to offer. Look carefully at *ES Regulation* s 37.14. They are entitled to receive at least minimum wage, unless they sell heavy industrial/agricultural equipment, or sailing/motor vessels. If a salesperson is entitled to minimum wage and the total commission falls short of that, the employer must make up the difference.

The first issue to examine in the case of a commissioned salesperson is the terms of the employment contract. These will tell you when the commissions are to be paid. Employers are not bound to bi-weekly payment of commissions. However, even if the employee must wait for sales to be reconciled before being paid their commission, they must still be paid wages bi-weekly.

c) Farm Labourers and Domestic Workers

The *ESA* has special provisions for farm and domestic labourers. See the Act and Regulation for more details. A domestic worker must have a written employment contract and be registered with the Employment Standards Branch (*ESA*, ss 14 and 15). The Employment Standards Branch is working in cooperation with federal immigration officials to curb abuses of the program. The federal agency will ensure that the employer is registered with the Branch before entry of a new immigrant is authorized. In 2002, under the banner of creating a more flexible workforce, the *ESA* was changed to exclude domestic and farm workers from certain overtime laws. Essentially domestic and farm workers can have their

hours averaged without the need for consent (see above at Section V.A.6(h): Averaging Agreements).

Most migrant farm labourers will be paid in accordance with the amount of work produced (i.e., payment per weight of crop picked). While this is legal, it should be noted that hours must still be recorded, and payments made for the purpose of Employment Insurance. Abuses by employers in this area have been significant, and workers should be aware that the government may try to collect EI from their paycheques if it is not reported.

> **NOTE:** The federal government via Citizenship and Immigration Canada administers the Live-in Caregiver Program. The Program came into effect on April 27, 1992. The purpose of the program is to prevent abuse and exploitation of domestic workers. The program was to clarify the employer-employee relationship by providing information on the terms and conditions of employment and on the rights of workers under Canadian law. The program also sets out educational requirements for live-in caregivers which are designed to aid a worker's ability to get a job after gaining permanent residency status and leaving domestic employment. While the first-year assessment interview and in-Canada skills upgrading have been eliminated, the remaining requirements are very high, thereby forming a serious barrier for these workers to enter Canada. The program requires the equivalent of a Grade 12 education (equivalent to second-year university in many countries), six months of formal training in the caregiving field or one year of full-time paid work experience, and good knowledge of English or French. Further information is available from the West Coast Domestic Workers' Association (see Section II.C: Referrals).

d) High Technology Professionals

The *ES Regulation* makes special provision for workers in the high technology sector. Most importantly, these professionals are exempt from the *ESA* provisions relating to hours of work, overtime, and Statutory Holidays (Parts 4 and 5). It is not easy, however, for an employee to qualify as a high technology professional – the criteria are very specific. See s 37.8 of the *ES Regulation* for a more detailed description, and especially if the employee deals with computers, information service, and scientific or technological endeavours.

Not all employees classified as high tech professionals by their employer fit the definition, and as a result may be entitled to overtime. The BC Employment Standards Branch awarded overtime pay to a group of digital animators, finding that they did not meet the overtime-exempt definition of high-tech professionals (see ER#426308)

e) Silviculture (Reforestation) Workers

Special rules apply to workers in the reforestation and related industries (as defined in *ES Regulation* s 1(1)). A silviculture worker is paid on a piece rate basis. This is defined as a rate of pay based on a measurable amount of work completed (e.g., payment by the tree). Whatever the rate, it must exceed the minimum wage rate. The *ES Regulation* lays out specific requirements that employers in these industries must meet relating to shift scheduling, holiday pay, and overtime. The special regulations are intended to address the remote job sites and special piece rate payment schemes that are popular in this industry. See *ES Regulation* s 37.9.

f) Professionals

The *ESA* does not apply to architects, accountants, lawyers, chiropractors, dentists, engineers, insurance agents and adjusters, land surveyors, doctors, optometrists, real estate agents, securities advisers, veterinarians, or professional foresters (*ES Regulation*, s 31).

g) Other exceptions to the ESA

There are additional exceptions and variances to the *ESA* set out in the *ES Regulation*, Part 7. Some of the professions for which there are exceptions or variances to the ESA include:

- Election workers
- Fishers
- Taxi drivers
- Logging truck drivers
- Newspaper carriers
- Oil and gas field workers
- Loggers working in the Interior
- Municipal police recruits
- Aquaculture – fin fish workers
- Miners
- Foster care providers

B. Covid-19

Due to the ongoing effects of Covid-19 aspects of employment law and the Employment Standards Act have been affected. These changes may evolve or be mitigated depending on future events. Be sure to review the most current jurisprudence if Covid-19 is a factor in the case.

1. Common Law and Covid-19

a) Mitigation

Courts may consider Covid-19 as an economic factor arising post termination which impacts the availability of comparable employment and may consider that in the analysis of whether an employee took reasonable steps to mitigate damages. See Mohammed v. Dexterra Integrated Facilities Management, 2020 BCSC 2008, https://canlii.ca/t/jc747.

b) Timing for Assessing Reasonable Notice

In Yee v. Hudson's Bay Company, 2021 ONSC 387, https://canlii.ca/t/jct10, the Ontario Supreme Court confirmed that the length of reasonable notice is assessed based on circumstances at the time of termination. The court did not increase the reasonable notice period for an employee who was terminated prior to the onset of the covid-19 pandemic, but argued the pandemic made it difficult for him to find new work.

In Iriotakis v. Peninsula Employment Services Limited, 2021 ONSC 998, https://canlii.ca/t/jd505, the employee was terminated after the start of the pandemic. The Ontario Supreme Court acknowledged the pandemic impacted the plaintiff's job search, but it was unclear how or whether this impacted the notice period. The Court cautioned that reasonable notice remained to be assessed as of the time of termination. Employees will likely need to provide specific evidence that the pandemic impacted the availability of alternative employment, to successfully argue for an increased notice period because of the pandemic.

c) New Position Offered on Return from Layoff and Constructive Dismissal

In Mack v. Vancouver Free Press Publishing Corp., 2021 BCCRT 370, the CRT found that an employee who was laid off during the pandemic and was offered to return to a significantly different position, did not resign by his rejection of the call back, but was in fact constructively dismissed, and entitled to a severance.

d) Canadian Emergency Response Benefit ("CERB") and Damages

There is evolving jurisprudence on whether CERB benefits received by an employee should be deducted from an employee's damages for wrongful dismissal. A few recent cases support the proposition that CERB benefits should not be deducted from an employee's severance award (see Slater v. Halifax Herald Limited, 2021 NSSC 210, https://canlii.ca/t/jghck & Fogelman v. IFG, 2021 ONSC 4042). However, as this question is relatively new and is evolving, be sure to review the most current state of the law on this issue.

e) COVID-19 and Vaccine Passports

Courts in British Columbia have generally dismissed constitutional challenges and civil suits brought against the province in relation to the vaccine passport, restrictions, and health orders arising from the pandemic. For example, see the following decisions:

In Kassian v. British Columbia 2022 BCSC 1603, three petitioners challenged the constitutionality of the vaccine passport provisions. Specifically, they argued that the medical exemption regime discriminated against persons with disabilities, contrary to section 15 of the Charter, and is unjustly coercive, contrary to section 7 of the Charter. The BCSC explained that the petitioners did not exhaust the remedies available to them under the legislative scheme; specifically, there was no evidence that the petitioners pursued the necessary medical opinions to support exemption requests from the vaccine passport. As such, the court declined to address the petitioner's Charter claims.

In Eliason v. British Columbia (Attorney General), 2022 BCSC 1604, the petitioners sought judicial review realted certain public health orders which mandated vaccination as a prerequisite for entry to certain businesses and events. The petitioners did not challenge the unconstitutionality of the public health orders themselves; rather, they alleged that it was unconstitutional for the government to provide "an effective, comprehensive, and accessible regime for medical exemptions in the Orders provisions" (para. 37). The Courts declined to consider the petitioners argument in respect to a Charter violation, on the grounds that two of the petitioners had alternate remedies available to them (in this case, vaccine exemption requests).

For further examples, see Maddock v. British Columbia, 2022 BCSC 1605 and Canadian Society for the Advancement of Science in Public Policy v. British Columbia, 2022 BCSC 1606.

C. The ESA and Covid-19

1. Covid-19 Related Leaves under the ESA

The Employment Standards Act has introduced several amendments related to Covid-19. They can be found at: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96113_01#section52.121

Section 52.12 of the ESA allows eligible employees to take unpaid leave if an employee has contracted Covid-19 or has been exposed to it, until the employee is no longer suffering the circumstance which caused them to take the leave. No note from a medical practitioner is not to be provided for this leave. Additionally, those who are required to quarantine or self-isolate under health agency guidelines, who are directed by the employer not to work, who are required to care for a child because of school or daycare closure, or who are trapped outside of BC as a result of travel restrictions (among other reasons listed in the amendment) are provided protection under the amendment. If an employer dismisses an

employer who is on an unpaid Covid-19 leave, there can be a claim of a breach of the Employment Standards Act (see ESA s. 52.12). See full section for further details.

Section 52.121 of the ESA provided for an amount to be paid to employees taking paid leave due to Covid-19, but the eligibility period for this section ended on December 31, 2021, and this section has been repealed.

2. Covid-19 and Section 65 (1) (d) Impossible to Perform

Section 65 (1) (d) says that an employee is not entitled to ESA notice or severance if the employee is employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act.

The Employment Standards Interpretation Guidelines have been updated several times, in relation to the criteria the Branch will consider in the analysis of whether Covid-19 created an employment contract that was impossible to perform due to an unforeseeable event. See further information at: https:/ / www2. gov. bc. ca/ gov/ content/ employment-business/ employment-standards-advice/ employment-standards/ forms-resources/ igm/ esa-part-8-section-65

3. Covid-19 Temporary Layoffs and ESA Amendment 2020

a) Layoffs

Under the Employment Standards Act, employers are only permitted to place employees on temporary layoff if there is a right to do so in the employment contract, layoffs are customary in the industry, or the employee consents. In normal circumstances, temporary layoffs can be for a maximum of 13 weeks, at which point if the employee is not recalled the layoff becomes a termination of employment, and triggers a severance obligation.

An exclusion was temporarily granted under the ESA for Covid-19 related temporary layoffs, extending the maximum layoff period from 13 to 24 weeks. This extension has expired. However, given the uncertainty surrounding future legislative responses to ongoing pandemic issues, be sure to check current layoff periods under the ESA if a layoff is in issue.

b) Unforeseeable Event Considerations

Section 65 (d) states that termination pay does not apply if the employee is “employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act,”

Employers may advance the argument that Covid-19 is an unforeseeable event which renders the employment contract impossible to perform and use that as an argument to avoid paying employees termination pay in lieu of notice.

The Employment Standards Branch interpretation guidelines have suggested that this clause may apply in some circumstances, as follows:

Covid-19

> If a business closure or staffing reduction is directly related to Covid-19 and there is no way for employees to perform work in a different way (for example, working from home) the exception may apply to exclude employees from receiving compensation for length of service and/or group termination pay.
>
> This exception is not automatic in all situations during the pandemic. If an employer terminates an employee for reasons that are not directly related to Covid-19 or if the employee's work could still be done (perhaps in a different way, such as working from home) the exception would not apply. Decisions on whether this exception

applies are made by the Director on a case-by-case basis.

However, the threshold for impossible to perform is very high (see BC EST # D105/08), and Employment Standards interpretation guidelines, while potentially indicative of results, are not binding precedent in an Employment Standards claim.

As a result, be sure to review new Employment Standards decisions to see how this provision has been interpreted in relation to Covid-19.

D. Breach of Employment Contract Claim

1. Severance Claims

The most common breach of an employee's contract (whether the terms of that contract are oral or in writing or a combination of the two) is a breach of a term that the employer will provide reasonable notice of dismissal.

When an employee is fired without being provided reasonable notice of dismissal or being paid money in lieu of reasonable notice (i.e., severance), the employee may have a breach of contract claim. The failure to provide reasonable notice (or pay in lieu) is also referred to as a wrongful dismissal. See Section V.C: Termination of Employment.

Courts may rule favorably for employees in costs awards where an employee is forced to sue to obtain a reasonable severance. In Janmohamed v Dr . Zia Medicine PC 2022 ONSC 6561, the parties could not agree on a costs valuation after the plaintiff accepted the defendant's Rule 49 offer. The Court awarded the plaintiff a significant costs award on the basis that the employers should not be incentivized to offer employees insufficient severance, forcing employees to sue to obtain what is justly due.

2. Constructive Dismissal Claims

If an employer has unilaterally changed a fundamental term of the employee's employment in a significant way, the employee may have been "constructively dismissed" and may be entitled to damages. See Section V.C: Termination of Employment. Examples of unilateral significant changes to fundamental terms of employment include significant changes to the type of work done by an employee, significant decreases to the employee's rate of pay, or significant changes to other working conditions.

In a cautionary tale for employees, the Alberta Court of Appeal ruled in Kosteckyj v Paramount Resources Ltd, 2022 ABCA 230 that 10 business days were enough for an employee to decide if a change imposed on him was a constructive dismissal. The employee's delay of more than 10 days in objecting to the change was a factor the ABCA used in overturning a constructive dismissal finding at trial. Employees considering making a constructive dismissal should be cautious not to delay action when a significant change is imposed on their terms of employment.

3. Bonus Clause Claims

If an employer failed to pay a previously agreed upon bonus to an employee, it may constitute a breach of the terms of an employment contract. In *Matthews v. Ocean Nutrition Ltd.*, 2020 SCC 26 the Supreme Court confirmed that unless a bonus plan "unambiguously" disentitles the employee to damages for the lost bonus, the employee will receive damages. The Court set out two questions needed to be answered to determine whether bonus and other payments would be included as part of an employee's severance. First, would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right? See also *Hrynkiw v. Central City Brewers & Distillers Ltd.*, 2020 BCSC 1640.

4. Other Contractual Claims

There are also situations during the employment relationship where an employer can breach other terms of an employment contract (other than the notice requirement).

5. Remedy: Court Claim

Claims for breach of contract are addressed through civil court claims, either at Provincial Court or Supreme Court depending on the potential value of the case.

Suing an employer while still on working notice is risky, as a court can find that suing an employer can amount to just cause for dismissal. Just cause means that the employer had justification to dismiss the employee without notice or severance.. See Section V.C.5: Just Cause Dismissal for more information.

There is conflicting case law on whether an employer would have just cause to dismiss an employee who sues the employer while still employed. As a result, prior to suing an employer while the claimant employee is still working or on a period of notice, claimants should carefully research the law and compare the current law to the employee's particular circumstances.

Sometimes a written contract, or certain provisions within it (such as a termination clause that limits an employee's right to a severance) will be invalid. See Section V.2: Employment Contract Considerations to determine whether the contract or any of its provisions are invalid.

E. Termination of Employment

At common law, employers can dismiss an employee at any time without cause, on provision of reasonable advance notice or pay in lieu thereof. In rare circumstances, employers can dismiss an employee for just cause, if the employee is guilty of serious misconduct.

In practice, dismissals are normally without cause. In without cause dismissal scenarios, employees are entitled to notice of dismissal, or pay in lieu of such notice, under both the ESA and common law (unless the employee's contract validly restricts the employee to only the ESA minimum severance).

Non-unionized, federally regulated employees, as covered by the CLC, are subject to different laws concerning dismissal without cause. See sections 240-246 of the CLC. Also see *Wilson v Atomic Energy of Canada*, 2016 SCC 29, https://canlii.ca/t/gsh2f.

The ESA (or the CLC for federally regulated employees) provides statutory minimums for notice, or pay in lieu, if an employee is dismissed from their employment. The maximum an employee can receive under the ESA is 8 weeks of notice or pay.

In addition, employees are entitled to reasonable notice of dismissal at common law, or pay in lieu of such reasonable notice. The amount of reasonable notice, or pay in lieu, should be sufficient to allow the employee to find comparable employment, based on the employee's age, length of service, and the nature of the employee's position.

The entitlement to notice at common law is a contractual entitlement. All employees have an employment contract, even if there is no written contract. Employment contracts can be written, oral, or a combination of both written and oral terms.

By default, there is an implied term in indefinite hire employment contracts (either oral or written contracts) that employers will provide employees with a reasonable notice of termination if they dismiss the employee without cause.

Written employment contracts may contain a termination provision that sets out how much notice (or pay in lieu of notice) the employee will receive if the employer terminates the employee without cause. In order to rebut the

presumption of reasonable notice and limit an employee's common law severance entitlement, termination clauses in employment contracts must be clear, unambiguous, and have to meet at least the minimum ESA entitlements.

If the employer fails to give the employee reasonable notice or pay in lieu, this will constitute a breach of the employment contract by the employer, and the employee could sue the employer for a severance in Small Claims Court, the Civil Resolution Tribunal, or BC Supreme Court. This is commonly called a wrongful dismissal claim.

Generally, the notice periods recognized at common law tend to be larger awards than the statutory minimum.

There are many potential issues involved if an employee is terminated. The below checklist and the information in this section of the chapter merely provide a starting point for further legal research.

1. Termination of Employment Checklist

☑ This section applies to both provincially and federally regulated non-unionized employees, dependent contractors, and independent contractors. It is necessary to determine which category the worker falls under. See Section IV: Preliminary Matters to determine this.

☑ Determine whether the worker has an indefinite or fixed term contract of employment. See Section V.C.2(a) Successive or Expired Fixed Term Contracts for details, as some contracts that appear to be for a fixed term may be deemed to be of indefinite duration by the courts, particularly when the fixed term contract is renewed year after year.

- If the contract is for an indefinite term, or if the worker was dismissed part way through a fixed-term contract, go to the next step of the checklist.
- If the worker was dismissed at the end of a fixed-term contract of employment, then their contract has simply been completed and there is generally no further entitlement to severance pay (unless their contract specifies otherwise).

☑ Determine whether the worker was dismissed or if they resigned. Sometimes a worker may have been forced to resign or may have had their pay or working conditions changed significantly, a practice known as constructive dismissal. See Section V.C: Termination of Employment to determine whether your situation would be considered a dismissal, constructive dismissal or resignation.

- If the worker was dismissed or constructively dismissed, continue to the next step of the checklist.
- If the worker voluntarily resigned, they are generally not entitled to severance pay (unless their contract specifies otherwise).

☑ If it appears that the contract may have become impossible to perform, determine whether there has been "frustration" of the contract; see Section V.C.16: Frustration of Contract. Note that this is rare, and layoffs usually do not fall into this category.

- If the contract has been frustrated then generally there is no entitlement to severance pay. Otherwise, continue to the next step of the checklist.

☑ Determine whether the terms of the contract specify the amount or length of notice or severance pay the worker will receive if dismissed.

- If this amount is specified, determine whether that provision of the contract is valid; see Section V.C(d) and (c): Invalid Contracts If the employment contract is valid, it will determine the amount of severance they are entitled to.
- If this amount is not specified, or if the contract or that provision of the contract is invalid, then:
    - Employees, dependent contractors, and independent contractors who are dismissed part way through a fixed term contract may be entitled to damages for breach of the contract; see Section V.C.4: Damages at Common Law-Fixed Term Contracts. Use these damages in place of those damages regarding "reasonable notice" for the rest of the checklist.

- Employees and dependent contractors who are employed for an indefinite term will generally be entitled to "reasonable notice"; go to the next step of the checklist.
- For independent contractors with an indefinite contract, the rules are more complex; see the cases listed in Section III.C.1 as a starting point for research as to whether the contractor may be entitled to reasonable notice. If the contractor is entitled to reasonable notice, continue to the next step of the checklist.

☑ Determine whether there may be just cause for dismissal; see Section V.C.5: Just Cause Dismissal - General. Note that it is often very difficult for an employer to prove that there is just cause. If there may be just cause, consider whether the employee has a potential defence; see Section V.C.6: Defences to Just Cause Arguments.

- If you think that the employer can prove in court that they truly had just cause for dismissing the worker, and the worker does not have a defence, the worker will generally not be entitled to severance pay.
- If there is a reasonable chance that the employer did not have just cause for dismissal, or if the employer may not be able to prove that there was just cause, continue to the next step of the checklist.

☑ For those workers entitled to reasonable notice, determine an approximate length for the worker's reasonable notice period; see Section V.C.4(d) Calculating Reasonable Notice. Note that it is difficult to predict how much a particular worker will receive if the case goes to trial, but case law can give an approximate range. Once this is done, calculate the damages the employee would be entitled to for the reasonable notice period. This generally includes the salary and benefits that the employee would have received if they had continued to be employed during the reasonable notice period.

- If the worker was given severance pay to cover their lost wages and benefits for the length of the reasonable notice period, or was allowed to continue working for the employer for that period, they will generally not be entitled to anything further.
- If the worker was given less working notice or severance pay than they are entitled to through their reasonable notice period, they may be able to claim the remainder in court; continue to the next step of the checklist.

☑ Determine whether the worker has mitigated their damages. Note that if the worker has mitigated their damages during the notice period, for example by finding a new job, they will have their severance award reduced by the amount of money they earn during the notice period. If the worker does not make reasonable attempts to find a new job, they may have their severance award reduced. See Section V.C.14: Duty to Mitigate.

☑ Determine whether the worker may be entitled to aggravated and/or punitive damages. If so, estimate how much they may be entitled to, and determine whether the worker has a strong case for these types of damages. See Section V.C.13: Aggravated and Punitive Damages.

☑ If the worker was an employee, determine what length of notice the employee is entitled to under the *Employment Standards Act* (or the *Canada Labour Code* for federally regulated employees). Note that if at least 50 employees were terminated at once, the employee is entitled to additional notice under the *ESA*; see Section V.C.4(b): Group Terminations. In the rare case that the employee is entitled to more money under the ESA than through reasonable notice, and the employee was dismissed in the past 6 months, consider filing a claim with the Employment Standards Branch. Otherwise, continue to the next step of the checklist.

☑ If the worker was an employee, and was dismissed for a discriminatory reason, determine whether they have a claim with the BC Human Rights Tribunal (or the Canada Human Rights Tribunal for federally regulated employees); see Chapter 6: Human Rights. If they do have a potential claim, estimate how much the employee would be able to claim for (i) lost wages (minus any amount from the duty to mitigate), and (ii) injury to dignity, feelings, and self-respect. Compare this to the amount the employee could claim for (i) reasonable notice (minus any amount from the duty to mitigate), and (ii) aggravated and punitive damages. If the employee is likely to obtain more money at the Human Rights

Tribunal, and has been dismissed within the past 12 months, consider filing a human rights claim. Keep in mind that it is possible to file both a civil claim and Human Rights claim for the same dismissal, but double wage loss recovery is not possible, and one claim may be deferred pending resolution of the other. See Chapter 6: Human Rights. Otherwise, continue to the next step.

☑ If the potential award for (i) reasonable notice and (ii) aggravated and punitive damages is under $35,000, as of June 1, 2017, consider filing a claim in Small Claims Court; see Chapter 20: Small Claims. If the worker has a strong case for an award significantly greater than $35,000, the worker should strongly consider contacting an employment lawyer to discuss proceeding with a claim in BC Supreme Court. If the potential award is only slightly over $35,000, the employee may wish to file in Small Claims Court, and waive their entitlement to any amount over $35,000, as proceeding in Small Claims Court can be less costly than proceeding in BC Supreme Court.

2. Employment Contract Considerations

As mentioned, the employer-employee relationship is contractual. Every employee has an employment contract, even if a written document does not exist.

Most employment contracts are contracts of indefinite hiring. This means that no definite term of employment was set out at the time of the contract, and there is an implied term that either party may terminate the contract upon giving "reasonable notice". The implied term to give reasonable notice can be overridden by an express notice provision limiting the amount of notice the employer is obligated to give the employee. Accordingly the courts will assume that an employee should receive "reasonable notice" prior to termination unless the contract explicitly says something different. If there is an express notice provision in the employment contract, then that clause is binding, unless there is a reason for it to be invalid (see **Section V.C.2(c) and (d) Invalid Contracts**, below).

If reasonable notice is not given, then the contract is breached, and courts can award damages in the form of compensation that would have been paid during that reasonable notice period. However, if there is just cause for dismissing an employee, no notice need be given and so there is no breach of the contract from which damages can arise.

Note that any wage claims that crystallized before the termination of the contract are not eliminated by just cause for dismissal. Just cause only relieves the employer from notice and severance pay requirements, but not liability for past wages, etc.

a) Successive or Expired Fixed Term Contracts

If an employee had successive fixed term contracts, the courts may find there is in fact an indefinite term of employment; see *Ceccol v Ontario Gymnastic Federation* (2001), 55 OR (3d) 614, https://canlii.ca/t/1fnnp.

If there was a fixed term contract and the employee continued to work after the term's expiration, the contract then becomes an indefinite contract. If the employee had an indefinite contract, but then signed a fixed-term contract, the new contract may not be valid; see **Section V.C.2(c) and (d) Invalid Contracts**, below.

b) Consideration

Once a job offer is made and accepted, a contract is in place (though as discussed above, it may be unwritten). To vary the terms of the contract after it is in place, there must normally be fresh consideration flowing from each party to the other. Consideration in contract law is the benefit one party receives from another as a result of entering into a contract with another party. This means that to change an existing contract, the new contract must contain a new benefit for both the employer and the employee. Because of this, an entire written contract might be invalid if the contract was imposed on the employee after they had already accepted the job offer: the employee would already have a contract, and the written contract would need to have some new benefit, or "fresh consideration", for the employee. Compare the signature

dates on the written contract to the actual start dates, to determine if there is an argument that the contract is unenforceable for lack of consideration.

The case of Rosas v. Toca, 2018 BCCA 191, https://canlii.ca/t/hs3c5, while not an employment law case, may present an arguments for employers that contract variation should be enforceable, even if there is no valid consideration. However, in obiter in the case of Quach v. Mitrux Services Ltd., 2020 BCCA 25, https://canlii.ca/t/j4tb5, the BCCA commented that Rosas v. Toca may not apply in the employment context or act to "change the authority of Singh in the nuanced world of employer and employee contractual relationships". Moreover, the recent case of Matijczak v. Homewood Health Inc., 2021 BCSC 1658, https://canlii.ca/t/jhp6p has affirmed the requirement for consideration. Taking into account the inequality of bargaining power in an employment relationship and the vulnerability of an employee relative to their employer, "fresh consideration" is still required in order for a contract variation to be valid in the employment context. Taken together, the BCSC decision in Matijczak and the comment from the BCCA in Quach are likely to affirm the requirement for fresh consideration, differentiating the employment context from that of contract law, generally.

c) Invalid Contracts – Vagueness or Ambiguity

Vague or ambiguous contract terms may be unenforceable. Courts will examine the wording of the contract terms to determine whether a clause is enforceable for vagueness or ambiguity. If a clause is not enforceable, courts may rule on the term of agreement based on the conduct of the employer and employee and pre-contractual communication between the parties. See *Alsip v Top Rollshutters Inc. dba Talius*, 2016 BCCA 252, https://canlii.ca/t/gs477.

d) Employment Standards Severance Clauses and Enforceability

Many employers enter into written employment contracts that purport to allow the employer to dismiss the employee without cause by providing only the Employment Standards Act minimum severance. These clauses will often be enforceable. However, some arguments are available to attempt to have these ESA severance termination clauses unenforceable.

e) Termination Clause Does Not Meet ESA Minimums

Any term of the written contract that does not meet the minimum standards set out by the Employment Standards Act (for provincially regulated employees) or the Canada Labour Code (for federally regulated employees) is invalid.

A contractual termination clause is not enforceable if, at any time, the clause would provide the employee with less than their entitlement under the *ESA*. See *Shore v Ladner Downs*, [1998] 160 DLR (4th) 76, https://canlii.ca/t/1d73h.

If a term of the contract is invalid, then the employee will likely receive whatever the common law provides instead of what the contract said.

For example, a termination clause might say the employee will receive 30 days' notice if they are being terminated without cause. Under the ESA, the employee could receive up to 8 weeks' notice. The contractual termination clause would be invalid because it purports to provide the employee with less than the minimum statutory entitlement.

In this example, the employee would be entitled to reasonable notice under common law. This can be greatly beneficial for the employee in cases where the common law provisions, such as the reasonable notice period, are better than the contractual provisions.

Note that in assessing whether a term of a contract breaches the ESA, one must consider the maximum entitlement that an employee could ever receive under the ESA at any point in time, rather than their current entitlement.

In the previous example, it is irrelevant whether the employee has worked for the employer long enough to be entitled to more than 30 days of notice under the ESA.

However, this principle may have been qualified with respect to severance clauses and fixed term contracts (see *Miller v Convergys CMG Canada Limited Partnership*, 2013 BCSC 1589, https://canlii.ca/t/g0b9t (upheld on appeal); *Rogers v Tourism British Columbia*, 2010 BCSC 1562, https://canlii.ca/t/2d6v5).

In *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, https://canlii.ca/t/j89s5, the ONCA ruled that if a section of a termination provision violated the ESA (even if distinct and separate from other sections) the entire termination provision will be void. The court refused to apply the general severability clause on the basis that once the clause is void, there is nothing to sever. The Court identified policy reasons for this decision, highlighting that even if an employer does not rely on an illegal termination provision, it may still gain the benefit of that illegal clause, as employees "may incorrectly believe they must behave in accordance with these unenforceable provisions."

As this area of employment law continues to be litigated and develop, students should review the most recent state of the law prior to advising clients on potential enforceability of a severance provision.

f) No Severance Ceiling Set out in Termination Clause

If a contractual ESA severance termination clauses does not set out that this severance is the maximum an employee will receive, the employee may not be limited to such a severance.

In *Holm v AGAT Laboratories Ltd*, 2018 ABCA 23, https://canlii.ca/t/hq0n3, the Alberta Court of Appeal looked at whether a termination clause was sufficient to limit a constructively dismissed employee's entitlement to severance. The termination clause provided for dismissal in accordance with the Alberta Employment Standards Code, but did not clearly state that this entitlement was a ceiling. As a result, the clause was ambiguous, and did not act to limit the employee's severance entitlement.

In *Movati Athletic (Group) Inc v Bergeron* 2018 ONSC 7258, https://canlii.ca/t/hwg5n, the court also found a termination clause that allowed the employer to terminate employment without cause at any time upon providing notice or pay in lieu of notice pursuant to Ontario Employment Standards was also not sufficient to limit the employee's severance, as it did not clearly state that the minimum statutory severance was a cap.

g) Duty to Perform Contracts in Good Faith

There exists a duty of honest performance of contractual obligations, including in the termination of contracts. See C.M. Callow Inc. v. Zolinger, 2020 SCC 45, https://canlii.ca/t/jc6vt.There is also a duty to exercise contractual discretion in good faith, which operates in every contract. See Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, 2021 SCC 7, https://canlii.ca/t/jd1d6. These general concepts will likely have applicability in the employment context.

h) General Contract Construction Rules and Unconscionability

Other general rules regarding contracts apply and may also invalidate the contract. Examples of these are duress, undue influence, and unconscionability, but these occur less frequently.

Unfair agreements may be set aside if they resulted from an inequality of bargaining power, based on the principle of unconscionability. The purpose is to protect those (i.e. employees) who are vulnerable in the contracting process. In *Uber Technologies Inc. v. Heller*, 2020 SCC 16, https://canlii.ca/t/j8dvf, the Court adopted a less stringent test for unconscionability and for setting aside contracts that were the result of an inequality of bargaining power. The SCC found that "although one party knowingly taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, it is not essential for a finding of unconscionability. Unconscionability does not require that the transaction was grossly unfair, that the imbalance of bargaining power was overwhelming, or that the stronger party intended to take advantage of a vulnerable party."

If an employment contract was entered into because of an inequality of bargaining power, even if the employer did not knowingly try to take advantage of the employee, one may wish to consider arguing the contract is unconscionable to relieve employees of onerous contract restrictions.

Under certain circumstances, employers and employees cannot use the above rules to invalidate a contract for their own benefit. If a new contract is imposed in which all the benefit is to the employee, the employee cannot have the contract invalidated for lack of fresh consideration to the employer in order to avoid a severance provision or other provision of the contract. Additionally, the employer cannot back out of a contract that only gave benefits to the employee, due to lack of fresh consideration to the employer.

3. Without Cause vs. Just Cause Dismissal

Employers can dismiss an employee in one of two ways:

a) Without cause, and on provision of reasonable notice or pay in lieu; or

b) For just cause.

Without cause dismissals and just cause dismissals are both express dismissal. An employer tells the employee they are being dismissed, generally by having a meeting and providing the employee with a letter of dismissal.

4. Without Cause Dismissal and Reasonable Notice

If an employee is dismissed without cause, the employee is entitled to reasonable notice of dismissal, or pay in lieu, under both statute law and common law.

If a non-unionized, federally regulated employee has been dismissed without cause, refer to sections 240-246 of the CLC; see *Wilson v Atomic Energy of Canada*, 2016 SCC 29, https://canlii.ca/t/gsh2f.

a) Notice under the ESA

Employees are entitled to notice, or pay in lieu of, under the ESA. These are the minimum statutory requirements for compensation for individual terminations. For periods of employment greater than three months, the employer must pay severance to the employee, or satisfy that obligation by giving written notice of termination.

For service between three months and one year, one week of wages (or notice) is required. For one to three years, two weeks' wages or notice are required. For three years, three weeks' wages or notice are required. After three consecutive years of employment, one additional week of wages or notice is required for each additional year of employment, to a maximum of eight weeks (s 63(3)(iii)). Additional compensation is required for group terminations (see below).

b) Group Terminations under the ESA

Group terminations (those of 50 or more at a single location) have additional requirements under the ESA. First, the employer must give written notice to the Minister, to each employee being terminated, and to the union. This notice must specify the number of employees being terminated, the date(s) of termination, and the reason for termination. According to s 64, the number of weeks notice for group terminations varies with the number of employees being terminated:

- At least eight weeks if between 50 and 100 employees;
- 12 weeks if between 101 and 300; and
- 16 weeks if 301 or more.

If an employee is not covered by a collective agreement, these notice requirements apply in addition to the statutory minimum for individuals.

Exceptions to these guidelines (ss 63 and 64), to which minimum notice requirements do not apply, are laid out in section 65 of the Act. No minimum notice or compensation is required of the employer by the *ESA* when the employee:

- has not worked for a consecutive period of three months;
- quits or retires;
- is fired for just cause (see discussion of just cause below);
- worked on an on-call basis doing temporary assignments they were free to accept or reject;
- was employed for a definite term and the employment ends in accordance with the end of the term of employment;
- was hired for specific work to be completed in 12 months or less;
- cannot perform the work because its performance has become impossible due to an unforeseeable event or circumstance (i.e. frustration of contract);
- was employed at one or more construction sites by an employer whose principal business is construction;
- refused reasonable alternative employment from the employer; or
- was a teacher employed by a board of school trustees.

c) Reasonable Notice at Common Law – Indefinite Term Contracts

In addition to *ESA* notice requirements, employees are entitled to reasonable notice of dismissal at common law or pay in lieu of such reasonable notice.

The entitlement to notice at common law is a contractual entitlement. As such, there may be a valid termination clause in an employment contract which sets out the employee's entitlement to common law notice.

In the absence of a valid termination clause in an employment contract, the employee is entitled to reasonable notice of dismissal at common law. The amount of reasonable notice, or pay in lieu, should be sufficient to allow the employee to find comparable employment, based on the employee's age, length of service, and the nature of the employee's position.

The case of *Bardal v Globe and Mail Ltd*, 1960 294 ONSC, https://canlii.ca/t/gghxf includes a list of the four primary factors to be considered in determining the appropriate length of a notice period:

1. the character of the employment;
2. the length of service;
3. the age of the employee; and
4. the availability of similar employment, having regard to the experience, training and qualifications of the employee.

These are known as the *Bardal* factors. The Supreme Court of Canada has endorsed this list of factors in a number of cases; see e.g. *Honda Canada Inc v Keays*, 2008 SCC 39, 2 SCR 362, https://canlii.ca/t/1z469.However, these factors are not exhaustive, and additional factors may be considered on a case-by-case basis.

The current upper limit of "reasonable notice" is 24 months, generally for the longest-tenured, older, and senior-level employees. While there are some case beyond this upper 24-month limit, which should be reviewed carefully if employees fall within the relevant age and years of service categories, these cases are the exception. There has been a trend over the past years with long term employees working for employers their entire lives and dismissed in their late 60s and early 70s claiming severances of 30 or more months. However, in *Dawe v. Equitable Life Insurance Company of Canada*, 2019 ONCA 512, https://canlii.ca/t/j12wp, the Ontario Court of Appeal decision suggests that "*exceptional circumstances*" must be present to award a notice period above 24 months, and that lengthy service and age would not generally suffice to enlarge a "cap" of beyond twenty-four (24) months.

Reasonable notice is an entitlement to assist the employee. In *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801, https://canlii.ca/t/gm6xq, the Ontario Court of Appeal held that the financial health of a company does not reduce its notice obligations to employees. Termination clauses in contracts are not always valid and enforceable. See

Section 16 above.

In addition, be aware that employers may try to rely on termination provisions in an employee handbook or other such workplace policy documents. For example, in *Cheong v Grand Pacific Travel & Trade (Canada) Corp.*, 2016 BCSC 1321, https://canlii.ca/t/gsknq the BC Supreme Court found that an employee handbook termination clause did not act to limit the employee's reasonable common law severance. It is important to review and question all documentation relied on to limit an employee's severance.

d) Calculating Reasonable Notice

To determine how much notice an employee might get, compare their case to previously decided cases. Carswell hosts an online Wrongful Dismissal Database. The database calculates average notice period awards from precedential cases. Reports can be purchased individually or by subscription. This is a helpful tool for searching for cases where an employee had a similar range of age, length of service, and job type as compared to the employee in question. The database is accessible online at: http://www.wrongfuldismissaldatabase.com

Additionally, the UBC Law Library and many other law libraries hold publications with tables of cases sorted by job type, such as the Wrongful Dismissal Practice Manual by Ellen E. Mole (which is also found on Quicklaw). WestlawNext Canada also offers Quantum Services Database for wrongful dismissal. Comparing the Bardal factors of the employee in question with those of previous cases using either of these methods can assist in finding an appropriate range for the reasonable notice period. As a starting point, you can ask the particular employee how much time it would take or has taken to find similar work for similar pay.

Reasonable notice is concerned with a period of time, not an amount of money. A permanent part-time employee is entitled to the same notice as a full-time employee. If an employer dismisses a part time employee with immediate effect, the fact that the employment is part-time will be reflected in the amount of pay in lieu of notice of dismissal the employee receives, not the length of the notice period. (Stuart v. Navigata Communications Ltd., 2007 BCSC 463 at para. 15).

Severance is generally awarded in a manner correlated to the length of service. However, in some circumstances short service employees can be entitled to proportionally more severance. Senior level short term employees, particularly upper management employees, may be entitled to proportionally more severance than their more junior counterparts. An example of an extended severance period for short service employees is found in *Chung v Quay Pacific Property Management Ltd*, 2020 BCSC 174, https://canlii.ca/t/j56wm, where the Court awarded a nine-month severance to a 53-year-old short service executive employee with only 2 years of service.

The length of reasonable notice may also be influenced by personal factors of the employee that affect how long it may take them to find similar work for similar pay. For example, the employee in Nahum v. Honeycomb Hospitality Inc., 2021 ONSC 1455, https://canlii.ca/t/jkgwq, was 5 months pregnant at the time of dismissal. She argued that her pregnancy should be considered as grounds for additional severance. The Court noted that pregnancy would not automatically increase the severance period, but that it could be up to the employee to demonstrate that the pregnancy is reasonably likely to have an adverse impact on the employee's ability to find alternative employment. In this case, the Court did find that the pregnancy was an important factor. She was awarded a 5-month severance despite only being employed for 4.5 months.

Similarly, gender and age may be a factor in determining the length of reasonable notice. The court in Cordeau-Chatelain v Total E&P Canada Ltd., 2021 ABQB 794, https://canlii.ca/t/jjlst, took judicial notice of the "compounding negative effects that gender and age can have on a woman in the professional job market, especially at the management level".

If an employee's ability to find similar work for similar pay is affected by personal factors such as gender and age or pregnancy, there may be an argument for an increased reasonable notice period.

e) Extensions to Notice Period

There is case law to support the principle that an employee's unique background and the nature of their responsibilities can outweigh an employee's short length of employment in assessing a reasonable notice period upon termination. For example, the employee's notice period was increased from 5 to 10 months in *Waterman v Mining Association of British Columbia*, 2016 BCSC 921, https://canlii.ca/t/grtkl, based on the employee's position in the company, her unique background and the nature of her responsibilities. Also see *Munoz v Sierra Systems Group Inc.*, 2016 BCCA 140, https://canlii.ca/t/gp1cv.

Generally, the maximum reasonable notice period is 24 months. In exceptional circumstances, such as very long services cases, courts can award notice periods beyond 24 months; see *Markoulakis v Snc-lavalin Inc.*, 2015 ONSC 1081, https://canlii.ca/t/gh79b.

f) Damages at Common Law - Fixed Term Contracts

Fixed term contracts have a defined end date. In the normal course, fixed term contracts simply end when the term expires, or they are terminated in accordance with termination provisions in the fixed term contract itself. Reasonable notice is not normally required to end a fixed term contract.

If an employee, dependent contractor, or independent contractor has a fixed-term contract, and is dismissed before the end date of the contract, they may be able to claim damages for a breach of the contract.

Determine whether the contract itself specifies the conditions under which the employer can dismiss the worker, and what amount of notice or severance is required. If this is specified, and the contract and termination clause are valid (see Section V.C.2(c) and (d) Invalid Contracts), this will generally be determinative.

If the contract does not specify the conditions of dismissal, or if the contract or the termination clause is invalid, the worker may be able to claim all the wages that they would have earned for the remainder of the contract. (*Canadian Ice Machine v. Sinclair*, [1955] SCR 777, https://canlii.ca/t/21v9w).

After determining the damages the worker may be entitled to, return to **Section IV.D.1: Termination of Employment Checklist**.

g) Calculating Damages for Wrongful Dismissal – All Compensation Considered

Employers are required to provide employees with reasonable notice of dismissal. This could be provided by advance notice, in which case the employee would work for the prescribed amount of time, and continue to receive all elements of their compensation, such as wages, benefits, pension, car allowance, etc.

If an employer provides an employee with pay in lieu of notice, that pay in lieu of notice should account for all the elements of compensation the employee would have earned had they worked for the reasonable notice period.

Of course, pay in lieu of notice would include replacement of the employee's lost wages over the course of the severance period. However, arguments can be made that severance should also include replacement of other aspects of an employee's lost compensation.

Company Vehicle or Car Allowance

For example, if an employee receives a company car for personal use, and that personal use is recognized by both the employer and employee as a benefit of employment, the employee is entitled to compensation for the loss of that car during the notice period.

Benefits

Other lost benefits, such as extended health and dental coverage are also recoverable during the notice period. A judge might calculate this loss by adding up all of the medical expenses incurred by the dismissed employee during the notice period that would have been recoverable under the employer's benefits plan had the employee been working, or by awarding the employee his or her actual out of pocket costs to purchase comparable replacement benefits themselves during the notice period. In assessing damages for lost benefits, it can be useful to have the employee obtain a quote from a benefits provider for comparable replacement benefits, and attach that quote if a severance counteroffer is being made to the employer.

Pension

If the employee had a pension plan, the loss is generally calculated as:

[the projected commuted value that the pension would have had if the employee remained employed during the notice period] minus [the commuted value the pension actually had at the time the employee was dismissed].

The commuted value is the net present value of the invested money, and its calculation is complicated; the pension plan administrator can provide the employee with the current and projected commuted values.

There are two general categories of pension plans: defined benefit plans and defined contribution plans. The calculation formula above is generally applicable for determining the loss of a defined benefit pension plan over a notice period. In some situations, a more simplified process of calculating the loss of employer pension contributions over the course of a notice period will be used for estimating the lost value of defined contribution pension plans. As a big picture concept, the idea is that if an employee receives pay in lieu of notice, the employee should be put in the same place financially in respect of their pension as if they had worked and continued making regular pension contributions during the notice period.

Bonus

An employee may be entitled to compensation for loss of bonus during the notice period. This assessment will require a consideration of whether the bonus was discretionary or based on quantifiable metrics, and whether the employee would have likely received a bonus had they worked during the notice period.

An employee may be able to claim a pro-rated portion of a bonus that was partially earned prior to dismissal. In *Andros v Colliers Macauley Nicolls Inc*, 2019 ONCA 679, https://canlii.ca/t/gh79b the Ontario Court of Appeal considered the issue of a bonus which is payable after the expiry of the notice period but during which the employee either worked part of the year or whose notice period included part of that year. The Court found that absent clear language in the contract, it would be inherently unfair that employees terminated without cause would be precluded from seeking a *pro rata* share of their bonuses "only by virtue of the fact that the notice period ended before the bonus payment date, particularly where the bonus payment date is entirely in the discretion of the employer."

Research should be done on this topic to determine potential entitlement.

h) Tips included in Severance Calculation

There is authority for the inclusion of estimated tips in an award of damages for wrongful dismissal: Patriquin, *Pier Marine Pub Ltd. v. Brown*, 1992 BCJ No 2868 (BCSC). Where a plaintiff's earnings are in part from cash gratuities, damages reflecting that lost income are not assessed as the amount that the plaintiff declares and pays taxes upon: *Chapple v. Umberto Management Ltd.*, 2009 BCSC 724, https://canlii.ca/t/23qr4

At common law, the employee is only entitled to be compensated for wages and benefits to which they would have been contractually entitled during the notice period, and not for any ex gratia expectancies (see *Swann v MacDonald Dettwiler and Associates Ltd*, [1995] BCJ No 1596 (QL) (SC)), https://canlii.ca/t/1dqv2.

Courts have a wide discretion to determine the appropriate damages based on the evidence of the plaintiff's pre-dismissal earnings (*Davidson v Tahtsa Timber Ltd*, 2010 BCCA 528, https://canlii.ca/t/2dkjb).If an employee's earnings have varied in the years prior to dismissal, some courts in BC have calculated damages by averaging the employee's annual wages (see *Krewenchuk v Lewis Construction Ltd*, [1985] BCJ No 1553 (SC), https://canlii.ca/t/22ktm. Where remuneration is based on an annual salary and not an hourly rate, a court may still assess damages based on the average salary paid in the years prior to dismissal (see *Goodkey v Dynamic Concrete Pumping Inc*, 2004 BCSC 894, https://canlii.ca/t/1hf7v).

Where an employee earns a variable income, courts may average the rate of pay within the relevant notice period for calculating damages; see *O'Dea v Ricoh Canada Inc.*, 2016 BCSC 235, https://canlii.ca/t/gncc4).

After determining the damages the employee may be entitled to, return to Section IV.D.1: Termination of Employment Checklist.

5. Just Cause Dismissal- General

If an employee is guilty of serious misconduct which goes to the heart of the employment relationship, the employer may dismiss the employee for just cause. If an employer has just cause to dismiss an employee, it is not required to provide any notice or pay in lieu of notice. Just cause it is a question of fact, and must be determined by a judge on a case by case basis.

Note that in the case of independent contractors, courts may instead consider whether there was a fundamental breach that goes to the root of the contract, depriving one party of the whole or substantially the whole benefit of the contract (see *Hunter Engineering Co v Syncrude Canada Ltd*,[1989] 1 SCR 426; *1193430 Ontario Inc v Boa-Franc Inc*, 78 OR (3d) 81); *Fernandes v Peel Educational & Tutorial Services Limited (Mississauga Private School)*, 2016 ONCA 468. The law on this topic can be complex and will require additional research.

Common law has defined just cause as conduct that is inconsistent with the fulfilment of the express or implied condition of service (*Denham v Patrick* (1910), 20 OLR 347 (Div Ct)). It is conduct inconsistent with the continuation of the employment relationship, which constitutes a fundamental breach going to the root of the contract (*Stein v BC Housing Management Commission* (1989), 65 BCLR (2d) 168 (SC), (1992), 65 BCLR (2d) 181 (CA)). This includes serious misconduct, habitual neglect of duty, incompetence, conduct incompatible with the employee's duties or prejudicial to the employer's business, or wilful disobedience to the employer's orders in a matter of substance; see *Port Arthur Shipbuilding Co v Arthurs et al*, [1968] S.C.J. No. 82, [1969] S.C.R. 85.

An objective test is used to determine whether there has been a serious misconduct or a fundamental breach. For a long term or senior employee, the employer may need more than mere misconduct; see *Mallais v Lounsbury Co* (l984) 58 NBR (2d) 345 (QB). What constitutes just cause will vary from case to case and must be something that a reasonable person would be unable to overlook (*McIntyre v Hockin*, [1889] OJ No 36, l6 OAR 498 (Ont CA)).

A single incident is usually insufficient to justify dismissal (*Buchanan v Continental Bank of Canada* (1984), 58 NBR (2d) 333 (QB)), unless that act is extremely prejudicial to the employer such as dishonesty or immoral character that causes a failure of trust (*Stilwell v Audio Pictures Ltd*, [1955] OWN 793(CA)).

The cumulative effect of minor instances may justify dismissal if they make the employee unable to perform their duties or result in a serious deterioration of the employment relationship (*Ross v Willards Chocolates Ltd*, [1927] 2 DLR 461 (Man KB)).

Where an employer accepts a certain standard of performance over a period of time, the employer cannot without warning treat such conduct as cause for dismissal (*Dewitt v A&B Sound Ltd* (1978), 85 DLR (3d) 604 (BCSC)).

Courts are required to take a contextual approach to determining whether just cause for dismissal existed, considering numerous factors. See *McKinley v BC Tel*, [2001] 2 SCR 161.

Although there is no comprehensive list of what constitutes just cause, the list below discusses some of the more common grounds for a dismissal.

a) Insubordination/Disobedience

Insubordination or insolence that is incompatible with the continuation of the employment relationship is just cause for dismissal (*Latta v Acme Cheese Co* (1923), 25 OWN l95 (Ont Div CT)). A single incident that is very severe and interferes with and prejudices the safe and proper conduct of the business will be just cause for dismissal (*Stilwell v Audio Pictures Ltd*, [1955] OWN 793(CA)). Poor judgment, insensitivity, or resentment, is generally not sufficient (*Leblanc v United Maritime Fisherman Co-op* (1984), 60 NBR (2d) 341 (QB)).

An intentional and deliberate refusal of an employee to carry out lawful and reasonable orders will generally suffice as cause for dismissal. However, should an order be outside the employee's job description, then such an order will not be considered "lawful and reasonable". Frequent less serious instances of disobedience can justify dismissal where they are combined with other misconduct (*Markey v Port Weller Dry Docks Ltd* (1974), 4 OR (2d) 12 (Co Ct); *Stein v BC Housing* (1989), 65 BCLR (2d) 168 (SC), (1992), 65 BCLR (2d) 181 (CA); *Cotter v Point Grey Golf and Country Club*, 2016 BCSC 10). Generally, one isolated act of disobedience will not, in itself, be cause for dismissal.

For a breach of company policy or company rules to constitute just cause for dismissal, the rule or policy must have been made clear to the employees and must have been regularly enforced by the employer.

> **NOTE:** A refusal to co-operate, a neglect of duties, or a refusal to perform the job may be just cause for dismissal (*Lucas v Premier Motors Ltd*, [l928] 4 DLR 526 (Alta CA)). However, if an employer proposes a unilateral change in position, job function, pay, hours, etc., it is not just cause if the employee refuses the change. Rather, it may be considered a constructive dismissal. Failure to accept a reasonable transfer not involving demotion or undue burden or hardship may be cause for dismissal, if such a transfer is determined to be an express or implied term of the contract.

b) Poor Employee Performance

Where there is actual incompetence, not just dissatisfaction with an employee's work, the employee may be dismissed with cause if such incompetence is the fault of the employee (*Waite v La Ronge Childcare Co-operative* (l985), 40 Sask R 260 (QB)). If an employee presents an exaggerated assessment of their own skills, a company is justified in dismissing that employee after finding out their true abilities (*Manners v Fraser Surrey Docks Ltd* (1981), 9 ACWS (2d) 155). Incompetence is assessed using an objective standard of performance, and it is for the employer to prove that the employee fell below the standard. Usually, one isolated example of failure to meet such a test does not warrant discharge (*Clark v Capp (1905)*, 9 OLR 192). The employer must prove that:

a) reasonable standards of behaviour and performance were set and clearly communicated to the employee;

b) the employee was notified when they did not meet those standards;

c) the employee received training and was allowed adequate time to meet those standards; and

d) the possible repercussions of failing to meet those standards were clearly communicated.

Just cause for termination exists when an employee fails to respond to these measures. However, the ESB and courts require that the employer prove that all these steps were taken. There is also a requirement that the employee appreciates the significance of the warning (*Korber v Can West Imports Limited and Satten*, [1984] BCWLD 737).

See *Hennessy v Excell Railing Systems Ltd.* (2005 BCSC 734), for a comprehensive list of what an employer must show to establish poor performance.

Incompetence as grounds for dismissal needs to be considered in light of the *Human Rights Code* and the *bona fide* occupational requirement ("BFOR") test (see *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union* (BCGSEU), [1999] 3 SCR 3). In a case of poor employee performance, the ESB will not find just cause for dismissal unless the employer can demonstrate a "neglect of duties".

c) Dishonesty

Dishonesty must be proven on a balance of probabilities and the burden rests with the employer (*Hanes v Wawanesa Insurance Company*, [1963] SCR 154). The employer must show that the employee intentionally and deceitfully engaged in the misconduct. Failure by the employer to prove dishonesty may lead to punitive damages.

Dishonesty may be a cause for dismissal, especially if it indicates an untrustworthy character or is seriously prejudicial to the employer's interests or reputation (*Jewitt v Prism Resources* (1981), 127 DLR (3d) 190 (BCCA)). In *McKinley v BC Tel*, [2001] 2 SCR 161, https://canlii.ca/t/521q, the Supreme Court of Canada used a contextual approach to make this assessment. The test is whether the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship or is fundamentally or directly inconsistent with the employee's obligations to their employer. An effective balance must be struck between the severity of the misconduct and the sanction imposed.

d) Intoxication

Depending on the extent of intoxication and degree of prejudice to the employer, intoxication may be a cause for dismissal; see *Armstrong v Tyndall Quarry Co* (1910), 16 WLR 111 (Man KB). However, intoxication in itself is not grounds for dismissal. The courts should undertake a contextual approach, per McKinley, look at all relevant factors (i.e., work history, discipline history, and whether the position is safety sensitive. Courts may be sympathetic to alcohol abusers especially if they are long-term employees; see *Robinson v Canadian Acceptance Corp Ltd* (l974), 47 DLR (3d) 417 (NSCA).

Consider whether the intoxication is part of a larger substance abuse issue. If so, the employee may have a Human Rights claim (see Chapter 6: Human Rights and the duty to accommodate).

e) Absences and Lateness

When an employee is frequently absent from work, the absence occurs at a critical time, or the employee lies about the absence, it may be a cause for dismissal. Chronic lateness may also be cause for dismissal, particularly if it is coupled with clear written warnings from the employer.

Consider whether the lateness or absenteeism are caused by a physical or mental disability. If so, the employee may have a Human Rights claim (see Chapter 6: Human Rights).

f) Illness

Temporary illness does not constitute just cause (*McDougal v Van Allen Co Ltd.* (1909), 19 OLR 351 (HC)). For a lengthy illness, one must consider the nature of the services to be performed, the intended length of service of the employee, and other factors (*Yeager v RJ Hastings Agencies Ltd* (1985), 5 CCEL 266 (BCSC), https://canlii.ca/t/22wgp). In some cases, a period of one year may not be too long for an employer to await the return of a valuable employee (*Wilmot v Ulnooweg Development Group Inc*, 2007 NSCA 49, https://canlii.ca/t/1rknd). If the employee is permanently incapable of performing work duties, they may properly be dismissed (*Ontario Nurse's Federation v Mount Sinai Hospital*, [2005] OJ No 1739, https://canlii.ca/t/1k90s). Long term illness might alternatively be considered frustration of contract, and, if the contract is frustrated, the employee is not entitled to severance pay.

Consider whether the illness is a physical or mental disability. If so, the employee may have a Human Rights claim (see Chapter 6: Human Rights).

g) Conflict of Interest

An employee has a duty to be faithful and honest. Information obtained in the course of employment may not be used for their own purposes or purposes that are contrary to the interests of the employer (*Bee Chemical Co v Plastic Paint and Finish Specialists Ltd et al* (1979), 47 CPR (2d) 133 (Ont CA)). An employee may be liable for damages for breach of contract where they are running a business contemporaneous with being an employee (*Edwards v Lawson Paper* (1984), 5 CCEL 99 (Ont HC)). An employee's conduct that is seriously incompatible with their duties and creates a conflict of interest can be grounds for summary dismissal (see *Durand v Quaker Oats Co of Canada* (1990), 45 BCLR (2d) 354 (CA), https://canlii.ca/t/1d7fp. Following the end of employment, an employee is not permitted to compete unfairly against the employer, for example by using confidential information.

h) Off-Duty Conduct

Private conduct will be considered just cause for dismissal if it is incompatible with the proper discharge of the employee's duties, or is prejudicial to the employer. This depends on the conduct and the nature of the job. Alleged criminal conduct or conduct that interferes with the internal harmony of the workplace, if it is prejudicial to the employer, may also be just cause.

i) Personality Conflict

A personality conflict, such as inability of an employee to function smoothly in the work environment on a personal level, is not grounds for dismissal unless it is inconsistent with the proper discharge of the employee's duties or is prejudicial to the employer's interests (*Abbott v GM Gest Ltd*, [1944] OWN 729 (Ont CA)). If the inability to get along with others results in business interference, the employee may be dismissed (*Fonceca v McDonnell Douglas Ltd* (1983), 1 CCEL 51 (Ont HC)).

j) Breach of Confidence and Privacy Obligations

An employee's unauthorized disclose of employer confidential information may amount to a cause dismissal. An employee's secret recording of meetings with management might be found to be a breach of confidentiality and privacy obligations amounting to cause. See *Hart v. Parrish & Heimbecker*, Limited 2017 MBQB 68, https://canlii.ca/t/h3n7h.

Similarly, surreptitious recordings of co-workers may be grounds for a just cause dismissal. In Shalagin v. Mercer Celgar Limited Partnership, 2022 BCSC 112, the employee recorded personal and private conversations of his co-workers. The Court found that this constituted just cause given the effect on the relationship of trust.

k) Deleting Company Information

Deleting or altering company information during departure from employment may in some circumstances be grounds for a just cause dismissal. However, as with all just cause cases a McKinley contextual analysis should be applied. In the case of *Kerr v. Arpac Storage Systems Corporation*, 2018 BCSC 704, the court found the employee's deletion of company information around the end of employment was not enough to constitute a just cause dismissal, partially due to the employee's mental state and because the employee apologized.

6. Defence to Just Cause Arguments

If an employer alleges just cause for dismissal, the employee might have one of the following defenses to the just cause allegations.

a) No Warning

It can be argued that an employer must warn an employee or issue escalating discipline before firing that employee for a series of trivial incidents that are not serious enough alone to justify dismissal (*Fonceca v McDonnell Douglas* (l983), 1 CCEL 51 (Ont HC)). However, if an employee is in a fiduciary relationship with their employer, a warning or escalating discipline may not be necessary if several incidents occur around the same time and cause a breakdown of trust; see Goruk v Greater Barrie Chamber of Commerce, 2021 ONSC 5005, https://canlii.ca/t/jh22k.

b) Condonation

If an employer's behaviour indicates that they are overlooking conduct which gives cause, that employer cannot later dismiss the employee without new cause arising; see (*McIntyre v Hockin (1889)*, 16 OAR 498 (CA)). This applies only where the employer knows of the conduct. The employer is entitled to reasonable time to decide whether to act, and this reasonable time period commences at the time that the employer learns of the employee's conduct.

Behaviour by the employer constituting condonation may include actions or omissions such as failing to dismiss the employee within a reasonable time (*Benson v. Lynes United Services Ltd*, [1979] 18 A.R. 328), tolerating an employee's behaviour without reprimand (*Johnston v General Tire Canada Ltd*, [1985] OJ No 98), giving the employee a raise (*Sjerven v. Port Alberni Friendship Center*, [2000] BCJ No 608, https://canlii.ca/t/1fn5d), or giving the employee a promotion (*Miller v Wackenhut of Canada Ltd*, [1989] OJ No 1993).

If an employer learns of an employee's misconduct after dismissing the employee, the employer may use that misconduct to justify the dismissal for cause. This can be referred to as after-acquired cause.

However, if the employer already knew of the employee's misconduct, but terminated the employee without alleging cause or gave the employee a letter of reference, in some cases the employer has been held to be estopped from alleging cause or has been taken to have condoned the employee's misconduct. However, there is conflicting case law on this subject and many cases have held that the employer may still allege cause. See *Smith v Pacific Coast Terminals*, 2016

BCSC 1876; *Technicon Industries Ltd v Woon*, 2016 BCSC 1543.

According to some case law, previous misconduct that has been condoned may be revived by new instances of misconduct, and the employer may then use the cumulative effect of the past and the new misconduct to justify dismissal. However, this is an area with conflicting case law. If the employer has warned the employee about the past misconduct, there would not be an issue regarding the revival of the past misconduct, as it would not have been condoned in the first place; the cumulative effect of the misconduct could then be used to justify dismissal.

The employee carries the burden of proving the condonation; see *Perry v Papillon Restaurant (1981)*, 8 ACWS (2d) 216.

c) Improper Just Cause Allegations as a Litigation Tactic

Some employers assert just cause (or file counterclaims) as a litigation tactic to deter an employee from advancing a valid wrongful dismissal claim. In these scenarios employees may use that employer tactic as both a defence, and as grounds for additional damages claims against the employer. See R*uston v. Keddco Mfg. (2011) Ltd.*, 2018 ONSC 2919, https://canlii.ca/t/hs2rn, where the court awarded moral damages, extensive costs, and $100,000 in punitive damages for improper cause allegations.

7. Redundancy and Layoff

Where the company no longer requires the employee, or the employer encounters economic difficulties or undergoes reorganization, the employee is still entitled to reasonable notice (*Paterson v Robin Hood Flour Mills Ltd (l969)*, 68 WWR 446 (BCSC)). In times of economic uncertainty, redundancy is not cause for dismissal. The economic motive for terminating a position does not relate to an individual's conduct and hence is not adequate cause (*Young v Okanagan College Board* (1984), 5 CCEL 60 (BCSC)), https://canlii.ca/t/22kt7.

"Temporary layoff" is defined in section 1 of the *ESA*. A B.C. Supreme Court decision, *Besse v Dr AS Machner Inc*, 2009 BCSC 1316, https://canlii.ca/t/25snv, established that the temporary layoff provisions of the *ESA* alone do not give employers the right to temporarily lay off employees: a layoff constitutes termination unless it has been provided for in the contract of employment either expressly or as an implied term based on well-known industry-wide practice, or the employee consented to the layoff. If the right to temporary layoff exists for one of these reasons, then the limits set out in section 1 apply: where an employee has been laid off for more than 13 consecutive weeks, and this has not been extended either by agreement or by the Director, the employee is considered to have been terminated permanently, and is entitled to severance pay. They also may be able to sue for wrongful dismissal before the 13-week period has expired. This would be the case where, although the employer has used the term "layoff", it is nonetheless clear that the employee has been terminated. Note the Covid-19 temporary extension to the ESA temporary layoff period as described earlier in this chapter.

8. Probationary Employees

The Employment Standards Act does not require any payment for the length of service during the first three months of employment (s 63).

However, if no probationary period is expressly specified in the employment contract, then the employee may still be entitled to reasonable notice at common law. The dismissed probationary employee could file a claim in Small Claims Court for wrongful dismissal.

In British Columbia, there is a developing judicial trend towards extending the right to be treated fairly to probationary employees. The test in British Columbia for terminating probationary employees is that of suitability, not just cause, as set forth in *Jadot v Concert Industries*, [1997] BCJ No 2403 (BCCA), https://canlii.ca/t/1dzdh. In determining

suitability, the case of *Geller v Sable Resources Ltd*, 2012 BCSC 1861, explained that the probationary employee must be given a chance to meet the standards that the employer set out when the employee was hired; the employer cannot begin imposing new standards afterwards.

In *Ly v. British Columbia (Interior Health Authority)*, 2017 BCSC 42, the Court held that if a company wants to fire an employee on probation, it should give the employee a fair chance to prove they can do the job. Otherwise, it may owe severance. To give an employee a fair chance to prove they can do the job, employers should:

1. Make the employee aware of how they will be assessed during the probation period.
2. Give the employee a reasonable chance to demonstrate their suitability.
3. Think about the employee's suitability based not only on work performance but also on personal characteristics such as compatibility and reliability.
4. Act fairly and with reasonable diligence in assessing suitability.

9. Near Cause

In the past, judges have reduced the notice period where there has been "near cause" (i.e., where even if there were no grounds for dismissal, there was substantial misconduct).

The Supreme Court of Canada in *Dowling v Halifax (City)*, [1998] 1 SCR 22, https://canlii.ca/t/1fqwm expressly rejected near cause as grounds for reducing the notice period. This decision has been consistently followed.

10. Constructive Dismissal

In some circumstances, an employer can make fundamental changes to the terms of an employee's employment in such a way that the employee may be forced to leave their job. This is called "constructive dismissal", and an employee who is constructively dismissed is entitled to the same benefits as if they were fired without cause.

If the employer makes a fundamental, unilateral change in the employment contract, it may amount to constructive dismissal. Changes to a "fundamental term of the contract" includes changes such as: significant reduction in salary, a significant change in benefits, a significant change in job content or status, or a job transfer to a different geographic location if such a transfer is not a normal occurrence or contemplated in the employment contract. Generally, a reduction in pay of more than 10% may result in a constructive dismissal. See *Price v 481530 BC Ltd et al*, 2016 BCSC 1940, https://canlii.ca/t/gv93h.

If a dysfunctional workplace creates an intolerable and toxic workplace, it may constitute constructive dismissal. However, this is a high bar to prove, and plaintiffs who are unreasonable may have difficulty proving a constructive dismissal based on a poisoned work environment. See *Baraty v. Wellons Canada Corp* 2019 BCSC 33, https://canlii.ca/t/hwz7c.

The imposition of a temporary layoff, where it is not provided for in the contract, has also been deemed to constitute constructive dismissal (see Section V.C.7: Redundancy and Layoff for details).

Suspensions from work may result in a constructive dismissal, particularly if the suspension is without pay. The case of *Cabiakman v Industrial Alliance Life Insurance Co*, [2004] 3 SCR. 195, https://canlii.ca/t/1hmp7 and *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, https://canlii.ca/t/ggkhh, reinforced an employer's right to impose a suspension for administrative reasons, with pay, provided the employer is acting to protect legitimate business interests, the employer is acting in good faith and fairly, and the suspension is for a relatively short period. However, an indefinite suspension without pay, particularly if there is no contractual term providing for such suspension, is likely a constructive dismissal.

A constructive dismissal claim is a drastic step for an employee, as it involves the employee leaving work (as though they were fired) and then bringing an action for constructive dismissal. The employee will no longer be receiving compensation from employment, and will instead be seeking to recoup that compensation through a court action.

Employees should consider providing employers with a warning of constructive dismissal and an opportunity to respond to changes in workplace conditions prior to leaving work under a constructive dismissal claim. In *Costello v. ITB Marine Group Ltd*, 2020 BCSC 438, https://canlii.ca/t/j61hf, the court disallowed an employee's constructive dismissal claim because the employee "did not give [the employer] a reasonable opportunity to respond to [her] complaint before taking the position that she had been constructively dismissed."

An employee bringing a claim for constructive dismissal is making a claim for the severance they would have received had they been dismissed without cause.

a) Mitigation Required

An employee is still required to mitigate their damages if they are constructively dismissed. Sometimes, the employee will be required to mitigate by continuing to work for their current employer. See *Evans v Teamsters Local Union No. 31* (2008 SCC 20), https://canlii.ca/t/1wqtf for a discussion of the relationship between constructive dismissal and the employee`s duty to mitigate.

b) Condonation

If an employee accepts the imposed changes without complaint, they are considered to have accepted the change, and will therefore be barred from action; however, employees are generally permitted a reasonable time to determine whether they will accept the changes.

c) Repudiation

Employees alleging constructive dismissal bear the risk that the court finds they have repudiated their contract of employment by either leaving the workforce or commencing legal proceedings against their employer (or both). If a court finds the employee repudiated the contract (i.e. quit instead of being constructively dismissed) then the employee does not get severance.

11. Resignation v. Dismissal

Not all resignations are resignations, and not all dismissals are dismissals. The legal test is what a reasonable person would have understood by the relevant statements and actions, taking into consideration the context of the particular industry, and all surrounding circumstances.

To be effective, a resignation must be clear and unequivocal. There must be a clear statement of an intention to resign, or conduct from which that intention would clearly appear. See *Koos v A & A Customs Brokers Ltd.* (2009 BCSC 563).

For example, harassment at work may cause the employee to be unable to continue working and this might cause them to resign; in cases such as these, additional research should be done to determine whether the situation should be considered a resignation or a dismissal.

12. Sale of a Business

If a business is sold, unless the seller specifically dismisses the employees there may be an implied assignment to the new owner if the employee continues to provide services as before and the new owners accept those services (*ESA*, s 97). See also *Helping Hands Agency Ltd v British Columbia (Director of Employment Standards)*, [1995] BCJ No 2524, https://canlii.ca/t/1ddv6.

13. Aggravated and Punitive Damages

a) Aggravated Damages

Courts may award aggravated damages if the employer acted unfairly or in bad faith when dismissing the employee, and the employee can prove that they suffered harm as a result of the manner of dismissal.

The loss must arise because of the manner of dismissal, and not due to the dismissal itself.

An employee should be encouraged to obtain medical evidence such as a doctor's report connecting this manner of dismissal to a personal injury. For example, the doctor's report might document the employee's depression, anxiety, or other mental harm. It may be helpful to have a doctor testify in court in order to present a solid case for aggravated damages. However, an employee can provide their own testimony regarding an injury, without medical corroboration, and a court can still consider whether to award aggravated damages. See *Lau v. Royal Bank of Canada*, 2017 BCCA 253. If the employee did not suffer documented harm, see section V.C.13.b: Punitive Damages below.

The basis for these additional damages is a breach of the implied term of an employment contract that employers will act in good faith in the manner of dismissal. In *Honda Canada Inc v Keays*, 2008 SCC 39, the Supreme Court of Canada held that any such additional award must be compensatory and must be based on the actual loss or damage suffered by the employee, which can include mental distress stemming from the manner of dismissal. However, normal distress and hurt feelings arising from the dismissal itself are not grounds for additional damages.

Prior to the Honda v Keays decision, damages awarded where the employer had acted in bad faith were assessed by simply extending the notice period to which the employee would otherwise be entitled. This practice was based on the Supreme Court of Canada's decision in *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, and the awards were informally known as "Wallace Damages". Following the Honda v Keays decision, the practice of assessing damages by extending the notice period is no longer to be used. Now, a claimant must prove what actual losses or mental harm the employee incurred, and the employee is then compensated for those actual losses or mental distress. See *Strudwick v Applied Consumer & Clinical Evaluations Inc*., 2016 ONCA 520.

What constitutes "bad faith" is for the courts to decide, and has in the past centred on deception and dishonesty. Mere "peremptory" treatment is not sufficient: see, for example, *Bureau v KPMG Quality Registrar Inc*, [1999] NSJ No. 261 (NSCA).

In Chu v China Southern Airlines Company Ltd, 2023 BCSC 21, degrading demotions, humiliating public discipline, and the special insult (to the Chinese descent plaintiff) of being fired on Chinese New Years resulted in an aggravated damages award of $50,000. Punitive damages of $100,000 were awarded in connection with hardball litigation tactics, including a pattern of conduct on the part of the defendant designed to stall and frustrate the prosecution, the high degree of the defendant's blameworthiness for its abusive and deliberate conduct, the vulnerability of the plaintiff, the profoundly harmful nature of the conduct, and the need for an award of sufficient size to act as deterrence and denunciation towards a large corporation.

b) Bad Faith Performance of Contracts

"Bad faith" has been found in cases the following cases:

- Where the employer lied to the employee about the reason for dismissal (see *Duprey v Seanix Technology (Canada) Inc*, 2002 BCSC 1335, where an employer told a commissioned employee they were being released due to financial hardship, when it was found they were being released so the employer would not have to pay owed commission);
- Where an employer has deceived the employee about representations of job security (*Gillies v Goldman Sachs Canada*, 2001 BCCA 683);
- Where a senior employee was induced to leave their position under the promise of job leading to retirement; and
- Where an employer promised an employee they would keep their job after a merger, although they knew differently (*Bryde v Liberty Mutual*, 2002 BCSC 606). In one case, a response by employer's counsel to an employee's counsel containing an allegation of just cause where none existed was held not to constitute bad faith (*Nahnychuk v Elite Retail Solutions Inc*, 2004 BCSC 746). However, in another province, a letter threatening to allege just cause where none existed, for the purpose of forcing a settlement, even though just cause was not plead in court, was held to give rise to additional damages (*Squires v Corner Brook Pulp and Paper Ltd*, [1999] NJ No 146 (Nfld CA)); and,
- Where an employer has made false accusations about the employee at the time of dismissal. See Price v 481530 BC Ltd et al, 2016 BCSC 1940, where an employer dismissed an employee on the basis of false allegations of dishonesty contributing to the creation of a hostile work environment and ultimately their constructive dismissal; and
- Where an employer produced false evidence of the employee's absence without leave in order to argue just cause for dismissal and only offered ESA minimum severance (*Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235)).
- Where a law firm was ordered to pay aggravated damages to an employee for unfair, bullying, and bad faith conduct by her former employer and her former principal. The employer's objectionable conduct included dismissing the employee without proper investigation, serving the employee a termination letter and a notice of claim in front of her classmates at PLTC (a deliberate public firing), and firing the employee on the basis of harsh and unwarranted accusations based on unfounded suspicions, which allegations were maintained throughout the litigation process. *Acumen Law Corporation v. Ojanen*, 2019 BCSC 1352, https://canlii.ca/t/j1z2k.

c) Good Faith Performance of Contracts

The Supreme Court of Canada affirmed the principle of good faith performance of contracts and its creation of the new common law duty of honesty in contractual performance in *Bhasin v Hrynew*, 2014 SCC 71, https://canlii.ca/t/gf84s.

This case was referenced in *Styles v Alberta Investment Management Corporation*, 2015 ABQB 621, where the court awarded $440,000 for the employer's refusal to pay awards under a long term incentive plan, in breach of duty of honest performance and good faith.

If one suspects the employer acted in bad faith in the manner of dismissal, one should do further research to determine whether the employee has a strong case. For a table of cases in which aggravated or punitive damages were sought, and a list of the damages awarded, see "Aggravated and Punitive Damages and Related Legal Issues", Employment Law Conference 2013, Paper 8.1, CLE BC.

d) Punitive/Moral Damages

If the conduct of the employer was especially outrageous, harsh, vindictive, reprehensible, or malicious, then the court may award punitive damages (see *Honda Canada Inc v Keays*). The focus will be on the employer's misconduct, and not on the employee's loss; the damages are not designed to compensate, but rather to punish and deter. Generally, the discretion to award punitive damages has been cautiously exercised and used only in extreme cases. Courts are wary of the risk of double-compensation where punitive damages and aggravated damages are considered in the same case.

Punitive damages are currently on an upward trend in BC. Since the Honda decision, courts have generally required evidence showing that an employee suffered mental harm to award aggravated damages, and this has left certain employees, who are less susceptible to suffering mental harm, without that recourse. However, courts are now trending towards awarding punitive damages more often.

Deceptive, misleading, or inaccurate communications during the termination may provide grounds for punitive damages. In Moffatt v. Prospera Credit Union, 2021 BCSC 2463, https://canlii.ca/t/jld9k, the Court awarded punitive damages equivalent to 2.5 months of the employee's salary as a result of the employer's misleading and inaccurate termination letter, which offered the employee less severance than in the employment contract. The Court highlighted the vulnerability of employees in a termination setting as justification for the punitive damages award. In Russell v The Brick Warehouse LP, 2021 ONSC 4822, an employee was terminated without cause, and provided a termination letter with a severance offer in exchange for a release. The termination letter did not inform the employee he would be entitled to ESA minimums if he did not sign the release and failed to provide the accrual of vacation pay during the ESA period. Court awarded "moral damages" of $25,000 in connection with the defects in the termination correspondence.

If an employee was treated particularly harshly by their employer, even if they did not suffer documented medical harm, consider claiming punitive damages. See the paper entitled "Aggravated and Punitive Damages and Related Legal Issues" for a table of cases in which aggravated or punitive damages were sought in order to compare your situation to others and determine an appropriate amount of damages (see section V.C.13 Aggravated and Punitive Damages, above).

If the employee has suffered any of the following situations through the employer's conduct, consider claiming for punitive damages:

- Defamation
- Malicious prosecution, if the employer maliciously instigates criminal proceedings against an employee (*Teskey v Toronto Transit Commission*, 2003 OJ No 4547)
- Duress
- Interference with the employee's compensation
- Flawed investigation of alleged employee misconduct
- Unproven alleged cause
- Constructive dismissal
- Demotion
- Sexual harassment
- Unsafe or unhealthy work environment
- Oppression (if the employee is also a shareholder of the corporation)
- Inducement to resign, for example by offering a letter of reference only if the employee resigns (*Vernon v British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133)
- Misrepresentations by the employer (*Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235)
- Employer's behaviour before, during, or after the dismissal
- Breach of the employee's privacy
- Insensitivity to an employee's pregnancy

- Physical or verbal assault or abuse
- Interference with trade unions
- Any independent causes of action
- Being "mean and cheap in trying to get rid of an employee" (*Gordon v. Altus*, 2015 ONSC 5663)
- Unduly insensitive treatment during attempts to exercise rights to contract renegotiation (*Pepin v. Telecommunications Workers Union*, 2016 BCSC 790; overturned on appeal, 2017 BCCA 194, and remitted back to the BCSC for a new trial)
- The tort of intentional infliction of mental distress (*Strudwick v Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520).

e) Workplace Investigations

Workplace investigations into misconduct must be carried out in a good faith manner without bias. Unfair process may entitle an employee to aggravated or punitive damages.

A flawed workplace investigation followed by a dismissal can attract aggravated damages; see *Lau v. Royal Bank of Canada*, 2015 BCSC 1639; *Kong v. Vancouver Chinese Baptist Church*, 2015 BCSC 1328; and *George v. Cowichan Tribes*, 2015 BCSC 513.

Additional damages may be warranted for an employer's undue delay in conducting a workplace investigation, resulting in a failure to investigate a complaint in a timely manner. See Toronto District School Board v Canadian Union of Public Employees, Local 4400, 2021 CanLII 101010 (ON LA), https://canlii.ca/t/jjp80.

14. Sexual Misconduct and Bad Faith

The #metoo movement is beginning to be reflected in the judicial process, and there is some indication that a more modern approach to workplace sexual assault will be taken by the Courts.

The Alberta Court of Appeal in *Calgary (City) v. Canadian Union of Public Employees Local 37*, 2019 ABCA 388 offered some important commentary on sexual assault in the workplace, in the context of a review of a workplace sexual assault judicial review.

The Court commented that adjudicators should not downplay the seriousness of sexual assault, should analyze it with the understanding that it is sexual harassment in its most serious form, should avoid focusing on outdated attitudes, avoid relying on legal precedents that are inconsistent with modern views of acceptable behaviour in the workplace, and recognize the employer's duty to maintain a safe and respectful workplace for all employees. This decision, while in the arbitration context, may provide employees with applicable conceptual arguments in appropriate circumstances.

In *Deol v. Dreyer Davison LLP*, 2020 BCSC 771, the BCSC was presented with an employee's claim for constructive dismissal and breach of the duty of good faith and fair dealing arising from harassment, including sexual harassment.

The employer applied to strike pleadings on grounds that recovery for losses caused by sexual harassment falls exclusively within the jurisdiction of the Workers' Compensation Board ("WCB") for tortious or injurious conduct, or the British Columbia Human Rights Tribunal ("BCHRT") for discriminatory conduct. However, the BCSC disagreed, and confirmed that the "conduct alleged and particularized in this case, which is pled to amount to harassment and a failure to address it (including racial and sexual harassment), is also capable of being considered a breach of the law firm's duty of good faith and fair dealing and other enumerated implied contractual terms"

15. Duty to Mitigate

a) Common Law

Claimants in civil court should be aware that an employee has a common law duty to mitigate their losses. An employee does not have to take every action possible to mitigate; instead, a reasonable effort is required; see *Gust v Right-of-Way Operations Group Inc.*, 2016 BCSC 1527. Searching for similar work is sufficient. However, searching only for identical employment in the same industry is not sufficient to fulfil the duty to mitigate. In Moore v. Instow Enterprises Ltd., 2021 BCSC 930, https://canlii.ca/t/jg044, the Court found that limiting a job search to an identical, niche role was not reasonable in the circumstances, and suggested that employees should take active steps to search for new employment. For a discussion of the relevant legal test for mitigation, see *James v The Hollypark Organization Inc.*, 2016 BCSC 495.

Because of the requirement to mitigate, the employee may have to take another job the employer offers, as long as the new job is not at a lower level than the previous one, and the change does not amount to constructive dismissal. Similarly, a dismissed employee may have to accept an employer's offer to work through the notice period (*Evans v Teamsters Local Union No 31*, 2008 SCC 20). Retraining may be considered part of mitigation if it is to enter a job field with better prospects. This applies where an employee tries and fails to obtain alternate suitable employment (*Cimpan v Kolumbia Inn Daycare Society*, [2006] BCJ No 3191).

In many cases, the duty to mitigate may require a constructively dismissed employee to stay on the job while seeking other employment (*Cayen v Woodwards Stores Ltd* (1993), 75 BCLR (2d) 110 (CA)).

Similarly, the duty to mitigate may also require a dismissed employee to accept an offer of re-employment from the employer who dismissed them. Even if an employer makes an offer of re-employment to a dismissed employee only after receiving a demand letter from the employee's lawyer, the employee may still be required to consider and/or accept that offer, and a failure to do so may be considered a failure to mitigate. In Blomme v. Princeton Standard Pellet Corporation 2023 BCSC 652, the Court highlighted that even if the offer of return to work is precipitated by a demand letter, this does not relieve the employee of obligation to consider the offer, and an employee's refusal may be considered a failure to mitigate.

Employees are not required to return to a position where the fundamental terms of their job have changed or where they have been maligned such that the relationship cannot be restored. Accusations of dishonesty in negotiations or radically limited and uncertain terms in offers may result in reemployment being found to be unreasonable. The employee is not expected to act in the employer's best interest to the detriment of their own interests. For example, if an employee was ill at the time of dismissal they are not required to make strenuous efforts to find new employment. Similarly, an employee in the late stages of pregnancy may not be required to seek new employment until several months after the birth of their child. The employee's perception of what is reasonable is usually given more weight than that of the employer.

An employee's failure to accept a job during their search for employment may not mean they failed to meet the requirements of mitigation if they were overqualified for the job; see *Luchuk v Starbucks Coffee Canada Inc.*, 2016 BCSC 830.

In a legal dispute, the onus of proof as to whether the claimant former employee has properly taken efforts to mitigate their damages generally falls on the defendant former employer.

b) Employment Standards

There is no duty to mitigate in order to receive statutory compensation for length of service under the ESA. An employee is entitled to statutory termination pay regardless of whether the employee finds new work.

c) Mitigation and Constructive Dismissal

An employee is still required to mitigate their damages if they are constructively dismissed. Sometimes, the employee will be required to mitigate by continuing to work for their current employer. See *Evans v Teamsters Local Union No. 31* (2008 SCC 20) for a discussion of the relationship between constructive dismissal and the employee`s duty to mitigate.

There are some circumstances where an employee's refusal to accept re-employment with the employer who fired them is found to be a failure to mitigate. However, this might not be the case if the trust relationship is eroded due to the employer's actions. See *Fredrickson v. Newtech Dental Laboratory Inc.*, 2015 BCCA 357.

d) Mitigated Damages

As severance pay is designed to compensate for lost income, a dismissed employee who found alternate employment after dismissal will have their severance pay reduced by the amount they are able to earn in their new job.

If the employee was working a second job before being dismissed but earned more in the second job (i.e., by putting in more hours) after dismissal, their severance pay will be reduced by the extra amount they have earned. See *Pakozdi v. B&B Heavy Civil Constructions Ltd.*, 2018 BCCA 23 at paras 36-51, https://canlii.ca/t/hpv6d.

16. Employment Insurance Payback

If an employee receives damages for wrongful dismissal, this money is treated as earnings, and the employee will be required to pay back the appropriate amount of EI benefits received while waiting for the court case to be heard (EI benefits are not deducted from the amount of the damage award). Note that the employee may be able to receive the EI benefits back again if they are still unemployed and searching for work after the period covered by the severance award; call Service Canada at 1-800-206-7218 for further details if this situation may apply to the employee.

In LaFleche v. NLFD Auto dba Prince George Ford (No. 2), 2022 BCHRT 88, the BC Human Rights Tribunal awarded lost wages, $14,000 for injury to dignity, and $29,000 in foregone EI maternity leave benefits to an employee who was not returned to her job after maternity leave because the employer kept the worker who covered the maternity leave. The Tribunal awarded $29,000 in foregone EI maternity leave benefits because the employee had a second child and did not have enough insurable hours to collect EI maternity leave benefits for her second child.

17. Frustration of Contract

If the contract becomes impossible to perform through no fault of the employee or the employer, then the contract is frustrated, and may be terminated without liability. The contract must be impossible to perform, not merely less profitable. The impossibility of performance must be unforeseen, there must be no alternative to termination, and termination must not be self-induced. Frustration of contract is a separate ground for termination of contract, separate from just cause, which is a breach of the employment contract by the employee.

Frustration normally arises in cases of long term disability where the employee has been off work for 1 or 2 years. Courts will consider whether the worker is likely to be able to return to work in the reasonably foreseeable future, see *Hydro-Quebec v Syndicat des employe-e-s de techniques professionnelles et de bureau d Ꞌ Hydro-Quebec* (2008 SCC 43) and *Naccarato v Costco* (2010 ONSC 2651).

If the employee suffers a serious, permanent, debilitating illness or injury, this could frustrate the contract; see *Wightman Estate v 2774046 Canada Inc*, 2006 BCCA 424.

However, note that in any case where an employee is dismissed due to a disability, there may be a case at the Human Rights Tribunal; the employer must have a bona fide occupational requirement that cannot be met by the employee due to their disability, and the employer must follow a proper process to attempt to accommodate the employee, in order to avoid liability. See Chapter 6: Human Rights for additional details.

If an employer validly terminates a contract on the basis of frustration, they are not required to provide severance.

Prior to terminating an employment contract on the basis of frustration, employers should provide the employee with an opportunity to provide any additional medical information which might change their decision. Failure to do so might result in a finding of without cause dismissal, as opposed to frustration of contract.

F. Post-Employment Issues

1. Restrictive Covenants

It is becoming increasingly common for employment contracts to include restrictive covenants that prevent former employees from doing certain things, including but not limited to: divulging company secrets, working for competitors, or setting up their own competing business. While restrictive covenants have historically applied to upper level employees, they are more and more common for all types of employees as specialization increases and more companies sell information as opposed to goods.

Whether a particular provision is a restraint of trade is determined not only by the form of the clause, but by the effect of the clause in practice (*Levinsky v The Toronto-Dominion Bank*, 2013 ONSC 5657). Restrictive covenants may also influence the assessment of reasonable notice (see "Two Topics Relating to Restraint of Trade in Employment: Practical Alternatives to Restrictive Covenants and the Impact of Restrictive Covenants on Reasonable Notice", Richard Truman and Valerie S. Dixon, Employment Law Conference 2014, Paper 3.2, CLE BC). As a general common law rule, restrictive covenants are presumed to be invalid. It is up to the party trying to enforce the covenant (usually the employer) to prove that it should be enforced, and it can be quite difficult to write a covenant narrow enough to be upheld in court. In deciding whether or not to enforce a restrictive covenant, the court must balance the interests of society in maintaining free and open competition with the interests of individuals to contract freely. The "public policy test" that emerges from the common law consists of the following considerations (per *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6):

> i) the employer must show a legitimate business interest for imposing the covenant on the employee - there must be a connection between the covenant and the business interest that is sought to be protected;
>
> ii) the covenant must minimally impair the employee's ability to freely contract in the future;
>
> iii) the restraint must be fair and reasonable between the parties, and must be in the public interest, having regard to the nature of the prohibited activities and the length of time and geographic area in which it will operate; and
>
> iv) the terms of the covenant must be clear and unambiguous – it will not be possible to demonstrate the reasonableness of an ambiguous covenant.

The courts are unwilling to re-write restrictive covenants if they contain uncertain and ambiguous terms; these covenants are deemed prima facie unreasonable and unenforceable (*Shafron v KRG Insurance Brokers (Western) Inc*). It can often be a simple matter to find an ambiguity: the length of time or geographic area might not be specified, or there may be a prohibition against soliciting clients that the employee did not work with, or the employer may have used a non-compete clause when a non-solicitation clause would have adequately protected their legitimate business interests. See *Powell*

River Industrial Sheet Metal Contracting Inc. (P.R.I.S.M.) v Kramchynski, 2016 BCSC 883.

2. Drawing Restrictive Terms to Employee's Attention

In Battiston v. Microsoft Canada Inc., 2020 ONSC 4286, https://canlii.ca/t/j8nd8, the Ontario Superior Court did not uphold a contract term that excluded the employee's rights to unvested stock awards after a without cause termination, because the employer failed to sufficient draw the provision to the employee's attention. The Court awarded the employee damages in lieu of the stock awards that would have vested during the notice period.

3. Record of Employment and Reference Letters

There is no statutory requirement under the *ESA* for an employer to provide a reference. Employers are required to provide former employees with a record of employment, which includes information such as the length of service, wage rate, but does not include anything about the employee's performance.

Since the decision of *Wallace v United Grain Growers*, 1997 CanLII 332 (SSC), https://canlii.ca/t/1fqxh, the view has been that an employer should provide a reference unless they have good reason not to. Failing to provide a reference could be construed by the courts as evidence of bad faith. In practical terms however, there is no way for a former employee to force their employer to provide a suitable reference letter without making some other sort of claim covered by the *ESA* or the common law.

If an employer tells an employee that they will only receive a reference letter if they resign, in order for the employer to avoid liability for severance payments, the employee may be able to make a claim for both wrongful dismissal and punitive damages (*Vernon v British Columbia (Liquor Distribution Branch)*), 2012 BCSC 133).

G. When an Employer Can Sue an Employee

Generally, it is rare for an employer to sue an employee. This might occur if an employee breaches a term of a contract (including an implied term), or if an employee breaches a fiduciary duty. Sometimes, after an employee brings an action against an employer, the employer will make a counterclaim against the employee as a strategic move to encourage the employee to settle for a lower amount; the strength of the employer's case should be carefully considered if this occurs.

The duties listed below are generally implied in employment contracts. This list of duties is not exhaustive.

1. Duty to Perform Employment Functions in Good Faith

Employees owe a duty of good faith to the employer; this is an implied term of employment contracts. An employee might breach this by actively working against one of their employment duties; for example, a supervisor who is supposed to retain employees could breach this duty by inducing the employees they supervise to resign in order to complete against the employer. See *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2008 SCC 54, and *Consbec Inc. v Walker*, 2016 BCCA 114, for further details.

2. Duty to Give Reasonable Notice of Resignation (Wrongful Resignation)

An employee must give their employer reasonable notice if they are resigning. "Reasonable notice", in the case of resignations, is much shorter than the notice that employers must give to employees who are being dismissed. Although giving two weeks' notice is the usual practice, the courts may require more or less than that amount, depending on the employee's responsibilities. In rare cases, employers can be awarded damages against employees who do not provide sufficient notice of resignation; see Gagnon & Associates Inc. et. al. v Jesso et. al., 2016 ONSC 209, https://canlii.ca/t/gmvlz..

In theory, an employee could be held liable for the profits that their continued employment would have generated for the employer during the reasonable notice period. However, this is generally only of concern if the employee generates significant profits for the employer. For further details, see RBC Dominion Securities Inc v Merrill Lynch Canada Inc, 2008 SCC 54, https://canlii.ca/t/212w5.

3. Competition Against the Employer

Employees without a valid non-competition clause (and who are not in a fiduciary position – see section V.E.3: Fiduciary duties, below) may compete against an employer as soon as they are no longer employed by the employer (*Valley First Financial Services Ltd v Trach*, 2004 BCCA 312, https://canlii.ca/t/1h820).However, employees should be careful not to compete unfairly, or compete using confidential information obtained from their former employer.

If an employment contract contains a restrictive covenant (such as a non-competition clause or a non-solicitation clause), see Section V.D.1: Restrictive Covenants, above.

4. Duty to Not Misuse Confidential Information

It is an implied term of an unwritten employment contract that the employee will not misuse the employer's confidential information. A common example of confidential information is the employer's list of customers. Employees who take a customer list by printing it out or putting it on a USB key and taking it with them, or by emailing it to themselves, would be in breach of this duty. One notable exception is that an employee may use any part of the customer list that they have simply memorized (per *Valley First Financial Services Ltd v Trach*, 2004 BCCA 312), but this still does not relieve the employee of the restriction on misuse of other employer confidential information to compete unfairly against the former employer. Additionally, employees such as financial advisors, who have developed ongoing relationships with clients, may be entitled to take a list of their own clients to inform them that they are departing, and where they will be working in the future (*RBC Dominion Securities Inc v Merrill Lynch Canada Inc et al*, 2007 BCCA 22 at para 81, reversed in part at 2008 SCC 54; *Edwards Jones v Voldeng*, 2012 BCCA 295, https://canlii.ca/t/frx42).Note however that this may be prevented if the employee is in a fiduciary position, and there may be limits on the permitted contact or other complications if the employee signed a non-solicitation agreement.

5. Fiduciary Duties

Only a small fraction of employees have fiduciary duties to their employer. They may have fiduciary duties if they are directors of the company, or if they are senior officers in a top management position (per *Canadian Aero Service Ltd v O'Malley*, [1974] SCR 592). A fiduciary position is generally one where the fiduciary (the employee) has some discretion or power that affects the beneficiary (the employer), and the beneficiary is peculiarly vulnerable to the use of that power (per *Frame v Smith*, [1987] 2 SCR 99), https://canlii.ca/t/1ftl7.

Employees who are in a fiduciary relationship to their employer have duties of loyalty, good faith, and avoidance of a conflict of duty and self-interest. They cannot, for example, take advantage of business opportunities that they should have been pursuing for their employer, even if they resign from their position.

6. Time Theft

In Besse v. Reach CPA Inc, 2023 BCCRT 27 , the BC Civil Resolution Tribunal ordered an employee to repay her employer wages received after the Tribunal found the employee was guilty of time theft. The employee had brought action against their employer for wrongful dismissal, and the employer counter-claimed for "time theft," alleging that the employee had collected wages for hours not actually worked. The Court accepted evidence via a time-tracking software

installed on the employee's computer, which recorded the amount of time that the employee accessed specific web-services during work hours.

H. Other Employment Law Issues

1. Discrimination in Employment

For provincially regulated employees, the *Human Rights Code* prohibits discrimination in employment on the basis of the following prohibited grounds (*HRC* ss 13, 43):

- Race
- Colour
- Ancestry
- Place of Origin
- Political Belief
- Marital Status
- Family Status
- Physical or Mental Disability
- Sex (this includes sexual harassment, and discrimination based on pregnancy or transgendered status)
- Sexual Orientation
- Age (only those over 19 years of age are protected by this provision)
- The person was convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person
- The person complains or is named in a complaint, gives evidence, or otherwise assists in a complaint or other proceeding under the *HRC*

This prohibition against discrimination in employment includes discrimination in the hiring process, in the terms and conditions of employment, and in decisions to terminate employment. Employment agencies also must not refuse to refer a person for employment based on one of the prohibited grounds for discrimination. Trade unions, employer's organizations, and occupational associations cannot discriminate against people by excluding, expelling or suspending them from membership (*HRC* s 14).

There must be no discrimination in wages paid (*HRC* s 12). Men and women must receive equal pay for similar or substantially similar work. Similarity is to be determined having regard to the skill, effort, and responsibility required by a job.

Family status protection includes childcare and family obligations. See Johnstone v Canada Border Services, 2010 CHRT 20, https://canlii.ca/t/2cs2j.In Harvey v Gibraltar Mines Ltd. (No. 2), 2020 BCHRT 193, https://canlii.ca/t/jbnsk, the BCHRT determined that the requirement to show a change in working conditions may not be necessary to demonstrate discrimination based on family status.

Outstanding confusion about whether a change to term of employment was needed for there to be family status discrimination was recently clarified in British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd., 2023 BCCA 168. The court confirmed that an employer does not need to change a term of employment in order for Family Status accommodation obligations to be triggered. In other words, there can be discrimination if a term of employment results in a serious interference with a substantial family obligation.

Included in the protected ground of sex is the protection of employees from sexual harassment in the workplace. The analysis of sexual harassment by the BC Human Rights Tribunal may be shifting away from requiring the complainant to

prove that the sexual harassment was unwelcome in an objective sense. As elucidated in Ms K v Deep Creek Store and another, 2021 BCHRT 158, https://canlii.ca/t/jkspm, to find sexual harassment contrary to the Code, the Tribunal "must determine that the conduct is unwelcome or unwanted. The burden on the complainant is to prove that they were adversely impacted by the sexualized conduct. If they do so, it is implicit in that finding that the conduct is unwelcome. It is open to a respondent to challenge an alleged adverse impact, so long as they do not rely on gender-based stereotypes and myths."

To further demonstrate the potential changing attitude and legal analysis of this issue, the Tribunal in Byelkova v Fraser Health Authority (No. 2), 2021 BCHRT 159, https://canlii.ca/t/jkspn, commented on the evolution of understanding of sexual harassment and related power dynamics in the workplace.

For more information about each of the prohibited grounds, see Chapter 6: Human Rights, Section III.B: Prohibited Grounds of Discrimination. See also "Recent Human Rights Cases of Interest for Employment Lawyers", Michael A. Watt, Employment Law Conference 2014, Paper 4.1, CLE BC, https://canlii.ca/t/2cs2j.

Though generally employers are prohibited from discriminating against employees, it is permitted if the discrimination is required due to a bona fide occupational requirement (*HRC* ss 11, 13). To successfully argue the defence of a bona fide occupational requirement against a prima facie case of discrimination, a respondent must show the following:

1. There is a legitimate job-related purpose for the respondent's conduct;
2. The respondent adopted the standard or acted in good faith, believing the standard or conduct is necessary to achieve the legitimate job-related purpose; and
3. The respondent's standard or conduct is reasonably necessary to the purpose, such that the respondent could not accommodate the complainant (or others sharing their characteristics) without undue hardship.

If the employee appears to have been discriminated against based on a prohibited ground, see Section V.F.1: Discrimination in Employment of this chapter for basic information on remedies for discrimination, or see Chapter 6: Human Rights, Section III.C: The Complaint Process for more detailed information.

Federally regulated employees are covered by the *Canadian Human Rights Act*. Similar protections are provided to that of the *Human Rights Code*, though they are not identical. The *Canadian Human Rights Act* has recently been updated to include gender identity or expression as a prohibited ground of discrimination.

Federal legislation allows employers to impose mandatory retirement, however, the BC provincial statute was amended in 2008 to prohibit this practice

Federal equal pay provisions in the *Canadian Human Rights Act* are somewhat broader than those found in B.C.'s *Human Rights Code*. It is discriminatory under the *Canadian Human Rights Act* to pay male and female employees different wages where the work that they are doing is of comparatively equal value. This means that even if the work itself is not demonstrably similar, the pay equity provisions may still be enforced if the value of the work is similar. Factors that are considered in determining whether work is of equal value include: skill, efforts and responsibility required, and conditions under which the work is performed (*Canadian Human Rights Act*, s 11(2)).

2. Duty to Inquire

In Lord v. Fraser Health Authority and another, 2020 BCHRT 64, the BCHRT noted that if something reasonably alerts the employer that the employee might have a disability that required accommodation, this duty to inquire becomes the first step in the duty to accommodate process. If an employer thinks there is a connection between an employee's poor work performance and a disability, the employer should inquire with the employee as to whether the employee has an illness or disability that is affecting performance, prior to taking actions that adversely affects the employee. Failure to do so could be a breach of the duty to accommodate.

3. Harassment in the Workplace

Bullying and harassment in the workplace are developing areas of the law. There are several possible avenues for addressing a complaint in this area if the issue cannot be resolved within the workplace.

The Workers Compensation Act was amended to cover mental disorders caused by workplace bullying and harassment (*Workers Compensation Act*, RSBC 1996 c 492, s 5.1); Chapter 7: Workers' Compensation provides additional information on how to make a claim. Employees will have to demonstrate that the behaviour to which they were subject was bullying and harassment and that it caused a disorder requiring their medical absence from work. Working with a doctor at early stages of the process can help with the eventual success of such an application.

If the bullying or harassment is related to discrimination based on one of prohibited grounds listed in the *Human Rights Code*, the employee may be able to file a complaint with the Human Rights Tribunal; see Chapter 6: Human Rights for additional information.

The BC Human Rights Tribunal has suggested that "the trend for injury to dignity awards is upward", in the case of *Araniva v RSY Contracting* 2019 BCHRT 97. In this case, the BC Human Rights Tribunal awarded $40,000 in damages for sexual harassment. The impugned conduct related to three verbal interactions and a touch on the arm asking for a hug followed by a reduction in hours when advances were rejected. The complainant had been previously sexually abused and the harassment triggered a significant emotional reaction.

The bullying or harassment could potentially constitute a constructive dismissal for which the employee could claim damages in court; see V.C.10: Constructive Dismissal.

Civil court claims connected to workplace related sexual harassment can also be considered, and courts are showing an increased receptiveness to such actions.

Finally, if the bullying or harassment is of an extremely serious nature, such as serious sexual harassment, consider whether the behaviour might be criminal and whether the police should be contacted. See also section 29, Sexual Misconduct and Bad Faith, earlier in this chapter.

4. Retaliation for Filing a Complaint

Generally, employers are not permitted to retaliate against an employee who files a statutory complaint.

A provincially regulated employee might file a complaint against an employer at the Employment Standards Branch, the Human Rights Tribunal, or with WorkSafe. The *Employment Standards Act*, the *Human Rights Code*, and the *Workers Compensation Act* each contain provisions which prohibit retaliation for filing complaints.

a) Employment Standards Act Claim Retaliation

An employer may not threaten, terminate, suspend, discipline, penalize, intimidate, or coerce an employee because the employee filed a complaint under the *ESA* (s 83). If this does happen, the Employment Standards Branch may order that the employer complies with the section, cease doing the act, pay reasonable expenses, hire or reinstate the employee and pay lost wages, or pay compensation (s 79). A complaint may be filed with the Employment Standards Branch.

b) Human Rights Code Claim Retaliation

A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, gives evidence or otherwise assists in a complaint or other proceeding under this Code (s 43). If a person is discriminated against in such a manner, they may file a complaint at the Human Rights Tribunal in the same way that they would complain about any other discriminatory practice; see Chapter 6: Human Rights, Section III.C: The Complaint Process.

c) Workers Compensation Act

Employers and unions must not take or threaten discriminatory action against a worker for taking various actions in regards to the Act, such as reporting unsafe working conditions to a WorkSafe officer (s 151). Remedies include the ability to reinstate the worker to their job (s 153). Additional details are set out in the *Workers Compensation Act*, Division 6 – Prohibition Against Discriminatory Action. For more information on the Workers Compensation Act and WorkSafeBC, see Chapter 7 of this manual.

d) Common Law Issues/Internal Complaints

An employee may face retaliation for bringing an internal complaint, possible through a formal complaint process outlined in an employment policy. If the employer retaliates against the employee in a significant manner, this could constitute a constructive dismissal. In addition, if the employer dismisses the employee following a legitimate complaint, this may form grounds for an aggravated damages claim as a result of a bad faith dismissal.

5. Employee Privacy

a) Legislation

There are three statutes in BC that concern privacy.

The *Privacy Act*, RSBC 1996 c 373, creates a statutory tort for breach of privacy. Whether a person's actions or conduct constitutes tortious conduct depends on what is reasonable in the circumstances. An action for breach of privacy can only be brought in BC Supreme Court.

The *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, [*FOIPPA*] applies to public bodies such as governmental ministries, universities, health authorities, etc. It gives individuals a right to access information held about themselves and access to many documents held by the public bodies. It also governs the collection, use, and disclosure of personal information, including public bodies' employees' personal information.

The *Personal Information Protection Act*, SBC 2003, c 63, [*PIPA*] applies to almost all organizations that are not public bodies covered by *FOIPPA*. It governs the collection, use, and disclosure of personal information, including employees' personal information.

b) Balancing Employer and Employee Interests

Generally, employers can collect information that is reasonably necessary in the circumstances. Some of the factors to be considered are whether the collection of the personal information is required to meet a specific need, whether the collection of information is likely to meet that need, whether the loss of privacy is proportional to the benefit gained, and whether there are less privacy-invasive methods of achieving the same end, per *Eastmond v Canadian Pacific Railway*, 2004 FC 852. In that case, surveillance of a rail yard was permitted after there were a number of incidents of theft, trespassing, and vandalism. GPS tracking of employees' work vehicles has also been permitted (*Schindler Elevator Corporation*, Order P12-01, 2012 BCIPC 25), though it generally necessary for the employer to inform the employee of the GPS tracking.

Random drug and alcohol testing can run afoul of privacy legislation. If the workplace is hazardous, this is not sufficient to justify random testing. There must be an additional factor, such as a general substance abuse problem at the workplace. If this additional factor is not present, then the employer cannot randomly test everyone in the workplace, but can test individual employees if there is reasonable cause to believe the employee was impaired while at work, was involved in a workplace accident, or was returning to work following treatment for substance abuse (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34). For more information

about alcohol and drug testing, consult “Alcohol and Drug Tests in the Workplace”, Kenneth R. Curry and Kim G. Thorne, Employment Law Conference 2014, Paper 1.1, CLE BC.

Other issues involving employee privacy may arise if an employer requests an employee’s medical information, monitors computer usage, or wishes to conduct personal searches of employees. Privacy laws are constantly evolving, and research should be done to determine whether the employer may be breaching privacy legislation.

Complaints regarding a breach of *FOIPPA* or *PIPA* can be filed with the Office of the Information and Privacy Commissioner for British Columbia.

The Ontario Superior Court of Justice recognized the tort of public disclosure of private facts in *Doe v. D*, 2016 ONSC 541, so there may be a new common law remedy in the appropriate circumstances.

References

[1] https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/hiring/young-people

VI. Remedies

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. The Employment Standards Branch

The Employment Standards Branch is the only forum an employee can go to if they have a complaint arising from a breach of the *ESA*. If the complaint is instead regarding a contractual issue, see section V.B: Small Claims Court and Chapter 20: Small Claims.

The *ESA* established the Employment Standards Branch to deal with complaints and to disseminate information about the Act to both employees and employers. The Employment Standards Branch is responsible for informing employers and employees of their rights under the *ESA*, and for administrating all disputes arising under the Act. The Employment Standards Branch’s Industrial Relations Officers and Employment Standards Officers are trained to interpret the *ESA* and to assist both employers and employees with problems arising under the Act. Employees should be referred to the Employment Standards Branch if they have a complaint arising under the *ESA*.

In *WG McMahon Canada Ltd v Mendonca* (1999), BCEST Decision No 386/99, the Employment Standards Tribunal set forth the “make whole remedy”, which permits the employee to receive compensation instead of reinstatement. The employee is essentially “made whole” financially by way of a compensation order, such that the employee would be in the same economic position they would have been in had the infraction not occurred. This is an extraordinary remedy but one which allows for significant compensation. The above case can be located on the Employment Standards Tribunal website [1].

Although the *ESA* also allows for reinstatement as a possible remedy, there are no published decisions in which it has actually been ordered.

Provincially regulated employees may still be able to seek reinstatement under other statutes such as the *Worker’s Compensation Act* or the *Human Rights Code* if their situation qualifies.

1. Application and Limitation Periods

The *ESA* gives the Director of Employment Standards power to investigate complaints made under the Act. The complaint must be made in writing and within certain time limits. The limitation period for an ESA complaint is six months. If still employed by the company, an employee should bring a complaint within six months of the event, and if the complainant is no longer employed with the defendant company, the complaint must be filed within six months of the termination date (s 74). When an employee is terminated after a temporary layoff, the last day of the temporary layoff is deemed to be their last day of employment for the purpose of calculating the six-month limitation period. If this six-month time period has elapsed, there may still be an action in Small Claims Court.

> **NOTE:** Time during which an employee was not working because they were on sick leave, pregnancy leave, Workers' Compensation benefits, etc. is nonetheless considered part of the term of employment.

2. Filing a Claim with the Employment Standards Branch

A complainant may file their complaint with the Employment Standards Branch in one of three ways:

- filling in a form and mailing or delivering it to the nearest Employment Standards Branch;
- filling in a form at the nearest Employment Standards Branch office; or
- submitting an online complaint form.

The Director may refuse to investigate a complaint if it is not made in good faith or if there is insufficient evidence to support it. The complainant may request, in writing, that any identifying information gathered for the purpose of the investigation remain confidential. However, the Director may disclose information if disclosure is deemed necessary to the proceeding or in the public interest (s 75).

Most employment standards complaints are resolved through a process of education of the parties, mediation, and/or adjudication, but some are referred to investigation. The officer reviewing the case has the discretion to determine the approach taken. Breach of any section of the *ESA* may be a basis for an investigation. At the conclusion of an investigation, the Director will give their determination (their decision) based on the evidence given. The Director has the power to settle the claim in a variety of ways, including:

- arranging payment to the complainant;
- forcing compliance with the Act; or
- requiring a remedy or cessation of the action (ss 78-79).

The Director also has the power to help parties settle a complaint and reach a binding settlement agreement that may be filed in Supreme Court for enforcement (s 78).

Section 29 of the *ES Regulation* provides an augmented penalty provision that grants the Employment Standards Branch more power to enforce the Act. The penalty provision is also used to enforce the offences listed in section 125 of the *ESA*.

Penalties per offence are:

First Determination:	$500
Second Determination:	$2,500
Third Determination:	$10,000

Under Part 11 of the *ESA*, an officer or director of a corporation is personally liable for up to two months' unpaid wages per employee if the officer or director held office when the wages were earned or were payable – however, officers or directors of a corporation are not personally liable on bankruptcy of the corporation (s 96(2)). Also, directors and officers may be considered a common employer and be held jointly and severally liable (s 95). If the business is sold, transferred, or continued after bankruptcy, the subsequent business may be considered a successor business and "the employment of an employee is deemed ... to be continuous and uninterrupted" (s 97).

Under the ESA (s 80), employers' liability for wages (including payments for length of service upon termination) can now include those wages that became payable within the twelve months prior to the date of the complaint, or within the twelve months prior to the date of the employee's termination – whichever is earlier. However, because some benefits become payable long after they were earned, an employee may be able to recover those benefits that they earned more than twelve months prior to the date of the complaint or date on which they were terminated. For example, in some cases vacation pay is not payable until two years after it is earned; in these cases, an employee could potentially recover vacation pay that was earned over a longer period than the twelve month collection limitation period. Similarly, employees may be able to recover wages that were entered into a time bank more than twelve months prior to the date of the complaint.

> **NOTE:** Employers cannot terminate, suspend, or discipline employees because they have filed, or may file, a complaint (s 83). The Branch can order an employee's reinstatement for contravention of this section and for violations of s 8 and Part 6.

3. Appeals

Anyone who wishes to appeal a determination of the Director must make an application to the Employment Standards Tribunal, a separate body established under Part 12 of the Act, at the conclusion of an investigation (s 115). The request must be made within certain time limits, which depend on the manner in which the decision is served. If the decision is hand-served, faxed, or delivered electronically, an appeal must be filed within 21 days. If the decision is sent by registered mail, an appeal must be filed within 30 days. After reviewing the decision, the Adjudicator of the Employment Standards Tribunal may confirm it, alter it, or refer it back to an officer. The appeal is decided based on the correctness of the Director's determination. (see *Alsip v Top Rollshutters Inc. dba Talius*, 2016 BCCA 252, https://canlii.ca/t/gs477, and *Howard v Benson Group Inc. (The Benson Group Inc.)*, 2016 ONCA 256, https://canlii.ca/t/gp8v7).

Sections 112 and 114 of the *ESA* confine the grounds of appeal to the tribunal to situations where:

a) **The Director erred in law:** An error in law may encompass the interpretation of a particular statutory provision, or its application to the facts presented. It can also be used when the appellant feels the Director acted unreasonably, or without evidence.

b) **The Director failed to observe the principles of natural justice in making the determination:** This ground of appeal encompasses a wide variety of circumstances such as bias on the part of the decision maker, procedural unfairness (refusing an adjournment without good reason), or when the appellant feels generally they have not been given the right to be heard (a right codified in s 77 of the Act).

c) **Evidence has become available that was not available at the time the Determination was made:** The new evidence must be material, in the sense that if the Director had been given the chance to review it the

determination in whole or in part would have been different.

Although the Act does not specifically allow a party to appeal the Director's findings of fact, in certain cases the Director's fact finding may be so flawed that it amounts to a legal error. *Gemex Developments Corp v British Columbia (Assessor of Area #12– Coquitlam)* (1998), 62 BCLR (3d) 354) defined an error of law as including instances where the Director was "acting on a view of the facts that could not reasonably have been entertained." This test has been adopted in a number of tribunal decisions. *Delsom Estate Ltd v British Columbia (Assessor of Area No 11 Richmond/Delta*, [2000] BCJ No 331 (BCSC) restated the test as being "...that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence" and is "perverse or inexplicable". For a summary of the law relating to judicial reviews under the Employment Standards Tribunal, see *Cariboo Gur Sikh Temple Society (1979) v British Columbia (Employment Standards Tribunal)*, 2016 BCSC 1622.

The tribunal may dismiss an appeal without a hearing if the requirements are not met, or if payment of a possible appeal fee, set up by regulation, has not been made. There are provisions for an appeal fee to be charged but there is currently no fee, nor are there plans to charge one.

If the employee is not satisfied with the decision of the Employment Standards Tribunal, they can seek judicial review of the decision; however, this must be done in BC Supreme Court. Employees should speak to a lawyer if they wish to pursue this possibility.

B. Provincial (Small Claims) Court

For information on how to proceed with a claim in Small Claims Court or the Civil Resolution Tribunal, see Chapter 20: Small Claims Court.

The Small Claims approach can often yield better results than claims filed with the Employment Standards Branch, particularly for cases involving termination of employment. For example, the ESA only requires an employer to pay one week's wages per year of service notice to a maximum of 8 weeks for dismissal without just cause, whereas a common law award could extend to as much as 24 months' wages. The Employment Standards Branch is also only able to award back-pay of up to twelve months, thus the claimant may wish to pursue a remedy in Small Claims Court if they are owed more than twelve months' back pay, and you determine there is a contractual claim to these funds. It might be in the employee's best interest to pursue certain claims through the Employment Standards Branch and others in Small Claims Court. However, keep in mind that civil court will not rule on a matter that is to be decided by the Branch.

Please note that employees may be prevented from directly enforcing rights under the ESA in civil court, and must instead use the Employment Standards Branch to enforce these rights (*Macaraeg v E Care Contact Centres Ltd.*, 2008 BCCA 182, https://canlii.ca/t/1wrdg). However, many of the interests protected by the ESA have parallel common law (contractual) remedies as well. A significant exception to this is overtime pay: employees have a contractual right to receive their normal hourly pay for all hours they work, but they can only make a claim at the Employment Standards Branch if they wish to receive 1.5 or 2 times their normal hourly rate for their overtime hours (an exception to this is if their employment contract specifically sets out that they will receive a higher rate for overtime pay, in which case this contractual right can be enforced in court). Each particular case should be reviewed fully before determining in which forum to proceed.

It is important to note that different stages of a dispute may appear in different forums. A finding that there was no just cause for termination through an Employment Standards hearing is not grounds for estoppel of an employer arguing just cause as a defence to a wrongful dismissal claim through civil court; see *Moore v. Instow Enterprises Ltd.*, 2021 BCSC 930, https://canlii.ca/t/jg044.

Also note that Small Claims Court only has jurisdiction for claims above $5,000 and up to $35,000. Employees with claims over $35,000 must either abandon the excess amount of the claim, or proceed to BC Supreme Court. Employees should consult a lawyer before proceeding in BC Supreme Court, as it can be quite complicated and costly. Employees with claims $5,000 or under may be required to pursue their claim through the Civil Resolution Tribunal.

When naming the defendant in Small Claims Court, the employee should sue the body with which the contract of employment was made, unless they are alleging fraud or induced breach of contract – in which case, consider joining the shareholders or directors of the company. The employee may have to sue the parent company and the subsidiary if the parent company does the hiring, paying, and terminating.

C. The BC Human Rights Tribunal

If an employee or potential employee has been discriminated against on the basis of one or more of the prohibited grounds, see Chapter 6: Human Rights, Section III.C: The Complaint Process for information on how to proceed with a complaint. If the employee was terminated from their position based on one of the prohibited grounds, they may be able to recover lost wages and compensation for injury to dignity, feeling, and self respect at the Human Rights Tribunal.

The employee also has the option to file a claim in Small Claims Court, the Civil Resolution Tribunal or BC Supreme Court for wrongful dismissal. See Section V.C: Termination of Employment for information on wrongful dismissal claims.

In most cases, the employee should choose one of these two options, based on which would provide the most compensation. For low-income employees who were employed for a short period of time, the Human Rights Tribunal can often provide greater compensation. However, in some cases where the employee has worked for the employer for a particularly long time before being terminated, or where the employer has demonstrated particularly egregious conduct, the employee may have better success in Small Claims Court or BC Supreme Court where they may be able to receive a larger severance award, and possibly punitive damages.

It is theoretically possible to have the employee's job reinstated by making a claim under the *Human Rights Code*. This is a significant remedy in itself, and it can also be used to incentivize a former employer to make a fair settlement offer, as they often do not wish for the employee to return. However, in practice the Human Rights Tribunal does not order reinstatement, so be sure to advise employees about the extreme unlikelihood of the reinstatement remedy.

D. Limitation Periods

If a client wishes to file a complaint with the Employment Standards Branch, there is a six month limitation period from the last day of employment to file a claim (ESA s 74).

Applications to the B.C. Human Rights Tribunal must be made within one year of the alleged contravention or the last day of employment (HRC s 22).

In the courts, there is a two-year limitation period (See *Limitation Act*, SBC 2012, c 13) for filing a wrongful dismissal claim. Section 124 of the ESA sets a limitation period of two years for any court action arising from an offence under the Act.

Note that in cases where an employer has provided working notice of dismissal, the limitation period for wrongful dismissal claims likely start when working notice is provided, not on the last day of employment. See *Bailey v. Milo-Food & Agricultural Infrastructure & Services Inc*. 2017 ONCA 1004, https://canlii.ca/t/hpd4z.

References

[1] http://www.bcest.bc.ca

VII. Strategies and Tips

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Gather Evidence

Employees who face employment issues should document everything so that they will be able to provide better evidence if the case goes to a hearing or trial. Employees who are dealing with work-related or dismissal-related stress should consider seeing a medical professional as soon as possible, as medical evidence can be extremely helpful at the Human Rights Tribunal and in Court. Medical evidence is often necessary if an employee wishes to make a claim for aggravated damages due to the manner of their dismissal, as only actual losses are compensable under this category of damages.

If evidence is in the possession of the employer, consider writing to the employer and asking them to put a litigation hold on all documents generally, and identify specific documents which the employee is aware exist. Warn the employer that if they do not preserve the evidence, you would be asking a court to draw an adverse inference in relation to such evidence if the matter proceeds to litigation.

Employees can also consider making a freedom of information request, such as a PIPA request, to request any information in the possession of the employer that relates to the employee.

B. Make a Claim for Employment Insurance

An employee who is dismissed may receive severance pay eventually; however, sometimes this can involve a long process. If the employee is receiving Employment Insurance (EI), they may have sufficient financial resources to wait a longer time to receive severance pay, and so they will be less likely to be forced to take a low settlement offer to pay their monthly bills. File for Employment Insurance immediately after being dismissed as Service Canada imposes time limits for filing. Make sure the employee understands that if they receive a severance settlement or judgement later on, they may have to pay back some of the EI benefits received during the severance period.

C. Make Reasonable Efforts to Mitigate Losses and Track Mitigation Efforts

Employees must make reasonable efforts to mitigate their damages. This is most relevant if the employee has been dismissed; the employee will be making a claim for damages in lieu of reasonable notice in Small Claims Court or the Civil Resolution Tribunal, or a claim for lost wages at the Human Rights Tribunal, and they must make reasonable efforts to mitigate these losses by searching for similar work. The employee should document their search for work. Note, however, that if the employee is successful in finding work, they will have successfully mitigated their damages, and will therefore be entitled to less compensation for lost wages or reasonable notice.

Employees should also be encouraged to keep accurate records of their job search efforts, for potential use as evidence at court.

D. File a Claim Quickly

Once an employee finds a new job, they begin to mitigate their damages, which will reduce their severance award. File a claim as soon as possible; if the employee can reach a settlement agreement or have the case tried before the employee finds a new job, you may avoid having a severance award reduced for mitigation income.

E. Consider Complexity and Strength of Claim

If a claim is filed that is relatively simple, the employee is more likely to get through the process more quickly; this is helpful if you wish to try to finish the process before the employee gets a new job and begins mitigating their damages. However, there can also be benefits to adding claims for aggravated or punitive damages or various torts, and benefits to splitting a claim into more than one forum; namely, there is the potential for a greater award and the potential for tax advantages on the damages received. Consider the strength of the claims, how important it will be for the employee to receive money quickly, and the likelihood of the employee finding a new job and mitigating their damages, before deciding whether to make a simple claim for severance pay, or to add additional claims.

F. Consider Tax Consequences During Settlement Negotiation

An employee must pay tax on the portion of an award that is given in place of the wages they would have received during their reasonable notice period.

However, if part of the damages is instead awarded as aggravated or punitive damages (in Small Claims Court or BC Supreme Court), or as damages for injury to dignity, feelings, and self-respect (at the BC Human Rights Tribunal), this portion of the award may not be taxable. Consider structuring a written settlement agreement to allocate a reasonable portion of the award to these potentially non-taxable categories of damages.

Employers will often also allow an employee to allocate an amount of a severance settlement to be paid directly to an RRSP account on a pre-tax basis, up to the employee's eligible RRSP room.

Note that this chapter, and LSLAP, cannot provide tax advice, and an employee may wish to consult an accountant or tax lawyer or the Canada Revenue Agency to determine exactly which amounts of a final settlement are taxable, and what the best strategy for payment structuring would be for a particular employee. It is helpful to obtain this recommended strategy from the employee's financial advisor at an early stage, so that the settlement structuring request can form part of the severance negotiations.

G. Consider Pursuing the Claim in Different Forums

In some cases, it may be advantageous to split up the various employment issues an employee faces and proceed in different forums based on which forum will award the greatest amount of money for each legal issue.

For example, one may wish to claim overtime pay and vacation pay at the Employment Standards Branch, and claim severance pay in Small Claims Court. This may be beneficial because overtime pay is only legally required under the *ESA*, unless the employee's contract calls for overtime pay to be paid, meaning that claims for it can only be brought at the Employment Standards Branch. However, severance pay tends to be significantly greater in Small Claims Court.

Often it will be best to keep the entire claim in one forum. Note that section 82 of the *ESA* states that once a determination has been made by the Employment Standards Branch, the employee may commence another action for the same wages only if the Director gives written permission or the Director or tribunal cancels the determination. This prevents the possibility of "double recovery"; if an employee received damages for an action in one forum, they may not receive the same damages in another. However, even if an employee has already gone through the Employment

Standards Branch to obtain the minimum statutory entitlement for length of service under the *ESA*, they are still able to make a claim in court for contractual breaches such as wrongful dismissal, and therefore they may potentially obtain additional severance pay (*Colak v UV Systems Technology Inc*, 2007 BCCA 220, https:/ / canlii. ca/ t/ 1r5sc). Nonetheless, proceeding at the Employment Standards Branch to claim the statutory minimum entitlements for length of service can be problematic for several reasons. Firstly, if the employee is also going to be proceeding in Small Claims Court for wrongful dismissal, a claim at the Employment Standards Branch may simply cause an extra expenditure of effort with no additional benefit. Secondly, if the Employment Standards Branch makes a determination as to whether or not there was just cause for dismissal, this determination is likely to be adopted by Small Claims Court if a claim is later filed there. It should be considered that of these two forums, only the Small Claims Court decisions are made by judges, so if it is anticipated that there may be complex legal arguments on the issue of just cause, it may be beneficial to proceed in Small Claims Court.

H. Consider Defeating Signed Release Agreements

An employee may have already signed a release agreement that waives any liability against the employer. This is not the end of the claim.

In considering a signed release agreement, you should first ensure that it applies to the situation at hand. For example, a release of all liability pursuant to the Employment Standards Act may not prevent an employee from recovering in common law.

If the release agreement is grossly unfair for the employee, it may also be set aside on grounds of unconscionability. The British Columbia Supreme Court has recently adopted Alberta's test for unconscionability in the context of a severance release as follows: (*Manak v. Workers' Compensation Board of British Columbia*, 2018 BCSC 182 at para 90, https://canlii.ca/t/hq954).

A contract is unenforceable for unconscionability if:

- It is a grossly unfair and improvident transaction;
- The victim did not receive independent legal advice or other suitable advice;
- There exists an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
- The other party knowingly took advantage of this vulnerability.

A severance release is also unenforceable if it was entered into under duress. For more information on the law of duress, generally, see *Bell v. Levy*, 2011 BCCA 417, https://canlii.ca/t/fnl3g.

Appendix A: Glossary

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Aggravated damages

- In the context of wrongful dismissal: damages awarded as compensation for an employee's reasonably foreseeable loss or harm that occurred due to the manner of their dismissal; generally awarded as compensation for psychological harm caused by the manner in which the employee was terminated from their employment.

Bad Faith

- If an employer dismisses a person in a harsh or vindictive manner, for example by purposely humiliating the employee or by taking some other action that might mentally harm the employee, they may have dismissed the employee in a bad faith manner, and the employee may be entitled to aggravated damages.

Constructive Dismissal

- A unilateral change by an employer to a fundamental term of an employee's contract (such as pay or job duties). The change must not be condoned, and must be significant. The employee might claim this change is a constructive dismissal (or equivalent to a dismissal because of the significance of the change), even though there has been no express act of dismissal on the part of the employer.

Contract

- An agreement between persons which obliges each party to do or not do certain things.

Dismissal

- An employer's decision to terminate a contract of employment.

Employment at Will

- An employment contract during which the employer may terminate the employment at any time. This is an American concept, as this type of employment does not legally exist in BC (or anywhere in Canada): if the employment contract purports to allow the employer to terminate the employee without notice, it is invalid and the employee may be able to obtain a severance award.

Just Cause

- Misconduct by an employee, or some other event relevant to the employee, which justifies the immediate termination of the employment contract. Note that this phrase has a different meaning in the context of Employment Insurance.

Mitigation of Damages

- The obligation upon a person who sues another for damages, to minimize - or mitigate - those damages, as far as reasonable.

Non-competition Agreement

- A contract or a clause in a contract in which an employee agrees not to compete against their employer. These are often found to be invalid in court, particularly if a non-solicitation agreement would have sufficed to protect the employer's interests.

Non-solicitation Agreement

- A contract or a clause in a contract in which an employee agrees not to solicit customers of the employer.

Reasonable Notice

- Employers must give an employee reasonable notice that their employment is to be terminated without cause, or payment of their usual salary and benefits in lieu of notice. The length of time that constitutes reasonable notice varies based on the employee's age, length of service to the employer, and employment responsibilities, and the availability of alternate employment. The reasonable notice period can be up to approximately two years.

Restrictive Covenant

- A contract in which a party agrees to be restricted in some regards as to future conduct. There are two common types: non-competition agreements and non-solicitation agreements.

Severance Pay

- An amount of money an employer owes to an employee in lieu of notice of the employee's termination.

Sick Leave

- Time off from work, paid or unpaid, on account of an employee's temporary inability to perform duties because of sickness or disability.

Union

- A defined group of employees formed for the purposes of representing those employees with the employer as to the terms of a collective contract of employment.

Workers' Compensation

- A public benefit scheme in which qualified workers who are injured in the workplace, receive compensation, commensurate with their degree of injury, regardless of who was at fault.

Wrongful Dismissal

- The failure to provide reasonable notice of the termination of an employment contract. Wrongful dismissal is a term that can apply to cases when an employer doesn't provide enough notice or severance in the case of a without cause dismissal, or when an employer fires an employee without any notice or severance in the case of a just cause termination.

Chapter Ten - Creditors' Remedies and Debtors' Assistance

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

There are legal remedies available to creditors to enforce a debt, but the related procedures are frequently time-consuming and potentially costly, and there is no guarantee that the creditor will actually receive all of the funds owed. The most important reason for starting civil proceedings to collect a debt is to permit the creditor to execute on their judgment. Such execution proceedings may include:

1. Examinations in aid of execution (to determine the debtor's ability to pay the debt);
2. Subpoena to debtor hearing (to obtain a court order compelling the debtor to make payments on the judgment);
3. Garnishment (to compel third parties, such as banks and employers, to pay funds into court to the credit of the judgment rather than pay those funds to the debtor. See "Garnishment" at page 12); and
4. Collection by execution (to lodge a writ of execution with the bailiff who will then seize and sell the debtor's assets and pay proceeds to the credit of the judgment).

A judgment may also be filed on the title of real property owned by the debtor and will remain on the title of that property for two years unless it is renewed, discharged (by the debt being paid or bankruptcy), or the creditor commences proceedings to sell the property and apply the proceeds of the sale against the debt.

Depending on the amount claimed, the matter will fall under the jurisdiction of the Civil Resolution Tribunal (under $5,000), Small Claims Court ($5,001 to $35,000) or the Supreme Court of British Columbia (above $35,000).

Most of this chapter relates to the Supreme Court of British Columbia process. However, similar principles apply to Small Claims Court. The Small Claims Court provides a detailed guide for creditors on enforcement procedures available under the Small Claims Court processes. See: https://www2.gov.bc.ca/gov/content/justice/courthouse-services/small-claims/how-to-guides/getting-results.

The applicability of the information within this chapter is limited in situations where property is subject to the *Indian Act*, RSC. 1985, cI-5.

Finally, the Civil Resolutions Tribunal is designed for self-represented litigants and has rules generally preventing legal professionals from representing litigants in tribunal claims. Therefore, LSLAP rarely represents clients with Civil Resolution Tribunal claims

NOTE: For regulations regarding High-Cost Loans and Credit products under the Business Practices and Consumer Protection Act [BPCPA], refer to Chapter 11: Consumer Protection.

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

Bankruptcy and Insolvency Act, RSC. 1985, c. B-3 as am. by SC 1992, c 27 and SC 1997, c 12.

Bankruptcy and Insolvency General Rules, CRC, c 368, s 129(1)

Builders Lien Act, SBC 1997, c 45.

Business Practices and Consumer Protection Act, SBC 2004, c 2.

Business Practices and Consumer Protection Authority Act, SBC 2004, c 2.

Court Order Enforcement Act, RSBC 1996, c 78.

Court Order Interest Act, RSBC 1996, c 79.

Creditor Assistance Act, RSBC 1996, c 83.

Family Maintenance Enforcement Act, RSBC 1996, c 127

Interest Act, RSC. 1985, c I-18.

Limitation Act, SBC 2012 c 13

Personal Property Security Act, RSBC 1996, c 359.

Pension Benefits Standards Act, RSBC 1996, c 352.

Repairers Lien Act, RSBC 1996, c 404.

Sale of Goods Act, RSBC 1996, c 410

Wage Earner Protection Program Act, SC 2005, c 47, s 1.

Warehouse Lien Act, RSBC 1996, c 480

Winding-up and Restructuring Act, RSC 1996, c 6.

Matters involving bankruptcy or insolvency should almost always be referred to an insolvency practitioner. Given the number of applicable statutes and regulations, the law in this area is frequently subject to change.

> **NOTE:** For regulations regarding High-Cost Loans and Credit products under the *Business Practices and Consumer Protection Act [BPCPA]*, refer to Chapter 11: Consumer Protection.

III. Creditors' Remedies

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

Before taking action against a debtor, a creditor must provide a reasonable time for payment on a demand loan or term loan. That time begins to run from the date of the demand for payment and not the date of the loan. What constitutes a reasonable demand period depends upon the facts of each case. For a list of factors to be considered see *Royal Bank of Canada v. W. Got Associates Electric Ltd.*, [1999] 3 SCR 408, 1999 CanLII 714 (SCC), para. 18) [1].

Under section 8 of the *Limitation Act*, in British Columbia, the period for when a proceeding for the collection of a debt must be commenced is 2 years from the "date of discovery" of the claim. The date of discovery is defined as the day on which the claimant knew or ought reasonably to have known all of the following:

a) That injury, loss or damage had occurred;

b) That the injury, loss or damage was caused by or contributed to by an act or omission;

c) That the act or omission was that of the person against whom the claim is or may be made; and

d) That, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

NOTE: The limitation period does not apply to court proceedings and claims exempted under sections 2 or 3.

NOTE: On March 18, 2020, the Supreme Court of British Columbia suspended regular court operaions due to COVID-19. Limitation periods that overlapped with the suspension of court operation were not affected. However, parties who experienced delays due to the suspension of operations may apply to extend their limitation period, which the Court will determine on a case-by-case basis.

A. Secured Creditors

1. Definition

A secured creditor holds a lien, mortgage, or charge against the debtor's assets or collateral as security for the repayment of the debt.

2. General Introduction to the PPSA

The *Personal Property Security Act* [PPSA] establishes a system for the registration, priority, and enforcement of secured loan and credit transactions involving personal property in B.C. Secured creditors holding agreements that create or provide for security interests (i.e. chattel mortgages and conditional sales agreements) must register these security agreements in order to "perfect" its interest and establish its priority in regards to third parties. See "Perfection" on page 3.

For agreements that are subject to the PPSA, Part 5 of the PPSA outlines the creditor's remedies (ss 56 - Rights and remedies, 57 - Collection of payments under intangibles or chattel paper, 58 – Right of seizure or repossession, and 67 - Rights and remedies: consumer goods). For agreements that involve fixtures, crops or accessions, ss 36 – 38 apply. In addition, Part 6 contains some sections (i.e. ss 68(2) - Good faith and commercially reasonable, and 72 - Notice) that are of procedural importance.

NOTE: *PPSA* issues, particularly those involving priority disputes or matters relating to the transitional provisions, are complex and may have to be referred to a lawyer.

3. What Does the PPSA Govern?

The scope of the *PPSA* is defined in s 2 as including every transaction that in substance creates a security interest without regard to its form. As well, under s 3, a transaction involving either a transfer of an account or chattel paper, a commercial consignment, or a lease for a term of more than one year that does not secure payment or performance of an obligation (i.e. does not create a security interest) is subject to the *PPSA*. **Section 55 provides that Part 5 does not apply to transactions brought within the *PPSA* by s 3. It is necessary to look to the terms and the common law.**

> **NOTE:** Section 4 lists types of transactions that are exempt from the *PPSA*. The *PPSA* does not apply to a "lien, charge or other interest given by a rule of law or an enactment unless the enactment contains an express provision that the *PPSA* applies". Generally this excludes real property and natural resources.

4. Perfection

For a creditor's interest in a good to be practically effective, s 35(1)(b) of the *PPSA* states that the interest must be "perfected", whereby the creditor becomes a "secured" party. By virtue of s 19, a security interest must satisfy two conditions to be "perfected":

i) The security interest must have "attached" (see below); and

ii) The secured party must ensure that "all steps required for perfection under this Act have been completed" (see below).

In general, attachment will ensure that the security interest is enforceable against the debtor, while perfection will protect the security interest against competing third party claims.

"Attachment": Section 12 states that a security interest attaches to the good when:

i) Value is given;

ii) The debtor has rights in the collateral; and

iii) Except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable under s 10 (unless the parties specifically agreed to postpone the time for attachment in which case the security interest will attach at the time specified in the agreement).

a) Methods of Perfection

i) **Perfection by possession of collateral applies to all forms of security interests (s 24)**;

ii) **Perfection by registration**. Subject to s 19, registration of a financing statement in the Personal Property Registry perfects a security interest in collateral. (s 25); and

iii) **Temporary perfection** (See ss 5(3), 7(3), 26, 28(3), 29(4) and 51).

5. Remedies

Where a debtor defaults on a security agreement, s 56 provides that the only rights and remedies the secured party has against the debtor are those provided in the security agreement (as long as they do not derogate those rights given to the debtor by the *PPSA*), and those specifically provided by the *PPSA* (s 17 and ss 36 – 38).

Important sections of the *PPSA* for the creditor are ss 58 and 59, which contain rules for seizing and disposing of collateral. These sections provide that, unless the security agreement states otherwise, where the debtor defaults on their payment, the creditor may elect to take possession of the collateral pursuant to the contract, dispose of the collateral and then sue for any amount still owing. Section 67, provides for a more limited set of remedies where the collateral takes the form of consumer goods – known as the "seize or sue" rule. Formerly, under legislation repealed by the *PPSA*, all

creditors could only seize or sue but not both. **The principle of "seize or sue" still applies to "consumer goods" (see Section II.A.6: Seizure, below); it no longer applies to commercial goods**.

6. Seizure

Where the security interest does not involve fixtures, accessions, crops, or consumer goods, s 58 provides the fundamental rule for realization upon non-possessory security interest in tangible personal property: **the secured party has a right to seize (in the case of a secured loan transaction) or to repossess (in the case of a secured credit sales transaction) the collateral**. Upon seizing the collateral, s 17 defines the rights and obligations of secured parties in possession of collateral. The section imposes a standard of reasonable care on the secured party in possession of the collateral and the secured party must follow the notice provisions outlined in ss 59(6) – (12) before they are entitled to carry through with disposal.

7. Disposal of Collateral

After seizing collateral, the secured party under s 59(2) may dispose of it either in its present condition or after repairing it (though s 68(2) protects the debtor from incurring unnecessary expenses because all rights, etc., under the *PPSA* must be discharged "in good faith"). Further, s 59(3) provides that the secured party may dispose of the collateral by a private or public sale (either as a whole or in commercial units or parts) and, if the security agreement so provides, by lease. See also Section II.A.10: Voluntary Foreclosure.

Section 59(2) provides a priority scheme regarding application of the proceeds of sale:

- First, toward the reasonable expenses of seizing, repairing, etc.;
- Second, toward the satisfaction of the obligations owed to the secured party; and
- Last, if any surplus exists, to the satisfaction of obligations owed to persons holding a subordinate security interest, and then toward the debtor (s 60(2)).

A person who buys an item from a disposal sale takes the good free and clear of the interests of the secured party, but also debtors, , and any subordinate creditors whether or not the secured party complied with the requirements of section 59(14). In the case of a prior secured creditor's interest, if the goods are "consumer goods" of a value less than $1,500 (and not fixtures) and the purchaser gave value for the goods, the purchaser takes them free of the prior secured creditor's interest (see ss 30(3-4)).

8. Notice of Intention to Dispose of Collateral

> **NOTE:** The forms of notices under the *PPSA* depend on a number of factors, including the nature of the security and the terms of the security agreement. Advice concerning the validity of notices should be referred to a lawyer.

Subject to the circumstances where notice is not required as per s 59(17) (e.g. for perishable collateral, collateral requiring disproportionately high storage costs relative to its value, etc.), the requirements for notice are outlined in ss 59(6) and (10). These sections require that the secured party, or receiver, as the case may be, must provide at least **20 days'** notice of their intention to dispose of the collateral to parties including the debtor and any other creditor.

When a secured party is considering methods of disposal, they must give notice to the following parties (see s 59(6) and s 60(2)):

i) The debtor;

ii) Any other person who is known by the secured party as the owner of the collateral (where that is not the debtor);

iii) Any creditor or person with a security interest in the collateral whose interest is subordinate to the secured party, who registered a financing statement, or whose security interest is perfected by possession at the time of seizure or repossession of the collateral; and

iv) Any other person with an interest in the collateral who has given notice to the secured party of their interest in the collateral before the notice of disposition is given to the debtor.

The secured party is required to include specific information in the notice (see s 59(7)):

i) A description of the collateral;

ii) The amount required to satisfy the obligation secured by the security interest;

iii) The arrears owing (exclusive of the operation of an acceleration clause);

iv) The expenses associated with seizure and repossession; and

v) The date, time and place of disposition.

In the case of a receiver attending to the disposition of the collateral, the receiver must give notice to (see s 59(10) and s 60(2)):

i) The debtor;

ii) Any other person known by the secured party to be an owner of the collateral;

iii) Any creditor with a security interest subordinate to that other secured party, who has either registered the financing statement, or who has perfected its security interest by possession at the time of the seizure or repossession of the collateral; and

iv) Any other person with an interest in the collateral who has notified the receiver of that interest in the collateral before the notice of disposition is given to the debtor.

The notice that the receiver must provide need contain only (see s 59(11)):

i) A description of the collateral;

ii) A statement that unless the collateral is redeemed it will be disposed of; and

iii) The date, time and place of any sale by public auction, or the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted

9. Surplus or Deficiency

When a secured party is left with a surplus after disposal of the collateral, it must be accounted for and paid to the parties in the order specified in s 60(2). If a dispute regarding entitlement arises, s 60(4) provides for the secured party to pay the secured funds into court, which gives those claiming entitlement the opportunity to make an application under s 70 for payment.

Under s 60(5), the debtor is responsible for any deficiency balance unless the secured party and the debtor have agreed otherwise and made provisionsas such in the security agreement.

NOTE: This section does not apply to consumer goods.

10. Voluntary Foreclosure

After default, a secured party may make a proposal to the debtor and other interested parties to take the collateral to satisfy obligations secured by it (s 61).

The debtor and other interested parties have 15 days to object to the secured party's proposal. Failure to object is deemed to be an irrevocable election to forfeit all rights and interests in the good and entitles the secured party to retain the good.

If the debtor or other secured party provides notice of objection to the secured party within 15 days after the notice is given, the secured party must dispose of the collateral in accordance with the provisions of s 59 (s 61(2)). In such circumstances, under s 61(7), the secured party may make an application to the court for an order that an objection to the secured party's proposal is ineffective because:

> i) The objection was made for a purpose other than protecting an interest in the collateral or the proceeds of the disposition of the collateral; or
>
> ii) The market value of the collateral is less than the total amount owing to the secured party plus the costs of disposition.

11. Restrictions on Realization

a) Subordination of Unperfected Security Interests

Under s 20(a), an unperfected security interest is subordinate to the interest of:

- A person who causes the collateral to be seized under legal process to enforce a judgment (including execution, garnishment or attachment), or who has obtained a charging order or equitable execution affecting or relating to the collateral;
- A representative of a creditor enforcing the rights of a person referred to above; and
- A sheriff acting under the Creditor Assistance Act and any judgment creditor entitled to participate in the distribution of property under the *Creditor Assistance Act*.

Also, if an interest is unperfected at the date of the bankruptcy or winding-up, then that interest is not effective against a trustee in bankruptcy or a liquidator (*Winding-up and Restructuring Act*, RSC 1985, c 6).

In addition, ss 20(c), 30(3) and 31 confirm the subordination of the interest of a secured party to a bona fide purchaser for value under various circumstances.

b) Restriction on the Right to Accelerate a Term Debt

The security agreement may contain an "acceleration clause" (s. 16 of PPSA) that provides that the total amount owing becomes due upon default in payments or on other grounds, such as whenever the secured party has "commercially reasonable grounds" to believe that they may not be repaid or that the collateral is "in jeopardy". If there is an acceleration clause in the security agreement, other than in the case of default of payments, the acceleration clause may not be invoked unless this objective test of "commercially reasonable grounds" has been satisfied. A secured creditor has commercially reasonable grounds when they have a reasonable belief that there is a risk of non-payment. This could occur for a variety of reasons including the debtor fleeing the country, being hospitalized or illegal activity taking place on the premises. If the risk is not obvious the creditor must make commercially reasonable efforts to verify their suspicions. Commercially reasonable efforts do not mean best efforts.

c) Limitation of the Right of Seizure for Consumer Goods

For collateral that is a "consumer good", where the debtor has paid at least two-thirds of the total amount secured, the creditor may not seize the good without first obtaining a court order (see Section II.A.12.a: Secured Party's Remedies).

d) Obligation While in Possession of Collateral

Section 17 of the *PPSA* imposes a standard of reasonable care on any secured party in possession of the collateral.

e) Rights of a Debtor

The *PPSA* preserves the debtor's (but not the secured party's) rights and remedies under other statutes that are not inconsistent with the PPSA as well as the specific rights and remedies provided in the security agreement, ss 17 and 56(2)(b).

f) Rights of Redemption and Reinstatement

Under s 62, a debtor has redemption rights. Any person entitled to notice of a pending disposition of collateral may "redeem" the collateral by tendering to the secured party fulfilment of the obligations secured by the collateral plus the reasonable expenses incurred by the secured party associated in seizing the collateral or otherwise preparing it for disposition. The aforementioned obligations may simply be the amount in arrears; however, it is more often the case that an acceleration clause applies, and that the obligations will be the total amount of the debt. Where the security agreement contains an acceleration clause, the debtor may apply to court for relief from the consequences of default or for an order staying enforcement of the security agreement's acceleration provision.

12. Consumer Goods

Where the collateral is a "consumer good", the calculation of the obligation secured and the obligation that must be tendered is varied. Consumer goods are defined as goods that are used or acquired for use primarily for personal, family or household purposes (s 1). The debtor may "reinstate" the security agreement by paying only the monies actually in arrears – negating the operation of any acceleration clause. The debtor may waive this right, but any such agreement must be in writing after default. Note that the number of times the debtor may reinstate the security agreement is limited depending on the period of time for repayment set out in the security agreement; however, the frequency of reinstatement may be varied by agreement between the parties.

a) Secured Party's Remedies

Section 67(1) lists the options available to a secured party. The secured party may elect to pursue one of the following remedies:

- Seize or repossess the goods (s 58);
- Enact the voluntary foreclosure remedy (s 61) (discussed above);
- Accept the surrender of the goods by the debtor; or
- Start an action to recover a judgment against the debtor for the amount of the unpaid debt or unperformed obligations under the security agreement.

This is sometimes called the "seize or sue" rule.

If the debtor has paid at least two-thirds of the total amount of the secured obligation, the secured party may not seize the consumer good used as collateral (s 58(3)). However, the secured party may apply to court for an order that the "two-thirds rule" should not apply and the court will make a decision based on (s 58(4), (5)):

- The value of the collateral;

- The amount of the obligation that has been discharged;
- The reasons for default; and
- The current and future financial circumstances of the parties.

b) Disqualification from "Seize or Sue" and Leases

A secured party with a security interest in "consumer goods" may escape the seize or sue provisions where:

- The debtor has engaged in wilful or reckless acts or neglect that has caused substantial damage or more deterioration than would be reasonably expected; a court, on application, may order that subsections (1) to (7) or any one or more of them do not apply so as to limit the rights and remedies of the secured party (ss 67(9)); or
- The secured party discovers after s 58 seizure or bringing action to recover a judgment that an accession that was collateral has been removed and not replaced by other goods of equivalent value and free from prior security interests, a claim may be advanced notwithstanding ss 67(2), (5) and (6) against the debtor for the value of the accession (s 67(8)).

  NOTE: The "seize or sue" rule does not apply to "true leases" but *will* apply to "security leases" or "conditional sales agreements". BC courts have been developing tests to distinguish between true leases and security leases. Disputes often arise over car leases. Creditors and debtors should consult with a lawyer who is familiar with this area of law when trying to figure out whether their contract is a true lease or a security lease. If the lease is a true lease the creditor has the option to seize and sue; see *Daimler Chrysler Services Canada Inc v Cameron, 2007 BCCA 144* [2].

13. Consequences of Electing to Proceed Against Collateral

Under s 67(2), an election to proceed against the collateral results in the extinguishment of the debtor's obligations under the security agreement or any related agreement (with the exception of land mortgages executed before July 1, 1973), thereby automatically releasing any guarantor or indemnitor of the obligations contained in the security agreement. However, ss 67(3) and 67(4) contain exceptions.

Since proceeding against the collateral precludes the creditor from recovering the deficiency of the debt, the creditor is well advised to collect as much of the debt as possible, from other sources prior to seizing the goods. Remember, however, that if the creditor collects 2/3 or more of the debt, they lose the right to seize the goods.

14. Consequences of Electing to Sue

An election to sue results in the following consequences for the creditor:

- Under s 67(6), if the creditor gets a judgment against the debtor and seizes the collateral pursuant to a writ of seizure and sale, the right of recovery is limited to the gross amount realized from the sale of the collateral;
- Under s 67(10), commencement of proceedings against the debtor extinguishes the security interest of the creditor in the goods. The secured party must also discharge any registration relating to the security interest no later than one month after the exercise of their rights.

Therefore, the sale proceeds become subject to a bankruptcy stay; and the creditor may have to share the proceeds of the seizure and sale with other creditors as they will no longer have priority based on secured creditor status. Exceptions include cases of fraud or cases where the stay is unjust. Where there is alleged fraud or the stay is unjust for other reasons, the creditor can apply to the court to have the stay removed against them specifically. Generally, the stay is removed so that litigants can continue their litigation.

B. Unsecured Creditors

A creditor initiates legal proceedings for one obvious and specific purpose: to permit that creditor to obtain a judgment and collect the debt owed. There may be cases where such action is not taken, for example, if the debtor has no assets and is not likely to ever have assets. There are also instances where a creditor may be legally prevented from initiating proceedings against a debtor, for example, if the debtor files an assignment in bankruptcy. These issues will be discovered when the debtor's assets, if any, are identified at a Payment Hearing in Small Claims Court, or in the Examination in Aid of Execution or Subpoena to Debtor Hearing in Supreme Court (see Appendix B: Checklist for Examination in Aid of Execution). However, when a debtor has or may have assets, the creditor may wish to obtain a judgment on the debt to execute against assets of the debtor.

1. The Creditor Assistance Act

Before this Act, the common law position was that priorities among execution creditors were determined in relation to the time the writs were filed. The creditor who filed the first writ would be paid in full, and then the next, and so on.

The principles of the *Creditor Assistance Act* allow creditors to give debtors time to pay, and not prejudice the patient creditor over another who files as soon as the debt is due. Section 3 provides that on execution, all creditors who have filed a writ will receive their share on a *pro rata* (or "rateable") basis. *Pro rata* means that each creditor will receive a share of the funds available for distribution that is proportionate to their share of the debtor's total debt.

Exceptions to this principle of pro rata distribution allow preference to sheriff's costs, costs to the creditor at whose instance the seizure and levy were made, and wage claims that do not exceed three month's wages, or salary. Further, the *Family Maintenance Enforcement Act*, RSBC 1996, c 127 provides that proceeds realized on execution under that Act are not subject to distribution under the *Creditor Assistance Act*. In addition, some statutory liens and charges may take priority over the rateable distribution under the Act.

> **NOTE:** Payments made pursuant to a foreclosure sale of land will be made in the order that judgments are registered at the Land Title Office, and not on a pro rata basis.

a) Money to be Levied by Execution

Under s 3, once the sheriff collects money, an event called a levy, the persons who qualify under the Act will distribute it. These persons must have filed a writ of execution prior to the levy or must file a writ within one month of the date notice of the levy was entered (s 2). Where the creditor does not have a judgment against the debtor at the time of levy, and the claim is for debt, the creditor may obtain a certificate of claim under the *Creditor Assistance Act*. If this certificate is delivered to the sheriff within one month of the levy, the creditor may participate in the rateable distribution. The procedure for the certificate of claim is in ss 6 – 21 of the Act.

b) Contest of the Creditor's Claim

Under s 14, on receiving an affidavit of claim the execution debtor may file and serve an affidavit of good defense to the claim within 10 days of the original service. The court may vary this length of time upon application. The distribution is halted pending verification of the validity of the claim.

Besides the debtor, another creditor may contest the claim (s 15). Grounds for filing include an allegation that there is no debt due in good faith from the debtor to the claimant, or an allegation that the claim is not one of debt as required by s 6 of the *Creditor Assistance Act*. A claimant whose claim is contested must make an application to the Supreme Court of British Columbia within eight days of being notified (s 16); otherwise, the claim will be deemed to have been abandoned.

Under s 12, if the amount levied does not satisfy all of the writs of execution and certificates of claim, the sheriff is authorized to make a further seizure of the execution debtor's personal property to satisfy all writs and certificates of claim. In addition, the certificate, if issued, remains in force for three years and may be renewed similarly to a writ of execution (s 13(1) and (2)).

2. Execution

Under s 55 of the Court Order Enforcement Act [COEA], any judgment creditor may have the property of the judgment debtor seized and sold by the sheriff to satisfy the amount owing under the judgment, subject to exemptions under ss 70-79 or as otherwise provided for in the COEA. Section 60 of the COEA directs that any surplus after payment of the judgment, interest, and reasonable costs of seizure and sale be paid to the debtor.

3. Exemptions from Seizure

Section 71(1) of the *COEA* creates categories of exemptions for the personal property of debtors with the specific amounts set by regulation. Debtors are allowed:

1. Necessary clothing, medical and dental aids that are required by the debtor and their dependents;
2. $4,000 for household furnishings and appliances;
3. $5,000 for one motor vehicle if the debtor is not a maintenance debtor;
4. $2,000 for one motor vehicle if the debtor is a maintenance debtor; and
5. $10,000 for tools and other personal property that the debtor uses in their occupation.

NOTE: See the COEA Exemption Regulations.

In addition, s 71.1(1) of the *COEA* exempts the principal residence of the debtor; $12,000 is the prescribed amount of equity exemption if the debtor's principal residence is located within the boundaries of the Capital Regional District or the Greater Vancouver Regional District. If the debtor's principal residence is located outside of these boundaries, $9,000 is the prescribed amount of equity exemption. These values are calculated using the net equity.

Section 71.3 of the COEA specifies that property in registered plans may be exempt from seizure as well (including Deferred Profit Sharing Plans, Registered Retirement Income Funds and/or Registered Retirement Savings Plans). In order to qualify for an exemption, the plan must be registered similar to the Registered Retirement Savings Plan. However, there are some employee DPSPs that are not registered and exempt from seizure. Notwithstanding this section, property can be seized despite being in a registered plan if it was contributed to the plan after or within 12 months before the date on which the debt became due. Under section 1(1) the "Family Maintenance Enforcement Act", a maintenance debtor refers to "a person required under a maintenance order to pay maintenance costs".

NOTE: Refer to BC Reg 28/98 (Court Order Enforcement Exemption Regulations) for further details regarding exemptions under the *COEA*. Where there are competing priority interests between judgment creditors and secured parties, each party should seek the assistance of counsel.

NOTE: The execution remedy is available to an unsecured creditor only after they have obtained judgment against the debtor.

NOTE: The B.C. Court of Appeal decision in *Atwal (Re), 2012 BCCA 46* [3] *confirmed that a debtor whose property is sold by a trustee under the* Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] is entitled to the above exemptions if the value of their property exceeds that which is prescribed in the legislation. Thus, if a debtor's vehicle, valued in excess of $5000 is sold by a trustee in bankruptcy, the debtor is entitled to $5000 of the sale price, as provided by the exemption.*

Any goods, chattels and effects of the judgment debtor (*COEA*, s 55), money, bank notes, cheques, or other securities for money, such as shares of an incorporated company in British Columbia (s 64; *Peligren v Ajac's Equipment (1982) Inc (1984), 56 BCLR 17, [1984] 5 WWR 563 (BCSC)* [4]*), and any legal or equitable present, future, executory or contingent interest in land (s 81) may be seized after the exemptions from s 71(1) of the* COEA *are applied.*

The secured creditor takes the secured goods subject to the security interest of the conditional seller or chattel mortgagee. Where the debtor is a conditional buyer or a chattel mortgagor, a sheriff or bailiff may seize secured goods. Sheriffs, however, are usually reluctant to seize collateral unless there is clearly equity in it. In such cases, the secured creditor cannot seize a greater interest than the debtor has.

Sections 71(3) and (4) set out three exceptions to the personal property exemptions provided in s 71(1) of the *COEA*:

a) The debtor cannot exempt goods identical to the goods that were the subject of the contract in question;

b) A trader cannot claim any goods that are part of their stock-in-trades; and

c) Corporate debtors cannot avail themselves of the personal property exemption.

In addition, s 65 of the "Insurance Act", RSBC 1996, c 226 allows for the exemption of certain insurance policies. Under s 65(1), if a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, it is not part of the estate of the insured and not subject to creditors of the insured. Under s 65(2), while there is in effect a designation in favour of a spouse, child, grandchild or parent of the insured, the insurance money and rights or interests of the insured in the money and in the contract are exempt from execution or seizure.

The *Bankruptcy and Insolvency Act*, 1985, s 67(1)(b.3) now shields all RRSP contributions from seizure in a bankruptcy, except those made in the 12 months prior to bankruptcy.

Certain interests have been held to fall outside s 71 and therefore are not exempt from seizure. Partial interest and equitable interests do not fall within s 71 and thus, for example, a purchaser under a conditional sales agreement cannot prevent seizure of the goods sold under the agreement. Similarly, the section does not apply to a charging order or a garnishing order since the section only refers to “forced seizure and sale”. Thus, monies in court and debts or wages being garnished cannot form part of the judgment debtor’s exemption under the *COEA*.

a) Execution Procedure: Chattels, Money, Shares, Etc.

The judgment creditor obtains an order for seizure and sale (Small Claims Court) or a writ of seizure and sale (Supreme Court) directing the sheriff or bailiff to seize and sell sufficient goods or securities to satisfy the debt plus expenses (*COEA*, ss 58 and 60). The seizure of shares involves particular problems: see ss 64 and 65; see also *Peligren v Ajac's Equipment (1982) Inc (1984), 56 BCLR 17, [1984] 5 WWR 563 (BCSC)* [4].

Where the sheriff seizes goods, the sheriff’s officers are entitled to assume that all the goods and chattels on the premises are the property of the judgment debtor at the time of the seizure. The judgment debtor has a duty to claim that some of the property is personal property or the personal property of others: see *Supreme Auto Body v. British Columbia (1987), 21 BCLR (2d) 101 (CA)* [5].

b) Execution Procedure: Land

NOTE: Issues relating to land should be referred to a lawyer.

If the judgment creditor registers a judgment in any Land Title Office, a lien is created against the interest in the real property of the judgment debtor that is registered in the land registration district in which the judgment is registered (s 82 of *Court Order Enforcement Act*). Once a judgment is registered, the judgment creditor may seek a court order to have the sheriff sell the land (ss 92 and 96). If the land is held in joint ownership and the debt is in one owner's name only, the enforcement proceedings are similar, but a creditor can only apply to have the judgment debtor's portion of the land sold. In this case, the debtor's joint tenancy interest is considered severed. The buyer/new owner of the partial interest in the land can be the judgment creditor, a third party, or the non-debtor owner. After the sale of the land, the new owner or the remaining non-debtor owner can bring an application under the Partition of Property Act to 'buy out' the new owner. **The judgment creditor must renew the judgment after two years or it is extinguished** (ss 83 and 91, COEA), unless it is a non-expiring judgment (i.e. a judgment registered under the *Family Maintenance Enforcement Act*).

NOTE: Where there is a conflict between the *PPSA* and the *Land Title Act*, the *Land Title Act* prevails (*PPSA*, s 74) except in regards to ss 36, 37, and 49 of the PPSA.

c) Legal Advice on Execution Orders

Once the execution process has begun, the debtor usually has one final opportunity to pay. In the case of land, the sheriff may not sell until one month after receiving the order for sale (COEA s 100). The debtor should be advised to pay if possible because the amount recovered on a forced sale may not be as high as otherwise obtained on a normal sale of property.

4. Garnishment

Garnishment is a judicial proceeding in which a creditor asks the court to order a third party who is indebted to the debtor to turn over to the creditor any of the debtor's property. The creditor is the garnishor. The third party is the garnishee. The *COEA* provides that a garnishing order may be obtained before or after judgment.

5. Garnishment of Bank Accounts and other Accounts Receivable

a) Garnishment Before or After Judgment

A pre-judgment garnishing order is paid into court pending the outcome of the proceedings, and may be used in circumstances where the debtor's ability to pay may be compromised before judgment. A pre-judgment garnishing order is not available against wages. The creditor's action against the debtor must be for a liquidated (i.e. explicitly specified) or ascertained sum. Damages for a breach of contract must be quantified as a term of that contract (see *Ocean Floors Ltd v Crocan Construction Ltd (2010), 2010 BCSC 409* [6]*). A definition of liquidated sum is found in* Steele v Riverside Forest Products Ltd *(2005), 2005 BCSC 920* [7]. The accompanying affidavit to a pre-judgment garnishing order must disclose the nature of the cause of action and the specified amount claimed. Note that recourse to a pre-judgment garnishing order is extraordinary and therefore the provisions of the *COEA* must be strictly complied with or it may be overturned. The creditor will generally swear an affidavit in support of a pre-judgment garnishing order by themself.

A creditor who begins an action for a liquidated sum may seek to garnish a debt owed to the debtor to have the money paid into court to "ensure" payment if the creditor is successful in court. However, remember other judgment creditors may also be trying to ensure payment.

If the order has not yet been made and the debt is valid, it may be in the debtor's best interest to pay the creditor if possible, since the debtor is liable for payment of the costs of the garnishing proceedings.

Typically, it is the debtor who applies for a release of a garnishment order to substitute for an order for payment by instalments. However, if the order has already been made, the creditor should examine the possibility of having the garnishment released and an order for payment by instalments substituted under s 5. The creditor can also seek to have exemptions lowered in the case of garnishment of wages under s 4, resulting in the debt being repaid faster. The creditor should be advised that hardship may be used as a defence.

A garnishee who wishes to dispute indebtedness to the defendant or judgment debtor, should file a dispute notice as soon as possible with the court. If they do not dispute it, a second order, called an order absolute may be issued (see Appendix A: List of Relevant Documents: **Affidavit in Support of Garnishing Order After Judgment**). This order operates as a judgment and execution may be taken against the garnishee. Inactivity could render a garnishee liable even if they never owed the money to the defendant/judgment debtor.

b) Which Debts Can be Garnished?

Any debt that is "due or accruing due" to a judgment debtor may be garnished by a judgment creditor. This requires that the debt be an existing or perfected debt even though payment is not yet due. Bank accounts can be garnished as long as it is not a joint bank account. Garnishment against joint bank accounts can only occur when there is a court judgement against all joint account holders. For example, a creditor bank may garnish a debtor's personal account, including a joint account, to offset the debtor's debts to that bank after a determination of how much of the account's value each joint account holder is entitled to. Term deposits may be garnished as long as any conditions on withdrawal are mere matters of procedure and administration, though there may be complications where the account is transferable.

Registered plans such as RRSPs and RRIFs are exempt from enforcement processes under s 71.3 of the *COEA*. However, contributions made in the 12 months preceding the date of judgment may be enforced on. Also, many pension plan payments are exempt pursuant to s 63 of the *Pension Benefits Standards Act*. Section 15 of the *COEA* provides that a creditor may seek a garnishing order that will attach a debt maturing in the future. This form of garnishing order may be useful in attaching monthly payments, since all future monthly payments can be attached by one order rather than issuing a garnishing order for each payment.

c) Procedure for Pre-Judgment Garnishing Order

In order to obtain a pre-judgment garnishing order, a civil action must first be commenced by a creditor for the amount of the debt.

The creditor must swear in an affidavit that an action on the debt is pending, provide the date of its commencement, the nature of the cause of action, and the actual amount (i.e. liquidated or ascertained sum) of the debt, claim or demand, and that the same is justly due and owing. The affidavit may be sworn before or after the action is commenced (although the form of the affidavit will differ). The affidavit must also state that another person, the garnishee, is indebted to the debtor, and provide the garnishee's address (COEA, ss 3(2)(e) and (f)).

The garnishing order may be set aside if the procedural requirements are not strictly complied with because it is considered an extraordinary remedy. For example, a pre-judgment garnishing order will be set aside where the affidavit in support sets out an amount including interest and the affidavit does not allege the existence of an agreement on the part of the debtor to pay interest: see *Nevin Sadler-Brown Goodbrand Ltd. v Adola Mining Corp. and Prophecy Developments Ltd.* (1988), 24 BCLR (2d) 341. **Never** claim court ordered interest in the affidavit.

The court has discretion to set aside a pre-judgment garnishing order, but the applicant must submit a meritorious set-off claim or show extraordinary hardship arising out of the garnishment. While the plaintiff's solicitor may swear in an affidavit as to what is the amount owing (see *Caribou Construction v Cementation Co (Canada) (1987), 11 BCLR (2d) 122 (SC)* [8]*;* Trade Fortune Inc v Amalgamated Mill Supplies *(1994), 89 BCLR (2d) 132 (SC)* [9]), most practitioners

prefer never to swear an affidavit to support a pre-judgment garnishing order. Whenever possible, the plaintiff should swear the affidavit: see *Samuel and Sons Travel v Right on Travel* (1987), 19 BCLR (2d) 199. Practitioners should only swear an affidavit where they are personally aware of the facts and not just based on what a client alleges as fact. The remaining procedure is the same as for post-judgment garnishing orders (below) except that the court retains the money pending the action's outcome.

d) Procedure for Post-Judgment Garnishing Order

Post-judgment garnishing orders are not held to the same level of scrutiny as pre-judgment garnishing orders.

In order to obtain a post-judgement garnishing order, a judgment creditor or their solicitor must swear an affidavit stating:

a) That a judgment has been recovered;

b) The amount that is unsatisfied;

c) That another person, the garnishee, is indebted to the judgment debtor; and

d) The address of the garnishee's residence in the jurisdiction (s 3(2)).

The affidavit is filed in the court registry along with the form of order requested. The garnishee is then to be served with a copy of the order, which commands them to pay the money into court. A copy of the order must be served on the debtor at once, or within a time allowed by the judge or registrar by memorandum endorsed on the order . Failure to serve a garnishing order on a debtor "at once" may result in the garnishing order being set aside. Whether delayed service is fatal to a garnishing order depends on the circumstances of each case. See *Skybound Developments Ltd. v. Hughes Properties Ltd. (1985), 1985 CarswellBC 219, 65 BCLR 79 (CA)* [10] *for a discussion on this topic. The garnishee may dispute indebtedness to the judgment debtor (see* ***Section II.B: Legal Advice for Debtors Who are Garnished****, below). Where the garnishee pays money, the court keeps the money until it is paid out to the judgment creditor under ss 11, 12, and 13.*

Funds held jointly to the credit of the defendant and another person, who is not a party to the action, cannot be garnished, see *238344 BC Ltd v Patriquin et al (1984), 57 BCLR 224* [11]*. That case also cited cases of exceptions where a creditor bank exercised its right of offset, but* 238344 BC Ltd *suggested these were wrongly decided.*

e) Payment by Instalments

A debtor against whom a garnishing order has been made may apply for a release of the garnishing order, and for an order for the payment of the debt by instalments on the basis of hardship. This order, if granted, will bind the debtor's creditors, but will only continue for as long as the debtor is not in default on any payment for more than five days, and so long as no other garnishing order is issued against them for any other debt (s 5). There is an exception where a creditor who elects to have a garnishing order changed to payment by instalments will be barred from seeking a garnishing order after the debtor defaults (see *Bank of Montreal v Monsell (1994), 58 BCLR 11 (SC)* [12]*). The creditor may apply to have the order varied if new evidence of the debtor's finances comes to light.*

6. Garnishment of Wages

a) Judgment Required

Garnishment of wages can only occur after a judgment (s 3(4)).

b) Deductions and Exempt Wages

70 percent of any wages due by an employer to an employee is exempt from seizure or attachment under a garnishing order. Therefore, only 30 percent of wages after statutory deductions (i.e. Employment Insurance premiums, Canada Pension Plan, Income Tax, etc.) can be garnished (s 3(5)). However, a single person cannot be left with less than $100 per month (or calculated pro rata for a shorter period), and a person with dependents cannot be left with less than $200 per month (or calculated pro rata for a shorter period) (s 3(5)). However, where wages are garnished to pay maintenance or support for the debtor's family, the exemptions allowed to that person are 50 percent of wages not exceeding $600 per month or 33 and 1/3 percent of wages exceeding $600 per month (*COEA* s.3(7)). These exemptions must not be less than $100 per month (s 3(7)).

Garnishment by the Family Maintenance Enforcement Program is called a Notice of Attachment. The *Family Maintenance Enforcement Act Regulation*, BC Reg 346/88 contains rules about exemptions from attachment. These rules are different than those found in the *COEA*.

c) Variation of Exemption

A debtor whose wages have been garnished may apply under s 4 of the COEA to have the exemption varied. The registrar or judge shall, within three days after receiving the application, notify persons affected by it and a hearing will be held within seven days.

With respect to maintenance orders, under s 18(2) of the *Family Maintenance Enforcement Act*, upon application by a creditor, the court can issue a garnishing order against the debtor without giving notice.

A separate garnishing order must be sworn and issued for each payment of wages to the debtor, since one garnishing order is good for only one debt that is owed to the debtor.

d) Employer's Liability for Firing Employee

No employer may fire or demote an employee because that employee has their wages garnished. An employer who does so is liable on summary conviction to a fine of up to $500 or up to three months in jail or both, and an employee must be reinstated with back pay if they are fired for garnishment of wages (s 27). One should consider the fact that the garnishment may have been the final reason among others for termination, and may be difficult to prove.

7. Garnishment of Statutory Benefits

Benefits including Employment Insurance, Canada Pension Plan, Old Age Security, workers compensation, social assistance and provincial disability benefits are usually exempt from garnishment, seizure or attachment. The exemptions are found in the statutes that govern these respective benefit programs.

However, this exemption from garnishment does not apply to offsets or to debts to the government. For example, debts to the federal crown may be collected from Canada Pension Plan benefits. Canada Revenue Agency is now routinely offsetting CPP and other benefits. Social assistance (welfare) is the only kind of statutory benefit that is truly exempt from garnishment. This also applies to Canadian Emergency Response Benefits and Canada Child Benefits received under the COVID-19 Emergency Response Act. **The creditor or debtor should also be advised that this protection against garnishment may not extend to a bank account into which the exempt income is deposited if it is**

commingled with other funds.

8. Enforcing a Judgment Outside of BC

It is possible to register a B.C. judgment in many foreign jurisdictions, including other Canadian provinces. The requirements for registration may differ from jurisdiction to jurisdiction, so the judgment creditor should consult with counsel in the destination jurisdiction to determine the specific requirements. A s 30 application to B.C. courts gives the court jurisdiction to issue a certificate in a reciprocating jurisdiction.

It is also possible, and sometimes more efficient, to sue on the judgment in the province or country where the judgment debtor's assets are located. Normally the foreign court requires a certificate. A s 30 application to B.C. courts gives the court jurisdiction to issue a certificate in a reciprocating jurisdiction.

C. Unsecured Creditors: Remedies and Options Before Judgment (Liens)

A lien is a claim, encumbrance, or charge on property (real or personal) for payment of a debt, obligation, or duty. In many cases, a creditor is entitled to place a hold or lien over specific property that has benefitted from the individual's material or labour. It acts as security from the individual's material or labour and as security for the payment to the creditor. **Property liens are complicated and potentially serious. Please refer to a lawyer.** The most common liens are listed below.

1. Liens on Land (Builder's Liens)

> **NOTE:** Builder's lien issues involve limitation periods and real property registrations and filings. The **time limitations are extremely strict**; solicitors have been known to lose suits because they filed a day late. **All cases should be immediately referred to a lawyer.** Refer to: *Builder's Lien Act*, SBC 1997, c 45.

Under the current *Builder's Lien Act*, a worker, material supplier, contractor, or sub-contractor who does or causes to be done any work upon, or supplies material, or both, for an improvement, has a lien for the price of the work and material, upon the interest of the owner in the improvement, upon the improvement itself, upon the material delivered to the land, and upon the land itself (s 2). "Price" does not include interest on outstanding accounts or court-ordered interest: see *Horseman Bros. Holdings Ltd v Lee* (1985), 12 CLR 145 (BCCA).

After a claim of lien is filed against land, the lien-holder may enforce their claim by obtaining a court order for the land to be sold (s 31). When a writ is issued, the lien holder must register a certificate of pending litigation against the land within one year of the date of its filing (s 33(1)), which prevents any dealings with the title to the land until after the court determines the validity of the claim. No claim of lien can be filed if the claim is for less than $200 (s 17).

a) Procedure

A claim of lien on land is filed in the Land Title Office (s 33(1)). A claim of lien must be in the prescribed form or it is extinguished (s 22). It takes effect from the time when work began, or when the first material was supplied for which the lien is claimed. A claim of lien has priority over all judgments, executions, attachments, and receiving orders recovered, issued, or made after that date (s 21).

b) Limitation Period

The time for filing a claim of lien is governed by s 20 and the time limitations are strict. The following limitation periods apply:

- **If a certificate of completion has been issued for a contract or subcontract, the claims of lien of the contractor, subcontractor, or any person engaged by or under the contractor or subcontractor must be filed no later than 45 days after the date on which the certificate of completion was issued.**
- **If there is no certificate of completion, a claim of lien may be filed no later than 45 days after the head contract or improvement has been completed, abandoned, or terminated.**

Under s 4, if a person agrees to have repairs done, they must withhold 10 percent of the value of the work or material as they are actually provided under the contract or subcontract, or the amount of any payment made on account of the contract or subcontract price, whichever is greater, from the contractor for a period of 55 days after the certificate of completion is issued. This covers the possibility of having to pay workers, subcontractors, and suppliers who were not paid for their services by the contractor. This holdback must not be retained from a worker, material supplier, architect, or engineer (s 4(6)). These funds are to be paid into a separate trust account at the time of payment.

In addition, all improvements done with the knowledge, but not at the request, of the owner will be held to be done at the request of the owner (s 3(1)). This rule does not apply to improvements made after the owner files a notice of interest in the Land Title Office. A notice of interest is a prescribed form warning other persons that the owner's interest in the land is not bound by a lien claimed under the Act for an improvement on the land unless that improvement is undertaken at the express request of the owner (s 1).

Unless an action to enforce a claim of lien is started and a certificate of pending litigation is registered in a Land Title Office within one year, the lien is extinguished (s 33(5)). Note that the owner may require the lien-holder to commence an action within 21 days, by sending the holder of a claim of lien notice in writing (s 33(2)).

2. Liens on Chattels (Repairer's Liens)

a) Possessory Lien and Right to Sell

Under the *Repairer's Lien Act* [*RLA*] RSBC 1996, c 404 [*RLA*] every mechanic or other person who has bestowed money, skill or materials upon any chattel for its improvement, has a common-law possessory lien on the chattel while it remains in their possession. The lienholder may keep the chattel until paid. Where the person holds the chattel for 90 days, they may sell it upon compliance with statutory provisions (s 2). If the lienholder gives up possession prior to filing a lien, they lose the lien (except with liens on automobiles and aircraft, etc.) and are restricted to ordinary remedies in court.

NOTE: The Commercial Liens Act received Royal Assent on March 31st, 2022, but has not yet come into force. It will come into force by regulation of the Lieutenant Governor in Council. The act overhauls commercial liens, and repeals several lien acts, including the Repairers Lien Act.

3. Liens on Automobiles, Aircrafts, Boats and Outboard Motors

If a garage keeper relinquishes possession of an automobile, aircraft, boat or outboard motor, they do not lose the lien, provided that the debtor, before giving up possession, signed an acknowledgement of indebtedness (e.g. invoice, statement of account, etc.) (s 3(1)).

a) Procedure

Where a garage keeper gives up possession of an automobile, etc., and afterwards files a financing statement with the Personal Property Registry to register the lien, the lien is not lost notwithstanding the surrender of possession and the garage keeper may enforce the lien by issuing a warrant for seizure to a licensed bailiff or the sheriff (s 11). The automobile or aircraft may then be sold by following the procedures for the sale of chattels set out in s 2 (s 12). A

warrant may only be issued within 180 days of filing the lien (s 11).

b) Limitation Period

The garage keeper has, pursuant to s 3 of the *Repairers Lian Act*, 21 days to register a lien once they have given up possession.

On the registration of a financing statement, the lien will expire after 180 days, unless the automobile, etc., has been seized within that period (s 4).

4. Buyer's Lien

When a buyer has made a partial or full payment to a seller - and the goods are unascertained or future consumer goods, the buyer can place a lien against all goods that are in, or will come into, the possession of the seller that correspond with the description or sample of goods agreed upon (See Part 9 of the *Sale of Goods Act*, RSBC 1996, c 410). This holds as long as the goods were not sold to someone else. The buyer also has a lien against any bank account where the seller normally deposits the proceeds of sales. This lien has priority over all other security interests, but generally is not valid in bankruptcy. Generally, provincial liens will only be recognized in bankruptcy if the specific property can be identified. If the seller has maintained records or documents that clearly identify the goods for which a deposit was paid, the buyer may be entitled to the lien. Where the seller maintains a separate trust account, the buyer can file a property claim for the trust funds which is in priority to other security interests. For examples of the trustee in bankruptcy (of the buyer's estate) having priority over unpaid sellers, see *In the Bankruptcy of Ian Gregory Thow, 2006 BCSC, 1414* [13] *and* In the Matter of the Bankruptcy of Anderson's Engineering Ltd. *2001 BCSC 1476* [14].

The seller can discharge the lien by handing over the good or returning the buyer's deposit, but the latter will not relieve the seller from the possibility of suit for breach of contract. The buyer's lien permits the buyer, upon application to court, to have goods seized and sold and have the proceeds delivered, or just have the goods delivered.

5. Liens for Storage

The *Warehouse Lien Act*, RSBC 1996, c 480 provides that every warehouse owner or operator has a lien on goods deposited with them for storage, whether deposited by the owner of goods or by their authority, or by any person entrusted with possession of the goods by the owner, or by their authority (s 2(1)). This right does not apply to unpaid charges for goods previously stored; see *Re Dutton Pacific Forest Products Ltd. (1980), 117 DLR (3d) 507 (SC)* [15]*, sub nom* Squamish Terminals Ltd. v Price-Waterhouse Limited*. After the warehouser gives the appropriate notices, the goods may be sold to collect the charges (ss 3 and 4).*

NOTE: The Commercial Liens Act received Royal Assent on March 31st, 2022, but has not yet come into force. It will come into force by regulation of the Lieutenant Governor in Council. The act overhauls commercial liens, and repeals several lien acts, including the Warehouse Lien Act.

6. Legal Advice on Liens

If the lien is valid pursuant to the "Builders Liens Act" and the debtor wishes to discharge the lien, but disputes the amount of the claim, the debtor may wish to make the payment to the court by application under s 23(1) of the *Builder's Lien Act*. This discharges the liability with respect to the Lien under s 23(2) The court will then assess the proper amount to be paid by receiving evidence, or directing a trial.

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IV. Debtors' Options

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

Being in debt is obviously stressful for debtors. Debtors should be made aware that measures can be taken against overeager creditors. Although creditors may choose to not initiate legal action, a **debtor should not assume that they can ignore their responsibilities.** The debtor may try to communicate with the creditor(s) in hopes of reaching an agreement about repayment, and to avoid potentially costly legal battles. However, this is only to be done when the debtor wishes to acknowledge the debt.

Under the *Limitation Act*, SBC 2012 c. 13. a creditor generally cannot succeed in pursuing a debtor after two years from the last payment or acknowledgement of the debt. Communications with creditors that acknowledge the debt will initiate a new two year time horizon in which a creditor is able to pursue the debtor. Under s 24(7) of the "Limitation Act", a partial payment of a debt refreshes the limitation period as it constitutes an acknowledgement of debt. To avoid acknowledging a debt, it is important that the following phrase be included in the letter: “This communication is provided solely for the purpose of [state purpose of letter] and does not constitute an acknowledgement of the alleged debt described (above).” This should be carefully considered when a debtor is approaching the end of a two year timeline in which they will be relinquished of legal responsibility for the debt at issue. Since this change to the limitation period, several major creditors have been pursuing debtors through in house collections more aggressively, rather than sending the accounts to third party agencies. The limitation change may also be leading creditors to pursue debtors in court with greater frequency.

If an acknowledgement of the debt occurs, both the debtor and the creditor must be realistic about the situation. Both parties must assess the costs and delay involved in any litigation. In such negotiations, the latter factors may work in favour of the debtor.

A debtor may wish to seek legal advice before discussing or disputing a debt with a creditor, but this is not always necessary. If the debtor believes they do not owe the debt they should consider legal advice. If the debtor believes they owe the money but disputes the amount claimed, they may also want to consider legal advice. However, if the debtor simply cannot meet the payment terms, it is recommended that they seek credit counselling. See Section V. Dealing With Debt.

Where a creditor is pressuring a debtor for payment, a debtor may send a “without prejudice” letter to the creditor explaining their position and/or offering a settlement. See Section V.F: Settlements.

A debtor cannot seek to avoid defending an action in court where that action takes place in another province on the grounds that the court lacks jurisdiction. An action under s 29 of the *COEA* to enforce an extra-provincial default judgment may proceed where the debtor was served but chose not to offer any defence to the original statement of claim. The creditor simply registers a judgment from another province in B.C., and it becomes a B.C. judgment. Furthermore, as a result of the decisions in *Morguard Investments v De Savoye, [1990] 3 SCR 1077* [1] *and* Beals v Saldanha*, [2003] 3 SCR 416, 2003 SCC 72* [2], American and other international default judgments can also be enforced in B.C.

The process for enforcing a foreign judgment is simplified where the judgment originates from one of the reciprocating states listed in the COEA. Examples of reciprocating states include all Canadian Provinces, most Australian states except for Western Australia, the United Kingdom, Germany, and a handful of states from the U.S. including California, Oregon, Colorado, Alaska, Idaho, and Washington. A comprehensive list can be found at: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/courtorderenflist. Judgments from one of the foregoing reciprocating states can simply be registered in the B.C.S.C.

If the judgement does not originate from a reciprocating state, a creditor must bring an action on the judgment or on the original cause of action instead. This process requires a trial on the judgment or original action, where the court will determine whether to enforce the foreign judgment.

> **NOTE:** There have been judgments for the creditor where the creditor pursues the debtor after the two-year timeline. This may happen where the creditor is inexperienced or neglectful, the debtor does not defend themselves, or the period between payments is not reviewed. If the judgment has been issued by the court, it may be more cost-effective to try and settle the matter with the creditor instead of challenging it in court.

A. Legal Advice for Debtors Under Secured Transactions

The information in this section is specific to the defendant's point of view, but is most usefully read in conjunction with Section II: Creditors' Remedies. If a student needs more information, that section may help to complete the picture.

Where the debtor is in default under a security agreement, s 56 of the PPSA provides that the secured party has against the debtor the rights and remedies provided in the security agreement (provided such do not derogate those rights given to the debtor by the PPSA) as well as those specifically provided by the Act.

Sections 58 and 59, contain rules for seizing and disposing of collateral. These sections provide that, unless the security agreement states otherwise, where the debtor defaults on their payment, the creditor may elect to take possession of the collateral pursuant to the contract, dispose of the collateral and then sue for any amount still owing. Section 67, provides for a more limited set of remedies where the collateral takes the form of consumer goods – known as the "seize or sue" rule. Formerly, under legislation repealed by the PPSA, all creditors could only seize or sue but not both. The principle of "seize or sue" still applies to "consumer goods" (see Section II.A.6.: Seizure and Section II.A.7: Disposal of Collateral); it no longer applies to commercial goods. The PPSA defines "consumer goods" as those goods that are used or acquired for use primarily for personal, family or household purposes. "Commercial goods" are those goods used for commercial purposes.

1. Notice

Subject to the circumstances where notice is not required as per s 59 (17) (i.e. for perishable collateral, collateral requiring disproportionately high storage costs relative to its value, etc.), the requirements for notice are outlined in ss 59(6) and (10): the secured party or receiver, as the case may be, must provide at least 20 days' notice of an intention to dispose of the collateral to parties including the debtor and any other creditor. The clinician should check to make sure that the debtor received notice in time and in the correct form. See Section II.A.8: Notice to Dispose of Collateral for a complete account of the notice requirements that must be met under the PPSA.

> **NOTE:** The forms of notices under the PPSA depend on a number of variables, including the nature of the security and the terms of the security agreement. Creditors or debtors seeking advice concerning the validity of notices should be referred to a lawyer.

2. Limitation of the Right of Seizure

With respect to collateral which is a "consumer good," where the debtor has paid at least two-thirds of the total amount secured, the creditor may not seize the good without first obtaining a court order (s 58(3) of the PPSA).

3. Rights of a Debtor on Realization

The PPSA preserves the debtor's (but not the secured party's) rights and remedies under other statutes that are not inconsistent with the *PPSA*, as well as the specific rights and remedies provided in the security agreement, ss 17, 17.1 and 56(2)(b).

4. Rights of Redemption and Reinstatement

Under s 62, a debtor has redemption rights. Any person entitled to notice of a pending disposition of collateral may "redeem" the collateral by tendering to the secured party fulfilment of the obligations secured by the collateral plus the reasonable expenses incurred by the secured party associated in seizing the collateral or otherwise preparing it for disposition. The aforementioned obligations may simply be the amount in arrears; however, it is more often the case that an acceleration clause applies, and that the obligations will be the total amount of the debt. Where the security agreement contains an acceleration clause, the debtor may apply to court for relief from the consequences of default or for an order staying enforcement of the security agreement's acceleration provision.

Under s 62(1)(b) of the PPSA, where the collateral is a "consumer good", the calculation of the obligation secured and the obligation that must be tendered is varied. The debtor may "reinstate" the security agreement by paying only the monies actually in arrears – negating the operation of any acceleration clause. The debtor may waive this right but any such agreement must be in writing after default. Note that the number of times the debtor may reinstate the security agreement is limited depending on the period of time for repayment set out in the security agreement; however, the frequency of reinstatement may be varied by agreement between the parties.

5. Execution

See Section III.B.2: Execution.

B. Legal Advice for Debtors Who are Garnished

The details of how an order for garnishment is obtained are found in the creditor's remedy portion of the chapter, but debtors should be reminded that hardship may be a defence to garnishment. Therefore, a pre or post-judgment garnishment order may be varied where it would be unfair to the judgment debtor; it is generally easier to have a pre-judgment order varied.

Under ss 3 or 4 of the *COEA*, a judge has the discretion to set aside a garnishing order once the debtor has made an application. A judge will consider:

For pre-judgment orders only:

1. The strengths and weaknesses of the defendant's defence to the claim.

For both pre and post-judgment orders:

1. Whether the judgment leaves the debtor with an inordinately low cash flow;
2. Whether there is a risk that the grant or continuance of the order will cause an injustice to the debtor;
3. Whether there is a possibility of abuse of process by the creditor; and
4. Whether the garnishment of certain payments, such as social assistance benefits, run counter to public policy

Furthermore, ss 3(5) and 4(4) of the *COEA* describes the limits to which a debtor's wages may be garnished. Thus, if a debtor has a low income or has savings they depend on for the necessities of life, they can have the amount that is being garnished (or proposed to be garnished) reduced, the terms of the order varied, or the garnishment ended. A person who is subject to a Notice of Attachment under the Family Maintenance Enforcement Program can also try to have the amount that is being 'garnished' reduced. Additionally, a garnishing order from a civil action has to be renewed monthly, while a garnishing orderfor maintenance does not.

If the debtor receives income from a statutory benefit that is exempt from garnishment (e.g social assistance or COVID-19 benefits), they should be advised as to how to protect their money after it is paid to them. The right of offset allows banks to seize deposited funds from an account at that institution to cover a loan or account in default. If funds which are exempt from garnishment are deposited into a regular account that is commingled with other funds, they will not be protected from seizure by the financial institution. Their income should be safe if it is paid by direct deposit into an account at an institution to which they do not owe any money. No other deposits should ever be made into this account. It is also helpful to speak to a branch manager so that they understand the purpose of the account. A debtor should be advised that they have a right to open a personal bank account at a chartered bank, even if they do not have a job or do not have money to put in the account right away. However, the applicant can be refused if the bank employee suspects fraud or experiences harassment from the applicant. For further information, see: http://www.fcac-acfc.gc.ca and navigate through the website by clicking on Consumers > Resources > Publications > Banking > Opening a personal banking account: understanding your rights.

> **NOTE:** This right to open a personal account does not extend to credit unions. Credit unions are regulated under provincial legislation rather than the federal act and they have wider powers to deny applicants. For further information, visit https://www.bcfsa.ca.

C. Harassment by Debt Collectors

The *Business Practices and Consumer Protection Act*, SBC 2004, c 2 [*BPCPA*] provides for the licensing and regulation of debt collectors, which is carried out by Consumer Protection BC. The statute provides that jurisdiction is determined by the location of the debtor. Under the statute, Consumer Protection BC has wide powers of investigation.

1. Unreasonable Collection Practices

A collector must not communicate with a debtor, a member of the debtor's family, a relative, a neighbour or the debtor's employer in a manner or with a frequency as to constitute harassment. The following constitutes harassment:

a) Using threatening, profane, intimidating or coercive language;

b) Exerting undue, excessive or unreasonable pressure; and/or

c) Publishing or threatening to publish a debtor's failure to pay (*BPCPA*, s.114).

A collector cannot communicate with a debtor at the debtor's place of employment unless one of the following conditions is met:

a) The collector does not have the home address or telephone number for the debtor and the collector contacts the debtor solely for the purpose of requesting the debtor's home address or telephone number or both;

b) The collector has attempted to contact the debtor at the debtor's home address or telephone number, but the collector has not contacted the debtor in any of these attempts (the collector is limited to one verbal attempt at the debtor's place of employment (s 116(2)), meaning one call even if the debtor doesn't answer or hangs up); or

c) The collector has been authorized by the debtor to communicate with the debtor at the debtor's place of employment (s 116 (1)).

When the collector is contacting the debtor, they must indicate the name of the creditor with whom the debt was incurred, the amount of the debt, and the identity and authority of the collector to collect the debt from the debtor (s 116 (3)).

The collector must only contact a debtor through writing if the debtor provides a mailing address and notifies the collector in writing that they wish to be contacted only by writing. (s 116 (4)). Be aware that ignoring written communications could result in a collector starting legal proceedings, notice of which would be sent via writing, so a debtor should always be reading the communications and carefully considering if and how they should respond.

In collecting or attempting to collect payment of debt, a collector must not supply any false or misleading information; misrepresent the purpose of communication; misrepresent the identity of the collector or, if different, the creditor; or use, without lawful authority, a summons, notice, demand, or other document that suggest or implies a connection with any court inside Canada (s.123).

If a creditor does not obey the *BPCPA*, the debtor may report the creditor to Consumer Protection BC [3].

2. Limits on Right of Seizure

Under s 122, no collector, whether on their own behalf or on behalf of another, directly, indirectly, or through others, shall:

a) Unless there is a court order to the contrary, remove from the debtor's private dwelling any personal property claimed under seizure, distress, or repossession, in the absence of the debtor, the debtor's spouse, the debtor's agent, or an adult resident in the debtor's dwelling;

b) Seize, repossess or levy distress against any chattel not specifically charged or mortgaged, or to which legal claim may not be made under a statute, court judgment, or court order; or

c) Remove, seize, repossess, or levy distress against any chattel during a day or during the hours of a day when such removal, seizure, repossession or distress is prohibited by regulations under this Act.

3. Consequences of Contravention of the Business Practices and Consumer Protection Act

Where there is evidence of misconduct by the debt collector, the Director may suspend, cancel, or refuse to issue their licence (s 146(1)). Such conduct includes (s 146(2)):

a) Contravening this Act or regulations;

b) Failing to meet the minimum requirements for a licence;

c) Contravening a condition of a license;

d) Engaging in a pattern of conduct by the debt collector that shows that they are unfit to have a licence; or

e) Being convicted of an offence under Canadian law for conduct that shows they are unfit to have a licence.

4. Legal Advice for a Harassed Debtor

If there may be a violation of the *Business Practices and Consumer Protection Act*, the debtor should do the following:

a) Find out the name of the collector and/or agency;

b) Record the exact words or practice followed by the debt collector or the agency; and

c) Detail the time and dates of the calls or visits.

With the above information the debtor should contact Consumer Protection BC for the name of the complaints manager for the collection agency the debtor is dealing with. This complaints manager will work with the debtor to resolve the complaint, including disciplinary action, if appropriate. Their website is http://www.consumerprotectionbc.ca and includes resources regarding consumer and debtor rights, as well as dispute resolution. It also includes a form for registering a complaint with Consumer Protection BC.

Finally, if the debtor suffered damages or inconvenience as a result of the agency's collection practices, a Small Claims action may be commenced (s 171, 172).

D. Credit Reporting Agencies

Businesses offering goods or services on credit often rely on credit bureau reports for financial and prior debt information on their customers. See *Business Practices and Consumer Protection Act, ss* 106-112.

The *Business Practices and Consumer Protection Act* regulates the activities of the credit bureaus in order to minimize unfair treatment of the party seeking credit. Federal legislation, such as the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*] and the *Privacy Act*, RSC 1985, c P-21 also outline the requirements for organizations in their use, collection, and disclosure of personal information in their business practices. Credit information that these bureaus can disclose is the most common type of personal information, and includes one's:

a) Name, date of birth and address;

b) Current and former marital status;

c) Current and former place of work;

d) Payment habits; and

e) Debts owing.

A credit reporting agency cannot give out an individual's personal credit report without that individual's consent. When one seeks credit, they will be asked to consent to the lender obtaining a credit report or a credit check. (After consent is given, the lender can obtain a "soft check" periodically meaning they can view the report relating to their loans).

Certain information cannot be included in a credit report, e.g., criminal charges (unless the individual was convicted), convictions more than six years old, and information about race, religion or political affiliation (BPCPA, s 109(1)).

Credit reporting agencies' records are not always accurate and up to date. The quality and accuracy of the credit information depends on the credit information provided by the credit-granting companies who sign up with the credit reporting agencies. If an individual finds incorrect information on their file, they can report the error to the agency that provided the information to have it corrected. If an individual has proof that their credit report contains an error and they are unable to resolve it with the creditor directly, the individual should contact the credit reporting agencies who are reporting the incorrect information.

The agencies will assist them in finding a resolution. **Any individual who is a victim of identity theft should immediately file a police report**. The *BPCPA* allows individuals to provide a 100 word explanation to the reporting

agency, which is to be kept and reported with their file (s.111); this may be a useful provision if a business has reported a disputed claim regarding yourself, or if you are a victim of identity theft. Any victim of identity theft is recommended to post a comment on their credit report. This notifies creditors of the fact that the identity theft has taken place, and prevents additional credit being granted without a thorough review by the creditor. It is an offence (punishable by a fine of up to $10,000 or imprisonment for up to 12 months) to knowingly supply false or misleading information to a reporting agency (s 112).

Consumers may obtain their own credit report for free at least once a year by telephoning the credit bureaus directly or completing the form available on their websites Alternatively, a consumer can obtain an instant credit report by using a credit card to pay a one time fee.

There are currently two main credit reporting agencies in Canada, listed below.

Equifax

Toll-free: 1-800-465-7166

Website: http://www.equifax.ca

TransUnion

Toll-free: 1-800-663-9980 (English); 1-877-713-3393 (French)

Website: http://www.transunion.ca

> **NOTE:** Individuals should check their credit history regularly. Industry specialists suggest once per year. Credit reporting agencies will send a person a copy of their credit history by regular mail for free. As each agency operates in a different matter, individuals are encouraged to request their credit history from both agencies, as they will likely be different.

References

[1] https://www.canlii.org/en/ca/scc/doc/1990/1990canlii29/1990canlii29.html?autocompleteStr=Morguard%20Investments%20v%20De%20Savoye%2C%20%5B1990%5D%203%20SCR%201077&autocompletePos=1

[2] https://www.canlii.org/en/ca/scc/doc/2003/2003scc72/2003scc72.html?autocompleteStr=Beals%20v%20Saldanha%2C%20%5B2003%5D%203%20SCR%20416%2C%202003%20SCC%2072&autocompletePos=1

[3] http://www.consumerprotectionbc.ca

V. Dealing with Debt

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

A. Introduction

NOTE: The following applies to individuals only.

Before giving or receiving advice dealing with debt, ensure that the debtor, in fact, is liable for the alleged debts. Be sure to determine who the actual creditor is. When a creditor assigns an account to a third party agency the third party does not become the creditor. There are situations, however, where third parties purchase accounts from creditors and thereby become the creditors themselves. Creditor remedies can differ depending on the type of creditor, in particular if a debt is owed to the government.

Most people do not seek advice until long after they have become overburdened with debts, however, getting help sooner rather than later will leave people with more options available to them. Financial counselling may be of assistance to explore which options will work best.

NOTE: Many counsellors and trustees provide an initial consultation at no cost. Consumers should be aware that unless they are going to meet with a lawyer they need not pay for an initial consultation.

B. Debtors' Assistance Referrals and Resources

The Credit Counselling Society is a non-profit organization that assists people who are experiencing difficulties with debts. They provide free and confidential counselling with highly trained counsellors. They can answer questions over the phone or by online chat, Monday – Saturday, with extended hours.

NOTE: Exercise caution when hiring unregulated companies that promise to "reduce" a consumer's debt. Effective April 1, 2016, any debt repayment agent and any corporation that collects and/or settles debt in BC should be registered with the Consumer Protection Agency (the Credit Counselling Society is a licensed organization). For information on your rights relating to debt collection, refer to the Debt Collection tab on the Consumer Protection Agency website [1]. Please see the *Business Practices and Consumer Protection Act,* s 127 for more information on debt repayment agents.

Credit Counselling Society

Online	Website [2]
Address	330 - 435 Columbia Street New Westminster, B.C. V3L 5N8
Phone	1-888-527-8999

The Financial Consumer Agency of Canada ("FCAC") publishes a great deal of useful information on consumer's rights as they relate to financial institutions, including information on opening personal banking accounts and guidelines for garnishing joint accounts: see http://www.fcac-acfc.gc.ca. You should be advised that credit unions in B.C. are governed by the provincial BC Financial Services Authority ("BCFSA"). See https://www.bcfsa.ca/for further details.

The Public Legal Education and Information Network's "Clicklaw" web site has a helpful section titled "Debt". Articles and information on various topics relating to consumer protection, debt and Small Claims Court in British Columbia can

be found online at: http://www.clicklaw.bc.ca.

Information on how to deal with debt collectors and collection agencies and harassment can be found on the Clicklaw website or through Consumer Protection BC online at: http://www.consumerprotectionbc.ca.

The Office of the Superintendent of Bankruptcy in Canada, an agency of Industry Canada, assists debtors by providing them with many useful online resources such as "Dealing with Debt: A Consumer's Guide" and "Debtor's Frequently Asked Questions". A full directory of licensed trustees in bankruptcy is available on their website: http://www.ic.gc.ca/app/osb/tds/search.html?lang=eng. A licensed trustee in bankruptcy will provide a free confidential assessment of your financial affairs and advise you of the merits and consequences of filing a consumer proposal or bankruptcy.

For further information the Office of the Superintendent of Bankruptcy can be contacted at:

Office of the Superintendent of Bankruptcy

Online	Website [3]
Address	2000 - 300 West Georgia Street Vancouver, B.C. V6B 6E1
Phone	(877) 376-9902 Fax: (604) 666-4610

Also refer to Section F below, *Settlements*.

C. Communicating with Creditors when Unable to Make Contractual Payments

> **NOTE:** Before communicating with creditors, debtors should be aware of the consequences of acknowledging a debt as a result of the *Limitation Act* SBC 2012 c 13. Under the Act, for debts last acknowledged from June 1, 2013 onwards, after two years since the last acknowledgement of a debt by the debtor, a creditor has no legal recourse for pursuing the unpaid debt. Therefore, by instructing a debtor to acknowledge a debt, even implicitly, a clinician will create a renewed two year time frame for the creditor to initiate legal action against the debtor. See note above, at the start of Section III, for further information.
>
> **NOTE:** Debtors should also be aware that if a judgement has been rendered against them it can be enforced for 10 years after the date of judgement (s 7). Refer to the *Limitation Act* for exceptions to this rule (s 23).

Depending on a consumer's circumstances, they may need to contact their creditors to ask for assistance in getting through financially difficult times. Most people truly want to honour their commitments; however, they may not be able to do so at this time. If someone needs help with determining what their budget is and if they have surplus income to offer their creditors a reduced payment, the Credit Counselling Society is able to help consumers at no cost: 1-888-527-8999.

If the debtor has enough surplus income in their budget to repay their debt, they may wish to contact their creditors in writing and offer reduced payments until they are in a position to make contractual payments again. **This is not a legal arrangement.** A sample letter requesting reduced payments can be found on CCS's website at http://www.nomoredebts.org/debt-help/dealing-with-creditors/debt-letters.html.

The steps involved in this reduced payment are:

1. Determine the amount(s) owed and to whom (verify with the creditors rather than relying on the debtors);
2. Determine how much money is available to pay to creditors, keeping the basic standard of living in mind;
3. Consider if the debtor has assets, bank accounts or investments at risk;

4. Consider the nature of the debt and if someone else would be impacted if the debtor is unable to make full payment, e.g. a joint credit card;
5. Work out a payment plan for the creditors on a pro rata basis;
6. Write the creditor a short letter outlining your situation and providing proof of reduced financial capacity, e.g. EI stub;
7. Send or fax the above letter with supporting documentation and retain proof of the creditor receiving said letter (e.g. fax transmission report), retain a copy for your file;
8. Update creditor periodically, e.g. if debtor's situation stays the same or improves and if they're able to resume contractual payments.

> **NOTE:** Contact the Credit Counselling Society for free help with this process if needed. The creditors may feel the reduced payments are not acceptable, but would likely not pursue alternative legal action if this is all the debtor can afford at this time. Communication with the creditors is vital, especially if a consumer has no ability to make payments at this time.

D. Debt Consolidation and Refinancing

Creditors will often offer refinancing or debt consolidation as the solution to the debtor's financial problem. The interest rate may be higher for the consolidation. Terms and conditions will determine total interest paid and the payment period. If making payments in the first place is the problem, consolidation loans may not be the solution. All creditors should be treated on a pro rata basis; if the consolidation only satisfies a particular creditor, the debtor should ensure they are at least able to meet the minimum payments owing to all other creditors.

> **NOTE:** It is important for debtors to be conscious of predatory lending and the current criminal rate of interest under section 327(1) of the Criminal Code. Bill C-47, which received royal assent on June 22, 2023, proposed an amendment to the criminal interest rate from 47 percent annual percentage rate (APR) to 35 percent APR. Bill C-47 also proposed to adjust the payday loan exemption and limit the interest that can be charged on payday loans.

E. Voluntary Debt Repayment Programs

When someone has some ability to repay their debts, but is unable to meet the minimum payment requirements of their creditors, contact the Credit Counselling Society for help determining if the Debt Management Program (DMP) at the Society might be an option. This is an agreement between a debtor, to make set, reduced monthly payments, and their creditors, who in return agree to accept reduced payments and who often suspend or reduce ongoing interest charges. A debtor agrees not to incur further debt while on the program. If a debtor defaults from the program, creditors may proceed with any and all remedies available to them. The debtor should contact the Credit Counselling Society for more information at 1-888-527-8999.

> **NOTE:** Though non-profit, the Credit Counselling Society does charge a small fee to administer the Debt Management Program (DMP). While counselling is free, CCS charges a one-time setup fee of no more than the average monthly payment to creditors to a maximum of $75 upon entering the DMP. Once a debtor has entered into the program and begins making payments, and only upon written acceptance by creditors, CCS charges 10% of a debtor's deposit to a maximum of $75 per month. CCS will consider reducing or waiving fees where they would become a barrier to debtors needing the help of a DMP.

F. Settlements

Depending on the consumer's circumstances, their creditors may be willing to accept a settlement on a portion of what is owed. If a consumer has funds available, they can approach their creditors in writing to accept a onetime lump sum payment. In exchange, the creditors agree to report the debt as "settled' to all credit reporting agencies. It is essential that the consumer get this agreement in writing from the creditors before sending any money for the settlement.

Debtors should be advised that some agencies that advertise "debt settlement" services may take advantage of debtors. Debtors should be aware of agencies that demand upfront fees before a settlement is negotiated. During the pay period of a settlement there is no protection from legal action or garnishes. Contact the Credit Counselling Society for help with the settlement process if needed. **Please consult the Financial Consumer Agency of Canada's warning regarding debt reduction companies at:**

http://www.fcac-acfc.gc.ca/eng/about/news/pages/ConsAlert-ConsAvis-0.aspx?itemid=170

G. Government Debt

The government is the most powerful creditor in Canada and has unique remedies available to it. For example see Section III.B.7: Garnishment of Statutory Benefits. There is also a category of government entities called "tax payer support entities." For debts owed to these agencies the six year limitation period still applies. Commercial crown corporations of self-sufficient entities do not belong to this category. Unpaid ambulance fees and Medical Services Plan premiums (which were eliminated starting January 1, 2020) are examples of tax payer support entities.

> **NOTE:** In response to the COVID-19 pandemic, the government launched the Canada Emergency Business Account (CEBA) program which offered interest free loans of up to $60,000 to small businesses and not-for-profits. Applications for CEBA loans were open from April 9, 2020, to June 30, 2021. CEBA borrowers in good standing have until December 31, 2023, to repay the balance of their loan and receive up to 33 percent of loan forgiveness. The amount of loan forgiveness will depend on the original amount borrowed. More information on the CEBA Program can be found at https://ceba-cuec.ca/.CEBA loans were issued by financial institutions, not the Government of Canada. The government guarantees these loans; however, the financial institutions appear to be primarily responsible for attempting to collect amounts owing. Therefore, CEBA loans may not be subject to the unique creditor remedies the government possess until the government pays out the guarantee to the financial institutions.

H. Services a Trustee Provides Under the Bankruptcy and Insolvency Act

The first appointment with a licensed insolvency trustee in BC is always free. During this appointment, the Trustee should outline the implications and information a consumer needs to consider before taking any action. This is the time to ask questions to understand the process and long-term effect on your credit. A Trustee should be willing to take the time to explain everything thoroughly as there is no backing out once someone has signed the documents to assign themselves into bankruptcy. The same limitation does not exist with consumer proposals. **For more information on how a licensed insolvency trustee helps with debt, refer to the Office of the Superintendent of Bankruptcy video series at**

http://www.ic.gc.ca/iec/site/bsf-osb.nsf/eng/br03567.html

1. Consumer Proposal

Depending on the nature and amount of the debt(s) and the consumer's ability to pay, a consumer proposal should be considered. Creditors may recover more money in consumer proposals than in bankruptcy. However, there are windfalls that arise in bankruptcies that can result in unexpected recoveries. A consumer proposal is a legal arrangement with creditors to repay a portion of the amounts owing (BIA s 66.11). Assets are not usually jeopardized (as they may be in bankruptcy) and the interest stops accruing as long as payments are being made. Legal action is not effective while the consumer proposal arrangement is in place (s 69.1(1)). Where secured creditors vote for the refusal of the consumer proposal, the creditor may proceed with their recovery as they otherwise would be entitled to (s 69(6)).

Filing a consumer proposal is not free. If the CP is accepted by the creditors, the first $1,500 is paid to the trustee. The first $1,500 is deducted before calculating the distribution to creditors. Consumers are also expected to pay the administrator 20% of the moneys distributed to creditors under the consumer proposal. There may also be more fees [*Bankruptcy and Insolvency General Rules,* CRC, c 368, s 129(1)]. Please consult a Trustee for more detailed information. **For more information on consumer proposals, refer to the Office of the Superintendent of Bankruptcy in Canada's description of consumer proposals at** https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01976.html

NOTE: Due to COVID-19, the following relief measures are in place for consumer proposals:

- From March 13 to December 31, 2020, debtors are allowed to miss up to 3 additional proposal payments before the consumer proposal will be deemed annulled
- The time for holding meetings of creditors (ss 51, 66.15 and 102 of the BIA) and mediations (s 105 of the BIA) is extended by the time of the Suspension Period (April 27, 2020 to June 30, 2020, or 65 days)
- The Trustee's obligation to apply to court for a hearing following a bankrupt's failure to comply with a mediated surplus agreement under s 170.1(3) is extended by the time of the Suspension Period

2. Personal Bankruptcy

Personal Bankruptcy is governed by the BIA, and is based on the premise that the debtor is completely unable to pay their debts, even at a reduced rate, and does not have assets to liquidate (debtor is insolvent). Bankruptcy is one option to deal with a heavy debt burden. The record of a bankruptcy stays on a person's credit record for a **minimum** of six years from the day the debts are discharged for a first-time bankrupt. This increases to 14 years for a second-time bankrupt. This does not necessarily mean that credit will be denied, only that the bankruptcy will be a factor that a potential creditor will consider when deciding whether or not to extend credit to that person. Certain professionals (such as lawyers, accountants, and mortgage brokers) may be required to report their bankruptcy to their professional organization. The BIA does provide that no person may be terminated just for filing bankruptcy.

The debtor is required by law to engage a trustee to administer their bankruptcy. Personal bankruptcy using a trustee may cost the debtor approximately $1685 (including $85 per counselling session, of which two are mandatory for a first-time bankruptcy and GST). Usually, the trustee will require a minimum payment to initiate the proceedings; however, the first appointment with a Trustee is free. The timelines for automatic discharge, in addition to being subject to fulfilment of the terms and conditions of the bankruptcy, are dependent on both bankruptcy history and the individual's surplus income (as prescribed by the Superintendent of Bankruptcy standards – Directive 11R2). For monthly surplus income under $200, a bankrupt is not required to pay any amount to the bankrupt's estate (Directive 11R2, 5(6)), and for monthly surplus income equal to or greater than $200, a bankrupt is required to 50% of their surplus income (Directive 11R2, 5(7)). For the 2022 version of Directive 11R2 and example calculations, visit https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03249.html

If all the conditions of bankruptcy have been met, there are no facts for which a discharge may be refused pursuant to s 173 of the BIA, and no objections have been filed by creditors or the Superintendent of Bankruptcy Canada;

- A first-time bankrupt with surplus income payable less than $200 is automatically discharged after nine months;
- A first-time bankrupt with surplus income greater than or equal to $200 is automatically discharged after 21 months;
- A second-time bankrupt with surplus income less than $200 is automatically discharged after 24 months;
- A second-time bankrupt with surplus income greater or equal to than $200 is automatically discharged after 36 months.

The average monthly surplus income is calculated at different times (Directive 11R2, 7(1)) depending on whether there have been any material changes in the bankrupt's financial circumstances. Examples for calculating the average monthly surplus income can be found at https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03249.html. The period of the discharge may also be extended for certain prescribed reasons under the BIA. Consult the Office of the Superintendent of Bankruptcy or trustee.

3. Debts That Bankruptcy Will Not Discharge

A debtor should know that filing for bankruptcy will not discharge some obligations, such as:

- An amount owing on a fine, penalty or restitution order imposed by a court in respect of an offence or debt arising out of a recognizance or bail;
- An award of damages by a court in civil proceedings in respect of bodily harm intentionally inflicted or sexual assault (including wrongful death resulting therefrom);
- A court order or a separation agreement regarding alimony or maintenance;
- An amount obtained under false pretences while acting in a fiduciary capacity;
- A debt resulting from obtaining property or services by false pretences or by fraudulent misrepresentation (other than a debt arising from an equity claim);
- Any debt or obligation for federal and provincial student loans where the date of bankruptcy occurs before the date on which the bankrupt ceased to be a full or part-time student or, as of June 18, 1998 through an amendment to the Act, within 7 years after the date on which the bankrupt ceased to be a full or part-time student (BIA, s 178(1)(g)).

The full list of exceptions may be found in s 178(1) of the BIA. Questions about bankruptcy, including specific questions regarding Canada Student Loans, may be directed to a licensed insolvency trustee or the Superintendent of Bankruptcy, at 1-877-376-9902.

4. Assets That May be Retained by the Bankrupt in B.C.

The bankrupt may retain household furnishings and appliances valued at up to $4,000 and any other goods or property exempt from execution under provincial and federal statutes (COEA, s 71(1); Court Order Enforcement Exemption Regulation, B.C. Reg. 28/98; BIA, s 67(1) and relevant amendments).

See Section III.B.3: Exemptions from Seizure for a list of what the *COEA* allows a debtor to retain.

All RRSPs and RRIFs are exempt from seizure in a bankruptcy (except for contributions made in the year preceding bankruptcy).

Any material transaction made within the past 12 months is reviewable. If a preference was given to a creditor, the trustee may act on the transaction. Lastly, any tax refund for the year of bankruptcy or any prior year becomes part of the bankruptcy, and will go to a trustee for the benefit of the creditors., or it may be seized by the government to fulfil a government debt.

NOTE: If the debtor (except anyone in commercial activities (self-employed or business) or in jail) chooses a trustee and is rejected (due to a fee charge) because they are unable to pay, they should contact the Office of the Superintendent of Bankruptcy ("OSB"), and ask to participate in the Bankruptcy Assistance Program. The debtor must obtain a written refusal from 2 trustees and, if they qualify for the program, will then be assigned a trustee in the referral program for a reduced fee (not for free). This program is not available to everyone that cannot afford to pay. Further, it does not exclude non-exempt assets such as GST and income tax refunds from seizure. Information can be found at the Bankruptcy Assistance Program website [4] or by calling the OSB's national number at 1-877-376-9902.

NOTE: A debtor who is on a low end fixed income, such as a fixed income pension, with circumstances unlikely to change may have no need to declare bankruptcy as they would be, in essence, judgment-proof. Refer to Section C above, Communicating with Creditors when Unable to Make Contractual Payments.

I. Student Loan Debt

The law surrounding student loans and grants is constantly changing, and varies greatly between provincial jurisdictions. Students should visit the federal and provincial student loan websites to get up to date information about repayment assistance. The information found below is up to date as of June of 2021.

1. Federal Student Loan Debt

The National Student Loan Service Centre (NSLSC) is responsible for consolidating all federal student debt in Canada. In certain circumstances, students can apply for the Repayment Assistance Plan (RAP) and receive payment relief. Successful applicants may receive temporary interest relief, permanent interest relief, and in the case of a student with a disability a portion of the principal amount of their loan may be forgiven. The level of assistance a student will receive is dependent on their income level, the size of their family, and whether they have a disability.

For further information on getting repayment assistance for Federal student loans, see https://www.canada.ca/en/services/benefits/education/student-aid/grants-loans/repay/assistance/rap.html.

NOTE: Effective April 1, 2023, the Government of Canada has permanently eliminated the accumulation of interest on federal student loans including loans being currently repaid. Debtors are still responsible for the interest accumulated before April 1, 2023.

2. Provincial Student Loan Debt

BC has a student loans service program called Student Aid BC. For further information on how to get repayment assistance for BC Provincial Student Loans, see https://studentaidbc.ca/repay/repayment-help.

NOTE: Due to COVID-19, effective March 30, 2020, all British Columbia student loan borrowers will temporarily have their repayments suspended until September 30, 2020. During this time, no payment will be required, and interest that currently applies to the federal portion of student loans will not accrue. Repayment will be paused automatically, so borrowers do not need to apply to have their repayment suspended.

References

[1] http://www.consumerprotectionbc.ca/
[2] http://www.nomoredebts.org
[3] http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/home
[4] http://www.servicecanada.gc.ca/eng/goc/bankruptcy_assistance.shtml

Appendix A: Relevant Forms

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

The following are debt-related forms and documents. These, and other Small Claims forms may be found online [1].

Pre-judgment Garnishment

A. COEA Form F: Garnishing Order Before Judgment

B. COEA Form B: Affidavit in Support of Garnishing Order Before Judgment

C. COEA Form A: Affidavit in Support of Garnishing Order Before Action

D. Affidavit in Support of Motion to Set Aside Garnishing Order (Enter into search box to locate)

E. Order To Set Aside Garnishing Order (Enter into search box to locate)

Post-judgment Garnishment

F. COEA Form D: Garnishing Order After Judgment

G. COEA Form B: Affidavit In Support Of Garnishing Order After Judgment

H. COEA Form E: Garnishing Order (Absolute)

I. Form 29; Enforcing a British Columbia Judgment in a Reciprocating Foreign Jurisdiction (Certificate: Pursuant to Schedule 2, COEA)

References

[1] http://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-forms/small-claims-forms

Appendix B: Examination Checklist

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

Students should consult the B.C. Law Society web site [1] for an extensive checklist for examination in aid of execution. Although this checklist is for the Supreme Court process, it is useful for Small Claims payment hearings as well.

1. Preliminary Matters
2. Employment
3. Real Property
4. Other Property (Legal or Equitable)
5. Dispositions of Property
6. Spouse
7. Family
8. Debts
9. Personal Budget
10. Litigation and Judgments
11. Satisfaction of the Judgment
12. Supplementary Questions for a Corporate Debtor

References

[1] http://www.lawsociety.bc.ca

Chapter Eleven - Consumer Protection

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Overview

This chapter provides a general discussion of consumer protection laws in British Columbia (BC).

While parts of this chapter are concerned with the rights of sellers, the main objective is to aid consumers who want to enforce contractual obligations, cancel contractual obligations, obtain damages for a breach of contract, or file a complaint with the appropriate regulator. This chapter should also help in determining contractual and other obligations of the parties, and whether or not those obligations are enforceable.

B. Common Law vs. Statute

An aggrieved party may have remedies under statutory law, the common law, or both. BC statutes provide better protection to consumers than is afforded by the common law. Since legislation (statutes) takes precedence over the common law, it is crucial to check all relevant statutes (see 11:II A. Legislation) when faced with the legal matters of consumers. For example, some contracts that are enforceable at common law are rendered unenforceable by relevant statutes.

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Legislation

- *Sale of Goods Act* [1], RSBC 1996, c 410 [*SGA*].

  The *SGA* regulates contracts for the sale (or lease) of goods, but not services. The *SGA* is not concerned with the ethics of the transaction unless there is also a defect in the manner in which the contract is carried out (e.g. if the goods are not delivered, are damaged, or are unfit for the purpose for which they were sold). The protections are stronger for new goods and goods sold by sellers in the business of selling that good (e.g. retail stores) than for goods that the purchaser knows are used or sellers who are not in the business of selling that good.

- *Business Practices and Consumer Protection Act* [2], SBC 2004, c 2 [*BPCPA*].

  The *BPCPA* is concerned with the ethics of a transaction, such as deceptive and unconscionable acts and practices, as well as content requirements for many types of consumer contracts. The BPCPA also gives consumers the right, under some circumstances, to cancel contracts where the consumer has ongoing obligations, such as time share and gym memberships. In addition, the Act regulates businesses that offer such contracts and other types of transactions that are open to abusing consumers, such as direct sales and payday loans. One of the key features of the Act is that it provides for statutory causes of action for certain kinds of consumer transactions.

- *Motor Dealer Act* [3], RSBC 1996, c 316 [*MDA*].

  The *MDA* sets out the requirements for motor dealers selling vehicles to retail consumers. It requires disclosure of the prior history of a car (e.g. its use as a taxi), any damage suffered over $2,000, and other important information. Clients with consumer complaints regarding car dealers should be directed to the Vehicle Sales Authority of British Columbia, which has the authority to investigate consumer complaints and provide dispute resolution.

  > **NOTE:** The *MDA* underwent several amendments in 2018-01-01 including amendments to the Consumer Advancement Fund that enacted ss 24.02-24.05, and provisions regarding the powers and undertakings of the registrar in ss 26.01-26.12.

- *Personal Property Security Act* [4], RSBC 1996, c 359 [*PPSA*].

  The PPSA governs all security agreements, as well as chattel mortgages, conditional sales, floating charges, pledges, trust indentures, trust receipts, assignments, consignments, leases, trusts, and transfers of chattel paper that secure payment or performance of an obligation. A security interest is an interest in goods or other property that secures payment or performance of an obligation for a lender. It is used to determine who retained title; however, recent cases abolished title as the most important factor. See also Section 11:VI Conditional Sales Contracts and Security Agreements

- *Bills of Exchange Act* [5], RSC 1985, c. B-4, ss. 188-192 [*BEA*].

  The *BEA* states that a promissory note is a written promise, like an “I owe you”, to pay a specified sum of money at a fixed time or on-demand. These are commonly used in conjunction with executory contracts, where one party has fulfilled their material obligations and the other party still has some or all outstanding.

- *Class Proceedings Act* [6], RSBC 1996, c. 50 [*CPA*].

  The *CPA* governs the application for and certification of class action proceedings.

- *Ticket Sales Act* [7], SBC 2019, c. 13 [*TSA*].

  The *TSA* regulates ticket sales in both primary and secondary markets. The act prohibits the use of certain software and sets out requirements for ticket service providers and suppliers.

B. Resources

A list of resources which clients might find useful:

- **Consumer Protection BC [CPBC]**

  Toll-free: 1-888-564-9963

  Website: http://www.consumerprotectionbc.ca

  Consumer Protection BC operates at arm's length from government and has responsibility for a range of licensing, inspection, investigation, and enforcement activities. If consumer protection legislation appears to have been violated, the aggrieved party can phone CPBC to report the infraction. This office has a mandate to receive and act on consumer complaints generally.

  > **NOTE:** This is the office to contact for students (on behalf of clients) seeking action by the Director under the statutory causes of action found in consumer protection legislation.

- **Vehicle Sales Authority of British Columbia [VSA]**

  Telephone: (604) 574-5050

  Website: http://www.mvsabc.com

  The VSA is a regulatory agency that oversees the retail sales of motor vehicles in British Columbia. This is the office to contact if a consumer believes that the *MDA* has been violated or has questions regarding the provisions in the *MDA*.

- **Better Business Bureau**

  Telephone: (604) 682-2711 or 1-888-803-1222

  Website: http://www.bbb.org/mbc

  Businesses voluntarily join this association, which provides self-policing of the business community. Complaints against a member company can be made at this office, which offers an extra-judicial resolution process for conflicts between consumers and member companies. Information about a specific member company can also be obtained.

- **Dial-a-Law**

  Telephone: (604) 687-4680 or 1-800-565-5297

  Website: http://www.cbabc.org/For-the-Public/Dial-A-Law

  This service provides pre-recorded summaries on the law pertaining to a wide variety of issues in consumer law. Some useful tapes include:

  a) Door-to-Door Sales, Time-Shares and Contracts You Can Cancel: 255

  b) Shopping by Phone, Mail or the Internet: 256

  c) Buying Defective Goods: 257

  d) Dishonest Business Practices and Schemes: 260

References

[1] http://www.bclaws.ca/civix/document/id/complete/statreg/96410_01
[2] http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00
[3] http://www.bclaws.ca/civix/document/id/complete/statreg/96316_01
[4] http://www.bclaws.ca/civix/document/id/complete/statreg/96359_01
[5] https://laws-lois.justice.gc.ca/eng/acts/b-4/index.html
[6] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96050_01
[7] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19013

III. Contracts for Sale of Goods

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Generally, consumers have no right to return goods or cancel a contract simply because they decide the goods are no longer wanted or needed. However, it is often only after the goods are purchased that damages or defects are discovered. In such cases, a purchaser may have a remedy if it can be shown that a term of the contract has been breached. It may also be the case that the business has a refund policy of which the consumer can take advantage.

This section outlines the protection that consumers have against the problems that may occur after a purchase has been made. To understand one's legal rights, it is necessary to know the differences between terms, representations, and mere puffs.

A. Identifying and Classifying the Terms of a Contract

A term of the contract is a promise made by the manufacturer or seller regarding the character or quality of an article. It can be either written or oral. Written terms will generally be straightforward to identify. Whether an oral statement can be properly considered a term may be less obvious. Not everything said by the seller will be a term of the contract. To be a term, the statement must be a specific promise that makes up part of the contract.

If a statement is not a term, it may be either a representation or a puff. A representation is a material statement of fact made to induce the other party to enter the contract. A puff is vague sales talk not meant to have any legal effect. For example, a statement that "This is a wonderful car" would be a puff and not meant to be taken literally as a contractual term (see 11:IV G. False or Misleading Advertising)

Whether a statement is a term, representation, or puff affects the remedy available to the consumer: damages (see D. Remedies for Breach of Contract below), rescission (under a claim of misrepresentation; see 11:IV G. False or Misleading Advertising), or no remedy, respectively. For this Chapter, we are concerned with terms of a contract.

If a statement is a term of the contract, it can be a condition, warranty, or innominate term. A well-drafted contract will characterize particular terms as conditions or warranties, though the wording used in the contract will not always be determinative (*Wickman Machine Tool Sales Ltd. v L. Schuler A.G.*, [1974] AC 235 [1]). The three types of terms are as follows (*Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, [1962] 2 QB 26, [1962] 1 All ER 474 [2] at para 49):

1. Condition

A condition is a term that is so essential to the agreement that its breach is considered to be a substantial failure to perform the contract. A breach of a condition is said to go to the root of the contract. In other words, the breach is such that it deprives the innocent party of "substantially the whole benefit" of the contract. If a manufacturer/supplier/seller breaches a condition, the buyer is entitled to terminate any further obligations under the contract and sue for damages.

Anticipatory breach is where one party (say, the seller) communicates their intention to breach in the future. The aggrieved party (here, the buyer), if aware of the impending breach, could accept the repudiation by the seller and terminate the contract, ending all future obligations except for the seller's obligation to pay the damages that stem from non-performance. Or, the aggrieved party could **not** accept the repudiation and may wait for the future breach to actually occur before pursuing damages (e.g., if they think that there is still a chance that the contract will be performed).

2. Warranty

A warranty is a term of the contract that is not so essential. A warranty must be performed, but its breach is not considered to go to the root of the contract. This meaning of warranty should not be confused with other uses of the word such as in "one-year maintenance warranty". When a warranty is breached, the contract is **not** terminated, meaning that the innocent party must continue to perform its own obligations under the contract (e.g., the buyer must still pay for the good) but can sue for damages for breach of warranty.

3. Innominate or Intermediate Terms

Innominate or intermediate terms arise out of the common law, but unlike conditions and warranties, they are not mentioned in the SGA. An innominate term is one that may be treated as either a condition or a warranty, depending on how severe the consequences of a breach turn out to be. Whether an innominate term is a condition or a warranty is for a judge to decide.

> **NOTE:** For certain terms, the *SGA* specifies whether they are conditions or warranties. The *SGA* also implies some terms as conditions or warranties even if they are not expressly included in the contract (see C. Provisions of the Sale of Goods Act below)

B. Determining if the Sale of Goods Act Governs the Contract

The *SGA* applies to transactions that can be characterized as **contracts for the sale** of **goods**. Any transaction that is not for the sale of goods does not receive the benefit of the *SGA*. Hence, the subject matter of the transaction must be goods, and the essential elements of a contract must also be present.

1. Goods

Goods include all personal chattels, other than "things in action" (e.g. cheques, insurance policies, money). Things attached to real property, which the parties agree to sever before sale, or under the contract of sale, are included (s 1). Note that registration in the Land Title Office may be advisable to avoid possible characterization of the goods as real property or fixtures, so that the SGA may apply to the transaction.

According to ss 1 and 9, the *SGA* covers **existing** and **future goods**. Future goods are goods to be manufactured or acquired by the seller after the making of the contract of sale.

According to ss 1 and 6(1), general property or title in the goods must pass – not merely a special property or interest. Thus, for example, a contract of bailment is not covered.

Contracts for skill and labour alone are not contracts for the sale of goods, so the *SGA* does not apply to them. However, if a contract is for labour and materials, then the *SGA* could apply to the materials (e.g. a contract to paint a house with paint supplied by the contractor).

2. Contract of Sale

According to s 6(1), the *SGA* applies only where the purchaser agrees to buy goods with money as consideration. Hence gifts, barters, or exchanges are not subject to the *SGA*'s implied conditions and warranties. However, a court may avoid this result by finding two separate contracts rather than a barter, as long as the consideration (which is the value being exchanged in the contract, whether money or goods) has its value measured in monetary terms: see *Messenger v Green*, [1937] 2 DLR 26 (NSSC). Thus, if a total price is attached, there will be a sale, even if payment is in goods rather than money.

According to s 6(3) of the *SGA*, a contract of sale may be absolute or conditional. If the contract is subject to some condition to be fulfilled later, it is called an agreement to sell.

Under s 8 of the *SGA*, it provides that the contract may be either written or oral.

3. Lease Contracts

The *SGA* applies to lease contracts if the goods are primarily leased for personal, family, or household purposes.

C. Provisions of the Sale of Goods Act

Under ss 16 – 19 of the *SGA*, many terms are implied into contracts for the sale of **new** items. When these implied terms can and cannot be expressly waived by the seller is governed by s 20. The *SGA* also defines these terms as conditions or warranties, thus determining the remedies available if breached.

1. Implied Conditions and Warranties

The vital part of the *SGA* for the consumer is ss. 16 – 19, which **may** add statutory conditions and warranties to a contract for the sale of goods, subject to the possibility of exclusion (see 2: Exemption from Implied Contractual Terms below).

a) Implied Condition of Title: s 16(a)

Under s 16(a), the *SGA* provides that, subject to contrary intentions, there is an implied **condition** that the seller has the right to sell the goods. In an agreement to sell goods at a later date, there is an implied condition that the seller will have the right to sell the goods at the date the buyer takes possession.

b) Implied Warranty of Quiet Possession: ss 16(b) and (c)

Under ss 16(b) and (c), the *SGA* provides implied **warranties** that in the future the buyer will enjoy undisturbed possession of the goods, free from any liens, charges, security interests, or other encumbrances in favour of third parties that are unknown to the buyer at the time the contract is made. For example, a contract of sale for a good may be made between a seller and buyer where a third-party lender made a loan to the seller with this good as collateral. If the secured creditor (the lender) subsequently makes claims against the buyer who was unaware of this security interest in the good at the time of sale, the buyer can sue the seller for damages resulting from breach of this implied warranty. The quantum of damages would likely be the amount of the liens outstanding so that the buyer could pay them off.

c) Implied Condition of Compliance with the Description: s 17

Under s 17, when goods are sold by description, there is an implied **condition** that they correspond to the description.

> **NOTE: Description** refers to generic characteristics of a good and does not include words of praise about the good.

Most sales will be sales by description. The notable exception is where a buyer makes it clear that they are buying a particular item on the basis of its qualities known, independent of any representations by the seller. Generally, where a buyer purchases a product because of a vendor's representations about its features (which may have been offered either gratuitously or in response to the buyer's questions), this will be a sale by description, with the vendor's representations forming part of the description. Catalogue purchases, online shopping, and purchases of products sealed in containers by the manufacturer are also sales by description.

If a sale is made by description and by sample, it is not enough that the bulk of the goods correspond with the sample; the delivered goods must also correspond with the description by which they were sold (s 17(2)).

> **NOTE: Specific goods** (as opposed to unascertained goods) are goods that, at the time the contract is made, are agreed to be the only goods whose transfer will satisfy the contract. For example, in a sale of a new chair, if the parties agree that a *specific* chair is to be the subject matter of the contract, the sale has been of specific goods. So, if the seller attempts to deliver a different chair, which is identical in every way, except that it is not the actual chair agreed upon, the seller has breached the contract. **Unascertained goods** are goods that are agreed to be the subject matter of the contract at a point in time after the contract is made. For example, in the sale of a new chair, if the parties agree only on a specific type of chair, but do not specifically single out any individual chair, the sale has been of unascertained goods.

Although s 17 cannot be excluded in retail sales of new goods, it may be excluded in private or commercial sales, subject to the *contra proferentum* rule. The *contra proferentum* rule states that a contract, if ambiguous, is construed as against the party who wrote it. Where a standard form contract (a "take it or leave it" contract that is drafted entirely by one party without any negotiations with the other party) is used, it is construed as against the party who offered it (usually the seller).

A sale by description may also raise s 18(b) issues (see e) Implied Condition of Merchantable Quality: s 18(b) below).

d) Implied Condition of Fitness for Buyer's Purpose: s 18(a)

Under s 18(a), if:

> (a) The buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that they rely on the seller's skill and judgment; and
>
> (b) The goods are of a description which it is in the course of the seller's business to supply;

then there is an implied **condition** that the goods are necessarily fit for such purpose. An **exception** occurs where the contract is for the sale of a specified article under its patent or trade name, in which case there is no implied condition as to its fitness for any particular purpose because the buyer is no longer relying on the seller's skill and judgement.

To establish a claim under s 18(a) of the *SGA*, three factors must be satisfied on a balance of probabilities (*Nikka Traders Inc v Gizella Pastry Ltd*, 2012 BCSC 1412 [3] at para 65):

1. That the buyer has made known to the seller the purpose for which it requires the goods;
2. The dissemination of that purpose shows that the buyer relies on the seller's skill or judgment; and
3. The goods are of a description that is in the course of the seller's business to supply.

Furthermore, the courts have held that the seller need not know the specific purpose for which the buyer wishes to use the goods; knowledge of a broad purpose is sufficient. For example, in *Sugiyama v Pilsen*, 2006 BCPC 265 [4] at para 71, the court held that s 18(a) provides a warranty that a car is "a reliable vehicle for use in driving in safety on the roads" and a car being sold must be reasonably fit for such purpose. However, if the buyer wishes to use the goods for an unusual or peculiar purpose, this must be indicated to the seller.

The "Patent and Trade Name Exception" is of little effect since the courts have interpreted it narrowly. The issue remains one of reliance, and the trade names exception will apply only where the buyer's use of the patent or trade name indicates a lack of reliance upon the seller. In other words, the exception only applies where a consumer decides to purchase goods solely because of the trade name of a product. See *Wharton v Tom Harris Chevrolet Oldsmobile Cadillac Ltd*, 2002 BCCA 78 [5] at paras 38-39.

e) Implied Condition of Merchantable Quality: s 18(b)

Under s 18(b), if:

1. Goods are bought by description, and
2. From a seller who deals in goods of that description, the seller is bound by an implied **condition** that the goods are of merchantable quality.

(1) The Concept of Merchantable Quality

The concept of merchantable quality is difficult to define. A commonly used test, the price abatement test, asks whether a reasonable buyer, informed of the actual quality of the goods, would buy the goods without a substantial abatement of price (*BS Brown & Son v Craiks Ltd*, [1970] 1 All ER 823 (HL) [6]). If the informed reasonable buyer would not buy without a substantial abatement of price, unmerchantable quality is inferred, and repudiation may be available.

Any damage to goods beyond the *de minimus* range may be said to render the goods of unmerchantable quality (*International Business Machines v Shcherban*, [1925] 1 DLR 864 (Sask CA), [1925] 1 WWR 405 [7]).

This section also applies to the sale of **used goods**, as well (s 18(b)). However, there is a lower standard here: the goods must be usable but not perfect. A minor defect does not necessarily render the goods unmerchantable. See *Bartlett v Sidney Marcus Ltd*, [1965] 2 All ER 753 (Eng CA).

The CRT has sometimes granted compensation for repair costs for used cars that broke down immediately after purchase from a dealer, on the basis that they violated the implied warranty under section 18(b). For example, in the case of *Sosa v. Reg Midgley Motors Ltd., 2019 BCCRT 487*, the CRT granted the cost of repairs when a serious transmission issue arose just a few days after the sale. The decision was made because the car did not demonstrate durability for a reasonable period. Similarly, in the case of *Scoretz et al v. Kolenberg Motors Ltd., 2019 BCCRT 549*, the CRT ruled in favour of compensating the Claimant for engine repair expenses, as the engine failed within two months of the purchase.

In any case, where the buyer seeks recovery of the full purchase price based on the implied condition of merchantable quality, they should be cautioned that continued use of the goods in question seriously weakens the argument that the goods are not fit for a particular purpose or are not of merchantable quality.

(2) Sale by Description

This section only applies to a sale by description (s.18(b)). This is usually not a problem since most sales are by description, except where the buyer is clearly buying a particular item on the basis of qualities known to them apart from any representations (see d) Implied Condition of Fitness for Buyer's Purpose: s 18(a) above).

(3) Seller who Deals in Goods of that Description

In addition to requiring that the sale be by description, s 18(b) also requires that the seller must "deal in goods of that description." In Hartmann v McKerness, 2011 BCSC 927 [8], a seller sold a watch by description over eBay and was sued for violating the implied condition of merchantability in s 18(b). In paragraphs 43-47, the BC Supreme Court held that the seller was not one "who dealt in goods of that description" for the purpose of 18(b), as he did not specialize in watches, but rather sold a large variety of goods.

(4) Effect of Examination by the Buyer

There is an **exception** where the buyer has examined the goods; then, there is no condition of merchantable quality to the extent that the examination ought to have revealed the defect. However, if the average person would not have been able to spot the defect, the condition of merchantability remains. Hence, it must be determined: 1) whether the buyer examined the goods, and 2) whether the defects ought to have been revealed by the examination.

NOTE: There is no obligation on the buyer to make a reasonable examination or even any examination.

(5) Implied Condition of Reasonable Durability

The goods must be durable for a reasonable period of time with regard to their normal use (s 18(c)).

f) Implied Conditions in Sales by Sample: s 19

For a contract to be a sale by sample, there must be an express or implied term in the contract to that effect (s 19(1)).

Three implied conditions of a sale or lease by sample are set out in s 19(2):

1. The bulk must correspond with the sample in quality;
2. The buyer or lessee must have a reasonable opportunity of comparing the bulk with the sample; and
3. The goods must be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

The last condition can only be relied upon where the defect would not have been apparent on a hypothetical reasonable examination. Contrast this with the s 18(b) condition of merchantability for sales by description, where the buyer's **actual** examination is considered.

2. Exemption from Implied Contractual Terms

a) Private Seller

Based on s 20, private sellers or lessors, as opposed to retail sellers or lessors, can explicitly exempt themselves from ss 17, 18, and 19. A retail sale is defined as one in the "ordinary course of the seller or lessor's business." Exemption or exclusion clauses are subject to the *contra proferentem* rule that such a clause, if ambiguous, may be interpreted strictly against the drafter.

b) Commercial Seller

Under s 20 of the *SGA*, retailers of **new goods** cannot exempt themselves from the implied terms in ss 16 – 19, and any clause that attempts to do so is void, subject to the exceptions listed below.

A seller who is making a retail sale in the ordinary course of business can **only** expressly waive ss 16 – 19 if:

(a) The goods are used (except s 16, which also applies to used goods);

(b) The purchaser, even a private individual, intends to resell the goods;

(c) The lease is to a lessee for the purpose of subletting the goods;

(d) The purchaser intends to use the goods primarily for business;

(e) The purchaser is a corporation or commercial enterprise; or

(f) The seller is a trustee in bankruptcy, a liquidator, or a sheriff.

Where a commercial dealer includes a disclaimer clause exempting the transaction from ss 16 – 19, the clause is void (no legal force or effect), unless one of the above exceptions applies. A seller who does not ordinarily sell the goods in the contract may also exclude themselves out of ss 17 – 19.

3. Buyer's Lien

Amendments to the *SGA* in 1994 created the buyer's lien, which gives priority to a consumer who has paid some or all of the purchase price of the goods but has not taken possession before the seller goes into receivership or bankruptcy.

4. Buyer's Obligations and Seller's Rights

A seller's rights arise from a breach of the buyer's obligations. The buyer has two main obligations: (1) to pay the price, and (2) to take delivery. A breach of either of these obligations does not necessarily give rise to all of the seller's possible remedies as outlined below. One must consider the severity and consequences of a breach to determine the seller's remedy. The seller has two classes of rights under the SGA: (1) personal rights against the buyer for price or for damages, and (2) *in rem* rights to the goods.

a) Seller's Personal Rights

(1) Action for the Price: s 52

This action arises when the property in the goods has passed to the buyer, and the buyer neglects or refuses to pay; or where the price is payable on a certain day and the buyer neglects or refuses to pay. This remedy involves the seller seeking the price of the goods.

(2) Damages for Non-Acceptance: s 53

This is an alternate remedy to action for the price. The prima facie rule for damages is set out in s 53(3). The seller is entitled to be paid an amount equal to the difference between the negotiated price and the market price for the goods. However, this rule may be displaced where there is either no available market or the goods are unique, in which case the damages will be assessed based on the estimated loss incurred by the seller stemming from the breach (s 53(2)).

b) Seller's *In Rem* Rights

(1) Unpaid Seller's Lien: ss 43 - 45

To get an unpaid seller's possessory lien (the right to retain the goods until the whole of the price has been paid), the seller must be an "unpaid seller" as set out in s 42. An unpaid seller may retain the goods beyond the specified delivery date. Where goods are to be delivered in instalments under a single contract, the seller may exercise a lien over any part of the goods if any part of the price is outstanding (s 45). If the goods are sold on credit, the seller is not entitled to a lien, except under ss 44(1)(b) and (c) where the term of credit has expired, or where the buyer is insolvent.

The right of lien may be lost if:

(a) The price is paid or tendered (s 44(1));

(b) Delivery is made to a carrier or other bailee (not the seller's agent) without reserving a right of disposal (s 46(1)(a));

(c) The buyer or the buyer's agent lawfully obtains possession (s 46(1)(b)); or

(d) There is a waiver (s 46(1)(c)).

(2) The Right of Stoppage in Transit: ss 47 - 49

This right can be exercised in accordance with s 47 when the seller is unpaid, the buyer is insolvent, and the goods are in the hands of a carrier.

(3) The Right of Resale: ss 43(1)(c) and 51

The seller has the right to resell:

(a) If the goods are perishable, or if notice of an intention to resell is given to the buyer by the unpaid seller, and the buyer does not pay within a reasonable time. In this case, the seller may resell the goods and recover damages from the original buyer for any loss from the breach of contract (s 51(3));

(b) If the seller has expressly reserved the right to resell in the contract (s 51(4)).

NOTE: If the buyer defaults and the contract provides that the seller may resell the goods in that situation, the seller may still claim damages (s 51(4)).

5. Other Sale of Goods Act Provisions

a) Stipulations as to Time

Under s 14, unless there is a different intention, stipulations as to the time of payment do not go to the essence of a contract of sale (i.e. they are **not** conditions).

b) Stipulations as to Quantity

Under s 34, if the seller delivers a quantity of goods either greater or lesser than that contracted for, the buyer may either reject the entire shipment, or accept the quantity delivered and pay accordingly, or, if the quantity is greater than ordered, reject the balance over that ordered. There is likely an exception when the difference in quantity is so slight as to be *de minimis*.

c) Stipulations as to Price

Under s 12, where a contract is silent as to price, the court will infer a reasonable price, but where the price would be too vague for the court to infer, there may be no consensus upon an essential term, and therefore no contract.

d) Instalments

Under s 35(1), a buyer need not accept delivery by instalments unless that is agreed to. Where a contract is for separately paid instalments, circumstances and construction of the contract determine whether a breach allows for repudiation of the entire contract, or only a right to sue for damages regarding the defective instalment.

6. Rules as to Transfer of Title and Risk

The *SGA* sets out five key rules regarding the transfer of title (and thus risk) of goods between the seller and the consumer in ss 22 – 23. Generally, the intent of the parties is the overriding consideration in determining when title to the goods passes (s 22). However, if the parties did not consider or address the issue of transfer of title in the contract, then the rules under s 23 apply.

The first four rules pertain to specific goods, while the fifth rule pertains to unascertained goods.

> **NOTE:** Recall that specific goods are goods that are agreed to be the only goods whose transfer will satisfy the contract, while unascertained goods are goods that are agreed to be the subject matter of the contract.

1. For an unconditional contract for the sale of specific goods in a **deliverable** state, then title (and thus risk) passes at the time of contract formation, regardless of when the payment or delivery is made (s 23(2));
2. For a sale of specific goods where the seller is bound to perform something to put the goods in a **deliverable state**, then title (and thus risk) passes when the task has been performed **and** the buyer has been notified (s 23(3));
3. For a sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or perform any other task to **appraise** (set the price of) the good, then title (and thus risk) passes when the appraisal has been performed **and** the buyer has been notified (s 23(4));
4. For the sale of goods subject to approval, then the title (and thus risk) passes when the consumer signifies their approval **or** after a specified or reasonable amount of time (ss 23(5) and 23(6)); and
5. For the sale of **unascertained** or future goods by description, then title passes when the goods are unconditionally appropriated to the contract by the seller (i.e. set aside specifically for sale to the consumer) with the assent of the buyer or the seller delivers the goods to a carrier pursuant to a contract and does not reserve a right of disposal (ss 23(7) and 23(8)). See *Bevo Farms Ltd. v Veg Gro Inc.*, 2008 BCCA 66 [9] for an example of unascertained goods (tomato seedlings) that became unconditionally appropriated when the seller contracted with the carrier for delivery,

and thus title and risk had passed to the consumer when the goods were destroyed.

The timing of transfer of title affects the consumer's legal rights in ways including, but not limited to, the following:

- If property was supposed to pass to the consumer by a specified time, but the seller does not deliver by that time, then this is a breach of contract. See A. Identifying and Classifying the Terms of a Contract to determine whether this is a breach of condition or breach of warranty, which determines the remedies available to the buyer;
- Whichever party has property of the goods is presumptively the person who is responsible for the goods, if something happens to the goods. See *Kovacs v Holtom*, [1997] A.J. 775 for an example where a convertible was destroyed while being restored at the defendants' garage shop, and the defendant was liable to the consumer for damages as title (and thus risk) did not yet pass to the consumer under rule #2 (s 23(3)); and
- Whether the seller or the buyer has title to the goods may affect third party claims to the property (e.g. a creditor who has a security interest in the goods).

D. Remedies for Breach of Contract

Actions for breach of contract are covered in ss 52 – 57 of the *SGA*. Common law and equitable remedies may exist as well.

1. Damages Generally

Generally, the object of damages is to put the injured party in the same position they would have been in had the other party performed their contract obligations ("expectation damages").

At common law, to be awarded damages for breach of contract, those damages must be in the reasonable contemplation of both parties at the time the contract was formed. If the damages are too remote, they may not be recoverable under contract law. Both sides must be aware of the circumstances at the time of formation that would lead to damages if an obligation went unperformed or underperformed. This may encompass either implied circumstances, if reasonable, or special circumstances that were communicated at the time the contract was formed (*Hadley v Baxendale* (1854), 156 ER 145 (Eng Ex Div) [10]). Damages that were substantially likely and easily foreseeable at the time the contract was formed will be deemed to have been in the reasonable contemplation of the parties. Once the **type** of loss is found to have been foreseeable, the extent of damages can be recoverable even if the **degree** of damages is so extensive as to be unforeseeable.

Parties have a common law **duty to mitigate** their damages from the date of the contractual breach. In a contract for the sale of goods, this means buying the goods elsewhere and suing the party who breached the contract for the additional amount paid for the goods over the contract price. In a contract for services, such as roof repair, this means hiring another party to do the repairs and suing the original party for the difference in price paid, if any. There is some jurisprudence that suggests when it is not feasible for a party to mitigate, they are excused from doing so. See *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 [11].

2. Breach of Warranty

For a breach of a term of the contract that is a warranty, the only available remedy will be damages. The innocent party must continue with the contract while seeking damages.

In a contract for the sale of goods governed by the *SGA*, the standard measure of damages is "the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach" (s 56(2)). Where the warranty pertained to quality of the goods, the loss will be calculated as the difference between the cost of obtaining the goods in the market and the contract price of the goods (s 56(3)). Thus, a buyer who has negotiated a good deal can recover the difference between their expected savings and the market price. Under s 57, it states that s 56 does not affect recovery of special damages or interest, if otherwise available by law. The common law governs the recovery of special damages. **For special damages to be recoverable, both parties must have been made aware of their possible incursion at the time of formation of the contract.**

3. Breach of Condition

For a breach of condition, the aggrieved (innocent) party can affirm the contract and seek damages in the future, or terminate the contract which discharges future obligations but still allows for the recovery of damages. The offending party has "repudiated" the contract by acting in a way that expresses the intention to no longer be bound by the contract, and the aggrieved (innocent) party can accept or reject that repudiation.

a) Repudiation

The buyer's primary right for a breach of a **condition** is to repudiate the contract and reject the goods. This can normally be exercised regardless of the actual quantum of loss or benefit to the parties. However, the right to repudiate may be lost under the *SGA*.

In the case of a rightful repudiation, the buyer may refuse further payment, and in addition, seek either damages or restitution from the seller. The consequence of wrongful repudiation termination (the buyer repudiates when they did not have the right to do so; e.g. because the seller breached a warranty rather than a condition) is that the buyer is liable to the seller for their own breach of condition. So, it is important to determine whether or not repudiation is justified **before** taking any action, by determining the nature of the term the seller breached.

(1) When a Breach of Condition is Treated as a Breach of Warranty

Under s 15(4), it specifies two circumstances where, unless the parties contract otherwise, any breach of condition (including the implied statutory conditions in ss 16 – 19) must be treated as a breach of warranty (1) in a contract for sale of **specific goods** when property has passed to the buyer or (2) where the buyer has accepted the goods, or part of them.

(2) Specific Goods: Upon Passage of Property

When s 15(4) is combined with ss 23(1) and (2), the result is that, for a sale of specific goods in a deliverable state, the buyer loses the right to repudiate as soon as the contract is made.

However, courts may avoid this harsh result by (1) implying a term allowing the buyer to accept the goods and later reject them: see *Polar Refrigeration Service Ltd v Moldenhauer* (1967), 60 WWR 284, 61 DLR (2d) 462 (Sask QB) [12] at para 22, (2) finding a total failure of consideration: see Rowland v Divall (1923), 2 KB 500, (3) finding the intent for property to not pass immediately (ss 22 and 23(1)), (4) finding that the goods are not specific, or (5) finding ss 23(3), (4) or (5) to be applicable.

(3) Unascertained Goods: Upon Acceptance

For a sale of unascertained goods, the buyer loses the right to repudiate upon acceptance of the goods (s 15(4)).

Under s 38, if the buyer has not previously examined the goods, there is no acceptance unless and until the buyer has had a reasonable opportunity to examine them. However, under s 39 a purchaser has accepted the goods once (1) the seller is notified by the buyer of acceptance, (2) the goods are used in a manner inconsistent with the seller's ownership (e.g. reselling the goods to a third party), or (3) the goods are retained without being rejected within a "reasonable time".

The court determines a reasonable time for inspection and possible rejection by looking at all the circumstances surrounding the transaction.

b) Damages for Breach of Condition

As mentioned above, the innocent party has a choice in the face of a breach of condition. They may:

1. Accept the repudiation, terminate the contract, and sue for damages right away. In this scenario the buyer is no longer responsible for their obligations under the contract; or
2. If they have a legitimate interest in doing so, may affirm the contract, wait for the date of performance, and sue for damages for any defect in performance at that date. In many cases involving one-time sales, the performance date will be contemporaneous with the date of the payment/delivery/breach, rendering this a moot point.

In deciding whether or not to affirm a contract in order to assess damages at a later date, the client should consider the implications of their duty to mitigate the loss. In a sale of goods, purchasing the goods from someone else can often mitigate damages because generally, no special interest exists in purchasing the particular goods from a particular vendor, so any substitute should suffice.

c) Specific Performance

If an aggrieved party does decide to affirm the contract, specific performance may be available for a contract of sale for specific goods. Specific performance is a court order compelling performance of a contract in the specific form in which it was made (*SGA*, s 55). In certain circumstances, it may be available at common law for unascertained goods (*Sky Petroleum Ltd v VIP Petroleum Ltd,* [1974] 1 WLR 576, [1974] 1 All ER 954). Specific performance is a discretionary (for judges to award) equitable remedy and will only be granted if damages are inadequate; for example, where the goods are unique or otherwise unavailable. According to s 3(1)(c) of the *Small Claims Act*, RSBC 1996, c 430, Small Claims Division of the Provincial Court of British Columbia can grant specific performance in an agreement relating to personal property (e.g. not real property like land or real estate).

4. Rescission

The remedy of rescission seeks to undo a contract and is available for misrepresentation. See 11:IV G. False or Misleading Advertising for a fuller discussion of what constitutes misrepresentation. Rescission is an equitable remedy that sets the contract aside and seeks to restore the parties to their original, pre-contractual positions. This usually means return of the goods and return of any payment made. Because it undoes the contract, no damages in contract law can be claimed beyond the restitution necessary to return the parties to their pre-contractual positions; however, damages may be available in tort law, such as for deceit or fraud. Because rescission is an equitable remedy, delay in bringing the action or acceptance of the goods may bar rescission.

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IV. Consumer Protection

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Does the Act Govern the Contract?

For a contract to fall under the *Business Practices and Consumer Protection Act* [*BPCPA*], the contract must be:

1. A consumer transaction, between
2. A consumer and
3. A supplier, as defined by s 1.

Each of the three criteria must be fulfilled before relying on the *BPCPA*.

The only exceptions to the applicability of the *BPCPA* are those listed under s 2 of the *BPCPA* and include credit reporting and debt collections practices. These sections apply regardless of whether the transaction or matter involves a consumer or not. Additionally, s 2(2) outlines the limited application of the *BPCPA* to contracts involving the sale, lease, mortgage of, or charge (such as a lien or security interest) on land or a chattel real.

1. Consumer Transaction

A consumer transaction is a dealing that:

> (a) Involves a supply of goods, services, or real property by a supplier to a consumer for primarily personal, family or household purposes, **or**
>
> (b) Is a solicitation, offer, advertisement or promotion by a supplier with respect to the above-mentioned types of transactions.

Except in Parts 4 and 5 of the *BPCPA*, a consumer transaction includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer.

The *BPCPA* **does not** apply to securities as defined by the *Securities Act*, RSBC 1996, c 418 or contracts of insurance under the *Insurance Act*, RSBC 1996, c 226.

2. Consumer

Generally, the consumer may reside inside or outside BC. In some circumstances, the *BPCPA* will only apply where the consumer resides in BC. A consumer is an individual, other than a supplier, who participates in a consumer transaction for **primarily personal, family, or household** purposes. The definition of consumer (s 1) does not include a guarantor of the consumer who actually participated in the transaction.

3. Supplier

A supplier means a person, whether in BC or not, who in the course of business participates in a consumer transaction by:

(a) Supplying goods, services, or real property to a consumer; **or**

(b) Soliciting, offering, advertising, or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction".

A supplier also includes the successor to, or assignee of, any rights or obligations of the supplier and, except in Parts 3 to 5 of the *BPCPA*, includes a person who solicits a consumer for a contribution of money or other property.

The definition of supplier in s 1 requires that the transaction occur "in the course of business". Thus, private sales and transactions made by people who are not in the business of dealing with such goods are generally exempt from the *BPCPA*. If a consumer buys a used car advertised in a newspaper ad placed by a private person, the consumer will likely be restricted to the remedies found in the *SGA* (but keep in mind certain limitations or lower standards for used goods) or at common law. Some remedies in the *SGA* are also available only when goods are sold in the ordinary course of business (e.g. s 18 *SGA*).

Several suppliers can be involved in one transaction. Therefore, in order for the consumer to sue, they need not have a contract with the supplier who made a deceptive representation or committed an unconscionable act. For example, a consumer buys a car from a dealer and the contract is assigned to a financial institution. The vendor would be a supplier, as would the finance company attempting to collect on the contract (s 15). Recall, as well, that the definition of a supplier under s 1 includes successors and assignees. Since privity of contract is not necessary, each of the suppliers would be liable under the *BPCPA* if they engaged in deceptive or unconscionable practices.

According to s 6(2), advertisers who, on behalf of another supplier, publish a deceptive or misleading advertisement are not liable for damages, court actions, or offences, **if** they did not know and had no reason to suspect that its publication would contravene s 5. If, however, they knew or ought to have known that the advertisement had the capability, tendency, or effect of deceiving or misleading, then they too may be liable as a supplier under the *BPCPA*.

B. Defining a "Deceptive or Unconscionable Act or Practice"

For the consumer to have a remedy, the supplier's conduct must involve deceptive or unconscionable acts or practices.

Under s 4, the *BPCPA* describes "deceptive" acts or practices. Under s 8, the *BPCPA* describes "unconscionable" acts or practices.

1. Deceptive Acts

A **deceptive** act or practice is a representation (whether oral, written, visual, descriptive, or other) or any conduct by the supplier that has the capacity, tendency, or effect of deceiving or misleading a consumer or guarantor. An extensive but non-exhaustive list of deceptive practices is set out in s 4(3).

If a certain practice is not listed in s 4(3), it may still be considered deceptive. The term "deceptive act or practice" was also found in BC's old *Trade Practice Act*, which was repealed by the *BPCPA* in 2004. Thus, looking back at the old *Trade Practice Act* jurisprudence can shed light on the meaning of "deceptive act or practice."

The term "deceptive practice" was interpreted by the court in *British Columbia (Director of Trade Practices) v Household Finance Corp*, [1976] 3 WWR 731, [1976] BCJ No 1316 (SC) at paras 19-23 [*Household Finance*] and later affirmed by the BC Court of Appeal. *Household Finance* suggests that a practice is deceptive for purposes of the *BPCPA* if it causes the consumer to commit an error of judgment. However, a practice of non-disclosure is not necessarily "a deceptive practice"

A plaintiff consumer relying on the supplier's deceptive practice for an action should show:

(a) That they were actually deceived by the deceptive practice;

(b) That they relied on the deception to the extent that an error of judgment resulted from the deception; and

(c) That the error of judgment caused loss.

To enforce the *BPCPA* against a supplier, the Director need only show that a deceptive practice would tend to cause consumers to make an error in judgment but does not need to show that any consumer made an error in judgment.

The *BPCPA*, similarly to the *Trade Practices Act*, should be interpreted as imposing "a high standard of candour, especially on suppliers who choose to commend their wares" (*Rushak v Henneken*, [1991] 6 WWR 596, [1991] BCJ No 2692 (CA) [1] at para 17 [*Rushak*]).

Where there is an embellishing endorsement of the goods, and the supplier knows the goods may be defective in an important respect, these facts must be disclosed (*Rushak*).

For the consumer to set aside the consumer transaction on the basis that the supplier engaged in a deceptive act or practice, the representation must be **material** – what is material depends on the individual circumstances of the transaction (*Rushak*).

The court may draw the conclusion that a practice is deceptive on the basis of vague contractual language in circumstances where that language allowed the supplier to claim that additional work was not part of the original contract: see *British Columbia (Director of Trade Practices) v Van City Construction Ltd*, [1999] BCJ No 2033 (SC) (QL) [2].

For a list of statutorily defined deceptive acts and practices, see the following link: http://www.bclaws.ca/civix/document/id/complete/statreg/04002_02#section4

2. Unconscionable Acts

Section 8 of the BPCPA "largely codifies the common law of unconscionability" (*Connor Financial Services International Inc. v. Laughlin*, 2015 BCSC 587 at 27). There are circumstances listed in s 8(3) that the courts must consider when assessing unconscionability, but the essential elements of BPCPA unconscionability and common law unconscionability are the same (*Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122 at para 54). The test for unconscionability is whether there is an "inequality of bargaining power and a resulting improvident bargain" (*Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para 65). Both essential elements are contextual, and the circumstances listed in s 8(3) can aid the court in their assessment. For example, in *A Speedy Solutions Oil Tank Removal Inc.*, 2021 BCCA 220, common industry practice and what terms competitors would have agreed to were both relevant in determining if the bargain was improvident. Furthermore, as per s 8(3)(b), the court will look at the particular vulnerabilities of the consumer to assess the inequality of bargaining power, such as mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, which will trigger the reviewability of that transaction in the consumer's mind.

One difference between common law and BPCPA unconscionability is the onus. Under s 9(2), if it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof is on the supplier to show that the unconscionable act or practice was **not** committed. Another potential key difference between common law unconscionability and BPCPA unconscionability is timing. In *Uber v Heller* at para 74, the court states that "Improvidence is measured at the time the contract is formed; unconscionability does not assist parties trying to "escape from a contract when their circumstances are such that the agreement now works a hardship upon them"". However, s 8(1) states that "an unconscionable act or practice by a supplier may occur before, during or after the consumer transaction". This difference between common law unconscionability and BPCPA unconscionability is noted in *Gomel v. Live Nation Entertainment*, Inc., 2021 BCSC 699 at para 71

> **NOTE:** As noted above, s 8(3) sets out a list of circumstances that the court must consider when determining whether a practice is unconscionable. Again, this list is not comprehensive, as the court must consider all of the surrounding circumstances of which the supplier knew or ought to have known at the time of the contract. Ultimately, the essential elements of common law unconscionability need to be met.
>
> Under s 10(1), if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor.

C. Remedies and Sanctions

1. Damages Recoverable by Consumers

Under s 171 of the *BPCPA*, a consumer may commence a civil action seeking damages for loss due to a deceptive or unconscionable act or practice. As with other civil actions, punitive damages or restitution may also be available. Small Claims Court may be used if the claim does not exceed $35,000 (*Small Claims Rules*, BC Reg 261/93, Rule 1(4)).

2. Transaction Unenforceable by Supplier

Under s 10(1), where there is an unconscionable act or practice in a consumer transaction, that transaction is unenforceable by the supplier.

3. Injunctions, Declarations and Class Actions

Under s 172, any person, whether or not that person has a special interest in or is affected by a consumer transaction, may bring an action seeking declaratory or injunctive relief. This involves seeking to have the court declare an act to be deceptive or unconscionable and to have the court grant an injunction restraining the supplier from engaging further in such acts. Under s 172(2) the Director may bring an action on behalf of consumers generally or a designated class of consumers.

The *BPCPA* stipulates that while the Provincial Court has jurisdiction for civil actions under s 171, actions under s 172 must be brought in Supreme Court.

For an example of a class action suit dealing with the *BPCPA*, see *Dahl v Royal Bank of Canada*, 2006 BCCA 369 [3]. Credit card debtors brought a class action suit against the Royal Bank of Canada, the Canadian Imperial Bank of Commerce, and the Bank of Montreal. In the plaintiffs' Statement of Claim, they asserted that the defendants failed to disclose the true cost of borrowing by providing the transaction dates for cash advances on their monthly statements rather than the posting dates (the dates the money was actually advanced), allowing more interest to be charged; the court, however, ultimately rejected this argument.

In any action for a permanent injunction under s 172(1)(b), the court may restore to any interested person any property or money acquired by deception or unconscionable acts or practices by the supplier (s 172(3)(a)) and may require the supplier to advertise to the public in a way that will assure prompt and reasonable communication to consumers (s 172(3)(c)).

4. Supplier Found Guilty of an Offence Under the BPCPA

Under s 189 is a list of offences punishable by both fines and imprisonment, which may be sought by the Crown against a party found in breach of the *BPCPA*. Under s 190, an individual who commits an offence under the *BPCPA* is liable to a fine of not more than $10,000, or to imprisonment for not more than 12 months, or to both.

D. Limitation Period

Under s 193, no prosecution under the *BPCPA* may be started more than **two years** after the date on which the subject matter of the proceeding arose.

Note that s 193 does not apply to civil proceedings. The limitations period in civil proceedings will depend on the nature of the claim and the time period allowed by the *Limitation Act*; see 11:IX E. Determine the Limitation Period for Making a Claim.

E. Powers of the Director

Consumer Protection BC [CPBC] is responsible for the administration and enforcement of the *BPCPA* and is also empowered by another piece of legislation: the *Business Practices and Consumer Protection Authority Act*, SBC 2004, c 3. Part 10 of the *BPCPA* contains all inspecting and enforcement powers of CPBC, its inspectors, and the Director. The Director has the power to:

> (a) Use the same powers that the Supreme Court has during trials of civil action for the purposes of an inspection, to summon and enforce the attendance of witnesses, compel witnesses to give evidence under oath or in any other manner, and to produce records;
>
> (b) Institute proceedings or assume the conduct of proceedings on behalf of a consumer;

(c) Make an order (called a “freeze” order) against assets of a person who is being investigated (s 159). This order can also be attached to property being held in trust for a person under investigation. Thus, although CPBC is not empowered to actually seize money, it is able to freeze accounts, which can be a way to encourage supplies to transfer funds to consumers;

(d) Refrain from bringing an action against a supplier and accept instead a written undertaking under s 154 of the *BPCPA*. This undertaking usually takes the form of a formal agreement between the Director and supplier and may involve consumer redress. It is probably one of the most effective remedies under the BPCPA because it avoids both the time and expense of court proceedings;

(e) Issue a compliance order under s 155 of the *BPCPA* where compliance is mandatory. The Director can order restitution and compensation to the consumer with this function (s 155(4)) without having to go through court proceedings. If a person fails to comply with a compliance order, they are committing an offence under s 189(5) and could face a fine of not more than $10,000, imprisonment for not more than 12 months, or both;

(f) File an undertaking, compliance order, or a direct sales prohibition order with the Supreme Court. Doing so would mean that the undertaking or order is deemed to be a court order, and thus it will be enforceable as such (s 157). This can be useful in encouraging resolution amongst parties.

(g) Seek a declaration and/or injunctive relief on behalf of a consumer, or a class of consumers, and make their applications *ex parte* (s 172); and

(h) Impose an administrative penalty under s 164.

While there are a number of actions that CPBC is empowered to take, including pursuing civil and quasi-criminal enforcement, it is much more likely that CPBC will be involved in handling complaints and in investigations. Complaints can be initiated on Consumer Protection BC's website: https:/ / www. consumerprotectionbc. ca/ consumer-help/ start-a-complaint/.

F. Deceptive Practices Under the Competition Act

In addition to the protections under the *BPCPA*, the *Competition Act*, RSC 1985, c C-34, proscribes various types of deceptive practices. Some common ones are discussed below:

1. More than One Price Tag (“Double Ticketing”)

Shopkeepers often mark goods for sale with more than one price tag. Under the *Competition Act*, RSC 1985, c C-34, it is an offence for the store to charge anything but the lowest price unless the lower price has been crossed out or the new tag covers the older tag (s 54). The older tag does not have to be unreadable; a line over it or a new tag slightly covering it is fine. However, a cashier may not cross out the older price at the cashier stand. Note that the consumer has no independent right of action. The Competition Bureau, on its website, indicates that “prosecutions under this section have rarely occurred”.

2. Advertising a Sale Price

If a business advertises a sale price, it must charge that price throughout the sale period (*Competition Act* s 74.05). However, the advertiser may be relieved of this obligation if (1) the price was advertised in error and if the advertisement indicated prices were subject to error, or (2) the advertisement is immediately followed by a correction. Advertisers who violate this section may be subject to an administrative penalty (s 74.1).

3. Bait and Switch

If a business advertises a sale, it must stock a reasonable quantity of the item (*Competition Act* s 74.04(2)). The bait and switch tactic occurs when a business advertises an item at a bargain price to attract customers but, having no intention of selling the item, does not adequately stock it. Rather, the business intends to use sale pressure to get customers to buy other, higher-priced items.

If the business does not have adequate stock of a sale item, it must issue rain cheques. Rain cheques are not required, however, if the advertisement states “while quantities last”.

Advertisers who violate this section may be subject to an administrative penalty (s 74.1). A business may avoid penalties stemming from bait and switch tactics if it attempted to supply more of an item than it was able to, if demand for the item was greater than expected, or if the advertisement stated that the sale price was good “while supplies last”.

G. False or Misleading Advertising

All advertising, whether on radio or television, in a newspaper or flyer or posted in a store, is subject to federal and provincial laws that prevent businesses from making false claims that may mislead consumers. The *BPCPA*’s prohibition against deceptive acts and practices extends to advertising, as a representation made before a sale (s 4(2)).

Purchasers have a right to know what they are buying. If a person asks for information and the sales agent volunteers it, the information **must** be correct and not deceptive. However, not everything a salesperson says is a term of the contract; some comments are mere puffery. Puffery is the sort of comment that is made to promote a product. Such comments are statements of opinion rather than misrepresentations of fact and are not treated as part of the contract (see 11:III A. Identifying and Classifying the Terms of a Contract).

- An example of puffery is “It’s a great little car.”
- An example of a statement of fact is “It's a 1994 Dodge.”

What would otherwise be puffery may constitute a deceptive act or practice under the *BPCPA*. In circumstances where a supplier provides a laudatory description of a defective item of which they have specific factual knowledge and of which the potential buyer is wholly unaware, the description is not mere puffery, but rather a deceptive act. See *Rushak*, above.

For credit advertising, pay particular attention to ss 59 - 64 of the *BPCPA*. When there is misrepresentation, a consumer may also have a cause of action at common law.

1. The Common Law

Despite the breadth of the *BPCPA*, it does not provide remedies for all contractual situations. Before commercial legislation (*SGA*) or consumer protection acts (*BPCPA*), the common law provided remedies for misrepresentation.

a) Fraudulent Misrepresentation

Fraudulent misrepresentation occurs when the vendor knowingly makes a false statement of fact that is material to the contract and the statement serves as an inducement to enter the contract. The buyer may be awarded the common law remedy of rescission and can also sue for damages in the tort of deceit. Breaches of contract damages, such as the expectation of profit, are not available, because a party cannot claim for the contract to be rescinded and, at the same time claim that the contract exists for the purposes of claiming damages.

b) Innocent Misrepresentation

An innocent misrepresentation arises when a representation of fact is false, material to the contract, and the buyer is induced to enter the contract by the representation. Unlike fraudulent misrepresentation, though the representation is not known to be false. The remedy, which is an equitable remedy, is rescission, which attempts to put the parties back in the position they were in before the contract.

A misrepresentation might also be considered to be a term of the contract or as a term in a collateral contract. In this situation, the client can sue for damages if the misrepresentation ends up being untrue.

For the remedy of rescission, there could be several possible bars:

- Third party rights have arisen;
- An undue delay occurred since the misrepresentation;
- The contract has been executed (not an absolute bar);
- The contract has been affirmed by the aggrieved party; or
- It is impossible for the courts to undo the contract.

c) Negligent Misrepresentation

Negligent misrepresentation operates in the same way as innocent misrepresentation, but it arises when the representation is made negligently as opposed to in a completely innocent manner. As with innocent misrepresentation, the remedy is rescission. *Hedley Byrne & Co Ltd v Heller and Partners Ltd,* [1961] 3 All ER 891 (HL) [4] is an example of a case involving negligent misrepresentation.

References

[1] https://www.canlii.org/en/bc/bcca/doc/1991/1991canlii178/1991canlii178.html?autocompleteStr=Rushak%20&autocompletePos=1

[2] https://www.canlii.org/en/bc/bcsc/doc/1999/1999canlii6663/1999canlii6663.html?autocompleteStr=British%20Columbia%20(Director%20of%20Trade%20Practices)%20v%20Van%20City%20Construction%20Ltd&autocompletePos=2

[3] https://www.canlii.org/en/bc/bcca/doc/2006/2006bcca369/2006bcca369.html?autocompleteStr=Dahl%20v%20royal%20bank%20&autocompletePos=2

[4] https://www.bailii.org/uk/cases/UKHL/1963/4.html

V. Direct Sales

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2023.

The *BPCPA* has replaced the *Consumer Protection Act*, and the *BPCPA* now also covers door-to-door sales, payday loans, gym memberships, unsolicited goods and services, and a number of other contracts (note that this is a non-exhaustive list of things the *BPCPA* covers). The primary remedy for consumers in the *BPCPA* regarding these types of activities is the right to avoid or cease contracts for direct sale or for future services, after giving **notice** in the manner required by the statute. A single contract may fall under more than one category, and in that case, will attract the requirements and cancellation provisions of each applicable section.

> **NOTE:** When exercising cancellation rights under the *BPCPA* consumers should be apprised of ss 27 and 28. In most cases, the contract is effectively rescinded by the cancellation; goods must be returned undamaged and payment must be refunded in full. Furthermore, if a supplier will not provide a refund as required under Division 2 of the *BPCPA*, s 55 stipulates that a consumer may be entitled to recover the refund as a debt due.

A. Direct Sales

When a consumer is approached by a salesperson, instead of making a conscious decision to seek out a product or service, they may be taken unaware and can be vulnerable to being taken advantage of. The *BPCPA* recognizes this risk by imposing disclosure requirements and allowing a consumer to cancel the contract in ways the common law does not permit.

A **direct sales contract** is defined in s 17 as:

...a contract between a supplier and a consumer for the supply of goods or services that is entered into in person at a place other than the supplier's permanent place of business, but does **not** include any of the following:

- A funeral contract, interment right contract or preneed cemetery or funeral services contract (see *Cremation, Interment and Funeral Services Act* and its associated regulations which, like the *BPCPA* and its regulations, are enforced by Consumer Protection BC);
- A contract for which the total price payable by the consumer, not including the total cost of credit, is less than a prescribed amount of $50 (*Consumer Contracts Regulation* B.C. Reg 272/2004 s 4 [*CCR*]); and
- A prepaid purchase card.

The *BPCPA* sets out a lengthy list of requirements under ss 19 and 20 for the content of direct sales contracts, such as the name, address, and telephone number of the seller, the name (in a readable form) of the individual who signs the contract on behalf of the supplier, a detailed description of the goods or services to identify them with certainty, the price, and a detailed statement of the terms of payment. When credit is extended (meaning any sort of arrangement where the individual/buyer can pay at a later date), there also needs to be a description of the subject matter of any security interest (such as collateral that the seller may hold in the buyer's property). This is **not** an exhaustive list; please consult the *BPCPA*.

Under s 5 of the *CCR*, there are several exemptions to the applicability of the *BPCPA* to direct sales contract. Such exemptions include:

- Certain classes of direct sellers who are selling goods or services for which they are licensed, registered or incorporated (s 5(4)).

- Direct sellers who enter into a direct sales contract at agricultural shows or fairs, trade shows, craft shows, temporary kiosks in shopping malls, or similar types of exhibits (s 5(5)).
- Direct sellers who attend the place following a request that was made at least 24 hours in advance by the consumer or a friend or relative of the consumer who is not an associate of the direct seller.

1. Right of Cancellation

Under s 21 of the *BPCPA*,

> (a) The purchaser may cancel the contract within **10 days** after receiving a copy of the contract. The purchaser need not offer explanations for their decision. The vendor then has 15 days after the date of cancellation to refund all money without deduction;
>
> (b) If a delivery date is specified in the contract and not all of the goods/services are delivered/performed within 30 days of this date, the purchaser may cancel the contract within one year after the date a copy of the contract was received, provided that the purchaser has not accepted or used the goods/services; and
>
> (c) If the contract does not contain information required under s 19 and 20(1) of the Act, the buyer may cancel within one year of the date of the contract.

A direct sale is unenforceable by the seller if the buyer is required to make a down payment in excess of a prescribed amount (*BPCPA* s 20(3)(b)). In the *CCR*, s 4(2) sets the amount of down payment prescribed under s 20(3)(b) as the lesser of $100 or 10% of the total price.

> **NOTE:** Whether the purchaser has **accepted** the goods is determined by the definition in the *Sale of Goods Act* (s 39).

The *BPCPA* does not make oral executory contracts unenforceable. However, s 20(3) requires that the seller gives a written copy of the contract to the buyer at the time of signing. Otherwise, the contract is not binding on the buyer.

Under s 54, the *BPCPA* requires that the buyer provide notice of cancellation to the seller and declares that it may be delivered by any method that permits the cancelling party to produce evidence that the contract was cancelled. Notice by registered mail, electronic mail, personal delivery, and fax are explicitly permitted. Nowhere does the *BPCPA* explicitly state that a notice of cancellation shall be in writing, but a buyer should be cautious and deliver **written notice**. The section explicitly permits that the notice can be given to the seller directly, or to the postal, fax, or electronic mail address of the seller shown in the contract. When a buyer rescinds a contract under s 21, that section also provides that the goods may be retained until all of the money paid is refunded.

In *Woodward v International Exteriors (British Columbia) Ltd*, (1991), 53 BCLR (2d) 397, 1 BLR 254 (CA) [1] at para 10, verbal notice of termination of an agreement was sufficient for the consumer to terminate this form of contract. Note that verbal notice may not be sufficient in all instances and written notice remains advisable.

B. Future Performance Contracts

A **future performance contract** is defined in s 17 as:

...a contract between a supplier and a consumer for the supply of goods or services for which the supply or payment in full of the total price payable is not made at the time the contract is made or partly executed, but does **not** include:

- A contract for which the total price payable by the consumer, not including the total cost of credit (amount to be paid later), is less than a prescribed amount of $50 (*CCR* s 6);
- A contract for the supply of goods or services under a “credit agreement”, as defined in s 57 (definitions), if the goods or services have been supplied;

- A time share contract; or
- A prepaid purchase card.

Future services contracts are subject to some important statutory requirements under Part 4, Division 2 of the *BPCPA*.

The *BPCPA* sets out a long list of requirements under ss 19 and 23 for the content of future services contracts, such as the name, address, and telephone number of the seller, a detailed description of the goods or services to identify them with certainty, the price, supply date, and a detailed statement of the terms of payment. When credit is extended (meaning that the supplier allows the individual/ buyer to pay all or part of the purchase price at a later date), there also needs to be a description of the subject matter of any security interest (e.g. collateral). This is **not** an exhaustive list; please consult the Act.

Under s 23(4), a future performance contract is not enforceable by the seller if a rebate or discount is given on the condition of some event occurring after the time the buyer agrees to buy (usually a referral selling scheme whereby the purchaser aids the seller in making a further sale).

If the future performance contract does not contain the required information (ss 19 and 23), then a consumer may cancel the contract by giving notice of cancellation to the supplier within **one year** of the date that the consumer receives a copy of the contract (s 23(5)). The required form and procedure for giving notice is set out in s 54.

C. Continuing Services Contracts: Gym Memberships, Travel or Vacation Clubs

These contracts are called continuing services contracts because, while you may pay now, the contract extends into the future. This type of contract is often used when one joins a karate club or a dance studio, or buys a membership in a vacation club.

Continuing services contracts must not exceed 24 months in duration, including all options to extend or renew the contract (s 24(3)), but may allow the consumer to renew the contract in writing within one month of the expiry of the contract (s 24(4)). If a contract does not comply with s 24(3) or is not validly renewed pursuant to s 24(4), alternative remedies are available under s 24(6):

> (a) The contract is not binding on the consumer for the period beyond 2 years;
>
> (b) Within 15 days of the consumer's request, the supplier must refund to the consumer all money paid for the period beyond 2 years; and
>
> (c) If the supplier does not comply with part (b), the consumer may recover that money as a debt due.

1. Right of Cancellation

Because they are often sold at high-pressure presentations, these contracts are subject to a **10 day** right of cancellation from the date the consumer receives a copy of the contract (s 25(6)). A 10 day right of cancellation also applies to time-share interests that are not covered by the *Real Estate Development Marketing Act*, SBC 2004, c 41, such as resorts or condominiums (s 26(3)).

Contracts for continuing services can also be cancelled if there is a **material change** in circumstances of the buyer or the seller, and where the buyer or seller gives notice of cancellation (s 25). When alleging a material change in circumstances as the basis for cancelling, the reason must be specified in the notice (s 25(2)).

Material changes in circumstances include, but are not limited to:

- The buyer's death.
- The buyer is mentally or physically unable to participate in the activity they signed up for.
- The buyer has relocated more than 30 km further from where they entered into the contract.

Material changes in circumstances of the seller include:

- Through the partial or entire fault of the seller, the services are not completed, or at any time the seller appears to be unable to reasonably complete the services in the time frame set out in the contract for the completion of services;
- The services are no longer available because of the seller's discontinued operation or substantial change in operation; and
- The relocation of the business of the seller 30 km further from the buyer without provision of equivalent service within 30 km.

The required form and procedure for giving notice are set out in s 54.

Additionally, if the business has made significant changes to the services it originally offered, like closing down, moving, or removing certain amenities, it may be considered a material change by the supplier, and the buyer may have a right to cancel.

To exercise their right of cancellation, buyers of continuing services can fill out the following forms and send them to the other party:

To cancel a continuing services contract within 10 days: https:/ / www. consumerprotectionbc. ca/ wordpress/ wp-content/uploads/2017/06/Cont.-serv.-cancellation-within-10-days.pdf

To cancel a contract because of the buyer's change in circumstances (buyer's material changes): https:/ / www. consumerprotectionbc. ca/ wordpress/ wp-content/ uploads/ 2017/ 06/ To-cancel-your-contract-because-of-your-change-in-circumstances-fill-out-this-form..pdf

D. Unsolicited Goods or Services

Under s 11, unsolicited goods or services means goods or services that are supplied to a consumer who did not request them, other than:

- Goods or services supplied to a consumer who knew or ought to have known they were intended for delivery to another person;
- Goods or services for which the supplier does not require payment; or
- A prescribed supply of goods or services.

Under s 12, a recipient of unsolicited goods has no legal obligation to the sender unless the recipient gives notice of an intention to accept them, or unless the recipient knew or ought to have known that the goods were intended for delivery to another person.

However, if a consumer does pay for unsolicited goods or services, under s 14 the consumer may give to the supplier a demand, in writing, for a refund from the supplier within 2 years after the consumer first received the goods or services if the consumer did not expressly acknowledge to the supplier in writing their intention to accept the goods or services.

> **NOTE:** If a consumer is being supplied with goods or services on a continuing basis and there is a material change in the goods or services or in the supply of them, the goods or services are deemed to be unsolicited goods or services from the time of the material change **unless** the supplier can establish that the consumer consented to the material change.

E. Distance Sales

Under s 17, a "distance sales contract" means "a contract for the supply of goods or services between a supplier and a consumer that is not entered into in person and, with respect to goods, for which the consumer does not have the opportunity to inspect the goods that are the subject of the contract before the contract is entered into but does not include a prepaid purchase card". This definition encompasses all forms of commerce where the parties are not face-to-face, such as catalogue sales, sales over the internet, or sales over the telephone. A supplier must give a consumer a copy of the contract within 15 days after the contract is entered into, as per s 48, which also sets out a list of requirements for distance sales contracts. The information that must be disclosed to the consumer prior to the consumer entering into the distance sales contract is set out in s 46. For example, the supplier must disclose a detailed description of the goods, the currency, delivery arrangements and the cancellation policy, if any. This is not an exhaustive list; please see the Act.

Additional requirements for contracts that are in electronic form are in s 47. Specifically, the supplier must make the information from s 46 available in a manner that the consumer can access, retain, and print. The supplier must also give the consumer the opportunity to correct errors and accept or decline the contract.

Consumer rights concerning cancellation of distance sales contracts are in s 49. Note that there are different time restrictions on cancellation rights for distance sales depending on which provisions the supplier does not comply with. Once a consumer gives notice to the supplier of the cancellation, the supplier has 15 days to refund to the customer all monies paid in respect of the contract and any related consumer transactions (s 50). If the supplier fails to do this, the consumer may have recourse under s 52 if the consumer charged to a credit card all or any part of the total price under the contract, and the consumer may also be entitled to recover the refund as a debt due (s 55).

F. Credit Transactions

Part 5 of the *BPCPA* deals with the disclosure of the cost of consumer credit.

The Acts set out disclosure requirements, as well as advertising requirements for both fixed and open credit. The basic distinction between fixed and open credit is that **open credit** involves multiple advances and does not establish the total amount advanced under the agreement. However, open credit can be subject to an overall credit limit. **Fixed credit** is a credit arrangement that is normally based on a fixed initial advance and a predetermined payment schedule. Under s 105 of the *BPCPA*, the creditor (lender) is obliged to compensate borrowers for contraventions of the Act.

The rules for credit transactions under the *BPCPA* are:

- Under s 66, lenders are required to furnish debtors (borrowers) with a written statement of disclosure. Consult ss 66 – 93 for the specific requirements pertaining to your client's situation.
- Under ss 59 – 64, certain requirements flow from the advertising of certain aspects of credit, such as interest-free periods, interest rates, and cost of credit.
- Under Division 4 of Part 5, a borrower has certain rights, such as being able to choose an insurer and to cancel optional services.
- Under s 99, where a credit card is lost or stolen, the holder is not liable for any charges incurred after notice in person or by registered mail has been given to the issuer of the card. In the case of purchases made before notice is given, an individual is only liable for $50 or up to the credit limit remaining on the card, whichever is less. This protection does not extend to situations where a credit card is used with a personal identification number at an ATM (see *Plater v Bank of Montreal*, [1988] BCWLD 986, 22 BCLR (2d) 308 (Co Ct)).

1. Notice Required for Increased Interest Rates

Under s 98, there is a notice requirement for certain changes in credit card interest rates.

2. Unsolicited Credit Cards

A credit card issuer must not issue a credit card to an individual that has not applied for one (s 96). This does not affect the ability of a credit card issuer to provide a renewal or replacement card that has been applied for.

3. Prepaid Purchase Cards (Gift Certificates and Gift Cards)

The terms of prepaid purchase cards are regulated under ss 56.1 – 56.5. A prepaid purchase card is a card, written certificate or other voucher with a monetary value that is issued or sold to a person in exchange for the future supply of goods or services. These include gift cards or gift certificates.

Under s 56.2, cards are prevented from being issued with an expiry date. *Prepaid Purchase Cards Regulation*, BC Reg. 292/2008 contains exemptions from the expiry date prohibition. These include cards issued for a specific good or service, cards issued for a charitable purpose, and cards issued to a person who provides nothing of value in exchange.

In *Sharifi v. WestJet Airlines Ltd.*, 2022 BCCA 149, West Jet issued WTB credits for a variety of reasons, including cancellation of flights. The court found that these credits were not prepaid purchase cards. This was because the credits were not directly purchased. The plaintiff purchased a prepaid flight, and the credits were contingent on future events that may never have happened. The Court stated that the credits were "an entirely different form of financial product or device than that which is contemplated in s. 56.1 of the BPCPA and the other relevant statutes." at para 61.

G. High-Cost Loans (Payday Loans)

1. Criminal Code

The *Criminal Code* prohibits loans that charge a criminal rate of interest (s 347), which is defined as an annual rate that **exceeds 60 percent**.

Loans offered by payday lenders, if calculated according to the *Criminal Code*, may charge rates that exceed the amount permitted under the definition. In 2006, the federal government amended the *Criminal Code* to **exempt** payday loan agreements from the criminal interest rate provision. Payday loan agreements are defined and are exempted from s 347 provided that the following three conditions are met (s 347.1):

1. The loan must be for $1500 or less and for 62 days or less;
2. The person must be licensed or specifically authorized under provincial law to enter into that payday loan agreement; and
3. The province must be designated by the Governor in Council (which will happen in a province that has adequate measures to protect recipients of payday loans).

2. Payday Loans

Under the *Payday Loans Regulation*, BC Reg 57/2009, s 2 designates payday lenders as a "designated activity" under s 142 of the *BPCPA*. A payday lender "means a person who offers, arranges, provides or otherwise facilitates payday loans to or for consumers" and includes "a person who, for compensation, arranges, negotiates or facilitates an extension of credit". Anyone who participates in a designated activity must carry a license (s 143). A payday lender must carry a separate license for each operating location. They must have a sign at each location displaying this license number, the maximum charges permitted in BC (15% of principal), the amount they charge, the total cost of borrowing $300 for 14

days, and the annual percentage rate they charge.

The regulations also set limits on the amount of interest that can be applied, mirroring s 347 of the *Criminal Code*.

- The maximum amount that can be charged on a payday loan is $15 for every $100 borrowed including all charges and fees.
- In addition, a payday loan cannot exceed 50% of the borrower's net pay to be received during a single pay period within the payday loan term.
- If the repayment amount is not paid, default fees cannot exceed 30% per annum on the outstanding principal.

Thus, payday loans in BC are permitted under *Criminal Code* s 347.1, as long as they follow the provincial requirements.

These requirements do set out a number of additional restrictions on payday lenders (*BPCPA* s 112.08). Notably, a payday lender may **not**:

- Sell insurance to or for the borrower, or require or request that the borrower insure a payday loan;
- Issue a new payday loan to a borrower who already has a payday loan issued by the lender;
- Require, request or accept consent from a borrower to use or disclose the borrower's personal information for a purpose other than offering, arranging, providing or otherwise facilitating a payday loan;
- Require, request or accept any undated cheque;
- Require, request or accept any post-dated cheque, pre-authorized debit or future payment of a similar nature, for any amount exceeding the amount to repay the payday loan by the due date, including interest and permissible charges (although, a one-time fee of $20 is allowed for a dishonoured cheque or pre-authorized debit – see s 17(2)(b) of the *Payday Loans Regulation*);
- Require or request any payment from the borrower before it is due under the loan agreement;
- Grant rollovers (i.e. charge a fee to extend a loan's due date);
- Require, request or accept an assignment of wages from the borrower (and if they do the assignment of wages is not valid);
- Require, request or accept from the borrower or any other person, as security for a payday loan, any personal property, real property, or documentation that could be used to transfer title in personal property or real property; or
- Discount the principal amount of a payday loan by deducting or withholding from the initial advance an amount representing any portion of the total cost of credit.

Additionally, there is a mandatory period set out in the regulations where a consumer is allowed to return the money and cancel the payday loan. This period begins on the date that the borrower receives the first advance and expires at the end of the second day that the payday lender is open for business after that first advance (*Payday Loans Regulation* s 14.2(1)).

3. High-Cost Credit Products

High-cost credit products, set out in part 6.3 of the BPCPA, are loans or lines of credit that charge high interest rates and/or various fees. The formal definition of a **High-Cost Credit Product** is:

> (a) A fixed credit product that has an APR that exceeds the prescribed APR and meets other prescribed criteria;
>
> (b) An open credit product that has an annual interest rate that, calculated in accordance with the regulations, exceeds the prescribed annual interest rate and meets other prescribed criteria,
>
> (c) A lease that has an APR that exceeds the prescribed APR and meets other prescribed criteria, or
>
> (d) A prescribed product through which credit (e.g. a loan) is extended by a high-cost credit grantor to a borrower (e.g. the consumer) primarily for a personal, family or household purpose, but does not include a payday loan, mortgage on real property or prescribed credit product.

> **NOTE:** Because interest rates can be compounded (interest on interest) at different frequencies (usually monthly, but can also be annually, semi-annually, quarterly, weekly, daily, or even continuously – which is set by the lender as a term of the contract for the loan or other credit arrangement), annual percentage rate (APR) is the convention for quoting interest rates on an annual basis. Since legislation also expresses interest rates in APR, this allows one to directly compare the APR-quoted interest rate from the contract to the APR-quoted limit in the statute.

The BPCPA limits the rate of high-cost credit products and sets out other limitations and prohibitions. A high-cost credit grantor is prohibited from accepting, requesting, or charging certain types of fees, including undisclosed amounts and penalties. The BPCPA also grants the borrower cancellation rights, including the right to cancel the agreement within the next day the credit grantor is open for business. There are required terms that a grantor must include in all high-cost credit agreements, and a grantor is prohibited from enticing potential borrowers by stating or implying that it will improve their credit, or by promising any prize or reward as an incentive to enter into a high-cost credit agreement. Furthermore, there are additional restrictions on collection and the use and disclosure of the borrower's information. The list available remedies can be found in s 112.31 of the BPCPA.

H. Remedies and Sanctions

In addition to the remedies already mentioned that are available to consumers, the *BPCPA* provides for further sanctions:

1. Fines or Imprisonment

For any contraventions of the *BPCPA*, s 190 establishes a summary conviction offence with penalties of imprisonment up to one year and fines of up to $10,000 for individuals and $100,000 for corporations. .

2. Investigation and Search Powers

Part 10 gives the Director the power to investigate and request information where there are reasonable and probable grounds to believe that a person has contravened, is contravening, or is about to contravene the *BPCPA* or an order made under it.

References

[1] https://www.canlii.org/en/bc/bcca/doc/1991/1991canlii1408/1991canlii1408.html?autocompleteStr=Woodward%20v%20International%20&autocompletePos=1

VI. Conditional Sales Contracts

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

The *Personal Property Security Act*, RSBC 1996, c 359 [PPSA] governs conditional sales agreements (e.g. the contract is subject to some condition to be fulfilled later) and security contracts. The *PPSA* established a new unified system for the registration, priority, and enforcement of transactions where collateral is given to secure payment or the performance of an obligation. The main purpose of the *PPSA* is to offer lenders or creditors a system of priority vis-à-vis other creditors where it is necessary for the lender or seller to take an interest in personal property to ensure the obligations of the borrower or purchaser are met. The legislation effectively creates a system for the registration and enforcement of a security interest against personal property.

Under s 2, the *PPSA* governs every transaction that creates a security interest, regardless of the form of the agreement, even in agreements that do not appear to be security agreements, so long as it is creating a security interest in substance. A "**security interest**" is defined in s 1(1) as an interest in goods that secures payment or the performance of an obligation.

> **NOTE:** For the purposes of this section, goods is used to define security interests. However, the actual definition is broader than that. For more information, see ss 1(a) and ss 1(b) "security interest".

Chapter 10: Creditors' Remedies and Debtors' Assistance has a discussion on the protection offered to a consumer by the *PPSA*, including the requirements of enforceable security. The *PPSA* has some special considerations applicable if the goods in which the collateral was taken were consumer goods. **Consumer goods** are defined in s 1(1) as goods that are acquired primarily for personal, family, or household purposes.

A. Creditor's Remedies Against the Debtor

1. Control by the Creditor

Under s 58, the *PPSA* provides that, where the debtor defaults on a security agreement, the creditor can take control of the collateral item through any method authorised by law with a few select exceptions (s 56). Where, however, the collateral is a consumer good and the debtor has paid two-thirds of the total amount secured, the creditor may **not** seize the goods without an application to the court (s 58(3))

2. Action by the Creditor

A creditor (lender) can sue the debtor (borrower) for breach of contract and seek repayment of the monies owed. Additionally, the creditor can enforce their interest in the collateral by seizure (s 58) or possession (s 61). Generally, the secured party (lender) can seize **and** sue for any deficiency. However, when consumer goods form all or merely a portion of the collateral, the secured party must elect to **seize or sue**, subject to s 58(3).

3. Acceleration Clauses

A security agreement provides that a creditor may accelerate payment (or performance) by the debtor if the creditor, in good faith, believes and has commercially reasonable grounds to believe that the prospect of payment or performance is about to be impaired or that the collateral is or is about to be placed in jeopardy (s 16).

B. Restrictions on the Creditor's Right to Dispose

Under s 59 of the *PPSA*, a creditor cannot sell the seized goods before the expiration of the **20-day** notice period, as every party entitled to notice under ss 59(6) or ss 59(10) via approved methods outlined in s 72 may **redeem** the collateral by fulfilling the obligations secured in the security agreement (s 62). Where the collateral is a consumer good, the redeeming party need only pay the amount in arrears (i.e. debt owing to date) plus reasonable seizure fees (s 62(1)(b)). This is known as the **right of reinstatement**. It cannot be used more than twice in a 12-month period (s 62(2)).

C. Disqualification from "Seize or Sue" Provisions

A party with a security interest in consumer goods may avoid the "seize or sue" restriction where:

> (a) The debtor (borrower) is a company, a partnership of corporations, or a joint venture of corporations (s 55(4)(a));
>
> (b) The debtor has engaged in wilful or reckless acts or neglect which have caused substantial damage or deterioration to the goods, and the secured party may seek a court order pursuant to s 67(9) disqualifying the debtor from the rights and remedies ordinarily available under ss 67(1) – (7); or
>
> (c) The secured party discovers after seizure that an accession that was collateral has been removed and not replaced by other goods of equivalent value and free from prior security interests; a claim may be advanced against the debtor for the value of the accession (s 67(8)).
>
> **NOTE:** Accession means goods that are installed in or affixed to other goods. For example, a shovel attached to a truck. See ss 38 and 1(1) for more information about accessions.

The seizure of consumer goods generally extinguishes the debt in relation to the security agreement. However, there are exceptions under s 67:

- If the creditor (lender) returns the consumer goods within 20 days after the seizure, that will revive the debt;
- If the security agreement is a mortgage or an agreement for sale and the consumer goods are part of this security, in the case that the lender exercises their rights under the mortgage or agreement of sale but does not seize the goods, the debt is **not** extinguished; or
- If the creditor (lender) has a purchase money security interest in the seized consumer goods and other consumer goods, the debt is extinguished to the extent identified in the security instrument as relating to the seized consumer goods.

These qualifications also apply in the event of a voluntary foreclosure and a voluntary surrender of consumer goods rather than a seizure.

For consumer goods only, if the creditor (lender) chooses not to enforce their interest in the collateral and chooses to seek judgement instead, the security interest in the collateral is also extinguished (s 67(10)(a)).

D. Third Party Purchaser's Rights

Under ss 30(3) and 30(4), where a third-party purchases collateral in the form of consumer goods worth less than $1,000, and the third party does not have knowledge of the security agreement between the vendor and the creditor, the third party takes the item free of the creditor's interest, even if registered. This is known as the "garage sale" defence. The purchaser is known more commonly as a *bona fide* **purchaser for value without notice**.

The third party's priority over the creditor ends if there is knowledge of the pre-existing security interest. Under s 1(2), "knowledge" is judged **objectively** rather than subjectively (i.e. would a reasonable person know?).

> **NOTE:** If the creditor's interest in the collateral does not continue because the third-party purchaser takes title free of that interest, the creditor's interest will continue in the proceeds of the sale of the security (collateral) by the debtor (borrower) to the *bona fide* purchaser if the original collateral is continuously perfected under s 28(2) or the proceeds are perfected within 15 days under s 28(3), unless the creditor authorized the deal. For more information on perfection and attachment, see s 19 and s 12, respectively.

Security is perfected when the requirements under the *PPSA* are met and has attached, meaning that the collateral has come into existence (i.e. if security has not attached, then there is no collateral). Under s 12, a security interest attaches when:

> (a) Value is given;
>
> (b) The debtor has rights in the collateral; and
>
> (c) There is an enforceable security interest (see s 10 for writing requirements for security agreements) unless the parties specifically agree to postpone the time of attachment, in which case the security interest attaches at that specified date.

Generally, once security is perfected, the creditor's interest has priority over the interests of third parties, whereas unperfected security takes a lower priority (s 19). However, as described above, one exception to s 19 is in s 30 where a creditor's interest in the collateral does not continue because of a *bona fide* purchaser's interest, but the creditor's interest will continue in the proceeds.

E. Application of PPSA to Leases

Many consumers lease cars instead of buying on credit under a financing agreement. A lease **can** qualify as a security agreement: see *Daimler Chrsyler Services Canada Inc. v Cameron*, 2007 BCCA 144 [1] for factors and *Re Bronson* (1995), 34 CBR (3d) 255 (BCSC) [2]. Therefore, if they default and the car is repossessed, the "seize or sue" restriction may apply, but the situation is not always clear-cut. LSLAP clients should be referred to a lawyer.

F. Bills of Exchange Act

Under Part V of the *Bills of Exchange Act* [*BEA*], a bill of exchange or a promissory note (i.e. an "I owe you") given for a consumer purchase must be clearly marked "Consumer Purchase" (s 190(1)), and where it is marked, the rights of an assignee of the bill or note are subject to any defence the purchaser would have against the vendor (s 191). Where it is not marked, it is void except in the hands of a holder in due course without notice (s 190(2)). The purpose of Part V is to codify the rule in *Federal Discount Corp v St Pierre* (1962), 32 DLR (2d) 86. [3]

Part V does not cover private sales (where the seller is not engaged in the business of selling the goods in question), or sales to small businesses or corporations of items to be used in their business. Nor does it cover a purchaser's loan (i.e. a loan from a lender to a person to enable that person to buy goods and/or services from a seller), subject to s 189(3) below.

A consumer bill is defined in s 189(1), and a consumer note is defined in s 189(2). A **consumer bill** or note is conclusively presumed if (s 189(3)):

1. The consideration for its issue was the lending of money, etc. by a person other than a seller, to enable the purchaser to make a consumer purchase; and
2. The seller and the person who lent the money, etc. were, at the time the bill or note was issued, not dealing with each other at arm's length within the meaning of the *Income Tax Act*.

If an instrument meets the definition of a consumer note, any defence that the consumer would have for an action against them by the seller would also be available against subsequent noteholders (the seller sells a good to the consumer and, in exchange, receives a note from the consumer, which is like an "I owe you" or a promise to be paid back). Therefore, if the consumer does not get what they have paid for, the consumer may not be required to pay the loan back when pressed for payment by the lender's assignee. Also, if the seller does not fulfil obligations under a warranty, the consumer will be able to resist payment (*Canadian Imperial Bank of Commerce v Geldart*, [1985] BCJ No 1973 and *Canadian Imperial Bank of Commerce v Kabatoff*, [1986] BCJ No 942).

References

[1] https://www.canlii.org/en/bc/bcca/doc/2007/2007bcca144/2007bcca144.html?autocompleteStr=Daimler%20chr&autocompletePos=3
[2] https://www.canlii.org/en/bc/bcsc/doc/1995/1995canlii3263/1995canlii3263.html?resultIndex=3
[3] https://www.canlii.org/en/on/onca/doc/1962/1962canlii124/1962canlii124.html?resultIndex=1

VII. Motor Dealer Act

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Overview of the Motor Dealer Act

The *Motor Dealer Act*, RSBC 1996, c 316 [*MDA*] sets up a licensing regime that requires all motor dealers in the province be licensed. The Registrar of Motor Dealers carries out the licensing function. The Registrar has the authority to receive complaints concerning the conduct of a motor dealer and has the authority to refuse to provide a license, or suspend or terminate an existing motor dealer's license.

The definition of a motor dealer is a person who, in the course of business:

> (a) Engages in the sale, exchange or other disposition of a motor vehicle (see "NOTE" below), whether for that person's own account or for the account of another person, to another person for purposes that are primarily personal, family or household;
>
> (b) Holds himself, herself or itself out as engaging in the disposition of motor vehicles under paragraph (a); or
>
> (c) Solicits, offers, advertises or promotes with respect to the disposition of motor vehicles under paragraph (a),

but **does not** include a salesperson.

> **NOTE:** As of April 5, 2021, the definition of a "motor vehicle" under the *MDA* was amended under s 1 to exclude a farm tractor, motor assisted cycle or regulated motorized personal mobility device. The definitions of these three exclusions can be found in the *Motor Vehicle Act*.

The *MDA* Regulations set out requirements concerning representations made by a motor dealer when offering motor vehicles for sale. A motor dealer is required to disclose to a prospective buyer whether the motor vehicle was previously used as a taxi, police or emergency vehicle, or for organized racing. In the case of a new motor vehicle, the motor dealer must disclose whether the vehicle has sustained damage that required repairs worth more than 20% of the asking price. In the case of a used vehicle, the dealer must disclose whether the vehicle has sustained damages requiring repairs of more than $2,000. The motor dealer is also required to disclose whether a vehicle has previously been used as a lease or rental vehicle and whether a used motor vehicle has been brought into the province specifically for the purposes of sale.

A motor dealer is required to disclose to a prospective consumer whether the odometer accurately reflects the true distance travelled by the motor vehicle. The *MDA* Regulations also set out the required contents of a sale or purchase agreement concerning new vehicles.

Under s 34 of the *MDA*, it is prohibited to disconnect or tamper with an odometer. It is also an offence to drive or operate a motor vehicle with a disconnected odometer. Furthermore, it is an offence for any person to alter, disconnect, or replace a motor vehicle's odometer with the intent to mislead a prospective purchaser about the distance travelled by the motor vehicle. Odometer tampering can significantly increase the apparent sale value of a motor vehicle and, therefore, the consumer should be wary of representations of low mileage. The *MDA* sets out regulatory responses to odometer tampering. The consumer who suffers loss as a result of odometer tampering has a contractual remedy and may be able to present a claim to the Motor Dealer Customer Compensation Fund Board.

B. Motor Dealer Customer Compensation Fund

An individual who suffers a loss as a result of purchasing a motor vehicle from a registered motor dealer may be entitled to compensation from the Motor Dealer Customer Compensation Fund Board ("the Board"). A consignor of a motor vehicle is also entitled to make an application – on similar grounds as a purchaser – for compensation for the loss of the consigned vehicle or the value of the vehicle. Individuals who have purchased a vehicle, primarily for personal or family use, from a registered motor dealer are eligible to apply to the Board for compensation. Before applying for compensation, the consumer must first make a demand against the motor dealer responsible for the loss. What constitutes an eligible loss is set out in s 5 of the *Motor Dealer Customer Compensation Fund Regulation*, BC Reg 102/95 [*MDCCFR*]. An eligible loss must be a liquidated amount arising from a trade-in, full payment, deposit or down payment or other liquidated amount in respect of the purchase of a motor vehicle. The cause of the loss must be related to the bankruptcy, insolvency, receivership, dishonest conduct, or failure of the motor dealer to provide clear title.

Under the *Motor Dealer Customer Compensation Fund Regulation [MDCCFR]*, an eligible loss may also arise from the unexpired portion of an extended warranty so long as it results from the bankruptcy, insolvency, receivership, or other failure of the motor dealer. Claims that will not be compensated include those based upon cost, value or quality, those based on an extended warranty or service if it is recoverable from an insurer, and those related to the portion of the operation of the motor vehicle claimed as a business expense (s 7). For further information about making an application for compensation from the Motor Dealer Customer Compensation Fund, call the Vehicle Sales Authority at (604) 574-5050 or visit http://mvsabc.com/compliance-and-claims/compensation-fund/. A claim against the Fund must be made **within two years** from the refusal or the motor dealer's failure to pay for the losses.

VIII. Miscellaneous

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Circumvention of Disclaimer Clauses

Vendors may try to protect themselves from liability arising from oral representations made to a buyer by inserting an exclusion clause into the written contract. Exclusion clauses attempt to invalidate any representations or warranties other than those explicitly mentioned in the written contract. Exclusion clauses can also seek to exclude statutory conditions and warranties, or they can attempt to limit the buyer's default rights. There can be a variety of ways to get around such clauses.

1. Statutory Relief

a) Retail Sales of Goods

Under s 20(2) of the *SGA*, in the case of a retail sale of new goods to a consumer, any term of a contract that purports to negate or in any way diminish the statutory conditions or warranties in ss 17 – 19 of the *SGA* is void.

b) Deceptive Act or Practice

Where a supplier makes oral representations to a consumer, but terms in the contract deny or negate such representations, the vendor may have engaged in a deceptive act or practice under the *BPCPA*.

c) Consumer Transactions Generally

In consumer transactions involving a commercial supplier, the purchaser may invoke s 187 of the *BPCPA*, which makes oral or extrinsic evidence admissible for determining the understanding of the parties.

2. Common Law Relief

Although the statutory provisions will usually help a consumer defeat disclaimer clauses, several common law doctrines and judicial techniques may also be of assistance.

a) Clause Deemed Not to Be Part of Contract

To rely on an exclusion clause, the seller must show that it is part of the contract. However, the court may find that the clause does not form part of the contract where, for example, it is insufficiently legible, or where it was inserted after the agreement was concluded. In *Thornton v Shoe Lane Parking Ltd.*, [1971] 2 QB 163 [1], the exclusion clause was written on signs inside the parking lot and was found to not have been incorporated into the contract, as the contract was concluded when the parking ticket was given by the machine at the entrance to the parking lot.

b) Misrepresentation as to the Clause's Legal Effect

When the seller misrepresents the legal effect of a disclaimer clause, a court may be willing to render the clause inoperative. Traditionally, however, courts would not invalidate a clause based on a misrepresentation of law, as opposed to fact.

c) Strict Interpretation of Clause

Disclaimer clauses are strictly construed against the party seeking to rely on them. Anything not explicitly found in the clause will not be read into it.

d) Collateral Contract

The court may find that where a clause excludes oral representations, an oral representation made by the seller actually constitutes a collateral (or parallel) contract. However, for a court to find there is a collateral contract, the collateral contract must also have all the elements of an enforceable contract (e.g. offer, acceptance, consideration, etc.)

e) Inadequate Notice

Some disclaimer clauses are hidden in the "boilerplate" fine print of the contract and have been held not binding for this reason, if they are particularly onerous and attention was not drawn to them (*Tilden Rent-A-Car Co v Clendenning* (1978), 18 OR (2d) 601, 83 DLR (3d) 400 (Ont CA) [2]).

B. Consumers' Rights against Creditors and Debt Collection Agencies

1. If the Client has Serious Debt, Inform the Client of:

(a) The limits of a creditor's remedies (*Court Order Enforcement Act*, RSBC 1996, c 78), including garnishment and seizure;

(b) The limits to debt recovery (exemptions) under the *Court Order Enforcement Act*; and

(c) Options for getting out of debt (see Chapter 10: Creditors' and Debtors' Remedies for Orderly Payment of Debts information).

2. Legislation Regulating Debt Collection

- *Business Practices and Consumer Protection Act*, SBC 2004, c 2
- *Court Order Enforcement Act*, RSBC 1996, c 78
- *Repairer's Lien Act*, RSBC 1996, c 404
- *Small Claims Act*, RSBC 1996, c 430
- *Bankruptcy and Insolvency Act (Canada)*, RSC 1985, c B-3
- *Debtor Assistance Act*, RSBC 1996, c 93
- *Creditor Assistance Act*, RSBC 1996, c 83
- *Personal Property Security Act*, RSBC 1996, c 359

For more information on debtor and creditor law, see Chapter 10: Debtors' and Creditors' Remedies.

C. Telemarketer Licensing Regulation

In the *Telemarketer Licensing Regulation*, BC Reg 83/2005 [*TLR*], "telemarketer" is defined as "a supplier who engages in the business or occupation of initiating contact with a consumer by telephone or facsimile for the purpose of conducting a consumer transaction."

Under the *TLR*, s 4(1) requires that telemarketers have a license for each location from which they conduct business.

A telemarketer must keep various records for **each** sales contract entered into and the records be maintained for a period of two years after the contract is entered into by the consumer (s 7).

Under s 8 of the *TLR*, several acts and practices by telemarketers are prohibited. Under s 8(2), it is prohibited to contact a consumer by either phone or fax on:

- Statutory holidays;
- Outside of the hours of 10 a.m. – 6 p.m. on Saturdays or Sundays; and
- Outside of the hours of 9 a.m. – 9:30 p.m. on any other day.

A telemarketer is prohibited from contacting a consumer more than once in 30 days for the same transaction (s 8(3)) and blocking their number on the call display of the consumer (s 8(4)). Furthermore, before the consumer enters into a contract or commits to contributing money, a telemarketer acting on behalf of a supplier must disclose (s 8(5)):

- The name, business address and telephone number of the supplier, or
- The purpose of the contribution if requesting a donation.

D. Repairer's Liens

The *Repairer's Lien Act*, RSBC 1996, c 404 [*RLA*], which codifies the common-law possessory lien, offers an extremely powerful collection tool for those who repair or do other work on chattels. With respect to any chattel, it allows the repairer to simply retain possession of the goods until paid and, if payment is not forthcoming, to sell the goods to recover the cost of the repair. In addition, for a limited category of chattels, the most important of which is motor vehicles, the *RLA*, if followed precisely, allows the repairer to maintain and enforce a lien on a vehicle, even after it has been returned to the owner. This is a common consumer problem encountered by individuals whose vehicles have been seized by a bailiff following a dispute over the amount of a repair bill. The most important requirement for a valid repairer's lien is that the repairer, after doing the work but before releasing possession of the vehicle, must get the owner to sign an acknowledgement of indebtedness (often included as part of the repair invoice). The repairer then has **21 days** to file a lien in the Personal Property Registry and, if everything has been done properly, the lien remains valid for a period of six months and can be renewed for an additional six months. At any time while the lien is subsisting, the garage keeper or repairer can have the vehicle seized by a bailiff.

Another common consumer complaint with respect to repairer's lien seizures is the amount of the bailiff's fee. Bailiffs frequently try to demand excessive seizure fees. A schedule to the *RLA* limits certain bailiff fees. See *Fees Regulation*, BC Reg 424/81. Complaints about excessive fees charged by bailiffs can be referred to the Director of Debt Collection, Ministry of Attorney General.

E. Liens for Storage

The *Warehouse Lien Act*, RSBC 1996, c 480 gives a statutory lien and power of sale to those who are in the business of storing goods.

F. Towed Vehicles

Under s 188(4) of the *Motor Vehicle Act*, RSBC 1996, c 318, where an illegally parked vehicle has been towed away, the owner of the vehicle must pay all costs and charges for the removal, care, and storage of the motor vehicle. These costs and charges represent a lien in favour of the keeper of the place where the vehicle is being kept.

G. Electronic Transactions Act

The *Electronic Transaction Act*, SBC 2001, c 10 [*ETA*] prevents parties from challenging contracts solely on the grounds that they are entered into electronically. The *ETA* removes legal uncertainty concerning the enforceability of contracts entered into electronically and is primarily designed to facilitate commercial relations using the Internet. However, s 17 of the Act provides an element of consumer protection. It provides that an electronic record created by an individual is not enforceable where the individual made a material error in the record and:

1. The electronic agent did not provide an opportunity to prevent or correct the error;
2. The individual notifies the other party that an error has been made as soon as practicable after learning of the error;
3. The person making the error takes reasonable steps to return the consideration in accordance with the instructions of the other party or destroy the consideration if requested to do so; and
4. The individual has not used or received any material benefit or value from the consideration.

H. Civil Resolution Tribunal

British Columbia's new *Civil Resolution Tribunal Act*, SBC 2012, c 25 [*CRTA*], establishes a new dispute resolution body, the Civil Resolution Tribunal [CRT]. The Tribunal provides a new online venue for the resolution of small claims matters. It encourages people to use a broad range of collaborative dispute resolution tools to resolve their disputes as early as possible, while still preserving adjudication as a last resort.

> **NOTE:** The CRT is relatively new and has been subject to ongoing amendments to its enacting legislation and associated regulations. Therefore, it is advisable to double check with the *CRTA* and its regulations to ensure that a potential claim can be brought under the CRT.

The CRT is able to resolve (and has initial exclusive jurisdiction of):

Small claims disputes up to a maximum value of $5,000 (which is referred to as the “tribunal small claims” under s 118 of the CRTA, the amount of which is set under s 3 of the *Tribunal Small Claims Regulation*, BC Reg 232/2018) for:

- Debt or damages;
- Recovery of personal property;
- Specific performance of an agreement relating to personal property or services; or
- Relief from opposing claims to personal property.

Claims related to motor vehicle accidents up to $50,000 (which is referred to as the “tribunal limit amount” under s 133 of the *CRTA*, the amount of which is set under s 7 of the *Accident Claims Regulation*, BC Reg 233/2018), such as:

- Damages for injuries suffered due to a motor vehicle accident
- Determination whether an injury is a minor injury for the purposes of the *Insurance (Vehicle) Act*

- Damage to property (such as a vehicle) incurred due to a motor vehicle accident.

Strata disputes between owners of strata properties and strata corporations for a wide variety of matters such as (*CRTA* s 121):

- Non-payment of monthly strata fees or fines;
- Unfair actions by the strata corporation or by people owning more than half of the strata lots in a complex;
- Uneven, arbitrary or non-enforcement of strata bylaws (such as noise, pets, parking, rentals);
- Issues of financial responsibility for repairs and the choice of bids for services;
- Irregularities in the conduct of meetings, voting, minutes or other matters;
- Interpretation of the legislation (such as the *Strata Property Act*), regulations or bylaws; and
- Issues regarding the common property.

For more information on the Civil Resolution Tribunal and the Small Claims Court, see Chapter 20: Small Claims.

I. Air Passenger Protection Regulations

Passengers on aircraft recently received an additional set of legal protections in the cases of delayed flights, denied boarding, children under 14 travelling with or without family, and musical instrument transportation. The *Air Passenger Protection Regulations* SOR/2019-150 [*APPR*] under the *Canada Transportation Act* went into effect with some protections entering into force on July 15th, 2019 and fully entering force on December 15th, 2019. There are also differences in the requirements for a large carrier (defined as carrying over 2 million people worldwide per year for the past 2 years) and a small carrier. The information below applies to **large carriers**, and small carriers have similar but slightly different obligations. Please see the *APPR* itself for more information.

1. Communication with Passengers

Air carriers must make its terms and conditions surrounding:

- Flight delay, flight cancellation and denial of boarding;
- Lost or damaged baggage; and
- The assignment of seats to children who are under the age of 14 years

available in simple, clear and concise language (*APPR* s 5(1)). Additionally, they need to provide this information (or a hyperlink to this information) on all digital platforms that they use to sell tickets and on all documents on which the passenger's itinerary appears (s 5(2)).

In the airport, the carrier is required to display signage indicating that passengers have certain rights under the *APPR* in the case of lost/damaged baggage or denied boarding.

There are additional requirements on the carriers and sellers of tickets for air travel in terms of advertisement (ss 25 – 31). Please see the regulation for more information

2. Delays, Cancellations, and Denial of Boarding

a) General

Under s 13(1), the *APPR* sets out the information that must be provided to passengers in the event of a delay, cancellation, or denial of boarding:

- The reason for the delay, cancellation or denial of boarding;
- The compensation to which the passenger may be entitled for the inconvenience;
- The standard of treatment for passengers, if any; and
- The recourse available against the carrier, including their recourse to the Agency.

In the case of a delay, the carrier is also required to give status updates every 30 minutes until a new departure time is set or alternative travel arrangements have been made (s 13(2)).

There are three possible categorizations for a delay, cancellation, or denial of boarding: it is not within the control of a carrier, it is in control of the carrier, or it is in the control of the carrier but is required for safety purposes. Determining the category of the incident is the first step for determining the benefits that are required to be afforded to the passenger.

The carrier is not at fault in situations such as weather conditions that render safe operation impossible, instructions from air traffic control, a medical emergency, a labour disruption within the carrier, illegal acts or sabotage, a collision with wildlife, or a security threat. It also includes a delay, cancellation or denial of boarding that is directly attributable to an earlier delay or cancellation caused by something outside of the control of the carrier where the carrier took all reasonable measures to mitigate the impact of the earlier delay or cancellation. These are merely examples and other situations could potentially be classified as not within the control of the carrier (s 10).

This table below sets out the benefits that must be provided to passengers in the event of a delay, cancellation, or denial of boarding (ss 10 – 21):

The Carrier Must:	Carrier not at fault	Carrier at fault, but needed for safety	Carrier at fault
Inform the passenger as set out in s 13 and detailed above	Yes	Yes	Yes
Provide food, drink, and access to communication free of charge in case of delay or cancellation	No	Starting 2 hours after original departure time, if passenger informed of delay/cancellation less than 12 hours before departure time	Starting 2 hours after original departure time, if passenger informed of delay/cancellation less than 12 hours before departure time
In the event of a cancellation, denial of boarding, or a delay of more than 3 hours where the passenger desires, provide alternate travel arrangements free of charge or a refund	A confirmed reservation for the next available flight with the carrier that is travelling to the destination within 48 hours; Or if that cannot occur, a confirmed reservation for a flight to the destination by any other carrier and if that flight departs from another airport, transportation to that airport; No refund need be offered	Provide a refund; or a confirmed reservation for the next available flight with the carrier that is travelling to the destination within 9 hours; If that cannot occur, a confirmed reservation for a flight to the destination by any other carrier from the original airport within the next 48 hours; Or, if that also cannot occur, a confirmed reservation for a flight to the destination by any other carrier and if that flight departs from another airport, transportation to that airport.	Provide a refund (minimum $400); or a confirmed reservation for the next available flight with the carrier that is travelling to the destination within 9 hours; If that cannot occur, a confirmed reservation for a flight to the destination by any other carrier from the original airport within the next 48 hours; Or, if that also cannot occur, a confirmed reservation for a flight to the destination by any other carrier and if that flight departs from another airport, transportation to that airport.

Provide compensation for a delay or cancellation with less than 14 days of notice	No	No	Compensation depends on how long it delays arrival to destination: • $400 if between 3 and 6 hours of delay • $700 if between 6 and 9 hours of delay • $1,000 if more than 9 hours of delay
Standard of Treatment for denial of boarding	No standard of treatment required by the regulations	Before a passenger boards the flight reserved as part of an alternate travel arrangement, provide them with the following treatment free of charge: 1. food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger; and 2. access to a means of communication. If a benefit is offered in exchange for a passenger giving up their seat, the carrier must provide the passenger a written confirmation before the flight departs	Before a passenger boards the flight reserved as part of an alternate travel arrangement, provide them with the following treatment free of charge: 1. food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger; and 2. access to a means of communication. If a benefit is offered in exchange for a passenger giving up their seat, the carrier must provide the passenger a written confirmation before the flight departs
Provide compensation for a denial of boarding	No	No	Compensation depends on how long it delays arrival to destination: • $900 if between 3 and 6 hours of delay • $1,800 if between 6 and 9 hours of delay • $2,400 if more than 9 hours of delay

Compensation must be monetary unless (*APPR* s 21):

- [The carrier] offers compensation in another form that has a greater monetary value than the minimum monetary value of the compensation that is required under these Regulations
- The passenger has been informed in writing of the monetary value of the other form of compensation;
- The other form of compensation does not expire; and
- The passenger confirms in writing that they have been informed of their right to receive monetary compensation and have chosen the other form of compensation.

In the case of compensation for delay, cancellation, or a refund, compensation needs to be applied for to the carrier before the first anniversary of the day on which the flight delay or flight cancellation occurred (s 19(3)).

In the case where a passenger's class of ticket changes on an alternate travel arrangement made by the carrier because of a delay, cancellation, or denial of boarding, the carrier may not charge an additional fee if alternate travel arrangements are of a higher class and, if the carrier was at fault for the delay cancellation or denial of boarding, must compensate the passenger the difference in the ticket cost if the alternate travel arrangement is of a lower class (s 17(6)). To the extent possible, the carrier must provide services that are comparable to those of the original ticket (s 17(3)).

b) Denial of Boarding, Priority Rules

When a passenger is denied boarding in a case where the carrier is at fault (even if it is done for safety reasons), there is a procedure in place for determining who is to be denied boarding (*APPR* s 15):

1. The air carrier must ask all passengers if they would be willing to give up their seat, and cannot deny boarding to a passenger until it has done so;
2. The carrier must not deny boarding to a passenger that is already on the aircraft, unless it is required for safety reasons; and
3. If any passenger(s) must be denied boarding, the carrier must start by denying boarding to passengers that fall into the lowest category on this list that contains passengers who are still entitled to board the plane:

    (a) An unaccompanied minor;

    (b) A person with a disability and their support person, service animal, or emotional support animal, if any;

    (c) A passenger who is travelling with family members;

    (d) A passenger who was previously denied boarding on the same ticket; and

    (e) All other passengers

c) Delay on the Tarmac

There are additional protections in place if a delay occurs while waiting on the ground in the aircraft either before take-off or after landing. Once there is a delay, the air carrier is required to provide access to the following, free of charge (s 8(1)):

- If the aircraft is equipped with lavatories, access to those lavatories in working order;
- Proper ventilation and cooling or heating of the aircraft;
- If it is feasible to communicate with people outside of the aircraft, the means to do so; and
- Food and drink, in reasonable quantities, taking into account the length of the delay, the time of day and the location of the airport.
- If urgent medical assistance is required, the carrier must facilitate access to that assistance

In addition, after 3 hours of delay on the ground the carrier must provide an opportunity for the passengers to disembark provided that it is not likely for take-off to occur in less than 45 minutes after the 3-hour delay (s 9).

3. Lost or Damaged Baggage

In the case where baggage is lost (even temporarily) or damaged, the carrier must provide compensation of up to $2,100 (see *APPR*) and a refund of any baggage fees (s 23).

4. Priority Seating for Children under 14

By December 15th, 2019, the carrier must facilitate the assignment of a seat to a child who is under the age of 14 years by offering, at no additional charge,

(a) In the case of a child who is four years of age or younger, a seat that is adjacent to their parent, guardian or tutor's seat;

(b) In the case of a child who is 5 to 11 years of age, a seat that is in the same row as their parent, guardian or tutor's seat, and that is separated from that parent, guardian or tutor's seat by no more than one seat; and

(c) In the case of a child who is 12 or 13 years of age, a seat that is in a row that is separated from the row of their parent, guardian or tutor's seat by no more than one row (s 22).

The carrier must compensate the passenger for the difference in ticket cost if the seat assigned to the child is of a lower class, and may ask for additional payment equal to the difference in ticket price if the passenger chooses a seat that is higher class than the ticket (s 22(3)).

5. Musical Instruments

All carriers must have policies in place for the transportation of musical instruments, including restrictions with respect to size, weight, quantity, and use of stowage space in the cabin; fees for transporting instruments; and the options available for a passenger if the airplane that the flight actually takes place on is different than expected and has insufficient storage space in the cabin.

Carriers must accept musical instruments as checked or carry-on baggage unless the specific instrument is too heavy, too large, or too unsafe according to the general terms and conditions of the carrier.

J. Cheque Cashing Fees for Government-Issued Cheques

The *BPCPA* sets out a restriction on the amount allowed to be charged to a person in fees for cashing a government-issued cheque, such as a cheque issued under the Employment and Assistance Act for income assistance (s 112.13). Specifically, under the *Government Cheque Cashing Fees Regulation* BC Reg 127/2018 [*GCCFR*], a person may not charge a cheque cashing fee of more than $2 plus 1% of the value of the cheque up to a maximum of $10 total (*GCCFR* s 3).

K. Consumers and Services Handling Human Remains

The *BPCPA* makes exceptions for contracts that can be considered funeral contracts, interment right contracts, and preneed cemetery or funeral services contracts (as defined in s 17). Part 4, Division 3 of this Act (ss 29 – 45) outlines contractual requirements and consumer protections for interactions between consumers and suppliers involved in the provision of these types of services.

Furthermore, the *Cremation, Interment and Funeral Services Act*, SBC 2004, c35 [*CIFSA*] governs much of the activity surrounding the handling of human remains, including the disposition, exhumation, removal, transportation, and storage of these remains. This legislation also dictates contractual requirements for contractual interactions between consumers and services including crematoria, funeral providers, and cemeteries, as well as containing stipulations for other types of interactions between consumers and these services.

L. Ticket Sales

The *Ticket Sales Act*, SBC 2019 [TSA], has come into force to regulate the conduct and practices of primary and secondary ticket sellers.

Primary ticket sellers are persons who are the original ticket seller or promoter. Secondary ticket sellers are persons who sell tickets that were originally made available by primary ticket sellers, in other words ticket re-sellers. Notably, the TSA prohibits software that is meant to circumvent security, access and control measures that are meant to ensure an equitable ticket buying process, in other words, many types of bots. It also requires disclosure of the total price of the ticket, including additional fees, and the face value of the ticket. The TSA also offers guarantees and protections to consumers in cases where their ticket is unusable because of counterfeit or cancellations.

Section 8 of the TSA also has prohibitions in respect to related primary and secondary ticket sellers. Secondary ticket sellers who are related to the primary ticket seller must not make a ticket available for sale unless the primary ticket

seller already made that ticket available for sale to the public. For example, in G*omel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699, Ticketmaster, a primary ticket seller, was also participating in the secondary ticket market for resale tickets, and only on tickets where it was also the primary ticket seller. Section 8 of the TSA now means that for these types of tickets, Ticketmaster must make them available on the primary market to the public before they can re-sell them on the secondary market.

References

[1] https://www.bailii.org/ew/cases/EWCA/Civ/1970/2.html
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IX. Forum of Redress

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

There are multiple forums through which the client can seek a resolution. Once the client's issue has been diagnosed legally, it is still necessary for the client to know where and how they can bring their claim. This section will cover the 3 major options and outline the pros and cons of each.

A. Arbitration

Many consumer contracts have an arbitration clause. This clause means that instead of taking up the issue in court, the issue will be taken up in arbitration. There are, however, instances where an arbitration clause can be unenforceable, and therefore not binding on the consumer.

1. BPCPA s 172 Remedies

In *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, the SCC decided that consumers can always bring their action invoking s 172 of the BPCPA to the supreme court, and that this was a statutory right. However, the SCC also stated that the choice to restrict arbitration clauses in consumer contracts is a matter of legislation and the courts must therefore defer. This means that for other claims, whether under other sections of the BPCPA, other statues or common law, arbitration clauses are valid and enforceable unless otherwise restricted.

2. Unconscionability

On a case-by-case basis, courts will determine if an arbitration clause is unconscionable and therefore unenforceable. In *Uber Technologies Inc. v. Heller*, 2020 SCC 16 [*Uber v Heller*], the SCC found the arbitration clause to be unconscionable and therefore unenforceable. Much like unconscionability in other terms of a contact, the court evaluated two elements to determine unconscionability: whether there is an "inequality of bargaining power and a resulting improvident bargain" (*Uber v Heller* at para 65). In *Uber v Heller*, the SCC determined there was an inequality of bargaining power because it was a standard form contract, there was a large disparity in sophistication between the parties, and a person in Heller's position could not be expected to appreciate the financial and legal implications of the arbitration clause. The SCC also determined that there was an improvident bargain because of the US$14 500 up-front

cost of arbitration. Therefore, the term was determined to be unconscionable and therefore unenforceable.

B. Consumer Protection BC

Consumer Protection BC is the regulator of many types of consumer transactions in BC. They license and inspect regulated businesses, assist consumers by responding to inquiries and providing information, and investigate alleged violations of consumer protection laws. Consumers can report alleged violations to Consumer Protections BC, and CPBC has investigative and enforcement powers to respond to those complaints.

C. Civil Resolution Tribunal / Small Claims / Supreme Court

Claims less than $5000 must be taken to the Civil Resolution Tribunal (CRT). If the claim is between $5001 and $35 000, the claim must be taken to Small Claims. Claims for more than $35 000 are taken to the Supreme Court. Refer to the Small Claims chapter for more information about the CRT and Small Claims.

D. Class Action

In many cases, it is not economically justifiable for a consumer to pursue their individual claim through the courts. For example, if their claim is for $100, they may have to spend money and hours of their time to reach a successful outcome at the CRT. For many consumers, this is simply not economical. There is also an issue of risk and competence; there is no guarantee that the time spent will result in a successful claim. Even though the CRT does not allow representation unless they grant permission, in *The Owners, Strata Plan NW 2575 v. Booth*, 2018 BCSC 1605, the court acknowledged that this does not bar the party from relying on counsel to prepare their submissions and assist, as long as the lawyer does not directly participate. Therefore, even if they are not directly represented, a big corporation keen on protecting their business interests will have access to more resources and legal advice than the average person bringing a claim to the CRT. This may make it difficult for a consumer to be successful, even if they commit a substantial amount of time making their claim.

Class Actions allow claimants to aggregate their individual claims. A lawyer can then represent the whole class, and will often work on a contingency fee arrangement, meaning the lawyer will take a percentage of the awarded amount. This shifts the risk to the lawyer and enables the class to get representation where they might not be able to individually. A representative plaintiff is appointed to act on behalf of the class as a whole. This is typically a member of the class, but there are exceptional circumstances where a person who is not a member of the class can be certified (*Class Proceedings Act*, RSBC 1996, c 50, s 2 (4) [CPA]). Class actions have an application process and either the plaintiff or defendant can apply.

1. Plaintiff Class Proceeding (CPA s 2)

A resident of British Columbia who is a member of the class can commence a proceeding on behalf of the class. They need to appoint a class representative and certify the proceeding as a class proceeding. Refer to CPA s 4 for additional requirements and responsibilities when applying for a class proceeding.

2. Class Certification (CPA s 4)

For a proceeding to qualify as a class proceeding, it needs to meet the certification requirements. The pleadings must disclose a cause of action, there must be an identifiable class of 2 or more persons, the claims of the members of the class need to raise common issues, a class proceeding needs to be the preferable procedure for the fair and efficient resolution of those common issues, there needs to be a representative who will fairly represent the interests of the class without a

conflict of interest, and that representative needs to have produced a workable plan setting out how they will advance the proceeding and notify members of the class. CPA s 4 (2) outlines how to determine if a class action is the preferable procedure, and s 4(3) and s 4.1 lay out multi-jurisdictional considerations. The case *Gomel v Live Nation Entertainment (Ticketmaster)*, 2021 BCSC 699, offers an in-depth example of certification.

X. Consumer Transactions

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Determine the Client's Position and Desired Outcome

- **Ask to see the contract.** Reading the terms as they are written is the first step in analysing the contract and determining its meaning.
- **What did the client and the other party agree to do, and how did that party agree?** Clients tend to focus on the personal consequences of a transaction. That a contract or its execution is inconvenient to the client is not helpful unless the client has a legal remedy. Determine the subject matter of the contract and the understandings surrounding it. It should be ascertained as early as possible what other terms or representations were made surrounding this contract as what is written on paper may not accurately communicate the parties' agreement.
- **What were the written and oral understandings?** Under traditional common law, a contract had to be either all written or all verbal. The *SGA* permits a contract to be partly in writing and partly by word of mouth, or implied by the conduct of the parties (s 8). The *BPCPA* states that parole (verbal) or extrinsic evidence can be admissible evidence toward understanding what agreements the parties made (s 187). Further, there is extensive case law supporting the position that one cannot induce another party to enter a contract with verbal representations and then refuse to act on those representations because they are not in the written contract.
- **Did the client receive all of the statutorily required information when entering the contract?** The *BPCPA* sets up significant notice and information requirements that, if unmet, may invalidate the contract.
- **What outcome is the client looking for?** Does the client want damages? Or to get out of a contract? Or some other remedy? The client may need assistance in resolving these questions. Frequently, a client will feel wronged but have no clear idea what their rights are or what solutions they would find acceptable.
- **When the client arranged the transaction, did they do so primarily for personal, household, or family purposes, or for business purposes?** In many situations, the *BPCPA* will not apply to non-consumer transactions. The SGA, on the whole, protects all buyers, although some rights may be weaker if the buyer is a business rather than a consumer.
- **Was the client cheated, misled, or bullied in the transaction?** If the answer is yes, the *BPCPA* or common law rules against misrepresentation or unconscionable conduct may apply.
- **Has the client in any way acquiesced to the actions of the other party, or waived their rights?** According to s 3 of the *BPCPA*: "Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act". Furthermore, the *SGA* allows some of the rights or duties under a contract of sale to be set aside (ss 20 and 69). At common law, if a party waives rights, they may be estopped from later insisting on them.

- **Has the other party already performed all or part of the obligations?** The *SGA* provides that if the buyer has accepted part of the goods, and the contract is not severable, the buyer can no longer treat the contract as terminated for breach without an express or implied term in the contract allowing so (s 15(4)). However, they may be entitled to damages for breach of contract in that situation. This position is subject to qualification. For instance, under s 23 of the *BPCPA*, concerning future performance contracts, the buyer is entitled to cancel the contract for up to a year when the supplier has not made the appropriate disclosures required by the Act.
- **Has the client expressed their concerns to the other party?** The other party may not know there is a problem. Where the other party has not been put on notice that there is a problem, issues of estoppel and acquiescence may enter into play. The *Law and Equity Act*, RSBC 1996, c 253 provides that a party to a contract may, instead of refusing to perform a disputed obligation, perform the obligation under protest if they give reasonable notice to the other party that the performance is under protest, and then perhaps receive compensation for that obligation if it is beyond what was required in the contract (s 62). Letting the other party know may be the simplest and cost-effective way to resolve any problems arising from a consumer transaction.
- **Is either party unable to perform the obligations due to circumstances beyond that party's control?** If so, the common law around frustration of contracts and the *Frustrated Contract Act*, RSBC 1996, c 166 may apply to the transaction.
- **Was the client's attention drawn to any onerous provisions in the contract?** *Tilden Rent-A-Car Co v Clendenning* (1978), 18 OR (2d) 601, 83 DLR (3d) 400 (Ont CA) [1] states that a party seeking to rely on onerous terms in a standard form contract should take reasonable measures to ensure that the other party is aware of those provisions. In *Karroll v Silver Star Mountain Resorts* (1988), 33 BCLR (2d) 160, 47 CCLT 269 (BCSC) [2], however, the Court found that there is no general requirement to bring onerous terms to the attention of a signing party; only circumstances in which a reasonable person would have known that the party signing was not consenting to those onerous terms create an obligation on the party tendering a document for signature.

B. Check the Form and Terms of the Agreement

- The terms of a contract should refer to such things as quality, terms of payment, and the time at which title is transferred.
- The terms may be construed either as conditions, warranties, or innominate terms. The rights and remedies of the buyer will depend on how the terms of the contract are classified. This is discussed at length in 11:III Contracts for the Sale of Goods.
- The form of the agreement(s) can be legally important. If there is a contract in writing, what is said about the subject matter of the contract may be characterized as representations or as terms of the agreement. Under s 8(1) of the *SGA*, it states (with qualifications) that a contract may be partly in writing and partly by word of mouth or may be implied by the parties' conduct.
- Some contracts are statutorily required to be in writing, and moreover, some require that the writing conform to a strict format that is laid out either in an Act or by Regulation. The *BPCPA* is very strict on the form required for some contracts, as explained in detail in that section.

C. Determine Whether the Contract Complies with the Statutory Requirements

If the contract does not comply with the statutory requirements, inform the client of any available defences against legal actions by the other party, possible legal actions by the client, available statutory remedies, and the appropriate action for the client.

D. Determine Whether Any Common Law Remedies are Available

Where the statutes do not apply, there may still be a common-law defence available.

1. No Obligation

To enforce the terms of a contract, there must be a contract and the particular terms must be enforceable under that contract.

2. Misrepresentation

Misrepresentation occurs when a party is induced to enter a contract based on a false statement. The remedies available depend on the nature of the misrepresentation. See 11:IV G. False or Misleading Advertising for more information on misrepresentation.

3. Frustration

If performance of the contract is impossible due to circumstances that arise after the contract was signed and that were outside of either party's control then the contract can be found to have been frustrated, and ongoing obligations under the contract will cease to apply. Once frustration is found to have occurred at common law, the *Frustrated Contract Act* will apply to adjust the rights and liabilities of each party and to appropriate restitution.

4. Mistake

Mistake is defined at common law as a fundamental misunderstanding between the parties to a contract. There are three categories of mistake: common, mutual, and unilateral.

- A **common mistake** exists when both parties make the same mistake. For example, the subject matter of the contract may not exist or was destroyed prior to the agreement.
- A **mutual mistake** exists when the parties make a different mistake, e.g. a purchaser wanted type A widgets and the vendor thought they ordered type B widgets, so there is disagreement as to a term of the contract. This is usually an offer and acceptance issue, for both parties have to come to agreement for there to be a contract in the first place.
- A **unilateral mistake** exists when one party is mistaken about the obligations that they have assumed. This is a difficult defence because a court is unlikely to excuse the party from obligations on account of their unilateral mistake unless the other party was aware of the mistake.

5. Laches or Acquiescence, Waiver, and Estoppel

If a party knowingly allows the other party in a contract to proceed according to a mistaken assumption that is to the other party's own detriment, then the initial party may have acquiesced to the mistaken assumption by inaction, and it may be enforceable against them.

The doctrine of laches becomes relevant if one party unreasonably delays pursuing a claim, and the other party is thereby prejudiced.

Promissory estoppel occurs when one party promises not to enforce their rights under the contract. In such a case, and where the other party has relied on the promise, it may be inequitable to allow the first party to later enforce the right. For an example of how promissory estoppel can be raised, see *Central London Property v High Trees House,* [1947] 1 KB 130, [1956] 1 All ER 256. [3]

In some circumstances, a party to a contract can waive rights within the contract. It may be possible to retract the waiver with reasonable notice.

6. Unconscionability, Undue Influence, and Duress

Unconscionability, undue influence, and duress can all make a contract voidable. There are two requirements for unconscionability: an imbalance in the relationship of the parties, and an imbalance in the contract. Unconscionability is also dealt with in the *BPCPA*, ss 8 – 10. See *Morrison v Coast Finance Ltd* (1965), 54 WWR 257, 55 DLR (2d) 710 (BCCA) [4] and *Harry v Kreutziger* (1978), 95 DLR (3d) 231 (BCCA) [5] for examples of unconscionability.

Undue influence is the abuse of a relationship of trust and confidence to strongly influence another to make a contract. See *Geffen v Goodman Estate*, [1991] 2 SCR 353, [1991] 5 WWR 389 [6] for an example of undue influence.

Duress is the coercion of the will to the point where it vitiates consent. There must be a contractual promise that is extracted from pressure (such as a demand or threat), where there was no practical alternative but to agree to the demand, and the victim demonstrated they contested to the pressure (such as protesting). See *NAV Canada v Greater Fredericton Airport Authority Inc.*, 2008 NBCA 28 [7] for an example of duress, specifically economic duress.

7. Illegality

In the past, Canadian courts would not enforce those contracts created for an illegal purpose.

A leading case in this area is *International Paper Industries Ltd v Top Line Industries Inc,* [1996] 7 WWR 179, 135 DLR (4th) 423 (BCCA) [8] in which a lease for a portion of land was declared invalid, preventing the tenant from exercising the option to renew, because the land was subdivided contrary to the Land Title Act, RSBC 1996, c 250.

Today, courts may enforce contracts made for an illegal purpose if inequity would otherwise result, or if the purpose of the governing statute is not undermined. See *Still v Canada (Minister of National Revenue)*, [1997] FCJ No 1622, [1998] 1 FC 549 (CA) [9]. The Court will consider the purpose and object of a statutory prohibition when deciding whether the contract is enforceable or not. *Continental Bank Leasing Corp v Canada*, [1998] 2 SCR 298 [10] at para 67, in particular, offers a good summary of the law of illegality.

8. Duty of Honest Performance

The Supreme Court of Canada has recently recognized that there is a general organizing principle of good faith and duty of honest performance in the context of Canadian contract law (*Bhasin v Hrynew,* 2014 SCC 71 [11] at para 33). The duty of honest performance requires contracting parties to act honestly in the performance of contractual obligations. Note that this is not a fiduciary duty and parties remain free to act in their own self-interest, as long as they do not lie or

mislead the other party. Since the duty of honest performance applies generally, to all contracts, it would also apply to consumer transactions where one party has been dishonest or misled the other party.

E. Determine the Limitation Period for Making a Claim

The *Limitation Act*, SBC 2012, c 13 sets out a general time limit of **2 years** on starting any claim from the time that the claim is discovered (s 6(1)). Generally, a claim is **discovered** on the first day that a person knew or ought to have known that the injury, loss, or damaged had occurred and was caused (or contributed to) by an act or omission of the person against whom the claim is (or may be) made and that the court would be the appropriate means to seek a remedy (s 8). Usually, this will be at the time of the act, but not always. If the person was (or is) a **minor** or was (or is) otherwise incapable of managing their affairs due to a disability, special discovery rules apply (ss 18 – 19). There are also special discovery rules in the case of fraud, trust property, and securities amongst others (ss 12 – 17).

In addition, certain acts provide exceptions to the general limitation period set out in the *Limitation Act*. For example, the *Local Government Act*, RSBC 2015, c 1 sets out that an action against a municipality must be commenced within **6 months** after the cause of action first arises (s 735). Because of this, you must carefully check through the acts associated with your cause of action to ensure that you will not miss a limitation date.

If the claim was discovered before June 1, 2013, the former *Limitation Act* applies. At this point, the claim would be outside the limitation period unless there is an exception in the act for the type of claim brought. Under the former act, if the claim is for breach of contract, s 3(5) of the *Limitation Act*, RSBC 1996, c 266 states that the limitation period for breach of contract is 6 years. However, under s 3(2)(a), where damages claimed arise from physical damage to persons or property, the limitation period is 2 years, even where the claim is based on contract. In addition, if the claim is for negligence as well, the limitation period is 2 years.

F. Determine the Forum of Redress

Determine if there is an arbitration clause. If there is, determine if there are enforceability issues for that arbitration clause. If there is no arbitration clause or it is unenforceable, determine the eligibility of the claim as a class action. If the claim appears to meet the certification requirements for a class action, the client will need to be advised of the pros and cons of class actions and individual claims and the merits of their claim. Keep in mind what forum their individual claim qualifies for (CRT, Small Claims, Supreme Court), as this may impact the context and circumstances of their individual claim. The aggrieved consumer can also report the alleged violation to Consumer Protections BC.

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Chapter Twelve - Auto Insurance (ICBC)

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

As of May 1, 2021, ICBC switched to a primarily no-fault system. This represents one of the biggest changes to the ICBC insurance system since its inception.

Under the former ICBC system, claims were handled through a mix of litigation and no-fault benefits. This meant that, while certain benefits were awarded regardless of the fault of the parties, in other situations one party in an accident would need to take the other party to court in order to gain access to compensation through the other party's insurance. Under the new system, the vast majority of all claims are handled on a no-fault basis, with some limited exceptions.

The new no-fault system means that insured parties will file a claim directly with ICBC in the vast majority of cases, and will be compensated for injuries directly by the insurer, regardless of whether or not they were at fault. ICBC will still internally assign fault to the parties when assessing claims in order to determine changes to premiums, but fault will not need to be shown to access injury compensation.

All claims for accidents occurring on or after May 1, 2021 are subject to this new no-fault system, known as Enhanced Care. Parts III - VII of this chapter outlines benefits under this new system. However, because this chapter was written in June of 2022 (shortly after the introduction of the Enhanced Care system), please be aware that ICBC may make changes and clarifications to the system as they roll it out that are not reflected in this manual.

The new Enhanced Care system does not apply to claims for accidents that occurred on or before April 30, 2021. For claims that occurred before this date, please see Parts VIII onwards of this chapter, which outlines the former system as it existed prior to the introduction of Enhanced Care.

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

A. Books (Relevant to Claims Prior to May 1, 2021)

Gregory, E.A. and Gregory, G.F.T., The Annotated British Columbia Insurance (Motor Vehicle) Act (Toronto: Carswell, 1995). Continuing Legal Education Society of British Columbia, British Columbia Motor Vehicle Accident Claims Practice Manual (Vancouver: Continuing Legal Education Society of British Columbia, 2000). Continuing Legal Education Society of British Columbia, ICBC Motor Vehicle Accident Claims (November, 1988) (Vancouver: Continuing Legal Education Society of British Columbia, 1988).

Continuing Legal Education Society of British Columbia, Vehicle Insurance: British Columbia Legislation and Commentary (Vancouver: Continuing Legal Education Society of British Columbia, 2007).

B. Legislation

Insurance (Motor Vehicle) Act, RSBC 1996, c 231 [*IMVA*]. *Insurance (Motor Vehicle) Act* - Revised Regulations (1984), BC Reg 447/83 [*IMVAR* [1]]. *Insurance (Vehicle) Act*, RSBC 1996, c 231 [*IVA* [2]].

Insurance (Vehicle) Regulation, BC Reg 447/83 [*IVR* [3]].

Notice to Mediate Regulations, BC Reg 127/98 [*NMR* [4]].

Motor Vehicle Act, RSBC 1996, c 318 [*MVA* [5]].

Motor Vehicle Act Regulations, BC Reg 26/58 [*MVA Regulations* [6]]. *Insurance Corporation Act*, RSBC 1996, c 228 [7]. *Limitation Act*, SBC 2012, c 13 [8] [*LA*].

NOTE: The *IMVA* and the *IMVA Regulations* were amended and renamed the *Insurance (Vehicle) Act [IVA]* and *Insurance (Vehicle) Regulation [IVR]* respectively. The *IVA* and *IVR* came into force and effect on July 1, 2007. Note that there are transitional provisions governing whether the provisions of the old Act, new Act, or both Acts apply to an individual claim.

C. Further Regulation (For Claims On or After May 1, 2021)

Basic Vehicle Damage Coverage Regulation, BC Reg 4/2021 [*BVDCR*]. [9]

Enhanced Accident Benefits Regulation, BC Reg 59/2021, [*EABR*] [10]

Minor Injury Regulation, BC Reg 234/2018 [*MIR*] [11]

Permanent Impairment Regulation, BC Reg 61/2021, [*PIR*] [12]

Income Replacement and Retirement Benefits and Benefits for Students and Minors Regulation, BC Reg 60/2021, s 2(1) [*IRR*] [13]

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[2] http://www.bclaws.ca/civix/document/id/complete/statreg/96231_01
[3] http://www.bclaws.ca/civix/document/id/complete/statreg/447_83_00
[4] http://www.bclaws.ca/civix/document/id/complete/statreg/127_98
[5] http://www.bclaws.ca/civix/document/id/complete/statreg/96318_00
[6] http://www.bclaws.ca/civix/document/id/complete/statreg/26_58_00
[7] http://www.bclaws.ca/civix/content/complete/statreg/111685340/96228/?xsl=/templates/browse.xsl
[8] http://www.bclaws.ca/civix/document/id/complete/statreg/12013_01
[9] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/4_2021
[10] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/59_2021
[11] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/234_2018
[12] https://www.canlii.org/en/bc/laws/regu/bc-reg-61-2021/latest/bc-reg-61-2021.html
[13] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/60_2021

III. Basic Coverage

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

NOTE: The following portion of this chapter is meant to serve as a basic primer covering some of the key principles of the new ICBC system, which applies to claims for accidents occurring on or after May 1, 2021. Given that this no-fault system is new as of May 1, 2021, there are still certain portions of it that are being clarified, or that may adapt with implementation.

A. Basic Coverage

Basic coverage is *mandatory* for all BC vehicles. Driving while uninsured is an offence (*MVA*, s 24(3)(a)) which carries a maximum penalty of a fine of up to $250 and/or imprisonment of up to three months (*MVA*, s 24(5)(a)). Driving an uninsured vehicle is also an offence (*MVA*, s 24(3)(b)) which carries a fine of at least $300 and no more than $2,000 and/or imprisonment for at least seven days and no more than six months (*MVA*, s 24(5)(b)).

The following is included as part of Basic Coverage. Note that this is meant to be a high-level explanation, and insured individuals should refer to their policy for more detail and up-to-date information.

B. Enhanced Accident Benefits

Enhanced Accident Benefits are provided as part of basic coverage and are outlined under Part 10 of the *Insurance (Vehicle) Act* [*IVA*]. These benefits apply to accidents on or after May 1, 2021, “in which there is bodily injury caused by a vehicle” (*IVA* ss 113 and 114(1)). These benefits are awarded on a no-fault basis, which means that they are paid directly by the insurer to the insured, irrespective of the fault of the insured (*IVA*, s 117). This also means that, under the new system, there is no longer a right of action (an ability to bring a lawsuit for damages against the other party) for injury arising from a vehicle accident (*IVA*, s 115). There are a few limited exceptions to this bar on actions for injury from a vehicle accident, which are outlined in Section VII: When You Can Still Sue.

1. Entitlement to Enhanced Benefits for BC Residents vs. Non-Residents

BC residents are covered by Enhanced Accident Benefits for accidents in BC, and for accidents in other jurisdictions in Canada and the United States.

For non-residents involved in an accident within BC, or one outside of BC but involving a BC-registered vehicle, particular considerations may apply to determine eligibility. See s 119 of the *IVA* for more detail on entitlement to benefits in these circumstances.

2. Claim Deadlines and Requirements to Report Promptly

As a general rule, the insured has two years from the date of the accident within which to make a claim for Enhanced Accident Benefits (*Enhanced Accident Benefits Regulation*, BC Reg 59/2021, s 55(1), [*EABR*]). However, there are certain circumstances in which the deadline for making a claim may be measured differently. S 55 (1) of the *Enhanced Accident Benefits Regulation* sets out claim deadlines in specified circumstances. Please do not rely on this manual chapter as an authority for claim deadlines, and be sure to consult the regulation closely or speak with ICBC directly to confirm your deadline by which to make a claim, as it may change or may be case-specific.

> **NOTE:** To access Enhanced Accident Benefits, the insured also has a duty to, "*promptly notify the corporation of the accident*" when an accident occurs (*EABR*, s 56(1)). If an insured fails to do so, "without reasonable excuse and to the prejudice of the corporation", then benefits may be refused (*EABR*, s 56(2)). For this reason, *it is important to not delay in reporting an accident to ICBC*, as this may affect your ability to make a claim later.
>
> **NOTE:** There may be other deadlines related to your Enhanced Accident Benefit claim not noted here.

3. Other Sources of Compensation

When awarding Enhanced Accident Benefits, ICBC will not pay a benefit that is available from another source as, "compensation for the same accident" (*IVA*, s 122(2)), although they may pay the difference between the Enhanced Accident Benefit and the other source. Other sources listed include those such as workers compensation, the Canada or Quebec Pension Plans, an employment or union plan, or other insurance (*IVR*, s 18(2)). Note that the above still applies even if the insured makes the choice not to access these other sources that are available to them.

4. Summary of Enhanced Accident Benefit Types

The following is a basic explanation of some of the Enhanced Accident Benefits included. Insured individuals should refer to their policy for more details, and up-to-date information.

a) Healthcare and Rehabilitation

These benefits cover healthcare and rehabilitation for those injured in a vehicle accident. These are available on a no-fault basis and are typically paid directly by ICBC to your medical provider (though this is not always the case).

An insured party is entitled to the following treatments if needed to treat the injury in the 12 weeks after their accident: acupuncture, chiropractic, kinesiology, massage therapy, physiotherapy, counselling, and psychology. Note that there are certain prescribed fee and appointment quantity caps for each of these treatments, which vary depending on the treatment type (see *Enhanced Accident Benefits Regulation*, s 19, Table 1). Once the 12-week post-accident period and/or the number of pre-authorized appointments have elapsed, the insured must show that additional treatment is needed either, "to facilitate the insured's recovery from the insured's bodily injury" (*EABR*, s 19(a)), or to, "address a decline in the insured's physical or mental function because of the insured's bodily injury" (*EABR*, s 19(b)).

Various prosthetics, other medical equipment and certain prescription and non-prescription medications are also covered by this benefit (*EABR*, ss 21(1) and (4), and s 23), as are, "ambulance services from the scene of the accident" in certain prescribed circumstances (*EABR*, s 20).

Rehabilitation benefits are also available, "to contribute to the rehabilitation of an insured and to facilitate the insured's recovery from the insured's bodily injury" (*IVA*, s 124), which may include modifications to the insured's home or vehicle (*EABR*, ss 24 and 25). In certain specified circumstances, compensation is also available to assist with the insured's, "activities of daily living" (*IVA*, s 125(1)) which they could otherwise carry out before the accident. The amount of this benefit varies depending on the type of activity and the degree of assistance that the insured needs (see *EABR*, ss 27-31 for detailed calculations).

Certain transportation, lodging and meal expenses are also covered if required for the insured to receive care. Note that there are relatively strict requirements for reimbursement or coverage of such expenses, which can be reviewed in detail under *EABR* ss 32-34.

Finally, in certain instances, reimbursement is also available to cover certain travel, lodging and meal expenses for an individual to travel to assist the insured. This applies in cases where an insured is under 16 years old, is in intensive care, requires "major healthcare" (defined in section 1 of the *Health Care (Consent) and Care Facility (Admission) Act*), has a "life threatening" bodily injury, or when their life is in, "imminent danger" (*EABR*, s 35(2). The travel must be either:

(a) to authorize treatment for the insured,

(b) to assist the insured to make a decision respecting major health care,

(c) to assist in the treatment of the insured's bodily injury, or

(d) to assist the insured on other medical or compassionate grounds. (*EABR*, s 35(3))

Note: There is a cap on the amount that ICBC will cover, and that they will only cover these expenses for up to two individuals (*IVA* s 125(6) and *EABR* s 35(4)).

For all of the above benefits, **make sure to consult your policy closely to see which benefits require pre-approval from ICBC, and which do not.**

b) Caregiver Benefit

The *IVA* allows for benefits to be paid to an insured who is injured in an accident and, "whose main occupation at the time of the accident is taking care of, without remuneration, one or more persons who are under 16 years of age or who are regularly unable for any reason to hold any employment" and who is, "unable to continue providing that care because of the insured's bodily injury". This benefit is not payable to an insured who is, "a full-time earner, temporary earner, student or minor", as these classes of insured persons have access to other benefits (*IVA*, s 152 (1)).

Once 180 days have passed following the accident, the insured individual receiving the caregiver benefit may choose to transition to the income replacement benefit. They may also choose to continue receiving the caregiver benefit (*IVA* s 152(4)). ICBC has a legal duty to give the insured information to help them make this choice (*IVA* s 152(5)).

c) Income Replacement Benefit

Income replacement benefits are available to full-time, part-time and temporary earners in certain prescribed circumstances, as well as to certain non-earners (*IVA*, ss 131-134). The entitlement amount is, "90% of the insured's net income" (*Income Replacement and Retirement Benefits and Benefits for Students and Minors Regulation*, BC Reg 60/2021, s 2(1) [*IRR*]), as calculated by certain formulas specified in the regulation. This amount of net income that can be used for calculation is up to a maximum of $100,000, effective until March 31, 2022. This cap will change on a yearly basis beginning on April 1, 2022, in which the amount is obtained by multiplying $100,000 by the ratio between (a) the

sum of the industrial average wage for each of the 12 months before October 1 of the year preceding the year for which the amount of the maximum yearly insurable earnings is calculated, and (b) the same sum for each of the 12 months before October 1, 2020 (*IRR*, ss 2(2) and (3)).

As set out in the *Income Replacement and Retirement Benefits and Benefits for Students and Minors Regulation*, s 1(1), full-time, part-time and temporary earners are defined as follows:

"full-time basis", in respect of employment, means:

> (a) an insured is employed at one employment for not less than 28 hours, not including overtime hours, in each week of the year preceding the date of the accident, or
>
> (b) an insured is employed at one employment
>
> > (i) for not less than 28 hours per week, not including overtime hours, and
> >
> > (ii) for not less than 2 years with periods of work not less than 8 months in duration and with gaps between periods of work not more than 4 months;

"part-time basis", in respect of employment, means an insured is employed for less than 28 hours per week, not including overtime hours;

"temporary basis", in respect of an insured who is a temporary earner, means the insured is employed but not on a part-time basis or full-time basis.

For **part-time, temporary, and non-earners**, after the first 180 days of benefits ICBC will initiate a process called determining employment (see *IRR*, s 13). This involves considering factors like, "education, training, work experience and physical and intellectual abilities of the insured immediately before the accident", as well as factors like work experience and wages over the five years prior to the crash. If the insured part-time, temporary or non-earner is unable to do the determined employment as a result of the accident, then they continue to receive their benefit, and cannot receive a lower benefit amount than received prior to the determination of employment. For those able to hold their determined employment, the income replacement benefit ends (*IRR*, s 11(1)(b)).

Two years following the accident, if the insured is still unable to hold their pre-accident job but is able to work, ICBC will determine employment for the insured (*IRR*, s 14(1)). This process applies to full-time workers, as well as part-time, temporary and non-earners who have previously had their employment determined under the process above. Once employment is determined under this process, the insured has a year to search for such employment. Following the end of that year, if the insured is able to find work, and that work has a, "gross yearly employment income" lower than that used to calculate their prior income benefit, then ICBC will begin to pay the insured, "the lesser of the following":

> (a) the difference between the income replacement benefit the insured was receiving before the employment was determined…and the net income from the determined employment as calculated under this regulation;
>
> (b) the difference between the income replacement benefit the insured was receiving before the employment was determined…and the net income the insured earns from employment."
>
> (IRR, s 10(1))

Some other circumstances in which *income replacement benefits may end include* when:

- "The insured is able to hold the employment that the insured held at the time of the accident" (*IVA*, s 146(1)(a))
- "The insured holds other employment from which the insured earns a gross income that is equal to or greater than the gross income that the insured earned from employment held at the time of the accident" (*IVA*, s 146(1)(b))

An insured who *recovers* from their injury and then suffers a relapse may also be entitled to re-instatement of their income replacement benefit. The calculation for this benefit varies depending on whether it has been less than two years or more than two years since the end of the prior benefit period (or since the accident if no prior income replacement

benefits were received) (*IRR*, s 9).

Benefits for Students and Minors: Certain benefits are also available to *students* aged 19 and over who are unable to continue their studies for a specified period due to an accident. If a student is eligible for both an income replacement benefit and a student benefit they cannot receive both, but are able to claim the larger benefit (*IRR*, Part 9). Similar benefits are also available for *minors* under age 19. Similarly, if a minor is eligible for both loss of studies benefit and an income benefit they cannot receive both, but are able to claim the larger benefit (*IRR*, Part 10).

Retirement Benefit: Retirement income benefits are available to certain insured persons over the age of 65. An insured person receiving income replacement benefits is transitioned to the retirement benefit on whichever of the following two dates is later in time: either when they reach 65 years of age, or five years after becoming entitled to income replacement benefits (*IVA*, s 149). These benefits are calculated at, "70% of the insured's net income as determined under subsection (2) of this section, less any pension income as determined under subsection (3)." (*IRR*, s 34(1)). The benefit is *not* available to those who are over 65 at the time of their accident and are not employed (*IVA*, s 148).

d) Death Benefit

Enhanced Care also provides for a death benefit, paid in a lump sum, for surviving spouses and dependants of the insured (*IVA*, ss 156-157). Death benefits for spouses are calculated by a formula which uses the deceased insured's gross income. These spousal death benefits are capped at a maximum of $500,000 (*EABR*, s 47(2)). Death benefits for dependants are calculated in accordance with the age of the dependant at the time of death, and are capped at a maximum of $89,306 (*EABR*, s 48(2)).

e) Permanent Impairment

Enhanced Care provides for a lump sum payment to be made in cases of permanent impairment (*IVA*, s 129). This payment is calculated by:

> (a) determining if the insured has sustained a catastrophic injury in accordance with section 2,
>
> (b) determining the insured's permanent impairment rating in accordance with section 4, and
>
> (c) determining the compensation that corresponds to, as applicable,
>
> > (i) the catastrophic injury in accordance with section 8 [permanent impairment compensation calculation — catastrophic injury], or
> >
> > (ii) the permanent impairment rating in accordance with section 9 [permanent impairment compensation calculation — non-catastrophic injury].
>
> (*Permanent Impairment Regulation*, BC Reg 61/2021, s 3 [*PIR*])

Catastrophic injury is defined in detail in s 2 of the *Permanent Impairment Regulation*. Detailed information on the above calculations can be found in the *Permanent Impairment Regulation*.

The Enhanced Care system also includes a recreation benefit for those who are permanently impaired as a result of their injuries. This benefit provides support for the insured to participate in certain recreational activities following their injury. Note that this benefit is only available to those with a "catastrophic injury" or those, "with a permanent impairment rating of 20% or more as determined in accordance with the Permanent Impairment Regulation" (*EABR*, s 36(2)). The dollar amount awarded for this benefit correlates to the percentage degree to which the insured is deemed to be permanently impaired (*EABR*, s 36(7)).

C. Basic Vehicle Damage Coverage

Basic vehicle damage coverage is also a part of ICBC's mandatory basic coverage (*IVA*, s 173), and provides indemnification for certain vehicle repairs and other losses resulting from vehicle damage that occur as a result of an accident in British Columbia involving, "at least two vehicles" (*IVA*, s 174(2)), in specified circumstances.

When indemnification is provided for basic vehicle damage, "[t]he total value of indemnification…must be reduced by the extent to which, expressed as a percentage, (a) the owner and the operator of the insured's eligible vehicle and a person in a prescribed class of persons is responsible for the accident, and (b) another person whose name is not ascertainable is responsible for the accident" (*IVA*, ss 174(4) and 175(4)). This means that the insured is only indemnified in accordance with the percentage amount for which they are found to be not responsible for the accident (i.e. if an insured fully responsible for the crash, they are not indemnified under this coverage). If there is another unknown person who is not responsible for the accident, indemnification is also reduced accordingly.

The indemnification provided for damage to or loss of an eligible vehicle is capped at $200,000 (*Basic Vehicle Damage Coverage Regulation*, BC Reg 4/2021, s 15(2), [*BVDCR*]).

Indemnification is also provided for, "reasonable expenses incurred by the insured for loss of use in relation to the eligible vehicle in respect of the following: (a) hiring passenger directed vehicles; (b) using public transportation; (c) renting a substitute vehicle that is similar to the eligible vehicle, with the corporation's approval; [and] (d) using other alternative transportation with the corporation's approval" (*BVDCR*, s 18(2)), though this indemnification for passenger directed vehicles and public transportation does not apply if these expenses, "exceed expenses that would have been indemnified for renting a substitute vehicle that is similar to the eligible vehicle" (*BVDCR*, s 18(3)).

D. Basic Third-Party Liability

The basic theoretical principle behind third party liability insurance is that it is meant to indemnify the insured for claims that may be brought against them by someone else. Under the no-fault system, care for injuries is provided directly by the insurer to the injured party, as outlined above. However, there are still certain instances where an insured party may find themselves facing a claim from another party in an accident, such as when the insured causes non-vehicle property damage, or is driving outside BC in a jurisdiction where the other party is entitled to sue.

This third-party liability coverage, included as part of basic mandatory vehicle coverage, provides indemnity for this sort of property damage, as well as for injury or death that occurs in other jurisdictions in Canada or the United States, with certain specified exceptions (*IVR*, s 64). This indemnity for basic third-party liability is capped at $200,000 for most vehicles, with higher limits for buses, taxis, and limousines (*IVR*, Schedule 3, s 1(1.1)).

E. Uninsured Motorists

This portion of basic coverage covers *non-vehicle property damage* caused to the insured's property by an uninsured (identified) motorist, in British Columbia (*IVA*, s 20). This insurance is capped at $200,000 (*IVR*, Schedule 3, s 9(1)).

ICBC will not indemnify the claimant for amounts that the claimant can claim through, "any benefit, compensation similar to benefits, right to indemnity or claim to indemnity" that the claimant is entitled to (*IVR*, s 106(1)). This includes benefits such as those available under the *Workers Compensation Act* and the *Employment Insurance Act*.

The process for claiming under this section remains the same as under the old ICBC system, and involves the insured claimant applying to ICBC. Once this claim is sent, ICBC has the ability to settle in favour of the claimant or to require the claimant to take legal action (*IVA*, s 20(5)). See Part II, Section X.D.1: of this manual (Uninsured Motorists or Unidentified Motorist Cases) for technical information on ICBC's rights and obligations in this process.

F. Unidentified Motorists (Hit and Run)

This portion of basic coverage covers *non-vehicle property damage* caused to the insured's property by an unidentified motorist (i.e. a hit and run case) in British Columbia. This coverage allows the insured party to bring a legal action against ICBC as a nominal defendant in order to obtain damages (*IVA*, s 24).

This insurance is capped at $200,000 (*IVR*, Schedule 3, s 9(1)), although a $750 deductible is subtracted from the total coverage amount paid to the insured (*IVR*, Schedule 3, s 9(1)).

ICBC will not indemnify the claimant for amounts that the claimant can claim through, "any benefit, compensation similar to benefits, right to indemnity or claim to indemnity" that the claimant is entitled to (*IVR*, s 106(1)). This includes benefits such as those available under the *Workers Compensation Act* and *the Employment Insurance Act.*

Obligations of the insured in unidentified motorist cases: It is critical that, to claim coverage, the insured must have:

> (a) **Within 48 hours after the discovery of the damage**, made a report to the police of the circumstances in which the damage occurred,
>
> (b) Obtained the police case file number for the report, and
>
> (c) On request of the corporation, advised the corporation of the police case file number.
>
> (*IVR*, s 107(1))

In addition, in order for a claimant to make a claim or get a judgment against ICBC in unidentified motorist cases, the court must first be satisfied that all reasonable efforts have been made to ascertain the identity of the owner and/or driver (*IVA*, s 24(5)). See Part II, Section X.D.2 of this manual for more details on the case law in relation to this requirement.

Finally, to proceed with the claim against ICBC as a nominal defendant, the claimant must give written notice to ICBC "as soon as reasonably practicable" and within six months of the accident (*IVA*, s 24(2)).

G. First Party Coverage Under Part 10 of the IVR

1. Inverse Liability

Inverse liability protection provides for compensation for vehicle loss or damage in situations where an insured is travelling in another jurisdiction in Canada or the United States whose laws do not otherwise allow the insured to sue for such compensation. The amount of compensation is, "an amount equal to the amount of damages the insured would have recovered if the insured had had a right of action" (*IVR*, s 147(2)). In practice, this would mean that the amount that can be recovered under inverse liability would be limited if the insured is found to be partially or fully at fault.

Compensation under this section is limited to, "the least of the following: (a) the cost of repairing the vehicle; (b) the declared value of the vehicle; (c) the actual cash value of the vehicle" (*IVR*, s 147(3)).

2. Uninsured or Hit and Run Accidents in Nunavut, the Yukon, Northwest Territories or United States of America

Section 148 of the *IVA* specifies coverage in situations where, "death or injury of an insured arises out of the operation on a highway in Nunavut, the Yukon Territory, the Northwest Territories or the United States of America of an unidentified or uninsured vehicle, other than an uninsured vehicle owned by or registered in the name of the insured or a member of the same household as the insured."

The coverage amount in these cases is capped at $200,000 (*IVR*, Schedule 3, s 11).

Note that the insured has certain duties in order to access this coverage. The *IVA* specifies that ICBC, "is not liable…unless the insured or a representative of the insured":

> (a) with respect to an accident with an unidentified vehicle, **reports the accident within 24 hours** after its occurrence to a policeman, peace officer, judicial officer or the administrator of any law respecting motor vehicles,
>
> (b) within **28 days after the occurrence, files with the corporation a statement under oath** that the insured has a cause of action arising out of the accident against the owner or driver of an unidentified or uninsured vehicle and setting out the facts in support of that statement, and on the request of the corporation, allows the corporation to inspect the motor vehicle the insured occupied at the time of the occurrence. (*IVR*, s 148(5)

In addition to the above, ICBC will *not* be liable (i.e. ICBC will not compensate the claimant) in the following situations:

- if the insured has a right of recovery under an unsatisfied judgment;
- if the insured was operating a vehicle without the consent of the vehicle's owner;
- if the insured fails to comply with s 148(4)(b) **to the prejudice of ICBC**. Under section 148(4)(b) of the IVR, the insured:
  - must file a copy of the originating process with ICBC within 60 days of the action commencing; **and**
  - must not settle a claim without the written consent of ICBC (*IVR*, s 148(4)

3. Underinsured Motorists

Underinsured motorist protection provides damages for injury or death in circumstances in which the other party to the accident, "is legally liable for the injury or death of an insured but is unable, when the injury or death occurs, to pay the full amount of damages recoverable by the insured or his personal representative in respect of the injury or death" (*IVR*, s 148.1(1)). In such cases, ICBC will, "compensate the insured, or a person who has a claim in respect of the death of the insured, for any amount he is entitled to recover from the underinsured motorist as damages for the injury or death" (*IVR*, s 148.1(2)).

Circumstances in which underinsured motorist protection would apply are uncommon under the new no-fault system but could arise in situations where the insured doesn't have access to compensation for injury under Enhanced Care and the other driver is liable for the accident but is underinsured.

The amount of coverage for underinsured motorist protection is capped at $1 million (*IVR*, Schedule 3, s 13).

Underinsured motorist coverage applies to accidents in both Canada and the United States (IVR, s 148.1(2)(b)). However, underinsured motorist coverage only applies in jurisdictions or situations where there is a right of action (an ability to sue) for damages from an accident injury (*IVR*, s 148.2(4)(a)). See Section VII: When You Can Still Sue for a list of situations in which an insured individual may still be able to sue for injury arising from an accident in BC.

In cases of hit and run accidents involving an underinsured motorist, underinsured motorist protection only applies where:

> (a) the hit and run accident occurs on a highway, and

(b) where the hit and run accident occurs in the Yukon, Northwest Territories or United States of America, there is actual physical contact between the insured or the vehicle occupied by the insured and the unidentified vehicle.

(*IVR*, s 148.1(4))

It is important to note that, in relation to underinsured motorist protection, *an insured is not permitted to settle an action without ICBC's written consent* (*IVR*, s 148.2(4)(b)).

IV. Optional Insurance

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

NOTE: The following portion of this chapter is meant to serve as a basic primer covering some of the key principles of the new ICBC system, which applies to claims for accidents occurring on or after May 1, 2021. Given that this no-fault system is new as of May 1, 2021, there are still certain portions of it that are being clarified, or that may adapt with implementation.

Optional Insurance Contracts ("OICs") are additional optional coverage that any person can purchase at their discretion. These typically either extend the limits of existing coverage (under the same terms and conditions as the coverage that is being extended), or provide coverage that is not already provided for (*IVA*, s 61(1)). OICs can be purchased through private insurers or through ICBC.

The following are *some* of the common types of coverage and what they provide for, over and above the Basic Compulsory Coverage, that are commonly available for discretionary purchase. The below is merely meant to be an outline of common OIC types, and so it is critical to refer to your policy to understand the specifics of what is covered in your OIC.

A. Extended Third-Party Liability

Allows for an extension of third-party liability coverage, on the same terms and conditions as the basic third-party liability coverage.

B. Income Top-Up

Extends the upper limit of the coverage available under the income replacement benefit provided as part of basic coverage (i.e., if an insured has a pre-accident net income over $100,000 this top-up might provide them greater coverage under this benefit).

C. Own Damage Coverage

1. Collision

This insurance covers loss or damage to the insured vehicle resulting from upset or collision with another object, including the ground or highway, or impact with an object on or in the ground. This type of insurance is available with a wide choice of deductibles (*IVR*, s 150).

2. Comprehensive

This insurance covers loss or damage from any cause other than collision or upset. In addition to the Specified Perils listed below, this includes vandalism, malicious mischief, falling or flying objects, missiles, and impact with an animal. Comprehensive coverage is subject to various deductibles (*IVR*, s 150).

3. Specified Perils

This insurance is more limited than Comprehensive. It covers only loss or damage caused by fire, lightning, theft or attempted theft, windstorm, earthquake, hail, explosion, riot or civil commotion, falling or forced landing of an aircraft or part of an aircraft, rising water or the stranding, sinking, burning, derailment or collision of a conveyance in or on which a vehicle is being transported on land or water (*IVR*, s 150).

D. Loss of Use Coverage

Loss of Use coverage can be purchased only in conjunction with Own Damage (collision, comprehensive, or specified perils coverage). It provides reimbursement up to the limits purchased by the insured for expenses incurred for substitute transportation when a valid claim can be made under Own Damage coverage. Subject to the regulations, an insurer may provide for exclusions and limits of loss in an OIC, in respect of loss of use of the vehicle (*IVA*, s 65).

An OIC providing insurance against loss of use of a vehicle may contain a clause to the effect that, in the event of loss, the insurer must pay only an agreed portion of any loss that may be sustained or the amount of the loss after deduction of a sum specified in a policy. For such a clause to have legal effect, it must be printed in a prominent place on the policy and in conspicuous lettering contain the words “this clause contains a partial payment of loss clause” (*IVA*, s 67).

V. Seeking Legal Counsel

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

NOTE: The following portion of this chapter is meant to serve as a basic primer covering some of the key principles of the new ICBC system, which applies to claims for accidents occurring on or after May 1, 2021. Given that this no-fault system is new as of May 1, 2021, there are still certain portions of it that are being clarified, or that may adapt with implementation.

The new no-fault system means that a majority of claims will now be adjudicated directly by ICBC instead of going through the court system.

However, there are certain circumstances in which an insured party may still wish to consult with a lawyer. This includes cases that are exceptions to the no-fault system (see Section VII: When You Can Still Sue). This may also include certain instances in which an insured party chooses to dispute an ICBC decision in court, such as minor injury determination disputes, or liability and damage disputes (see Section VI: Disputes With ICBC).

Parties may also consult legal counsel for general legal advice about their claim.

Those seeking legal representation for disputes, to claim benefits, or for general legal advice about their claim should be advised that many personal injury firms operate on a contingency basis, and the insured may not have to pay up front fees. See Part II, Section VIII.C: Seeking Legal Counsel for Your Claim for more information about contingency contracts, as these were common under the old ICBC system, and many lawyers may still use them for representation under the new system.

VI. Disputes with ICBC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

NOTE: The following portion of this chapter is meant to serve as a basic primer covering some of the key principles of the new ICBC system, which applies to claims for accidents occurring on or after May 1, 2021. Given that this no-fault system is new as of May 1, 2021, there are still certain portions of it that are being clarified, or that may adapt with implementation.

If you have an issue with the outcome of your claim or with how it was decided, there are processes available to dispute your claim. Different procedures apply to different types of claim disputes. The following outlines the remedies for some common types of disputes that may arise with ICBC. ***This section should be used with caution, as at the time of writing certain parts of the ICBC dispute process*** (minor injury disputes, and liability and damages disputes) ***were under review at the BC Court of Appeal.***

A. Minor Injury Determination Disputes

If your injury is classified as a minor injury, this places a cap on the amount on non-pecuniary damages that you can access (*IVA*, s 103(2)). Minor injury has a specific legal meaning, and is defined in s 101(1) of the *IVA* as: "a physical or mental injury, whether or not chronic, that

> (a) subject to subsection (2), does not result in a serious impairment [(defined in s 101(1) of the *IVA*)] or a permanent serious disfigurement [(defined in s 101(1) of the *IVA*)] of the claimant, and
>
> (b) is one of the following:
>
> > (i) an abrasion, a contusion, a laceration, a sprain or a strain;
> >
> > (ii) a pain syndrome;
> >
> > (iii) a psychological or psychiatric condition;
> >
> > (iv) a prescribed injury or an injury in a prescribed type or class of injury;[(defined in s 1(1) of the *Minor Injury Regulation*)] "

Minor injury classifications may be disputed either internally, by speaking with your claim representative and their manager, or by making an application to the Civil Resolution Tribunal (CRT) to adjudicate on the matter. Note that ICBC does not make further information publicly available about the process or deadlines for disputing a determination internally.

The CRT is an independent administrative tribunal, authorized by the Civil Resolution Tribunal Act to adjudicate on minor injury determination, among other matters. The CRT process does not involve legal representation, and use of the CRT to resolve these disputes is meant to cut legal costs for all parties, although certain parties who require assistance can apply to have a helper or advocate to assist them in the tribunal process. For more details on the CRT, see the LSLAP Manual on the CRT and its procedures.

Note: As of June 2022, the BC Court of Appeal has upheld the CRT's authority to adjudicate on minor injury determinations as being constitutional (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2022 BCCA 163 (CanLII)). This case may ultimately be brought before the Supreme Court of Canada in the future, but as of now the CRT has jurisdiction on minor injury determinations below $50,000.

B. Liability And Damages Disputes

Following an accident claim, ICBC will compile information from various sources to determine liability. Per ICBC's website, this internal process includes gathering information from other drivers, witnesses, or police reports, as well as conducting comparisons with similar accidents, or determining if there are any Motor Vehicle Act violations. Generally, this process results in a finding of partial, full or no fault in relation to the accident (i.e., the insured's degree of liability).

Disputes about a finding of liability can be made internally through ICBC's Claims Assessment Review process, in which an independent arbitrator reviews the liability decision. Per the ICBC website, an insured has *60 days* after the initial decision within which to submit a Claims Assessment Review application, although ICBC may change this internal deadline, so it is always best to confirm the deadline as soon as possible.

Disputes about liability or damage assessments can also be disputed in certain circumstances by making an application to the CRT to adjudicate on the matter. The CRT has jurisdiction over liability and damages in cases where an accident occurred in BC, and was, "caused by a vehicle or the use or operation of a vehicle as a result of which a person suffers bodily injury" (*IVA*, s 101) and where the total damage amount is less than or equal to $50,000 (note that this damage cap to fall within CRT jurisdiction is, "including loss or damage to property related to the accident but excluding interest and any expenses referred to under section 49" of the *CRT Act*) (*CRT Act*, s 133(1)(c)).

Note: See previous note about CRT above.

C. Disputing Denied Benefits (in relation to Parts 1 AND 10 of the IVA)

Disputes in relation to denied accident benefits can be handled by making an application to the CRT to adjudicate the matter. This applies to benefits denied under Part 1 or Part 10 of the *IVA* (*CRT Act*, s 132(b)).

Note: The case of *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, mentioned above, did not strike down the CRT's ability to adjudicate on disputes regarding denied benefits. As such, unlike minor injury and liability/damages disputes, parties cannot choose whether to bring their denied benefits disputes before either a court or the CRT, and *must bring these disputes before the CRT*.

Disputes about denied accident benefits may also be made internally through ICBC's Claims Decision Review process. However, ICBC does not provide public information on the process or deadlines for this. Speak directly to your ICBC representative for more information about options for disputing denied benefits internally.

D. Disputes About Basic Vehicle Damage Coverage

Disputes related to Basic Vehicle Damage Coverage (see Section III.C: Basic Vehicle Damage Coverage) can be resolved either internally between the insured and ICBC, or through arbitration. This applies to disputes about:

(a) the nature and extent of required repairs or replacement,

(b) the value of the damage to or loss of the eligible vehicle, or

(c) the price received, or the estimated price that would have been received, from the sale of the damaged eligible vehicle. (*BVDCR*, s 28)

This arbitration process must follow the *Arbitration Act*, as well as the rules laid out in ss 28-32 of the *Basic Vehicle Damage Coverage Regulation*. *There is a two-year limitation date from the date of the accident to submit for arbitration* (*BVDCR*, s 29(2)).

VII. When You Can Still Sue

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

NOTE: The following portion of this chapter is meant to serve as a basic primer covering some of the key principles of the new ICBC system, which applies to claims for accidents occurring on or after May 1, 2021. Given that this no-fault system is new as of May 1, 2021, there are still certain portions of it that are being clarified, or that may adapt with implementation.

A. Injuries from an Accident

Section 115 of the *IVA* states that there is no longer a right of action (an ability to bring a lawsuit against someone) in British Columbia for injuries from a motor vehicle accident.

However, s 116(2) of the *IVA* outlines certain exceptions in which those injured in a motor vehicle accident can sue for certain non-pecuniary and non-compensatory damages (non-pecuniary damages are those that are difficult to assign a number value to, such as pain and suffering damages. Non-compensatory damages are those that are not meant to directly compensate for the injury, such as punitive damages, which are designed to punish the defendant). The exceptions in which a person injured in a motor vehicle accident can still bring a lawsuit for non-pecuniary and non-compensatory damages are:

> (a) a vehicle manufacturer, respecting its business activities and role as a manufacturer;
>
> (b) a person who is in the business of selling vehicles, respecting the person's business activities and role as a seller;
>
> (c) a maker or supplier of vehicle parts, respecting its business activities and role as a maker or supplier;
>
> (d) a garage service operator, respecting its business activities and role as a garage service operator;
>
> (e) a licensee within the meaning of the Liquor Control and Licensing Act whose licence authorizes a patron to consume liquor in the service area under the licence, respecting the licensee's role as a licensee in the sale or service of liquor to a patron;
>
> (f) a person whose use or operation of a vehicle
>
> > (i) caused bodily injury, and
> >
> > (ii) results in the person's conviction of a prescribed Criminal Code offence; [(s 12 of the IVR sets out prescribed Criminal Code offences)]
>
> (g) a person in a prescribed class of persons. [(s 13 of the IVR further defines this)]

Note that the government has reserved the right to pass new regulations restricting ss 116(a) - 116(e). They also reserve the right to pass further regulations clarifying exceptions under s 116 (g).

These exceptions also do not apply to voluntary operators and passengers in vehicles that, "knew or ought to have known...[were] being operated without the consent of the owner, the out-of-province owner or, in the case of a leased motor vehicle, the lessee" (*IVA*, s 116(1)). This means that voluntary operators and passengers in situations where a vehicle is being operated without the owner or lessee's consent cannot sue under the new system, even if they otherwise fit within the other exceptions outlined in s 116(2).

B. Vehicle Damage

Sections 172 and 173 of the *IVA* state that there is no longer a right of action (an ability to bring a lawsuit against someone) in British Columbia in most circumstances for vehicle damage occurring in accidents involving at least two cars and occurring on- and off-highway.

However, there are certain prescribed classes of persons who may still have an action brought against them for vehicle damage from on-highway accidents, or who may start an action for vehicle damage from off-highway accidents (*IVA*, ss 172 and 173). See the Basic Vehicle Damage Coverage Regulation ss 6(2) and 8(2) for these exceptions in relation to both on-highway and off-highway accidents.

C. Uninsured and Unidentified Motorist Cases

As noted in Part I, Sections III.D and E of this manual, in order to claim damages in uninsured and unidentified motorist cases, a claimant may be required to bring legal action against an uninsured motorist, or (in unidentified motorist cases) against ICBC as a nominal defendant. As noted, under the new system the coverage for uninsured and unidentified motorist accidents only applies to non-vehicle property damage caused by such accidents, so the bars on litigation for injuries and vehicle damage discussed above would not affect the ability to litigate in these cases.

VIII. On or Before April 30 2021

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

NOTE: The following portion of this chapter was written prior to April 30, 2021. Therefore, though it is written in the present tense, please be advised that it applies only to claims for accidents that occurred on or before April 30, 2021.

A. General

The automobile insurance system in BC is comprised of “no-fault” benefit claims and indemnification for claims in tort law.

No-fault benefits are included as part of the basic (compulsory) insurance coverage offered by the Insurance Corporation of British Columbia (ICBC or “the Corporation”) exclusively. As the name implies, payment of the no-fault coverage is given regardless of whether any element of fault is attributed to the insured. Optional coverage above and beyond the basic coverage may be purchased from either ICBC or a private insurer under an optional insurance contract (“OIC”).

Claims for damages brought under tort law, however, do require the presence of a fault element on the part of the defendant to be successful. The victim of the accident (e.g. a personal injury claimant) may sue the other driver(s), the owner(s) of the insured car, the manufacturer(s), automobile shop(s), municipality, the insurer(s), or any other parties liable for the injury. Legislatively, there is no limitation on the maximum amount of damages that a court could award to a victim. However, case law and statute may effectively cap certain heads of damage, such as non-pecuniary damages. Where the necessary conditions are met, ICBC may indemnify the insured for all or part of the assessed liability. This means that where damages are awarded to a victim in an accident, ICBC will pay those damages instead of the party (i.e., the insured) who is at fault.

It is important to determine whether the action is one that can be commenced in BC and whether the law of BC applies. For cases involving a BC resident who has been involved in an out-of-province accident, private international law rules will govern the action. Generally, for the substantive issues, the laws of the jurisdiction where the accident took place will apply. For procedural matters, the rules of the trial court will apply. A summary of out-of-province insurer qualifications, service procedures, and jurisdictional considerations is listed in Section XIII.

The *Insurance (Vehicle) Act [IVA]* and the *Insurance (Vehicle) Regulation [IVR]* form a code governing most aspects of auto insurance in BC. This chapter is not meant to be a comprehensive summary of the IVA or IVR but rather is a guide to help people locate the relevant sections of the *IVA* and *IVR* that they are likely to encounter. A few preliminary concepts, which will be of use in understanding this chapter, are discussed immediately below.

1. Indemnification

Drivers purchase car insurance to protect themselves in the event that they are found liable for damages. If the necessary preconditions are met, ICBC assumes liability for payment of benefits or damages to the claimant or victim of a car accident. Instead of the insured paying the damages claimed, the insurance company, "indemnifies" the insured.

2. Subrogation

Subrogation is a common feature of insurance contracts. When ICBC assumes liability for payment of benefits or damages of any kind on behalf of the insured, ICBC is 'subrogated' to the right of recovery that the insured had against any other person (*IVA*, s 84), i.e., ICBC has all remedies available to it that the insured person might have exercised by themselves (*IVA*, s 83).

3. Premiums and Point Penalties

Premiums are regular payments made by the insured to ICBC. Premiums are based on where the insured lives, how the vehicle is used, the type of vehicle, and the insured driver's claim record.

The point penalty system is authorized by sections 210 and 211 of the *Motor Vehicle Act [MVA]*. Section 28.01 of the *Motor Vehicle Act Regulations*, BC Reg 26/58, outlines the various breaches and/or offences of the *MVA* and the corresponding point penalties recorded.

Starting June 10, 2019, any traffic ticket a driver gets will have the potential to increase their ICBC insurance rates. Traffic tickets will be broken down into two categories: high-risk tickets and regular traffic tickets. High-risk tickets include but may not be limited to:

- Impaired driving incidents, including a 24-Hour Prohibition from driving, a 3-day prohibition from driving, a 7-day prohibition from driving, a 30-day prohibition from driving, or a 90-day Immediate Roadside Prohibition or Administrative Driving Prohibition. The increased insurance rates for impaired driving incidents will also include any individuals who have criminal convictions for impaired driving, refusing to provide a breath sample. The individual will be required to pay increased insurance rates once the individual's mandatory driving prohibition is over.
- Electronic Device tickets, which increases insurance rates on top of adding to the Driver Risk Premium
- Excessive Speeding tickets, which also increases insurance rates on top of adding to the Driver Risk Premium
- Driving While Prohibited charges
- Criminal Code driving convictions

These increased insurance rates would start on September 1, 2019.

4. Waiver

Section 85 of the *IVA* allows ICBC to waive a term or condition of an insurance contract (also known as "the plan"). However, in order for a term or condition to be waived, the waiver must be in writing **and** signed by an ICBC officer.

B. Application of the Current Legislation, and Transitional Provisions

On June 1, 2007, the *IVA* and accompanying *IVR* were amended. Transitional provisions in Parts 1, 4, and 5 of the *IVA* dictate which regime, old or new, will apply to a particular claim (ss 1.2, 58, and 74 respectively).

Generally, it is safe to say that the *IVA* and the *IVR*, taken as a whole, apply to:

- **Insurance policies** under the universal compulsory vehicle insurance plan set out by the Act (the "plan") that take effect on or after June 1, 2007;
- Optional **insurance contracts** that take effect on or after June 1, 2007;
- Any **claims** that arise under these insurance plans or contracts; and
- **Insured persons**, and **insurers**, and **ICBC** in relation to these insurance plans or contracts.

  NOTE: The critical time to look at is the date on which the individual insurance policy or contract came into effect or was renewed.

Claims and parties to the claims in relation to an insurance policy that came into effect before June 1, 2007 will continue to be governed by the old *IMVA* and *IMVAR*. It is entirely possible for a single accident to trigger the operation of both the old and new Acts simultaneously, (albeit in relation to different aspects of the resultant legal issues).

Although the *IVA* and *IVR* cover both ICBC and private insurer plans, some parts of the Act and Regulation apply only to one or the other. Specifically, the parts of the Act and Regulation that govern ICBC are Parts 1, 5, and 6 of the Act and Parts 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 14 of the Regulation. The parts of the Act and the Regulation that govern the private insurers are Parts 4, 5, and 6 of the Act and Parts 13 and 14 of the Regulation.

Furthermore, the *IVA* and *IVR* apply to both universal mandatory coverage and optional coverage. Part 1 of the *IVA* applies to ICBC's mandatory coverage only. Part 4 of the *IVA* applies to optional coverage. Parts 5 and 6 of the *IVA* apply to both mandatory coverage and optional coverage.

C. Seeking Legal Counsel for Your Claim

Most personal injury lawyers will take motor vehicle accident claims on a contingency basis (a percentage of the total sum recovered) and offer a free consultation. Since this means that there is usually no cost barrier, it is often wise to at least consult a lawyer to ensure that you will receive the amount to which you are entitled. Here are a few things to be aware of when consulting a lawyer for your claim:

1. Contingency Fees

Contingency fees are variable; some lawyers use a sliding scale so that the fee increases as the trial date approaches. The Law Society of British Columbia imposes limits on contingency fees for motor vehicle injuries, and the maximum permitted under the Law Society Rule 8-1 is 33 1/3% of the amount recovered.

2. The Contingency Fee Contract

The contingency fee contract must be in writing and must contain a provision that it is the claimant's right to have the contract reviewed by the Supreme Court for reasonableness.

Contingency fee contracts often provide that if the claimant discharges the lawyer, the claimant will have to pay an hourly rate for services up to the date of discharge and that these fees must be paid before the lawyer will transfer the file to another lawyer. A claimant who discharges a lawyer can have the lawyer's bill reviewed by a Registrar of the Supreme Court in a hearing called an Assessment. The Registrar will make a ruling about the reasonableness of the bill and whether the claimant should be required to pay the bill right away.

3. Disbursement Costs

Disbursement costs are the expenses incurred for photocopying, medical reports, transcripts of evidence, police reports, motor vehicle searches, etc. Law firms will often pay these costs for the claimant and collect them at the end of the lawsuit. Some law firms take a retainer fee for disbursements.

4. Marshalling of Reports

Over the course of the claim, the claimant's lawyer will collect your medical records, typically for the period from 2 years before the motor vehicle accident to the period following the accident, and deliver them to the defence counsel. As a claimant in a personal injury action, it is important to be diligent in pursuing recommended medical treatment and visiting a family physician, as clinical medical records are typically only generated when a patient attends at an appointment. The lawyer for the claimant and for the defendant(s)/ICBC may also arrange for independent medical evaluations with specialized doctors over the course of the claim.

If there is a claim for loss of prospective earnings or cost of future care, the claimant's lawyer may also collect and deliver economic briefs and reports by vocational specialists, accountants, actuaries, and other non-medical professionals. This will require the claimant to draft a letter granting their lawyer signing authorization. – this letter should address who is receiving the authorization (in this case, the lawyer) and for what purpose, related issues, or kinds of documents (in this case, disclosures) the authorization is for.

The claimant's lawyer will also receive defence reports and expert summaries. All of this goes on behind the scenes. Claimants wishing to have a more active role in their file should not hesitate to contact their lawyers for periodic updates.

IX. Limitation on Experts

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

NOTE: The following portion of this chapter was written prior to April 30, 2021. Therefore, though it is written in the present tense, please be advised that it applies only to claims for accidents that occurred on or before April 30, 2021.

(The information on this page affects all trials taking place after October 1, 2020, but not those for accidents that occur after the introduction of Enhanced Care on May 1, 2021)

Amendments were introduced to the *Evidence Act*, RSBC 1996, c.124 [*EA*] which limit the number of experts and expert reports that are used on the issue of damages in most trials, with judicial discretion to allow for additional experts in appropriate cases. The purpose of the amendments is to decrease the cost, complexity, and delay associated with using many experts in a trial. As a result, claims will be resolved more efficiently in court.

Changes:

1. For fast-track claims (where the amount sought by the plaintiff is less than $100,000.00), there will be a limit of one expert and one expert report per party, *EAA* 12.1 (2)(b).
2. For claims that are not considered to be fast track claims, there will be a maximum of three experts and expert reports for each party, *EAA* 12.1 (2)(a).
3. Parties involved in the claim can agree to use more experts than the limit if every party to the claim agrees, *EAA* 12.1 (4)(a)(b).
4. *EAA* 12.1(5) provides judicial discretion to allow for additional experts beyond the limitation for cases where:
    - a. The subject matter of additional expert to be tendered has not already been addressed by the other experts. *EAA* 12.1 (6)(a)
    - b. Without the additional expert evidence, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding. *EAA* 12.1 (6)(b)
5. A limit is placed on the maximum amount recoverable from an unsuccessful litigant to $3,000.00 per each expert report in motor vehicle personal injury cases, *EAA* 12.1 (9)(a)(i)(A). The total recoverable disbursements in motor vehicle personal injury cases will also be limited to 5% of the judgment or settlement, *EAA* 12.1 (9)(a)(i)(B).
6. Disbursements include all expenses used for the purpose of the lawsuit including expenses such as courier fees and photocopying. It will not include fees payable to the Crown such as filing fees, court fees, and jury fees. *EAA* 12.1 (9)(a)(ii).

Exceptions:

1. The limitation of the number of experts will not apply if an expert report has been served before February 6, 2020, and the trial date set out in the notice trial is before October 1, 2020, *EAA* 12.2 (2)(b)
2. The $3,000.00 limit to recoverable on expert reports and the 5% limit on disbursements would not apply if the cost for experts has already been incurred prior to February 6, 2020, or a notice of trial has been filed and served prior to February 6, 2020, for a trial before October 1, 2020. *EAA* 12.2 (3)(b)

X. Compulsory Coverage

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

NOTE: The following portion of this chapter was written prior to April 30, 2021. Therefore, though it is written in the present tense, please be advised that it applies only to claims for accidents that occurred on or before April 30, 2021.

ICBC is the sole provider of basic insurance for non-exempt vehicles in BC. Exempt vehicles are described in sections 43–44 of the *IVA* and also in section 2 of the *IVR*. For most vehicles owned, leased, or operated in BC, third-party liability coverage up to $200,000 is only available from ICBC. Full coverage for exempt vehicles, extended coverage in excess of the basic coverage (third party liability insurance over $200,000, *IVR*, s 67), and collision ("own damage") insurance may be purchased from either ICBC or from private insurers. See Section XI: Optional Insurance, below. Note that private insurers may have their own requirement for coverage that may be above and beyond the requirements of ICBC

Vehicles licensed in BC are required by law to carry basic compulsory coverage, which is evidenced by a certificate of automobile insurance issued under the *IVA* to someone licensed under the *MVA* (i.e., the "insured").

NOTE: The definition of "the insured" varies somewhat from section to section in the *IVA* and *IVR*.

Driving while uninsured is an offence (*MVA*, s 24(3)(a)) which carries a maximum penalty of a fine of up to $250 and/or imprisonment of up to three months (*MVA*, s 24(5)(a)). Driving an uninsured vehicle is also an offence (*MVA*, s 24(3)(b)) which carries a fine of at least $300 and no more than $2,000 and/or imprisonment for at least seven days and no more than six months (*MVA*, s 24(5)(b)).

A. Scope of Coverage

Subject to various limitations and exclusions, basic compulsory coverage is set out in the *IVR* and provides the insured with:

- indemnity for third party legal liability (Part 6);
- accident benefits; no-fault benefits payable for death or injury (Part 7);
- coverage for damages caused by uninsured or unidentified motorists (Part 8);
- first party coverage (Part 10). This includes:
  - inverse liability (Division 1 of Part 10); and
  - underinsured motorist protection (UMP) (Division 2 of Part 10).

B. Third Party Legal Liability: Part 6 of the IVR

1. Indemnity

This insurance indemnifies the insured against liability imposed on the insured by law for the injury or death of another, and/or loss or damage to another's property, to a total limit of $200,000 (*IVR*, s 67), to be shared among the victims of a motor vehicle accident (Schedule 3, s 1). The base limit of liability is $500,000 in claims made for a bus, and $300,000 in claims made for a taxi or limousine. Extended Third-Party Legal Liability coverage may be purchased at the insured's discretion. (See Section XI: Optional Insurance, below). **If the insured is found legally liable, and no extended coverage has been purchased, they are responsible for payment of any claims in excess of the above limits.**

As of September 16, 2019, ICBC introduced a new insurance category (blanket insurance certificate) for transportation network services (TNS) or ride-hailing companies such as Uber and Lyft. The blanket basic coverage provides coverage up to $1,000,000 third party liability when the vehicle is a) hailed by passengers through the online platform and b) is operated to transport the passengers (*IVR*, s 154). This blanket coverage is not for individual drivers and it is mandatory for ride-hailing companies.

2. Who is Covered

The definitions of "insured" for this part of the *IVR* may be found in *IVR*, s 63. For our purposes, the most relevant definitions of "insured" are:

(a) a person named as an owner in an owner's certificate

(b) an individual who, with the consent of the owner or while a member of the owner's household, uses or operates the vehicle described in the owner's certificate,

(c) where the owner is deceased, the personal representative of the owner or a person having, with the consent of the personal representative, custody of the vehicle until the grant of letters probate or of administration to the personal representative, and

(d) where the owner is not an individual,

(i) an officer, employee, or partner of the owner for whose regular use the vehicle described in the owner's certificate is provided, or

(ii) a member of the household of an officer, employee, or partner of the owner, who, with the consent of the owner, uses or operates the vehicle described in the owner's certificate.

3. Extension of Indemnity

According to *IVR*, s 65, indemnity is extended to an insured who operates a motor vehicle not described in an owner's certificate issued to the insured (i.e., someone else's car). For the purposes of s 65 only, "insured" includes the following:

(a) a person named as an owner in an owner's certificate;

(b) a member of the owner's household;

(c) an employee or partner of the owner for whose, regular use the vehicle described in the owner's certificate is provided; and

(d) the spouse of an employee or partner described in paragraph (c) where the spouse resides with the employee or partner.

Note that, absent this expanded definition, "insured" would not otherwise cover a member of the insured's household operating a vehicle not described in an owner's certificate issued to the insured.

As of September 1, 2019, ICBC requires drivers to list out all the household members who may drive their vehicles, regardless of the number of times they may drive it. In addition, non-household members such as employees who may be driving the insured's vehicle for more than 12 times a year will also be required to be listed at the time of purchasing the policy. The additional members listed will be factored into the calculation for the premium paid.

If a household member or non-household member, who was not listed on the principal's policy, gets involved in an accident, ICBC will have the right to impose a financial penalty on the principal's policy and the principal may also be subjected to a higher premium rate when renewing the policy in the future.

4. Restrictions on Indemnity

Section 65(2) of the *IVR* states that if an insured is operating a motor vehicle that is not described in an owner's certificate issued to them, indemnity is not extended to the insured if:

- the insured is operating the motor vehicle in connection with the business of a garage service operator;
- the motor vehicle is owned or regularly operated by the insured;
- the motor vehicle is for commercial use,
  - In respect of a TNS-only vehicle operated under a transportation network services authorization, the corporation's exemption applies only if injury or death of another, or loss or damage to property of another, arises out of the operation of the TNS-only vehicle when
    - (a) the vehicle has been hailed by or for passengers through the use of the online platform to which the transportation network services authorization relates, and
    - (b) the insured is operating the vehicle for the purposes of picking up, transporting or dropping off those passengers.
- the motor vehicle is in fact not licensed under the MVA (or similar legislation) and the insured does not have reasonable grounds to believe the motor vehicle is licensed; or
- the insured is operating the vehicle without the consent of the owner and does not have reasonable grounds to believe that they have the consent of the owner.

Section 77 provides, in part, that an owner seeking to rely on the coverage provided for a vehicle not named in the owner's certificate cannot do so if they also own (or lease) the non-described vehicle that has been involved in the accident (i.e. you cannot just insure one vehicle and expect this to cover all of the other vehicles in your fleet).

Neither garage service operators nor their employees are covered by the owner's certificate issued for customers' vehicles while the vehicle is in the care, custody, or control of the garage service operator or their employee for a purpose relating to the business. "Garage service operator" is defined in Part 1 of the *IVR* as "the operator of a motor vehicle service facility and includes a dealer, service station operator, motor vehicle repairman, auto body shop repairman, wrecker operator, and the operator of a vehicle parking or storage facility" (s 57). To offset the effect of s 57, the garage service operator must obtain special coverage pursuant to s 150.

5. What is Covered

In addition to the legal liability coverage (i.e., s 65 indemnification) outlined above, *IVR* ss 67 and 69 states that ICBC may also pay for:

> (a) reimburse an insured for reasonable payments for emergency medical aid necessary to a person injured as the result of an accident for which indemnity is payable under this Part, if reimbursement is not provided to the insured under another Part or by another insurer,
>
> (b) pay costs incurred for fire extinguishers, jacks or other necessary emergency equipment or supplies provided to the insured,
>
> (c) pay that proportion of the costs taxed against an insured in an action respecting a claim under this Part that
>
> > (1) the amount offered by the corporation as its total liability for indemnity to the insured under this Part in an offer to settle served in accordance with the Supreme Court Civil Rules bears to
> >
> > (2) The aggregate of all special and general damages awarded in respect of the occurrence for which the claim is made,
>
> (d) pay

(1) prejudgment interest under the Court Order Interest Act or similar legislation of another jurisdiction, and

(2) post-judgment interest under the Interest Act (Canada) or similar legislation of another jurisdiction

on that part of the judgment that is within the applicable limit set out in section 1 of Schedule 3, and

(e) if indemnity is provided to the insured under this Part and by one or more optional insurance contracts provided by an insurer other than the corporation, contribute to the payment of expenses, costs and reimbursements for which provision is made under section 172 in accordance with that other insurer's and the corporation's respective liabilities for

(1) damages awarded against the insured, or

(2) the amount payable under a settlement made on behalf of the insured.

6. What is Not Covered

ICBC will *not* indemnify an insured for certain types of damage, including:

- loss or damage to property carried in or on a vehicle owned, rented or in the care, custody or control of an insured (s 72.1); or
- liability directly or indirectly arising out of the operation of attached equipment (i.e., machinery or equipment that is mounted on or attached to the vehicle, and which is not required for the safe operation of that vehicle) at a site where such equipment is operated, unless the attached equipment is used in accordance with the *IVR* (s 72(2)); or
- under Part 4, 6, 7, or 10 in respect of injury, death, loss or damage arising, directly or indirectly, out of radioactive, toxic, explosive or other hazardous properties of nuclear substances within the meaning of the *Nuclear Safety and Control Act* (Canada), s 56(1)(a)); or
- under sections 20 or 24 of the Act or section 49.3, Part 7 or Part 10 of the *IVR* in respect of any injury, death, loss or damage arising, directly or indirectly out of a declared or undeclared war or insurrection, rebellion or revolution (*IVR*, s 56(1)(b)); or
- under *IVA*, ss 20 or s 24, under *IVR*, ss 49 or 49.3(1)(b), Part 6 or Part 10 in respect of punitive or exemplary damages or other similar non-compensatory damages (*IVR*, s 56(1)(c)); or
- a general or special assessment, penalty or premium, payable under the *Workers' Compensation Act* (British Columbia) or similar Act (*IVR*, s 72.1(1)(a)).

7. Duties of the Insured

An insured has a duty to report to ICBC mid-term changes, as required by s 9 of the *IVR*. These changes may result in an increase or decrease in the premiums paid to ICBC. The insured named in the owner's certificate is obligated to report to an ICBC agent the following:

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(1) In this section, "the territory in which the vehicle is primarily located when not in use" means the territory in which the place where the vehicle is kept when not being driven is located.

(2) The insured named on an owner's certificate must,

(a) within 10 days after

(i) the insured's address is changed from the address set out in the certificate, or

(ii) the insured acquires a substitute vehicle for the vehicle described in the certificate, or

(b) before

(i) the use of the vehicle described in the certificate is changed to a use to which a different vehicle rate class applies than the vehicle rate class applicable to the use set out in the certificate, or

(ii) a vehicle in respect of which the premium is established on the basis of the territory in which a vehicle of that vehicle rate class is used or principally used, as the case may be, is used or principally used in a different territory than that set out in the certificate,

report the change of address, vehicle, use or territory to a person referred to in section 3, and pay or be refunded the resulting difference in premium.

(3) If the premium for a vehicle is established on the basis of the territory in which the vehicle is primarily located when not in use and that territory as set out in the owner's certificate is changed, the insured named on the certificate must, unless the vehicle is being used by the insured for vacation purposes, report the change to a person referred to in section 3 within 30 days of the change, and pay or be refunded the resulting difference in premium.

Furthermore, ICBC is not liable to indemnify an insured who, to the prejudice of ICBC, fails to comply with duties outlined in s 73 of the *IVR*. This section states that an insured:

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(1) An insured must

(a) promptly give the corporation written notice, with all available particulars, of

(i) any accident involving death, injury, damage or loss in which the insured or a vehicle owned or operated by the insured has been involved,

(ii) any claim made in respect of the accident, and

(iii) any other insurance held by the insured providing coverage for the accident,

(b) on receipt of a claim, legal document or correspondence relating to a claim, immediately send the corporation a copy of the claim, document or correspondence,

(c) cooperate with the corporation in the investigation, settlement or defence of a claim or action,

(d) except at the insured's own cost, assume no liability and settle no claim, and

(e) allow the corporation to inspect an insured vehicle or its equipment or both at any reasonable time.

(2) The corporation is not liable to an insured who, to the prejudice of the corporation, fails to comply with this section.

8. Duties of the Corporation

On receipt of a notice of a claim under Part 6 of the *IVR*, ICBC must, at its expense, assist the insured by investigating and negotiating a settlement where, in their opinion, such assistance is necessary, and defend the insured against any action for damages (s 74).

9. Rights of the Corporation

Upon assuming the defence of an action for damages brought against an insured, ICBC has the right, subject to section 79 of the Act, to the exclusive conduct and control of the defence. This right includes, but is not limited to, the right to appoint and instruct counsel, to admit liability, to negotiate, and/or settle out of court (*IVR*, s 74.1).

10. Forfeiture of Claims and Relief from Forfeiture

Certain conduct by the insured or applicant can result in "forfeiture", whereby the insured is deemed to have given up their right to be indemnified by ICBC. In this situation, the claim for indemnification becomes invalid. Apart from exclusions, a claim may be forfeited under s 75 of the *IVA* if:

(a) an applicant for coverage falsely describes the vehicle in respect of which the application is made to the prejudice of the insurer (s 75(a)(i));

(b) an applicant for coverage knowingly misrepresents or fails to disclose a fact required to be stated in it (s 75(a)(ii));

(c) then insured violates a term or condition of or commits a fraud in relation to the plan or the OIC (s 75(b); see Section X.B.11: Breach of Conditions and Consequences;

(d) an insured makes a "wilfully false statement" with respect to the claim (s 75(c)).

NOTE: According to Brooks v Insurance Corporation of British Columbia [1], 1994 CanLII 3304 (BC SC), per Bouck J, the purpose of s 19(1)(e) (now *IVA*, s 75(c)) is to prevent intentionally deceitful misstatements for the purpose of defrauding the insurer; "exaggerated guesses" by an insured as to the value of a lost motor vehicle, or figures inserted for the purpose of goading an insurer into action, are insufficient to deny coverage unless a fraudulent purpose on the part of the insured is shown.

However, ICBC may relieve the insured from forfeiture under s 75 if said forfeiture would be "inequitable". Furthermore, ICBC must relieve an insured from forfeiture if: a) it is equitable to do so, and b) the insured dies or suffers a loss of mind or bodily function that renders the insured permanently incapable of engaging in any occupation for wages or profit (*IVA*, s 19(3)).

Because there are various definitions of "insured" in the *IMVAR* (and *IVR*), the only reasonable interpretation of s 19 (the relief of forfeiture provision discussed above) is that it is to be read broadly to include all of the definitions: see *Khatkar v Insurance Corporation of British Columbia* (1993), 25 CCLI (2d) 243 (BC Prov. Ct.), per Stansfield Prov. Ct. J.

11. Breach of Conditions and Consequences

Insured persons must be careful to abide by the terms and conditions of their plans and OICs. Coverage may be lost if an insured breaches certain conditions, including, but not limited to:

(a) failing to comply with s 73 of the *IVR*, to the prejudice of ICBC See Section X.B.7: Duty of Insured

(b) operating a vehicle when not authorized and/or not qualified to do so by law (*IVR*, s 55(3)(a));

(c) using the vehicle in illicit trades, racing, or to escape or avoid arrest or other similar police action (*IVR*, s 55(3)(b), (c) and (d));

(d) towing an unregistered and/or unlicensed trailer (*IVR*, s 55(4));

(e) using the vehicle for a different purpose than the one declared by the insured in their application for insurance, except as "occasionally" permitted (*IVR*, s 55(2(a)); or

(f) naming in the owner's certificate someone as the principal operator of the insured vehicle who is not actually the principal operator (*IVR*, s 75).

NOTE: When the court determines who the principle driver is, it will consider the entire period covered by the insurance plan: see *Dehm v Insurance Corporation of British Columbia*, 1981 CanLII 608 (BC SC) [2].

Despite any breach of condition by an insured, insurance money is still payable to third parties by ICBC in cases where the insured person was:

(a) incapable of properly controlling the vehicle because of the influence of alcohol or drugs;

(b) convicted under any one of the following sections of the *Criminal Code*, RSC 1985, c C-46 (see also *MVA Regulations*, s 28.01 Table 4):

- s 220 (criminal negligence causing death);
- s 221 (criminal negligence causing bodily harm);
- s 236 (manslaughter); s 249 (dangerous operation of a motor vehicle);
- s 252(1) (failure to stop at an accident),
- s 253 (driving while impaired or with a blood-alcohol level exceeding 80 milligrams per 100 millilitres);
- s 254(5) (refusal or failure to give a breath sample);
- s 255 (impaired driving causing bodily harm or death);
- s 259 (4): driving while disqualified;
- a conviction under the Youth Criminal Justice Act (Canada) for any of the above offences;
- "similar result" or conviction of these offences in a jurisdiction in the U.S.; or
- a conviction under ss 95 or 102 of the MVA or similar convictions under another Canadian or American jurisdiction (both concern driving while prohibited); or

(c) permitting another person to use the insured vehicle in a way that results in a conviction for any of the offences outlined above (IMVA Regulations, s 55).

12. Making a Claim Under Part 6: Procedural Steps and Considerations

a) Limitation Period

Section 76 of the *IVR* provides that any action started to enforce third-party liability for bodily injury and/or property damage (i.e. claims made under Part 6 of the *IVR*) must comply with the *LA* section 3(2)(a) of the LA provides a two-year limitation period for actions for damages related to injuries to a person and/or property, including negligence claims against the driver and/or the owner of the vehicle driven.

Minors are not subject to a limitation period (*LA*, s7). After the minor has reached age 19, s 3(2)(a) begins to apply and the two-year limitation period commences. However, if the minor's guardian or litigation guardian receives a Notice to Proceed, the limitation period is initiated notwithstanding the minor status (*LA*, s 7(6)). The Notice to Proceed must meet the requirements of the *LA*, ss 7(7)(a-g).

It is important to be aware of the limitation periods associated with *IVR* Part 7 benefits, see Section X.C. Accident ("No-Fault") Benefits: Part 7 of the *IVR* below.

b) Duties Outlined in Section 73 of the *IVR*

An insured must comply with s 73 of the IVR. Failure to do so may result in a claim being denied. **See** Section X.B.7. Duties of the Insured.

c) Service on ICBC

A claimant who starts an action for damages caused by a motor vehicle or trailer must also serve ICBC with a copy of the Notice of Civil Claim the same way the defendant is served and must also file proof of service in the court in which the action is started. No further step in the action can be taken until eight days after the filing of the service in court (*IVA*, s 22).

d) Information and Evidence

ICBC has a broad right to compel the insured and others to provide information set out in the *IVA*. Specific types of information that ICBC can demand are noted in s 11 (combined forms and information); s 27 (accident report); s 28 (medical reports for accidents before April 1, 2019); s 29 (employers' reports); and s 30 (superintendent's records).

According to *McKnight v General Casualty Insurance Co. of Paris* [3], 1931 CanLII 473 (BC CA), an insured need not provide information or evidence to an insurance company respecting a breach if the company is contemplating using such a breach to deny coverage to the insured. This is not considered to be refusing to cooperate with the insurer in the defence of the action. However, the insured may still have to provide information regarding the accident itself.

C. Accident ("No-Fault") Benefits: Part 7 of the *IVR*

1. What are "No-Fault" Benefits?

Regardless of who is at fault in an accident, ICBC pays benefits for injuries to the occupants of a licensed vehicle and pedestrians and cyclists injured by a vehicle described in any owner's certificate. The accident benefits, commonly called "no-fault" benefits, are payable to an insured for death or injury caused by an accident arising out of the owner's ownership, use, or operation of a vehicle in Canada or, with some restrictions, in the U.S. (*IVR*, s 79(1)).

In *Amos v ICBC* [4], [1995] 3 SCR 405, 1995 CanLII 66 (SCC), the Supreme Court of Canada laid out a two-part test for determining if death or injury falls within the scope of s 79(1). The following must be met:

> (a) the accident must result from the ordinary and well-known activities to which automobiles are put; and
>
> (b) there must be some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the plaintiff's injuries and the owner's ownership, use, or operation of their vehicle. That is, the connection between the injuries and the ownership, use, or operation of the vehicle must not be merely incidental or fortuitous.

Amos reversed the BC Court of Appeal judgment and held that the plaintiff's injuries were causally connected to the ownership and use of their vehicle. The plaintiff was shot while driving away from a gang who was trying to gain entry into their motor vehicle. However, Major J. noted that if the gunshots had been truly random and not causally connected to the plaintiff's ownership of the vehicle then their injuries would not have been covered under s 79(1).

2. Who is Covered?

Section 78 of the *IVR* contains a definition of "insured", which includes, in part:

- a person named as an owner in an owner's certificate;
- a member of the household of a person named in an owner's certificate;
- an occupant of a vehicle that is licensed in the province and is not exempted under section 1.01 or 1.02 of the *Act* (vehicles from the federal or a provincial government other than BC);
- any occupant of a vehicle that is not required to be licensed in BC, but is operated by a person named in a driver's certificate;
- a cyclist or pedestrian who collides with a vehicle described in an owner's certificate;
- a resident of the Province who is entitled to bring an action for injury or death under section 20 (uninsured vehicles) or 24 (remedy for hit and run accidents) of the *IVA*; or
- the personal representative of a deceased insured.

3. Benefits Payable

a) Disability Benefits for Employed Persons

ICBC is obligated to pay "no fault" benefits to an insured person if:

(a) within 20 days of the accident, the injury completely disables the insured; **and**

(b) the insured is an "employed person" (*IVR*, s 80).

An "employed person" is defined in s 78 of the *IVR* as a person who, on the day of the accident or for any 6 months during the previous 12 months immediately preceding the accident, is employed or actively engaged in an occupation for wages or profit. Eligible insured persons who are completely unable to engage in employment can collect either 75 percent of their average gross weekly earnings or $300 per week, whichever is less, for the length of the disability or 104 weeks, whichever is shorter. See section 80 and Schedule 3, s 2(a) of the *IVR* for more details. Starting April 1, 2019, this amount will be increased to $740 per week.

NOTE: There is a waiting period of seven days before disability benefits are paid out. Also, no benefits are paid for these initial seven days (*IVR*, s 85).

b) Disability Benefits for Homemakers

Insured persons who are homemakers may also be eligible for no-fault benefits. If a homemaker sustains an injury from an accident, and it substantially or continuously disables the insured from regularly performing most household tasks, ICBC will compensate the insured for the duration of the disability or 104 consecutive weeks, whichever is shorter (*IVR*, s 84(1)). The insured will be compensated for reasonable expenses incurred by the insured in hiring a person to perform household tasks on the insured's behalf, up to a maximum of $145 per week (*IVR*, Schedule 3, s 2(b)). However, there is no compensation for household tasks performed by an insured's family members (*IVR*, s 84(2)). Starting April 1, 2019, this amount will be increased to $280 per week.

c) Disability Beyond 104 Weeks

If at the end of the first two years, the total disability continues, an insured receiving benefits under s 80 or 84 of the *IVR* can continue to receive the payments for the duration of the disability or until the age of 65, whichever is shorter (*IVR*, s 86). The no-fault benefits will be reduced by the amount of the Canada Pension Plan benefits if and when such benefits become payable to the insured (*IVR*, s 86).

NOTE: Any benefits payable under s 80, 84, or 86 of the IVR may be reviewed every 12 months and terminated by ICBC on the advice of its medical adviser (*IVR*, s 87).

d) Medical or Rehabilitation Benefits

In addition to the disability benefits described above, ICBC is obligated to pay all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance or professional nursing service, or for necessary physiotherapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis (*IVR*, s 88(1)). In appropriate cases, ICBC may also provide attendant care to the insured to perform duties normally undertaken by the insured (*IVR*, s 88(2)(c)). Under Schedule 3, s 3, ICBC's liability for rehabilitation benefits is limited to $300,000. For qualification: the amount by which the liability of the corporation is limited in respect of each insured injured:

- in the same occurrence on or after January 1, 1990 and before January 1, 2018 must not exceed $150 000, and
- in the same occurrence on or after January 1, 2018 must not exceed $300 000.

Also, ICBC is not liable for expenses payable to the insured under a medical, surgical, dental, or hospital plan, or paid or payable by another insurer (s 88(6)).

e) Death Benefits

In the event of the applicant's death, ICBC will pay:

(a) up to $7,500 for funeral expenses (see s 91 and s 4 of Schedule 3 of the *IVR*);

(b) $5,000 if the deceased was a "head of a household" (i.e. was providing the "major portion" of household income), plus a Supplemental Death benefit of $1,000 for each survivor other than the first, plus Additional Death Benefits of $145 per week for the first survivor and $35 per week for each additional survivor for a duration of 104 weeks (see s 92 of the *IVR*);

(c) $2,500 if the deceased was a "spouse in household" (i.e. was supporting the household or helping to raise dependent children), plus a Supplemental Death benefit of $1,000 for each survivor other than the first, plus Additional Death Benefits of $145 per week for the first survivor and $35 per week for each additional survivor for a duration of 104 weeks (see s 92 of the *IVR*).

NOTE: Status with respect to "head of household", "spouse of household" or "dependent child" is determined at the date of death resulting from a motor vehicle accident.

In addition, the *Family Compensation Act*, RSBC 1996, c 126 [FCA [5]], creates a statutory right for claims to be brought by the surviving spouse, parent, grandparent, or child of the deceased, in some cases appropriately as against ICBC.

The *FCA* provides a statutory scheme for fatal accident compensation that abrogated the common law rule that no one has a cause of action in tort against a person who has wrongfully caused the death of a third person (see *Gaida Estate v McLeod* [6], 2013 BCSC 1168 (CanLII)).

The *FCA* intends to place the claimant in the same economic position that they would have enjoyed but for the death of their spouse, parent or child. There are only a limited number of family members that would be eligible for compensation under the *FCA*, and the definition of who qualifies for compensation is important. The starting point to determine eligibility for bringing a claim begins with section 1 of the *FCA*.

Compensation under the *FCA* is generally limited to the following:

1. damages for loss of love, guidance and affection (generally for infant children of the deceased only);
2. damages for the loss of services that would otherwise have been provided by the deceased to the remaining family members;
3. damages for the loss of financial support to the remaining family members;
4. limited out-of-pocket expenses incurred as a direct result of a death (funeral and related expenses); and,
5. damages for loss of inheritance.

f) Reinstatement and Revival of No-Fault Benefits

No-fault benefits can be reinstated if a person receiving benefits goes back to work only to find that the injury comes back and prevents them from working (*Brewer v Insurance Corporation of British Columbia* [7] 1999 CanLII 6570 (BC SC). This includes a situation where a plaintiff goes back to work prior to the end of the 104-week period and leaves work after the end of the 104-week period (*Symons v Insurance Corporation of British Columbia* [8], 2016 BCCA 207 (CanLII)).

4. Restrictions and Exclusion of Benefits

Claimants should check the *IVR* carefully to find what restrictions are applicable to a given claim for benefits. The following is merely a brief summary of some very complicated provisions. Generally, ICBC is not liable to pay any of the benefits discussed above, in any of the following situations:

- if the applicant resides outside BC **and** the vehicle in which they were riding or driving at the material time was not designated in an owner's certificate (s 96(a));
- if the applicant at the time of the accident was an occupant of, or was struck by, a vehicle that could not be licensed under the *MVA* or *Commercial Transport Act* (s 96(b)(i));
- if the death or injury resulted from the injured person's suicide or attempted suicide, whether "sane or insane" (s 96(c));
- if the applicant was an occupant of a vehicle being used in an illicit trade at the time of the accident (s 96(e)); or
- if the death or injury is a result of the applicant's medical condition, as distinct from an injury caused by the accident, unless the condition was itself a direct result of an accident for which benefits are provided under Part 7 of the *IVR* (s 96(f)).

Also, under s 90 of the *IVR*, ICBC may terminate an insured's benefits if the insured refuses to undergo any:

- medical, surgical, or other similar treatment, which, in the opinion of the ICBC medical adviser and the medical practitioner attending the insured, is likely to relieve, wholly or partly, the insured's disability; or
- retraining or educational program likely to assist in the insured's rehabilitation.

If ICBC intends to terminate an insured's benefit, ICBC must first give an insured at least 60 days notice in writing, by registered mail, of their intention to terminate benefits. Under section 90(3) of the *IVR*, the insured may, within that 60-day period, apply to the Supreme Court for an injunction against the termination of the benefits, on the ground that:

- the treatment required of the insured is unlikely to relieve the disability;
- the treatment may injuriously affect the balance of the insured's health; or
- the treatment program is not likely to assist in rehabilitation.

5. Forfeiture and Breach of Conditions

The same provisions apply as those outlined under Third-Party Legal Liability. These are contained in s 19 of the *IVA* and s 55 of the *IVR*. See Section X.B.10: Forfeiture of Claims and Relief from Forfeiture and Section X.B.11: Breach of Conditions and Consequences, above.

6. Making a Claim Under Part 7: Procedural Steps and Considerations

a) Limitation Period

Section 103 of the IVR provides that any action started to enforce no-fault or accident benefits must do the following:

- the insured must have "substantially" complied with sections 97-100 Section X.C.6.b: Duties in Sections 97-100 of the *IVR*, below; and
- the action must be started by the later of the following:

  (a) with **three months** after the date of the response from ICBC;

  (b) within **two years** after the date of the accident for which the benefits are claimed;

  (c) where benefits have been paid, with two years after the date the insured last received a payment.
- These limitation periods also apply to minors. In other words, the limitation date for Part 7 actions for minors does not commence at age 19 but commences on the date of the accident.

b) Duties in Sections 97-100 of the *IVR*

An insured must meet the requirements set out in s 97-100 of the *IVR*. If an insured fails to do this to the prejudice of ICBC, ICBC may deny coverage of a claim. The following is a brief summary and claimants should refer to the *IVR* for more detail. The insured must comply with the following:

- give prompt notice to ICBC of the accident;
- provide a written report within 30 days of the accident;
- provide a proof of claim (a standard form authorized by ICBC and provided to applicants) within 90 days of the accident; and
- at ICBC's request, promptly provide a certificate of an attending medical professional as to the nature and extent of the insured's injury and the treatment, current condition, and prognosis of the injury;
- at ICBC's expense and request, be medically examined by someone selected by ICBC;
- where applicable, permit a post mortem examination and/or autopsy.

  NOTE: For liability to cease (i.e. coverage to be denied), ICBC must have suffered prejudice as a result of the applicant' s failure to comply.

D. Uninsured Motorists or Unidentified Motorists (Hit and Run) Cases

1. Claims Against Uninsured Vehicles: Section 20 of the *IVA*

While it is against the law, there are some drivers who operate motor vehicles without any insurance. If a claimant suffers damages from an uninsured motorist, they are not without a remedy. Instead, the claimant may make a claim to ICBC for compensation.

a) Definition of Uninsured Vehicle

Under the current *IVA*, an "uninsured motorist" continues to be defined as someone who operates a motor vehicle without third-party liability coverage of at least $100,000. When death, personal injury, or property damage results from the use of an uninsured vehicle, a claimant may apply to ICBC under s 20 for compensation.

b) Limitation Period

The claimant must meet the requirements set out in the *LA*. The claimant has two years from the date of the loss to start an action for personal injury, death, and/or property damage (*LA*, s 3(2) and *Civil Resolution Tribunal Act*, s 13).

c) Rights and Obligations of ICBC

If ICBC receives such an application under s 20, it must forward a notice it to the owner or driver of the uninsured motor vehicle, by registered mail (*IVA*, s 20(3)). If ICBC pays out any amount under this section, it is subrogated to the rights of the person paid (i.e. the successful claimant). Also, ICBC may maintain an action in its name or in the name of the successful claimant against the person liable (*IVA*, s 20(11)).

After ICBC has given notice to the owner or driver of the uninsured vehicle ("the defendant"), it has control over the resolution of the case. ICBC is deemed to be the agent of the defendant for service of notice. Thus, the Claimant may start an action against the defendant by serving ICBC with a Notice of Claim in Small Claims or a Notice of Civil Claim in Supreme Court.

ICBC has the authority to settle or consent to judgement, at any time, in the name of the uninsured defendant. But, if the defendant responds within the time limit indicated in the notice, then ICBC is not entitled to recover from the defendant without a judgment (s 20(5)). If the claimant serves the uninsured defendant directly and they do not enter an appearance or does not file a Response to Civil Claim, or does not appear at trial, or does anything that permits default judgment to be taken against them, then ICBC may intervene. ICBC can defend the action in the name of the defendant. ICBC's acts are deemed to be the defendant's acts (*IVA*, s 20(7)).

d) ICBC Liability Limited

There is a limit to how much ICBC will pay out for any individual claim made under section 20 of the *IVA*. Regardless of the number of claims or the number of people making claims, the limit of ICBC's liability arising out of the same accident is $200,000, including claims for costs, pre-judgment, and post-judgment interest (see *IVR*, s 105 and Schedule 3, s 9(1)).

The insured and the claimant both have an obligation to seek other sources of coverage. Applicants may have other sources of insurance, including claims or benefits under the *Workers' Compensation Act*, RSBC 1996, c 492, the *Employment Insurance Act (Canada)*, RSC 1996, c 23, and/or the government of Canada or provinces or territories. It is important that applicants apply for all benefits they are entitled to under the above sources of coverage or other similar sources coverage since ICBC is relieved from paying the of judgment equal to what is provided by these sources.

Furthermore, applicants should also apply for all benefits and/or coverage from any private insurance that they may have as soon as possible. An applicant may have private insurance through their employer. ICBC may not be obligated to pay benefits that could have been received (note: need not actually receive) from another source. If a decision is made concluding that ICBC is not liable for these amounts, the limitation period for making a claim through the other source will most likely have ended. See section 81, 83 and 106 of the *IVR* for more details.

Also, see Section X.D.3. Exclusion of ICBC Liability, below.

Any dispute as to entitlement or amount of damages an insured is entitled to recover must be submitted for arbitration under the *Commercial Arbitration Act*, RSBC 1996, c 55 (*IVR*, s 148.2).

Excess underinsured motorist protection may still be purchased through insurers and presumably is intended to be covered under *IVA* Part 4 (Optional Insurance Contracts).

2. Claims Against Unidentified or Hit and Run Motorists: Section 24 of the *IVA*

Where personal injury, death, or property damage arises out of the use of a vehicle on a road **in British Columbia** and the identity of the driver and owner cannot be ascertained (or the ascertained owner is not liable, as would be the case if the vehicle had been stolen), the injured party may sue ICBC as nominal defendant. For accidents occurring outside BC, see Section X.E.1: Inverse Liability and Uninsured or Hit and Run Accidents Outside BC.

a) Reasonable Efforts to Ascertain Identity

In order for a claimant to make a claim or get a judgment against ICBC under s 24 of the IVA, the court must first be satisfied that all reasonable efforts have been made to ascertain the identity of the owner and/or driver (IVA*, s 24(5)). Leggett v Insurance Corporation of British Columbia* [9]*, 1992 CanLII 1263 (BCCA), states that the critical time of taking steps to ascertain the identity of the driver is immediately at the scene of the accident, and that reasonable efforts must be interpreted in the context of the claimant's position and ability to discover the driver or owner's identity. This could include taking down the description of the vehicle, including the license plate number, if the claimant is able to at the scene. If the identity of those persons cannot be ascertained, ICBC is authorized to settle any such claims, or to conduct the defence of the case as it sees fit.*

b) Written Notice to ICBC

To proceed with the claim against ICBC as a nominal defendant, the claimant must give written notice to ICBC "as soon as reasonably practicable" and within six months of the accident (*IVA*, s 24(2).

c) Police Report Requirements

A claimant must make an accident report to the police (*IVA*, s 107(1)). More specifically, the claimant must:

- make a report to the police within 48 hours of discovering the loss or damage;
- get the police case file number for the police report; and
- on ICBC's request, advise ICBC of the police case file number.

If a claimant fails to comply with the above without reasonable cause, then ICBC will not be liable to pay the claim made under s 24 of the *IVA*.

d) Limitation Period

Once notice has been properly provided, the claimant must also meet the requirements set out in the *Limitation Act*. The claimant has two years from the date of the loss to start an action for personal injury, death, and/or property damage (*LA*, s 3(2)).

3. Exclusion of ICBC Liability

There are certain situations where ICBC will not be liable to pay a claim made under section 20 and/or section 24 of the *IVA*. ICBC will **not** be liable:

- to a claimant, under s 24 of the *IVA*, who fails to comply with section 107(1) of the *IVA* without reasonable cause (see Section X.D.2.c): Police Report Requirements);
- to a claimant, under s 20 or 24 of the *IVA*, for loss or damage arising while the vehicle was in the claimant's possession without the owner's consent (i.e., stolen) (*IVR*, s 107(2)(a)).

4. Forfeiture and Breach of Conditions

The same provisions apply as those outlined under Section X.B.10: Forfeiture of Claims and Relief from Forfeiture and Section X.B.11: Breach of Conditions and Consequences, above. These are contained in s 19 of the *IVA* and s 55 of the *IVR*.

E. First Party Coverage Under Part 10 of the IVR

1. Inverse Liability and Uninsured or Hit and Run Accidents Outside British Columbia: Part 10, Division 1 of the *IVR*

a) Section 147 Claims: Inverse Liability

(1) What is Inverse Liability?

Inverse liability coverage is part of the basic insurance plan, which covers costs to vehicle repairs when an insured is involved in an accident out of British Columbia. More specifically, the basic compulsory coverage will pay for loss or damage to a BC vehicle resulting from an accident occurring **outside BC**. but in Canada or the U.S. if the insured does **not** have a right of action under the law of:

- the place where the accident happened; or
- the place where the person responsible for the accident is a resident (e.g. unidentified defendant following a hit and run collision).

(2) Who is Covered?

Section 147 of the *IVR* has its own definition of "insured", which includes:

(a) the person named as an owner in an owner's certificate or if deceased, their personal representative;

(b) a person who can provide written proof that they are the beneficial owner of a commercial vehicle described in an owner's certificate; or

(c) the renter of a vehicle described in an owner's certificate.

(3) What is Covered?

"Loss or damage" in this section means damage to the vehicle and does not include compensation for medical or rehabilitation costs. Compensation is to the extent to which the insured would have recovered if they had a right of action. In other words, ICBC will pay to the extent that the other driver is found liable (*IVR*, s 147). However, this amount is limited to the lesser of the cost of the vehicle repair, the declared value of the vehicle, or the actual cash value of the vehicle.

(4) Dispute Resolution

If the insured is found to be at fault or partially at fault, they will be responsible for paying for the remaining costs of repair to the vehicle, unless the insured person purchased collision coverage (see Section XI.B.2.1: Collision). If a dispute between the claimant and ICBC arises under this section, it must be arbitrated. Once the arbitrator adjudicates the dispute, the reasons for the decision must be published.

b) Section 148 Claims: Accidents in Nunavut, Yukon, Northwest Territories or the U.S.A.

This section deals with the scenario of a person having a motor vehicle accident in Nunavut, the Yukon, or Northwest Territories, or the U.S. that involves an uninsured or unidentified motorist.

(1) Who is Covered?

A person involved in a motor vehicle accident may be entitled to compensation under section 148(2) of the *IVR*, if that person:

- is a person named as an owner in the owner's certificate, or a household member of the person named as an owner in the owner's certificate;
- suffers death or injury in the Nunavut, Yukon, Northwest Territories or the U.S.; **and**
- the vehicle responsible is an unidentified or uninsured vehicle.

(2) How Much is the Coverage?

ICBC's liability (i.e., the payout) is limited to $200,000 (see Schedule 3, s 11 of the *IVR*). Payments are subject to adjustment if recovery or partial recovery is made from another party (*IVR*, s 148(2)).

(3) Exclusion or Limitation of Liability by ICBC

If a claim is made under this section, the claimant must be sure to comply with the requirements set out in s 148 of the *IVR*. ICBC will not be liable (i.e. ICBC will not compensate the claimant) in the following situations:

- if the insured has a right of recovery under an unsatisfied judgment;
- if the insured was operating a vehicle without the consent of the vehicle's owner;
- if the insured fails to comply with s 148(4)b) **to the prejudice of ICBC** (see immediately below); **or**
- if the insured fails to comply with s 148(5) (see immediately below).

(4) Insured's Obligations Under Section 148(4) and (5) of the *IVR*

Under section 148(4)(b) of the *IVR*, the insured:

- must file a copy of the originating process with ICBC within 60 days of the action commencing; **and**
- must not settle a claim without the written consent of ICBC

Under s 148(5) of the *IVR*, the insured (or their representative) must:

- for accidents involving an **unidentified** vehicle, report the accident, within 24 hours of the accident, to the police, or the administrator of any law respecting motor vehicles;
- file with ICBC, within 28 days of the accident, a statement under oath that:

    (a) the insured has a cause of action arising out of the accident against the owner or driver of an **unidentified or uninsured** vehicle and

    (b) setting out the facts in support of that statement; **and**

    (c) at ICBC's request, allow ICBC to inspect the insured's motor vehicle that was in the accident.

NOTE: Payments made under s 148 will be deducted from the amount aninsured is entitled to under Parts 6 or 7 of the *IVR* (s 148(6) and (7)). Also, ICBC will not be liable to pay any benefit, indemnity, or compensation payable from another source, including: Workers Compensation, Employment Insurance, and any government bodies (s 106(1)).

(5) Dispute Resolution

Any dispute between the claimant and ICBC under this section must be arbitrated. The arbitrator who adjudicates the dispute must publish the reasons for the decision (*IVR*, s 148(8)).

2. Underinsured Motorist Protection (UMP): Part 10, Division 2 of the *IVR*

a) What is UMP Coverage?

$1 million of UMP coverage is part of the basic compulsory coverage motorists have with ICBC. It provides compensation against bodily injury or death for the victim of an accident caused by a motorist who does not carry sufficient insurance to pay for the claims. The maximum coverage under UMP is $2,000,000 (which an insured must pay an extra premium to purchase) for each insured person (Schedule 3, s 13 of the *IVR*). This limit includes claims for prejudgment and post-judgment interest and costs. See section 148.1(5).

b) Prerequisites for UMP Coverage

Generally, UMP coverage is available where an insured's death or injury is caused by the operation of a vehicle operated by an underinsured motorist, and occurs in Canada or the U.S.

If an insured is making a claim for UMP coverage in the relation to a **hit and run** accident, there are additional requirements that need to be met. Under section 148.1(4), the following criteria must also be met:

- the accident must occur on a highway; and
- the accident must have **physical** contact between the insured vehicle and the unidentified vehicle, **if** it occurred in Nunavut, the Yukon Territory, the Northwest Territories, or the United States.

c) Who Is Covered?

Section 148.1 of the *IVR* has its own definition of "insured". Note that the insured need not be in their car to be eligible for compensation. Under this section, "insured" includes, but is not limited to:

- a person named in the owner's certificate and members of their household;
- any person who is an occupant of the insured vehicle;
- any person with a valid BC "driver's certificate" (i.e., driver's license) and members of their household; and
- any person entitled, in the jurisdiction in which the accident occurred, to maintain an action against the underinsured motorist for damages because of the death of one of the insured.

d) Who is Not Covered?

There are certain people who are not entitled to UMP coverage. Section 148.1(3) of the *IVR* describes when ICBC will not be liable. The following are most relevant, whereby coverage is denied if:

- the insured's vehicle was in fact not licensed and the insured had no reasonable grounds to believe it was; or
- the vehicle's operator or passenger did not have the owner's consent to operate or be in the vehicle and ought to have known there was no consent (i.e., the operator or passenger is in a stolen vehicle).

e) UMP Coverage and Accidents Outside B.C.

For accidents occurring outside BC, the **law of the place where the accident occurred determines the legal liability of an underinsured motorist**, whereas the **amount** of the UMP claim is determined by BC law. See section 148.2(6) of the *IVR*.

UMP protection does not apply in a jurisdiction where the right to sue for injuries caused by a vehicle accident is barred by law (*IVR*, s 148.2(4)). UMP coverage does not apply to vehicles used as buses, taxis, or limousines (s 148.4).

f) Forfeiture and Breach of Conditions

Under section 148.2(5) of the *IVR*, the same provisions that apply to those outlined under Third Party Legal Liability also apply here (see Section X.B.10: Forfeiture of Claims and Relief from Forfeiture and Section X.B.11: Breach of Conditions and Consequences, above.). An award otherwise available under UMP will be reduced by any amount forfeited by a breach outlined in s 55.

g) Dispute Resolution

Any dispute between the claimant and ICBC must be arbitrated. An arbitrator who adjudicates a dispute under this section must publish the reasons for the decision (*IVR*, s 148.2(1.1) and ((2.1)).

References

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XI. Optional Insurance

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

NOTE: The following portion of this chapter was written prior to April 30, 2021. Therefore, though it is written in the present tense, please be advised that it applies only to claims for accidents that occurred on or before April 30, 2021.

A. Introduction to OICs

Optional Insurance Contracts ("OICs") are additional optional coverage that any person can purchase at their discretion. The following are **some** of the **types** of coverage, over and above the Basic Compulsory Coverage, that may be purchased at the owner's option from a private insurance company. The term OIC includes, but is not limited to policies providing coverage for excess third-party liability, excess own vehicle damage, excess UMP coverage, and excess no-fault income replacement.

> **NOTE**: Formerly, Part 9 of the *IMVA Regulations* (Extension Insurance) covered material under this part. Under the current legislation, it has been replaced by Part 4 of the *IVA* (Optional Insurance Contracts) and Part 13 of the *IVR* (Optional Insurance Contracts).

1. Limiting and Excluding Coverage Under an OIC

Section 61(1.1) of the *IVA* provides that an OIC that extends coverage in an existing certificate or policy may nevertheless **limit** the extended coverage as follows:

- by prohibiting a specified person or class of persons from using or operating the vehicle;
- by excluding coverage for a specified risk; or
- by providing different limits of coverage for different persons or risks or classes of persons or risks.

> **NOTE**: The above prohibition, exclusion, and limit are not binding on the insured unless the policy has printed on it in a prominent place and in conspicuous lettering the words "This policy contains prohibitions relating to persons or classes of persons, exclusions or risks or limits of coverage that are not in the insurance it extends" (*IVA*, s 61(2)).

In an OIC, an insurer may provide for further exclusions and limits to coverage for losses in respect of:

- the loss of the vehicle;
- damage to the vehicle; or
- the loss of use of the vehicle.

Section 61(1.2) of the *IVR* provides that an OIC may **not**, in respect of third-party liability insurance coverage:

- prohibit a person who is living with and as a member of the family of the owner of the vehicle from using or operating the vehicle; or
- exclude or provide different limits of coverage for that person.

Despite any provision of the *IVA* or *IVR*, an insurer is not liable to an insured under an OIC for loss or damage in circumstances specified in the owner's policy if:

- the OIC relates to a vehicle that is not required under the *Motor Vehicle Act* to be licensed and insured (*IVA*, s 61(7)(a)); and
- the owner's policy is endorsed with a statement that the insurer is not liable to the insured for loss or damage in those circumstances (s 61(7)(b)).

B. Types of OICs

1. Extended Third-Party Legal Liability

Third Party Legal Liability insurance may be increased from the basic compulsory $200,000 (taxis and limousines require $300,000; buses $500,000) to a greater amount. The exclusions and conditions that apply to the basic Third-Party Legal Liability coverage (Part 6) also apply to this extended coverage. See Section X.B.10: Forfeiture of Claims and Relief from Forfeiture and Section X.B.11: Breach of Conditions and Consequences.

2. Own Damage Coverage

Own Damage protection is provided by Collision, Comprehensive, or Specified Perils coverage. It covers loss or damage sustained to the vehicle named in the owner's certificate.

a) Types of Own Damage Coverage

(1) Collision

This insurance covers loss or damage to the insured vehicle resulting from upset or collision with another object, including the ground or highway, or impact with an object on or in the ground. This type of insurance is available with a wide choice of deductibles (*IVR*, s 150).

(2) Comprehensive

This insurance covers loss or damage from any cause other than collision or upset. In addition to the Specified Perils listed below, this includes vandalism, malicious mischief, falling or flying objects, missiles, and impact with an animal. Comprehensive coverage is subject to various deductibles (*IVR*, s 150).

(3) Specified Perils

This insurance is more limited than Comprehensive. It covers only loss or damage caused by fire, lightning, theft or attempted theft, windstorm, earthquake, hail, explosion, riot, or civil commotion, falling or forced landing of an aircraft or part of an aircraft, rising water or the stranding, sinking, burning, derailment or collision of a conveyance in or on which a vehicle is being transported on land or water (*IVR*, s 150).

b) Limit on Liability

The limit on the amount of indemnity payable is determined, by whichever of the following is lesser (*IVR*, s 169 and Schedule 10 s 5):

(a) the cost of repair of the vehicle and its equipment;

(b) the actual cash value of the vehicle and its equipment; or

(c) the declared value of the vehicle and its equipment.

c) Exclusion of Liability

Own Damage Coverage does **not** cover loss or damage:

- to tires, unless the loss or damage is caused by fire, theft, or malicious mischief, or is coincidental with other loss or damage;
- to any part of the vehicle resulting from mechanical breakdown, rust, corrosion, wear and tear, explosion within the combustion chamber, or freezing, unless caused by fire, theft, malicious mischief or coincidental with other loss or damage;
- consisting of mechanical or physical failure of the vehicle or any part of it; or
- to contents of the vehicle including personal effects.

Other situations to which coverage does **not** apply are:

- embezzlement;
- conversion (i.e., when a seller does not own the vehicle sold);
- voluntary parting of ownership, whether or not induced to do so by fraud; and towing of an uninsured vehicle that is required to be insured

d) Coverage Available Through ICBC Policy

Although Part 9 of the *IMVAR* has been repealed and many of its sections are not covered by the *IVA* or *IVR*, ICBC continues to implement much of the content of that Part through internal policy. The following are types of policies that are available through ICBC policy.

(1) Loss of Use Coverage

Loss of Use coverage can be purchased only in conjunction with Own Damage (collision, comprehensive, or specified perils coverage). It provides reimbursement up to the limits purchased by the insured for expenses incurred for substitute transportation when a valid claim can be made under Own Damage coverage. Subject to the regulations, an insurer may provide for exclusions and limits of loss in an OIC, in respect of loss of use of the vehicle (*IVA*, s 65).

An OIC providing insurance against loss of use of a vehicle may contain a clause to the effect that, in the event of loss, the insurer must pay only an agreed portion of any loss that may be sustained or the amount of the loss after deduction of a sum specified in a policy. For such a clause to have legal effect, it must be printed in a prominent place on the policy and in conspicuous lettering contain the words “this clause contains a partial payment of loss clause” (*IVA*, s 67).

(2) Limited Depreciation Coverage

This optional coverage is available for first owners of certain new vehicles who have purchased Own Damage Coverage. Its purpose is to protect the owner from the high rate of depreciation during the first two years of the vehicle’s life, when such depreciation is a significant factor in payment of a claim by ICBC. Total Loss Payout is the full purchase price or the manufacturer’s list price, whichever is less. Damage for other than a total loss will be repaired with similar kind and quality of parts, without depreciation.

e) Forfeiture of Claims and Breach of Conditions

Apart from exclusions described above, a claim may be forfeited:

- under s 75 of the *IVA*, which states that an insured must not falsely describe the vehicle in respect of which the application is made, misrepresent or fail to disclose in the application a fact required to be stated, violate a term or condition of the insurance contract, or wilfully make a false statement with respect to a claim;
- under s 169 of the *IVR*;
- if certain conditions are breached, including failure of the insured to comply with the *IVR*; or
- if any regulation is breached by the insured. For an exhaustive list, see *IVR*, s 55.

The principal examples of failure to comply with, or breach of, regulations are:

(a) being under the influence of liquor or drugs so as to be incapable of proper control of the vehicle;

(b) being convicted for an offence under ss 249, 252, 253, 254, or 255 of the *Criminal Code*;

(c) operating a vehicle when not authorized and qualified (*IVR*, s 55);

(d) using the vehicle in illicit trade, or to avoid arrest, or other police action (s 55);

(e) towing an unregistered, unlicensed trailer (s 55);

(f) permitting others to breach a condition (s 55);

(g) using a vehicle in a manner contrary to the insured person's statement in their application for coverage, the result being a form of breach of condition. This happens most commonly in cases where coverage of a vehicle for "pleasure purposes" is applied for, and the vehicle is damaged when in fact being used to take the insured person to or from work (s 55 sets out the specifics);

(h) failing, without reasonable cause and to the prejudice of ICBC,

(i) to make a police report within 48 hours after the discovery of theft, loss, or damage;

(ii) to obtain a police case file number; and

(iii) to advise ICBC within seven days of making the report to the police of the circumstances of that loss or damage as well as the police case file number (s 136 (a)); and

(i) failing, without reasonable cause and to the prejudice of ICBC, to comply with ss 67 or 68 of the *MVA*, or similar provisions in the law of another Canadian or American jurisdiction, relating to the duties of a driver directly or indirectly involved in an accident (*IVR*, s 136(b)).

f) Exceptions to Forfeiture

If a vehicle is used "contrary to statement in application", the right to indemnity is not forfeited when the damage occurs during a mere "occasional" use of the vehicle in violation of the statement in the application.

g) Reporting Accidents

Coverage may be denied where an insured person fails to comply with ss 67 or 68 of the *MVA*, without reasonable cause and to the prejudice of ICBC The onus of proving compliance lies on anyone who is bound to report.

Section 67 of the *MVA* deals with the duty to file accident reports in cases where aggregate damage apparently exceeds $1,000, or where there is any bodily injury, and provides that the reports are normally confidential.

Section 68 deals with the immediate duties of persons in charge of vehicles involved in a highway "incident", namely: to remain at the scene, render assistance, and provide identification of person and insurance coverage. If the other vehicle is unattended, the driver of the colliding vehicle must leave full identification conspicuously posted.

Any breach of these duties is an offence punishable under the *MVA*. Similar duties are created by ss 249 and 252 of the *Criminal Code*. A breach of them can result in more severe penalties. These duties apply to any highway "incident" regardless of any insurance aspects of the case, and even if the driver was only "indirectly" involved in the incident.

h) Limitation

There is some confusion about which claims must be brought within one year of the accident and which have a limitation period of two years. The IVA stipulates that any action by an insured person against ICBC "shall be commenced within **one year** after the happening of the loss or damage, after the cause of action arose, or after the final determination of the action against the insured (*IVA*, s 17 & 76(7)). *IVR*, s 103, on the other hand, stipulates that no action shall be brought against the Corporation for loss or damage under Part 7 of the *IVR* after the expiration of two years from the occurrence of the loss or the last day benefits were provided. From a practical point of view, **it is almost always better to commence an action as soon as possible to avoid any problems with limitation periods**.

i) Dispute Resolution and Appeals Process

(1) How Decisions Regarding Liability are Made

Disputes frequently arise when the vehicle of a person insured by ICBC is damaged by another insured person. In that situation, an adjuster will decide the degree of fault between the two parties. The adjuster's decision is based on traffic regulations, and the rules of negligence, with the party in contravention of the *MVA* generally being found at fault. If both parties have contravened some regulation, however, a 50-50 assessment is often made. This is also the case when there are no independent witnesses.

(2) Appeal Process: Two Routes

If a client is dissatisfied with an adjuster's decision, there are two available courses of action:

(a) the client can go through ICBC's internal appeal procedure by asking the adjuster to review their decision and, if there is no change, by asking the claims manager to review it. If the client is still not satisfied, the third step is to present the client's case to an appeal panel; or

(b) the client can sue. This is commonly the most satisfactory course, particularly where the amount in issue is relatively small, as where the damage is about the same amount as the "deductible". Such an action is not brought against ICBC under the policy, but against the driver (and owner, *MVA*, s 86) whose negligence is said to have caused the accident. In such a case, that ICBC was not liable to pay the "deductible" to its own insured does not relieve the negligent party from liability, assuming always that negligence can be established.

There are two ways in which to frame the action. The plaintiff can either claim the total amount of damage resulting from the negligence, even though ICBC has already paid a portion of it, or the plaintiff can claim merely the amount that ICBC has not paid. Remember, however, that a plaintiff cannot collect twice, and if they sue for more than the deductible, they may be held to be acting as a trustee for the Corporation and therefore liable to account for anything in excess of the deductible. In either case, the plaintiff bears the onus of proving the negligence alleged against the defendant.

NOTE: If ICBC denied liability to indemnify a person insured by it and that person is sued, ICBC is entitled to apply to the court to be joined as a third party (*IVA*, s 77(3)). Upon being made a third party, ICBC can then defend the action fully, despite its previous denial of liability to indemnify the defendant (*IVA*, s 77(4)). In *West v Cotton* (1994), 98 BCL R (2d) 50 (SC), the third party, ICBC, conducted the defence of a defendant to whom it denied coverage and who did not participate in the proceedings. Having succeeded in proving his claims, the plaintiff was not entitled to recover their costs, with one exception: that being against the third party. In this case,

ICBC would have suffered significant prejudice if it had been precluded from presenting its defences as third-party since the defendant did not demonstrate any interest in maintaining the action.

XII. Personal Injury Claims

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

NOTE: The following portion of this chapter was written prior to April 30, 2021. Therefore, though it is written in the present tense, please be advised that it applies only to claims for accidents that occurred on or before April 30, 2021.

A. Making a Claim with ICBC

The *IVR* provides for a number of benefits that are administered by ICBC, as the motorist's insurer, in instances where the motorist damages their automobile and/or sustains injuries after an accident. These regulations can be thought of as the motorist's "insurance policy". All of the benefits to which a motorist is entitled are explained in the *IA Regulations*. ICBC adjusters in claim centres around the province administer these benefits. The following outlines the general process to be expected.

A claimant must also keep in mind that drivers have certain responsibilities at the scene of an accident. For a full list of these responsibilities, please see Chapter 13: Motor Vehicle Law of the LSLAP Manual.

1. Dial-A-Claim

When calling Dial-a-Claim, the claimant will be put in touch with a representative who will take down pertinent details of the accident, including the time, date, place, license identification of the vehicles involved, etc The representative will ask the claimant to give a brief narrative of how the accident occurred. This narrative will be taken down and entered into the computer files at ICBC The claimant will then be given a claim number that will follow the claim and the claimant through the entire process. The claim number enables ICBC to find the claimant's file through any office and to quickly identify the adjuster who is dealing with the claim.

2. Meeting with the Adjuster

The Dial-a-Claim representative will schedule an appointment for the claimant at a local claim centre. When the claimant goes to the appointment, they will talk to an adjuster about the accident. The adjuster will ask the claimant to make a statement about how the accident occurred and about the injuries that the claimant sustained.

The adjuster will also ask the claimant to sign "No-Fault Benefit Claim Forms". These forms are not "releases" and by signing them, the claimant is not waiving any of their rights to benefits or to damages for injuries or loss emanating from the accident. The forms simply allow for the release of the claimant's MSP number, the claimant's SIN number, information from the claimant's doctor, and information from the claimant's employer. Nonetheless, it would be prudent for unsophisticated or illiterate claimants to have someone, other than the adjuster, go over the forms with them before signing.

3. The Adjuster's Perspective

While the adjuster is an agent of the claimant's own insurance company, for purposes of administering the "no-fault benefits" the adjuster is also an agent of the tortfeasor's insurance company and, in that capacity, has an interest in minimizing the claimant's injuries and damages.

The adjuster will typically encourage the claimant to minimize the extent of the injuries or damages. The claimant should be aware of this and should guard against agreeing that everything is satisfactory when it is not. Claimants should be cautious not to express optimism about their injuries and should try to neither understate nor overstate their injuries.

Where fault is an issue, claimants may find the adjuster manipulating their narrative to place them in a negative light. This is often done in very subtle ways and claimants should be aware of it so that they can guard against it. Typically, an adjuster will draw a map or diagram of the accident scene and state that it is "not to scale". The Corporation may later claim that the diagram is an accurate depiction of the accident and tantamount to a confession of fault.

The claimant should avoid agreeing with interpretations of the accident that are made by the adjuster and should endeavour to have the adjuster transcribe the claimant's exact words. Typically, the adjuster will write out the claimant's statement in longhand and then ask the claimant to review it. The claimant may feel reluctant to make changes because the adjuster has taken the time to write out the statement. The claimant should not hesitate to make changes and initial them, or to ask the adjuster to start all over again.

The claimant should be extremely careful in making statements to the adjuster. The claimant must understand that these statements will later be scrutinized. In cases involving serious injury and cases where liability is disputed, the claimant should have a lawyer with them when they make statements to the adjuster.

4. The "Independent" Medical Assessment

Under the *IVR*, ICBC may appoint a doctor to make an "independent" medical assessment of the claimant's condition even after your own doctor has assessed you'. While some of these doctors are objective, others may have a strong defence bias. Their task is to see if they can locate weaknesses in the claimant's case. The claimant should take care neither to exaggerate nor to minimize the injuries.

5. ICBC Private Investigators

The claimant should be aware that private investigators hired by ICBC do exist. They check up on claimants and the evidence that they gather can be used against claimants. For example, if the claimant says that they cannot mow the lawn or lift a bag of flour, and then goes outside and does just that, they run the risk of being photographed and/or videotaped by a person employed by ICBC.

B. Identifying Parties to the Dispute

The plaintiff(s) in a given case may be any or all of the following:

- the injured party (which could be the driver, occupant, or bystander) or the estate of the deceased; the relatives of the injured party; the registered owner of the vehicle in the accident; and/or the guardian of a party lacking the requisite mental capacity to commence an action.

In general, anyone whose negligence may have caused or contributed to the motor vehicle accident should be joined as a defendant. This might include:

- the drivers; passengers; the estate of deceased defendants; registered owners of vehicles; ICBC or other insurers; the ministry of BC transportation; municipalities; the parties responsible for the manufacture or maintenance of the

vehicle; and/or employers.

Appropriate third parties to the dispute will often include insurance companies (including ICBC) who, while not themselves tortfeasors, may be under an obligation to indemnify the defendant.

> **NOTE:** It is very important to properly determine who the parties are. Failure to do so may adversely affect the client's claim, and/or may result in an empty judgement. See Chapter 20: Small Claims for more information (the information may hold true in Supreme Court as well).
>
> **NOTE:** When the accident occurred "in the course of employment", the *Workers Compensation Act* [*WCA*], RSBC 1996, c492, may apply. Where the *WCA* is engaged, the Act assumes exclusive jurisdiction over the case, and an action in tort is barred. It is therefore extremely important to fully explore the employment relationship(s) of both plaintiffs and defendants before proceeding. See Chapter 7: Workers' Compensation for more information.

C. The Fault Requirement

The present system of accident compensation is fault-based. The claimant sues in tort, which can be divided into two areas: intentional torts and negligence. Injuries that are caused with intent to contact (in the case of battery) are intentional torts. Injuries that are caused by a lack of reasonable care by one party are negligence claims. Negligence encompasses all departures from accepted reasonable standards.

A prerequisite to any tort action is that the damages suffered by the claimant were not caused by the claimant's own fault. If the claimant is partly at fault for the accident, damages will be reduced in accordance with the claimant's degree of fault. For example, if the claimant is 50 percent to blame for the accident, their damages will be reduced by a corresponding amount of 50 percent.

Cases where fault is an issue frequently go to trial. Claimants should be advised that often the adjuster will suggest a claimant is fully at fault for the accident, when in fact they may only be partially at fault. The claimant should recognize that the adjuster is trying to dissuade the claimant from litigating a claim. The claimant may well end up establishing 50 percent fault on the part of the other driver and obtaining a 50 percent settlement.

D. Private Settlements

Private settlements should be discouraged. Potential plaintiffs should always consult a lawyer prior to settling a claim, whether privately or with ICBC. Similarly, potential defendants in such matters should seek the advice of a lawyer and contact ICBC prior to paying out any sums, so as not to prejudice their rights and their plan of insurance with ICBC. If you pursue a private settlement you may be in breach of your policy and may hurt or revoke your claim.

E. Inequality of Bargaining Power

The courts may set aside a release of claim for personal injuries on the grounds that it was in circumstances where it can be shown there was inequality of bargaining power between the parties.

In *Towers v Affleck* [1], 1973 CanLII 1692 (BC SC) at page 719, Anderson J. stated that the question to be determined is whether "the plaintiff has proved by a preponderance of evidence that the parties were on such an unequal footing that it would be unfair and inequitable to hold them to the terms of the agreement which they signed. While the court will not likely set aside a settlement agreement, the court will set aside contracts and bargains of an improvident character made by poor and ignorant persons acting without independent advice unless the other party discharges the onus on them to show that the transaction is fair and reasonable." See also *Pridmore v Calvert et al* [2], 1975 CanLII 1091 (BCSC).

On the basis of the preponderance of the evidence (or on a balance of probabilities), therefore, the following questions should be asked:

1. Was there inequality of bargaining power?
2. If so, would it be unfair or inequitable to enforce the release of claim against the weaker party?

Where a plaintiff signs a Release of Claim, the defendant will not be able to dismiss a claim the plaintiff subsequently makes using Rule 9-7 of the *BC Supreme Court Civil Rules*, if the evidence leads the court to conclude that the plaintiff was misled, even if unintentionally, into believing the document signed was releasing claims in areas that the plaintiff believed to be irrelevant.

This reasoning relies on the plea of *non est factum* (Latin for "not my deed"), a common law plea allowing a person who has signed a written document in ignorance of its character to argue that, notwithstanding the signature, it is not their deed. In other words, if the person's mind does not go with the deed of signing, the release is not truly their deed.

Unconscionability and misrepresentation may also be successful grounds for rendering an otherwise valid Release of Claim invalid. Unconscionability can be established when the bargain was an unfair one and when there is an inequality of power in the bargaining positions. See *Morrison v. Coast Finance Ltd.* [3], 1965 CanLII 493 (BCCA). Misrepresentations are untrue or misleading statements made during a negotiation. See *Clancy v Linquist* [4] 1991 CanLII 795 (BCSC), per Scarth J.

In *Mix v Cummings* [5] 1990 CanLII 1 (BCSC) [*Mix*], per Perry J., a general release discharging and releasing defendants from all claims, damages, and causes of action resulting, or that will result, from injuries received in an automobile accident was upheld on the following basis:

1. the court found no mutual mistake of fact based on a misconception as to the seriousness of the injuries sustained in the accident;
2. the release was not the product of an unconscionable or unfair bargain; and
3. the plea of *non est factum* and want of *consensus ad idem* were unfounded in the circumstances.

The implication of the *Mix* judgment is that the presence of any of the above factors in a particular set of facts may be sufficient to invalidate a general release. Note, however, that the mere fact that a plaintiff's injuries became more serious than they anticipated when signing a release will generally **not** invalidate the release.

F. Plaintiff's Duty to Mitigate

The plaintiff has a duty to mitigate his/her injuries after an accident. Generally, this means following your doctor's instructions so that recovery from any injuries is as quick as possible. Failing to follow your doctor's instructions can aggravate the injury and prolong recovery, thus increasing expenses. If this is the case, ICBC will argue that your failure to mitigate and speed up the recovery should decrease the amount of money to which you are entitled. This occurred in *Rasmussen v Blower* [6], 2014 BCSC 1697, , where the plaintiff was counselled to do physiotherapy and massage, but only attended one appointment of each. The trial judge stated that the plaintiff should have shown more perseverance and given time to allow the medical treatments to work. Due to the plaintiff's failure to mitigate, the trial judge reduced the plaintiff's award by 20%.

If you find that you are unable to afford certain treatments that are mandated, you should apply for coverage through Part 7 (no-fault) benefits (see Part X.C). A judge will not take a failure to apply for these benefits as an excuse for not continuing with treatment (*Rasmussen v Blower*).

G. Which Court has Jurisdiction?

1. Provincial Court, Small Claims Division

The Small Claims limit is $35,000 (effective June 1, 2017). Accordingly, claims for minor injuries may come within the jurisdiction of the Provincial Court. The procedure for bringing a case to trial in Small Claims Court is fully set out in this Manual in Chapter 20: Small Claims.

A claim commenced in Small Claims court can be transferred to Supreme Court on application by one of the parties or by a judge on their own initiative. Such an application should be made as early as possible for a greater chance of success. A judge at the settlement/trial conference, at trial, or after application by a party at any time, must transfer a claim to Supreme Court if they are satisfied that the monetary outcome of a claim (not including interest and expenses) may exceed $35,000. However, there may be exceptions. A claim will remain in the Small Claims Division if the claimant expressly chooses to abandon the amount over $35,000. For personal injury claims, a judge must consider medical or other reports filed or brought to the settlement/ trial conference by the parties before transferring the claim to the Supreme Court.

2. Civil Resolution Tribunal

Starting April 1, 2019, the Civil Resolution Tribunal (CRT) began making decisions on the following matters, when there is disagreement between a claimant and ICBC:

1. classification of an injury as a minor injury;
2. entitlement to receive accident benefits claimed;
3. decisions regarding who is at-fault in the crash and settlement amounts for all motor vehicle injury claims below a threshold that will not exceed $50,000. (i.e. liability and damage disputes)

    Note: As of March 2021, the BC Supreme Court has deemed the CRT's authority to adjudicate on **minor injury determinations** and **liability and damage disputes** as being unconstitutional (*Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348 (CanLII) [7]). This case is currently being appealed. At present, this means that parties can choose to bring minor injury determination disputes, as well as liability/damage disputes in relation to cases with damages of up to $50,000, to either the CRT or through the court system. Disputes regarding entitlement to receive accident benefits are unaffected by this decision and will proceed solely through the CRT. It is unclear when this appeal will be decided, or how the outcome will affect the forum for these disputes going forward.

For claims started before April 1, 2019, the upper limit of $5,000 applies and the claim must be made under the CRT's small claims jurisdiction – this is not the same as the Small Claims Court.

The Civil Resolution Tribunal is designed to be accessible, economical, and without the need for legal representation. Claimants will still be able to hire a lawyer for most motor vehicle claims made on or after April 1, 2019, should they choose to do so. In some circumstances, the claimant may have to ask the CRT for permission to hire a lawyer. Decisions made by the Civil Resolution Tribunal can be reviewed by the Supreme Court of British Columbia.

3. Supreme Court of British Columbia

The Supreme Court of British Columbia is governed by the *Supreme Court Civil Rules*.

Actions involving the ICBC for damages over $50,000 (effective July 2, 2019) come within the jurisdiction of the Supreme Court of British Columbia (Accident Claims Regulations, s 7). The following represents a brief overview of the procedure for bringing a case to trial at this level.

A claim commenced in Supreme Court can be transferred to the Small Claims on application by one of the parties or by a judge on their own initiative. The judge must be satisfied that the monetary outcome of the claim will not exceed $50,000. Such an application should be made as early as possible for a greater chance of success, and where appropriate, may be accompanied by an express statement by the plaintiff abandoning any claim to damages in excess of $50,000.

a) Regular Trial

(1) The Notice of Civil Claim

A claim in the Supreme Court of British Columbia is initiated by filing a Notice of Civil Claim. The Notice of Civil Claim is served upon ICBC and the defendant(s). The *IVR* deals with situations where there are unknown drivers, hit and run accidents, etc. Where the defendant is an uninsured motorist, ICBC will receive the pleadings and file a defence.

(2) The Response to Civil Claim

After the claim has been served, ICBC will appoint defence counsel on behalf of the insured, or on behalf of itself if there is an uninsured motorist, and file a Response to Civil Claim.

(3) Reserving a Trial Date

After the Response to Civil Claim is filed, the parties will reserve a trial date. The trial date usually falls approximately two to two-and-a-half years ahead. The reason for this delay is that the court registry is overbooked. The delay is not usually a problem since it takes some time to organize the trial and it is often not until some time after the accident that the full extent of the claimant's injuries can be determined. If additional time is required, when the trial date arrives, the trial can be adjourned by consent of the parties.

(4) The Examination for Discovery

Once the trial date is reserved, an Examination for Discovery may be held. Discovery of the plaintiff is initiated at the option of defence counsel and will typically occur six months to one year after the lawsuit is initiated. The Discovery will usually take one day but can last longer in certain cases. Prior to the Discovery, defence counsel will scrutinize the claimant's statements to the adjuster. At the Discovery, the defence counsel will cross-examine the claimant about the manner in which the accident occurred and the extent of the claimant's injuries.

Most cases are not settled until after the Discovery, since it is at this stage that defence counsel is able to assess the credibility and seriousness of the claim and make a determination respecting the sort of damages to which the claimant may be entitled.

b) Fast Track Litigation - Rule 15-1

This rule was introduced to provide an efficient and less expensive means of dealing with cases where the trial will last 3 days or less.

Fast track litigation may apply to an action if:

1. The only claims in the action are for money, real property, builder's lien, and/or personal property **and** the total of the following amounts is $100,000 or less, exclusive of interest and costs:

   (a) the amount of any money claimed in the action by the plaintiff for pecuniary loss;

   (b) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss; and

   (c) the fair market value, at the date the action is commenced, of all real property, all interests in real property, all personal property and all interests in personal property claimed in the action by the plaintiff.

2. The trial of the action can be completed within 3 days

3. The parties to the action consent, **or**

4. The court, on its own motion or on the application of any party, so orders.

NOTE: The court is not prevented from awarding damages in excess of $100,000.

If this rule applies to an action,

1. any party may file a notice of fast-track action in Form 61;

2. the filing party must serve all other parties on record with a copy; **and**

3. the words “Subject to Rule 15-1” must be added to the style of proceeding, immediately below the listed parties, for all documents filed after the notice of fast-track action is filed or if the court so orders.

4. This rule ceases to apply if the court, on its own motion or on application of any party, so orders.

5. Parties to a fast-track action can serve on another party a notice of application or an affidavit in support of an application ONLY after a case planning conference or a trial management conference has been conducted in relation to the action. This rule does not apply if:

   (a) The court orders the fast-track action to cease;

   (b) If an application is made by a party, judge, or master to relieve a party from this requirement if

      (i) It is impracticable or unfair to require the party to comply; **or**

      (ii) The fast-track litigation application is urgent;

   (c) If the action is scandalous, frivolous, or vexatious (as per Rule 9-5);

   (d) If the action will proceed by summary judgment or summary trial (Rule 9-6 and 9-7);

   (e) If an application is made to add, remove, or substitute a party; or

   (f) The parties consent.

6. Fast track action must be heard by the court without a jury.

7. Examinations for discovery of a party of record by all parties of record who are adverse in interest must not, in total, exceed 2 hours or any greater period to which the person to be examined consents, unless otherwise ordered by a court

8. All examinations for discovery in a fast track action must be completed at least 14 days before the scheduled trial date, unless the court orders otherwise or the parties to the examination consent.

9. If a party to a fast track action applies for a trial date within 4 moths after the date on which this rules becomes applicable to that action, the registrar must set a date for the trial that is not later than 4 months after the application for a trial date.

10. Rule 11-8 is modified in a fast track action:

(a) Rule 11-8 (3): Except as provided under this rule, a party to a vehicle action may tender, at trial, only the following as expert opinion evidence on the issue of damages arising from personal injury or death:

(i) expert opinion evidence of up to 3 experts;

(ii) one report from each expert referred to in paragraph (a).

(b) Rule 11-8 (3) (a) is to be read as if the reference to “3 experts” were a reference to “one expert”.

11. Rule 11-8 (8): In a vehicle action, only the following amounts may be allowed or awarded to a party as disbursements for expert opinion evidence on the issue of damages arising from personal injury or death:

(a) the amount incurred by the party for up to 3 expert reports, whether or not the reports were tendered at trial, provided that each report was

(i) served in accordance with these Supreme Court Civil Rules, and

(ii) prepared by a different expert;

(b) the amount incurred by the party for

(i) a report allowed under subrule (4) or (5),

(ii) a report referred to in subrule (6) or (7), or

(iii) a report prepared by an expert appointed by the court under Rule 11-5 (1);

(c) the amount incurred by the party for an expert to give testimony at trial in relation to a report, referred to in paragraph (a) or (b), that was prepared by the expert.

12. Rule 11-8 (8) (a) is to be read as follows: the amount incurred by the party for one expert report, whether or not the report was tendered at trial, provided that the report was served in accordance with these Supreme Civil Court Rules.

H. Damages

Claimants often have unrealistic expectations about the amount of damages they are likely to receive. Claimants should be cautious about listening to stories of awards told by relatives and friends as these stories may be exaggerated and/or may be missing crucial pieces of information.

1. How Damages are Assessed

The court will determine what damages a claimant is entitled to on the basis of precedent. It is, therefore, possible to project what the court will award by looking for similar cases. The judgments will outline the nature of the injuries sustained by the claimant and the court’s assessment of damages.

2. Heads of Damage

To understand an award, it is necessary to consider all the heads of damage. For example, a claimant who is a brain surgeon at the height of their career and who has a finger amputated might have a loss of prospective earnings claim in the millions and a relatively small claim for non-pecuniary losses. In contrast, a claimant who is retired and has a leg amputated may have a relatively low loss of prospective earnings claim but a relatively high claim for non-pecuniary damages.

The major heads of damage are as follows:

a) Non-pecuniary Damages

Non-pecuniary damages are awarded to **compensate** the claimant for pain and suffering, loss of enjoyment of life, loss of expectation of life, etc. In 1978, the Supreme Court of Canada placed a cap of $100,000 on awards for non-pecuniary damages in *Andrews v Grand & Toy Alberta Ltd* [8], 1978 CanLII 1 (SCC). This means that the limit for this head of damages after adjusting for inflation, is now about $380,000.

Effective April 1, 2019, there will be a limit of $5,500 on payouts for pain and suffering for minor injuries. ICBC is working to create a legal definition of what is a minor injury. It will include sprains, strains, general aches and pains, cuts and bruises, and mental anxiety and stress from a crash.

b) Loss of Prospective Earnings

Loss of prospective earnings is the capitalized value of the claimant's loss of income from the time of the accident to the claimant's projected date of retirement. The capitalization rate will be calculated by using present rates of return on long-term investments, and an allowance will be made for the effects of future inflation. In determining the value of prospective earnings, the claimant's earning capacity over their working life, prior to the accident, will be evaluated. In a claim for the capitalized value of lost prospective earnings, the defendant will seek to reduce that amount by introducing evidence of future contingencies.

c) Cost of Future Care

Cost of future care is the cost of the claimant's future care over their expected life span. As with loss of prospective earnings, cost of future care is capitalized and reduced for contingencies.

d) Special Damages

Special damages compensate the claimant for expenses like drugs, crutches, orthopaedic shoes, and artificial limbs. Claimants should keep every document, receipt and bill that relates to their accident. The claimant must have the originals to be reimbursed.

3. Lump Sum Awards and Structured Settlements

Damages can be paid in a lump sum or through a structured settlement. A structured settlement is an arrangement where the damages to which a claimant is entitled are left under the control of the insurer. The insurer enters an annuity contract with the claimant and agrees to pay that claimant a certain income for a set period of time. Structured settlements are often recommended in infant cases and cases where the claimant has a mental disability or infirmity. In rare cases, a court imposes a structured settlement.

Structured settlements are worth considering if the amount of the principal settlement exceeds $50,000 to $100,000. These arrangements offer advantages for the claimant and the insurer. One advantage for the claimant is that the interest gained on that settlement is not taxable. The claimant, therefore, gets much more money than if they took the lump sum

and invested it. Another advantage is that the claimant does not suddenly come into a large sum of money and run the risk of spending it foolishly. The advantage to the insurer is that the Corporation doesn't have to pay out all of the money at once and is entitled to derive income from it.

Structured settlements can be set up through a number of licensed dealers in British Columbia. Various options are available. For example, the claimant could receive a lump sum every five years, an indexed monthly sum, a monthly sum that decreases over the years, or a monthly sum and periodic lump sum payments. Most dealers do not charge for providing projections of the various income streams and the costs associated with them.

I. Costs

In addition to the claim for damages, the successful claimant should claim costs. Courts award costs to compensate for the costs of pursuing a claim. Costs are calculated or assessed on the basis of a tariff set out in the *Supreme Court Act*, RSBC 1996, c 443. They do not fully compensate the claimant for the cost of pursuing the litigation but go some distance toward paying for the disbursements and a portion of the legal fees charged by the lawyer. Claimants in Small Claims court can claim "expenses" but not counsel fees.

J. Reaching a Settlement Before Trial

1. Negotiation

Following examination for discovery, defence counsel will write a detailed reporting letter to the adjuster making recommendations about a settlement. The adjuster will present the defence counsel's recommendations to ICBC, which may or may not accept them. Upon reply, defence counsel will inform the claimant's counsel of ICBC's position. If the claimant is unwilling to settle, the claimant's counsel may contact the adjuster and submit a counter-offer or continue to prepare the claimant's case for mediation or trial. This process will likely be repeated several times.

2. Mediation

The Notice to Mediate is a new process by which any party to a motor vehicle action in Supreme Court may compel all other parties to the action to mediate the matters in dispute (*Notice to Mediate Regulation*, BC Reg 127/98, s 2 [*NMR*]). The Notice to Mediate process does not provide a blanket mechanism to compel parties into mediation. Rather, this process provides institutional support for mediation in the context of motor vehicle actions.

The party that wishes to initiate mediation delivers a Notice to Mediate to all other parties in the action no earlier than 60 days after the pleading period, and no later than 77 days before the date set for the start of the trial. Within 10 days after the Notice has been delivered to all parties, the parties must jointly agree upon and appoint a mediator (*NMR*, s 6). The mediation must occur within 60 days of the mediator's appointment, unless all parties agree in writing to a later date (*NMR*, s 5). If one party fails to comply with a provision of the *NMR*, any of the other parties may file a Declaration of Default with the court (*NMR*, s 11). If this occurs, the court has a wide range of powers, such as staying the action until the defaulting party attends mediation, or making such orders as to costs that the court considers appropriate.

The parties will share the cost of the mediator equally, unless the parties agree on some other cost sharing arrangement (*NMR*, s 9(2)(b)). The hourly rates of mediators vary, and this is a factor to be considered in selecting a mediator. The mediator will probably spend about one hour preparing for the mediation, and the mediation session will last about three hours.

3. ICBC's Obligations to the Insured

ICBC has an obligation to protect the insured by making an effort to settle the claim in the limits of the amounts of coverage. Insurers are under an obligation to consider the interests of their insured in deciding whether to settle a claim. The insurer assumes by contract the power of deciding whether to settle and it must exercise that power in good faith.

In *Fredrikson v Insurance Corporation of British Columbia* [9], 1990 CanLII 3814 (BCSC), Esson CJ. summarizes the law respecting the insurer's duty to its insureds in certain areas discussed therein. In this particular case, ICBC acted in good faith, and in a fair and open manner, followed the course the insured wished to take. Among the points raised in the judgment are:

> (i) the exclusive discretionary power of ICBC to settle liability claims places the insured at the mercy of the insurer
>
> (ii) this vulnerability imposes duties on the insurer to act in good faith and deal fairly, and to not act contrary to the interests of the insured, or, at least, to fully advise the insured of its intention to do so;
>
> (iii) the insurer's duty to defend includes the obligation to defend by all lawful means the amount of any judgment awarded against the insured.

See also *Shea v Manitoba Public Insurance Corporation* [10] 1991 CanLII 616 (BCSC), per Finch J.

4. Formal Offers to Settle and Cost Consequences

Under Rule 9-1 of the *Supreme Court Rules*, a plaintiff or defendant who refuses a reasonable offer to settle may be penalized for needlessly dragging out the litigation.

> **NOTE**: An offer to settle does not expire due to a counter offer being made.

For Rule 9-1 to be engaged, a formal offer to settle must be made in writing, and delivered to all parties of record, and must contain the language:

- "The .....*[party(ies)]*....., ...*[name(s) of the party(ies)]*....., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

Such an offer to settle must not be disclosed to the court/jury or set out in any proceeding until all issues in the proceeding, other than costs, have been determined. Also, an offer to settle does not constitute an admission.

If a plaintiff accepts an offer, the sum of which falls in the jurisdiction of the Provincial Court (*Small Claims Act*), they are **not** entitled to costs, other than disbursements. However, this rule can be overridden if the court finds a sufficient reason for the proceeding taking place in the Supreme Court.

The court, in assessing costs has broad discretion to consider a refusal to settle in making an order with respect to costs. The court may consider:

- whether the offer ought to have reasonably been accepted;
- relationship between the terms of settlement and the final judgment of the court;
- relative financial circumstances of the parties; and/or
- any other factor the court considers appropriate.

Based on such considerations, the court **may** do one or more of the following:

- if it determines that the offer ought reasonably to have been accepted, then the court may deprive a party of costs, to which it would otherwise be entitled, for steps taken after the date of service or delivery of the offer to settle;
- award double costs for all or some of the steps taken in the proceeding after the delivery date of the formal offer;
- award a party costs for all or some of the steps taken in the proceeding after the delivery date of the formal offer which that party would be entitled to had the offer not been made;

- Where the plaintiff refuses an offer to settle from the defendant, and the eventual judgement is no greater than the offer, the court may award the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of the offer.

The rules penalizing a plaintiff for overreaching the true value of a claim can be catastrophic, and can visit financial ruin upon a claimant who does not exercise a sober and realistic assessment of their claim as they proceed into Supreme Court. It is entirely within the realm of possibility that a claimant who refuses to accept an offer of $30,000.00, after judgment for $29,000.00 (i.e., lower than the offer to settle) would finish the day, after paying the insurer's costs and disbursements, and their own disbursements, with **nothing** or **less than nothing**: a debt to the insurer and their own lawyer for disbursements.

It should be stressed to clients that the lawyer who is hired to do a personal injury case is supposed to be objective, realistic, and not inclined to simply tell the client what they want to hear. When a lawyer talks about the risks of litigation, this penalty for misjudging the value of a case is one of the most important risks to consider.

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XIII. Out-of-Province

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

NOTE: The following portion of this chapter was written prior to April 30, 2021. Therefore, though it is written in the present tense, please be advised that it applies only to claims for accidents that occurred on or before April 30, 2021.

A. Conflict of Law Issues

Following *Tolofson v Jensen* [1]*, 1994 CanLII 44 (SCC), in Canada, the substantive law to be applied in torts is the law of the place where the activity occurred, rather than the place where the action is being tried.*

When foreign law applies to an action commenced in BC, unless all counsel can agree on the substantive law that applies, counsel seeking to rely on the foreign law has the burden of proof to establish the content of that law. This is often supported by expert opinion evidence in court.

1. Limitation Periods

Subsequent cases have confirmed that limitation laws are generally (but not always) substantive.

2. Assessment of Damages

The court in *Wong v Wei* [2], 1999 CanLII 6635 (BCSC) drew a distinction between the availability of heads of damage, which is a matter of substantive law, and the assessment or quantification of damages, which is a matter of procedure.

B. Jurisdiction

In general, any claim will likely go through the court where the accident occurred (i.e., if the accident was in BC, it will go through the BC Provincial or BC Supreme Court).

If an accident occurs outside BC and the defendant(s) resides outside of BC, the issue of jurisdiction should be carefully examined before the limitation period expires in either jurisdiction.

Counsel should keep in mind that a plaintiff has two claims, one in tort and the other against a first party insurer for Part 7 or equivalent) benefits. The jurisdiction issue for the two claims should be considered separately.

The defendant can challenge BC court's jurisdiction on the basis that the BC court has no jurisdiction to hear the matter at all (i.e. the court lacks jurisdiction *simpliciter*) or that there is a more convenient jurisdiction within which the case may be heard (i.e. the defendant argues that the BC court is *forum non conveniens*).

The BC court has jurisdiction simpliciter where there is a real and substantial connection between BC and the defendant or between BC and the subject matter of the action. Section 10 of *Court Jurisdiction and Proceedings Transfer Act* [3], SBC 2003 c 28 [*CJPTA*] lists the circumstances in which it is presumed that there is a real and substantial connection.

In situation involving parallel proceedings in two jurisdictions, it may be necessary to engage in a *forum conveniens* analysis to determine the most convenient jurisdiction within which to hear the matter. In determining the most efficient forum to hold the trial, a court may consider, among other things: where witnesses live; whether injury or disability makes it difficult for one party to travel; and which substantive law will apply (applying complex foreign laws in a BC court may require expensive expert witnesses to be called).

C. Out-of-province Insurers

1. Interprovincial or International Reciprocity

Each Canadian province and territory and each U.S. state has legislation governing the licensing, operation, and insurance coverage of motor vehicles. Provinces cannot regulate insurers operating outside of their borders. However, out-of-province insurers often agree to be bound by the court rules in British Columbia if their insured vehicle causes an accident by way of B.C. business authorizations (licences) or a Power of Attorney and Undertaking ("PAU").

The Canadian Council of Insurance Regulators maintains a repository of all PAUs filed in Canada by U.S. and Canadian auto insurers. A listing of companies that have filed a PAU can be found on the CCIR's website [4]. A complete listing of all British Columbia and extraprovincial insurance companies that have been issued "business authorizations" in British Columbia is available from FICOM and can be downloaded from FICOM's website [5].

In the case of a claim made against the insured of an out-of-province insurer, PAUs or licences obligate the out-of-province insurer to:

(i) file an appearance in B.C. court;

(ii) not raise any coverage defence which would not be available to an insurer in B.C. respecting a B.C. insured; and

(iii) pay any motor vehicle judgment against the insured up to the minimum liability limits required by B.C. (i.e. $200,000).

NOTE: Failure by an out-of-province insurer to disclose that it has signed a PAU cannot be grounds for claims of bad faith or negligence (*Pearlman v American Commerce Insurance Co* [6], 2009 BCCA 78).

2. Underinsured Motorist Protection (UMP)

Underinsured Motorist Protection is mandatory first-party coverage provided by ICBC to compensate an insured in the case of injury or death caused by an at-fault motorist. Generally, most residents of B.C. will have access to UMP coverage as the definition of an "insured" set out at s 148.1 of the *IVA* includes:

(a) an occupant of a motor vehicle described in the owner's certificate,

(b) a person who is

(i) named as the owner or renter in the owner's certificate where that person is an individual,

(i.1) an assigned corporate driver, or

(ii) a member of the household of a person described in subparagraph (i) or (i.1),

(b.1) a person who is

(i) an insured as defined in section 42 and who is not in default of premium payable under section 45, or

(ii) a member of the household of an insured described in subparagraph (i), or

(c) a person who, in the jurisdiction in which the accident occurred, is entitled to maintain an action against the underinsured motorist for damages because of the death of a person described in paragraphs (a), (b) or (b.1), and, for the purpose of the payment of compensation under this Division, includes the personal representative of a deceased insured.

If a claimant is injured in an accident caused by an individual with limited or no insurance, the *IVA* still provides for compensation. However, UMP coverage is coverage of last resort, and ICBC often requires a claimant to exhaust all other avenues before accessing UMP, including litigating against an at-fault motorist with limited coverage.

Under UMP, the basic coverage received is $1 million. However, excess UMP coverage to $2 million can be purchased by paying a premium on ICBC insurance.

From the UMP coverage, ICBC is entitled to make various deductions under s 148.1 of the *IVR* (under the definition of "deductible amount"). The deduction of a plaintiff's other insurance entitlements can have a significant impact on the value of a legitimate claim.

3. Optional Insurance Contracts and Excess Coverage

Section 80 of *IVA* provides that if there is an optional insurance contract and any other vehicle insurance (none of which are identified as being issued "in excess" of the others) then each insurer is liable only for the rateable proportion of any loss, liability, or damage. For example, if Policy A provides coverage up to $100,000 and Policy B Provides coverage of $300,000 and the liability of the insured is assessed at $100,000 then Policy A would pay out $25,000 and Policy B would pay $75,000.

Policies providing coverage "in excess" will be triggered only if the limit of other insurance coverage is reached. Part 4 of the *IVA* regulates contracts for excess and optional insurance coverage.

There is no formal, established claims-handling protocol between ICBC and private excess auto insurers in B.C. Absent any express agreements between ICBC and the excess insurer, neither insurer has any control over the other. Therefore, the plaintiff's counsel should not assume that ICBC is sharing all information and documents with the excess insurer.

4. Service Outside BC

a) Without a Court Order

According to Rule 4(5) of the *Supreme Court Civil Rules*, in any of the circumstances enumerated in s 10 of the *CJPTA*, the B.C. plaintiff can serve the out-of-province defendant without an order of the court.

Notable circumstances for which this is the case include:

- Actions concerning a tort committed in B.C,; and
- Actions concerning contractual obligations, where:
  - the contractual obligations, to a substantial extent, were to be performed in B.C.; or
  - by its express terms, the contract is governed by the law of B.C.

In cases where a PAU operates, the claimant need not serve the out-of-province insured directly as the PAU appoints B.C.'s Superintendent of Financial Institutions as the out-of-province insurer's counsel to accept service for any lawsuit against the insured arising out of a motor vehicle accident that took place in B.C.

b) With Leave of the Court

The B.C. plaintiff must obtain an order for service outside B.C. if the facts of the claim do not fall within one of the recognized categories listed in s 10 of *CJPTA*.

References

[1] http://www.canlii.org/en/ca/scc/doc/1994/1994canlii44/1994canlii44.html?autocompleteStr=tolofson&autocompletePos=1
[2] http://www.canlii.org/en/bc/bcsc/doc/1999/1999canlii6635/1999canlii6635.html?autocompleteStr=wong%20v%20wei&autocompletePos=1
[3] http://www.bclaws.ca/civix/document/id/complete/statreg/03028_01

[4] http://www.ccir-ccrra.org

[5] http://www.fic.gov.bc.ca

[6] http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca78/2009bcca78.html?autocompleteStr=pearlman%20v%20amer&autocompletePos=1

Chapter Thirteen - Motor Vehicle Law

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

Motor vehicle law is a relatively complex area of law. There is significant overlap between federal and provincial laws, as well as laws relating to insurance provided by the Insurance Corporation of British Columbia. While reading this chapter or doing any research on motor vehicle law, it is important to remember that more than one law may cover the same situation, and that this may result in complex interactions between the legal regimes applicable to driving. It is advisable to consult a lawyer knowledgeable in motor vehicle law issues for advice on more complex motor vehicle law questions, particularly where there is a risk of jail time, loss of driver's license, or other serious consequences upon conviction such as immigration consequences.

Please note that this chapter is directed towards a general motoring audience.

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

Motor vehicle law in BC is governed by several different pieces of legislation. This section briefly outlines these sections, and more information on the operation of this legislation is contained throughout the chapter.

A. Motor Vehicle Act

The *Motor Vehicle Act*, RSBC 1996, c 318 [1], or "*Motor Vehicle Act*", is the primary piece of provincial legislation (law) that creates offences related to operating a motor vehicle in British Columbia. The *Motor Vehicle Act* is a lengthy act, and it is not possible to provide a complete summary of all of its provisions in this chapter. This chapter endeavours to provide a summary of the most common *Motor Vehicle Act* issues, and to provide resources for further research.

B. Other Provincial Acts/ Regulations

- The *Offence Act*, RSBC 1996, c 338 [2] provides a general procedure for handling all provincial offences.
- The *Motor Vehicle Act Regulations*, BC Reg 26/58 [3], and the *Violation Ticket Administration and Fines Regulation*, BC Reg 89/97 [4], detail penalties for specific offences.
- Motor vehicle law intersects with the *Insurance (Vehicle) Act*, RSBC 1996, c 231 [5] and *Insurance (Vehicle) Regulation*, BC Reg 447/83 [6]. For more information, see Chapter 12: Automobile Insurance.

C. Criminal Code

The *Canadian Criminal Code*, RSC 1985, c C-46 [7], is the federal legislation that sets out most of the criminal offences in Canada, in ss 320.11 to ss. 320.4. The *Criminal Code* sets out several criminal offences related to driving, details of which are set out later in this chapter. Further information on criminal offences and procedures in general can be found in Chapter 1: Criminal Law.

It is worth noting, as discussed above, that there is significant overlap between the *Criminal Code* driving offences and the *Motor Vehicle Act*. In appropriate circumstances, the Crown may stay the proceedings under federal (criminal) legislation if the accused is prepared to plead guilty to a corresponding or similar charge under provincial legislation. This is often in the accused's best interest if the Crown has a strong case as no criminal record will result upon conviction of a provincial offence.

D. Resources

1. Online Resources

a) BC Ministry of Transportation/RoadSafetyBC Website

The Ministry, including its agency RoadSafetyBC, provides a wealth of online information on motor vehicle law, including information on the *Motor Vehicle Act*, driving prohibitions and suspensions.

Online	Website [8]

b) ICBC Website

The ICBC website provides information on driver licensing.

Online	Website [9]

c) University of Victoria Law Centre Guide to Defending Traffic Tickets

Although out of date, the Law Centre's summary provides a useful overview of the process for disputing a Violation Ticket.

Online	Website [10]

2. Services

a) Lawyer Referral Service

The Lawyer Referral Service, operated by the Canadian Bar Association BC Branch, can provide referrals to lawyers practising in the area of your issue. The first 30-minute consultation is free, with fees after that point agreed between the lawyer and the client.

Individuals with specific questions related to motor vehicle law, or who are concerned about the effect of a ticket or conviction on them, should consult with a lawyer practising in the area.

Online	Website [11]
Phone	604-687-3221 Toll-free: 1-800-663-1919

b) Legal Services Society/Legal Aid

Legal Aid is available to individuals who are faced with significant consequences after a criminal conviction. These include jail time, or immigration complications that could lead to deportation. Legal Aid is also available where individuals have a physical or mental condition, illness, or disability that makes it impossible for an individual to represent themselves.

Online	Website [12]
Phone	604-408-2172 Toll-free: 1-866-577-2525

References

[1] http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96318_00
[2] http://www.bclaws.ca/civix/document/id/complete/statreg/96338_01
[3] http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/26_58_00
[4] http://www.bclaws.ca/Recon/document/ID/freeside/89_97_01
[5] http://www.bclaws.ca/civix/document/id/complete/statreg/96231_01
[6] http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/447_83_00
[7] https://laws-lois.justice.gc.ca/eng/acts/C-46/
[8] http://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling
[9] http://www.icbc.com/driver-licensing/Pages/Default.aspx
[10] https://www.uvic.ca/law/about/centre/resources/defending%20traffic%20tickets.php
[11] http://www.accessprobono.ca/lawyer-referral-service
[12] http://www.legalaid.bc.ca

III. At the Roadside

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

Most motor vehicle law issues begin at the roadside, in an interaction with a police officer, or other peace officers. This section discusses common issues encountered at the roadside, and provides an outline of your rights when you are stopped by a peace officer.

A. Powers of Peace Officers

Police officers have the power to stop drivers to check for the fitness of the motor vehicle, possession of a valid driver's license, proper insurance, and sobriety of the driver. Police officers do not need a warrant, or even reasonable and probable grounds to perform such stops. **The fact that you are driving on a public highway is enough to justify a vehicle stop.**

According to the Supreme Court of Canada in *R v Ladouceur*, [1990] 1 SCR 1257, 56 CCC (3d) 22 [1], random checks by the police for motor vehicle fitness, possession of valid driver's license and proper insurance, as well as sobriety of driver constitute arbitrary detention contrary to s 9 of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]. However, these checks are considered reasonable limits under s 1 of the Charter so long as they are "truly random routine checks": *R v McGlashen*, [2004] OJ No 468, 115 CRR (2d) 359 [2]. The *Ladouceur* decision was affirmed in *R v Orbanski*, 2005 SCC 37, [2005] 2 SCR 3 [3].

Pursuant to *Motor Vehicle Act s 79* a peace officer may arrest without warrant any person:

> a) Whom the officer finds driving a motor vehicle, and who the officer or constable has reasonable and probable grounds to believe was driving in contravention of *Motor Vehicle Act* ss 95 or 102 (driving while prohibited) (s 79(a)); or
>
> b) Whom the officer has reasonable and probable grounds to believe is not insured or who is driving without a valid and subsisting motor vehicle liability insurance card or financial responsibility card (s 79(b)); or
>
> c) Whom the officer has reasonable and probable cause to believe has contravened *Motor Vehicle Act* s 68 (leaving the scene of an accident) (s 79(c))

and may detain the person until they can be brought before a justice.

B. Your Obligations

When stopped by a peace officer while *driving*, you must, upon request, provide your driver's license, vehicle registration, and proof of insurance. If these items are located in the glove compartment or other out-of-sight location, it may be advisable to ask the officer for permission to retrieve them before reaching for them, so that the officer does not think that you are reaching for a weapon.

Effective January 1, 2022, the provisions establishing British Columbia residency requirements for holding a driver's licence have changed. Section 24.1 of the Motor Vehicle Act has been amended to redefine who is a resident of the province. The definition of "resident of British Columbia" is persons who ceased to be ordinarily resident in British Columbia within immediately preceding 90 days, and persons in British Columbia who are required under contract to be in British Columbia for a period of more than 6 months for the purposes of temporary work. Students are exempt from

this.

When a legal breath sample is demanded by a peace officer, a driver must forthwith provide a sample of breath to determine the concentration of alcohol in the driver's body. See s 320.15(1) of the *Criminal Code*. More information on breath samples is available in section IX of this chapter.

Additionally, if a police officer has reasonable suspicion that a driver is impaired by a drug other than alcohol, they must submit to a Standardized Field Sobriety Test ("SFST"). More information on SFST is available in section IX of this chapter.

You have specific obligations at the scene of a collision. They are outlined in the next section of this chapter: Duties After a Collision

C. The Right to Silence

The right, under sections 7 and 11(c) of the *Charter of Rights and Freedoms*, to remain silent and not be required to make self-incriminating statements, generally applies in the motor vehicle context.

With the exception of providing license, registration, and insurance, providing a sample of breath, and providing a statement at the scene of a collision in which you were involved, you are not obligated to make a statement to the police, or to answer their questions.

If you are detained, you have the right to contact a lawyer before you make any statement. In *R v Suberu*, 2009 SCC 33 [4], the Supreme Court of Canada found that the right to speak to a lawyer arises as soon as a person is detained, even though they have not been formally arrested yet. In *R v Grant*, 2009 SCC 32 [5], the court found that “detention” begins as soon as there is physical or psychological restraint imposed by the police that prevents a person from leaving.

In summary, your right to silence continues to operate when you are stopped in a vehicle by the police. If the response to you (politely) asking whether you are free to go is anything other than an unqualified “yes”, you should assume you are being detained, and may wish to exercise your right to remain silent so as to avoid making statements that may incriminate you. **Any admissions that you make at the roadside can be, and most likely will be, used against you in court.** Remember that police officers are collecting evidence at the roadside. If you are arrested, you should ask to speak to a lawyer as soon as possible, and avoid making any statements or admissions until you have had an opportunity to speak to a lawyer.

D. Vehicle Standards

1. Equipment Standards in General

The general rule is that a “person must not drive or operate a motor vehicle or trailer on a highway or rent a motor vehicle or trailer unless it is equipped in all respects in compliance with this Act and of the regulations” (*Motor Vehicle Act* s 219(1)). Section 219(2) permits a peace officer to require the inspection of a registered owner’s motor vehicle and motor vehicles at a rental firm.

Under *Motor Vehicle Regulations* s 25.30, where a police officer has reasonable and probable grounds to believe that a vehicle is unsafe for use on a highway, regardless of whether or not the vehicle actually meets the standards prescribed under the *Motor Vehicle Act*, the officer may:

a) Order the vehicle removed from the highway until repairs as ordered by the officer are completed or the peace officer revokes the order; and/or

b) Order the surrender of the vehicle license and/or number plates.

Seat belt issues, discussed below, are the most common source of equipment standards issues, but for a complete list of required standards, please consult the *Motor Vehicle Act* and *Regulations*.

2. Seat Belt Assembly

Section 220 of the *Motor Vehicle Act* requires that any motor vehicle manufactured after December 1, 1963 must be equipped with at least two front seat belt assemblies before it is sold or operated.

Section 220(4) requires that when the motor vehicle is operated, these assemblies must be properly fastened except as per s 220(5):

> a) When a person is driving in reverse, or
>
> b) (Repealed)
>
> c) In the case of a person engaged in work which requires frequent alighting and in which the maximum vehicle speed is 40 km per hour, or;
>
> d) The person is under the age of 16

Courts have upheld the rules enforcing mandatory seat belt use as they are held not to be an infringement of an individual's *Charter* rights. The provisions are integral to the broad legislative scheme promoting highway safety and minimizing the overall human and economic cost of accidents. The alleged infringement of a person's right to free choice is so insignificant that it cannot be considered a measurable breach of *Charter* rights: *R v Kennedy*, [1987] BCJ No 2028, 18 BCLR (2d) 321 (CA) [6].

References

[1] https://www.canlii.org/en/ca/scc/doc/1990/1990canlii108/1990canlii108.html?autocompleteStr=r%20v%20ladouc&autocompletePos=1
[2] https://www.canlii.org/en/on/onsc/doc/2004/2004canlii18216/2004canlii18216.html?resultIndex=1
[3] https://www.canlii.org/en/ca/scc/doc/2005/2005scc37/2005scc37.html?autocompleteStr=r%20v%20orbanski&autocompletePos=1
[4] https://www.canlii.org/en/ca/scc/doc/2009/2009scc33/2009scc33.html?autocompleteStr=r%20v%20suberu&autocompletePos=1
[5] https://www.canlii.org/en/ca/scc/doc/2009/2009scc32/2009scc32.html?resultIndex=1
[6] https://www.canlii.org/en/bc/bcca/doc/1987/1987canlii2453/1987canlii2453.html?autocompleteStr=r%20v%20kennedy%2C%20%5B1987%5D%20&autocompletePos=1

IV. Duties after a Collision

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

A. Remain at the Scene

1. Motor Vehicle Act Provisions

Pursuant to *Motor Vehicle Act* s 68(1), the driver of a vehicle involved in an accident must:

a) Remain at the scene or return immediately

b) Render all reasonable assistance, and

c) Produce, in writing, their name and address, the registered owner's name and address, the vehicle license number, and particulars of insurance.

It is an offence to omit to do the duties specified in *Motor Vehicle Act* s 68(1). The reason or motive for leaving the scene is irrelevant. Since this is a strict liability offence, the defence of due diligence may be available to an accused.

2. Criminal Code Provisions

Under *Criminal Code* s 320.16(1), "everyone commits an offence who operates a conveyance and who at the time of operating the conveyance knows that, or is reckless as to whether, the conveyance has been involved in an accident with a person or another conveyance and who fails, without reasonable excuse, to stop the conveyance, give their name and address and, if any person has been injured or appears to require assistance, offer assistance."

B. Provide Information

1. Duty to Provide Information Under the Motor Vehicle Act

If asked, the owner or a person in a motor vehicle that a peace officer believes has been involved in an accident or a violation of the *Motor Vehicle Act* must provide any information respecting the identity of the driver at the time of the accident (*Motor Vehicle Act* s 84). The person has the right to remain silent until they speak to a lawyer, which is advisable in most circumstances.

2. Police Accident Reports

Although accident reports are not open to public inspection, parties to the accident may obtain license numbers from the reports as well as names of drivers, registered owners, and witnesses (*Motor Vehicle Act* s 249(2)).

C. Duties Regarding Damage to Unattended Vehicles or Property

1. Damage to Unattended Vehicles

Under the *Motor Vehicle Act* s 68(2), the driver, operator, or any other person in charge of a motor vehicle that collides with an unattended vehicle must stop, locate, and notify, in writing, the owner of the unattended vehicle of the name and address of the driver, the operator, or any other person in charge of the motor vehicle as well as the registered owner's name and address and the vehicle license number. The information must be left in a conspicuous place on the damaged

vehicle.

2. Damage to Other Forms of Property

In the event of damage to property other than another vehicle, the driver, operator, or any other person in charge of the motor vehicle must take reasonable steps to locate and notify the owner of the property, in writing (*Motor Vehicle Act* s 68(3)). The driver must take reasonable steps to provide the following particulars to the owner of the property: the name and address of the driver, operator, or other person in charge of the vehicle as well as the license number of the vehicle and the name and address of the vehicle's registered owner.

V. Violation Tickets

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

A. General Information

What is commonly referred to as a "speeding ticket" issued in accordance with the provisions of the *Offence Act* is known legally as a provincial "Violation Ticket". This section provides information on Violation Tickets, including how to dispute a Violation Ticket.

An individual charged under the *Motor Vehicle Act* will receive a Violation Ticket issued under s 14 of the *Offence Act*. However, under s 11 of the *Offence Act*, a person can also be charged criminally for a violation of the *Motor Vehicle Act*. This is for serious offences such as *Motor Vehicle Act* ss 95 and 102 (driving while prohibited). When charged for serious motor vehicle offences you will be issued a promise to appear and court attendance is compulsory if an Information is laid. For Violation Tickets, court attendance is only required if a Violation Ticket is disputed. If you fail to appear in court for a Violation Ticket, your non-attendance is deemed not disputed and you will be found guilty of the offence.

B. How to Dispute a Violation Ticket

These procedures may change from time to time. Refer to the information on the back of your Violation Ticket for the most up-to-date information.

The special procedure for adjudicating Violation Tickets is set out in ss 14–18 of the *Offence Act*. To dispute a Violation Ticket, one must either go to an ICBC office or provincial court registry with the ticket, or mail a "Notice of Dispute Form PTR021", as well as a copy of the Violation Ticket to: "Ticket Dispute Processing, Bag #3510, Victoria, BC, V8W 3P7". The Notice of Dispute must contain the address of the accused, a copy of the Violation Ticket, and if a copy of the the Violation Ticket is not available, sufficient information to identify the Violation Ticket and the alleged contravention or fine disputed (*Offence Act* s 15(3)).

You must file your Notice of Dispute within 30 days of the day on which the ticket was issued.

Motor Vehicle Act s 124 gives municipalities authority to create motor vehicle bylaws on matters such as parking and to enforce them by fine or imprisonment under s 124(1)(u). Municipalities cannot use this authority with respect to speeding (s 124(2)). An individual charged with a bylaw offence will receive a bylaw infraction notice or a Municipal

Ticket Information. While the following generally applies to these offences, special procedures may be imposed. **Follow the procedures outlined on the bylaw infraction notice or Municipal Ticket Information.**

More information on disputing Violation Tickets is available on the BC Ministry of Justice website at: https://www2. gov. bc. ca/ assets/ gov/ law-crime-and-justice/ courthouse-services/ fines-payments/ disputing-paying-tickets/ vt-brochure.pdf

1. What if You Miss the 30-Day Time Limit?

If you do not file your dispute within 30 days, you must file an "Affidavit Form PTR020", pursuant to s 16(2) of the *Offence Act*, available at any court registry, explaining the reasons for your delay, along with the "Notice of Dispute Form PTR021" and a copy of the ticket. Extensions are not guaranteed, and are at the judicial discretion of the justice of the peace considering your application. Be as detailed as possible and provide all evidence available in support.

2. How Do I Prepare for Court for a Violation Ticket?

In challenging a ticket, it is important to:

- Read the relevant sections of the *Motor Vehicle Act* to determine the elements of the offence and, if the Crown fails to lead evidence on any of these elements, motion for dismissal at the conclusion of the Crown's case can be made. The evidence must include identification of the alleged offender by name and address as well as the time, date, and location of the offence.
- Request for all relevant disclosure from the police detachment, this includes asking for police notes, all witness statements, and any information or training that the officer intends to rely on at trial.
- Pursuant to s 100 of the *Offence Act*, the Crown can apply to amend most mistakes on Violation Tickets, however there is a one-year statutory limit to make amendments.

For more detailed information on disputing Violation Tickets, you may wish to consult the University of Victoria Law Centre's information on defending traffic tickets at https:/ / www. uvic. ca/ law/ about/ centre/ resources/ defending%20traffic%20tickets.php.(Note that it may be outdated information)

3. What Happens in Traffic Court?

When you attend traffic court, your case will generally be presided over by a Judicial Justice of the Peace ("the Justice"), and not a Judge. Justices of the Peace are addressed as "Your Worship". The Justice will guide the hearing process. There is generally no Crown Prosecutor in traffic court; police officers prosecute the tickets.

Arrive at court at least 15 minutes before the scheduled court time. This provides you with the opportunity to speak to the officer before the courtroom opens. If you are intending to take the matter to trial, it is recommended that you send in a disclosure request to the police detachment requesting: the police notes; general occurrence report, witness statements; if a speeding ticket, any evidence relation to the calibration of the laser or radar gun. The police officer has a disclosure obligation pursuant to "R v Stinchcombe", [1991] 3 SCR 326 [1].

Police officers can provide testimony in person, via video- or tele-conference, or by certificate. You cannot be convicted without the evidence of the officer who issued you the ticket. If the police officer who issued your ticket does not attend in person or electronically, and has not submitted a certificate, a different officer present cannot provide evidence to convict you.

If you plead guilty and are applying for a fine reduction, you must show economic hardship. In such cases, the justice of the peace has the power to reduce the fine. Section 88 of the *Offence Act* states that the fine can be reduced based on the offender's means and ability to pay, subject to minimum fines specified in the *Motor Vehicle Act*.

A record of the finding is sent to the Superintendent of Motor Vehicles (hereinafter, the "Superintendent"). Any discretionary determination made by the Superintendent may, in certain circumstances, be subject to judicial review.

The decision of a Provincial Court judge or justice of the peace may be appealed to the Supreme Court of BC. However there is a strict 30-day appeal limit. Any individual looking to appeal a violation ticket should consult a lawyer.

4. What Happens if the Police Officer Does Not Show Up?

The officer who issued the Violation Ticket must provide evidence beyond a reasonable doubt that you committed the offence in question. The officer must prove the offence beyond a reasonable doubt, and that the officer cannot prove the offence beyond a reasonable doubt if the officer who issued the ticket is not present. In such situations, you should plead "not guilty". The presiding justice will most likely dismiss the ticket for "want of prosecution" and the ticket will be dismissed.

If you plead not guilty, the officer may attempt to adjourn the matter to another day when the other officer can attend. You should oppose this adjournment, and note that you were not given advance notice.

5. What Happens if I Cannot Make the Court Appearance?

You can apply to a justice for an adjournment, by filing the "Application to Adjourn a Hearing PTR818" form. This form can be filed by mailing it to the Violation Ticket Centre address listed above, or filing it at any court registry. All applications should be made within 2 weeks of the scheduled hearing date. In urgent circumstances you can have a lawyer, friend or family member attend and make an application for an adjournment at the date and time of the scheduled hearing.

6. What if You Miss the Court Date?

If you do not attend the hearing, the ticket will be deemed not disputed, the conviction will apply to your driving record, and the full fine amount will be immediately payable.

Within 30 days of missing the scheduled hearing date you may file an "Affidavit Form PTR019" pursuant to s 15(10) of the *Offence Act*, requesting a new hearing date at the registry of the provincial court where your ticket was set to be heard. After 30 days from the missed hearing date you must file "Affidavit form PTR020", pursuant to s 16(2) of the *Offence Act*.

References

[1] https://www.canlii.org/en/ca/scc/doc/1991/1991canlii45/1991canlii45.html?autocompleteStr=r%20v%20stinchcombe&autocompletePos=1

VI. Provincial Offences

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

A. Common Offences

1. Speeding

The most common provincial offence committed in BC is speeding in violation of section 146 of the *Motor Vehicle Act*. Generally, drivers must not exceed 50km/h in a municipality or on treaty lands, 80km/h on other highways, and must not operate a motor vehicle at a rate of speed higher than that posted on a sign. S 148.2 of the Motor Vehicle Act lists a defence to speeding: if the sign stating the speed limit was obscured or impossible to read, the accused cannot be convicted. This is an affirmative defence and the burden is on the accused to prove that the sign was obscured or impossible to read.

2. Careless Driving

Under s 144(1) of the *Motor Vehicle Act*, it is an offence to drive:

a) Without due care and attention;

b) Without reasonable consideration for other persons using the highway; or

c) At a speed that is excessive given the road, traffic, visibility, or weather conditions.

A person who commits an offence under (a) or (b) is liable on conviction to a fine of not less than $100 (s 144(2)) and six points added to their driving record. Subject to the minimum fine, s 4 of the *Offence Act* states that a fine must be less than $2,000. A person who commits an offence under (c) is liable on conviction to a fine of $173 and three penalty points as per the VTAFR and *Motor Vehicle Act Regulations*.

To convict a driver of any of these offences, the Crown must only prove inadvertent negligence: a lack of proper care or absence of thought. The standard of care is determined in relation to the circumstances and carelessness must be proved beyond a reasonable doubt: *R v Beauchamp*, [1952] OJ No 495, (1953)106 CCC 6 (Ont CA).

3. Street Racing

Part 9 of the *Motor Vehicle Act* includes street racing provisions. Street racing has become a major public issue and authorities treat it very seriously. Per *Motor Vehicle Act* s 250, “Race” includes circumstances in which, taking into account the condition of the road, traffic, visibility, and weather, the operator of a motor vehicle is operating the motor vehicle without reasonable consideration for other persons using the highway or in a manner that may cause harm to an individual, by doing any of the following:

a) Outdistancing or attempting to outdistance one or more other motor vehicles;

b) Preventing or attempting to prevent one or more other motor vehicles from passing; or

c) Driving at excessive speed in order to arrive at or attempt to arrive at a given destination ahead of one or more other motor vehicles.

According to *Motor Vehicle Act* s 251(1)(e), a peace officer may cause a motor vehicle to be taken to and impounded at a place directed by the peace officer if the peace officer has reasonable grounds to believe that a person has driven or operated a motor vehicle on a highway in a race or in a stunt and the peace officer intends to charge the person with a

motor vehicle related *Criminal Code* offence or an offence under section 144 (1), 146 or 148 of this Act.

Per ss 253(2) and 3(a), the impoundment period for s 251(1)(e) is seven days, unless the owner of a motor vehicle has also had a motor vehicle impounded within the last two years before the present impoundment, in which case the vehicle will be impounded for thirty days.

4. Use of Electronic Devices

Part 3.1 of the *Motor Vehicle Act* outlines offences related to the use of electronic devices while driving. Section 214.2 defines an "electronic device" as (a) a hand-held cellular phone, (b) a hand-held device capable of receiving email or text messages, or (c) any prescribed class or type of electronic device. Prescribed electronic devices are further defined in s 3 of the *Use of Electronic Devices While Driving Regulation*, BC Reg 308/2009 [EDWDR] as any of the following:

- Electronic devices that include a hands-free telephone function;
- Global positioning systems;
- Hand-held electronic devices, one of the purposes of which is to process or compute data;
- Hand-held audio players;
- Hand microphones; or
- Televisions.

Exceptions for hands-free use of electronic devices are permitted under s 7 of the *EDWDR*. Further exceptions for persons carrying out special powers, duties, or functions are allowed under s 5.

Fines for the use of an electronic device while driving have increased significantly as of June 1st, 2016, and now stand at $368 per offence. As well, 4 penalty points are issued for a violation of this section.

"Use" of an electronic device is defined broadly. Per *Motor Vehicle Act* s 214.1 use means:

> (a) *Holding the device in a position in which it may be used;*
>
> (b) *Operating one or more of the device's functions;*
>
> (c) *Communicating orally by means of the device with another person or another device; or*
>
> (d) *Taking another action that is set out in the regulations by means of, with or in relation to an electronic device.*

Additionally, *EDWDR* s 2 adds watching the screen of an electronic device as use of an electronic device.

In *R v Bainbridge* 2018, BCPC 101 [1] the accused was found guilty of the offence for simply holding the device in his hand while driving. The court held that any number of functions of the accused's phone **could** have been used in the position in which he held his phone. In *R v Jahani*, 2017 BCSC 745 [2], the accused was found guilty of the offence for plugging his phone into the cord to charge the phone.

In *R v Tannhauser*, 2018 BCPC 183 [3], the accused was acquitted of the offence because his cell was programmed with a software that immobilized the phone when a vehicle that is in motion. **This case was appealed and BCCA ordered a new trial. The judge in the BCCA trial said that even though the cell phone could not immediately be used due to the software, it was still an electronic device held in a position in which it may be used, which is illegal *R. v. Tannhauser*, 2020 BCCA 155 [4].

In *R v. Partridge*, 2019 BCSC 360 [5], the accused was observed by a police officer looking downwards whilst driving and when stopped, a cell phone was found wedged between the folds of the passenger seat such that the screen was facing the driver. Accused was convicted. However, the accused was acquitted on appeal because the mere presence of a cell phone within sight of a driver is not enough to secure a conviction, leaving aside a situation where, for example, the screen is illuminated and so the driver may then be utilizing the cell phone in some fashion.

In *R v. Bleau*, 2021 BCSC 13 [6], the accused received a ticket while listening to a podcast through his vehicle's sound system. Bleau's phone was connected by Bluetooth and loosely placed in the cup holder of the centre compartment. The phone was not securely affixed to the vehicle, but Bleau did not touch or otherwise interact with the device. In this decision, the Court acquitted Bleau of his conviction. It was decided that passively listening to a podcast on an unmounted device, did not constitute "use" per section 214.1.

In a recent unreported BC Provincial Court decision, it was found that smartwatches do not fall under the definition of an "electronic device" for the purpose of MVA. The reasoning behind this is that a smartwatch is not a handheld device since it is worn on the body.

B. Penalty Points

Penalty points are imposed in accordance with the schedule set out in Division 28 of the *Motor Vehicle Act Regulations*. It is important to note that conviction for *Criminal Code* offences also results in the imposition of penalty points. See Appendix A for examples of offences and their corresponding penalty points.

The number of penalty points will be taken into account under *Motor Vehicle Act* s 93 when the Superintendent suspends a license. **The Superintendent may suspend the license of a class 5 driver who accumulates 15 or more points in any two year period.** For a class 7 driver, or novice driver, the Superintendent may suspend the licence for receiving single a 3 point Violation Ticket. More information can be obtained from the Driver Improvement Program Policies and Guidelines [7].

As of December 2017, class 5 driver who incurs two high-risk offences (Use of Electronic Device; Excessive Speed; and/or Drive Without Due Care or Attention) in a one year period risks losing their driver's licence for up to 5 months.

1. ICBC Effects of Penalty Points

Drivers who have received 4 or more driver penalty points will be required to pay a premium to ICBC, even if they do not own or insure a motor vehicle. In essence, these premiums are a surcharge on Violation Tickets that put a driver beyond 3 penalty points. For more information, see http:/ / www. icbc. com/ driver-licensing/ tickets/ Pages/ Driver-Penalty-Points.aspx.

C. Vicarious Liability for Provincial Motor Vehicle Offences

Pursuant to *Motor Vehicle Act* ss 83 and 88, the owner of a motor vehicle is liable for any violation of the *Motor Vehicle Act* or *Motor Vehicle Act Regulations* unless they can prove that:

a) They did not entrust the motor vehicle to the person in possession or exercised reasonable care and diligence when doing so (*Motor Vehicle Act* s 83(3));

b) Although the registered owner, they are not the actual owner (*Motor Vehicle Act* s 83(5)(b)); or

c) The person committing the offence was not the registered owner's employee, servant, agent or worker (*Motor Vehicle Act* s 88(3)).

Under *Motor Vehicle Act* s 83(4), if an owner is liable for an offence committed by the driver, a fine of not more than $2,000 may be imposed in place of the fine or term of imprisonment specified in the enactment.

Under s 83(7), no owner is liable if the driver was convicted under the *Motor Vehicle Act* for:

a) Driving without a license or without the appropriate class of license (s 24(1));

b) Driving while prohibited by order of peace officer or Superintendent (s 95);

c) Driving while prohibited by operation of law (s 102);

d) Impaired driving (s 224); or [REPEALED]

e) Refusing to give a blood sample (s 226(1)). [REPEALED]

Generally, where the driver of a motor vehicle has been convicted of an offence, financial liability rests on them and further relief cannot be sought against the owner of the vehicle.

D. Limitation Period

An information or Violation Ticket in relation to a *Motor Vehicle Act* offence must be laid or issued within **12 months** from the date the alleged offence took place (*Motor Vehicle Act* s 78).

E. Fines

The Violation Ticket Administration and Fines Regulation prescribes fines for *Motor Vehicle Act* offences. Appendix A of this chapter provides examples of fines.

References

[1] https://www.canlii.org/en/bc/bcpc/doc/2018/2018bcpc101/2018bcpc101.html?autocompleteStr=r%20v%20bainbridge&autocompletePos=3
[2] https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc745/2017bcsc745.html?autocompleteStr=r%20v%20jahani&autocompletePos=1
[3] https://www.canlii.org/en/bc/bcpc/doc/2018/2018bcpc183/2018bcpc183.html?autocompleteStr=r%20v%20tannhaus&autocompletePos=1
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[6] https://www.bccourts.ca/jdb-txt/sc/21/00/2021BCSC0013.htm
[7] https://www2.gov.bc.ca/assets/gov/driving-and-transportation/driving/roadsafetybc/high-risk/street-racing/driver-improvement-policies-guidelines.pdf

VII. Vehicle Impoundment

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

Your vehicle may be impounded for a variety of offences or reasons, including excessive speeding, driving while prohibited, or for alcohol-related offences. If your vehicle has been impounded, this section details procedures for disputing that impoundment. For information on offences that may result in vehicle impoundment, consult the sections on particular offences in this chapter.

A. When Can You Dispute your Vehicle Impoundment

3 and 7-day impoundments cannot be disputed. Impoundments over 7 days can be disputed. Impoundments must be disputed within 15 days of being issued: *Motor Vehicle Act* s 256(1).

The Vehicle Impoundment review process is governed by ss 256 to 258 of the *Motor Vehicle Act*.

B. How to Dispute

To dispute a vehicle impoundment, you must go to an ICBC vehicle driver licensing office with the notice of impoundment and apply for a review of the impoundment. For more information, you can consult the RoadSafetyBC website on impoundment at https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/roadsafetybc/high-risk-driver/impoundment.

VIII. Superintendent

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

A. Reasons

1. Driver Improvement Program – Class 5 license

The driver improvement program is administered by the Superintendent of Motor Vehicles and allows the Superintendent to prohibit from driving anyone whose driving record is not satisfactory to the Superintendent.

Drivers are first issued with a Notice of Intent to Prohibit, informing them that their record is not satisfactory. Such notices may be issued for reasons including:

- The Superintendent considers it in the public interest – for example, if you have a bad driving record;
- If you incur nine or more active penalty points on your record in a two year period, that is generally sufficient to trigger a notice of probation;
- Your driver's license was suspended in another province or state;
- You haven't provided the payment (referred to as damages) the court ordered you to pay for a vehicle accident in which you were the driver or vehicle owner;
- You have not taken the medical exam required by the Superintendent.

If any further offences are recorded during the probation period, or within six months afterwards, the superintendent will likely issue a "Notice of Prohibition". Drivers may either accept the prohibition by signing and returning the "Notice of Prohibition", in which case the prohibition starts immediately, or the driver may make a written submission giving reasons why they should not be prohibited from driving.

The Driver Improvement Program appeal process is detailed below.

If the written submissions are not accepted, or an individual does not respond to a notice of intent to prohibit, they will be issued with a notice of prohibition. They must immediately sign the notice, surrender their driver's license to ICBC, and not drive for the term of the prohibition.

For more information on the Driver Improvement Program, see https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/roadsafetybc/high-risk-driver/driver-improvement.

2. Driver Improvement Program – Class 7 license/ Novice Drivers

Novice drivers, including those in the "L" or "N" categories may be referred to the Driver Improvement Program with as little as 2 points on their record. As well, drivers in the graduated licensing program cannot exit the program (i.e. get a full, non-N, license) until 24 months after a prohibition.

The Driver Improvement Program appeal process is the same as detailed above.

3. Other Reasons for Prohibitions

The superintendent may prohibit you from driving for other reasons, including:

- A failure to obtain automobile liability insurance;
- Indebtedness to ICBC for reimbursement of money paid in respect of a claim; or

- Indebtedness to the government for failure to pay fines.

B. Appeals

A person can apply for a review of a s 93(1)(a)(ii) driving prohibition under the Driver Improvement Program. The driver must within 21 days of receiving the notice of intent to prohibit, send in an application for review and written submissions as to why the driving prohibition should not be imposed or should be reduced. There is a $100 review fee that must be paid by way of a money order or certified cheque, or at any ICBC driver licensing office.

For more information on the Driver Improvement Program and guidelines, see https://www2.gov.bc.ca/assets/gov/driving-and-transportation/driving/roadsafetybc/high-risk/street-racing/driver-improvement-policies-guidelines.pdf.

The Superintendent is given discretion in determining which evidence they will consider in making the decision. A suspension cannot be quashed solely on the basis that the Superintendent did not consider certain relevant evidence (*Motor Vehicle Act* s 93(3)). The *Motor Vehicle Act* appears to permit the Superintendent to limit the period during which a license is suspended to certain times of the day or days of the week (*Motor Vehicle Act* s 25(12)(a)). An appeal of the Superintendent's decision to uphold the driving prohibition must be made in the BC Supreme Court and occur within 30 days of the Decision (*Motor Vehicle Act* s 94(1)).

C. Automatic Prohibitions

A driver convicted of a *Criminal Code* motor vehicle offence is automatically prohibited from driving for a period of one year (*Motor Vehicle Act* s 99). The automatic prohibition also applies to some offences under the *Motor Vehicle Act*, including:

a) s 95: driving while prohibited by order of peace officer or Superintendent;

b) s 102: driving while prohibited by operation of law;

c) s 224: impaired driving; (Repealed)

d) s 226(1): refusing to give a blood sample. (Repealed)

Under *Motor Vehicle Act* s 100(3), an individual who refuses to stop for a police officer will receive a two-year prohibition from driving if they are also convicted of one of the following Criminal Code offences:

a) s 220: criminal negligence causing death;

b) s 221: criminal negligence causing bodily injury;

c) s 236: manslaughter; or

d) s 320.13(1), (2), or (3): dangerous operation of a motor vehicle.

IX. Alcohol and Drugs

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

A. Approved Screening Devices

Pursuant to s 320.27(1) of the *Criminal Code*, a peace officer may demand a breath sample into an Approved Screening Device (ASD) from a driver if the officer reasonably suspects that there is alcohol in the driver's body and they have operated a motor vehicle within the preceding 3 hours. This is permitted for both drivers who are operating a motor vehicle or have care or control of it. An ASD is different than a breathalyser device at the police station and it does not provide a numerical value for the readings of "warn" or "fail". If the police do not administer the ASD right away, they may not be able to use the result's readings at trial.

Since the enactment of Bill C-46 in December 2018, a police officer is also allowed to demand a mandatory breath sample from a driver at any time. This demand does not require the officer to have reasonable grounds to believe the driver is impaired—they can ask any driver to provide a mandatory sample. This type of demand only applies to roadside tests, not tests where the individual needs to be transported to the police station. The driver does not have a right to consult with counsel before providing a mandatory demand breath sample. There are some requirements for an officer to make a mandatory demand:

a) The officer must have an ASD in their possession when they ask the driver to provide the sample; and

b) The officer must ask for the sample when the driver is driving or in care and control of a motor vehicle (they can pull a driver over and ask for a sample, but they cannot make a mandatory demand after the driver stops driving, like after they get home).

Before requiring the driver to provide a roadside breath sample into an ASD, the peace officer does not have to inform the driver of their *Charter* right, under s 10(b), to consult a lawyer. At this time, the driver does not have the right to speak to a lawyer before deciding whether to blow or refuse: the driver must decide right away. If the driver refuses, they will likely be issued a refusal to provide a breath sample under s 215.41(4) of the *Motor Vehicle Act* or under s 320.15(1) of the *Criminal Code* or an Immediate Roadside Prohibition (IRP).

The ASD tests for alcohol in the body and it will show a numerical value for a blood alcohol content ("BAC") under 50 milligrams of alcohol in 100 millilitres of blood (.05), "warn," or "fail." It shows a warn for blood-alcohol levels between 50 and 79 milligrams of alcohol in 100 millilitres of blood (.05), and a fail for levels of not less than 80 milligrams. No numerical values are given for a "warn" or a "fail" and it is impossible to determine the actual BAC of the driver.

In contrast, a breathalyser machine measures alcohol in the breath to see if the driver's blood alcohol concentration is over the legal limit of .08. It is more accurate than the ASD and must be operated by a qualified technician. In practice, the breathalyser is no longer used, and the police rely solely on the ASD to form the basis of issuing the driving prohibition.

In summary, if the police demand a roadside breath sample, the driver must comply with the breath demand into the ASD. The driver is legally compelled to provide a breath sample unless there is a reasonable excuse not to do so. Refusing without a reasonable excuse constitutes a separate offence.

B. Provincial Roadside Driving Prohibitions

Under the *Motor Vehicle Act* s 215.41, an immediate roadside prohibition will be served for driving or being in the care or control of a motor vehicle with a blood-alcohol reading in excess of 50 milligrams of alcohol per 100 millilitres of blood (.05). Care or control of a vehicle means occupying the driver's seat with access to the ignition key, even if the vehicle is parked.

The consequence depends on a number of circumstances, including a driver's prior history of prohibitions. For clarity, these consequences are listed below. Beyond the penalties noted below, receiving multiple penalties, or just one 90-day driving prohibition or *Criminal Code* penalty, can result in referral to the Responsible Driving Program (RDP), or the Ignition Interlock Program (IIP). The RDP is a course taken over 8 or 16 hours, whereas the IIP requires the installation of an interlock device in the driver's vehicle. For more information, consult the Road Safety BC website [1].

1. Immediate Roadside Prohibitions

An officer can demand anyone in care and control of a motor vehicle to provide a roadside breath sample using an Approved Screening Device. You have the right to request a second sample be taken, and to have the lower reading prevail.

If you register in the WARN (.05) range, the police may, at their discretion:

- Seize your driver's license
- Issue you a 'Notice of Prohibition' which will start immediately – removing your driving privileges – the length of which depends on prior IRP convictions (if any)
    a) 3-day driving prohibition if it is the first time caught in the warn range
    b) 7-day driving prohibition if it is the second time caught in the warn range within five years; or
    c) 30-day driving prohibition if it is the third time caught in the warn range within five years.

If you register in the FAIL (.08) range, or refuse to provide a sample, the police may, at their discretion:

- Seize your driver's license
- Issue you a 'Notice of Prohibition' which will start immediately – removing your driving privileges for 90 days

As discussed above, your vehicle may be impounded if you are issued an Immediate Roadside Prohibition. This is discretionary for 3 and 7-day prohibitions, but mandatory for 30 and 90-day prohibition.

2. Challenging Immediate Roadside Prohibition (issued for 3, 7, 30, or 90 days)

A person may, within 7 days of being served with a notice of driving prohibition under section 215.41, apply to RoadSafetyBC for a review of the driving prohibition (*Motor Vehicle Act* s 215.48(1)) by attending any driver licensing centre, and completing and submitting the form, "Immediate Roadside Prohibition – Application for Review – Section 215.48 *Motor Vehicle Act*". Fill in the blanks and check all relevant boxes that indicate the 'grounds for review.'

The grounds for review are:

- Not the driver or in care or control of a motor vehicle;
- Not advised of right to a second test on an ASD;
- Requested second test, but the officer did not perform the test;
- Second test was not performed on a different ASD;
- Prohibition was not served on the basis of the lower ASD result;
- The result of the ASD was not reliable;

- The ASD, which formed the basis of the prohibition, did not register a WARN or FAIL reading;
- The ASD registered a WARN, but the blood alcohol content was less than .05;
- The ASD registered a FAIL, but the blood alcohol content was less than .08;
- Prohibition should be reduced because did not have any previous IRPs; or
- Did not refuse or fail to comply with a demand to provide a breath sample, or had a reasonable excuse for refusing or failing to comply with a demand.

The applicant may attach any statements or evidence for the superintendent's review. Please note that the filing of an application for review does not stay the driving prohibition. (*Motor Vehicle Act* s 215.48(4))

To apply for a review of the Immediate Roadside Prohibition, the applicant must show proof of their identity, and provide a copy of the Notice of Driving Prohibition issued by the peace officer

There are two types of reviews: written and oral. The superintendent is not required to hold an oral hearing unless the driving prohibition is for 30 or 90 days, and the applicant requests an oral hearing at the time of filing the application for review and pays the prescribed oral hearing fees (*Motor Vehicle Act* s 215.48(5)). In a written review, all documents are reviewed by the adjudicator at the appointed time and location, but no oral submissions will take place. In an oral review, the adjudicator will listen to why the driving prohibition ought to be revoked. It is highly recommended that full written submissions are also provided. If the oral hearing is missed, the hearing will automatically change to a written review system. The payment for a written review is $100 whereas the payment for an oral review is $200. The payment is non-refundable.

To submit supporting documents for the oral or written review they must be provided in advance of the hearing. This can be done by submitting the supporting documents in advance of the hearing at any ICBC driver's licensing office or by faxing them to RoadSafetyBC at 250-356-6544.

For both oral hearings and written reviews, all written information you wish to be considered in your review hearing should be provided to the Superintendent by 4:30 p.m., two days prior to the date and time of the scheduled review.

A decision will be rendered within 21 days from the date the driving prohibition is issued.

Possible review outcomes include:

a) Driving prohibition revoked: will be advised to reapply for driver's license. The reinstatement fees and monetary penalties will be waived or refunded, however any outstanding debts owed to the province or ICBC must be paid.

b) Driving prohibition confirmed: terms of driving prohibition will remain unchanged.

It is highly recommended that individuals seeking to challenge an Immediate Roadside Prohibition be represented by a lawyer.

For more information on the monetary penalty and potential referral to remedial driving programs, see: https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/roadsafetybc/prohibitions/alcohol

3. What Happens if You Lose the Hearing?

The administrative decision (review decision) is final. If the application is unsuccessful, the only recourse is through a judicial review. The application for the judicial review must be filed within 6 months of receiving the decision, and is made by filing a Petition in Supreme Court. It is highly recommended that individuals seeking to challenge the administrative decision by way of judicial review be represented by a lawyer.

The IRP scheme is quasi-criminal and summary in nature, thus subject to Jordan caselaw. In Lowe v. British Columbia (Superintendent of Motor Vehicles) 2022 the petition (for judicial review) was dismissed for unreasonable delay, as 56 months had elapsed between the time the petition was filed, and counsel served a notice of hearing. The petition was dismissed for unreasonable delay. R. V. Jordan, 2016 was a landmark case that established a significant shift from past practices of the criminal justice system. Unreasonable delay applies to the Motor Vehicle Act.

4. 12 and 24-Hour Prohibitions

24-Hour roadside prohibitions are issued by the police where they believe on reasonable and probable grounds that your ability to drive is affected by alcohol or drugs. The police do not need a breath sample to issue a 24-hour prohibition, but you have the right to request an ASD test. Note, however, if you take an ASD test and test in the WARN or FAIL ranges, more serious penalties will apply to you.

If you are issued a 24-hour prohibition, the police will take your license, and you will have to retrieve it at the police station after 24 hours have passed.

For individuals wishing to challenge a 24-hour prohibition for either **alcohol** or a **drug**, there is an internal review process available through RoadSafetyBC pursuant to s. 215.1 of the Motor Vehicle Act. This must be done within 7 days. For more information on the review process, visit https:/ / www2. gov. bc. ca/ assets/ gov/ driving-and-transportation/driving/roadsafetybc/suspensions/alcohol/24-hour-review-guidelines.pdf

24-hour prohibitions may also lead to a 24-hour impoundment, as discussed above.

12-hour suspensions apply only to drivers in the Graduated Licensing Program (“L” or “N” drivers) for violations of the GLP rules. In other respects they are similar to 24-hour prohibitions.

While a suspension under *Motor Vehicle Act* s 215 will be placed on the driver’s record, this is a preferable alternative to a charge and conviction under the *Criminal Code*.

C. Drug Offences

The BC government has passed legislation amending the *MVA* which received royal assent on May 17, 2018, and has come into force by regulation of the Lieutenant Governor in Council.

The new legislation includes a number of amendments. Section 25(10.101) allows the Lieutenant Governor in Council to impose a condition on driver’s licenses that those who hold the license must not operate a motor vehicle while having a prescribed drug in their body.

Section 90.3(2.1) allows a peace officer to demand a sample of a bodily substance from a driver who holds a driver's licence on which a condition is imposed under section 25 (10.101) for analysis by means of approved drug screening equipment. If the analysis indicates the driver has a prescribed drug in their body, the peace officer may serve them with a notice of license suspension and request the driver to surrender their license. Section 90.3(3) allows the peace officer to apply the same consequence to a driver who declines to provide such a sample.

Similar amendments alter much of the *MVA* regulations for driving with alcohol in your system so that driving with a prescribed drug in your system can result in the same penalties. There is no blood drug concentration specified yet. It will

be possible for a combination of drugs and alcohol to trigger penalties even if the blood concentration of each substance is less than the legal limit (section 94.1).

D. Federal Alcohol Offences

The *Criminal Code* provides a number of federal criminal offences related to impaired driving. These are serious criminal offences, with significant possible penalties. Individuals facing *Criminal Code* charges are strongly encouraged to consult with a lawyer.

1. Impaired Driving/ Driving Over 80

Section 320.14(1)(a) of the *Criminal Code* makes it an offence either to operate a motor vehicle while alcohol or drugs impair one's ability to drive. Section 320.14(1)(b) makes it an offence to operate a motor vehicle with a blood-alcohol concentration equal to or exceeding 80 milligrams of alcohol per 100 millilitres of blood within 2 hours of driving.With a charge under s 320.14, the Crown must prove operation if operation is charged or prove care or control if care or control is charged. These are two separate and distinct offences and neither is included in the other: *R v Henry*, (1971), 5 CCC (2d) 201 (BC Co Ct); *R v James* [2] (1974), 17 CCC (2d) 221 (BCSC); and *R v Faer* [3] (1975), 26 CCC (2d) 327 (Sask CA). Since it is difficult to conceive of a situation when driving is not also care or control, the Crown will almost always charge care or control.

The court in *R v Kienapple* [4] [1974], 15 CCC (2d) 524 (SCC) held that an accused cannot have multiple convictions for the same act. The *Criminal Code* s 320.15(4) also states that a person who is convicted of an offence under this section cannot be convicted of another offence in this section for a single incident. **Therefore, an accused cannot be convicted of both impaired driving and having a blood alcohol concentration exceeding 80 milligrams.**

The Crown can establish acts of care or control by proving any use of the vehicle or its fittings and equipment or some course of conduct associated with the vehicle which creates the danger or risk of putting the vehicle in motion: R v Toews [5], [1985], 2 S.C.R. 119.

A peace officer may demand a breath or blood sample pursuant to *Criminal Code* s 320.27 (1) if the peace officer has reasonable grounds to suspect the individual has alcohol or a drug in their body and they have operated a conveyance in the preceding 3 hours. Refusal to comply with a demand for a sample is a criminal offence (s 320.15(1)). Since Bill C-46 was passed in 2018, an officer no longer needs reasonable grounds to suspect an individual has drugs or alcohol in their body as long as the individual is operating a vehicle and the officer has an approved screening device in their possession (*Criminal Code* s 320.17 (2)).

For a charge under s 320.14, the Crown may prove a blood alcohol reading in excess of .08 by producing a valid certificate of analysis or providing *vive voce* testimony at trial from a registered analyst or breathalyser technician about the blood alcohol concentration at the time the accused provided a breath sample.

Under section 320.31(1), the results from the analyses of breath samples are presumed to be accurate when:

> a) The qualified technician, using an approved instrument, conducted a system blank test and a system calibration check before each sample was taken;
>
> b) There was an interval of at least 15 minutes between the samples were taken; and
>
> c) The results of the analyses rounded down to the nearest multiple of 10mg, did not differ by more than 20mg of alcohol in 100mL of blood.

The results of blood sample analyses are also presumed to be accurate unless there is evidence to the contrary (s 320.31 (2)).

Note that this presumption pertaining to the evidence contained in the breathalyser certificate does not offend s 11(d) of the *Charter* which protects the presumption of innocence: *R v Bateman*, [1987] BCJ No 253; 46 MVR 155 (BC Co Ct).

As stated above, a conviction requires the production of a valid certificate or *vive voce* testimony at trial from a registered analyst or a breathalyser technician. However, the breathalyser technician or registered analyst must have the requisite qualifications.

2. Refusing to Provide a Sample

There are two ways that an officer can demand a sample: the first is a roadside mandatory demand, which requires that the officer have an approved screening device in their possession and does not require them to suspect the driver of having alcohol or drugs in their system (s 320.27(2)). The purpose of this test is for screening. An individual does not have the right to counsel before providing a roadside breath sample. The second type of demand under s 320.27(1) is both subjective and objective. The peace officer has reasonable grounds to suspect the driver has alcohol or a drug in their body and they operated a conveyance within the preceding 3 hours (based on *Criminal Code* s 320.27(1) and *Charter* s 8 (protection against unreasonable search and seizure) as interpreted in *R. v. Bernshaw* [6], [1995] 1 S.C.R. 254.

> **NOTE: Providing a breath sample is not a voluntary procedure**: the peace officer demands the sample. The driver may refuse only if they have a "reasonable excuse".

In some cases, a reasonable excuse has been held to include the right to first consult with a lawyer in private before providing the sample. This only applies when the driver is taken to the police station or medical facility for testing (not to roadside breathalyzer tests/mandatory demands). Where an accused chooses to exercise the right to retain counsel, the police officer must provide them with a reasonable opportunity to retain and instruct counsel, like offering them a phone to use: *R v Elgie* [7] (1987), 48 MVR 103 (BCCA); *R v Manninen* [8], [1987] 1 SCR 1233. The officer must refrain from attempting to elicit evidence until the detainee has been offered this opportunity. If the police officer does not inform the driver of their right to retain and instruct counsel (*Charter* s 10(b)), the breath or blood sample, if given, may be excluded from evidence if admitting it "would bring the administration of justice into disrepute" (*Charter* s 24(2)).

As with all *Charter* rights, the right to retain counsel is subject to reasonable limits prescribed by law and demonstrably justified in a free and democratic society: *R v Orbanski and Elias* [9], [2005] 2 SCR 3. The Court in *R v Thomsen* [10] [1988] 1 S.C.R. 640 held that "[w]hile a demand for a breath sample into a screening device constitutes a detention under s 10 of the *Charter*, the suspension of the accused's ability to implement the right to retain and instruct counsel until arrival at the detachment for breath testing is a reasonable limitation on the exercise of that right".

The length of time constituting a sufficient and reasonable opportunity for an accused to exercise the right to retain and instruct counsel will depend on the circumstances of each case. An otherwise short period of time may not be unreasonable due to the behaviour and attitude of the individual under investigation by the police. Police officers are always mindful of the fact that they must take a breath sample within two hours of the time the offence was allegedly committed (*R v Dupray*, (1987), 46 MVR (2d) 39 (BC Co Ct)).

Breach of *Charter* s 10(a) (failure to be informed of reason of arrest) may also result in exclusion of evidence under s 24(2) of the Charter.

3. Drug-Impaired Driving

Bill C-46 received royal assent on June 21, 2018 and came into force and effect in 2018. The Bill makes significant changes to the *Criminal Code* and regulations.

The Bill creates the *Criminal Code* offences for driving while impaired by marijuana. The Bill proposes limits for the amount of THC, the main psychoactive ingredient in marijuana, that drivers can legally have in their system while driving. Note that these limits still apply if the driver has a prescription for marijuana.

The proposed amendments are to the Regulations, not the *Criminal Code*. The Regulations set out the per se limits.

- A driver who has 2 to 5 ng of THC per mL of blood risks a fine of up to $1000 and a criminal conviction;
- A driver who has over 5 ng of THC per mL of blood is considered impaired and risks facing a criminal conviction, a $1000 fine and a one-year driving prohibition; and
- A driver who has a combination of THC above 2.5 ng per mL of blood and a blood alcohol concentration of over 50 mg of alcohol per 100 mL is also considered impaired and risks facing a criminal conviction, a $1000 fine and a one-year driving prohibition.

4. Penalties

Under Criminal Code s 320.19(1), impaired driving is a hybrid offence. For both summary and indictment, the minimum punishments are the same:

> (i) For a first offence, a fine of $1,000,
>
> (ii) For a second offence, a term of imprisonment for a term of 30 days, and
>
> (iii) For each subsequent offence, imprisonment for a term of 120 days.

The court does not have to impose the minimum sentence if the accused successfully completes a treatment program (s 320.23(2)). If convicted of an indictable offence under s 320.19(1), the accused may be liable to imprisonment for a maximum term of 10 years. If convicted on summary conviction, the accused may be liable for a fine of not more than $5,000, imprisonment for a maximum term of 2 years less a day, or both.

There are higher minimum fines that apply if the driver's BAC is especially high (s 320.19(3). For a BAC between 120-160mg per 100mL of blood, a minimum fine of $1,500 applies (s 320.19(3)(a)). For a BAC higher than 160mg per 100mL of blood, a minimum fine of $2,000 applies (s 320.19(3)(b)).

In addition to facing the risk of a criminal conviction, drivers who are charged under the Criminal Code are also issued a 90-day Administrative Driving Prohibition pursuant to s 94.1 of the *Motor Vehicle Act*.

5. Provincial Driving Prohibitions for Criminal Convictions

If you are convicted of a federal criminal impaired driving or refusal offence under ss 320.14(1) or 320.15(1) of the Criminal Code, you may be prohibited from driving as follows (s 320.24(1)):

- Upon 1st Conviction — not less than 1 year and not more than 3 years, plus the entirety of the period of time that the offender is imprisoned;
- Upon 2nd Conviction — not less than 2 years and not more than 10 years, plus the entirety of the period of time that the offender is imprisoned;
- Upon 3rd Conviction and any subsequent convictions after that — not less than 3 years, plus the entirety of the period of time that the offender is imprisoned (there is no maximum period).

Note that these prohibitions are in addition to any other penalty that applies.

In addition, 10 penalty points are recorded pursuant to the Motor Vehicle Act Regulations and the offence may be a breach of certain conditions under s 55(8) of the *Insurance (Vehicle) Regulation* if convicted, meaning that insurance will not cover an accident that occurs within 2 hours before the offence was committed if the offender was operating the vehicle. This also applies if the offender was convicted under the Young Offenders Act or a similar act in the US.

6. 90 Day Administrative Driving Prohibitions

Under BC's *Motor Vehicle Act* (s 94.1), a 90-Day Administrative Driving Prohibition (ADP) will be issued to any driver who is found to have a BAC over 0.08 or a blood drug concentration (BDC) that violates the *Motor Vehicle Act* Regulations. An ADP can also be issued if the driver refuses to provide a sample without a reasonable excuse or if a drug recognition expert determines that their ability to drive was impaired. This is in addition to federal criminal charges you may face. An ADP cannot be issued along with an Immediate Roadside Prohibition (IRP) (only one can be issued).

The difference between an ADP and an IRP is that an IRP is issued following a WARN or FAIL reading from an Approved Screening Device, or a refusal to provide an ASD sample. The length of time that a driver is prohibited from driving under an IRP also differ depending on whether they have received one before or not. An ADP is based on specific BAC (as opposed to WARN/FAIL), BDC, refusal to provide a sample, or a drug impairment determination. The prohibition period for an ADP is always 90 days.

The driver can apply for a review of the ADP within seven days of the date they receive the Notice of Driving Prohibition.

The Grounds of Review for challenging an ADP are more limited than challenging an IRP. The grounds of review are as follows:

- I did not operate or have care or control of a motor vehicle;
- The concentration of alcohol in my blood did not exceed 80 milligrams of alcohol in 100 millilitres of blood within three hours.
- I did not refuse or fail to comply with a demand under section 320.15 of the Criminal Code to supply a breath or blood sample.
- I had a reasonable excuse for failing or refusing to comply with a demand under section 320.15 of the Criminal Code to supply a breath or blood sample.

E. Alcohol and Cannabis in Vehicles

1. Alcohol in Vehicles

Section 76 of the Liquor Control and Licensing Act sets out that a person must not drive or otherwise exercise control over the operation of a motor vehicle, whether or not it is in motion, while there is liquor in the person's possession or in the motor vehicle. However, the above does not apply:

a) If the liquor is in a container that is unbroken and has an unopened seal;

b) If the liquor is being transported, sold or served in accordance with the terms and conditions of a licence, authorization or permit; or

c) If the liquor is not readily accessible by the driver and passengers.

Violation of section 76 of the Liquor Control and Licensing Act can result in being issued a ticket for $230.

2. Cannabis in Vehicles

Section 65 of the Cannabis Control and Licensing Act sets out that cannabis cannot be consumed while a vehicle or boat is being operated. Neither the driver nor passenger can consumer cannabis whether the vehicle is in motion or not.

- Consuming cannabis while operating a vehicle or boat can result in a ticket of $575;
- Consuming cannabis in a vehicle or boat operated by another person can result in a ticket of $230;
- Operating a vehicle or boat while knowing that another person is smoking or vaping cannabis in it can result in a ticket of $230.

Section 81 of the Cannabis Control and Licensing Act sets out that an adult must not operate a vehicle while the adult has personal possession of cannabis or there is cannabis in the vehicle. However, the above does not apply:

a) If the cannabis was produced by a federal license holder and is still in its original unopened packaging;

b) If the cannabis is not readily accessible to the driver and any passengers in the vehicle; or

c) If one or more cannabis plants are not budding or flowering.

Violation of section 81 can result in being issued a ticket for $230.

References

[1] https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/roadsafetybc/high-risk-driver
[2] http://canlii.ca/t/gcqt9
[3] http://canlii.ca/t/g7hf3
[4] http://canlii.ca/t/1twxz
[5] http://canlii.ca/t/1ftzx
[6] http://canlii.ca/t/1frmf
[7] http://canlii.ca/t/22kmf
[8] http://canlii.ca/t/1ftmx
[9] http://canlii.ca/t/1l0b0
[10] http://canlii.ca/t/1ftg5

X. Federal Offences

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

A. Dangerous Operation

Under the *Criminal Code*, it is an offence to operate a motor vehicle in a manner that is dangerous to the public having regard to all of the circumstances (*Criminal Code* s 320.13 (1)). The consequences differ depending on whether or not the dangerous driving caused bodily harm or death.

Dangerous operation that does not cause bodily harm or death is a hybrid offence (s 320.13 (1)). The driver can be sentenced on summary conviction or indictment. If convicted on indictment, the maximum sentence is imprisonment for a term not exceeding 10 years (s 320.19 (5)).

Dangerous operation causing bodily harm (s 320.13 (2)) is also a hybrid offence. On indictment, the individual is liable to imprisonment for a term not more than 14 years (s 320.2 (a)) The minimum punishment is (s 320.2 (b)):

(i) For a first offence, a fine of $1,000,

(ii) For a second offence, imprisonment for a term of 30 days,

(iii) For each subsequent offence, imprisonment for a term of 120 days.

On summary conviction, the individual is liable to a fine of not more than $5,000 or to a term of imprisonment no longer than 2 years less a day, or both. The minimum punishments for convictions on indictment also apply to summary convictions.

Dangerous operation causing death (s 320.13 (3)) is an indictable offence. The maximum penalty is imprisonment for life (s 320.21). The minimum sentences for convictions of Dangerous operation causing bodily harm also apply to Dangerous operation causing death.

Dangerous operation (s 320.13) is included in the offences created under *Criminal Code* ss 220 (causing death by criminal negligence), 221 (causing bodily harm by criminal negligence), and 236 (manslaughter). If there is not enough evidence to prove one of the three offences above, it is still possible to convict of dangerous operation s 320.13 (1) (*Criminal Code* s 662(5)).

In *R v. Chung*, 2020 SCC 8 [1], the Supreme Court upheld a conviction of dangerous driving causing death. The court decided that even momentary excessive speeding can be sufficient to meet the required mens rea (state of mind) for dangerous driving. The test to be applied is whether a reasonable person would have foreseen the danger of the momentary conduct. Chung demonstrates that in certain contexts, momentary acts can still result in a criminal conviction.

B. Operation While Prohibited

Operation while prohibited is a Criminal Code offence under s 320.18.

The Criminal Code s 320.18(1) states that anyone who operates a conveyance while prohibited from doing so by an order under the Act or another legal restriction imposed by any other Act of Parliament is guilty of an offence. An exception to this is if the driver is registered in an alcohol ignition interlock device program and they are abiding by the conditions of that program (s 320.18[2]). This is a hybrid offence, so the Crown can choose to proceed summarily or by indictment depending on the severity of the alleged violation and other factors.

The possible punishments if found guilty of dangerous operation under s 320.18 are: a) if convicted on indictment, a term of imprisonment not exceeding 10 years b) on summary conviction, a term of imprisonment not exceeding 2 years less a day.

C. Criminal Negligence

This section is not specifically aimed at motor vehicle operators, but is applicable in some circumstances. Under the *Criminal Code*, criminal negligence involves acts or omissions showing "wanton or reckless disregard for the lives or safety of other persons" (s 219). In Canada, the law surrounding the *mens rea* requirements for criminal negligence was clarified in *R v Creighton* [2], [1993], 3 S.C.R. 3. The standard is to be measured by a modified objective test: whether the accused's conduct constituted a marked departure from that of the reasonable person given all the circumstances. Characteristics personal to the accused will not be considered with the exception of accused's incapacity to appreciate the nature of the risks associated with their actions.

In *R v Beatty* [3], [2008] 1 S.C.R. 49, 2008 SCC 5, the Court addressed the issue of criminal negligence in the context of dangerous driving. Unlike *Creighton*, there is no substantive dissent, though five of the newer Supreme Court justices took a slightly different approach to the modified objective test. They noted that the actual (subjective) state of mind of the accused at the time of the accident is relevant in determining if there was a marked departure from the standard of the reasonable person. In Beatty, a momentary lapse of attention with no other evidence of dangerous driving was held **not** sufficient to warrant criminal sanction under s 249 (criminal negligence causing death).

If negligence results in death, an indictable offence has been committed and the driver may be liable to life imprisonment (s 220). If the negligence results in bodily injury, an indictable offence has been committed and the driver may be liable to imprisonment for 10 years (s 221).

D. Limitation Period

Section 786(2) of the *Criminal Code* states that, with respect to summary offences, "[n]o proceedings shall be instituted more than **six months** after the time when the subject-matter of the proceedings arose". In contrast, **there is no limitation period for indictable offences**.

References

[1] https://www.canlii.org/en/ca/scc/doc/2020/2020scc8/2020scc8.html
[2] http://canlii.ca/t/1fs09
[3] http://canlii.ca/t/1vrp5

XI. Driving While Prohibited

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

It is an offence under the *Motor Vehicle Act* s 95(1)(a) to drive a motor vehicle on a highway or industrial road knowing that they are prohibited from doing so under:

- ss 91 (prohibition issued by the Insurance Corporation of British Columbia for an unsatisfied court judgment);
- 92 (prohibition against driving relating to fitness or ability to drive);
- 93 (prohibition issued by Superintendent in the public interest);
- 94.2 (driving prohibition for driving while impaired by alcohol or refusing to provide a breath sample without reasonable excuse),
- 215 (24 hour impaired driving prohibition);
- 215.43 (immediate roadside driving prohibition); or
- 251(4) (prohibition for driving while failing to hold a license, or while an impoundment notice was issued on the license).

Then the person commits an offence and is liable:

- On a first conviction, to a fine of not less than $500 and not more than $2 000 or to imprisonment for not more than 6 months, or to both, and
- On a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than $500 and not more than $2 000 and to imprisonment for not less than 14 days and not more than one year.

The individual's driving record will also be blemished and they will receive a 10 point *Motor Vehicle Act* infraction on their record.

The term “knowingly” means that Crown must prove beyond a reasonable doubt that the person charged knew that they were prohibited from driving. However, service of a prohibition certificate by registered mail, per Motor Vehicle Act s 95(4)(a) constitutes constructive knowledge, even in cases where the accused never reads the driving prohibition: *R v. Wall*, 2010 BCPC 316 [1].

The prohibited driver’s vehicle will likely be impounded if caught driving while prohibited. For more information on vehicle impoundment, please see https:/ / www2. gov. bc. ca/ gov/ content/ transportation/ driving-and-cycling/ roadsafetybc/high-risk-driver/impoundment.

It is advisable that individuals charged with Driving While Prohibited seek out legal advice from a lawyer. It is possible to work out a plea deal with the Crown Counsel to a lesser included offence of Driving Without a License pursuant to s 24(1) of the *Motor Vehicle Act*. The benefits of this resolution are that:

- There is no statutory minimum driving prohibition;
- No minimum fine amount; and
- The individual's driving record will only be blemished with a 3 point *Motor Vehicle Act* infraction on their record.

References

[1] https://www.canlii.org/en/bc/bcpc/doc/2010/2010bcpc316/2010bcpc316.html

XII. ICBC Breaches

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

A. Motor Vehicle Act/ Insurance (Vehicle) Act offences

Some violations of the *Motor Vehicle Act* or *Criminal Code* may also be breaches of ICBC insurance conditions and serve to void your insurance. For more information, consult **Chapter 12 – Automobile Insurance (ICBC)**

XIII. Bicycles

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

A. Bicycles

A cyclist has the same rights and duties as a driver of a motor vehicle including the duties of safe operation, care, attention, consideration, and provision of information at the scene of an accident, of other highway users. In addition, the *Motor Vehicle Act* provides that an individual commits an offence if they operate or are a passenger on a bicycle on a “highway” and are not wearing a helmet (s 184). A “highway” is defined as any road, street, or avenue that a vehicle can drive on. Almost every municipality, including the City of Vancouver, has followed this section of the *Motor Vehicle Act* by passing bylaws requiring cyclists to wear bicycle helmets.

Furthermore, cyclists must ride on a designated bicycle path, if available, or if not, then in single file as near as practical to the right side of the road (s 183(2)). Lamps and reflectors are required for a cycle operated on a highway between one half-hour after sunset and one half-hour before sunrise (s 183(6)).

In the event of an accident, the cyclist must remain at the scene and lend assistance (s 183(9)). Cyclists are being considered increasingly responsible for accidents they are involved in. One particular area where cyclists are being held responsible is where they pass a driver on the right while the driver is also turning right at an intersection. If a cyclist is hit by a car turning right while the cyclist is passing on the right, it is possible the cyclist may be found at fault. This is indicative of a general trend of cyclists being treated like motor vehicles. If a cyclist is hit while breaking a traffic law, it is quite possible that the cyclist may be held at fault.

Bill 23 received royal assent on May 11, 2023, and created new duties for drivers regarding cyclists, pedestrians, and other prescribed persons. This bill adds sections 157.1 and 162.1 to the MVA which states that drivers must maintain a minimum distance of 1 meter when passing and 3 meters when following cyclists, pedestrians, and other prescribed persons on the road. Additionally, this bill added the definition of “vulnerable road user” as a pedestrian, person operation or in on a cycle, or other prescribed persons. Section 144.1 of the MVA was added to provide a general duty for

motorists to take proper precaution with respect to vulnerable road users on the road.

> **NOTE:** Bill 23 also changed the definition of pedestrian under the MVA. Pedestrians are persons who are not in or on a vehicle, cycle, or other device, unless the device is capable of being propelled by human power and is or is similar to a wheelchair, a stroller, a skateboard, a kick scooter, roller skates, in-line roller skates, skis or a sleigh. Additionally, pedestrians are not persons on animals or persons in or on designated personal mobility devices. This change in definition affects multiple provisions throughout that MVA that refer to pedestrians.

B. Motor Assisted Cycles

Motor assisted cyclists are subject to the same rights and duties as a driver of a motor vehicle. There is no requirement for a driver's license, registration, or insurance in order to operate a motor assisted cycle. To prevent illegal operation, it is important to consult the legal definition of a "motor assisted cycle" under section 1 of the Motor Vehicle Act. Per section 182.1 of the Motor Vehicle Act. the specific criteria set out in the Motor Assisted Cycle Regulation must also be met.

As defined in the *Motor Vehicle Act*, a "motor assisted cycle" is a device prescribed by the Lieutenant Governor in Council that meets the following criteria

a) A person can ride the device;

b) The device has attached wheels or hand cranks that all the cycle to be propelled by human power and that can be operated while the motor is engaged or providing assistance to propel the cycle;

c) The device has an attached motor that is a prescribed type and does not exceed a prescribed output; and

d) The device meets the prescribed criteria, if any.

In *R v. Ghadban*, 2021 BCCA 69 [1], Ghadban was convicted for not having a valid driver's license and for driving without insurance. Ghadban contended that the electric vehicle he was operating was a motor assisted cycle, which would not require him to be licensed or insured. The Court held that the vehicle's primary mode of propulsion was the electric motor rather than the pedals. The Court also stated that the motor never 'assists' cycling because the motor does not run while it is being manually pedalled.

For more information on the differences between Motor Assisted Cycles and Limited Speed Motorcycles, please visit ICBC's page on electric bikes: https://www.icbc.com/vehicle-registration/specialty-vehicles/Low-powered-vehicles/Pages/Electric-bikes.aspx.

References

[1] https://www.bccourts.ca/jdb-txt/ca/21/00/2021BCCA0069.htm

XIV. LSLAP Program Information

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

LSLAP does not provide representation for provincial offences and will seldom provide representation in criminal motor vehicle offences. LSLAP will not provide representation for indictable offences or offences involving drugs or alcohol. If the offence is serious, the client should be referred to a lawyer, particularly through the Lawyer Referral Service The Legal Services Society (Legal Aid) may represent the accused if there is a risk of imprisonment upon conviction. An accused may also receive Legal Aid representation if they face a loss of livelihood upon conviction, has a mental or physical disability that is a barrier to self-representation, or faces immigration complications that may result in deportation.

Appendix A: Penalty Points and Fines

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 1, 2023.

This appendix lists fines and penalty points for some of the most common Motor Vehicle Act offences. As well, please note that many of these offences carry other penalties, discussed in this chapter. A comprehensive list of the penalty points from the Motor Vehicle Act Regulations and the fines from the VTAFR are available on the ICBC website at http://www.icbc.com/driver-licensing/tickets/Pages/fines-points-offences.aspx

Offence	Fine	Points
No Driver's License or Wrong Class of License (*MVA* s 24(1))	$276	3
Driving Without Insurance (*MVA* s 24(3)(b))	$598	0
Failing to Produce a Driver's License or Insurance (*MVA* s 33(1))	$81	0
Disobeying a Red Light at an Intersection (*MVA* s 129(1))	$167	2
Driving without Due Care and Attention (*MVA* s 144(1)(a)	$368	6
Speeding (including in and out of municipalities, and in violation of signs) (*MVA* ss 146(1),(3),(5),(7)	$138–196	3
Speeding in a School or Playground Zone (*MVA* ss 147 (1) and (2))	$196–253	3
Excessive Speeding (*MVA* s 148(1))	$368–483	3
Failing to Keep Right (*MVA* s 150(1)	$109	3
Failing to Signal a Turn (*MVA* s 170)	$121	2
Using an Electronic Device While Driving/ Emailing or Texting While Driving (*MVA* ss 214.2(1) and (2)	$368	4
Failing to Wear a Seatbelt or Permitting a Passenger Without a Seatbelt (*MVA* ss 220(4) and (6)	$167	0
Illegibile License Plate (*MVAR* s 3.03)	$230	0
Failing to Display an "N" or "L" Sign (*MVAR* ss 30.10(2) and (4)	$109	
Failing to Slow Down or Move Over Near a Stopped Official Vehicle (*MVA* s 47.02)	$173	3

Illegal Use or Possession of Permit or Insurance (*MVA* s 70(1)(a))	$115–2,300	0
Illegal Use or Possesion of Identification Card or Driver's License (*MVA* ss 70(1.1)(a) or (b)	$460–23,000	0
Motor Vehicle Related *Criminal Code* Offences	N/A (May be imposed by court)	10
Driving While Prohibited/ Suspended (*MVA* ss 95(1) / 234(1))	$575–2,300	10

Chapter Fourteen - Mental Health Law

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 11, 2023.

This chapter provides a very general overview of the rights of persons with mental illnesses, whether as patients inside a mental health facility or as persons outside such a facility. This discussion of mental health law is intended to provide the reader with a general framework to use for their own information or as a basis for further research. An excellent resource for further information or referrals is the Community Legal Assistance Society (CLAS). CLAS operates a mental health law program that represents individuals at hearings before the BC Criminal Code Review Board, under Part XX.1 of the Mental Disorder provisions of the Criminal Code of Canada and the BC Mental Health Review Board under the the *Mental Health Act*, RSBC 1996, c 288 [*MHA*]. CLAS also provides legal information and identifies potential test cases. See **Chapter 22: Referrals** for CLAS' contact information.

This chapter engages with the legal issues that may arise due to a person's mental disorder. By "mental disorder", we are referring to the range of illnesses and disorders dealt with by psychiatry. It is important to keep in mind that mental illness is not the same as mental incapacity. For legal matters concerning capacity, such as the capacity to enter into a contract, make a will, or create a representation agreement, please consult **Chapter 15: Guardianship**.

For the purposes of this chapter, the most important statute is the *MHA*. Other pertinent legislation is listed later in this chapter under **Part II: "Governing Legislation and Resources"**. If you have an issue regarding a person who has come into conflict with the law and shows signs of psychiatric disturbance, you may also need to review the *Forensic Psychiatry Act*, RSBC 1996, c 156 [*FPA*]. This legislation governs the forensic psychiatry services, which assists with court ordered psychiatric assessments, including fitness to stand trial or "Not Criminally Responsible" designations.

A. Mental Health, Capacity, and the Law: An Overview

There are three distinct areas of concern at the intersection between the law, mental health, and capacity: (1) persons who suffer or have suffered from psychiatric disorders, (2) persons who have developmental disabilities, and (3) persons who have diminished capacity. These issues are considered separately below in order to direct you to the pertinent chapter. Some matters are covered in this chapter, while others are covered in **Chapter 15: Guardianship**. However, it is important to bear in mind that a client may experience several mental health challenges that overlap and blur the lines between the categories. For example, a person may have diminished cognitive capacity due to Alzheimer's in addition to an underlying schizophrenia disorder that they manage with medication.

1. Psychiatric Disorders

The first group encompasses those who may not have a developmental disability or diminished capacity but who suffer from psychiatric disorders. Psychiatric disorders can range from mild delusions or mood disorders, to pervasive and severe psychosis. These individuals are most likely to fall under the provisions of the *MHA*. The legal issues faced by this group are the central focus of **Chapter 14: Mental Health Law**. Therefore, in this chapter it is important to note that the term "mental disorder" refers to psychiatric illness and not to those with developmental delays or diminished

capacity.

2. Developmental Disabilities

This second category refers to people who are developmentally delayed or intellectually impaired due to genetic factors, birth trauma, or injury early in life, and who may or may not be able to live independently within the community. These individuals may not have the capacity to make legal decisions or treatment decisions. Family members should be encouraged to use the planning tools found in **Chapter 15: Guardianship** to make provisions for the care of these individuals. To plan for their financial well-being, their family members may wish to consult the **Chapter 15** section " Overview of Incapacity – Section D. Wills and Estates." However, developmental delays are not covered in depth in the LSLAP Manual. For further information regarding supports and resources for persons with developmental disabilities, please visit the following Government of British Columbia websites:

- Adults with Developmental Disabilities

  Website: https:/ / www2. gov. bc. ca/ gov/ content/ family-social-supports/ services-for-people-with-disabilities/supports-services#programssupportsforadultswithdd [1]

- Transition Planning for Youth and Young Adults

  Website: https:/ / www2. gov. bc. ca/ gov/ content/ family-social-supports/ services-for-people-with-disabilities/transition-planning-for-youth-young-adults [2]

- Children & Youth with Support Needs

  Website: https:/ / www2. gov. bc. ca/ gov/ content/ health/ managing-your-health/ child-behaviour-development/support-needs [3]

3. Cognitive Incapacity

The third area of concern includes those people who, due to disease or trauma, have become mentally incapable. It is important to note that the threshold for capacity may differ depending on the legal matter at stake – for example, there may be a different level of capacity required for the decision to appoint a Representative in a Representation Agreement than there would be for the decision to draft a will. Family members and caregivers for this group would be better served by the information in **Chapter 15: Guardianship**.

References

[1] https://www2.gov.bc.ca/gov/content/family-social-supports/services-for-people-with-disabilities/supports-services#programssupportsforadultswithdd
[2] https://www2.gov.bc.ca/gov/content/family-social-supports/services-for-people-with-disabilities/transition-planning-for-youth-young-adults
[3] https://www2.gov.bc.ca/gov/content/health/managing-your-health/child-behaviour-development/support-needs

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 11, 2023.

A. Legislation

Adult Guardianship Act, RSBC 1996, c 6 [*AGA*].

Adult Guardianship and Planning Statutes Amendment Act, S.B.C 2007, c 34 [*AGPSAA*].

Bill 23, *Mental Health Amendment Act*, 2022 (assented to 2 June 2022), SBC 2022, c 17.

Criminal Code, R.S 1985, c. C-46 (Part XX.1, Mental Disorder provisions) [*CC*].

Forensic Psychiatry Act, RSBC 1996 c 156 [*FPA*].

Health Care (Consent) and Care Facility (Admission) Act, RSBC 1996, c 181 [*HCCFA*].

Mental Health Act, RSBC 1996, c 288 [*MHA*].

Mental Health Amendment Act, S.B.C 1968, c 27 [*MHAA*].

Mental Health Regulations, B.C Reg. 233/99; O.C. 869/99; B.C. Reg. 96/2018, May 15, 2018

Patients Property Act, RSBC 1996, c 349 [*PPA*].

Power of Attorney Act, RSBC 1996, c 370 [*PAA*].

Public Guardian and Trustee Act, RSBC 1996, c 38 [*PGTA*].

Representation Agreement Act, RSBC 1996 c 405 [*RAA*]

B. Resources

1. Crisis Resources

Crisis Centre of Greater Vancouver

24 hour hotline that provides emotional support for clients in distress and refers them to other resources for food, shelter, counselling and legal advice. **Please note this is not a counselling hotline.**

Online	Website [1]
Phone	(604) 872-3311 Toll-free: 1-800-SUICIDE (784-2433)

Vancouver Coastal Regional Distress Line

This service is delivered by professionally trained volunteers. The crisis line serves all communities within the Vancouver Coastal Health Region.

Online	Website [2]

Phone	604-872-3311 Toll-free: 1 (866) 661-3311 TTY: 1 (866) 872-0113

Kids Help Phone

- Kids Help Phone is Canada's only 24/7 e-mental health service offering free, confidential support to young people in English and French.
- If young people need help right now, they can text a trained, volunteer crisis responder at Kids Help Phone about anything they're going through. No issue is too big or too small.
- Young people can work with a professional counsellor at Kids Help Phone over the phone or through online chat to better understand what they're going through.

Online	Website [3]
Phone	1(800)-668-6868 Text: 686868

2. Counselling Services

Counselling is an invaluable resource for those experiencing distress resulting from legal issues. Some counsellors may also provide integrated case management for those suffering from more severe disorders requiring greater support.

Broadway Youth Resource Centre (BYRC)

Offers counselling and support services in areas of youth and family, anger management, addiction, housing, employment, sexual orientation and/or gender identity issues. These services are offered without charge.

Online	Website [4] E-mail: byrc@pcrs.ca
Address	2455 Fraser Street Vancouver, BC V5T 0E6
Phone	Telephone: (604)-709-5720 Fax: (604) 709-5721

Foundry BC

- Foundry is a province-wide network of integrated health and wellness services for young people ages 12-24.
- Foundry's integrated services make it possible for young people to access five core services in one convenient location: mental health care, substance use services, physical and sexual health care, youth and family peer supports, and social services.
- Young people can access integrated services by walking into one of our 16 local Foundry centres, exploring online tools and resources at foundrybc.ca, or connecting virtually through the free Foundry BC app.

Online	Website [5] Central Office email: info@foundrybc.ca

Other Counselling Options

This PDF provides an excellent list of options for reduced cost counselling services, compiled by Megan Sutherland of Willow Tree Counselling https://willowtreecounselling.ca/ [6]

Online	PDF List [7]

3. Advocacy Resources

Access Pro Bono (Greater Vancouver and Victoria)

Provides advice on rights pertaining to mental health law upon appointment. May also be available for *habeas corpus* applications, s 33 applications under the *MHA*, as well as applications for judicial review of Mental Health Review Board hearing decisions.

Online	Website [8]
Address	300 - 845 Cambie St Vancouver, BC V6B 4Z9
Phone	Toll-free: 1-877-762-6664

Peer Navigator Program (Canadian Mental Health Association)

Provides peer-based support on a wide breadth of issues surrounding mental health, housing, income assistance, legal aid and community connections.

Online	Website [9] Email: peer.navigation@cmha.bc.ca
Address	110 - 2425 Quebec St. Vancouver, BC 5TB 4L6
Phone	(604) 872-3148

Disability Alliance BC

- A self-help umbrella group that raises public awareness about issues affecting people with disabilities.
- Their Disability Law Clinic (DLC) Legal Services program provides free and confidential summary advice and referral services on issues pertaining to accessibility laws, discrimination/human rights, access to services, and accommodation in the workplace.
- A great resource for people with any type of disability (mental or physical) that can provide assistance with a wide range of legal and non-legal issues.
- Clients should contact the Advocacy Access number, below.

Online	Website [10]
Address	1450-605 Robson St. Vancouver, BC V6B 5J3
Phone	(604) 875-0188 TTY: (604) 875-8835 Toll-free: 1-800-663-1278

B.C. Human Rights Clinic (CLAS)

Provides informational services and an advocacy programme to protect human rights and prevent discrimination.

Online	Website [11]
Address	1140 West Pender St. Vancouver, BC V6E 4G1
Phone	(604) 622-1100 Toll-free: 1-855-685-6222 Fax: (604) 685-7611

Community Legal Assistance Society (CLAS)'s Mental Health Law Program

Provides representation for involuntarily detained patients who have tribunal hearings either under the MHA or the mental disorder provisions of the Criminal Code. Other CLAS programs provide free legal services in specific areas such as housing, worker's rights, E.I., sexual harassment in the workplace, and human rights.

Online	Website [12]
Address	1140 West Pender St. Vancouver, BC V63 4G1
Phone	(604) 685-3425 Fax: (604) 685-7611

COAST Foundation Society

Provides a variety of mental health services, including a mental health resource centre and community or shared housing options.

Online	Website [13] Email: info@coastmentalhealth.com
Address	293 East 11th Ave. Vancouver, BC V5T 2C4
Phone	(604) 872-3502 Toll-Free: 1-877-602-6278 Fax: 604-879-2363

Kettle Friendship Society

A non-profit agency providing support and services to those suffering from mental illness. Services include providing housing assistance, employment advocacy and an on-site health clinic.

Online	Website [14]
Address	1725 Venables St. Vancouver, BC V5L 2H3
Phone	(604) 251-2801 Fax: 604-251-6354

Legal Aid BC

- Legal Aid BC is a provincial Crown Corporation. LABC was created by the Legal Services Society (LSS) Act in 1979 to provide legal information, advice, and representation services. Their priority is to serve the interests of people experiencing barriers accessing the legal system. Some of the services are available to all British Columbians.
- Clients can get legal representation if they face prison issues for which the Charter of Rights and Freedoms provides the right to a lawyer.

Online	Website [15]
Address	400-510 Burrard St. Vancouver, BC V6C 3A8
Phone	(604) 408-2172 Toll-free: 1-866-577-2525

Motivation, Power, and Achievement Society (MPA)

Offers information, counselling and representation for Review panels. The Court Services Program assists clients who have a mental health disability during the criminal court process. Clients may also be assisted following court appearances (e.g., with bail or probation orders).

Online	Website [16]
Address	122 Powell St. Vancouver, BC V6A 1G1
Phone	(604) 482-3700 Fax: (604) 738-4132 Court Services: (604) 688-3417

Nidus Personal Planning Resource Centre and Registry

- A non-profit organization that provides information about personal planning, specializing in Representation Agreements and operates a centralized Registry for personal planning documents.
- Website includes self-help guides and templates.

Online	Website [17]

4. Government Resources

British Columbia Review Board

- Makes review dispositions where individuals charged with criminal offences have been given verdicts of "Not Criminally Responsible" (NCR) on account of mental disorder or "Unfit to Stand Trial" (UST) on account of mental disorder, by a court.

Online	Website [18]
Phone	(604) 660-8789 Toll-free: 1-877-305-2277 Fax: (604) 660-8809

Canadian Mental Health Association, BC Division

- Provides recovery-focused programs and services to promote good mental health, and includes resources for youth and adults.

Online	Website [19] Email: info@cmha.bc.ca
Address	905-1130 West Pender St. Vancouver, BC V6E 4A4
Phone	(604) 688-3234 Toll-free: 1-800-555-8222 Fax: (604) 688-3236

Department of Justice

- The Department of Justice website contains all federal statutes, information about the Canadian justice system, and links to related websites.

Online	Website [20]

Guide to the Mental Health Act

- Provides plain-language explanations regarding the *MHA* and its implications for those who are impacted by it.

Online	Website [21]

Representing Clients Impacted by Coercive Mental Health and Substance Use Health Laws: Legal Research and Resource Guide

- A guide by Health Justice that provides an overview of legal research and resources for lawyers and advocates to represent affected clients.
- Downloadable PDF is available at the above link.

Online	Website [22]

Mental Health Review Board

- Responsible for conducting reviews of involuntarily admitted patients under the *MHA*. Their website provides frequently asked questions, rules, and other helpful links.

Online	Website [23]
Phone	(604) 660-2325

Ministry of Health Services

- Downloadable *MHA* forms are available on their website.

Online	Website [24]

Public Guardian and Trustee of BC (PGT)

- An independent, impartial public official and Officer of the Court who serves to balance protection with autonomy and to ensure that people may live as they choose with the support of family and friends.
- Offers **Child and Youth Services**; namely upholds and protects the rights of those under the age of 19 by reviewing all personal injury settlements, legal contracts, trusts and estates involving minors and by ensuring that children are properly represented in all legal matters that affect their lives.
- Acts as guardian of estate for children who are in provincial government care and for those undergoing adoption.
- **Services to Adults** are primarily to uphold the rights of adults who are unable to manage their own affairs. This role includes helping them with financial and legal matters and supporting their lifestyle and health care decisions.
- **Estate Administration** settles the estates of deceased persons when there is no named executor or when there is no one willing or able to act as executor. This includes securing assets, settling debts and claims against the estate and

identifying and locating heirs and beneficiaries.

Online	Website [25]
Address	700-808 West Hastings St. Vancouver, BC V6C 3L3
Phone	(604) 660-4444 Fax: (604) 660-0374

Planned Lifetime Advocacy Network (PLAN)

- Provides advocacy services and up-to-date legal information on wills and estates, trustees and financial planning. PLAN also works with families in developing personal support networks for relatives with disabilities and provides advocacy and monitoring services for families whose parents have passed away.

Online	Website [26]
Address	205-175 East Broadway St. Vancouver, BC V5T 1W2
Phone	(604) 439-9566 Fax: (604) 439-7001

Representative for Children and Youth (RCYBC)

- Supports children, youth and some young adults receiving services or programs provided or funded by government, including addiction services, mental health services, and children and youth with special needs.

Online	Website [27]
Phone	1-800-476-3933

Vancouver Access & Assessment Centre (AAC)

- Located at Vancouver General Hospital, the AAC offers short term treatment on-site, by telephone, and by mobile response. Clinical staff, including registered nurses, social workers, and psychiatrists, provide 24/7 support, stabilization, and crisis management to clients.
- To be eligible for this service, clients need to be:

    * 17 years of age and older,

    * residents of Vancouver.

Online	Website [28]
Phone	1-604-675-3700

References

[1] https://crisiscentre.bc.ca/
[2] https://www.vch.ca/en/service/crisis-response-lines#wysiwyg--15811
[3] https://kidshelpphone.ca
[4] https://pcrs.ca/service-resource-centres/broadway-youth-resource-centre-2
[5] https://foundrybc.ca
[6] https://willowtreecounselling.ca/
[7] https://willowtreecounselling.ca/wp-content/themes/willowtree/reduced-cost-counselling.pdf
[8] http://www.accessprobono.ca
[9] https://vancouver-fraser.cmha.bc.ca/programs-services/peer-navigator/
[10] https://disabilityalliancebc.org/
[11] https://bchrc.net/
[12] http://www.clasbc.net/
[13] http://www.coastmentalhealth.com
[14] http://www.thekettle.ca
[15] http://www.legalaid.bc.ca/
[16] http://www.mpa-society.org
[17] http://www.nidus.ca
[18] http://www.bcrb.ca/
[19] http://www.cmha.bc.ca/
[20] http://www.justice.gc.ca/eng/
[21] https://www.health.gov.bc.ca/library/publications/year/2005/guide-mental-health-act.pdf
[22] https://www.healthjustice.ca/for-lawyers-legal-advocates
[23] https://www.bcmhrb.ca/
[24] https://www2.gov.bc.ca/gov/content/health/health-forms/mental-health-forms
[25] http://www.trustee.bc.ca
[26] http://www.plan.ca
[27] https://rcybc.ca
[28] http://www.vch.ca/locations-services/result?res_id=1186

III. Theory and Approach

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 10, 2023.

Admission to a mental health facility can significantly impact an individual's ability to exercise their rights. Textbooks have advocated for a functional approach to mental health law, encouraging courts to consider solely how the disability may relate to the specific issue brought before them. Incapacity in one area does not necessarily mean incapacity in all areas. Most mental health legislation, however, is over-inclusive, and therefore impairs the rights of mentally ill persons in areas where they might have the mental capacity to act for themselves. The common-law tests for capacity can be found in **Chapter 15: Adult Guardianship** [1].

Section 15(1) of the *Canadian Charter of Rights and Freedoms* [*Charter*] has made it easier to preserve the rights of those affected by mental health law. While most discriminatory legislation in BC remains unchallenged, the *MHA* "deemed consent provisions" and the *HCCFA* and *Representation Agreement Act* "substitute decision making" provisions, was challenged as unconstitutional at the BC Supreme Court (see *MacLaren v British Columbia (Attorney General)*, 2018 BCSC 1753 [2]). This litigation isn't expected to be resolved for quite some time, however. The Attorney General of BC raised the issue of public interest standing in the above case which resulted in the case being dismissed. This decision was appealed to the BC Court of Appeal and the appeal was allowed on the issue of public interest standing in favour of the Council of Canadians with Disabilities (see *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241 [3]). The Attorney General of BC applied for leave to appeal to the Supreme Court of Canada, and the Supreme Court of Canada heard the appeal January 13, 2022. The Supreme Court of Canada released its decision on June 23, 2022. The SCC has held that the Council of Canadians with Disabilities has the standing to challenge the constitutionality of the legislation (see *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27) [4]. However, this litigation is still ongoing and will take time to resolve.

All *Charter* challenges have been directed towards either the *MHA*, the *HCCFA*, or the *Criminal Code*. The Community Legal Assistance Society may be able to assist with serious *Charter* challenges, including test litigation.

References

[1] https://wiki.clicklaw.bc.ca/index.php?title=Introduction_to_Adult_Guardianship_and_Substitute_Decision-Making_(15:I)

[2] https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc1753/2018bcsc1753.html?autocompleteStr=maclaren%20v%20british&autocompletePos=1

[3] https://canlii.ca/t/j9c0x

[4] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/19424/index.do#:~:text=The%20claim%20asserts%20that%20the,of%20a%20substitute%20decision%E2%80%91maker.

IV. Legal Rights

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 11, 2023.

A. Income Assistance

Mentally ill persons may be eligible for benefits under the "Persons with Disabilities" (PWD) or "Persons with Persistent and Multiple Barriers to Employment" (PPMB) designations. Qualification requirements are strict, but decisions concerning eligibility can be negotiated with the Ministry of Employment and Income Assistance, and, if need be, appealed. Generally, a doctor must fill out a specific form indicating that the person qualifies. Disability Alliance BC assists with applications and appeals (for further details, see **Chapter 21: Welfare Law**). There may be strict deadlines for these applications, so it is important to avoid delay in these cases.

B. Employment/Disability Income

If a person cannot work because of mental health issues, the person may be entitled to employment insurance, disability benefits, or CPP disability benefits, or WCB benefits if the mental illness is work related. For information on CPP disability benefits, see **Section IV.D: Canada Pension Plan**, below. Please be advised that there are strict time limits involved when applying for these benefits.

If a person is hospitalized in a psychiatric facility because of an injury at work, they may be eligible for WCB benefits. Please contact the Workers Advisory Group through CLAS for more information, or refer to **Chapter 7: Workers' Compensation**.

C. Employment Insurance

Individuals who are voluntarily or involuntarily admitted to a psychiatric facility may still be eligible to collect Employment Insurance benefits. However, the *Employment Insurance Act*, SC 1996, c 23 is a complex piece of legislation, detailing numerous requirements to qualify for benefits (e.g. number of hours worked, previous claims, unemployment rate, etc.). If a person is denied benefits, it is best to consult a lawyer with specific expertise in these areas (e.g. CLAS). Be aware that there may be strict timelines in applying for benefits or appealing a denial of benefits. For more information, please consult **Chapter 8: Employment Insurance**.

D. Canada Pension Plan

Long-term patients may apply for disability pensions. A claim takes four or five months to process. Hospitalization does not affect a person's right to collect a pension and it is possible to receive CPP benefits for periods of hospitalization. Disability Alliance BC assists people with these applications if they reside in the community. Those who are hospitalized should contact the hospital social worker to assist with these applications as soon as possible, as strict time limits may apply.

E. Driving

A mental disorder does not automatically disqualify a person from driving. The Superintendent of Motor Vehicles—or a person authorized by the Superintendent—has the discretion to deny licences to those deemed "unfit" under section 92 of the *Motor Vehicle Act*, RSBC 1996, c 318. This decision is based on the Canadian Council of Motor Transport Administrators (CCMTA) Medical Standards with BC Specific Guidelines [1]. Each section describes the medical condition(s) under evaluation, the potential effect of the condition(s) on driving ability, and guidelines for assessing driving ability.

Chapter 6 of the Guidelines discusses cognitive impairment (including dementia), while Chapter 14 addresses psychiatric disorders. The national standard allows those with psychiatric disorders to hold a license if their condition is stable, if they possess the insight to stop driving if their condition worsens, and if the faculties required to drive safely are not impaired. The BC Guidelines add that RoadSafetyBC can request a Driver's Medical Examination Report and additional medical information from the individual's doctor or mental health team. The Guidelines also set out the conditions for maintaining a license, for reassessment if a license is lost, and the information that will be sought from health care providers during an assessment.

It is important to note that individuals who have been hospitalized due to a mental health issue must stop driving and report to RoadSafetyBC. Those who suffer a psychotic episode may have to undergo annual re-assessment until their doctor reports that the episodes have abated enough to resume driving. While assessments must rely primarily on clinical evaluations, re-assessment intervals may be determined on an individual basis by RoadSafetyBC. The assessment guidelines, as well as their rationale, can be reviewed online at https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/roadsafetybc/medical-fitness/medical-prof/med-standards/14-psychiatric#14.6.1.

A review of a driver medical fitness decision can be requested at no cost in the event that a medical condition has changed or improved. RoadSafetyBC's adjudicator or a nurse case manager will consider any information provided, but an up-to-date medical assessment from a physician is required.

F. The Right to Vote

Both voluntary and involuntary patients in mental health facilities have the right to vote. This has been the case since *Canada (Canadian Disability Rights Council) v Canada* [2] (1988), 3 F.C 622, where it was decided that a person is not disqualified from voting on the basis that a committee has been appointed for them. Polling stations are normally set up at long-term psychiatric care facilities; because enumeration also takes place at the facility, patients must vote in the riding where the hospital is located.

G. Human Rights Legislation

Under both provincial and federal human rights legislation, it is illegal to discriminate against a person in the protected areas of housing/tenancy, employment, or services customarily available to the public on the basis of mental illness. For information on launching a human rights complaint, see **Chapter 6: Human Rights**.

H. Civil Responsibility

In general, mental incompetence or disability is not a defence to an action for intentional tort or negligence. However, where a certain amount of intent or malice is required for liability, the fact that the defendant lacked full capacity to understand what they were doing may relieve them of liability. A defendant lacking the ability to control their actions will not be liable. Involuntary actions do not incur liability. Anyone responsible for the care of a mentally ill person may be held responsible if the plaintiff proves a failure to take proper care supervising the person.

In civil suits, a guardian *ad litem* may be appointed with permission of the court (can be petitioned by a lawyer) to start or defend an action where a mentally ill person is a party and lacks the capacity to commence or defend that action. A person involuntarily detained under the *MHA* appears to meet the definition in the BC Supreme Court *Rules of Court* of a person under a legal disability for filing or defending a court action. Therefore, the person would need to proceed through a guardian *ad litem*. The guardian *ad litem* could be a friend or a relative of the person, an organization, or another individual chosen and appointed by the court.

Additionally, any person found not criminally responsible by reason of a mental disorder under the *Criminal Code* may not be liable for damages as a result of the offence.

I. Immigration and Citizenship

Section 38 of the *Immigration and Refugee Protection Act* [3] [*IRPA*] deals with inadmissibility on health-related grounds. Pursuant to s 38(1)(c), foreign nationals will be inadmissible if they "might reasonably be expected to cause excessive demand on health or social services." This rule could present a bar to admission for individuals determined to be developmentally delayed or those with a history of mental illness.

However, s 38(2) lists certain exceptions. If a person may be classified as (a) a member of the family class and the spouse, a common law spouse, or a child of a sponsor; (b) a refugee or a person in similar circumstances; (c) a protected person, or; (d) where prescribed by regulation, one of their family members, that person will be exempted from the rule under section 38(1)(c).

Section 38(b) of the *IRPA* sets out that another bar to admission is the likelihood that a health condition could cause danger to public safety. Unlike section 38(1)(c), this provision is not subject to the exemptions under section 38(2). According to guidance used by IRCC staff, mental health conditions are considered likely to cause danger to public safety when they involve uncontrolled or uncontrollable elements, such as:

- certain impulsive sociopathic behaviour disorders;
- some aberrant sexual disorders such as paedophilia;
- certain paranoid states' or some organic brain syndromes associated with violence or risk of harm to others;
- applicants with substance abuse leading to antisocial behaviours such as violence, and impaired driving; and
- other types of hostile, disruptive behaviour.

These definitions, and others, can be sourced from the IRCC website [4].

J. The *Charter*

Sections 7 (the right to liberty), 9 (the right to protection against arbitrary detention) and 15 (the equality provision) of the *Charter* are particularly critical for protecting the rights of the mentally ill. The legal rights protection provisions may also be applicable, including section 12, which concerns cruel and unusual punishment.

The following decisions reflect the way that *Charter* rights have been considered when they conflict with provincial legislation regarding mental health.

Fleming v Reid, (1991) OR (2d) 169 [5] at paras 52-59 addressed the impact of section 7 on provisions of Ontario's mental health legislation. Mentally competent involuntary patients refused treatment despite their doctors' opinion that treatment would be in their best interests. The impugned provision of Ontario's *Mental Health Act*, RSO 1980, c 262 allowed a Review Board to override treatment refusals issued by a substitute consent-giver based on the patient's prior competent wishes. The court held that this provision violated the right to security of the person and was not in accordance with the principles of fundamental justice. However, the disposition of this case has not influenced the application of BC's mental health legislation to date.

In *Mazzei v British Columbia (Director of Adult Forensic Psychiatric)*, 2006 SCC 7 [6] at paras 46-47 [*Mazzei*], it was decided that the Review Boards under the Part XX.1 Mental Disorder provisions of the *Criminal Code of Canada* have the power to issue binding orders to parties other than the accused. This power can be exercised on the director of a hospital who is party to the proceedings; although the Review Board cannot dictate a specific treatment, it can impose conditions regarding treatment. This power was granted to ensure that treatments are culturally appropriate. In *Mazzei*, conditions were imposed regarding drug and alcohol rehabilitation to ensure that the process was appropriately adjusted to the individual's First Nations' ancestry.

A more recent Supreme Court decision, *R v Conway*, 2010 SCC 22 [7] at para 78 [*Conway*] responded to the issue of whether the Ontario Review Board (ORB) under the Mental Disorder Provisions of the *Criminal Code* has the authority to grant remedies under section 24(1) of the *Charter*. The challenge was brought by Paul Conway, an individual found not responsible by reason of a mental disorder in 1983. He argued that his treatment and detention violated his *Charter* rights, and therefore entitled him to an absolute discharge. The Supreme Court developed a test to determine whether an administrative tribunal is authorized to grant *Charter* remedies. The Supreme Court ruled that pursuant to section 24(1), the ORB is a "court of competent jurisdiction", but that an absolute discharge was not a remedy that could be granted by the ORB under the particular circumstances. Ultimately, the *Conway* decision affirms the application of the Charter to administrative tribunals, including the *Criminal Code of Canada', Part XX.1 (Mental disorder provisions)* provincial Review Boards, which includes the British Columbia Review Board (BCRB). However, this decision limits the scope of available remedies under section 24(1) to those that have been specifically granted to a given body by the legislature. In *Conway*, the Review Board could make a determination that the provision was unconstitutional, but did not have the authority to strike it down.

A case in which CLAS acted as an intervener — *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, (2012) 2 SCR 524 [8] at paras 73-74 — opened the door for groups of individuals to bring *Charter* challenges. In this case sex workers were granted public standing as a group to bring *Charter* challenges. This decision impacts people with mental health disorders as well by enabling patients that are detained in mental health facilities to bring *Charter* challenges as a group, rather than being forced to do so on an individual basis. Additionally, organizations can begin an action on behalf of a group of vulnerable people if there is no other way for the issue to be brought before a court.

K. Legal Rights of Those in Group Homes

Throughout the greater Vancouver area, there are many “group homes” run by and/or for persons with mental health disorders who do not require confinement in a provincial mental health facility. Additionally, "Supportive Apartments" are a new tool that the provincial government has been using. These homes, run by groups such as COAST and the Motivation, Power, and Achievement Society (MPA), are governed by the *Community Care and Assisted Living Act*, SBC 2002, c 75. Foster homes and group homes of the provincial government fall under different Acts: the *Child, Family and Community Service Act*, RSBC 1996, c 46 and the *Hospital Act*, RSBC 1996, c 200.

These types of homes have some interesting interactions with the *Residential Tenancy Act*, in that they may or may not be covered on a case by case basis. Because there is no definitive answer at this time, individuals in group homes with tenancy issues should contact CLAS or seek other legal assistance.

Municipalities often place restrictions on the location of group homes. A Winnipeg bylaw requiring a minimum distance between group homes was struck down for violating s 15 of the *Charter* (*Alcoholism Foundation of Manitoba v The City of Winnipeg* (1990), 69 DLR (4th) 697 (Man. C.A.) [9]).

References

[1] https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/roadsafetybc/medical-fitness/medical-prof/med-standards
[2] https://canlii.ca/t/jqrtx
[3] https://laws.justice.gc.ca/eng/acts/i-2.5/
[4] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/medical-requirements/definitions.html
[5] https://www.canlii.org/en/on/onca/doc/1991/1991canlii2728/1991canlii2728.html?resultIndex=1
[6] https://www.canlii.org/en/ca/scc/doc/2006/2006scc7/2006scc7.html?resultIndex=1
[7] https://www.canlii.org/en/ca/scc/doc/2010/2010scc22/2010scc22.html?resultIndex=1
[8] https://www.canlii.org/en/ca/scc/doc/2012/2012scc45/2012scc45.html?resultIndex=1
[9] https://www.canlii.org/en/mb/mbca/doc/1990/1990canlii8022/1990canlii8022.html?resultIndex=1

V. Patient Admission

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 10, 2023.

Admissions to mental health facilities under the BC provincial *MHA* may be either voluntary under section 20 or involuntary under section 22 (see **Section VII** below). Involuntary admission under the *MHA* involves doctors renewing the patients' involuntary admittance status on a regular basis.

Admission can also occur due to a verdict of "Not Criminally Responsible by reason of Mental Disorder" or "Unfit to Stand Trial" for criminal charges, under the Mental Disorder provisions, *Part XX.1, Criminal Code of Canada (CC)*. This is not considered an "involuntary" admission under the *MHA*, but rather an NCRMD or UST admission, under the *CC*. NCRMD and UST will see matters of treatment and release governed by a British Columbia Review Board (BCRB), governed by the Mental Disorder provisions.

Part 3 of the *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181 [*HCCFA*] came into force on November 4, 2019, and it outlines the regulations for admission to a care facility. No person is to be admitted unless they have given consent, substitute consent (by a personal guardian with authority or person otherwise designated by the act) has been given, or the person is admitted on an emergency basis under section 24. Section 25(1) of the *HCCFA* states that if a person in care is capable and expresses a desire to leave—or they are incapable and the person authorized to act as their substitute expresses a desire for them to leave—a manager must not prevent them from leaving.

It should be noted that patients who are initially admitted voluntarily may later have their status changed to involuntary using the admission procedure for involuntary patients. This procedure is described later in this chapter.

A. Charges for Mental Health Services

Section 4 of the *Mental Health Regulations* (BC Reg 233/99) provides a formula for calculating the charges for care of persons admitted voluntarily (under s 20 of the *MHA*) to a mental health facility. The formula is calculated by adding the daily Old Age Security maximum to the daily Guaranteed Income Supplement and multiplying by 85%.

This provision does not authorize or identify any charges for care to be paid by those persons who are admitted involuntarily (*MHA*, s 22). According to *Director of Riverview Hospital v Andrzejewski* (1983), 150 DLR (3d) 535 (BC County Court) [1], section 11 of the *MHA* does not authorize any charges for mental health services where an individual is admitted involuntarily. Please review the *Mental Health Regulations* to determine the authorized charges for different classes of patients (i.e. voluntary and involuntary).

B. Consent to Treatment

Psychiatric treatment is legally considered a type of medical treatment. The *HCCFA* sets out the requirements for consent from the patient before a health care provider can legally provide health care. Generally, adults are presumed to be capable of consenting to treatment, and they have the right to give or refuse consent to treatment. However, there are significant exceptions in the realm of mental health or psychiatric treatment.

The *HCCFA* does not apply to the provision of psychiatric treatment where an individual is involuntarily detained under the *MHA* and/or is on leave from a psychiatric facility or has been transferred to an approved home (*HCCFA* s 2). For those individuals, the director of the relevant psychiatric facility has the right to consent to psychiatric care on the involuntarily detained patient's behalf (see **Section VII**). Additionally, for patients not involuntarily admitted, s 12(1) of the *HCCFA* allows an adult to be treated without their consent in an emergency situation in order to preserve that adult's

life, or to prevent serious mental or physical harm, or to alleviate severe pain, if certain other conditions are met.

References

[1] https://www.canlii.org/en/bc/bcsc/doc/1983/1983canlii3135/1983canlii3135.html?autocompleteStr=Andrzejewski%20&autocompletePos=1

VI. Consent to Medical Treatment

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 10, 2023.

The following subsections apply **only** to patients voluntarily admitted to a mental health facility or voluntarily receiving treatment from a health care/psychiatric service provider. Patients admitted involuntarily lose certain rights (see **Section VII**).

A. Adult's Right to Consent

Every adult is presumed to be capable of giving, refusing or revoking consent to health care and to their presence at a care facility (*HCCFA*, s 3).

Every adult who is capable has the right to give, refuse and revoke consent on any grounds (including moral and religious), even if refusal will result in death (*HCCFA*, s 4).

Every adult who is capable has the right to be involved to the greatest degree possible in all case planning and decision making (*HCCFA*, s 4).

B. Care Provider's Duty to Obtain Consent

A health care provider must not provide health care to an adult without consent, except in an emergency situation or when substitute consent has been given and the care provider has made every reasonable effort to obtain a decision from the adult (*HCCFA*, ss 5, 12).

For consent to be valid, it must be related to the proposed health care, voluntary, not obtained by fraud or misrepresentation, informed (see *HCCFA*, s 6(e)), and consent must be given after an opportunity to make inquiries about the procedure (*HCCFA*, s 6). Informed consent, according to *Reibl v Hughes* [1], [1980] 2 SCR 880 (SCC), requires a medical practitioner to advise the patient of

1. The nature of the procedure;
2. The benefits and risks of the procedure;
3. Any alternatives to the procedure; and
4. The likely prognosis of not having the procedure.

C. Emergency Situations

A care provider may provide care to an adult without the adult's consent in an emergency situation where the adult cannot give or refuse consent, and where no personal guardian or representative is present (*HCCFA*, s 12). If a personal guardian or representative later becomes available and refuses consent, the care must stop (*HCCFA*, s 12(3)).

However, the above does not apply if the care provider has reasonable grounds to believe that the adult, while capable and after attaining 19 years of age, has expressed an instruction or wish applicable to the circumstances to refuse consent to the health care (*HCCFA*, s 12.1).

D. Personal Guardians and Temporary Substitute Decision Makers

A care provider may provide care to an adult without the adult's consent if the adult is incapable of giving or refusing consent and if a personal guardian or representative gives consent (*HCCFA*, s 11).

If a personal guardian or representative refuses consent, the health care may be provided despite the refusal in an emergency if the person refusing consent did not comply with their duties under the *HCCFA* or any other act (*HCCFA*, s 12.2).

A temporary substitute decision maker (TSDM) can be chosen by the care provider in accordance with *HCCFA*, s 16. See *HCCFA*, ss 16-19 for the authority and duties of a TSDM. There is a statutory list of those assigned to be a TSDM, beginning with a spouse, and moving down. More details can be found in **Chapter 15: Adult Guardianship**.

In circumstances where a person with a mental health disorder is judged to be incapable of making a health care decision, the provisions for a substitute decision maker under the *HCCFA* continue to apply. However, if the person is declared an involuntary patient under s 22 of the *MHA*, then psychiatric treatment can be provided under the deemed consent provisions of s 32 of the *MHA*.

E. Consent to Treatment Forms

When admitted to a mental health facility, voluntary patients (or their committees, parents, guardians or representatives) may be asked to sign a "consent to treatment" form, which purports to "authorize the following treatment(s)". There is no basis in law for requiring this form be signed as a prerequisite of a voluntary admission, but the law does not prohibit such a requirement.

Under the *HCCFA*, "An adult consents to health care if

(a) the consent relates to the proposed health care,

(b) the consent is given voluntarily,

(c) the consent is not obtained by fraud or misrepresentation,

(d) the adult is capable of making a decision about whether to give or refuse consent to the proposed health care,

(e) the health care provider gives the adult the information a reasonable person would require to understand the proposed health care and to make a decision, including information about

(i) the condition for which the health care is proposed,

(ii) the nature of the proposed health care,

(iii) the risks and benefits of the proposed health care that a reasonable person would expect to be told about, and

(iv) alternative courses of health care, and

(f) the adult has an opportunity to ask questions and receive answers about the proposed health care." (s 6).

Consent can be given in writing, orally, or inferred from conduct.

1. Refusal to Sign Consent Treatment Form: Possible Consequences

A person who refuses to sign the consent form may be deemed a patient who "could not be cared for or treated appropriately in the facility" under s 18(b) of the *MHA*. This person runs the risk of being refused admission to the facility or being discharged if already admitted.

Under the *Patients Property Act* (*PPA*) hospitals could circumvent the issue of consent by seeking a court order, supported by two medical opinions, to have the patient declared incapable of managing their personal affairs. Minor changes were made to the *PPA* in September 2011. Under the *PPA*, a legal guardian or public trustee is appointed as committee to give consent on behalf of the patient. It is not sufficient for a family member to give consent for a voluntary informal patient without first obtaining legal guardianship or committeeship, or becoming a Representative under the *Representative Agreement Act*, or becoming a substitute decision maker under the *HCCFA*.

A decision from Nova Scotia regarding guardianship found that some of the central provisions of the *Incompetent Persons Act*, R.S.N.S., 1989, c. 218 are unconstitutional (*Webb v Webb*, 2016 NSSC 180 [2]). This legislation allows for the appointment of a guardian where a person is found incompetent (similarly to the *PPA*), but it was found that the legislation was overbroad. It did not allow a court to tailor a guardianship order so that a person subject to that order could retain the ability to makes decisions in respect of those areas in which they are capable. This may have an impact on the application of BC's *PPA* in the future.

Sections 50 to 59 of the *Adult Guardianship Act*, RSBC 1996, c 6 [*AGA*] allow for a person from a designated agency to make unilateral decisions which affect the adult's support and assistance without their consent, including treatment and removal from a residence. For instance, section 56 allows a person from a designated agency to apply for a court order which can determine an adult's mode of treatment. Furthermore, section 59 gives a person from a designated agency broad powers, such as the power to enter their premises without a warrant, to remove them from their premises and convey them to "a safe place", and to provide emergency medical care. This is permitted so long as these powers are exercised within the context of an emergency situation or a context where the adult is incapable of providing consent. See **Chapter 15: Adult Guardianship** for more information.

The facility could also proceed under the *HCCFA* by declaring the patient incapable of consenting, by using a TSDM and/or by claiming that a state of emergency exists such that the patient must be treated without their consent.

References

[1] https://canlii.ca/t/1mjvr

[2] https://www.canlii.org/en/ns/nssc/doc/2016/2016nssc180/2016nssc180.html?resultIndex=1

VII. Involuntarily Admitted

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 10, 2023.

Patients who are admitted to a mental health facility without their consent are admitted involuntarily. The *MHA* provides mechanisms for both short-term emergency admissions and long-term admissions. The *HCCFA* or the *Representation Agreement Act* and all of their requirements regarding consent to treatment do not apply to the psychiatric treatment of involuntarily admitted patients. Involuntarily admitted patients therefore have few legislative rights. However, some provisions of the *MHA* could be challenged under the *Charter*, such as the current CLAS challenge in BC to the "deemed consent" provisions of the *BC Mental Health Act* (see *MacLaren v British Columbia (Attorney General)* [1], 2018 BCSC 1753). The Attorney General of BC raised the issue of public interest standing in the above case which resulted in the case being dismissed. This decision was appealed to the BC Court of Appeal and the appeal was allowed on the issue of public interest standing in favour of the Council of Canadians with Disabilities (see *Council of Canadians with Disabilities v British Columbia (Attorney General)* [2], 2020 BCCA 241). The Attorney General of BC applied for leave to appeal to the Supreme Court of Canada, and the Supreme Court of Canada heard the appeal January 13, 2022. The Supreme Court of Canada released its decision on June 23, 2022. They held that the appeal should be dismissed and awarded special costs on a full indemnity basis to the respondent throughout. The order of the Court of Appeal remitting the question of the respondent's public interest standing to the Supreme Court of British Columbia was set aside and standing was granted to the respondent (see *British Columbia (Attorney General) v Council of Canadians with Disabilities* [3], 2022 SCC 27).

A similar challenge occurred in Ontario, in *PS v Ontario* [4], 2014 ONCA 900. The constitutionality of the provisions of the *Mental Health Act*, R.S.O. 1990, c. M.7, which provided for involuntary committal of long-term detainees, were challenged and found to violate section 7 of the *Charter*. The judgement stated that during an involuntary detention, the patient must be provided meaningful procedural avenues to seek the accommodation and treatment they need to be rehabilitated. It was determined that the province does not have the power to detain mental health patients indefinitely, where such procedural protections are absent. This will likely change the role patients themselves play in determining the course and nature of their treatment in Ontario. It is unclear at this stage what effect this Ontario case may have in British Columbia.

A recent case in British Columbia, *AH v Fraser Health Authority* [5], 2019 BCSC 227 clarified the procedures for detention under amendments to the *AGA*. It found that the Fraser Health Authority's detention of A.H. of nearly a year was not an "emergency measure" as laid out in s 59(2)(e) of the *AGA*, and that such detentions should not last longer than is necessary to apply for a support and assistance order from the Provincial Court.

Section 22 of the *MHA* provides that a person may be admitted involuntarily and detained for up to 48 hours on the completion of one involuntary patient certificate (Form 4 – BC *MHR*). The person must first be examined by a doctor and the doctor must provide a medical certificate stating that they are of the opinion that the person has a mental disorder and requires treatment to prevent "the substantial mental or physical deterioration" of the person or to protect that person or others. A second doctor must provide a second certificate if the person is to be detained for longer than the initial 48 hours. The leading case in this area, *Mullins v Levy* [6] 2009 BCCA 6 at paras 105-110 [*Levy*], applied a broad definition of "examination" and stated that the *MHA* does not require a personal interview of the patient in every instance. However, a patient is entitled to request a Review Panel hearing after the second certificate is completed, in accordance with section 25 of the *MHA*. The involuntary detention can be renewed for one-, three-, and subsequent six-month periods. The involuntarily detained patient has a right to apply for a Review Panel hearing within each renewal period.

When the patient is re-evaluated, the facility must determine whether the involuntary admission criteria still apply and whether there is a significant risk that if the patient is discharged, they will be unable to follow the prescribed treatment plan and be involuntarily admitted again in the future.

The *MHA* also potentially allows involuntarily committed patients to be granted leave or extended leave under certain conditions, as authorized by their doctor. This means that the patient may be permitted to live outside of the facility, but they will still be considered to be involuntarily committed, and will remain subject to the provisions of the *MHA*.

The Mental Health Law Program (MHLP) at CLAS assists involuntarily admitted patients at Mental Health Review Board (Review Panel) hearings. Since 2017, the Attorney General has agreed to fund representation for all involuntarily detained patients who cannot afford counsel at their Review Panel hearings. If CLAS is unavailable to make these representations, they have a roster of contracted lawyers who may provide counsel. Access Pro Bono also provides telephone assistance for people who are facing involuntary detention and seeking information about their rights under the *MHA*.

A. Restraint and Seclusion While Detained Under the *MHA*

British Columbia's *MHA* is silent on the issues of restraint and seclusion. Section 32 merely provides that every patient detained under the Act is subject to the discipline of the director and staff members of the designated facility. Issues surrounding restraint and seclusion have yet to be thoroughly considered in BC, and there are few cases in Canada that address them. In *Levy*, the plaintiff sued a hospital and its staff for negligence, false imprisonment and battery after he was detained and medicated for five days against his wishes when doctors decided he required treatment for mania. Although the plaintiff argued that his *Charter* rights were violated, and he challenged the *MHA* and the *HCCFA* as unconstitutional, the Court did not rule on the *Charter* arguments. The plaintiff's claim was denied at the BCCA on factual grounds, and the Supreme Court declined to hear his appeal.

This leaves the patient's rights in the hands of facility policymakers. Such policy focuses on the benefits that seclusion may give to a patient for treatment purposes and regard is given to the safety of hospital staff. The uncertainty of the law in this area, combined with a serious potential for the deprivation of patients' rights, leaves open the possibility of a *Charter* argument to uphold patients' rights in the future.

B. Short-Term and Emergency Admissions

A person may be detained in a psychiatric facility upon the receipt of one medical certificate signed by a physician or nurse practitioner (*MHA*, s 22(1)). Such involuntary confinement can last for a maximum of 48 hours for the purposes of examination and treatment. A second medical certificate from another physician is required to detain the patient for longer than 48 hours (*MHA*, s 22(2)). As an alternative to the admissions criteria under the MHA, a patient may be given emergency treatment under section 12 of the *HCCFA* if they have not been involuntarily admitted. As of November 4, 2019, a person can also be admitted in the case of emergencies under section 24 of the *HCCFA*.

1. Authority of a Police Officer

If a police officer believes a person has an apparent mental disorder and is acting in a manner likely to endanger that person's own safety or the safety of others, the police officer may apprehend and immediately take the person to a physician or nurse practitioner for examination, which includes admission to a psychiatric facility for examination by a physician there. (*MHA*, s 28(1)).

A person apprehended under s 28(1) of the *MHA* must be released if a physician or nurse practitioner does not complete a medical certificate in accordance with section 22(3) and 22(4) of the *MHA*.

2. Authority of a Provincial Court Judge

Anyone may apply to a Provincial Court judge to issue a warrant authorizing an individual's apprehension and conveyance to a mental health facility for a period not exceeding 48 hours. To grant this warrant, the judge must be satisfied that admission under section 22 is not appropriate and that the applicant has reasonable grounds to believe that sections 22(3)(a)(ii) and (c) of the *MHA* describe the condition of the individual (see *MHA*, s 28(4)).

C. Application for Long-Term Admissions

A person can be admitted to a facility by the director of a provincial health facility on receipt of two medical certificates (Forms 4.1 and 4.2 under the *MHR*), each completed by a physician or nurse practitioner in accordance with s 22(2), (3), and (5). The patient will be discharged one month after admittance unless the detention is renewed (Form 6 under the *MHR*) in accordance with s 24 of the *MHA*.

> **NOTE**: Please note that Form 4 could be used instead of Forms 4.1 and 4.2. However, the old Form 4 will continue to be legally valid for physicians to complete **until January 31st, 2024**, after which point Form 4.1 and Form 4.2 must be used.

D. Contents of Medical Certificates (*MHA*, s 22 (3))

The certificates must contain:

1. A physician's or nurse practitioner's statement that
    a) the individual was examined on the date or dates set out, and
    b) the physician or nurse practitioner is of the opinion that the person to be admitted has a mental disorder;
2. An explanation of the reasons for this opinion; and
3. A separate statement that the physician or nurse practitioner believes the individual requires medical treatment in a provincial mental health facility
    a) to prevent the person's substantial mental or physical deterioration,
    b) to protect the person, or to protect others, and
    c) that the individual cannot be suitably admitted as a voluntary patient.

For admission to be valid, the physician or nurse practitioner who examined the person must sign the medical certificate (Form 4.1) and must have examined the patient not more than 14 days prior to the date of admission. For a second medical certificate (Form 4.2) to be valid, it must be completed within 48 hours of the patient's admission. The *MHA* does not provide guidance about the type of examination required, nor does it require that the patient be informed of the purpose of the examination or that the examination is even being conducted. This practice has been the subject of a *Charter* challenge in the past, but the case was dismissed for other reasons (see *Levy*).

The *MHA* is currently under revision, which may affect the list of requirements with respect to medical certificates needed for involuntary admissions. Please consult the Table of Legislative Changes [7] to see updates on the *MHA*.

E. Consent to Treatment

Under section 31, a patient who is involuntarily detained under the *MHA* is deemed to consent to any treatment given with the authority of the director. This will override any decisions made by a patient's committee, personal guardian, temporary substitute decision maker, or representative.

An involuntary patient, or someone acting on their behalf, may request a second medical opinion on the appropriateness of the treatment authorized by the director. Under s 31(2) a patient may request a second opinion once during each detention period. Under s 31(3) upon receipt of the second medical opinion, the director need only consider whether changes should be made in the authorized treatment for the patient. There is no statutory right of appeal from the director's decision to treat the involuntary patient. Currently, this issue is the subject of a *Charter* challenge. A decision has yet to be made regarding the issue. Please refer to *MacLaren v British Columbia (Attorney General)* [1], 2018 BCSC 1753 and *British Columbia (Attorney General) v Council of Canadians with Disabilities* [3], 2022 SCC 27.

F. Right to Treatment

Section 8 of the *MHA* requires directors to ensure that patients are provided with "treatment appropriate to the patient's condition and appropriate to the function of the designated facility." However, what constitutes "appropriate treatment" is not clearly set out by the *MHA*, leaving the parameters uncertain. It is unclear what would constitute a failure to provide treatment and whether a facility would be bound to discharge a patient should a failure be found.

A patient held without any treatment whatsoever may be able to claim civil damages on the basis of non-administration of treatment, constituting a breach of a statutory duty. Decisions regarding what amounts to appropriate treatment fall within the discretion of the institution. However, it is important to note that the common law of medical malpractice applies to treatment administered in a mental health facility, thus imposing certain limitations on that discretionary power.

G. Right to be Advised of One's Rights

Pursuant to section 34 of the *MHA* and Form 13 under the *MHR*, directors must fully inform patients orally and in writing of their s 10 *Charter* rights and of the *MHA* provisions relating to duration, review, and renewal of detention; review hearings; deemed consent and requests for second opinions; and, finally, court applications for discharge. Directors are bound to ensure that patients are able to understand these rights.

British Columbia has also recently introduced legislation that will allow amendments to the MHA so that people involuntary admitted under the act will be given the option to meet with and access support from an independent rights advisor. This service is expected to be available in 2023 and will be delivered by a team of independent rights advisors who will provide information and answer questions regarding rights and obligations under the *MHA*.

H. Transfer of Patients or Extended Leave

Section 35 of the MHA gives the director authority to transfer a patient from one facility to another when the transfer is beneficial to the welfare of the patient. Under s 37, a patient may be given leave from the facility (no minimum or maximum periods are specified). Under s 38, a patient may also be transferred to an approved home under specific conditions.

A person released from a provincial mental health facility on leave or transferred to an approved home is still considered to be admitted to that facility and held subject to the same provisions of law as if continuing to reside at the mental health facility (*MHA* s 39(1)). The patient is still detained under the *MHA* and will be subjected to treatment authorized by the director, which is still deemed to be given with the consent of the patient. If the conditions of the leave or transfer are not met, the patient may be recalled to the facility they are on leave or were transferred from, or they may be sent to another authorized facility (*MHA* s 39(2)). There is no statutory obligation on the facility to inform the patient that the leave is conditional or has expired, raising the possibility that a patient may unknowingly violate the terms of their leave.

Under section 25(1.1), if a patient has been on leave or in an approved home for more than 12 consecutive months without a request for a review panel hearing, their treatment record must be reviewed by the Mental Health Review Board. If the Mental Health Review Board believes there is a reasonable likelihood that the patient could be discharged, a Review Panel must be conducted. In practice, however, the Review Panel ordinarily contacts the patient to ask if they would like a hearing.

I. Discharge of Involuntary Patients

1. Through Normal Hospital Procedure

The director may discharge or grant leave to a person from an institution at any time (ss 36(1) and 37 of the *MHA*). Under section 23, "a patient admitted under s 22 may be detained in a provincial mental health facility for one month after the date of their admission, and they shall be discharged at the end of that month unless the authority for their detention is renewed in accordance with s 24". A doctor must renew that authority for further periods of one month, then three months, and then six months.

2. Through a Review Panel Hearing

An involuntary patient is entitled to a Review Panel hearing before a Mental Health Review Board (MHRB). Generally, a patient is entitled to one hearing during each period of involuntary detention. The application for a Review Panel hearing may be made by the patient or by someone acting on the patient's behalf (*MHA*, s 25). The application is completed by filling out an "Application for Review Panel Hearing" (Form 7 under the *Mental Health Regulations*), Section 6 of the *MHR* sets out the requirements for scheduling a Review Panel hearing.

A Review Panel hearing takes place before a MHRB panel of three people, which according to section 24.1(3) of the MHA, must include

- a medical practitioner or a person who has been a medical practitioner,
- a member in good standing with the Law Society of British Columbia (or a person with equivalent training) and
- a person who is not a medical practitioner or a lawyer.

Under the *MHA*, the Minister appoints the Chair and all the legal, medical and community members authorized to sit as MHRB members. The Chair serves full-time and the members serve part-time. The Chair appoints three members for each Review Panel hearing from the list of people previously chosen by the Minister.

To maintain a quasi-judicial character, it is policy that those who sit on the MHRB do not have access to the patient prior to the hearing. Decisions are based on evidence and testimony presented at the hearing only. Section 24.3 of the *MHA* gives the MHRB power to compel witnesses and order disclosure of information.

The hospital's position is usually presented by another medical practitioner acting as the hospital's representative; this case presenter is ordinarily the involuntarily detained person's attending psychiatrist. The involuntary patient has a right to representation by a lawyer or trained legal advocate who can present the patient's position at the hearing.

The MHRB members generally rely on the hospital presenter and the patient's counsel to provide documents and evidence during the Review Panel hearing. However, the MHRB may order disclosure of records that are relevant to making a decision. Under the *MHA*, the MHRB has the authority to order the production of documents, while the parties appearing before the MHRB have document disclosure obligations under the Rules of Practice and Procedure.

Procedure at review panel hearings is subject to the principles of fundamental justice under section 7 of the *Charter* and to due process under the common law, as well as the provisions of the *Administrative Tribunals Act* listed under s 24.2 of the *MHA*. Patients also must know the evidence that will be presented at the Review Panel hearing with sufficient time in advance of their hearing in order to have an opportunity to prepare a response and challenge that evidence.

The Mental Health Review Board (MHRB) has also developed MHRB Rules of Practice and Procedures, and Practice Directions, which are available on the MHRB website [8].

a) Patients' Rights at Review Panel Hearings

Legal Respresentation

If a patient is represented, the MHRB and facility will communicate with the patient representative on all issues regarding the hearing. This representative need not be a lawyer. Representation at a panel is provided free of charge by CLAS' Mental Health Law Program within the lower mainland or on an *ad hoc* basis outside of the lower mainland (see **Section II.B.2: Resources** for contact information).

Patients may be represented by advocates from the Mental Health Law Program (MHLP). Patients may also choose to hire a lawyer or ask a family member, friend, or other person to represent them.

Review Panel Hearing Attendance

Most review panel hearings occur by video, via an online platform such as Zoom. Accommodations for disabilities or other reasons that would make a video hearing inappropriate can be sought by application to the Chair.

The fundamental principles of justice dictate that one has a right to appear at one's own hearing. However, under section 25(2.6) of the *MHA*, the chair of the Review Panel may exclude the patient from the hearing or any part of it if they are satisfied that exclusion is in the patient's best interests. This power is rarely exercised; when it is, it is often done in accordance with the patient's wishes, as Review Hearings may cause a lot of distress.

The patient or counsel can call witnesses to give evidence in support of the patient's argument for discharge. A patient representative who wants to call a witness must make arrangements for their attendance. A witness may attend in person or by electronic means.

Document Disclosure

Presumptively, patients also have the right to access all documents regarding their hearing prior to the hearing. For self-represented patients, under *Rule 15* of the Mental Health Review Board Rules of Practice and Procedure, the facility must provide the patient adequate time and an appropriate location for document review prior to the hearing. Facilities also have an obligation to provide all disclosure in its possession as early as possible and no later than 24 hours prior to the hearing.

Access the Mental Health Review Board Rules of Practice and Procedure at https://www.bcmhrb.ca/app/uploads/sites/431/2020/01/BC-MHRB-Rules-of-Practice-and-Procedure-effective-Jan-31-2020.pdf

Facilities have an obligation to disclose copies of all relevant records in their possession or control as early as possible and no later than 24 hours before the start of the hearing, or in exceptional circumstances, no later than 30 minutes prior to the start of the hearing. Facilities' disclosure obligations are triggered after receiving a hearing notice from the MHRB. If a facility has decided to limit disclosure, it must notify and explain to the patient or their representative the exceptional circumstances that justify limits on disclosure.

Documents obtained through the disclosure process are confidential and must only be used for the purposes of the hearing, except with the consent of the patient, or by order of the MHRB. More information about disclosure can be found at https:/ / www. bcmhrb. ca/ app/ uploads/ sites/ 431/ 2020/ 01/ Practice-Direction-Guidelines-for-Disclosure-effective-Jan-31-2020.pdf.

A patient representative who wants to refer to a document at a hearing must provide a copy of that document to the facility as early as possible and no later than 24 hours before the start of the hearing, or in exceptional circumstances, no later than 30 minutes prior to the start of the hearing.

Case Note

A facility must provide a written summary of the evidence it intends to present at a hearing ("case note") to the patient or their representative no later than 24 hours before the start of the hearing, or in exceptional circumstances, no later than 30 minutes prior to the start of the hearing. When all or part of a hearing proceeds by electronic means, the facility must make every effort to disclose a copy of the case note to the MHRB and any participant no later than 24 hours prior to the scheduled hearing.

Documents to Be Disclosed prior to Review Panel Hearings

Any document referred to or relied on in a case note or by a case presenter is considered a Relevant Document and must be disclosed 24 hours in advance of the hearing. A non-exhaustive list of Relevant Documents may include:

- Forms (Forms 4, 4.1, 4.2 and 6)
- Other Forms (Forms 11, 12 and 21)
- Medical reports, including attending physician reports
- Past admission/discharge notes and summaries
- Psychiatric Progress reports
- Mental Health Team assessments
- Attending physician notes
- Therapy notes
- Any document that will be referred to or relied on in the case note and presentation

Review Panel Hearing Postponement

A patient or a patient representative may apply to postpone a hearing. Unless the Board otherwise directs, an application to postpone made within two business days of a scheduled hearing must be in writing and state:

(a) why the request is reasonable; and

(b) why granting the request will not unduly prejudice the other participants.

At the request of a patient or patient representative, the Board will reschedule a postponed hearing as soon as reasonably practicable thereafter, but not later than:

(a) 14 days in a one-month certification period; and

(b) 28 days in a three-month or six-month certification period.

Review Panel Decision

Within 48 hours of the hearing, the Review Panel must decide (by majority vote) whether the patient's involuntary detention should continue. Decisions must be in writing. Reasons must be provided no later than 14 days after the hearing. Section 25(2.9) of the *MHA* compels the panel to deliver a copy of the decision without delay to the mental health facility's director, as well as to the patient or their counsel. If the decision is that the patient be discharged, the director must immediately serve a copy of the decision on the patient and discharge them.

b) What the Review Panel Must Consider

Involuntary Patient Status

Under section 25(2) of the *MHA*, the Review Panel is authorized to determine whether the detention of the patient should continue. The patient's detention must continue if sections 22(3)(a)(ii) and (c) continue to describe the patient. Section 22(3)(a)(ii) requires that the person or patient is a person with a mental disorder.

The MHA defines a person with a mental disorder as a person who has a disorder of the mind that requires treatment and seriously impairs the person's ability to either react appropriately to the person's environment or to associate with others. Section 22(3)(c) adds three more criteria that are required for involuntary patient status. That is, the patient is a person with a mental disorder who

> (i) requires treatment in or through a designated facility,
>
> (ii) requires care, supervision and control in or through a designated facility to prevent the person's or patient's substantial mental or physical deterioration or for the protection of the person or patient or the protection of others, and
>
> (iii) cannot suitably be admitted as a voluntary patient.

A Review Panel hearing must be conducted notwithstanding any defects in authority (Forms 4.1 and 4.2 as well as Form 6) for the initial or renewed detention pursuant to section 22 of the *MHA*.

Compliance with Treatment Plans

The Review Panel must consider the past history of the patient, including their past history of compliance with treatment plans. The panel must assess whether there is a significant risk that the patient will not comply with treatment prescribed by the director. Presumably, if the panel concludes that there is a significant risk that the patient will not comply with the director's treatment plan, it is open to them to conclude that sections 22(3)(a)(ii) and (c) continue to describe the patient. Again, the *MHA* amendments have made the criteria for detention broader and it seems likely that it is more difficult for patients to end their detention under the *MHA*.

Serious Impairment

Please note that the following information is subject to change due to the ongoing litigation:

The BC Supreme Court previously held that the Review Panel board members have an obligation to determine whether or not the legal criteria to be an involuntary patient are met at the time of the hearing, not whether they were ever seriously impaired at some point in the past (see *AT v British Columbia (Mental Health Review Board)* [9], 2021 BCSC 1680). This decision thus affects the interpretation of the serious impairment criteria whether a person is 'seriously impaired' by the mental disorder — by clarifying that the assessment of whether or not one is seriously impaired should occur at the time of the hearing. This judicial review decision was vital as prolonged detention under the *MHA* on the basis that one met the criteria for involuntary patient status instead of their current condition, could have disturbing results.

Under a more recent decision in *AT v British Columbia (Mental Health Review Board)* [10], 2022 BCSC 1905, the status of "person with a mental disorder" under section 1 of the *MHA* would be granted if a patient demonstrates "seriously impairing, active symptoms of a mental disorder" (para 154). This decision affects patients who might be asymptomatic during their review panel hearings but have been experiencing active, seriously impairing symptoms in the past. In addition, an involuntary patient may meet the definition of "person with a mental disorder" when there is a significant risk that they will fail to follow their treatment plan if discharged. The possibility of failing the treatment plan may be regarded as "seriously impairing" under section 1 of the *MHA*.

3. Through Court Proceedings

A person may apply to the Supreme Court for a writ of *habeas corpus*, which is a writ requiring a detained person to be brought before a court to evaluate the lawfulness of the involuntary detention based on the documents used to support the detention. This is most suitable where there were procedural defects in the patient's admission or defects in the involuntary detention certificates (Forms 4.1 and 4.2 as well as Form 6 under the *MHR*). *AH v Fraser Health Authority* [5], 2019 BCSC 227, discussed above, is an example of a case involving a writ of *habeas corpus*. If the Court finds that the detaining authority did not adhere to the statutory requirements for involuntary detention, this may constitute grounds for an action in false imprisonment and civil battery for unauthorized treatment, and the patient may be entitled to an award of damages (*Ketchum v Hislop* [11] (1984), 54 BCLR 327 (SC)).

Under section 33 of the *MHA*, a request can be made to the Supreme Court for an order prohibiting admission or directing the discharge of an individual. This request may be made by a person or patient whose application for admission to a mental health facility is made under section 20(1)(a)(ii) or section 22, by a near relative of a person or patient, or by anyone who believes that there is not sufficient reason for the admission or detention of an individual.

Legal Aid BC and Access Pro Bono may be available for *habeas corpus* applications, section 33 applications under the *MHA* and applications for judicial review of Mental Health Review Board hearing decisions. Please see the "Advocacy Resources" section for more details.

J. Escapes From Involuntary Detention

1. Apprehension Without a Warrant

A patient, detained involuntarily in a mental health facility who leaves the facility without authorization is, within 48 hours of escape, liable to apprehension, notwithstanding that there has been no warrant issued (*MHA*, s 41(6)).

2. Warrant Constituting Authority for Apprehension

Where a person involuntarily detained has been absent from a mental health facility without authorization, the director of the facility may within 60 days issue a warrant for apprehension; this warrant serves as authority for the apprehension and conveyance of the person back to the facility (*MHA* s 41(1)).

3. Patient Considered Discharged After 60 Days

A patient is deemed to have been discharged if they have been absent from the facility for over 60 days without the issuance of a warrant (*MHA* s 41(3)). However, if the patient is "charged with an offence or liable to imprisonment or considered by the director to be dangerous to [themselves] or others," the person is not deemed discharged and a warrant may still be issued.

4. Aiding Escapees

Under section 17 of the *MHA*, any person who helps an individual leave or attempt to leave a mental health facility without proper authority, or who does or omits to do any act that assists a person in so leaving or attempting to leave, or who incites or counsels a patient to leave without proper authority, commits an offence under the *Offence Act*, RSBC 1996, c 338.

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VIII. Youth

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 11, 2023.

The provisions for voluntary and involuntary detention under the *MHA* apply identically to adults and children ages 16 or older. Children 16 and older may request admission to a mental health facility and, if a physician finds that they have a mental disorder, they can be voluntarily admitted; they may also be discharged at their own request (*MHA* s 20(6)(a)).

A child over the age of 16 may be involuntarily admitted to a mental health facility when they meet the criteria set out under section 22 of the *MHA*. Please see **Section VII** for the requirements for admission as an involuntary patient.

There are special provisions under the *MHA* for voluntary and involuntary admission of children under the age of 16 to mental health facilities.

For plain language descriptions of voluntary and involuntary detention for youth, and for further information regarding the impact of the Mental Health Act on youth, please review the 2021 report issued by the Representative for Children and Youth, entitled "Detained: Rights of children and youth under the *Mental Health Act*" [1].

A. Involuntary Admission of Youth

Children under the age of 16 can be admitted to a mental health facility via the same provisions that permit detention of adults. Children under 16 who are involuntarily detained have the same right to receive notice (*MHA* s 34.1). The child must be informed both orally and in writing of the name and location of the facility they have been admitted to, their rights under section 10 of the Charter, and the provisions of sections 21, 25, 31, and 33 of the *MHA*.

Review Panel Hearings for Youth

Section 21 of the *MHA* advises the child that if they request to leave the facility, they are entitled to a hearing by review panel within the statutorily mandated time frames to determine whether their detention should continue. The process of a hearing by review panel is described under section 25 of the *MHA*. Section 31 advises the child that treatment authorized by the director is deemed to be given with the consent of the patient, that they may request a second medical opinion on the appropriateness of their treatment once in each detention period, and that the director must consider whether the second opinion merits changes to the authorized treatment. Section 33 notifies the child that they can apply to the court for a discharge and explains how this action would proceed.

The above-mentioned report released by the Representative for Children and Youth highlights that children detained under the *MHA* feel unheard and uninformed in spite of the obligation to inform children of their rights and in spite of the procedures for reviewing their detention. An investigation by CLAS was cited in support of the view that health care providers have inadequate education, training, and time to advise children of their rights (Community Legal Assistance Society, Operating in Darkness: BC's *Mental Health Act* Detention System (Vancouver, 2017), 67 [2]), and that this has significant consequences for children involuntarily detained under the *Act*. Children face significant barriers to exercising their rights, including barriers to accessing legal representation.

To address these concerns, the MHRB has employed a Navigator commencing May 2023 who is working to assess the needs of children and youth applicants. The Navigator is the point person for all communications and coordination of children and youth applicant hearings from the time of filing of the application for hearing to the conclusion of the hearing. The Navigator has ongoing communication with the applicant and participants regarding the process steps, the Board's Rules of Practice and Procedure, the incorporation of any children and youth protocols and practices, and the

implementation of any reasonable accommodations including cultural, spiritual, emotional, language-related, and technical.

In addition, the facility and the patient or their representative are to attend a pre-hearing conference with the Navigator, as necessary, for hearings involving children and youth. The pre-hearing conference may be by telephone or other method set by the MHRB and at a time set by the MHRB. The purpose of the pre-hearing conference is to address any reasonable accommodation requests by the applicant, outstanding disclosure or witness issues, or any other issues raised by the parties to ensure that the applicant is provided trauma-informed, procedurally fair, and timely access to justice.

The MHRB has special obligations in relation to children under the *United Nations Convention on the Rights of the Child*. To honour these obligations, the MHRB has issued Practice Direction – Children in Hearings [3]. This Practice Direction describes the procedures that must be followed by all participants to ensure a child-centred approach to review panel hearings when applications are made by children who under the age of 19 years.

Guiding Principles of Review Panel Hearings for Youth

- Best Interests of Child:

  the hearing process is oriented to the needs and best interests of the child. This approach must account for the child's individual needs, abilities, age, maturity, language, and culture. In particular, it must account for the rights of Indigenous children under the *United Nations Declaration on the Rights of Indigenous Peoples*.

- Minimize conflict:

  the hearing process is designed to minimize and reduce the duration of conflict the child experiences and any negative impact on the child.

- Preserve Relationships:

  participants must conduct themselves with honesty and integrity, and must not act in a manner that would undermine the MHRB's processes. Participants must treat all persons in the hearing with courtesy and respect. The hearing process, in and of itself, does not increase family conflict or harm the child's relationship with their healthcare providers or caregivers.

- Voice, fairness, and safety:

  the child has the right to participate in a hearing process that is respectful, fair, and safe. A child capable of forming their own views has the right to express those views and to have those views be given due weight in accordance with their age and maturity. The child must have the opportunity to have their views and preferences heard, either directly or through a representative.

- Accessible, proportionate, and timely:

  the hearing process is understandable and explained to the child in a developmentally appropriate manner. There should be proportionality between the issues to be resolved and the processes used to resolve them. Decisions affecting a child are to be made in a timely way that is appropriate to the child's sense of time and in accordance with the *Board's Rules of Practice and Procedure* [4].

Direction for Review Panel Hearings for Youth

- Notice:

  participants must notify the MHRB immediately when an application for a review panel hearing is made by a child. Participants include the child's representative, case presenters, and facility representatives.

- Guiding Principles:

  participants must apply these Guiding Principles to every hearing involving a child. All participants must ensure the child has the opportunity to be heard and consulted, either directly or through a representative, in all matters of process and substance affecting the child in light of such factors as their age, maturity, culture, language, or any individual need.

- Flexible Process:

  participants must expect a flexible process for hearings involving a child. The Board and panel will apply a flexible process to ensure that the Guiding Principles infuse every review panel hearing involving a child. For example, this may result in shorter hearings or the participation of guardians in appropriate cases.

- Process to request that Guardians attend the hearing:

  if either party wishes a guardian to be present for all or part of the hearing, the guardian must be available at the beginning of the hearing. The party advocating for the guardian to attend, must, at the beginning of the hearing, provide the reasons to the panel members that the attendance of the guardian is helpful and in the best interests of the child. The panel will then rule on whether the guardian is to be present or not, and will also rule on whether the guardian will be attending in the role of a witness (attendance is limited to providing evidence) or is attending as an observer (cannot give evidence).

B. Voluntary Admission of Youth

Children under the age of 16 can be admitted to a mental health facility under the same provisions that permit voluntary detention of adults. However, there is another way for youth to be "voluntarily" admitted to a health facility. At the request of a parent or guardian, a child can be admitted to a mental health facility on a voluntary basis if the examining physician determines that the child has a mental disorder (*MHA* s. 20). This is considered a voluntary detention because parents have the legal right to make decisions on behalf of their children; however, this does not mean that the detention is considered voluntary by the child. Because the parents consented to the detention on behalf of the child, they are also able to remove the child at any time. If a parent or guardian requests that the child be discharged, the request must be followed unless the director is satisfied that the child meets the conditions for involuntarily admitting a patient over the age of 16.

The "deemed consent to treatment" provision under section 31 of the *MHA* does not apply to children who are detained at the request of their parents. Consent must come from the child's parents, unless the child is considered a mature minor with the capacity to engage in their own decision-making. A mature minor is a child under the age of 16 who has been found to have legal capacity and the right to decision-making autonomy commensurate with their intelligence and maturity (*A.C. v. Manitoba (Director of Child and Family Services)* [5], 2009 SCC 30). Children who are mature minors have the authority to consent to their own treatments. Their right to consent cannot be overridden by the parent or guardian, medical team, or the director without a court order. The Infants Act allows doctors to attain consent from mature minors who understand the nature and consequences of a given treatment as well as its potential risks.

In a way, this provides children with more protection than those over the age of 16. Rather than being subjected to the "deemed consent" treatments required by the director, which prevent adults from having a decision-maker act on their

behalf, parents are able to consent to treatments on behalf of the child. Alternatively, children who are considered mature minors may consent to their own treatments.

However, this pathway to detention in a mental health facility raises the concern that the detention is not truly voluntary, even if it is voluntary in name due to consent by the parents, because the patient themselves has not consented or voluntarily admitted themselves.

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IX. Criminal Code

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 11, 2023.

A. Fitness to Stand Trial

An accused is presumed fit to stand trial until the contrary is proven on a balance of probabilities (*Criminal Code*, s 672.22 of the *Criminal Code*). The burden of proof is on whoever side raises the issue, either the accused or Crown Counsel (*Criminal Code*, s 672.23(2)).

An accused is deemed “unfit to stand trial” under s 2 of the *Criminal Code* if they are incapable of understanding the nature, object, and possible consequences of the criminal proceedings, or if they are unable to communicate with counsel on account of mental illness. If the court reaches the verdict that the accused is unfit to stand trial, any plea that has been made will be set aside and the jury will be discharged (*Criminal Code* s 672.31). Under section 672.32, the accused may stand trial once they are fit to do so. For a detailed outline of the tests for fitness, see *R. v Taylor* (1992), 77 CCC (3d) 551 [1].

In *R. v. Daley*, 2019 NBCA 89 [2], the court has highlighted the preferred interpretation of the test for fitness. The court has adopted an approach from *R. v. Morrissey*, 2007 ONCA 770 [3] in which the accused’s communication abilities must permit them to seek and receive effective legal advice. In other words, their ability to meaningfully be present and participate in the trial should be considered. For more information on the test for fitness to stand trial, see *R. v Kampos*, 2020 BCSC 1437 [4] at paras 19-24.

The court may order a trial (not an assessment) on the issue of the accused’s fitness to stand trial at any stage in the proceedings prior to a verdict, either on its own motion or on an application of either the prosecution or the defence (*Criminal Code* s 672.23).

If a person is found unfit to stand trial, they may be detained in a mental health facility until they recover enough to be able to proceed with the trial (*Criminal Code*, s 672.58). However, the court cannot make a disposition order to have an accused detained in a health facility without the consent of the hospital or a treating physician (*Criminal Code*, s 672.62(1)). A recent Supreme Court of Canada case, *R v Conception*, 2014 SCC 60 [5] (at para 3), confirmed the need for

such consent. The court found that "[t]he hospital consent was required for the disposition order in its entirety, and not simply the treatment aspects of it." The exception to this is the rare case in which a delay in treatment would breach the accused's rights under the Charter and an order for immediate treatment is an appropriate and just remedy for that breach. An inquiry by the court must be held no later than two years after the verdict of "unfit" and every two years afterward. The court may now extend the period for holding an inquiry where it is satisfied that such an extension is necessary to determine whether sufficient evidence can be adduced to put the person on trial (*Criminal Code*, s 672.33).

After the court deems a person unfit to stand trial, a disposition hearing must be held by the Review Board within 45 days, taking into account the safety of the public and the condition and needs of the accused. While the term in section 672.54 "least onerous and least restrictive" has been replaced by "necessary and appropriate", the intent of the legislation has not changed, as explained below in **C. Disposition Hearings after NCRMD**.

The BC Court of Appeal considered a Review Board decision regarding custody in a fitness case; *Evers v British Columbia (Adult Forensic Psychiatric Services)*, 2009 BCCA 560 [6]. The BCAA stated that the Review Board erred in proceeding with a disposition hearing in the absence of the accused without first attempting to ensure the accused's presence by issuing a warrant or allowing a short adjournment. Further, the court stated that fear of non-compliance with medical treatment cannot be the main objective motivating a custody disposition order, nor can the Review Board impose treatment as a condition on the accused.

In *R v Demers*, 2004 SCC 46 [7], the court found that the former sections 672.33, 672.54 and 672.81(1) violated the Charter rights of permanently unfit, non-dangerous accused persons. The court wanted to ensure that an accused found unfit will not be detained unnecessarily when they pose no risk to the public. Pursuant to this decision, these sections have been amended.

A Review Board may now make a recommendation to the court to enter a stay of proceedings if it has held a hearing and is of the opinion that the accused remains chronically unfit and does not pose a significant threat to public safety. Notice of intent to make such a recommendation must be given to all parties with a substantial interest in the proceedings (*Criminal Code*, s 672.851).

The Review Board, the prosecutor, or the accused may apply for an order of assessment of the accused's mental condition if necessary to make a recommendation for a stay of proceedings, or to make a disposition if no recent assessment has been made (*Criminal Code*, s 672.121). A medical practitioner or any person designated by the Attorney General may also make an assessment. An assessment order cannot be used to detain an accused in custody unless it is necessary to assess the accused, or unless the accused is already in custody, or it is otherwise required.

An appeal from an order for a stay of proceedings may be allowed if the Court of Appeal finds the assessment order unreasonable or unsupported by evidence.

A recent case (*R v JJG*, (2014) BCSC 2497 [8]at paras 17-27) considered the issue of whether statements made by an accused during the fitness to stand trial hearing are admissible in the trial. In this case, the accused made an admission of guilt during the fitness hearing. The court ruled that the statements were inadmissible at trial.

B. Criminal Responsibility

1. Defence of Mental Disorder – Criminal Code, Section 16

An accused may be found "Not Criminally Responsible on account of a Mental Disorder" (NCRMD), if an accused is found to have been suffering from a mental illness at the time of the offence which resulted in either:

- A lack of appreciation of the nature and quality of the offence (i.e. they could not foresee and measure the physical consequences of the act or omission) (*R v Cooper* (1980), 1 SCR 1114 [9]; or
- A failure to realize that the act or omission was wrong (i.e. they did not know it was something that one should not do for moral or legal reasons (*Chaulk v The Queen* (1990), 3 SCR 1303 [10].

This is a verdict distinct from either guilty or not guilty. If an accused is found NCRMD, the court can decide whether the accused will receive an absolute discharge, a conditional discharge, or a custody disposition to be detained in a psychiatric hospital. Alternatively, and more often in practice, the court can defer this decision to the provincial Review Board designated under section 672.38 of the *Criminal Code*. If the accused is not found to be a significant threat to public safety (discussed below), they must be given an absolute discharge.

When addressing the matter of the accused's mental capacity for criminal responsibility, the court has much the same power to order an assessment to obtain evidence on this question (*Criminal Code*, s 672.11(b)) as it does with respect to an accused's fitness to stand trial. Pre-trial detention of an accused while awaiting in-custody assessments was held to violate section 7 of the Charter by an Ontario court (*R v Hussein and Dwornik* (2004), 191 CCC (3d) 113 (OSCJ) [11] [*Hussein*]). However, *Hussein* was not followed in a more recent Ontario case (*Her Majesty the Queen in Right of Ontario v Phaneuf* [Indexed as: *Ontario v Phaneuf* [12] (2010) ONCA 901, 104 OR (3d) 392 at para 19]). The Ontario Court ruled that the relevant provisions in the *Criminal Code*, specifically s.672.11, cannot be interpreted as requiring accused individuals who are ordered to be assessed in custody in a hospital to be taken immediately to that hospital. It cannot be read as prohibiting their detainment in a detention centre pending transfer to the hospital. Accordingly, it was held that Hussein was wrongly decided.

The accused is always entitled to raise a lack of mental capacity when facing criminal liability by calling evidence relating to it. The Crown may adduce evidence on the accused's mental capacity for criminal responsibility where the accused has raised the issue or has attempted to raise a reasonable doubt using a defence of non-mental disorder automatism (a mental state lacking the voluntariness to commit the crime). Where the accused pleads not guilty, does not put mental capacity in issue and does not raise the defence of non-mental disorder automatism, the court may allow the Crown to adduce evidence on the issue of mental capacity only after it has been determined that the accused committed the act or omission (*R v Swain* (1991), 63 CCC (3d) 481 (SCC) [13]).

An accused is presumed to not suffer from a mental disorder that exempts them from criminal responsibility until the contrary is proven on a balance of probabilities (*Criminal Code*, s 16(2)). An official finding that the accused is NCRMD will only occur when the Crown has otherwise proven the guilt of the accused beyond a reasonable doubt, and when the mental disorder exempting the accused from criminal responsibility is proven on a balance of probabilities. The burden of proof is on the party that raises the issue (*Criminal Code*, s 16(3)).

C. Disposition Hearings After NCRMD

A finding of NCRMD ends criminal proceedings against the accused. There will then be a disposition hearing either in court or before the Review Board (*Criminal Code* s 672.38). Under s 672.54 a person found NCRMD may be:

> (a) discharged absolutely where the review board or court finds that the accused is not a significant threat to the safety of the public;
>
> (b) discharged subject to conditions considered appropriate by the court or review board; or
>
> (c) detained in custody in a psychiatric hospital subject to conditions considered appropriate by the court or Review Board.

With the passage of Bill C-14 in 2014, discussed fully below, the court may also designate a person as a high-risk accused, and then the Review Board would only be able to make a narrow custody order. The amendments flowing from Bill C-14 have changed other sections of the Mental Disorder provisions of the *Criminal Code*, some of which are highlighted below.

Bill C-14, or the *Not Criminally Responsible Reform Act*, SC 2014, c 6 [*NCRRA*], came into force on July 11, 2014. This legislation was intended to strengthen the *Criminal Code's* decision-making process relating to findings of NCRMD, and thereby make public safety the primary consideration, enhance victim safety, and provide victims with a stronger voice in the process.

The primary function of the amendments was to create a new designation of "high-risk accused". Section 672.64 of the *Criminal Code* allows the court to designate a person who was found NCRMD to also be a high-risk accused. This designation is available when the offence is a serious personal injury offence, as defined in section 672.81(1.3), committed by an accused who was over 18 at the time of the offence. One of two additional factors must also be present. The first of these factors is a finding by the court that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person. The second factor is a finding by the court that the acts underlying the offence were of a brutal nature, indicating a risk of grave physical or psychological harm to another person.

When deciding whether to render this designation, the court considers the factors outlined in section 672.64(2) of the *Criminal Code*. These factors include the nature of the offence, the accused's current mental state, any patterns of offence-related conduct, and expert opinion. Once a person is found to be a "high-risk accused", they are subject to mandatory hospital detention and may have increased time between Review Board hearings.

For the high-risk accused designation to be removed, the Review Board must first refer the finding to a superior court. The court may only revoke the designation if satisfied that there is not a substantial likelihood that the accused will use violence that could endanger the life or safety of another person.

Bill C-14 also aimed to improve victim's rights, by providing notice to victims of the intended residence of any NCRMD accused who receives an absolute or conditional discharge. The victim is informed of the general location where the offender resides, but not the specific address. Furthermore, when the high-risk status of an accused is under review by the court, victims may file impact statements which must then be considered by the court.

Significant criticism has been directed at these provisions prior to their coming into force, suggesting that they will do little to improve the rights and safety of victims, and that they are unnecessarily punitive in nature. It has been argued that by placing the "high-risk" designation in the hands of the courts, the ability for the Review Board and hospitals to appropriately assist, treat and manage NCMRD patients will be diminished. For a full discussion of these concerns, see Lisa Grantham's "Bill C-14: A Step Backwards for the Rights of Mentally Disordered Offenders in the Canadian Criminal Justice System". Despite the criticisms directed at Bill C-14, there have not been any significant changes to the

Review Board or its authority since the new provisions came into force.

In British Columbia, there is no person currently designated as a "high-risk accused". The only BC case involving a determination of "high-risk accused" status is *R v Schoenborn*, (2010) BCSC 220 [14] [*Schoenborn*]. The accused was found NCRMD and was currently held in a mental health facility. In April 2015, the BC Review Board granted Schoenborn escorted community access at the discretion of the Director of the facility in order to aid his rehabilitation. In 2017, the Attorney General of BC applied unsuccessfully to the BC Supreme Court to have Schoenborn designated as a "high-risk accused". After many days of evidence in court, the judge found that Schoenborn did not meet the criteria for a "high risk accused" (*R v Schoenborn*, 2017 BCSC 1556 [14]).

There is some discrepancy between the provinces as to whether the "high-risk accused" designation can be applied retroactively. In British Columbia, it has been found that applying a retroactive "high risk" designation to trials that occurred before the legislation came into effect is not unconstitutional (*R v Schoenborn* 2015 BCSC 2254 [15]). However, Quebec courts made the opposite determination in 2015 (see *R c CR*, 2015 QCCQ 2299 [16]).

When the Review Board renders a decision under section 672.54, it must consider "the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused." The 2014 Bill C-14 amendments have changed the wording from requiring the Review Board to make a decision that is "least onerous and least restrictive" to one that is "necessary and appropriate". However, subsequent Review Board decisions and court decisions have confirmed that the intent and guiding principles from the Supreme Court of Canada case of *Winko v British Columbia (Forensic Psychiatric Institute)*, 1999 2 SCR 625 [17] [*Winko*] still apply. Therefore, the principle of making the least onerous and least restrictive order still applies to Review Board decisions. For further related case law please see *Ranieri (Re)* 2015 ONCA 444 [18]; *Osawe (Re)*, 2015 ONCA 280 [19]; *McAnuff (Re)* 2016 ONCA 280 [20].

The Review Board must assess cases in which a person is found NCRMD at least once per year if the person is still detained in a mental facility or is fulfilling conditions pursuant to the disposition hearing (*Criminal Code*, s 672.81). However, as a result of the operation of section 672.54, it is possible for individuals found NCRMD to be subjected to prolonged or indeterminate detention or supervision by the Review Board, even for committing relatively minor offences.

In response to a number of cases challenging the constitutionality of section 672.54, the Supreme Court in *Winko* rejected arguments that section 672.54 violates the Charter. According to *Winko*, a "significant risk to the safety of the public" means a real risk of physical or psychological harm to members of the public. The conduct giving rise to the harm must be criminal in nature. The process of determining whether the accused is a significant threat to public safety is non-adversarial, and the courts or Review Board may consider a broad range of evidence. This includes the accused's past and expected course of treatment, present medical condition, past offences, plans for the future and any community support that exists. See *Winko* for a detailed application of section 672.54. Bill C-14, discussed fully below, codifies some of this decision, such as the definition of "significant harm".

Two Supreme Court of Canada cases considered the "least onerous and least restrictive" requirement of s 672.54. In *Pinet v St Thomas Psychiatric Hospital*, 2004 SCC 21 [21], it was held that the "least onerous and least restrictive" requirement applies not only to the bare choice among the three potential dispositions – absolute discharge, conditional discharge or custody in a designated hospital, but also to the particular conditions forming part of that disposition. In *Penetanguishene Mental Health Centre v Ontario (Attorney General)*, 2004 SCC 20 [22], the court decided that this applied not only to the choice of the order, but also to the choice of appropriate conditions attached to the order, consideration of public protection, and maximisation of the accused's liberties.

The Review Board's powers were considered in *Mazzei v BC (Director AFPS)*, 2006 SCC 7 [23]. It has the power to place binding orders and conditions on any party to the Review Board hearing, including the director of the psychiatric

hospital. The Review Board does not prescribe or administer treatment, but may supervise and require reconsideration of treatment provided. Treatment is incidental to the objectives and focus on public safety and reintegration, and the Review Board aids in only these two goals.

For information on pleading “Mental Disorder” and “Non-Mental Disorder” automatism, please consult the Continuing Legal Education Society’s course “Criminal Law and Mental Health Issues [24]”.

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X. Complaints

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 10, 2023.

Complaints concerning provincial mental health facilities, their practices or their treatment of patients may be taken to the BC Ombudsperson. This office has the authority to investigate patient complaints, make recommendations to the facility, mediate any problems arising between a patient and the facility, and to make recommendations to the Lieutenant-Governor and the Provincial Cabinet concerning the results of these investigations.

Complaints must be made in writing. The office is careful to ensure that, where necessary, the identity of the complainant is withheld from hospital staff. Common complaints include concerns about over-medication, seclusion, or providing information about patient rights. In such cases, the Ombudsperson has the authority to take the issue to an outside medical source to verify whether the patient is receiving appropriate levels of medication, to ensure the facility follows necessary protocols and reviews for placing people in seclusion and provides immediate rights information for those involuntarily detained. Complaints can be filed through the website at https://bcombudsperson.ca or by calling the Ombudsperson's office at 1-800-567-3247.

Pursuant to investigating these complaints, in March of 2019, the Office of the Ombudsperson released a report titled "Committed to Change: Protecting the Rights of Involuntary Patients under the *Mental Health Act*". This report investigated many complaints alleging that the legislative safeguards outlined above were not followed. The report states that the Office was "disappointed to find significant levels of non-compliance" when reviewing the forms. "In many cases, forms were simply not completed. In many other cases, the forms were completed late or in a manner that did not provide anything close to adequate reasons" (p 6).

The report includes the office's methodology, findings, and recommendations, and it can be accessed at https://www.bcmhrb.ca/app/uploads/sites/431/2019/03/OMB-Committed-to-Change-FINAL-web.pdf.

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XII. LSLAP File Administration Policy

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 10, 2023.

This section is specific to LSLAP clinicians. It sets out internal LSLAP practice and policy regarding Mental Health. Students with clients who have upcoming review panel hearings are encouraged to contact the Mental Health Law Program at CLAS for advice and to determine whether a referral would be appropriate. The Mental Health Law Program (MHLP) at CLAS assists involuntarily admitted patients at review panel hearings.

Chapter Fifteen – Guardianship

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 10, 2023.

The purpose of the adult guardianship and substitute decision-making legislation in British Columbia is to create a scheme by which adults (people over the age of 19) can plan for their future in the event that they may need assistance with decision making, and to provide a means to assist adults who may be vulnerable to abuse and neglect.

The legislation is informed by the guiding principle that all adults have a right to self-determination and autonomy and that any incursion into this right must be governed by the presumption that they are capable of making their own decisions and that any support provided to them is the least intrusive available.

There are six statutes governing adult guardianship and substitute decision-making:

- *Power of Attorney Act*
- *Representation Agreement Act*
- *Health Care (Consent) and Care Facility (Admission) Act*
- *Public Guardian and Trustee Act*
- *Adult Guardianship Act*
- *Patients Property Act*

This chapter will begin with a discussion of the concept of "capacity" or "capability" (which will be used interchangeably), followed by a discussion of the planning mechanisms available to appoint a substitute decision maker and finally to the concept of adult guardianship and how assistance can be provided to vulnerable adults.

II. Governing Legislation

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 10, 2023.

A. List of Acronyms

AD – Advance Directive

AGA *- Adult Guardianship Act*

AGR *- Adult Guardianship (Abuse & Neglect) Regulation*

DAR – *Designated Agencies Regulation*

EPOA – Enduring Power of Attorney

FIA – *Financial Institutions Act*

HCCFA – *Health Care (Consent) & Care Facility (Admission) Act*

HCCR – *Health Care Consent Regulation*

HPA – *Health Professions Act*

LA – *Limitations Act*

LTA – *Land Title Act*

PAA – *Power of Attorney Act*

PAR – *Power of Attorney Regulations*

PGT – Public Guardian and Trustee

PGTA – *Public Guardianship and Trustee Act*

PLA – *Property Law Act*

POA – Power of Attorney

PPA – *Patients Property Act*

PPAR – *Patients Property Act Rules*

RA – Representation Agreement

RAA – *Representation Agreement Act*

RAR – *Representation Agreement Regulation*

RPP – Registered Pension Plan

RRIF – Registered Retirement Income Fund

RRSP – Registered Retirement Savings Plan

SCCR*- Supreme Court Civil Rules*

SPGR – *Statutory Property Guardianship Regulation*

TA – *Trustee Act*

TSDM – Temporary Substitute Decision Maker

WESA – *Wills Estates and Succession Act*

B. Governing Legislation

Adult Guardianship Act [1], RSBC 1996, c 6 [*AGA*].

Adult Guardianship (Abuse and Neglect) Regulation [2], BC Reg 13/2011 [*AGR*].

Designated Agencies Regulation [3], BC Reg 38/2007 [*DAR*].

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

Financial Institutions Act [5], RSBC 1996, c141 [*FIA*].

Health Care (Consent) and Care Facility (Admission) Act [6], RSBC 1996, c 181 [*HCCFA*].

Health Care Consent Regulations [7], BC Reg 17/2011 [*HCCR*]

Land Title Act [8], RSBC 1996, c 250, ss 45, 51–57, 283(2) [*LTA*].

Limitation Act [9], SBC 2012, c 13, ss 1, 11, 19–21, 24–26 [*LA*].

Patients Property Act [10], RSBC 1996, c 349 [*PPA*].

Power of Attorney Act [11], RSBC 1996, c 370 [*PAA*].

Power of Attorney Regulations [12], BC Reg 111/2011 [*PAR*].

Property Law Act [13], RSBC 1996, c 377, ss 16, 26–7 [*PLA*].

Public Guardian and Trustee Act [14], RSBC 1996, c 383 [*PGTA*].

Representation Agreement Act [15], RSBC 1996, c 405 [*RAA*].

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Statutory Property Guardianship Regulation [17], BC Reg 152/2018/2014 [*SPGR*].

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III. Mental Capacity

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 11, 2023.

The fact that a person has a mental illness, disability or impairment is not conclusive of their mental capabilities. Capacity to make a legally binding decision depends upon the type of decision at hand. The legal capacity standards for carrying out transactions, entering into relationships, or managing a person's affairs are set out both in common law and statute.

The various common law capacity standards are discussed in great length in the upcoming BC Law Institute's Report on the Common Law Tests of Incapacity (https:/ / www. bcli. org/ wp-content/ uploads/ 2013/ 09/ 2013-09-24_BCLI_Report_on_Common-Law_Tests_of_Capacity_FINAL. pdf), which covers capacity to do the following:

- Make a will
- Make an inter vivos gift
- Make a beneficiary designation
- Nominate a committee
- Enter a contract
- Retain legal counsel
- Marry
- Form the intention to live separate and apart from a spouse
- Enter an unmarried spousal relationship

The planning statutes set out the specific test for capacity that is required for an adult to sign a valid planning document, and it is important to note that the tests differ depending on the nature of the decision being made. Just because someone lacks capacity in one regard does not mean that they necessarily lack capacity in another context.

A. Capacity to Make a Will

The capacity to make a will is commonly referred to as "testamentary capacity," and the testator of the will must have this capacity at the time that they make the will. There are two main ways in which a testator may be found to lack testamentary capacity. First, if a testator is found to have a "general unsoundness of mind." This assessment considers factors including the testator's ability to appreciate: the nature of a will and the consequences of making one, the property that might be affected by a will, the people who are to receive property under the will, and the way that property is to be distributed under the will. The second way that a testator may be found to lack testamentary capacity is if they are under "specific delusions." Generally, under this assessment, the law will only take those delusions that have a direct bearing on the will itself into account.

Because creating a will involves many complex cognitive steps and evaluations (including assessing one's own interests and positions as well as the interests and positions of others in relation to one's property) the test for testamentary capacity is generally viewed as being particularly stringent compared to the tests for capacity in other types of decision-making—a comparatively high level of capacity is needed. However, the stringency of the test may be able to be adapted depending on how complicated a particular will is, or if there are particularly compelling policy reasons to adjust the test.

Additionally, due to the unique nature of a will, there are other important issues that may arise surrounding the issue of testamentary capacity. For instance: since wills must follow formal requirements, suspicious circumstances may have bearing on the presumption of capacity, and undue influence may have bearing on the validity of a will.

If a person is found to lack testamentary capacity, British Columbia legislation mandates that there is no way for this person to create a valid will.

B. Capacity to Make an *Inter Vivos* gift

The term "gift" takes on a particular meaning in a legal context, and the law may vary depending on the nature or type of the gift, and the circumstances in which a gift is given. The test for assessing the capacity to make a gift borrows largely from the tests for capacity in making a will, and from tests for capacity to enter into a contract. The test for testamentary capacity requires that the person making the gift does not have a general unsoundness of mind and that they are not under specific delusions. The test for capacity to enter into a contract, when applied to a gift situation, would require that the person making the gift must be able to understand the terms of giving the gift, form a rational judgment of the effect of giving the gift, and the person who would be the recipient of the gift must not have knowledge of "incompetency" on the part of the person giving the gift. In the past, courts have used different elements of these two tests to different degrees to assess capacity for making a gift, and there is debate over to what degree the test for capacity for gift-giving should be based on the test for testamentary capacity versus the test for contractual capacity.

The transfer of property via gift is voidable against the person giving the property as gift, unless the person receiving the gift has given consideration or had no reasonable way of knowing that the person giving the gift lacked the capacity to do so.

C. Capacity to Make a Beneficiary Designation

Beneficiary designations are commonly used when someone wants funds from an insurance or savings plan to go directly to someone else (the beneficiary) should they die. The test for assessing whether the designator had the requisite capacity to make this designation depends on the nature of what is being designated; in recent years, courts in British Columbia have primarily applied a test that is similar to the test for testamentary capacity.

D. Capacity to Nominate a Committee

A "committee" is somebody appointed by the court to make decisions on that person's behalf, should they be incapable of making their own legal and financial or personal care decisions. The appointment of a committee of estate entitles the committee to make legal and financial decisions for the adult. The appointment of a committee of person allows the committee to make personal and health care decisions for the adult. The governing legislation with respect to court-appointed committees is the Patients Property Act (PPA). This legislation allows for a person to nominate a committee in writing in the event they become incapable and require the appointment of a committee (s 9).

There is not much case law that addresses the test to be used when assessing whether a person has the capacity to nominate a committee, but the case law that does exist seems to indicate that the test for capacity to nominate a committee has two components: the nominator must have the capacity to understand the nature of nominating a committee, and they must have the capacity to understand the effect that this nomination has on their interests. This case law also suggests that the capacity required for nominating a committee is lower than the capacity that would be required for a person to be considered a "patient."

E. Capacity to Enter a Contract

Capacity issues surrounding the formation of a contract also engage the area of contract law, and thus the test to assess someone's capacity to enter into a contract is informed by unique considerations. Basically, the test for this type of capacity has three components: the person must be able to understand the terms of the contract, they must be able to form a "rational judgment of its effects upon [their] interests," and the other party to the contract must not know that the person is incompetent. There may be other factors of relevance for assessing capacity in a contract situation as well. For instance, the fairness of the contract and delusions held by a party may play a role. The test for capacity in this area is quite flexible and the test varies in stringency depending on context.

Due to the entanglement of this type of capacity with the area of contract law, the test for capacity in these circumstances must include consideration of the interests of the person in question as well as any other interests that are relevant in contract law (such as the interests of the other party to a contract, or the interests of society in general). If a person is found to lack the capacity to enter into a contract, that contract will not be void (as is the case in other situations of capacity, such as wills), but rather the contract will be voidable. Thus, the contract could be affirmed by the person who lacks capacity if they had a period of lucidity, or by a representative.

F. Capacity to Retain Legal Counsel

The capacity to retain legal counsel is unique because while other capacities are considered as isolated in time (for instance, whether a person had capacity at the time they entered a contract), capacity in situations regarding retaining legal counsel can be ongoing—this is referred to as "instructing" legal counsel. While retaining and instructing legal counsel are separate situations, the line between them often gets blurred.

The test for capacity in these situations is largely built upon the test for capacity to enter a contract, as the relationship between a person and their legal counsel is a contractual one. However, due to the unclear boundaries between the isolated retention of legal counsel and the ongoing instruction of legal counsel, many have argued that there is need to incorporate aspects from other areas of as law as well—in particular, the law of agency. The test for the capacity to retain legal counsel is described as being on the more stringent side of the capacity spectrum, due to its ties to the test for contractual capacity and the thought-process and decisions that one must be able to engage in in order to retain legal counsel.

Lawyers must not allow themselves to be retained by prospective clients who lack capacity, although there are exceptions to ensure that people are not left without any way of getting legal help because they lack capacity. Additionally, if a client who had capacity during the retention of legal counsel loses capacity afterwards, lawyers have an obligation to ensure that the client's interests are still properly represented.

G. Capacity to Marry

Although marriage is a contract, there are special considerations surrounding marriage due to its unique subject matter that take the test for the capacity to marry outside of purely the test to enter a contract. Historically, the test for the capacity to marry has fallen into the less stringent side of the spectrum. Essentially, the test for the capacity to marry involves an assessment of whether the person in question has been able to appreciate what marriage is as a contract, what it means socially and personally, and what the obligations and expectations are for someone who is legally married.

Of course, the idea of "marriage" has changed over time and courts have occasionally tried to alter the test for the capacity to marry—today, the law is somewhat murky about what exactly is and is not required. Some of the attempted changes to the test include requiring that the person be able to manage their own finances and requiring that the person be able to appreciate the effects of the marriage on their previous marriages and their children.

If a party to a marriage is found to have lacked capacity when they entered the marriage, the marriage is void. This can be argued not only by a party to the marriage but also by anyone else who has a financial interest at stake because of the marriage. Additionally, the test for capacity has also been adapted to apply to situations where one of the parties to the marriage was intoxicated.

H. Capacity to Form the Intention to Live Separate and Apart from a Spouse

It is important to keep in mind that the capacity to form the intention to live separate and apart from a spouse is intertwined with family law considerations and family law legislation. However, the main test used to determine this capacity is referred to as the "test of capacity to separate," and it has its origins in case law. The test in these instances centres on whether the person had the capacity to appreciate the implications and ramifications of ending that marriage.

It is important to keep in mind that the capacity to form the intention to live separate and apart from a spouse is intertwined with family law considerations and family law legislation. However, the main test used to determine this capacity is referred to as the "test of capacity to separate," and it has its origins in case law. The test in these instances centres on whether the person had the capacity to appreciate the implications and ramifications of ending that marriage. Notably, the presence of delusions is treated differently in this test of capacity than they are in many other types of capacity: just because a person is experiencing delusions that affected their decision to live separate and apart from a spouse does not necessarily mean that they lacked capacity in these situations. The test for capacity to separate has a similarly low stringency as the test for capacity to marry.

If a person is found to lack the capacity to form the intention to live separate and apart from a spouse, then it is unlikely that this act of living apart from their spouse will be enough to end a marriage.

I. Capacity to Enter into an Unmarried Spousal Relationship

No court in British Columbia, or in Canada for that matter, has ever directly engaged with the issue of whether a test for capacity to enter an unmarried spousal relationship is required. This does not mean, however, that capacity is irrelevant in these situations. When courts analyse these unmarried spousal relationships, the importance of intention is often emphasized. Intention necessarily engages the notion of capacity. Ultimately, the test for the capacity to enter an unmarried spousal relationship is undefined—if it even exists at all.

IV. Substitute Decision Making

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 11, 2023.

For a brief overview of multiple legal instruments for substitute decision making, please visit Public Guardian and Trustee of British Columbia guide It's Your Choice: Personal Planning Tools which can be found at https://www.trustee.bc.ca/documents/STA/It%27s_Your_Choice-Personal_Planning_Tools.pdf. The guide offers the following table which summarizes key characteristics of each legal instrument for substitute decision making:

Legal tools	Manage your financial affairs	Address your legal affairs	Make personal care decisions on your behalf	Make health care decisions on your behalf	Make a decision to admit you to a care facility
Enduring power of attorney (EPOA)	Yes	Yes	No	No	No
Representation agreement for financial affairs, or personal and health care decisions or all (Financial RA7)	Yes	Yes	Yes	Yes	Yes
Representation agreement for personal and health care decisions only (Personal/Health RA9)	No	No	Yes	Yes	Yes
Advance directive	No	No	No	Yes	No
Nomination of a committee of estate	Yes	Yes	No	No	No
Nomination of a committee of person	No	No	Yes	Yes	Yes

A. Power of Attorney

A Power of Attorney (POA) is a legally binding document that allows a capable adult (called the "adult") to grant the authority to other capable adult(s) (called the "attorney(s)") to make financial and legal decisions on their behalf.

The adult can make very individualized and specific provisions in a POA. For example, a POA can be very narrow in scope, allowing the attorney(s) to do one specific act (e.g. cashing a pension cheque, transferring property, or paying insurance). Alternatively, the adult can make a POA that is intentionally broad in scope, allowing the attorney(s) to handle all financial decisions on their behalf.

The following sections explain: what types of POAs can be made; the test for capacity to create a POA and what can be done in the event of incapacity; who is involved in a POA; how a POA can be made, changed, or revoked, and useful information for LSLAP students dealing with POAs.

1. Overview of Power of Attorney

a) Types of Power of Attorney (POA)

There are two types of POAs. It is important to find out which type of POA would best suit the adult's needs. The first is governed by Part 1 of the PAA, and is sometimes called a "General POA." The second is governed by Parts 2 and 3 of the PAA, and is sometimes called an "Enduring POA." The key difference between the two is that a POA under Part 1 ends once the adult becomes incapable, while a POA under Parts 2 and 3 continues even when the adult becomes incapable. Questions to ask include:

- What tasks does the adult want the attorney to be able to perform?
- When does the adult want the attorney to begin to act?
- Does the adult want the POA to be used for a limited time only?
- Does the adult want the POA to be in effect immediately or only when they become incapable?
- How will incapacity be decided?
- Do the adult's powers terminate if and when the adult becomes incapable?

The two types of POA are as follows:

1. **General:** General POAs are governed by Part 1 of the *PAA*, and by common law for agency relationships. They are effective immediately, or as specified on the document, and ongoing until the loss of capacity, revocation or death. The test for capacity for making general POAs can be found in the BCLI's Report on Common Law Test of Capacity (https://www.bcli.org/wp-content/uploads/2013/09/2013-09-24_BCLI_Report_on_Common-Law_Tests_of_Capacity_FINAL.pdf).General POAs are rarely used in incapacity planning, as they become no longer in effect when an adult becomes incapable (which is often when a POA is most needed).
2. **Enduring:** Enduring POAs (EPOAs) are governed by Parts 2 and 3 of the PAA. Enduring POAs continue in the event that the adult loses capacity, and only ends upon revocation or death. These are the most common type of POA, they allow the attorney to act while the adult is capable and continue when/if the adult becomes incapable.

EPOAs can be effective immediately, or "springing." A "springing" EPOA stays dormant until a future date or event (i.e. the loss of capacity) and ends only upon death. The adult can decide in advance how capacity is to be determined, such as by requiring the agreement of a family member and two doctors. A springing EPOA is not active until the adult loses capacity.

See *Goodrich v British Columbia (Registrar of Land Titles)* [1], 2004 BCCA 100. (The BCCA decided that even though the PAA does not explicitly allow for a springing power of attorney, it is nevertheless possible to make one.)

Both general POAs and EPOAs can be limited in relation to assets, duration, or specific types of transactions. For example, an adult could draft a POA for the attorney to manage their bank accounts and pay their bills while they are on vacation, but not give authority to the attorney over their real estate and investments. A bank's POA will be limited to transactions at that institution for the accounts identified.

In most cases, the POA will be effective immediately, once signed and witnessed by the adult and attorney(s), and will continue on an ongoing basis. Unless otherwise specified, all usage of the term "POA" in the subsequent sections of this chapter refers to an Enduring Power of Attorney as governed by Part 2 of the *PAA*.

b) Who can Appoint and Revoke an Attorney

The "adult" is any adult who makes a POA to appoint an attorney to make financial decisions on their behalf. The adult must be (*PAA* s10 and 12):

- An individual who is 19 years of age or older
- Mentally capable of making a POA
- Acting voluntarily, or on their own

The adult must have mental capacity at the time that the POA is signed, and must be able to understand the nature and implications of a POA. An adult who has mental capacity has the legal right to make decisions, including the legal right to choose whether to:

- Determine the type, scope or purpose of the POA
- Define the roles and authority of the appointed attorney(s)

- Provide instructions to the attorney(s)
- Express wishes, values and beliefs
- Change or revoke a POA

c) The Test of Capacity

An adult is presumed to be capable of making decisions about their financial affairs and of understanding the nature and consequences of making, changing or, revoking an enduring POA (section 11 *PAA*).

Pursuant to section 12 of the PAA, an adult is incapable of understand ing the nature and consequences of the proposed enduring power of an attorney if the adult cannot understand all of the following:

(a) the property the adult has and its approximate value;

(b) the obligations the adult owes to their dependants;

(c) that the adult's attorney will be able to do on the adult's behalf anything in respect of the adult's financial affairs that the adult could do if capable, except make a will, subject to the conditions and restrictions set out in the enduring power of attorney;

(d) that, unless the attorney manages the adult's business and property prudently, their value may decline;

(e) that the attorney may misuse the attorney's authority;

(f) that the adult may, if capable, revoke the enduring power of attorney;

(g) any other prescribed matter.

If an individual does not complete a POA while they are capable, and later becomes incapable of managing their financial affairs, the adult may be able to create a Representation Agreement, which has a lower test of capacity. Alternatively, a capable, interested person can apply to the court for committeeship, in order to manage the incapable adult's affairs.

d) Attorney(s)

An attorney is an adult who is capable and willing to carry out the financial tasks and/or make financial decisions on behalf of the adult. An attorney is required to sign the POA to signify that they accept the role and the responsibility. If an attorney is not willing to accept this role, then the attorney should not sign the POA. In this context, an "attorney" does not need to be a lawyer, although an adult may wish to appoint their lawyer to act as an attorney. An attorney must be (PAA s 18 and s 19):

- An adult (i. e. at least 19 years of age), the PGT or certain financial institutions
- Mentally capable to carry out the financial tasks
- Able to understand and fulfill their legal duties
- Able and willing to act in accordance with the instructions, wishes, values and beliefs of the adult
- Acting voluntarily/on their own.

Section 18 of the *PAA* states who may act as an attorney. One or more of the following persons can be named:

- An individual, other than:
  - An individual who provides personal care or health care services to the adult for compensation or,
  - An employee of a facility where the adult resides and where the adult receives personal care or health services.
  - Exception: if the individual is a child, parent or spouse of the adult, in which case they may be named as attorney
- The Public Guardian and Trustee

- A financial institution authorized to carry on trust business under the *Financial Institutions Act*, RSBC 1996, c 141 [*FIA*].

More than one person can act as an attorney. An adult who names more than one attorney may assign each a different area of authority, or all or part of the same area of authority (PAA s 18(4)). The adult might prefer to define distinct roles for each attorney (i.e. appoint one as the attorney for certain transactions, such as personal banking and a second individual as their attorney over different matters, such as property). The POA should be clear about the roles and responsibilities of each attorney and whether or not unanimous consent is necessary in each type of transaction.

According to s 18(5) of the PAA, where an adult appoints multiple attorneys for all or part of the same area of authority, the attorneys must act unanimously in exercising their authority. The exception to this rule is where the adult specifically does the following in the POA:

- Describes circumstances where the attorneys do not have to act unanimously
- Sets out how a conflict between attorneys is to be resolved
- Authorizes an attorney to act only as an alternate and sets out:

    (i) The circumstances in which the alternate is authorized to act in place of the attorney, for example, if the attorney is unwilling to act, dies or is for any other reason unable to act, and

    (ii) The limits or conditions if any, on the exercise of authority by the alternate.

Where a POA appoints two or more attorneys to act for an adult, all the attorneys will need to be in agreement regarding decisions made for the adult, **unless otherwise specified in the POA**.

Appointing more than one person has potential advantages and disadvantages. The practice can reduce the potential for an attorney to misuse their power by providing built-in scrutiny by a second attorney. However, having multiple attorneys may make the decision-making process complicated and inefficient.

e) The Public Guardian and Trustee (PGT)

An adult who does not have relatives or friends who are willing and able to serve as an attorney may ask the PGT to consider acting as an attorney in the event of incapacity. According to s 6(c) and s 23 of the *PGTA*, the PGT may agree to act as attorney for a fee. If an adult needs to appoint the PGT as attorney, contact the PGT. It is important to note that the PGT will only act as a representative in matters of finance and will not be able to act as a representative for health care decisions.

Another circumstance where the PGT may become involved is where an attorney is misusing a POA or otherwise failing to fulfill their legal obligations. Any person may notify the PGT if there is a reason to believe that fraud, undue pressure or some other form of abuse or neglect is being or was used to induce an adult to make, change or revoke financial or legal document(s). Any person may also notify the PGT where an attorney is:

- Incapable of acting as attorney
- Abusing or neglecting the adult
- Failing to follow the instructions in the POA
- Otherwise failing to comply with legal duties of an attorney

For more information about the role of the PGT where there is financial abuse, neglect or self-neglect, refer to section VI: Adult Abuse and Neglect in this chapter.

For more information on the role of the PGT in general, please visit BC's PGT website: https://www.trustee.bc.ca/Pages/default.aspx.

2. Creating a Power of Attorney

The most important aspect of drafting a POA is to ensure that the document accurately reflects the adult's specific wishes. Questions to ask include:

- What does the adult want to do?
- Does the adult have capacity to make this POA?
- Does the adult understand the nature of this POA?
- Does the adult understand the potential legal impact of this POA?
- Has the adult received suitable independent legal advice?
- What type of authority does the attorney need?
- Does the adult want to limit the attorney's authority?
- When should the POA be in effect (i.e. ongoing or limited)?
- Has the adult created other POAs?

Any adult can draft a POA. However, it is advisable to consult a lawyer or notary prior to finalizing a POA. Independent legal advice will help ensure the POA only grants an attorney the powers and authority that the adult wants to give.

An adult with capacity is free to choose to sign a POA or not. It is important to be aware of situations where a person may be putting undue pressure (including physical, financial or emotional threats, manipulation or coercion) on the adult. For more information, refer to the discussion of undue influence below in section **VIII: Adult Abuse and Neglect** in this chapter. Also refer to the BCLI guide on Undue Influence, which is helpful for understanding the dynamics surrounding undue influence in relation to other legal documents like POAs. The guide can be found at https://www.bcli.org/wp-content/uploads/undue-influence-recognition-prevention-guide-final-3.pdf.

a) Formalities

Formalities are the specific requirements for a POA to be considered valid (i.e. whether the POA has to be signed or witnessed). According to s 16 and s 17 of the *PAA*, an enduring POA must be:

- In writing
- Signed and dated by the adult in the presence of two witnesses (only one witness is required if that witness is a lawyer who is a member of the Law Society of British Columbia or a notary who is a member in good standing of the Society of Notaries Public of British Columbia), and
- Signed and dated by the attorney(s) who agree to act in the presence of two witnesses (unless one witness is a lawyer or a notary)

A new POA will need to be signed by both the adult and the attorney(s). These signatures do not need to be in each other's presence. In other words, the attorney and adult may sign the document separately. However, these signatures must each be witnessed by two capable adults (unless one witness is a lawyer or notary).

As of September 1, 2011, an attorney must sign an EPOA in the presence of two witnesses before assuming their authority (*PAA* s 17). If a person who is named as an attorney does not sign the POA, then the person is not required or legally able to act as an attorney. If a person named as attorney does not sign, the authority of any other named attorney is not affected (unless the POA states otherwise).

According to s 16(6) of the *PAA*, the following persons must not act as a witness to the signing of an EPOA:

- A person named as an attorney
- A spouse, child or parent of a person named as an attorney
- An employee or agent of a person named as an attorney, unless the person named as an attorney is a lawyer, a notary, the PGT or a financial institution authorized to carry on trust business under the Financial Institutions Act

- A person who is not at least 19 years of age
- A person who does not understand the type of communication used by the adult (unless interpretive assistance is used)

The *PAA* provides a standard form that can be used to create a POA. The most up-to-date version of this form is generally also posted on the government of BC website: www.bclaws.ca.

Although there is no legal requirement to register a POA, an EPOA can be registered through the Personal Planning Registry. More information about this service is available on their website: http://www.nidus.ca.

> **NOTE:** These formalities for a POA to be considered valid may be temporarily altered in extenuating circumstances. On May 19, 2020, the Minister of Public Safety and Solicitor General, under the authority of the Emergency Program Act, temporarily suspended these rigid requirements in a Ministerial Order, in order to accommodate for the public health and safety concerns in the wake of the COVID-19 pandemic. Under this Ministerial Order, "electronic presence" may be enough to fulfill the formal requirements for ensuring the validity of a POA or RA when British Columbia is declared to be in a "state of emergency". For more information, see Ministerial Order No. 1M62: https://www.bclaws.gov.bc.ca/civix/document/id/mo/hmo/m0162_2020.

b) Land Transactions

An adult might authorize the attorney(s) to make a transaction involving land (i.e. transfer of title, closure of sale of property, etc) on behalf of the adult. If the authority of an attorney involves land transactions, then the POA must be executed and witnessed in accordance with the Land Title Act, RSBC 1996, c 250 [*LTA*].

A POA that grants authority to the attorney to make land transactions will expire after 3 years of its execution. There is an exception to this where an adult signs an EPOA, or the POA expressly exempts itself from these provisions (*LTA* s 56).

A POA that confers the power to deal with land transactions and registration of land titles must be witnessed and notarized by a lawyer who is a member of the Law Society of British Columbia or a notary who is a member of the Society of Notaries Public of British Columbia. This is because POAs that involve land transactions require more care and consultation to ensure that the adult is aware of the legal impact of conveying this authority to the attorney(s).

c) Banks, Credit Unions and Other Financial Service Providers

Financial institutions and agents (e.g. banks, credit unions, investment advisors, customer service representatives, estate planners, etc.) may ask individuals to complete their institution's POA. This request normally occurs where an adult wishes to grant the attorney access to bank accounts to pay bills, make transfers, etc. The financial institution may request that the adult and attorney fill out their institution's Limited POA. For more information about financial institution's POA requirements and joint accounts refer to the Canadian Bankers Association website: https://cba.ca/powers-of-attorney-bank-requirements?l=en-us.

If the adult signs an institution's POA, this can sometimes create a conflict between POAs. These important questions should be asked:

- What does the adult want to do?
- What kind of POA should apply?
- Is the financial institution's form suitable?
- Has the adult received suitable independent legal advice?

The adult should **not** sign a POA form without seeking legal advice. For more information on preparing documents, consult the **Appendix** or organisations such as Nidus Personal Planning Resource Centre and Registry. Contact information may be found in section **VII.D: Resource Organizations** of this chapter.

NOTE: It is good practice to notify financial institutions and agents that a new POA has been made and/or that the previous POA has been revoked. This can be done in writing, with a copy of the new POA.

3. Other Jurisdictions

Enduring POAs (EPOAs) that have been made in some jurisdictions outside of BC, including other Canadian provinces and territories, or some other countries (e.g. United States, United Kingdom, Australia and New Zealand) may be recognized as legally valid in BC. These provisions are set out in s 38 of the *PAA*, and subject to the Power of Attorney Regulation, BC Reg 111/2011 [*PAR*].

Section 4(3) of the *PAR* requires that the EPOA from another jurisdiction be accompanied by a certificate, from a solicitor who is permitted to practice in the jurisdiction where the EPOA was made. The certificate must indicate that the EPOA meets the requirements set out in s 2(a) to (c) of the *PAR*.

According to s 4(2)(a) to (c) of the *PAR*, an EPOA from outside BC will be deemed a valid EPOA in BC where it:

- Grants authority to an attorney that comes into effect or continues to have effect while an adult is incapable of making decisions about their own affairs
- Was made by a person who was, at the time of its making, residing elsewhere in Canada or in the United States, the United Kingdom, Australia, or New Zealand
- Is in accordance with the laws and continues to have legal effect in the jurisdiction in which it was made

Section 4(4) states that the EPOA is limited by the *PAA* and the jurisdiction in which the deemed enduring power of attorney was made. Section 4(4) also requires that an attorney and the adult must both be at least 19 years of age before the attorney can exercise any powers or perform any duties.

4. Acting as an Attorney

Below is a description of the various duties and powers held by an attorney. In most POAs, the attorney(s) will immediately be able to act on behalf of the adult. However, in some types of POAs (e.g. a Springing or Limited), the terms of the POA will specify a 'triggering event' or date when an attorney has the authority to act on the adult's behalf. Regardless of when an attorney is permitted to act, the following duties and powers apply.

a) Duties

The primary responsibility of an attorney is to act in accordance with the adult's instructions, wishes, beliefs and values. The *PAA* explicitly sets out a number of statutory duties and powers. According to s 19(1) of the *PAA*, an attorney must:

- Act honestly and in good faith
- Exercise the care, diligence and skill of a reasonably prudent person
- Act within the authority given in the POA
- Keep prescribed records and produce these records for inspection and copying upon request

An attorney must act in the adult's best interest, taking into account the adult's current wishes, known beliefs and values and explicit directions in the POA (*PAA* s 19(2)). Where reasonable, an attorney must give priority to meeting the personal care and health care needs of the adult, foster the independence of the adult, and encourage the adult's involvement in any decision-making (*PAA* s 19(3)).

Concerning the adult's personal property and real property, an attorney must keep the adult's property separate from their own property (PAA s 19(4)). If the property is jointly owned by the adult and the attorney as joint tenants, or has been substituted for, or derived from, property owned as joint tenants, an attorney must also:

- Only invest the adult's property in accordance with the *Trustee Act*, RSBC 1996, c 464 [*TA*]
- **Not** dispose of property that is subject to a specific testamentary gift in an adult's will
- Keep the adult's personal effects at the disposal of the adult

If an EPOA explicitly says that an attorney will be exempt from these provisions, then the attorney is not legally obligated to fulfill these duties.

b) Powers

An adult may grant general or specific powers to an attorney in a POA. An attorney may also be permitted to exercise statutory powers to act on behalf of the adult. According to s 20 of the *PAA*, an attorney named has the statutory power to:

- Make a gift or loan, or charitable gift, if the POA permits or certain conditions set out in the *PAA* are met (see below)
- Receive a gift or loan, if the POA permits
- Retain the services of a qualified person to assist the attorney
- Change or make a beneficiary designation, in limited circumstances (see below)

The scope of an attorney's powers can be limited or expanded in the express wording of a POA. An attorney is **exercising authority improperly** if:

- The attorney acts when the authority of the attorney is suspended or has ended
- Or the EPOA is not in effect, is suspended, terminated or invalid

c) Gifts, Loans and Charitable Donations

An attorney may make a gift or loan, or a charitable gift from the adult's property if the EPOA permits the attorney to do so, or if (*PAA* s 20):

- The adult will have sufficient property remaining to meet the personal care and health care needs of the adult and the adult's dependents, and to satisfy other legal obligations
- The adult, when capable, made gifts or loans, or charitable gifts, of that nature; and
- The total value of all gifts, loans and charitable gifts in a year is equal to or less than a prescribed value (set out in s 3 of the *PAR*)

According to s 20(2) of the *PAA*, an attorney may receive a gift or loan, if the EPOA permits.

d) Creating a Will and Designating Beneficiaries

Attorneys are **not allowed to make a will** on behalf of an adult. According to s 21 of the *PAA*, any will that is made or changed by the attorney on behalf of an adult is not legally valid. Further, if the adult has given instructions prohibiting delivery of the will to the attorney(s), then a person must not provide the will to the attorney(s).

An attorney is also **not allowed to dispose of property** that is designated as a testamentary gift in the adult's will. Section 19(3)(d) of the *PAA* provides an exception to this only where the disposition is necessary to comply with the attorney's duties. According to s 20(5), an attorney is allowed to change a beneficiary designation, in an instrument other than a will, in very limited circumstances set out in s 20(5)(b) of the *PAA*, including:

- A change to a beneficiary designation if the court authorizes the change
- The creation of a new beneficiary designation if the designation is made in
  - An instrument that is renewing, replacing or converting a similar instrument made by the capable adult, and the designated beneficiary remains the same

- A new instrument that is not renewing, replacing or converting a similar instrument made by the capable adult, and the newly designated beneficiary is the adult's estate

e) Deeds

Where there exists a POA, an attorney may execute a deed under the seal of the attorney on behalf of the adult (whether an individual or a corporation). According to s 7 of the *PAA*, as long as it is within the scope of the attorney's authority, such a deed is binding on the adult and has the same effect as if it were under the seal of the adult.

f) Delegating and Retaining Services

An attorney is not allowed to delegate their authority to another person. According to s 23 of the *PAA*, an attorney must not delegate powers and authorities to others, unless expressly empowered to do so in the POA. An attorney may delegate financial decisions concerning investment matters to a qualified investment specialist (e. g. mutual fund manager) in accordance with the *PGTA* or the *TA*, s 15.5.

An attorney **is** permitted to retain services. According to s 20(4) of the *PAA*, an attorney may retain the services of a qualified person to assist the attorney in doing anything the adult has authorized.

g) Liability

An attorney who acts in the course of their legal duties is not liable for any loss or damage to the adult's financial affairs, if the attorney complies with the following (*PAA* s 22):

- The statutory duties of the attorney as set out in s 19 of the *PAA*
- Any directions given by the court under s 36(1)(a) of the *PAA*
- Any other duty that may be imposed by law

To protect innocent persons from liability arising from transactions made after the POA relationship has been terminated, BC's PAA modifies the common law regarding the effects of termination. If the attorney or a third party has acted in good faith, the PAA shifts the loss from the attorney or third parties to the adult.

Section 3 of the *PAA* protects the attorney from liability for acts done in good faith and in ignorance of the termination of their authority. Section 4 protects third parties who deal in good faith with the attorney, where the third party and attorney are unaware of the termination.

> **NOTE:** Section 57 of the *LTA* provides that the principal may file the termination of the agency in the Land Title Office. Filing the notice protects the principal from registration of 'instruments' (as defined in the *LTA*) executed by the attorney after the termination of their authority, even though the attorney and a third party may have been ignorant of the termination.

h) Records and Accounts

The adult's account must be kept up to date (*PAR* s 2). The adult's assets and accounts must also be kept separate from those of the attorney and any third parties (*PAA* s 19(4)). Per s 2 of the *PAR*, all assets belonging to the adult held by the attorney, and all books, documents, and account records entrusted to the attorney must be available for production to the capable adult at a reasonable time (usually during annual reviews).

i) Expenses and Remuneration

Payment to an individual (as opposed to the PGT) for service as an attorney under a POA is less common. However, s 24 of the *PAA* allows for an attorney to be compensated where authorized in an EPOA, provided that the rate or amount is set out in the EPOA. An attorney may also be reimbursed for reasonable expenses properly incurred in acting as the attorney.

5. Changing, Revoking, or Ending a POA

A POA will be suspended or end in the following circumstances (see s 29(2) of the *PAA*):

- Death of the adult or the attorney
- Bankruptcy of the adult
- Court appointment of a committee
- Revocation by the adult, who is still capable
- Resignation of the attorney(s)
- If the attorney is the adult's spouse and their marriage (or marriage-like relationship) ends
- If the attorney is a corporation and that corporation dissolves
- If the attorney is convicted of a prescribed offence, or an offence where the adult is the victim
- Per s 19.1 of the *PPA*, a POA is suspended if the PGT becomes the statutory property guardian

Adults who are making a POA should be informed of the procedure for ending (revoking) or changing the POA. Likewise, adults should also know how an attorney may resign. In many situations, adults are unaware of their right to end a POA. As long as an adult has capacity they can revoke a POA. Details of how this is done appear below.

a) Revocation by an Adult

An adult who has capacity can change, revoke or end a POA at any time. A POA must be revoked in writing. This is called a 'Notice of Revocation'. Telling someone that the POA is no longer in effect is not enough. Each attorney must be given a signed Notice of Revocation (*PAA* s 28(2)), and the revocation will not be effective until such notice has been given (*PAA* s 28(4)).

Although the *PAA* does not set out how a Notice of Revocation is to be delivered to the attorney(s), it is suggested that the adult deliver it by one of the following methods:

- By registered mail to the person's last known address
- By leaving it:
  - With the person
  - At the person's address
  - With an adult who appears to reside with the person
  - If the person operates a business, at the business, with an employee of the person
  - By transmitting it by fax to the person with the number they provided for notification purposes

An adult should check if their POA lists other requirements or steps related to revoking in addition to the requirements from the legislation.

In addition to informing the attorney(s) in writing of the revocation, a capable adult who wishes to revoke an existing POA should:

- Request that the original POA be returned, if it has been given to someone
- Contact all businesses, institutions, and individuals to whom the existence of the POA was known, and notify them in writing that the POA has been revoked, effective immediately, requesting that they destroy all copies of the document which they possess;
- Register the revocation at the Land Title Office (only applies where the POA deals with land transactions)
- Inform Nidus, if the POA was registered with Nidus

b) Resignation of the Attorney(s)

An attorney can also formally resign at any time. An attorney must give written notice to the adult and any other attorney(s). The resignation of an attorney is effective when written notice is given, or on a later date specified in the notice.

An attorney who loses the capacity to fulfill legal duties should resign. Likewise, if an attorney is unable or unwilling to act on behalf of the adult, according to the adult's instructions, wishes and values, then the attorney should resign.

As of September 1, 2011, s 17(1) of the *PAA* outlines that an attorney who does not sign a POA is not obligated or authorized to act as an attorney. It is possible to refuse becoming an attorney by simply choosing not to sign the POA. Section 17(4) also states that an attorney who does not sign is not required to provide any notice of any kind but ethically the attorney should let the adult know. If a person *does* sign the POA and wishes to resign from acting as attorney, then written notice must be provided to the adult, any other attorneys and, if the adult is incapable, a spouse, near relative or, if known to the attorney, close friend of the adult. If an adult who has capacity does not want the attorney to act, then the adult can revoke or change the POA. If an adult no longer has capacity and others are concerned about the conduct of an attorney, then you may wish to contact the PGT.

c) Duties after Termination

Even after a POA has come to an end, an attorney may not use any information gathered during the course of duties as attorney for personal or private profit. Nor can an attorney solicit customers from the adult's business.

6. Note on POAs For LSLAP Students

When a client approaches LSLAP for assistance with creating a POA, the following a series of questions should be asked to ascertain the kind of POA that would best suit the needs of the client without putting the person at risk of being taken advantage of:

1. Is the client (mentally) capable, in the view of the clinician, of granting a POA? The presumption is that all adults are capable. The general test is the ability to understand and appreciate the meaning of what they are trying to do in each particular case. Warning signs of temporary or ongoing incapacity can include the following (bear in mind the list below is not comprehensive and the indicators below do not necessarily indicate incapacity):

- Sudden confusion, short term memory problems, disorientation
- Signs of depression
- Appears worried, distressed, overwhelmed
- Signs of substance abuse

- Inability to answer open-ended questions

Refer to BCLI Guide on Undue Influence for a full checklist at: https://www.bcli.org/wp-content/uploads/undue-influence-recognition-prevention-guide-final-3.pdf

2. Why does the client want a POA?

3. For what purpose does the client require someone else to manage their financial affairs?

4. Does the client need to authorize broad powers, or can powers be narrowly defined and still meet the needs of the client?

5. What tasks does the attorney need to be authorized to do to meet the client's needs?

6. When does the POA need to start?

7. Is it appropriate for the POA to have a built-in expiration date?

8. Has the client thought about who they wish to appoint as attorney(s)?

It may be helpful for students to provide information or guidance to clients on who the client should appoint as attorney, to reduce the risk of financial abuse, based on the following considerations:

- Appoint someone who will respect the client's unique values and interests
- Appoint someone who is familiar with the duties and limitations of the role of attorney, or who will take the time and initiative to become educated about them
- Consider who is best placed to carry out the responsibility of handling the client's financial matters: Does the person live nearby? Is the person easy to communicate with? Does the person like to deal with finance and money, or have some training or education in this regard?
- A spouse is not always the best choice – a partner could be in a situation of crisis when the older adult becomes incapable and the client should consider whether it is best for the partner to take on the additional responsibility at such a difficult time.
- Appointing more than one attorney could create practical problems. For example, appointing all of the client's children can create a situation of conflict where it may be challenging for the children to come to an agreement. Having two attorneys under a joint power of attorney can also make it harder to make decisions quickly as consultation and discussion will be required to make any decision. Nonetheless, multiple attorneys can be appropriate in some contexts.

Students should confer with their Supervising Lawyer if there is any doubt that the client understands and appreciates the POA. Also note that an adult should not be required to have a POA as a condition of receiving any good or services, such as residence in an assisted living or community care facility.

a) Misuse and Abuse of a POA

The misuse or abuse of a POA is a criminal act and can be prosecuted under s 331 (theft by person holding Power of Attorney), s 332 (misappropriation of money held under direction), s 215 (failure to provide necessaries of life), or s 380 (fraud) of the *Criminal Code*.

If a student or client has concerns that a person may be abused or neglected, or is at risk of being abused or neglected, then in most instances the student should discuss these concerns with the client and provide them with access to appropriate support services (e.g., the Seniors Abuse & Information Line at 604-437-1940 or 1-866-437-1940).

If a crime is suspected, consult with the Supervising Lawyer about how and whether to make a report to the appropriate authority. Students need to remember their legal responsibility to maintain professional conduct and client confidentiality. If there is concern that the adult is not capable, it may also be appropriate to refer the concern to the PGT.

For example, s 17 of the *PGTA* allows the PGT to investigate potential abuse of POA relationships. Similar authority for the PGT to investigate abuse and neglect are provided by s 34 to 36 of the *PAA*.

Power of Attorney abuse is a constant concern and unfortunately a frequent occurrence. The abuse may manifest in pressure to grant a POA or misuse of funds or property under a POA. Try to meet with the client alone, or at least without the potential attorney in the room, to be certain that the client truly wishes to create a POA and grant powers to the potential attorney in question. Make sure to inquire about the relationship between the client and the proposed attorney, and be on alert for possible undue influence or fraud. Refer to BCLI Guide on Undue Influence, above, for a full checklist of considerations and what to watch for. For more information about abuse and neglect of older adults, you can also consult the following resources:

- BC Centre for Elder Advocacy and Support: www.bcceas.ca
- Canadian Centre for Elder Law: www.bcli.org/ccel
- Public Guardian & Trustee: www.trustee.bc.ca
- Vancouver Coastal Health: Resource: www.vchreact.ca
- Advocacy Centre for the Elderly website: www.acelaw.ca

NOTE: It is possible, and even common, for an adult to appoint an attorney under the *PAA* (to make financial decisions) and appoint a different person as a representative, under the *RAA* (to make health care decisions). This commonly happens where a person who knows the personal wishes and values of the adult is adept at handling health care decisions, and a more financially astute person is chosen as attorney.

B. Representation Agreements

Representation Agreements (RAs) are governed by the *Representation Agreement Act* (*RAA*). A primary goal of the *RAA* is to give legal recognition to substitute decision makers, and status for informal helpers that are family and friends. Another important change has been a shift of focus toward support for capacity rather than assessments of incapacity, as the latter can take away an individual's personal autonomy.

RAs are an instrument by which an individual can proactively plan for the possibility of future incapacity, by appointing another person to make decisions on their behalf. RAs are the primary method by which adults in BC can plan for future health care substitute decision making. An RA can also be used to give legal authority to a person's **supportive decision-maker—**a person appointed under the RA to help the adult make their decisions, not necessarily to make their decisions for them. As the capacity test for creating an RA is lower than the test for creating a POA, a person with limited cognitive capacity may have the capacity to create an RA.

In the BC health care system, health care providers must speak directly to an individual to inform them about health care choices and consequences. An adult with capacity has the right to give or refuse consent for treatments. Due to illness, accident or disability, an individual needing health care may not be capable of understanding advice, making informed decisions, or providing meaningful consent to a proposed treatment. If the adult has previously enacted an RA, then the representative(s) will be able to give or refuse consent on behalf of the capable adult, acting as appointed substitute decision-maker(s) to make decisions according to the incapable adult's personal wishes, values and beliefs.

An individual making an RA may be in a vulnerable position due to family dynamics, cognitive challenges, discriminatory beliefs about people with disabilities, or other factors. Vulnerability may create more opportunities or potential for abuse. Anyone helping another create an RA should be aware of indicators of abuse and follow guidelines outlined in this chapter that will help them to notice abuse. If necessary, the adult should be met with alone to ensure that the adult truly wishes to create an RA and give powers to the potential representative. Also note that, according to s 3.1 of the amended *RAA*, an adult must not be required to have an RA as a condition of receiving any good or service.

RAs may come into effect immediately or upon future incapability. The vast majority of registered RAs come into effect immediately. The first duty of a representative is to consult and abide by the personal wishes, values and beliefs of the adult, at all times.

1. Types of Representation Agreements

Under the current *RAA*, there are two levels of RAs that an adult can choose to create, named for the section which governs them: s 7 RAs and s 9 RAs. Both types of RAs allow the adult to select any or all areas of decision-making created by the statutory section in which they will authorize the representative to act on their behalf. Some RAs allow a routine financial substitute decision making. This includes all s 7 RAs, as well as some s 9 RAs executed prior to September 1, 2011 which authorize a representative to make financial support arrangements as described in s 9(1)(f) of the repealed provisions of the *RAA* (see s 44.2 of the current *RAA*). After September 1, 2011, a s 9 RA may only be made concerning personal and health care decisions.

a) Section 7 Representation Agreements

Section 7 RAs designate a substitute or supportive decision-maker to make personal care decisions, **major and minor health care decisions** for the adult, and routine legal and financial decisions.

These health care decisions cover the majority of health and personal care related choices that an individual can make over the course of their life. The list of decisions includes decisions regarding:

- Personal care, including where and with whom the adult is to reside
- Consent to treatment
- Medication
- Minor or major surgery
- Diagnostics and tests
- Palliative care
- Living arrangements of the adult

A s 7 RA may also allow the representative to take care of **routine financial affairs** of the adult. 'Routine management of financial affairs' is defined in the RA Act Regulation s 2(1) as:

> (a) Paying the adult's bills;
>
> (b) Receiving the adult's pension, income and other money;
>
> (c) Depositing the adult's pension, income and other money in the adult's accounts;
>
> (d) Opening accounts in the adult's name at financial institutions;
>
> (e) Withdrawing money from, transferring money between or closing the adult's accounts;
>
> (f) Receiving and confirming statements of account, passbooks or notices from a financial institution for the purpose of reconciling the adult's accounts;
>
> (g) Signing, endorsing, stopping payment on, negotiating, cashing or otherwise dealing with cheques, bank drafts and other negotiable instruments on the adult's behalf;
>
> (h) Renewing or refinancing, on the adult's behalf, with the same or another lender, a loan, including a mortgage, if
>
> > (i) The principal does not exceed the amount outstanding on the loan at the time of the renewal or refinancing, and
> >
> > (ii) In the case of a mortgage, no new registration is made in the land title office respecting the renewal or refinancing;

(i) Making payment on the adult's behalf on a loan, including a mortgage, that

(i) Exists at the time the representation agreement comes into effect, or

(ii) Is a renewal or refinancing under paragraph (h) of a loan referred to in that paragraph;

(j) Taking steps under the *Land Tax Deferment Act*, RSBC 1996, c 249 for deferral of property taxes on the adult's home;

(k) Taking steps to obtain benefits or entitlements for the adult, including financial benefits or entitlements;

(l) Purchasing, renewing or cancelling household, motor vehicle or other insurance on the adult's behalf, other than purchasing a new life insurance policy on the adult's life;

(m) Purchasing goods and services for the adult that are consistent with the adult's means and lifestyle;

(n) Obtaining accommodation for the adult other than by the purchase of real property;

(o) Selling any of the adult's personal or household effects, including a motor vehicle;

(p) Establishing an RRSP for the adult;

(q) Making contributions to the adult's RRSP and RPP;

(r) Converting the adult's RRSP to an RRIF or annuity and creating a beneficiary designation in respect of the RRIF or annuity that is consistent with the beneficiary designation made by the adult in respect of that RRSP;

(s) Making, in the manner provided in the Trustee Act, any investments that a trustee is authorized to make under that Act;

(t) Disposing of the adult's investments;

(u) Exercising any voting rights, share options or other rights or options relating to shares held by the adult;

(v) Making donations on the adult's behalf to registered charities, but only if

(i) This is consistent with the adult's financial means at the time of the donation and with the adult's past practices, and

(ii) The total amount donated in any year does not exceed 3% of the adult's taxable income for that year;

(w) In relation to income tax,

(i) Completing and submitting the adult's returns,

(ii) Dealing, on the adult's behalf, with assessments, reassessments, additional assessments and all related matters, and

(iii) Subject to the Income Tax Act, 1996 RSBC, c 215 and the *Income Tax Act* (Canada), 1985 RSC, c 1 signing, on the adult's behalf, all documents, including consents, concerning anything referred to in subparagraphs (i) and (ii);

(x) Safekeeping the adult's documents and property;

(y) Leasing a safety deposit box for the adult, entering the adult's safety deposit box, removing its contents and surrendering the box;

(z) Redirecting the adult's mail;

(aa) Doing anything that is:

(i) Consequential or incidental to performing an activity described in paragraphs (a) to (aa), and

(ii) Necessary or advisable to protect the interests and enforce the rights of the adult in relation to any matter arising out of the performance of that activity.

For greater clarity, the Regulations state that the routine management of the adult's financial affairs does **NOT** include the following (s 2(2) *RAR*):

> (a) Using or renewing the adult's credit card or line of credit or obtaining a credit card or line of credit for the adult;
>
> (b) Subject to subsection 1.(h), instituting a new loan, including a mortgage, on the adult's behalf;
>
> (c) Purchasing or disposing of real property on the adult's behalf;
>
> (d) Guaranteeing a loan, posting security or indemnifying a third party on the adult's behalf;
>
> (e) Lending the adult's personal property or, subject to subsection 1.(v), disposing of it by gift;
>
> (f) On the adult's behalf, revoking or amending a beneficiary designation or, subject to subsection 1.(r), creating a new beneficiary designation; and
>
> (g) Acting, on the adult's behalf, as director or officer of a company.

The creation of a s 7 RA does not require the services of a lawyer.

A s 7 RA does not permit a representative to make health care and personal decisions that involve decisions to refuse health care necessary to preserve life, or to physically restrain, move or manage the adult against the adult's objections.

If there is a conflict between an enduring POA and a s 7 RA which includes routine management of financial affairs, *the enduring POA will take priority*.

b) Section 9 Representation Agreements

Section 9 RAs designate a substitute decision-maker for significant and sometimes very personal or more controversial health or personal care decisions. Under this section, representatives can do anything that the representative considers necessary in relation to the personal care or the health care of the adult, including:

- Where the adult is to live and with whom, including whether the adult should live in a care facility
- Whether the adult should work and, if so, the type of work, the employer, and any related matters
- Whether the adult should participate in any educational, social, vocational or other activity
- Whether the adult should have contact or associate with another person
- Whether the adult should apply for any licence, permit, approval or other authorization required by law for the performance of an activity
- Day-to-day decisions on behalf of the adult, including decisions about the diet or dress of the adult
- Giving or refusing consent to health care for the adult, including giving or refusing consent in the circumstances specified in the RA to specific kinds of health care, even where the adult refuses to give consent at the time the health care is provided
- Physically restraining, moving and managing the adult and authorizing another person to do these things, if necessary to provide personal care or health care to the adult

A representative under s 9 RA must not do the following, *unless expressly provided for in the RA*:

- Give or refuse treatment in accordance with s 34(2)(f) of the *HCCFA*
- Make arrangements for the temporary care and education of the adult's minor children, or any other person who is cared for or supported by the adult
- Interfere with the adult's religious practices

Section 34(2)(f) of the *HCCFA* pertains to refusing substitute consent to health care necessary to preserve life (*HCCFA* s 18). In a s 9 RA, if a representative is provided with the power to give or refuse consent to health care for the adult, then the representative may give or refuse consent to health care necessary to preserve life (*RAA* s 9(3)). Some other health

decisions are also excluded from potential powers, e.g. 'sterilization for non-therapeutic purposes' (*RAA* s 11(2)).

The creation of a s 9 RA no longer requires the services of a lawyer. However, careful attention should be paid to the requirements and powers given under s 7 and s 9 RAs to determine which one best suits the needs of the adult.

Prior to September 2011, a s 9 RA could include broad financial powers, equivalent to those given in a POA. The new *PAA* says this broad authority in an RA is now treated as if it were an enduring POA, and the representative must follow the requirements under the *PAA* to use these powers (s 44. 2 Transitional Provision of the *PAA*).

2. Who Can Be a Representative?

Section 5(1)(a) of the *RAA* specifies that an individual who is 19 years of age or older can be appointed as representative unless that person is:

- providing personal care or health care services to the adult for compensation, unless the caregiver is a child, parent, or spouse of the adult, or;
- working as an employee of a facility in which the adult resides and through which the adult receives personal care or health care services.

The PGT can also be named as a representative.

According to s 5(1)(c) of the *RAA*, a credit union or trust company can only have authority to make (limited) financial decisions listed in a s 7 RA. A credit union or trust company cannot make decisions regarding health care or personal care. Under s 5(2) of the *RAA*, an adult can also name more than one Representative either:

> (a) over different areas of authority; and/or
>
> (b) over the same area of authority, in which case, the representatives must be unanimous in exercising their authority.

RAA s 5(4) requires that all representatives for RAs made under s 7 complete a certificate in the prescribed form.

3. Acting As a Representative

The law defines several duties that representatives owe to the adult. There are several statutory parameters with respect to what a representative *must* do (e.g. consult with the adult) and what a representative *must not* do (e.g. make a will). Below is an outline of the legal 'do's and don'ts' that a representative must follow.

a) Duties

Under s 16(1) of the *RAA*, a representative must:

- Act honestly and in good faith
- Exercise the care, diligence and skill of a reasonably prudent person
- Act within the authority given in the RA

When making decisions with the adult or on behalf of the adult, the representative must consult with the adult to determine their current wishes, and comply with the wishes if reasonable (*RAA* s 16(2)).

If the current wishes of the adult cannot be determined, then the representative needs to comply with the instructions or wishes the adult expressed while capable (*RAA* s 16(3)). A representative cannot make decisions based on their own opinion but must represent the adult's own wishes to health care providers and others. In other words, a representative must 'stand in the shoes' of the adult and base health care decisions on what the adult would want.

If the adult's instructions or wishes are not known, the representative must act on the basis of the adult's known beliefs and values, or in the adult's best interests, if their beliefs and values are not known (*RAA* s 16(4)).

Upon application by a representative, the court may exempt the representative from the duty to comply with the instructions or wishes the adult expressed while capable (*RAA* s16(5)).

Adults should communicate instructions and wishes to the named representative(s). This should be done in writing (including by e-mail or recorded transmission), but can also be done orally, for as long as the adult has capacity. It is best that the representative(s) know exactly what the adult would want.

b) Delegation of Authority

A representative is not permitted to delegate authority to another person (*RAA* s 16(6)). The exception to this is that a representative who has been appointed to make financial investments on behalf of an adult may delegate authority to qualified investment specialist, including a mutual fund manager (*RAA* s 16(6.1)). A representative may also retain the services of a qualified person to assist in carrying out the adult's instructions or wishes.

c) Accounts and Records

A representative must also keep accounts and records concerning the exercise of authority (*RAA* s 16(8)). These accounts and records must be produced upon request of the adult, the appointed monitor, or the PGT. A representative who has been appointed to make financial decisions must keep the adult's assets separate from their own (*RAA* s 16(9)). An exception to this exists where the assets are owned by the adult and the representative as joint tenants or have been substituted for, or derived from, assets owned by the adult and the representative(s) as joint tenants.

d) Access to Information

A representative may request information and records respecting the adult, if the requested information or records relate to the incapacity of the adult or an area of authority granted under the RA (*RAA* s 18).

A representative also has a duty to keep information confidential. A representative must not disclose information or records, except where it is necessary to perform the duties owed to the adult, for an investigation by the PGT, or to make an application to or comply with an order of the court (*RAA* s 22).

e) Creating a Will

A representative must not make or change a will for the adult for whom the representative is acting, and any change to a will that is made for an adult by their representative has no force or effect (*RAA* s 19.01).

f) Remuneration and Expenses

A representative (or an alternative representative or monitor) is not entitled to be paid for acting on behalf of the adult, unless the RA expressly sets out and authorizes the amount or rate of remuneration, or upon application by a representative, the court authorizes the remuneration (*RAA* s 26(1)). In addition, an RA cannot authorize a representative to be paid for making any decision under Part 2 of the *HCCFA* (*RAA* s 26(1.1)).

A representative, alternative representative, or monitor is entitled to reimbursement for reasonable expenses incurred in the course of performing the duties or exercising the powers. Accounts and records of the reasonable expenses paid must be kept.

4. Monitors

The role of the monitor is to ensure that the representative appointed under an RA is carrying out their duties. The monitor acts as an extra safeguard and support to ensure that the RA is working for the adult.

a) Appointment and Resignation

An adult may appoint a monitor to oversee their chosen representative who is acting under a s 7 or s 9 RA (*RAA* s 12(3)). The monitor can be appointed to oversee personal, health care and financial decisions.

If an adult has a s 7 RA which authorizes their representative to make routine financial decisions, the adult MUST appoint a monitor to oversee their chosen representative unless:

(a) The representative is the adult's spouse, the PGT, a trust company or a credit union, or

(b) The adult has appointed two representatives who must act unanimously (*RAA* s 12(1)).

Failure to comply with this requirement will make the provision of the RA authorizing the representative to make routine financial decisions invalid (*RAA* s 12(2)).

A monitor must be 19 years or older and must be willing and able to perform the duties and to exercise the powers of a monitor (*RAA* s 12(4)). An individual named in a representation agreement as a monitor must complete a Monitor's Certificate (*RAA* s 12(5)).

A monitor may resign by giving written notice to the adult, each representative and any alternate representatives. The resignation will be effective upon giving notice or at a later date specified in the written notice (*RAA* s 12(6)). See s 12 of the *RAA* for general provisions regarding the appointment and resignation of a monitor.

b) Duties and Powers

The monitor's duties and powers are outlined in s 20 of the *RAA*. The monitor must:

- Make reasonable efforts to ensure that the representative is fulfilling their duties (these duties are set out in s 16 of the *RAA*)
- Act honestly and in good faith and use the care, attention and skill of a responsible person

However, a monitor cannot make decisions on behalf of the adult.

If the monitor is concerned that the representative is not fulfilling their duties, the monitor must raise their concern with the representative(s) and the adult and try to solve the problem through discussion and communication. The monitor may require the representative to report to them or produce accounts (*RAA* s 20(4)). The monitor has a right to visit and speak with the adult at any reasonable time (*RAA* s 20(2)) and any person with custody or control of the adult is prohibited from hindering the monitor's access to the adult (*RAA* s 20(3)). If, after checking and discussion, the monitor believes that the representative is not following their duties or is abusing the adult in any way, the monitor is legally required to contact the PGT to make a complaint (*RAA* s 20(5)).

c) Payment and Expenses

The monitor can be reimbursed for expenses incurred in carrying out their duties (*RAA* s 26(2)) but can only be paid a fee if provided for in the RA and authorized by the BC Supreme Court (*RAA* s 26(1)). Alternatively, if the PGT appoints a replacement monitor, the PGT may authorize payment of a fee (*RAA* s 21(3)).

d) Replacement Monitor

The PGT may appoint a replacement monitor at the request of the representative or other interested person if the initial monitor is unsuitable, no longer able to act or has ceased acting and the adult is no longer capable of making a new RA (*RAA* s 21(1)).

5. Creating a Representation Agreement

The adult who executes the Representation Agreement must have the mental capacity to do so, as set out in the RAA.

The RA must also be in writing, signed and witnessed (*RAA* s 13). The adult and each of the representative(s) must sign the RA (*RAA* s 13(2)). Two adults must witness the signatures. However, only one witness is necessary if that witness is a lawyer and member in good standing with the Law Society of BC or is a member in good standing of the Society of Notaries Public.

Witnesses cannot be (*RAA* s 13(5)):

- One of the representatives
- An alternate representative
- A spouse, child, or parent of anyone named in the RA as a representative or alternate representative
- An employee or agent of a representative or alternate representative
- Anyone under 19 years of age
- Anyone who does not understand the type of communication used by the adult who wishes to be represented

Each representative and each witness for a s 7 RA must also complete a certificate in the prescribed form (*RAA* s 13(1.1) and s 13(6)). Please consult the Nidus Personal Planning Resource Centre for more information about prescribed forms.

An RA becomes effective on the day it is executed unless the RA specifies that it is to become effective at some later time based upon a triggering event (e.g. loss of capacity). According to s 15 of the *RAA*, the RA must specify how a triggering event is to be confirmed and by whom (e.g. loss of capacity confirmed by two medical professionals).

Although there is no legal requirement to register an RA, registration may be done through the Nidus e-Registry. When a person registers, they can decide which organizations can access their record. For more information contact Nidus Personal Planning Resource Centre.

For more information on preparing documents, consult organisations such as Nidus Personal Planning Resource Centre and Registry.

> **NOTE:** These formalities for a RA to be considered valid may be temporarily altered in extenuating circumstances. On May 19, 2020, the Minister of Public Safety and Solicitor General, under the authority of the *Emergency Program Act*, temporarily suspended these rigid requirements in a Ministerial Order, in order to accommodate for the public health and safety concerns in the wake of the COVID-19 pandemic. Under this Ministerial Order, 'electronic presence' may be enough to fulfill the formal requirements for ensuring the validity of a POA or RA when British Columbia is declared to be in a 'state of emergency'. For more information, see Ministerial Order No. 1M62 [2].

6. Changing, Revoking or Ending a Representation Agreement

An RA can be changed or revoked by the adult at any time (as long as the adult has mental capacity) (*RAA* s 27(1)). The adult must provide written notice to the representative(s), alternative representative(s) and the monitor. The change or revocation is effective either when written notice is given to each of these persons, or on a later date specified in the written notice (*RAA* s 27(3.1))

An RA ends where:

- The adult who made the agreement revokes the RA
- The adult who made the agreement or the representative dies
- The court issues an order that cancels the RA
- The representative becomes incapable or resigns
- As provided for under s 19 of the PPA

Where the adult who made the agreement and the representatives are spouses, then an RA will normally end when the marriage or marriage-like relationship ends. However, if the RA explicitly says that the RA will continue to be in effect after the end of the marriage or marriage-like relationship, then the RA will continue.

7. Other Jurisdictions

As of September 1, 2011, agreements from other jurisdictions that perform the same function as an RA in British Columbia may be deemed to be a representation agreement under the *RAA*. Subject to any further limitations or conditions set out in the regulations, the criteria for accepting an extra-jurisdictional RA is that it must (*RAA* s 41):

- Perform the function of an RA
- Be made in a jurisdiction outside BC
- Comply with any prescribed requirements

The certificate in the prescribed form must be completed by an extra-jurisdictional solicitor. Please consult the Nidus Personal Planning Resource Centre for more information about prescribed forms.

These recognition rules only apply to s 9 RAs for personal and health care decisions (see s 9 of the *Representation Agreement Regulations*).

8. Note on RAs for LSLAP Students

When a client approaches LSLAP for assistance with creating an RA, students should ask the following questions to ascertain the kind of RA that the client needs and whether LSLAP can assist them:

1. Is the client capable of creating an RA? The presumption is that all adults are capable. The test for capacity depends on whether it is a s 7 or s 9 agreement at issue.
2. Why does the client want to create an RA?
3. Who is the client considering to be their representative?
4. What is the relationship between the client and their chosen representative?
5. Are there signs of abuse, neglect or self-neglect? Does the adult have access to community resources? Is there a need to involve a Designated Agency?
6. Which specific authorities would the client like their representative to have?
7. Have they spoken to their chosen representative to see if they are willing to serve?
8. What is the status of the client's will? Explain that wills do not provide direction or authority if testators become incapable, and POAs/RAs do not function like wills.
9. Would the client like to appoint a substitute or supportive decision-maker?

Students should refer to their Supervising Lawyer if there is any doubt that the client understands and appreciates the RA. Also note that, according to s 3.1 of the *RAA*, an adult must not be required to have an RA as a condition of receiving any good or service.

If there are concerns that a person may be abused or neglected, or at risk of being abused or neglected, the student should discuss these concerns with the client and provide information and access to appropriate support services (e.g., Seniors Abuse & Information Line at 604-437-1940 or 1-866-437-1940).

Students also need to remember their legal responsibility to maintain professional conduct and client confidentiality. If abuse or neglect is suspected, consult with the Supervising Lawyer about how to make a report to the appropriate authority. Refer to sections **VII. A: Resource Organizations** and VI: Adult Abuse and Neglect in this chapter.

9. The *Bentley (Litigation Guardian) v Maplewood Seniors Care Society* Case

An important case for both Representation Agreements and Advance Directives is *Bentley (Litigation Guardian) v Maplewood Seniors Care Society* [3], 2014 BCSC 165. The case highlights issues of consent, the ability of an adult to change their consent from written instructions, and the meaning of health care versus personal care. A discussion of the case is available by case brief through CLE online: http://canliiconnects.org/en/summaries/33208.

C. Advance Directives

An Advance Directive (AD) is a written document made by a capable adult that gives or refuses consent to health care, in the event that they become incapable of giving health care instructions. The legal provisions for ADs are set out in Part 2.1 of the *HCCFA*. A valid AD executed in accordance with the requirements set out in the *HCCFA* is *legally binding* upon health care providers and substitute decision-makers.

1. Significance of an Advance Directive

The law provides detailed guidelines for how a health care provider is to respond when an AD is in place. The new legislation recognizes a written AD which, when made in accordance with the *HCCFA*, provides a valid consent on the basis of which health care provider can provide treatment, without involving any substitute decision-maker. In order to be valid, the new AD must be executed in accordance with the legislation and contain two 'informed consumer' acknowledgements in writing to the effect that:

1. The refusal of treatment is binding; and
2. There is no substitute decision-maker.

(See below regarding circumstances where a substitute decision-maker, such as a committee or representative, does exist.)

According to s 19.7 of the *HCCFA*, health care providers are to rely on the instructions given in a valid AD when:

- The health care provider is of the opinion that an adult needs care
- The adult is incapable of giving or refusing consent to the health care
- The health care provider does not know of any personal guardian or representative who has authority to make decisions for the adult in respect of the proposed health care
- The health care provider is aware that the adult has a valid, binding AD that is relevant to the proposed health care

The health care provider is to make a reasonable effort in the circumstances to determine whether the adult has an AD, representative or guardian. If the adult has both an RA and an AD, then the health care provider must seek consent from the representative. According to s 19.3 of the *HCCFA*, instructions in the AD will be treated as wishes expressed while capable, which are binding on a representative. However, the health care professional can act on the instructions in an

AD without the consent of a representative if the AD expressly states that: 'a health care provider may act in accordance with the health care instructions set out in the advance directive without the consent of the adult's representative.'

The central purpose of an AD is to give or refuse consent to health care. If the adult has given consent in a valid AD, then the health care provider should provide that health care, and need not obtain the consent of a substitute decision-maker. Similarly, if the adult has refused consent in a valid AD, then the health care provider must not provide that health care, and need not obtain the consent of a substitute decision-maker.

It remains necessary for a health care provider to obtain consent from a substitute decision-maker in the following situations:

- If there is a committee of person in existence or a representative under an RA
- If there is a verbal instruction or wish
- If there is a written instruction but it is not in a properly completed AD
- If there is a written instruction from another jurisdiction
- If there is a wish in an AD that is not properly signed and witnessed
- If there is an AD that does not contain the mandatory informed consumer clause

In addition, an AD does **not** apply in certain circumstances. According to s 19.8 of the *HCCFA*, a health care provider is **not** to rely on an AD where:

- Instructions in the AD do not address the health care decision to be made
- Instructions in the AD are so unclear that it cannot be determined whether the adult has given or refused consent to health care
- Since the AD was made, while the adult was capable, the adult's wishes, values or beliefs in relation to a health care decision significantly changed
- Since the AD was made, there have been significant changes in medical knowledge, practice or technology that might substantially benefit the adult in relation to health care

If a health care provider is not aware that the adult has an AD that refuses consent to specific health care and provides that health care to the adult, but subsequently becomes aware of an AD in which the adult has refused consent, then the health care provider must withdraw the health care.

It is possible for an adult who does not complete an AD to still receive health care. Completion of an AD **must not be mandatory** prior to providing any good or service (i.e. health care). In other words, an adult has the right to not complete an AD. For example, where an adult is being admitted to a care facility and instructed to 'fill out these forms' prior to treatment, the adult does not have to fill out the AD.

In the absence of an AD, if the adult has not appointed a representative, then the health care provider will seek consent from a Temporary Substitute Decision-Maker (TSDM), as set out in s 16 of the *HCCFA*.

2. Making an Advance Directive

An AD must include or address any prescribed matter and indicate that the adult knows the following:

- A health care provider may not provide any health care for which the adult refuses consent in the AD
- A person may not be chosen to make decisions on behalf of the adult in respect of any health care for which the adult has given or refused consent

For more information on preparing documents, consult organisations such as Nidus Personal Planning Resource Centre and Registry.

3. Changing, Revoking, or Ending an Advance Directive

An adult with capacity may revoke or change an AD at any time. According to s 19.6 of the *HCCFA*, an adult who has made an AD may change or revoke the AD as long as the adult is capable of understanding the nature and consequences of the change or revocation.

A change must be made in writing. The amended AD must also be signed and witnessed by two capable adults (unless one witness is a lawyer or notary).

A revocation may be made by expressing an intention to revoke an AD and then making another document, including a subsequent AD. Alternatively, an AD may be revoked by destroying the AD with the intention to revoke it.

4. Examples of Advance Directive Provisions

Examples of directives made in an AD might include consenting or refusing consent to the following:

- CPR (if cardiac or respiratory arrest occurs)
- Artificial nutrition through intravenous or tube feedings
- Prolonged maintenance on a respirator (if unable to breathe adequately alone)
- Blood cultures, spinal fluid evaluations, and other diagnostic tests
- Blood transfusions

Note that it is not likely that simple refusals like 'I refuse CPR' are going to be sufficient for health care providers. It is important to describe the circumstances to the best degree possible under which consent will be refused, such as only refusing CPR if cardiac arrest occurs, rather than stating only to refuse CPR. The adult may use the phrase 'under any circumstances' to make it clear to health care professionals that consent is not given in any case.

> **NOTE:** The adult should have their AD added to their doctor's patient files, their hospital records, and any other relevant agencies. If the AD is revoked or altered, the adult should advise each of these agencies or provide them with the new or revised AD.

a) Do Not Resuscitate Orders ('DNR Orders')

Do Not Resuscitate Orders are a common form of AD which instruct medical professionals *not* to perform CPR. This means that doctors, nurses, emergency medical personnel, or other healthcare providers will not attempt emergency CPR if a person's breathing or heartbeat stops. DNR Orders may appear in a patient's advance directive document.

However, DNR orders can also be made in a hospital or personal care home, and noted on that person's chart, or be made by persons at home. Hospital DNR Orders tell the medical staff not to revive the patient if cardiac arrest occurs. If a patient is in a personal care home or at home, a DNR Order tells the staff and/or medical emergency personnel not to perform emergency resuscitation and not to transfer the patient to a hospital for CPR.

Each hospital will have its own policies regarding the implementation of DNR Orders, but such policies are guided by the Joint Statement on Resuscitative Interventions (1995) which was approved by the Canadian Healthcare Association,

the Canadian Medical Association, the Canadian Nurses Association and the Catholic Health Association of Canada and was developed in cooperation with the Canadian Bar Association. The Joint Statement can be located at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1488016/

Guiding Principles of the Joint Statement include:

- A competent person has the right to refuse, or withdraw consent to, any clinically indicated treatment, including life-saving or life-sustaining treatment (Principle 3). In this situation, the healthcare professional will discuss with the patient whether the patient wishes to be resuscitated and a notation will be made on the person's chart.
- When a person is incompetent, treatment decisions must be based on their wishes, if these are known. The person's decision may be found in an advance directive or may have been communicated to the physician, other members of the health care team or other relevant people. In some jurisdictions, legislation specifically addresses the issue of decision-making concerning medical treatment for incompetent people; the legislative requirements should be followed (Principle 4).

5. Note on ADs for LSLAP Students

When a client approaches LSLAP for assistance with creating an AD, students should ask the following series of questions in order to ascertain whether LSLAP can assist them:

1. Is the client capable of creating an AD? The presumption is that all adults are capable. The test is the ability to understand and appreciate the meaning of what they are trying to do in this particular case.
2. Why does the client want to create an AD?
3. What types of health care provider does the client want to give consent to?
4. What types of health care provider does the client want to refuse consent to?
5. Does the client have an RA in place? What is the relationship between the client and their chosen representative?
6. Does the client want the representative to be able to give or refuse consent, notwithstanding the AD?

It is common for practitioners to refer the client to their doctor for discussion of the types of health care that the client may want to give or refuse consent to, and to obtain the appropriate wording of an AD from that doctor. Students should discuss this option with the client and consider referring them to their doctor in the first instance.

Students should refer to their Supervising Lawyer if there is any doubt that the client understands and appreciates the AD. Also, note that an adult is not required to have an AD as a condition of receiving health care treatment.

If there are concerns that a person may be abused or neglected, or at risk of being abused or neglected, the student should discuss these concerns with the client and provide information and access to appropriate support services (e.g., Seniors Abuse & Information Line at 604-437-1940 or 1-866-437-1940). Students must also remember their legal responsibility to maintain professional conduct and client confidentiality. If abuse or neglect is suspected, consult with the Supervising Lawyer about how and whether to make a report to the appropriate authority.

D. Temporary Substitute Decision-Makers (TSDM)

The statutory framework of the *HCCFA* allows for the appointment of a temporary substitute decision-maker (TSDM) in some situations where there is no representative previously appointed and an adult no longer has capacity. For instance, in BC, a health care provider is legally required to get consent prior to treating a patient. A capable adult can give or refuse consent to health care treatment expressly or by inference either orally or in writing. However, when an adult is not capable of making this election (i.e. due to illness, loss of consciousness, or injury), health care providers are required to get consent from a substitute decision-maker in order to commence treatment. There are, however, exceptions for this requirement when urgent or emergency health care is required (*HCCFA* s 12). Planning tools, such as RAs and ADs may

be helpful in obtaining this consent. If the patient has an RA in place, then instructions for consent will need to be obtained from the representative (*HCCFA* s19). If the patient has an AD in place, then the instructions for consent will need to be obtained from the representative (*HCCFA* s19).

However, if there is no representative and no committee in place, then the health care provider will need to find a TSDM to give or refuse consent (*HCCFA* s19.8). The *HCCFA* outlines the specific procedures that health care providers must follow to obtain legally valid consent. Section 16(1) of the *HCCFA* sets out the 'default list,' which health care providers must follow (in hierarchical order) to determine the appropriate person to act as a TSDM. To obtain substitute consent to provide major or minor health care to an adult, a health care provider must choose the first, in the listed order, of the following who is available and qualifies under s 16 of the *HCCFA*:

- The adult's spouse or partner
- The adult's child who is over 19
- The adult's parent
- The adult's sibling
- The adult's grandparent
- The adult's grandchild
- Other relatives by birth or adoption (but not in-laws or step-children)
- Close friend
- Persons immediately related by marriage (including in-laws and step-children)

To qualify to give, refuse or revoke substitute consent to health care for an adult, a person must under s 16(2) of the *HCCFA*:

- Be at least 19 years of age
- Have been in contact with the adult during the preceding 12 months
- Have no disputes with the adult
- Be capable of giving, refusing or revoking substitute consent
- Be willing to comply with the duties in section 19

If no one listed in subsection (1) is available or qualifies under subsection (2), or if there is a dispute about who is to be chosen, the health care provider must choose a person authorized by the Public Guardian and Trustee (which can include a person employed in the Office of the Public Guardian and Trustee).

The TSDM must act in accordance with the adult patient's wishes, values and beliefs, when the patient is unable to provide their own consent and does not have an appointed committee or a representative.

E. Admission to Care Facilities

Part 3 of the *Health Care (Consent) and Care Facility (Admissions) Act* (HCCFA) describes consent requirements for admission of adults into care facilities. If an adult is incapable of providing consent for admission into a care facility, a manager of the facility may admit an adult to the facility if consent is provided by a committee of person. For more information on committees, please refer to Section V: ADULT GUARDIANSHIP in this chapter.

If an adult does not have a committee of person, a substitute will be chosen from the following list, in this order, to give or refuse consent:

- The adult's representative, if they have authority to give consent to admission
- The adult's spouse
- The adult's child
- The adult's parent

- The adult's sibling
- The adult's grandparent
- Anybody related by birth
- A close friend
- A person immediately related to the family by marriage

If no person meets these requirements, or if there is a dispute over who is chosen, the manager of the facility must notify the PGT. The PGT can authorize a person to give or refuse consent, including one of their staff.

In providing consent, the substitute decision maker must consider:

- The adult's current wishes
- The adult's previously expressed wishes and known beliefs and value
- Whether the adult would benefit from admission
- What other options may be available and appropriate or less restrictive to support the adult's care

F. Limits on Substitute Decision-Makers

1. Health Care Consent Regulation

The *HCCFA's Act's Health Care Consent Regulation* outlines scenarios in which a temporary substitute decision maker cannot provide consent on behalf of someone (s 5).

Situations where the temporary substitute decision maker may not be able to provide this consent include:

- abortion
- electroconvulsive therapy
- psychosurgery
- removal of tissue from a living human body for implantation in another human body or for education or research
- experimental health care, participation in a program that has not been approved by the appropriate committee
- any treatment that involves using "aversive stimuli" to cause a behavioural change

2. Medical Assistance in Dying (MAiD)

The Criminal Code of Canada was amended on June 17th, 2016, to permit the Medical Assistance in Dying (MAiD) under certain conditions. This means that a medical or nurse practitioner may, at a person's request, administer a substance to cause their death, or prescribe a substance so that the person can self-administer a substance that causes their death.

Consent for MAiD can only be given by patients who are able to consent, and substitute decision-makers cannot give consent on a patient's behalf. This is because the College of Physicians and Surgeons of British Columbia's "Professional Standards and Guidelines" clearly prohibits consent for MAiD to be given via an RA or AD. The "Professional Standards and Guidelines" have weight in law pursuant to s 5(2) of the Medical Practitioners Regulation under the *Health Professions Act*.

For more information on the Standards and Guidelines of the College of Physicians, please see their document on MAiD at https://www.cpsbc.ca/files/pdf/PSG-Medical-Assistance-in-Dying.pdf.

References

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[2] https://www.bclaws.ca/civix/document/id/mo/mo/2020_m162
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V. Adult Guardianship

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 10, 2023.

In BC, a person or the Public Guardian and Trustee (the "PGT") may be appointed to manage the legal, financial and/or personal and health care decisions for another person.

The *Patients Property Act* (*PPA*) allows a judge to appoint a committee (pronounced caw-mi-TEE, with an emphasis on the end of the word). A court appointed committee steps into the shoes of the adult and is authorized to make legal and financial decisions (committee of estate) and/or personal and health care decisions (committee of person) on behalf of an adult who has been declared incapable of making those decisions by the Court.

Part 2.1 of the *Adult Guardianship Act* (*AGA*) contains a statutory process by which the PGT becomes statutory property guardian. As statutory property guardian, the PGT has the same authority as a committee of estate and will make legal and financial decisions on behalf of the adult.

Adults may consult *CLAS* and the Public Guardian and Trustee for more information on committeeship. The Public Guardian and Trustee produces a number of helpful publications on committeeships. The resources can be found at http://www.trustee.bc.ca/reports-and-publications/Pages/default.aspx. It is also advisable to contact an Estate and Guardianship Litigation Lawyer, possibly through the Law Society's Lawyer Referral Service (604-687-3221).

A. Patients Property Act: Court-Ordered Committeeship

A court may declare a person incapable of managing their affairs, their person, or both. Upon making the declaration, the appointment of a committee of estate and/or person is required to allow decisions to be made on behalf of the person. A court-ordered committee and its application is a Supreme Court procedure: provincial courts do not have jurisdiction in this regard.

Section 1 of the PPA provides the following definitions:

- A "**patient**" is a person who is in incapable of managing their affairs or themselves, due to mental infirmity, disease, age etc.
- A "**committee**" can be an appointed individual, the PGT, or a statutory property guardian.

1. Types of Committees

a) Committee of the Estate

A committee of the estate has the authority to make financial and legal decisions on the patient's behalf. This routinely includes:

- Controlling the patient's income
- Conducting banking
- Paying expenses
- Selling real property

b) Committee of the Person

A committee of the person holds the authority to make decisions regarding the patient's health and well-being, place of residence, and admission to a care facility.

A committee of the person can only be appointed by the court.

A patient may have either a committee of the estate, a committee of the person, or both. It may be that the same individual is appointed to a committeeship comprising both estate and person, or it may be that separate individuals are appointed to each committeeship.

2. The Court Ordered Committee

There are two steps involved in appointing a committee for an individual who is incapable:

- An order must be made by the Supreme Court declaring that the patient is incapable of managing their own affairs and/or person.
- The court appoints one or more individuals as Committee of the estate and/or the person.

a) Declaration of Patient Incapability

An individual must be declared incapable of managing their affairs before a committee of estate can be appointed. Similarly, a person must be declared incapable of managing themselves before a committee of person is appointed.

1. Section 2 of the *PPA* provides that the Attorney General, a near relative or the subject, or any other person may file an application to the court for an order declaring incapability. Supreme Court Civil Rules (Rules) R. 2-1(2)(e) states that, unless R. 17-1 applies, guardianship proceedings must be commenced by way of petition.

2. The court will then consider the affidavits of two medical practitioners who provide their opinion on the incapacity of the subject. The medical practitioners must be members of the BC College of Physicians and Surgeons.

3. In addition to the medical practitioners' affidavits, the applicant must swear an "affidavit of kindred and fortune", which as the name suggests, set out particulars of the patient's family and financial affairs. The affidavit of kindred and fortune must be in a prescribed form (Form 3), as set out in the *Patients Property Act Rules*.

4. The court then may decide whether the subject is incapable based on the affidavit material before it on the application, or it may proceed:

(a) By converting the petition into an action. The test for determining whether a petition is to be tried was recently reviewed and amended in *Cepuran v. Carlton* [1], 2022 BCCA 76. The court clarified that "a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in

determining the issues, pursuant to R. 16-1(18) and R. 22-1(4)" (para 160). There are no determinative factors for referring a matter to trial; rather, the courts have discretion on a case-by-base basis to determine whether a proceeding is suitable for trial.

(b) By order, to require the person to undergo an additional examination with either:

(i) One or more medical practitioners other than those whose affidavits were before the court, or

(ii) A board of 3 or more medical practitioners designated by the College of Physicians and Surgeons of British Columbia at the request of the court

5. Notice of the application to the courts must be personally served on the subject **not less than 10 days prior** to the date of the application hearing. See s 2(2) of the *PPA*. This requirement may be waived if the court is satisfied that to serve notice of the application would injure the subject's health or would otherwise be inadvisable in the interests of the subject.

- In order for a waiver of notice to be granted, there must be a medical affidavit advising the court that it would be injurious to the health of the adult to be served with notice of the application. The affidavit must demonstrate this clearly and provide evidence, it is not sufficient to simply restate the language of the statute. A discussion on this can be found in *T.H.N et al v Q.V.L.* [2], 2000 BCSC 24.

In summary, the court application must include:

- Petition (*Supreme Court Civil Rules*, BC Reg 168/2009 2-1(2))
- Affidavit of Service (unless notice requirement was waived)
- Affidavit of Kindred and Fortune setting out next of kin and financial circumstances of patient (*PPA Rules*, Rule 2(3))
- Affidavit from two physicians (*PPA*, s 3(1))
- Notice of Application to Appoint a Committee (*PPA Rules*, Rule 2(2))
- Chamber Order to Appoint a Draft Order

While it is not required to include consent of the next of kin, it is recommended. See below.

b) Resisting a Declaration of Incapability

If the subject of the application wishes to oppose it, they are entitled to be represented at the hearing either in person or through counsel.

c) Challenging Affidavits

The medical affidavits provided should not be older than six months, and should clearly lay out the diagnosis, clinical findings, and prognosis of the patient. Under the *PPA*, s 5(2), the judge may order that the subject be examined by one or more duly qualified medical practitioners other than those whose affidavits were before the court. The judge may also order an examination by a board of three or more duly qualified medical practitioners designated by BC's College of Physicians and Surgeons.

Section 5(3) of the *PPA* provides that the judge must order such an examination if the subject asks unless the court or judge is satisfied that the person is not mentally competent to form and express the request. However, the person does not need to wait for the courts order to present other evidence of their capability or their own independent medical affidavit evidence.

d) Subsequent Applications

If a person is declared incapable by the court, that person can apply to the court after one year, for a declaration that they are no longer incapable. However, such an application cannot be made by the person or anyone else more than once per year, except by leave of a judge. Affidavit evidence of two medical practitioners will be required to support the application (*PPA* s 4).

e) Appointment of a Committee

Once the patient has been declared incapable, the judge will appoint a committee. This appointment is governed by the *PPA*. If the court does not appoint a committee, the role defaults to the PGT (*PPA* s 6).

f) Private Committee

A family member, friend, or any other person can apply to the court to become a committee of the patient.

The *PPA, Patient Property Act Rules*, BC Reg 311/76 (*PPA* Rules) and the *Supreme Court Civil Rules*, BC Reg 168/2009 govern the application process.

Although the *PPA* does not say who else should be served, in practice the proposed committee should obtain consents to their appointment as committee from next-of-kin, or if they do not consent, serve the next-of-kin with the application and supporting affidavits.

If the committee was nominated by the patient prior to incapability, then the written nomination should also be included (see below). In addition, if the applicant was appointed attorney, representative or executor, it would be useful to include proof of this in the application. If they were appointed as attorney, representative or executor, they will likely be exempted from the requirement to post security.

g) Notice to the Public Guardian and Trustee

Section 7 of the *PPA* provides that notice in writing of the application must be served on the Public Guardian and Trustee not less than **10 days prior** to the hearing of the application and, if applicable, to a committee already appointed. The PGT can review the application and oppose the appointment if the applicant is considered unsuitable. The PGT may also impose terms on the committee or make recommendations to the court that conditions be imposed on the committee. The PGT will file a Response, setting out the position of the PGT on the appropriateness of the applicant to act as committee and will make recommendations with respect to bonding or restrictions upon the committee's management of the adult's affairs.

h) Nomination of Committee by Patient

Under s 9 of the *PPA*, an individual has the power to nominate a committee of their choice. However, the person nominated cannot serve as a committee until appointed by the court. The nomination must be in writing and signed by the person when they were of full age and of sound and disposing mind (i.e. before the court declares them incapable). A person may want to execute a nomination and have a lawyer hold it in reserve to be released if there is an application for the appointment of a committee.

The nomination must be executed in accordance with the requirements for the making of a will under the *Wills, Estates and Succession Act* (*WESA*), which are that it must be in writing, signed by the nominator and properly witnessed (*WESA* s 37).

Note that members of military forces are exempt from some of the formal requirements; see the *WESA* s 38.

Other than compliance with the WESA, there are no formal requirements for the nomination of a committee. Therefore, a brief, clear statement may be best.

E. g.: "In the event of my becoming mentally incapacitated, I hereby nominate <name of nominee> as my committee. <Signed and Dated. > Witnessed in the presence of the signatory, who signed in our presence. <Signature of Witnesses>."

Each witness must be present at the time the other witness ascribed their name on the document. For a full precedent, see *Wills Precedents: An Annotated Guide*, Continuing Legal Education Society of British Columbia, 2019 (Bogardus, Wetzel & Hamilton).

If the nomination is in proper form, it will later be submitted with the application for the appointment of a committee. The judge shall appoint the committee that has been so nominated "unless there is good and sufficient reason for refusing the appointment" (*PPA* s 9).

i) Costs

The costs of all proceedings are in the discretion of the court (*PPA* s 27). Generally, the court orders payment of all the committee's reasonable legal fees from the patient's estate, theoretically so the applicant does not suffer losses for doing what, in many cases, is considered their moral obligation. Even though the patient's estate initially pays costs, the PGT may later review the costs on a passing of accounts to ensure that they are reasonable. If the fees paid by the patient's estate are unreasonable, the committee must return the excess amount to the patient's estate. The committee should have legal fees reviewed by the registrar of the court if unsure of their reasonableness.

The recent case of *Wong (Re)* [3], 2023 BCSC 22 reiterates that the costs of all proceedings are in the discretion of the court. In para 14 of *Wong (Re)*, the court acknowledged that the default approach is to award special costs to all parties to a committeeship application whose good faith participation

- was effected solely in the patient's best interests, and
- was unmotivated by the possibility of personal benefit or other improper ulterior considerations.

However, in para 14, *Wong (Re)* confirms that the Court may depart from this approach due to

- concerns regarding an applicant's motives,
- how the applicant conducted the proceeding, and
- the estate's ability to bear a costs order.

Another recent case *Horton (Re)* [4], 2020 BCSC 87 is an example of the court deciding not to award costs in favour of either child who submitted competing applications for appointment as committee of the estate and person of their parent. Where committee petition is contested, costs payable from patient's estate are not guaranteed to be granted to the applicants. In particular, competing petitions driven by animosity or power struggle may not be awarded the costs as explained in *Horton (Re)*.

j) Public Guardian and Trustee (PGT) as Committee

The PGT is a corporation established under the *Public Guardian and Trustee Act* with a unique statutory role to protect the interests of British Columbians who lack legal capacity to protect their own interests. This may include acting as committee of estate and/or person where a person needs assistance and there is no other family member or friend who can assume this role, or where there is conflict among family members and a neutral party is preferred.

The Public Guardian and Trustee (PGT) may take steps to become committee of estate if:

- There is no valid enduring power of attorney, or the attorney is not fulfilling their role
- The individual is incapable
- There is a need for someone to make financial decisions
- There is no suitable person available and willing to apply to be committee

- There are no other less intrusive options

The PGT charges a fee to provide estate management services in accordance with the *Public Guardian and Trustee Fees Regulation*, BC Reg 312/2000 [PGT Fees Regulation].

The PGT can become committee of estate and/or person in one of two ways:

1. The PGT may become committee of estate and/or person by Court Order. The PGT may bring an application for the appointment or, in a proceeding to appoint a committee, where there is a conflict, one or more of the parties may seek an Order that the PGT be appointed. The PGT will provide a response in the proceedings setting out whether they are prepared to take on this role. Typically, the PGT will only agree to act as committee of estate. A committee of person is required to make very personal decisions on behalf of the person and a family member or friend is usually more appropriate to act in this role if it is required.
2. As of December 1, 2014, the PGT may also become committee of estate by a legislative process set out in the *AGA*. See below.

For more information, please visit the PGT website: https://www.trustee.bc.ca/Pages/default.aspx.

B. Adult Guardianship Act: Statutory Property Guardian

The *PGT* may become statutory property guardian through a legislative process outlined in the *AGA*. A statutory property guardian is the equivalent to a committee of estate and has the duties and responsibilities to the adult as set out in the *PPA*.

1. The Legislative Committeeship Process

a) Assessment of Incapability

Several steps are required before an adult may be certified as incapable under the *AGA*.

Any individual can notify the PGT and the PGT can conduct an investigation to determine whether intervention is warranted. If it is found to be so, the PGT can request an assessment of incapability by a qualified health care provider.

1. A "qualified" health care provider is defined in s 3(2) of the *Statutory Property Guardianship Regulations* [*SPGR*]. It includes a health care provider as defined in the *Health Professions Act* and the *Social Workers Act*, as well as registrants of the British Columbia College of Social Workers; BC College of Nursing Professionals; College of Occupational Therapists of British Columbia; and registrants of the College of Psychologists of British Columbia.

2. The qualified health care provider then assesses the adult according to the prescribed procedures and if satisfied, prepares a Report of Assessment of Incapability along with a Details of Assessment for review by a health authority designate.

(a) The procedure for an incapability assessment is outlined in s 5 through 10 of the *SPGR*. These procedures are also required for any subsequent reassessment of the adult's incapability such as a review requested by the adult or an ordered review.

(i) The assessment is composed of two parts: a medical component and a functional component.

(ii) Prior to conducting the assessment, the adult must be given notice of the purpose of the assessment and their rights (see *SPGR* s 6(1)(a-f)

(iii) Section 10 outlines that an assessment report must be completed by filling out a Form 1 and that details of the assessment must be attached. The qualified health care provider must also inform the

adult of the result and the determination and offer the adult a copy of Form 1 and the details attached.

(iv) The qualified health care provider does not need to inform the adult or offer a copy of the report if they have reason to believe that doing so may result in serious physical or mental harm to the adult or significant damage or loss to the adult's property. A health authority designate is defined by s 4 of the *SPGR*.

3. Upon receiving Form 1, the health authority designate may issue a Certificate of Incapability if they are satisfied the criteria has been met. The criteria should be set out here. The designate must also have consulted with the PGT and notified the adult and, if possible, any spouse or near relative of the adult, of the intention to issue a Certificate of Incapability.

(a) The criteria are provided by sections 32(3)(a) to (e) of the *AGA*. It is important to note that the Certificate of Incapability cannot be signed if the adult has granted power over all of the adult's financial affairs to an attorney under an enduring power of attorney unless that attorney is not complying with the attorney's duties under the *Power of Attorney Act* or the enduring power of attorney, as applicable (*AGA* s 32(3)(e)).

(b) The notice required to the adult and a near relative is outlined in s 11 of the *SPGR*. Section 11(3) states that the adult or near relative be given at least 10 days to respond. Notice is given in writing of the intention to issue a Certificate of Incapability. Notification does not need to be provided to the adult or near relative if the designate has reason to believe that doing so may result in serious physical or mental harm to the adult or significant damage or loss to the adult's property.

(c) The Certificate of Incapability is Form 2 (*SPGR* s 12).

4. Once the Certificate of Incapability is signed by the health authority designate, the certificate must be forwarded to the PGT. The adult and a spouse or near relative must be informed that the Certificate of Incapability has been issued and provided with a copy.

(a) The BC Government has created a form called "Health Authority Designate Concluding Letter" for the purpose of providing notice to the adult.

(b) The PGT becomes the statutory property guardian on the date that the certificate was signed by the health authority designate.

(i) The PGT must inform the adult and, if information is available, a spouse or near relative, that the PGT has the power to manage the adult’s financial affairs (AGA s 33(2)). Tand that the adult, or person acting on their behalf, may request a second assessment and potentially a court review (*AGA* s 33(3)).

(ii) The adult or someone on behalf of the adult may request a second assessment within 40 days of being notified (*AGA* s 60(2))

See *A Guide to the Certificate of Incapability Process Under the Adult Guardianship Act* [5].

b) Reassessment of Incapability

Once a Certificate of Incapability has been issued and the time for a second assessment has passed, or the second assessment confirms the assessment of incapability, s 34 of the *AGA* outlines three different ways that a reassessment can be made of an adult's incapability.

1. If the PGT informs the body that designated the health authority designate who issued the certificate of incapability that a reassessment should occur.
2. If the adult requests a reassessment and has not been reassessed within the preceding 12 months
3. The court orders a reassessment under s 35(3) of the *AGA*.

c) Court Review of Assessment of Incapability

After a second reassessment has occurred and the adult is still declared incapable, the adult can apply for a court review.

The parties to the court review are:

- The adult
- The body that designated the health authority who issued the certificate of incapability
- If ordered by the court, a person appointed under the *Patients Property Act*, as committee for the adult following a declaration under that Act that the adult is incapable of managing themselves

The court may order another reassessment of the adult's incapability.

During this review, the court may confirm the determination of incapability, or reject the determination of incapability and order that the statutory property guardianship is ended.

2. Ending Committeeship (Statutory Property Guardian Authority Under the *AGA*)

A Statutory Property Guardianship can be ended in one of four ways:

1. The PGT is satisfied that the adult no longer needs a Statutory Property Guardian.

    (a) Notice must be provided to the adult that they no longer have a Statutory Property Guardian.

2. After a second assessment, the health authority designate accepts that the adult is no longer incapable.

    (a) The adult will be provided a form entitled 'Health Authority Designate Acceptance of Determination of Capability.'

    (b) Notice must be provided to the PGT

3. A court order after a review of an incapability assessment under s 35 of the *AGA*

4. The court appoints a committee under the *PPA*

3. Serving as a Committee

a) Duties

The committee's general duty is to exercise their powers for the benefit of the patient, having regard to the nature and value of the patient's property, and the patient's circumstances and needs and those of their family (*PPA* s 18). **The committee is fiduciary and is not allowed to use or take any benefit from their position**. When the patient has assets, the PGT will often recommend that the committee post a bond to secure the proper performance of these duties or seek a restriction on accessing the patient's funds. The committee may use professional services to assist them in some duties. However, professionals cannot be retained to do actions an ordinary person could perform. The cost of professional services is paid for by the patient's estate.

Specific duties of the committee include:

- Passing accounts before the PGT, at the times directed by the PGT (*PPA* s 10(d)). This includes, if the PGT requires it, a true inventory of the whole estate of the patient. The patient's assets are not the committee's, and thus the committee must account to the PGT for all transactions. Provisions regulating this duty are contained in s 10 of the *PPA* and in Rule 21-5 of the rules governing the Act in the *Supreme Court Civil Rules*, BC Reg 168/2009
- Upon the patient's death, the committee is no longer required to pass accounts before the PGT, but must provide the committee's accounts to the executor or administrator of the patient's estate, or, if the committee and the executor or administrator of the patient's estate are the same person, to the beneficiaries of the patient's estate (*PPA* s 24)
- Paying patient's maintenance, care and treatment costs out of the estate (*PPA* s 23)
- Bringing an action, if necessary, on behalf of the patient as their litigation guardian (*PPA* s 22)
- Exercising the rights, powers, duties, and privileges of the patient after the patient's death, as if they had not died, and serving as executor or administrator until letters probate of the will or letters of administration to the estate of the patient are granted and notice in writing is served upon the committee (*PPA* s 24)
- Filing income tax returns and applying for pensions

b) Powers

The committee of the estate has all the rights, powers, and privileges over the patient's estate as the patient would have if they had legal capacity (*PPA* s 15). This includes power to buy and sell property, open and close bank accounts, pay accounts etc. These powers include that would have been exercisable by the patient as a trustee, guardian of a person, holder of power of appointment or as the personal representative of a person (*PPA* s 17). For example, if the patient was acting as personal representative to their spouse prior to incapacity, the committee would now have the responsibility to make decisions for the spouse under the Representation Agreement. However, the court has discretion to place limits on any powers that the committee could otherwise perform (*PPA* s 16). In such a case, any powers that were limited by the court would fall to the PGT.

A committee of the person has the "custody of the person" of the patient. This means the committee is responsible for the person's welfare and well-being.

For investing money, a committee is a trustee within the meaning of the *Trustee Act* (*PPA*, s 15(2)), which means a committee must comply with the provisions of this Act when it comes to investing the patient's money. For example, the committee must meet a certain standard of care in making investment decisions and freedom to delegate investment decisions is limited.

If a patient (as opposed to the committee) transfers their property while incapable, for instance, by selling land or giving a gift, the transfer will be voidable (i.e. deemed to never have occurred at the option of the committee), unless full and valuable consideration was paid for the property, or a reasonable person would not have known that the adult was incapable (*AGA* s 60(2)).

> **NOTE:** An Enduring Power of Attorney or representation agreement is *terminated* when a person becomes a 'patient' by being declared incapable of managing their affairs by court order (*PPA* s 19). Therefore, the authority of a court order committee will never conflict with that conferred by a power of attorney. Where a committee is appointed under the *AGA* statutory property guardianship rules, any EPOA or s 7 RA for routine financial affairs is suspended (*PPA* s 19.1).

c) Remuneration

Under s 14 of the *PPA*, a person is allowed 'reasonable' compensation from the patient's estate for services rendered as committee. However, a person does not have to claim compensation. The amount of compensation is fixed on the passing of the accounts to the PGT.

If the PGT acts as the committee of estate, its fees are charged in accordance with the *Public Guardian and Trustee Fees Regulation*. Fees may be reduced or waived where the PGT is satisfied that hardship or injustice would result from charging the full fee (*PGT Fees Regulation* s 3).

A committee has a first lien upon the estate of the patient or the person who has ceased to be a patient (*PPA* s 14(4)).

NOTE: The Public Guardian and Trustee has helpful information for private committees at www.trustee.bc.ca.

4. Discharge of a Committee

a) Rescission of a Committee

On application by the Attorney General, the PGT, or any other person, a judge may rescind the appointment of a person (other than the PGT) appointed as committee (*PPA* s 6(2)). The rescission is subject to the committee complying with the requirement to pass accounts set out in s 13 of the *PPA*. This application may be filed along with an application for a new committee. This process cancels the committee's authority to act for the patient.

b) Discharge of a Committee

If a person regains their mental capability and ceases to be a 'patient,' that person, or the committee (other than the PGT), may apply to the court for the discharge of the committee (*PPA* s 12). Notice in writing of this application must be provided to the PGT 10 days prior to the application. The judge who hears the application may, and shall if asked by the PGT, order the committee to pass accounts. The order declaring the person capable may also discharge the committee upon passing accounts or upon receipt of a waiver of that requirement from the adult. There will almost always be outstanding accounts.

Once the committee is discharged, the committee has no further powers or duties with respect to the estate of the person who has ceased to be a patient (*PPA* s 13(4)(a)).

NOTE: At this time there is no section under the *PPA* governing the discharge of the PGT as committee.

c) Release from Liability

A discharged committee, is released from liability concerning the management of the estate except in respect of undisclosed acts, neglects, defaults, or accounts, or where the committee was dishonest or unlawful in their conduct (*PPA* s 13(4)(b)). Disagreement between the person who has ceased to be a patient and the committee regarding management of the estate would mitigate against the discharge of the committee.

References

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[3] https://www.canlii.org/en/bc/bcsc/doc/2023/2023bcsc22/2023bcsc22.html
[4] https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc87/2020bcsc87.html
[5] http://www.trustee.bc.ca/reports-and-publications/Documents/A%20Guide%20to%20the%20Certificate%20of%20Incapability%20Process%20under%20the%20Adult%20Guardianship%20Act.pdf

VI. Adult Abuse

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 11, 2023.

A. What is Adult Abuse and Neglect?

An adult might be experiencing, or be vulnerable to experiencing, abuse, neglect or self-neglect. In situations where an adult is in need of support or assistance in order to prevent abuse or neglect, the following legislation applies: Part 3 of the *AGA*; s 34 and 35 of the *PAA*; s 31 of the *RAA*; and s 17 to 19 of the *PGTA*.

The law defines abuse, neglect and self-neglect to include acts and a failure to act. Refer to the *Practical Guide to Abuse and Neglect Law in Canada* for a summary of the law and practical guidelines on how to identify and respond to situations of abuse or neglect. This guide is produced by the Canadian Centre for Elder Law (CCEL) and is available online at https://www.bcli.org/project/practical-guide-elder-abuse-and-neglect-law-canada.

Section 1 of the *AGA* defines the terms “abuse” and “neglect” broadly as follows:

- “Abuse” means the deliberate mistreatment of an adult that causes the adult

  (a) physical, mental, or emotional harm, or

  (b) damage or loss in respect of the adult's financial affairs,

  and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors.
- “Neglect” means any failure to provide necessary care, assistance, guidance or attention to an adult that causes, or is reasonably likely to cause within a short period of time, the adult serious physical, mental or emotional harm or substantial damage or loss in respect of the adult's financial affairs and includes self-neglect.

B. Responding to Adult Abuse and Neglect

Sometimes the most appropriate and helpful response to abuse or neglect is not a legal response. In some instances, it may be appropriate to contact a designated agency, or the PGT. However, the key response is generally to listen to the individual’s description of their experience, and to help the person get support and assistance, often through identifying an appropriate referral agency. You will want to consider whether there is an urgency to the circumstances that suggests a need for immediate action. For example:

- Is the person in immediate danger of harm?
- Will money be stolen or spent?
- Will property be taken away?
- Does the person appear to lack mental capacity?

BC's PGT office has prepared a useful "decision tree" to help with deciding where to refer someone who is abused or neglected. The front half is the decision tree itself, a flow chart of where to refer. The back contains a table setting out the response from the three resources – the police, the designated agency, and the PGT's office. Please see **Appendix B** for the Decision Tree.

The CCEL has published the following guiding principles for responding to concerns about abuse, neglect or self-neglect: (*A Practical Guide to Elder Abuse and Neglect Law in Canada* (2011)).

1. Talk to the individual

Ask questions. Talk to the person about their experience. Help the person to identify resources that could be helpful.

2. Respect personal values

Respect the personal values, priorities, goals, and lifestyle choices of the individual. Identify support networks and solutions that suit their individuality.

3. Recognize the right to make decisions

Mentally capable adults have the right to make decisions, including choices others might consider risky or unwise.

4. Seek consent or permission

In most situations, you should get consent from the adult before taking action.

5. Respect confidentiality and privacy rights

Get consent before sharing another person's private information, including confidential personal or health information.

6. Avoid ageism

Prevent ageist assumptions or discriminatory thinking based on age from affecting your judgment. Avoid stereotypes and show respect for the inherent dignity of all human beings, regardless of age.

7. Recognize the value of independence and autonomy

Where this is consistent with the adult's wishes, assist the adult to identify the least intrusive way to access support or assistance.

8. Know that abuse and neglect can happen anywhere and by anyone

Abuse and neglect of older adults can occur in a variety of circumstances from home care to family violence.

9. Respect rights

An appropriate response to abuse, neglect, or risk of abuse or neglect should respect the legal rights of the individual while addressing the need for support, assistance, or protection in practical ways.

10. Get informed

Ignorance of the law is not an excuse for inaction when someone's safety is at stake. If you work with older adults you need to educate yourself about elder abuse.

Another useful document provided by the Public Guardian and Trustee is called *Decision Tree: Assisting an Adult Who is Abused, Neglected or Self Neglecting* and the related videos (See Section **VII. Sources and Resources**).

1. Designated Agencies

There is no duty for the general public to report abuse, neglect, or risk in BC. However, if an older adult is experiencing, or particularly vulnerable to, abuse, neglect, or self-neglect and is unable to access the necessary support or assistance on their own, anyone may notify a Designated Agency (DA). A representative of the DA will then meet with the adult to decide on what steps can be taken. The DAs are legally required under the *AGA* to respond to reports of abuse, neglect, and self-neglect. The DA process includes involving the adult in decisions about how to seek support and assistance, providing the necessary support and assistance to prevent abuse or neglect, and respecting the right for an adult with

capacity to refuse support or assistance.

The DAs are set out in the *AGA*, and the *DAR*. They include BC Community Living, Providence Health Care Society, and each of the provincial Health Authorities (i. e. Vancouver Coastal Health, Interior Health, Fraser Health, Island Health Authority, and Northern Health Authority). For contact information, refer to section **VII. B: Designated Agencies** in this chapter.

A DA must determine whether an adult needs support and assistance if the agency receives a report of abuse or neglect, has reasons to believe that an adult is abused or neglected, or receives a report that the adult's representative, guardian, or monitor has been hindered from visiting or speaking with the adult (*AGA* s 47). Where an adult is found to be in need of support or assistance, a DA may take any of the following courses of action: (See s 47(3) and s 51 of the *AGA*).

- Investigate whether abuse or neglect is happening
- Provide assistance to obtain care, social support, or legal guidance
- Assist in obtaining an appropriate representative or guardian
- Inform the Public Guardian and Trustee
- Prepare and implement a support and assistance plan with the adult
- Apply to the court for an order authorizing the provision of services

Designated Agencies (DAs) must involve the adult, to the greatest extent possible, in decisions about how to seek support and assistance, and in decisions regarding the provision of support and assistance necessary to prevent abuse or neglect in the future (*AGA* s 52). DAs are also legally required to respect the right for an adult with capacity to refuse support or assistance (*AGA* s 2).

Legal professionals need to remember their responsibility to maintain professional conduct and client confidentiality with respect to their clients. There is not a mandatory requirement to report abuse, neglect, or self-neglect in BC. However, a report to a DA can be made anonymously.

Make sure that the adult has access to all available resources. If the situation is an emergency, **call 9-1-1**. If the situation is not an emergency, but the older adult is in need of support and assistance to protect themselves, then you may need to contact a DA. Refer to sections **VII A: Resource Organizations** and **VII. B: Designated Agencies** in this chapter for further relevant information, as well as the CCEL tool "Elder Abuse and Neglect: What Volunteers Need to Know", found at: http://www.bcli.org/project/elder-abuse-and-neglect-what-volunteers-need-know.

2. Public Guardian and Trustee

The Public Guardian and Trustee (PGT) has the statutory authority to investigate all situations where there appears to be financial abuse, neglect, or self-neglect. A designated agency discussed above may refer an investigation of abuse to the PGT.

The statutory powers, set out in s 17 of the *PGTA*, allow the PGT to investigate and audit the affairs, dealings, and accounts of:

- A trust, a beneficiary of which is a young person, an adult who has a guardian, or an adult who does not have a guardian but who is apparently abused or neglected, as defined in the *RAA*
- If the PGT has reason to believe that the interest in the trust, or the assets of the young or adult, may be at risk, or that the representative, guardian, or attorney has failed their duties
- An adult who does not have a guardian, a representative, or an attorney under an EPOA but who is apparently abused or neglected, as defined in the *RAA*
- An attorney under a POA or EPOA, where the PGT has reason to believe assets are at risk or person is not fulfilling their duties

- A representative
- A guardian

The statutory powers also allow the PGT to:

- Require trustee, attorney, representative, guardian to provide accounts necessary for an audit (*PGTA* s 18(2))
- Ask the court for an order allowing access to information previously denied when undertaking an audit or investigation (*PGTA* s 18 (4))
- Protect a person's financial affairs and freeze assets in urgent situations for up to 30 days and renew the instructions up to three times for a total of 120 days (*PGTA* s 19)

Any person may notify the PGT where a representative or attorney is: (*RAA* s 30(1)(h); *PAA* s 34(2)(c))

- Abusing or neglecting the person for whom the representative or attorney is acting
- Failing to follow the instructions in the RA
- Incapable of acting as a representative or attorney
- Failing to fulfill the duties of a representative or attorney
- Otherwise failing to comply with an RA, or an EPOA

Any person can also make an objection to the PGT if there is a reason to believe that fraud, undue pressure, or some other form of abuse or neglect is being or was used to induce an adult to make, change or revoke a financial or legal document (*PAA* s 34(2)(b)), or a Representation Agreement (*RAA* s 30(1)(b)).

On receiving an objection concerning Representation Agreements, the PGT must promptly review the situation and may do one or more of the following (*RAA* s 30(3)):

- Conduct an investigation to determine the validity of the objection
- Apply to the court for an order confirming a change to, or the revocation of, the RA or cancelling part of the RA
- Apply to the court for an order that the RA is not invalid
- Recommend that someone else make a court application
- Make a report to a designated agency, requesting support and assistance in accordance with s 46 of the *AGA*
- Appoint a monitor
- Authorize remuneration for a monitor out of the adult's asset
- Take any other action considered necessary

On receiving a report concerning Power of Attorneys, the PGT must promptly review the situation and may do one or more of the following (*PAA* s 34(3)):

- Conduct an investigation to determine the validity of the report;
- Apply to the court for an order described in s 36 of the *PAA*
- Advise the person who made the report to apply to the court for an order described in s 36 of the *PAA*
- Make a report under s 46 of the *AGA*
- Take steps under the *PPA* to become a committee
- Take no action, or take any action that the PGT considers necessary

See Part 3 of the *PGTA* for the planning and accountability obligations of the PGT.

For more information, please visit the PGT website: https://www.trustee.bc.ca/Pages/default.aspx.

3. Additional Resources for Older People Experiencing Abuse or Neglect

Refer to section **II. D: Resource Organizations** in this chapter, for contact information for the BC Centre for Elder Advocacy and Support, and the Public and Guardian Trustee of British Columbia.

VII. Sources and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 10, 2023.

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A. Resource Organizations

Seniors First BC (Formerly known as the BC Centre for Elder Advocacy and Support)

1. 150-900 Howe Street

Vancouver, BC V6Z 2M4

Telephone: 604-688-1927

Seniors Abuse and Information Line (Confidential)

Toll Free: 1-866-437-1940

Telephone: (604) 437-1940

Fax: (604) 437-1929

Website: http://seniorsfirstbc.ca/

Email: info@seniorsfirstbc.ca

Seniors First BC is a provincial organization dedicated to providing legal information on issues related to older adults and the law, particularly issues involving abuse, Powers of Attorney, Representation Agreements, and consumer fraud. Seniors First BC also staffs an Elder Law clinic that provides free legal services to older adults who would not otherwise be able to access justice due to low income or other barriers

Canadian Center for Elder Law (CCEL) Faculty of Law, University of British Columbia

1822 East Mall

Vancouver, BC V6T 1Z1

Telephone: (604) 822-0142

Fax: (604) 822-0144

Website: http://www.bcli.org/ccel

E-mail: ccels@bcli. org

CCEL is a national non-profit organization that conducts legal research, law reform, outreach and public education on the law as it relates to older adults. The CCEL has produced a number of practical tools and guidance for legal professionals, financial service providers, social workers, health care workers, caregivers, advocates, volunteers, and the public.

BC Association of Community Response Networks (BC CRNs)

Website: http://www.bccrns.ca

CRNs are located throughout BC. They seek to increase community coordination in response to abuse and neglect, through a focus on community development, education, prevention, and advocacy. They work to establish networks of community and government agencies, and local businesses to facilitate these goals.

Vancouver Coastal Health – ReAct Adult Protection Program (VCH ReAct)

Corporate Office

11th Floor, 601 West Broadway

Vancouver, BC V5Z 4C2

Toll Free: 1-877-732-2899

Telephone: (604) 904-6173

Fax: (604) 904-6179

Website: http://www.vchreact.ca

E-mail: react@vch.ca

Vancouver Coastal Health is a Designated Agency under the *AGA*. VCH React provides educational materials to help health care providers recognize and respond to abuse, neglect and self-neglect of vulnerable adults. Each health authority has a similar program. The following contact and phone numbers are provided by the Public Guardian and Trustee website Assessment and Investigations page http:/ / www. trustee. bc. ca/ services/ services-to-adults/ Pages/ assessment-and-investigation-services.aspx

- **Fraser Health**: 1-877-REACT-08 (1-877-732-2808); react@fraserhealth.ca

  https:/ / www. fraserhealth. ca/ health-topics-a-to-z/ adult-abuse-and-neglect/ getting-help-for-adult-abuse-and-neglect#.W9vJ-GhKiUk
- **Interior Health**: For direct community numbers visit https://www.interiorhealth.ca/information-for/seniors/adult-abuse-and-neglect
- **Northern Health**: Prince George Adult Protection Line 250-565-7414
- **Vancouver Island Health Authority**:
  - South Island: 1-888-533-2273
  - Central Island: 1-877-734-4101
  - North Island: 1-866-928-4988

Nidus Personal Planning Resource Centre and Registry

1440 West 12th Avenue

Vancouver BC V6H 1M8

Telephone: (604) 408-7414

Toll Free: 1-877-267-5552

Fax: (604) 801-5506

Website: http://www.nidus.ca

E-mail: info@nidus.ca

Nidus provides public legal education on personal planning and related matters, specializing in Representation Agreements. They have made available on their website various factsheets and guides on personal planning matters, as well as self-help forms for creating Representation Agreements. Nidus also operates a centralized registry for personal planning documents, which allows for secure, online storage of planning documents and the option to allow third parties like hospitals and financial institutions to search for your record.

Public Guardian and Trustee of BC

700 - 808 West Hastings Street

Vancouver, BC V6C 3L3

Telephone: (604) 660-4444

Fax: (604) 660-0374

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

E-mail: mail@trustee.bc.ca

The Public Guardian and Trustee produces publications on various aspects of adult guardianship as noted above. The PGT can conduct investigations where there are concerns of financial abuse, neglect or self-neglect. The PGT acts as a committee, when required, and may agree to act as an attorney. The PGT may also make health care decisions as a Temporary Substitute Decision Maker. The PGT remains bound by statutory law and is established under the *Public Guardian and Trustee Act*, RSBC 1996, c 383 [*PGTA*].

B. Designated Agencies

In BC, anyone can make a report to a Designated Agency when there are concerns that an adult is experiencing abuse, neglect or self-neglect, and needs support or assistance to protect themselves. For more information about the statutory role of Designated Agencies and the Public Guardian and Trustee, refer to section VI: Adult Abuse and Neglect.

The Designated Agencies for BC are: (see s 61 of the *Adult Guardianship Act*, RSBC 1996, c 6 [*AGA*], and the *Designated Agencies Regulation*, BC Reg 38/2007 [*DAR*])

Community Living BC

Phone: (604) 664-0101

Toll-Free: 1-877-660-2522

Website: http://www.communitylivingbc.ca

Vancouver Coastal Health Authority

Phone: (604) 736-2033

Toll-Free: 1-866-884-0888

Website: http://www.vchreact.ca/

Fraser Health Authority

Phone: (604) 587-4600

Toll-Free: 1-877-935-5669

Website: http://www.fraserhealth.ca

Island Health Authority

Phone: (250) 370-8699

Toll-Free: 1-877-370-8699

Website: http://www.viha.ca

Interior Health Authority

Phone: (250) 469-7070

Toll-Free: 1-844-870-4754

Website: http://www.interiorhealth.ca/

Northern Health Authority

Phone: (250) 565-2649

Toll Free: 1-866-565-2999

Adult Protection Line: 250-565-7414

Toll Free: 1-844-465-7414

Website: http://www.northernhealth.ca

Providence Health Care Society

St. Paul's Hospital—Phone: (604) 862-2344

Mount St. Joseph's Hospital—Phone: (604) 874-1141

Holy Family Hospital—Phone: (604) 321-2661

Website: http://www.providencehealthcare.org

Appendix A: EPOA

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 11, 2023.

Important note to students regarding this precedent: If students use this precedent (produced by the Ministry of the Attorney-General of BC) students should ensure that the automatic revocation of prior POAs (para 2) should not be included in the POA without very clear instructions from the client that the client WANTS all prior POAs revoked (e. g. this would include prior bank POAs).

In addition, students should be aware that the “effective date” (para 9) works if there is only one attorney appointed. If more than one attorney is appointed, the POA cannot be used and will not be effective unless all attorneys have signed.

Note that this POA precedent does not include custom clauses e. g. delegation, gifts, loans etc. If the client wishes to include custom clauses, the student should refer to *Wills Precedents: An Annotated Guide*, Continuing Legal Education Society of British Columbia, 2019 (Bogardus, Wetzel & Hamilton) for precedent clauses.

This appendix is available from its source for download in PDF [1].
A permanent archive version is also available at https://perma.cc/T7FZ-TEYK.
Readers of the print edition please see the "Supplementary Documents for Appendices" section.

References

[1] http://www2.gov.bc.ca/assets/gov/health/managing-your-health/incapacity-planning/enduring_power_of_attorney.pdf

Appendix B: Decision Tree on Adult Abuse and Neglect

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 11, 2023.

This appendix is available from its source for download in PDF [1].
A permanent archive version is also available at https://perma.cc/A8SY-Q6ZE.
Readers of the print edition please see the "Supplementary Documents for Appendices" section.

References

[1] http://www.trustee.bc.ca/Documents/adult-guardianship/Decision%20Tree.pdf

Chapter Sixteen – Wills and Estate Administration

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

When a person dies, the property and possessions they leave behind become known as their estate. Estates must be settled: debts and taxes must be paid, assets may need to be sold, and the property must be distributed. This work is done by the personal representative of the estate, who is appointed by the deceased's will or by the court if a will does not exist. This process is governed by the *Wills, Estates and Succession Act*, SBC 2009, c 13 [*WESA*]. See XI. Estate Administration and XII. Duties of a Personal Representative for more details on estate administration. See IX. Property and XIII. Taxation: RRSP, RRIF & TFSA for more details on what property forms part of the estate and what property passes outside of the estate.

If a person dies without a will, they are "intestate". *WESA* gives specific instructions for how an intestate estate should be distributed and who can do the distributing. See VIII. Intestacy and XI. Estate Administration for more information.

To ensure their estate is distributed in a way that reflects their wishes and personal circumstances, many people create a will. A will is a legal document that sets out what should happen to a person's estate and to any minor children upon their death.

WESA sets out important rules that need to be followed for a will to be valid. These include rules about the mental capacity required to make a will, the process for certifying that the contents reflect the will maker's intentions, and a system for registering the will to ensure it is located upon death (see III. Making and Executing a Will). There are rules for how to amend or revoke a will, and for what happens if a will does not comply with the formalities required to be valid (see IV. Mistakes and Alterations in a Will, VI. Revocation of a Will, and V. Court's Powers to Cure Deficiencies and Rectify a Will). Finally, there is an expectation that a will maker will provide for their spouse(s) and child(ren), if any, and rules that must be followed if a will maker wishes to disinherit them (see VII. Wills Variation Claims). There are also specific rules that may affect certain Indigenous people and people living on certain Indigenous lands (see X. First Nations and Wills).

The only wills and estates issues LSLAP can assist with are the drafting of certain types of simple wills for eligible clients. See XIV. LSLAP File Administration Policy for more details.

This chapter provides a summary of will preparation and estate administration procedure. In this chapter, any reference to a court is to the BC Supreme Court, unless otherwise stated.

The *Wills, Estates and Succession Act*, SBC 2009, c 13 [*WESA*], came into force on 31 March 2014. *WESA* substantially revised wills and estates law in BC by repealing and consolidating the *Estate Administration Act*, RSBC 1996, c 122; the *Probate Recognition Act*, RSBC 1996, c 376; the *Wills Act*, RSBC 1996, c 489; and the *Wills Variation Act*, RSBC 1996, c 490.

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

A. Legislation

- *Wills, Estates and Succession Act*, SBC 2009, c13 [*WESA*].
- *Trustee Act*, RSBC 1996, c 464.

B. Texts

Many texts are available that provide more information on this area of the law. Be aware that the law on wills & estates has significantly changed since *WESA* came into force on 31 March 2014. Therefore, earlier resources may be outdated. The Continuing Legal Education Society of BC (CLEBC) offers the following material for a paid subscription:

1. General

Stephanie J Daniels et al, eds, *BC Estate Planning & Wealth Preservation*, (Vancouver: CLEBC) (loose-leaf updated 2023)

James Baird et al, *Wills, Estates, and Succession Act Transition Guide* (Vancouver: CLEBC, 2014)

2. Drafting

Peter Bogardus, Sadie Wetzel & Mary Hamilton, *Wills and Personal Planning Precedents - An Annotated Guide* (Vancouver: CLEBC) (loose-leaf updated 2022) ("*Wills and Personal Planning Precedents*")

3. Probate

Aubrie Girou et al, eds, *Probate and Estate Administration Practice Manual* (Vancouver: CLEBC) (loose-leaf updated 2023)

C. Bureaus and Web Sites

Department of Vital Statistics

This department keeps records of all births, marriages, deaths, and name changes in British Columbia. Additionally, this department manages the wills registry.

605 Robson Street, Room 250
Vancouver, B.C., V6B 5J3
Telephone: 1 (888) 876-1633
Website: https:/ / www2. gov. bc. ca/ gov/ content/ family-social-supports/ seniors/ health-safety/ health-care-programs-and-services/vital-statistics

Canadian Legal Information Institute ('CanLII')

CanLII is a non-profit organization that provides access to court judgments, tribunal decisions, statutes and regulations from all Canadian jurisdictions.
Website: http://www.canlii.org/en/

III. Making and Executing

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 8, 2022.

A. Assessing Will-maker Competence

To make a valid will, a person must:

- Be 16 years of age or older;
- Have testamentary capacity;
- Intend to make a will; and
- Comply with the formalities in *WESA*.

1. Testamentary Capacity

a) Generally

The will-maker must have the requisite testamentary capacity. No person of unsound mind, who lacks testamentary capacity, is capable of making a valid will. Testamentary capacity is defined through the common law, not statute. The basic test is found in *Banks v Goodfellow*, (1870) LR 5 B 549 (QB) at para 569 [*Goodfellow*]; for a recent application of this test, see *Nassim v Healey* [1], 2022 BCSC 402 at para 41 [*Nassim*].

According to the *Goodfellow* case and subsequent decisions, to have testamentary capacity a will-maker must:

- Understand the nature of the act of making a will and its effects;
- Understand the extent of the property they are disposing;
- Be able to comprehend and appreciate the claims to which they ought to give effect; and
- Form an orderly desire as to the disposition of the property.

In *Nassim*, the courts also outline a more “modern” form of the *Goodfellow* test that was quoted in *Laszlo v Lawton* [2], 2013 BCSC 305 at para 188 *[Laszlo],* "The testator must be sufficiently clear in his understandings and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural object of his bounty and (3) the testamentary provisions he is making; and he must moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property…"

Laszlo at para 189 sets out the relevant time for assessing capacity: when the will-maker gave instructions and when the will maker-executed the will.

b) Presumption of Requisite Capacity

The law presumes that a will-maker has the requisite capacity if a will was duly executed in accordance with the formal statutory requirements after being read over to a will-maker who appeared to understand it.

Nevertheless, a student or lawyer should always assess the will-maker's capacity when taking instructions from the will-maker. This decision should be based on the will-maker's instructions, not any assertion from the will-maker that they are capable. To this end, avoid asking the will-maker direct questions about capacity, such as "are you capable?"

Some helpful lines of inquiry to assess capacity include determining whether the will-maker can understand the nature of the testamentary act (that they are making a will), can recall the property, and can comprehend that they are excluding possible claimants under intestacy or through a wills variation claim. Delusions or partial insanity will not destroy testamentary capacity unless they directly affect testamentary capacity or influence the dispositions in the will.

c) Presumption of Validity

The rules regarding the burden of proof in relation to testamentary capacity were set out by the Supreme Court of Canada in *Vout v Hay* [3] [1995] 2 SCR. 876, 125 DLR (4th) 431 [*Vout*]. Essentially, if a will is duly executed in accordance with the formal statutory requirements after being read by a testator who appears to understand the will, it is presumed that the testator possessed the requisite capacity and knew and approved the contents of the will. This presumption may be rebutted where "suspicious circumstances" or undue influence exist (see below).

d) Undue Influence

A will or a portion of it that is made as a result of undue influence is not valid. Undue influence is not mere persuasion but is physical or psychological **coercion**. There must be capacity to influence and the influence must have produced a will that does not represent the will-maker's intent. Section 52 of WESA now provides that, if it is shown that the will-maker was in a position where the potential for domination or dependence was present, the burden shifts to the party seeking to defend the will to show that the will was not procured through undue influence. A spouse, parent, or child, etc. may put their claims before the will-maker for recognition. This does not constitute undue influence unless it amounts to coercion. If the will-maker continues to be capable of making decisions freely, the advice or persuasion does not amount to undue influence. See *Leung v Chang* [4], 2013 BCSC 976 for a framework for the burden of proof in litigation regarding contested wills.

To challenge a will on the grounds of undue influence, the asserting party must show that the will does not represent the will-maker's true intentions due to the coercion. If this can be shown, undue influence is presumed. The party that wishes to defend the will may rebut this presumption by showing that the will was a result of the testator's own "full, free and informed thought". See *Stewart v Mclean* [5], 2010 BCSC 64 at para 96. Factors that can assist with rebutting the presumption includes proof that:

a) No actual influence was used or there was a lack of opportunity to influence;

b) The will-maker obtained independent legal advice or had the opportunity to do so;

c) The will-maker had the ability to resist the influence; or

d) The will-maker had knowledge and appreciation about what they were doing.

Notwithstanding section 52 of *WESA*, an individual challenging a will on the basis of undue influence should have sufficient evidence to establish actual undue influence – in challenging the validity of a will, it may be insufficient to simply point to a relationship where there was a potential for the testator's domination or dependence, without more. An allegation of undue influence is a serious allegation which should not be made lightly. See *Ali v Walter Estate* [6], 2018 BCSC 1032; *Geffen v Goodman Estate* [7], [1991] 2 SCR 353, 81 DLR (4th) 211; *Cowper-Smith v Morgan* [8], 2017 SCC

61.

Allegations of undue influence should not be readily brought. A failed allegation of undue influence may attract severe monetary consequences against the accuser. When one alleges undue influence, they are accusing another of being a fraudster. A failed allegation of fraud more readily justifies an award of special costs against the accuser. Therefore, a party who fails to prove a case of undue influence runs the risk of having to pay the full legal costs of the defending party. As such, undue influence should be carefully considered and investigated before commencing a court action. See *Mawdsley v Meshen* [9], 2011 BCSC 923.

The will drafter should ensure that the will represents the will-maker's intentions and that they are not being coerced into making the will or disposition against their wishes. This is especially relevant where the aged or infirmed are concerned.

e) Suspicious Circumstances

Suspicious circumstances may arise where a person who prepares a will also takes a benefit under it, though this is not exhaustive of all circumstances that raise a suspicion. The suspicion is that the will-maker did not know or approve of the contents of the will, and this suspicion must be removed before probate will be granted (see *Riach v Ferris* [10], [1934] SCR 725, [1935] 1 DLR 118; see also more recent applications in *Clark v Nash* [11], (1989) 61 DLR (4th) 409 (BCCA), 34 ETR 174 and *Johnson v Pelkey* [12], (1997) 36 BCLR (3d) 40 (SC), 17 ETR (2d) 242.

Suspicious circumstances surrounding the making of a will is not a stand-alone ground to challenge the validity of a will; however, if a challenger of a will can demonstrate that suspicious circumstances existed when the will was drafted, this may shift the burden to the propounders of the will to prove that the testator had knowledge and approved of the contents of the will when it was made. In *Vout v Hay* [13], [1995] 2 SCR 876 at para 25 [*Vout*], the Court held that suspicious circumstance may be raised by:

a) circumstances surrounding the preparation of the will,

b) circumstances tending to call into question the capacity of the testator, or

c) circumstances tending to show that the free will of the testator was overborn by acts of coercion or fraud.

The Court in *Vout* held that where the party seeking to overturn the will can point to some evidence, that if believed would prove suspicious circumstances, the burden of proof shifts to the propounder of the will to prove on a balance of probabilities that the will-maker knew and approved of the will's contents and had the necessary testamentary capacity. This problem is best avoided by ensuring the will is prepared by the will-maker or some independent party (e.g., a student or lawyer) and not by a beneficiary, or the spouse of a beneficiary, under the will.

B. Finding and Appointing a Personal Representative

1. Duties of the Personal Representative

The Executor or Administrator is responsible for the administration of the estate, including inventorying and realizing assets, distributing assets, and winding up the estate.

2. Executor

An Executor is appointed by the will-maker in the will to handle all aspects of the estate after the will-maker's death. Any person, trust company or financial institution may be an Executor depending on the size of the estate. Although not recommended, a minor may be appointed; however, if they have not reached the age of majority on the will-maker's death, probate may be delayed.

The will-maker should appoint a person that is willing to act, familiar with the estate, young enough to outlive them, and preferably living in BC. An alternative Executor should also be appointed in case the first Executor is unavailable. The Executor, if they accept the position, must carry out the duties of Executor. The Executor may renounce, under section 104 of *WESA*, if they have not already intermeddled with the estate. In this scenario, the administration of the estate passes as if they have never been appointed Executor.

3. Administrator

An Administrator is appointed by the court to administer the estate of a person who dies intestate (without a valid will). Section 130 of *WESA* provides the order of priority among applicants for the administration of an intestate estate. An Administrator cannot act until the court issues a Grant of Administration. A "Grant of Administration with Will Annexed" may be granted where there is a will, but the Executor named in the will cannot or will not act (e.g. due to refusal to act, incapacity, or death of the Executor). The order of priority for administration with will annexed is provided in section 131 of *WESA*. The Administrator's legal capacity to act starts from the date of the issuance of the Grant of Administration.

4. Personal Representative is Accountable

A personal representative is a fiduciary at law and must act to the benefit of the estate and the beneficiaries. They cannot purchase from the estate unless they are given specific power to purchase in a will. They are accountable to the estate for any profit made while acting as Executor or Administrator. If the personal representative makes mistakes and causes loss to the estate, that person could be held personally liable and could be required to replace the loss unless the court finds that they acted honestly and reasonably.

5. Remuneration and Benefits

A personal representative may be entitled to remuneration under a remuneration contract or pursuant to an express authority under the will. Otherwise, they are entitled to fair and reasonable remuneration, not to exceed 5 percent of the gross aggregate value of the estate under section 88 of the *Trustee Act*, RSBC 1996, c 464, and an annual care and management fee not exceeding 0.4 percent of the average market value of the assets. A personal representative may be a beneficiary under the will, though it is a rebuttable presumption that any benefit other than a residuary bequest under the will is in lieu of compensation. See *Canada Permanent Trust Co v Guinn*, (1981) 32 BCLR 288 (SC).

A trust company can be appointed Executor but usually will not consent unless the assets are substantial.

If the client requires a trust company to be appointed as the Executor, the client should be referred to a private lawyer.

C. Drafting the Will

Section 37(1) of *WESA* requires that a will be in writing. The will-maker and two or more witnesses in the presence of the will-maker must sign the will. It may be typed or handwritten, or both, as in the case of printed will forms. Subsection 3 sets out that a will is deemed to be in writing if the will is in electronic from.

1. Intention and Precision

A fundamental rule of drafting is to ascertain the **will-maker's intent** regarding how the estate will be divided. Have the will-maker consider present desires as well as future possibilities. A beneficiary may predecease the will-maker and the will-maker may want the deceased's share to go to someone else. Potential will variation claims must be anticipated. **A qualified lawyer should be consulted if a wills variation claim may occur.** See **Section VI: Wills Variation Claims**, to determine when this issue might arise.

Use clear and precise language. Those drafting a will should make an effort to use fewer technical legal terms and more common language. The concepts of Latin maxims may be difficult for some to comprehend and cause unnecessary frustration. Using simple language will reassure clients that those who read it will understand what is being conveyed.

Do not use words and phrases that are open to more than one interpretation. Be clear in describing property and time periods. Remember that certain terms used to describe property or relationships have precise legal meanings. Do not use them casually. Be careful when describing property and beneficiaries. For example, the clause "I give the assets in my bank account to John" is poorly drafted. It may mean a savings account, chequing account, or both. John may be a son, nephew or lover.

It is well-settled that courts will allow a successful party in litigation to recover costs from an unsuccessful party. However, the rule that costs follow the event is generally modified in wills variation and interpretation actions. In the absence of misconduct, where the opinion, advice or direction of the Court is sought on a question relating to the validity or interpretation of a will, the Court may order the costs of all parties to be paid out of the estate. See *Wilson v Lougheed* [14], 2012 BCSC 1166.

> **NOTE: The sample clauses throughout this document are merely examples. You should ensure that the clauses you use are appropriate and that the will is internally consistent.** For example, if specific bequests are given to various persons, another clause in the will should not dispose of the entire estate, but may dispose of the residue. Consult a qualified lawyer, the CLEBC *Wills and Personal Planning Precedents* resource or any other books on will precedents for additional assistance with the structure of various clauses.

2. Actual Drafting

A will contains instructions about what should happen after the will-maker's death. As a result, keep in mind the importance of precision and consistency when drafting a will. Generally, there are several paragraphs common to all wills. The CLEBC's *Wills and Personal Planning Precedents—An Annotated Guide* is especially useful.

In addition, the top of each page of the will should identify the page by number and indicate "the Last Will and Testament of [will-maker's name]" and should be initialled by the will-maker and witnesses.

3. Part One

The first part of the will deals with initial matters. The opening clause of a will is called the "domicile clause" and identifies the will-maker and the place where the will was made. The first paragraph is known as the revocation clause, which cancels any wills previously made. The next paragraph appoints the Executor and Trustee and an alternate Executor and Trustee of the will. Following this paragraph is the guardian clause, which appoints someone to look after any minor children. This is important in cases where the death of both parents occurs at the same time.

a) Opening and Revocation Clauses

The opening clause is fairly standard. It identifies the will-maker, gives their place of residence and may state their occupation:

> **SAMPLE:** "This is the last will of me, [name], of [address], British Columbia." (See 2020 CLEBC *Wills and Personal Planning Precedents*, 1.5).

Though the last testamentary disposition of property is generally the effective one, it is standard practice to insert a general revocation clause that revokes all previous wills and codicils. This clause should be included even though the will-maker has never before made a will. It follows the opening clause.

> **SAMPLE:** "I revoke all my prior wills and codicils." (2020 CLEBC *Wills and Personal Planning Precedents*, 1.11).

The revocation clause will not revoke other non-will testamentary dispositions such as designations made on insurance policies, RRSPs, etc. It is more effective to designate the estate as the beneficiary to such policies or RRSP if the will-maker wishes for these monies to fall into the estate.

This revocation clause may need to be modified in some situations. For example, a will-maker may have a will in another jurisdiction disposing of assets in that jurisdiction. One should be careful to not unintentionally revoke wills that deal solely with assets in another jurisdiction. Further, a will-maker may elect to create dual wills for the purpose of separating assets that require probate (e.g. real property and most bank accounts) and those that do not require probate (e.g. shares in private companies). Dual wills can help save probate fees and were given effect under section 122(1)(b) of *WESA*. See s 7.5 of the 2020 edition of the CLEBC *Wills and Personal Planning Precedents*. A will-maker who wishes to create dual-wills should seek assistance from a lawyer.

b) Appointing the Executor and Trustee

> **SAMPLE:**"I appoint my [relationship] [full name of executor/trustee] ("[executor/trustee name]") of [executor/trustee's address] to be my Trustee.
>
> If [executor/trustee name] dies, is incapable, or is unwilling to act or continue to act as my Trustee, I appoint my [relationship] [full name of alternative executor/trustee] of [alternative executor/trustee's address] to be my Trustee." (See 2020 CLEBC *Wills and Personal Planning Precedents*, 3.5)

The Executor also takes the role of a Trustee during the administration of the estate. However, the will-maker may wish to establish a continuing trust and thus appoint different people to be Executor and Trustee of a specific trust. A Trustee is appointed where the will-maker wishes to prevent the beneficiaries from squandering all or part of the estate and to provide for more capable management funds or property, or to provide for infant children until they attain the age of majority. A trustworthy and competent person should be chosen to be the Trustee. This person will have legal title to the property.

A bank or trust company may also be appointed. Their expertise and trustworthiness make them an excellent choice, although the cost may be prohibitive, especially with small and simple estates.

c) Appointing a Guardian

A will-maker may wish to appoint a guardian for their children during their age of minority (see *Family Law Act*, SBC 2011, c 25 s 53(1)(a)). Financial assistance should be provided to the guardian to cover the costs of raising the children. This arrangement is made with the Trustee. The guardian must be prepared to accept the position and should be consulted beforehand.

A will-maker cannot grant a greater level of guardianship than they possess. Also note that under section 176 of the *Family Law Act*, a child's guardian does not automatically become a trustee of the child's property. If there is any uncertainty regarding what type of guardianship the client has, or whether the client even has guardianship, the client should be referred to a family law lawyer, as LSLAP cannot deal with questions of family law.

Those appointing a guardian should be aware that the court could review such a decision. As well, members of the family can apply to have a decision in the will set aside. However, it must be strictly proven that the guardian appointed by the will-maker is unsuitable for the position.

> **SAMPLE:** "I appoint my [relationship] [full guardian name] ("[guardian name]") to be the guardian of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, [guardian name] will appoint a guardian in [preferred pronoun] will, or otherwise, to be the guardian of my minor children." (2020 CLEBC *Wills and Personal Planning Precedents*, 4.9)

For more information, see Chapter 3: Family Law.

4. Part Two

The second part of the will addresses the disposition of the estate. The Executor/Trustee is given the power to deal with the estate as they see fit, namely, to sell assets and convert into money or postpone such conversion of the estate for such a length of time as they think best. Further, the Executor/Trustee directs payment of debts, specific bequests, cash legacies, gifts to the spouse, and gifts to children (gifts of the residue of the estate).

a) Vesting Clause

This clause gives the Executor/Trustee the power to deal with the estate as they see fit, in keeping with the will-maker's wishes under the will and the Trustee's fiduciary duties.

> **SAMPLE:** "I give my Trustee all my property of every kind and wherever located to administer as I direct in this Will. In administering my estate, my Trustee may convert or retain my estate as set out in paragraph(s)... [refer to the applicable "convert, keep or invest" clause] of this Will" (2020 CLEBC *Wills and Personal Planning Precedents*, 7.3)

Immediately after this clause, the student should insert the clause "I direct my Trustee to hold that property on the following trusts:" See the sample will template in 2020 CLEBC *Wills and Personal Planning Precedents*, 48.2, to better understand how this would look.

b) Payment of Debts

This clause is usually inserted even though the Executor/Trustee is legally required to pay debts outstanding at death, reasonable funeral expenses, taxes, and legal fees out of the estate.

SAMPLE:

"(a) to pay out of my estate:

(i) my debts, including income taxes payable up to and including the date of my death [and any financial charges with respect to any property which, pursuant to this will, is transferred free and clear to a beneficiary for beneficiaries];

(ii) my funeral and other expenses related to this Will and my death; and

(iii) all estate, gift, inheritance, succession, and other death taxes or duties payable in respect of all property passing on my death, including:

A. insurance proceeds on my life payable as a consequence of my death (but excluding the proceeds of insurance upon my life owned by any corporation or owned by any partnership of which I am a partner);

B. any registered retirement savings plan, registered retirement income fund, annuity, pension, or superannuation benefits payable to any person as a result of my death;

C. any gift made by me in my lifetime; and

D. any benefit arising by survivorship,

and my Trustee may pay these taxes whether they are imposed by the law of this jurisdiction or any other, and my Trustee may prepay or delay payment of any taxes or duties,"

(2020 CLEBC *Wills and Personal Planning Precedents*, 8.4)

c) Items-in-Kind

The will-maker may wish to make a specific bequest of a personal article. The appropriate item must be listed.

SAMPLE:

"(a) to deliver my [article 1] to my [relationship] [article 1 recipient full name], if [they] are alive on the date that is 5 days after the date of my death, and if [they] are not alive on that date, add [article 1] to the residue of my estate.

"(b) [to pay [all/a specified portion] of the packing, freight, and insurance costs my Trustee decides [are/is] appropriate for delivering any items of the Articles as required by this will]." (2020 CLEBC *Wills and Personal Planning Precedents*, 11.8)

d) Cash Legacies

The will-maker may wish to make a specific bequest of cash legacies.

SAMPLE: "to pay:

(i) $ [amount] without interest to [name of recipient of cash gift] of [address], if [they] are alive on the date that is 30 days after the date of my death, and if [name of recipient of cash gift] is not alive on that date, that amount will form part of the residue of my estate;" (2020 CLEBC *Wills and Personal Planning Precedents*, 13)

If the client feels that their estate may not be large enough to pay all desired legacies, the client may wish to express an order of priority for the legacies. See 2020 CLEBC *Wills and Personal Planning Precedents*, 13.4.

e) Gifts to Spouse

In the event of a common accident where both spouses die, and it cannot be determined who died at what particular time, then each spouse's estate passes as if they had outlived the other spouse (*WESA*, s 5). In the case of a joint tenancy, the property is treated as if it were held as a tenancy in common (*WESA*, s 5). These presumptions will be subject to contrary intention made in a will or other applicable instrument. Also, if a spouse does not survive the deceased spouse by five days, that person is deemed to have predeceased the deceased spouse (*WESA*, s 10). Disposition of life insurance is dealt with differently under the *Insurance Act*, RSBC 2012 c 1, ss 59-64.

To ensure that property passes according to the will-maker's intention, a 30-day survivorship clause should be added, which requires the surviving spouse to survive the will-maker by 30 days (or such period as the will-maker wishes). A sample clause when the deceased spouse leaves the residue to the surviving spouse is:

SAMPLE:

> "(a) to give the residue of my estate to [residue name], if [they] are alive on the date that is 30 days after the date of my death;
>
> (b) if [residue name] is not alive on the date that is 30 days after the date of my death, [specify what to do with residue]." (2020 CLEBC *Wills and Personal Planning Precedents*, 15.4)

If the will-maker is not giving a residue but the entire estate, the appropriate words would be "to give all my assets, both real and personal, of whatsoever kind and wheresoever situate, to…"

Because of the presumption that a reference in a will to a relationship is presumed to refer to those that are legally married, a **"common-law spouse" should not be referred to as "my husband" or "my wife" but should be identified by name, such as, "my partner, [name]."**

f) Gifts to Children

If the will-maker's spouse does not survive the will-maker, often the will-maker will want to leave the estate to their children. A will-maker must decide whether they wish to divide the estate between only those children alive at the will-maker's death, or if they wish to benefit the issue of any pre-deceased child as well (i.e. grandchildren).

> **SAMPLE:** "If [spouse's name] is not alive on the date that is 30 days after the date of my death, to divide the residue of my estate in equal shares [between/among] those of my children who are alive on the date that is 30 days after the date of my death, except if [either/any] child of mine has died before that date and one or more of their children are alive on that date, that deceased child of mine will be considered alive for the purposes of the division and the share creates for that deceased child of mine will be divided equally among those of their children who are alive on that date;" (2020 CLEBC Wills and Personal Planning Precedents, 15.8)

[The will should then go on to detail the terms upon which the shares will be distributed to the beneficiaries: e.g. the age at which the trustee should pay out the shares.]

If the children are under 19, usually a trust should be created for them until they reach majority age. See Part Three-b, Gifts to Children, immediately below. **If a trust needs to be created for a minor child, the student should refer the client to a private lawyer**.

5. Part Three

a) Implied and Express Powers of Executor

The third part of a will deals with the administration of the estate. This section outlines the Trustee's general powers and responsibilities: trusts for minors, payments for minors, and valuation of the estate. The only implied power of an Executor to deal with assets is a power to "call in" and sell the assets which are not specifically gifted in the will. Therefore, a well-drafted will should involve several express powers so that the Executor can efficiently deal with the assets of the estate.

> **NOTE**: There is an important distinction that must be made between the duties and powers of the Executor. On the one hand, duties are non-discretionary. They dictate a course of action that the Executor must take according to the intentions of the will-maker as set out in the will. On the other hand, powers are discretionary. They allow the executor to make decisions within a range of possibilities according to the intentions of the will-maker.

b) Gifts to Children

As a general rule, anyone named in a will can inherit under that will. However, minors cannot sign a valid receipt for their share in an estate. In practical terms, this means that minors must wait until they reach the age of majority to inherit under a will. The parent, guardian, or other trustee for the benefit of the child would hold title to any property until the child reaches age 19. When property is held by a trustee in trust for a child under the age of 19, the trustee is deemed to have the power to encroach and may, at their discretion, apply all or part of the income to which the child may be entitled towards the maintenance and/or education of the child (*Trustee Act*, RSBC 1996, c 464, s 24).

The clause creating the trust should:

- Create the trust for the benefit of the children;
- Set out a discretionary schedule of payments;
- Grant a power of encroachment and/or a direction to pay income;
- Leave a deceased beneficiary's share to their children if they die before reaching the age of vesting. If they have none, then the trust should direct who receives the remainder of the share.
- Give the Trustee discretion to invest outside the *Trustee Act*, only if they are acquainted with business matters.

> **SAMPLE:** "If any person who becomes entitled to any part of my estate is under the age of majority, and I have not specified terms in this Will on which my Trustee is to hold that part, I direct my Trustee to hold that part, and:
>
> (a) pay or use so much of the income and capital of that person's part of my estate as my Trustee decides for that person's benefit until that person reaches 19;
>
> (b) add any income not paid or used in any year to the capital of that person's part of my estate;
>
> (c) give that person what remains of that person's part of my estate when that person reaches 19, but if that person dies before reaching 19, give what remains of that person's part of my estate to that person's estate; and
>
> (d) at any time my Trustee decides, my Trustee may give some or all of that part of my estate to that person's parent or guardian as trustee [, other than [name of person to exclude, if any,]] to receive and hold that part of my estate for that person's benefit on the same terms as set out in paragraphs (a), (b) and (c) above. When the parent or guardian receives that part of my estate, my Trustee is discharged in connection with that part of my estate and need not inquire about how it is used."
>
> (See 2020 CLEBC *Wills and Personal Planning Precedents*, 20.4.)

The intended beneficiaries (i.e. the children) need not be alive at the time of execution to be included if a general term such as "children" is used.

Section 153 of *WESA* provides that where there is no trustee in the estate, money bequeathed to a minor is paid to the Public Guardian in trust for that minor. The *Infants Act*, RSBC 1996, c 223 (s 14(1)) states that, subject to the terms of a trust set up in a will, the Public Guardian may authorize payment of all or part of the trust for the maintenance, education or benefit of the infant.

If part of an estate is distributed to a minor, the Executor or Administrator of an estate is left open to an action by the minor (upon reaching the age of majority) to repay all the monies distributed in a manner not in accordance with the terms of the will.

If a will-maker wants a clause to limit the Trustee's investment powers, a wills precedent book must be consulted. If any of the persons the will-maker wishes to benefit are stepchildren, the will should clearly identify that person by name rather than merely by relationship (i.e. "children"). **Stepchildren are not considered children under *WESA* and should be referred to by name**. Adopted children, however, are for all purposes the children of the adopting parents, and not the legal children of the natural birth parents, per section 3 of *WESA*.

It is possible for a minor to receive monetary gifts before they reach the age of 19. However, before probate will be granted, the Public Guardian and Trustee of BC must be notified. The Trustee's foremost concern is protecting the child, and it is in the Trustee's discretion whether or not a gift will be given. Factors such as the amount of the gift and its intended purpose will be considered.

c) Valuation of Estate

This section of a will outlines the Trustee's general power and discretion to fix the value of the estate.

> **NOTE**: While the Trustee has a general discretion to fix the value of the estate, there must be some factual basis to support this valuation. The Trustee has a fiduciary responsibility to act to the benefit of the estate and the beneficiaries.
>
> **SAMPLE:** "When my Trustee divides or distributes my estate, my Trustee may decide which assets of my estate to allocate to any share or interest in my estate (and not necessarily equally among those shares or interests) and the value of each of those assets. Whatever value my Trustee places on those assets will be final and binding on everyone interested in my estate." (2020 CLEBC *Wills and Personal Planning Precedents*, 20.8)

6. Part Four

The fourth part of a will is concerned with the elimination of potential beneficiaries, funeral directions, and finally, execution and attestation.

a) Eliminating Potential Beneficiaries

See Section VI: Wills Variation Claims for more information regarding why eliminating potential beneficiaries can be problematic.

b) Funeral Directions

These directions are not binding, but the Executor must arrange for a funeral that is fitting having regard to the will-maker's position and manner of life. Prudent practice is to advise the will-maker that they should make these wishes known to the Executor.

SAMPLE: "I want my remains to be [buried/cremated]. I hope that if any funeral or memorial service is held as a result of my death it will be conducted with unostentatious simplicity." (2020 CLEBC *Wills and Personal Planning Precedents*, 21.3)

c) Execution and Attestation Clause

The execution and attestation clause should not be on a page of its own. It must follow the final clause of the will on the same page. This is required to prevent the insertion of additional clauses after the will is signed. Always have the will-maker sign it at the end of the will in the presence of two witnesses who do not have an interest in the estate (i.e. is not a beneficiary or executor) and are not the spouses of any individual who has an interest in the estate; there must be room for the two witnesses' signatures (see Section **III.D: Executing the Will** and Section **III.E: Attesting the Will**).

SAMPLE:

"I have signed this Will on *[month, day, year]*.

We were both present, at the request of *[will-maker's name]*, and we were both 19 years of age or older, when this Will was read to *[will-maker's name]*. *[Will-maker's name]* seemed to thoroughly understand it and approve its contents. We remained present while [will-maker] then signed this Will with the name of *[will-maker name]*. We then signed as witnesses in the presence of both *[will-maker name]* and *[signor]* and in the presence of each other.

_____ Signature of Witness _____

Printed Name _____

Address (Street) _____

City

_____

Occupation _____

Signature of Witness

_____ _____

[full name of will-maker]

Printed Name

_____

Address (Street)

_____

City

_____

Occupation"

(2020 CLEBC *Wills and Personal Planning Precedents*, 22.35)

NOTE: Execute only the original will. Copies should not be signed by the will-maker and witnesses but can be photocopied or have facsimile signatures and dates inserted. Students should write or stamp the word "copy" on all photocopies.

NOTE: Ability to electronically witness a will. Ministerial Order No. M161 was issued in response to the COVID-19 pandemic, and the order allows for temporary electronic witnessing of wills starting on March 18, 2020. Since then, *Bill 21* has been tabled, which will give full validity to electronically witnessed wills going forward. *Bill 21* is not yet fully in effect, so readers are advised to seek out the most recent updates. See Section **III.E.2: Signatures of Witnesses** for more information.

D. Executing the Will

1. Presumption of Proper Execution

Inclusion of a signed attestation clause will raise a presumption that the will is properly executed (*Singh Estate (Re)* [15], 2019 BCSC 272 paras 58-60). An attestation clause is a clause at the end of the will where the will-maker signs their name testifying to the fact that they are signing the approved will. This is also the place where the two witnesses must sign to show that they have witnessed the will-maker approving of the will.

If special circumstances exist, e.g. the will-maker is blind or illiterate, a wills form manual should be consulted in order to draft the appropriate attestation clause.

2. Electronic Wills

It will be possible to satisfy the writing requirement if the will is in electronic form. Section 37(4) says that an electronic will is a will for the purposes of this act. This means that wills can be signed and stored electronically. The following are two scenarios of how an electronic will may be executed and witnessed:

The will-maker and the two witnesses are physically in the same room. They share an electronic drive that displays a PDF of the will. The will-maker signs the PDF will on the electronic device in the physical presence of the two witnesses, and then each of the witnesses sign the PDF in the physical presence of the will-maker.

Alternatively the will-maker and the two witnesses are all in different physical locations but are all in the same video conferencing "room". For example, a Zoom room or a MS Teams room. The will-maker uses the screen sharing function on the video conferencing platform to share a live display of the will on their screen with the two witnesses. The will-maker then signs the will by electronic signature. The first witnesses then does the same, and the second witness then does the same.

After the electronic will is signed, it is recommended that the will-maker immediately save a complete signed electronic copy of the will as a PDF, lock the PDF from further editing and secure it in a secure location.

If a client seeks to execute or have their electronic will witnessed, please consult with the supervising lawyer prior to taking instructions or agreeing to help the client.

3. Beneficiary's Debt to Estate

According to *Johnston Estate (Re)* [16], 2017 BCSC 272, the rule in *Cherry v Boultbee*, 41 ER 171 applies in Canada. This means that the beneficiary is required to bring their debts towards the estate into account, even if the debt claim would otherwise be statute-barred by the *Limitations Act*. *Johnston Estate (Re)* states that "the purpose of the rule was to prevent a beneficiary who owed money to an estate from receiving more than their fair share of the estate."

E. Attesting the Will

1. Signature of Will-Maker

a) Meaning of Signature

There must be a signature or a mark on the will intended to be a signature. Thus, something less than a signature, e.g. initials, will be sufficient where it is intended to represent the name and to be a signature (*In the Goods of Chalcraft*, [1948] 1 All ER 700; *Bradshaw Estate, Re* [17], [1988] NBJ No 709, 90 NBR (2d) 194). Where necessary, the will-maker's hand may be guided by another person; however, this requires the will-maker's clear direction or consent

(*Re: White*, (1948) 1 DLR 572 (NS App Div)).

The will-maker need not sign the will themselves. Sections 1(1) and (2) of *WESA* provides that the "will-maker's signature" includes "a signature made by another person in the will-maker's presence and by the will-maker's direction." Where someone else signs on behalf of the will-maker, there must be some act or word by the will-maker constituting a direction or request. When someone else signs, that person may sign in either the will-maker's name or their own name, but this circumstance should be noted in the attestation clause (*Re Fiszhaut Estate*, (1966) 55 WWR 303 (BCSC)). If this issue should arise, there must be further review to ensure the signature's legal validity.

b) Position of Signature

Section 37(1)(b) of *WESA* requires the signature be at the end of the will. Section 39(2) defines when a will is deemed to be signed at the end and provides that a disposition made below or after the signature is of no effect. Case law has taken a liberal view of these requirements, finding a signature not at the end to have been intended to be at the end (*In the Goods of Henry Hornby*, [1946] 2 All ER 150 and *Currie v Potter* [18] [1981] 6 WWR 377, 12 Man R (2d) 396 (Man QB)) and finding a disposition after the signature to have been intended to precede the signature (*Palin v Ponting*, [1930] para 185, considered in *Beniston Estate v Shepherd*, (1996) 16 ETR (2d) 71 (BCSC)). However, to ensure the validity of the will and all dispositions, the will should be signed at its end, after all dispositions. When a will is more than one page, it should be signed at the end of the last page and there should be a portion of the will on the last page. The last page of the will should indicate the will-maker is signing this page as the last of all the pages constituting the will. Although not required, the will-maker and witnesses should initial the other pages of the will.

c) Electronic Signatures

Section 35.3 of *WESA* states that a reference to a signature includes an electronic signature and a reference to a statement being signed includes the statement being signed electronically. It also states that the requirement for the signature of a person is satisfied by an electronic signature. This means that an individual may sign a will electronically and a wet ink signature is not required. Also of importance, section 39(1) of *WESA* will not apply to electronic signatures so it will be particularly important to ensure that electronic signatures are properly placed to indicate that the will-maker intended to give effect to the entire will. See **Section III.D.2: Electronic Wills**, for more information.

2. Signatures of Witnesses

a) Generally

The will-maker must make or acknowledge the signature in the joint presence of two attesting witnesses present when the will is signed (*WESA*, s 37) A beneficiary of the will or the will-maker's spouse should never witness the will, as it may void the gift they receive through the will (*WESA*, ss 40, 43). It will be sufficient if the will-maker has made their signature in the joint presence of the witnesses. If they have not, the will-maker must acknowledge the signature in the witnesses' presence, as it becomes a question of fact that witnesses must have actually seen or been able to see the signature when the will-maker acknowledged it (see *Re Shafner*, (1956) 2 DLR (2d) 593, 38 MPR 217 (NSSC)).

Both witnesses must also attest after the will-maker makes or acknowledges their signature in their joint presence. Though they need not sign in each other's presence, they must each sign in the presence of the will-maker who must actually see or be able to see the witnesses sign (*WESA*, s 37(1)(c)). **Attesting witnesses must be able to confirm the will-maker's execution of the will; they do not need to be aware of the contents of the will**.

Section 35.2 of *WESA* states that individuals are allowed to be in each other's "electronic presence" to satisfy the requirement that a person take an action in the presence of another person, or while other persons are present at the same

time. Electronic presence is defined as "the circumstances in which 2 or more persons in different locations communicate simultaneously to an extent that is similar to communication that would occur if all the persons were physically present in the same location" (*WESA*, s 35.1).

This means that signing parties may be physically or electronically present for the execution and witnessing of a will to satisfy the presence requirements of *WESA* sections 37(1)(b) and (c). If a will-maker and witnesses are in each other's electronic presence, the will may be made by signing complete and identical copies of the will in counterpart, and those copies of the will in counterpart are deemed to be identical even if there are slight differences in the format of the copies (*WESA*, s 35.2).

See **Section III.D.2: Electronic Wills**, for two potential scenarios of how to be in someone's "electronic presence."

b) Competence of Witnesses

Any person 19 years of age or older may be a witness (*WESA*, s 40(1)).

A will is not invalid if the only reason for invalidity is that a witness is legally incapable of proving the will either at the time the will was signed by the will-maker or afterwards. **However, if the witness is not 19 years old or older at the time the will was signed by the will-maker, then the will is invalid**.

c) Gifts to Witnesses

Section 43 of *WESA* provides that a gift to a witness, or the spouse of a witness, to a testamentary document is void. Section 43(3) of *WESA* explicitly provides that, even if such a gift is void, this has no effect on the validity of the remainder of the will.

There is one exception to this rule. Section 43(4) of *WESA* provides that, if the court is satisfied that the will-maker intended to make the gift to the person, the gift to the witness will not be void. In *Bach Estate, Re* [19], 2017 BCSC 548 at para 54, the Court held that section 43(4) of *WESA* empowers the court to declare a presumptively void gift valid if it "is satisfied that the document represents the testamentary intentions of that deceased person". The court also held that "extrinsic evidence is admissible on the question of testamentary intent, and the Court is not limited to the evidence that an inspection of the document provides." See also *Re Estate of Le Gallais* [20], 2017 BCSC 1699.

F. Filing a Wills Notice

After the will is complete, a Wills Notice should be filed with the Department of Vital Statistics in Victoria (*WESA*, at s 73). The purpose of the notice is to record the existence and location of the will and make it easier to find the will after the will-maker's death. A will-maker is not required by law to file a Wills Notice. However, it is recommended as a wills search must be undertaken by the Executor or Administrator before the Grant of Probate or Grant of Administration are issued.

A Wills Notice should be filed whenever a will is made, revised, revoked or moved or whenever a codicil is executed. In order to file a Wills Notice, the will-maker must have the following information:

- Legal name and date of birth;
- Place of birth;
- Date the will was signed;
- Location of the will; and
- The date the note was filed with the Vital Statistics Agency.

There are three ways of filing a Wills Notice: either online, by mail, or in person. All three methods require a $17.00 charge for filing, payable to the Minister of Finance. Forms are available at https://www2.gov.bc.ca/assets/gov/

health/forms/vital-statistics/vsa531_fill.pdf. If filing by mail is preferred, then the VSA 531 form must be completed and mailed to **Vital Statistics Agency**, PO Box 9657 Stn Prov Govt, Victoria, BC V8W 9P3.

Finally, the VSA 531 form can be submitted in person to any Service BC Counter. Locations can be found at: http://www.servicebc.gov.bc.ca.

If a will is made with LSLAP, the forms are also on file in the LSLAP office. **A copy of the notice should be made and the original notice should be sent to the Vital Statistics Agency**. The copy should be either kept with the will or with the personal representative. Do not send a copy of the will. Students may not sign the notice as the client's solicitor. The client must sign the form.

> **NOTE ON ELECTRONIC WILLS:** The Wills Notice Form does not provide dedicated space to indicate the electronic location of a will. If they chose to register an electronic will, a client should use the address space on the form to indicate the digital location of the will. This might be in the form of a link to a cloud storage space, the file path to a document stored on a hard drive, or something else entirely. Clients should consider potential barriers to accessing an electronic will. If it proves impossible to locate or access an electronic will after the will maker is deceased, their estate will be distributed as if the electronic will did not exist. Electronic wills are very new in BC, and there is little jurisprudence surrounding their use.

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IV. Mistakes and Alterations

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

A will may be changed by executing a new will, executing a codicil, or altering the will before it is executed. Where a will-maker wants to alter a will, section 54(2) of *WESA*, requires that the will-maker sign and the witnesses attest the signature in the margin or near to the alteration, or at or near to a memorandum written in the will referring to the alteration. An alteration should be so attested even if made before the will itself is executed. This will avoid subsequent litigation which may arise if an unattested alteration appears to have been made after the execution of the will. **Where a mistake is made when drafting a will, the safest course is to draw up a new, corrected will**.

There are three reasons why executing a new will may be a preferable course of action:

1. A new will avoids any danger of a codicil not adequately referring to the correct will;
2. When only one document exists (i.e. the new will) there is less likelihood of misinterpretation; and
3. If a codicil is used to revoke a gift made in the will, the party who would have received the gift will be informed of the change made by the will-maker, which could cause personal discord in the Will-maker's relationship with that person.

An unattested alteration made after the will is executed is invalid and may also invalidate any existing part of the will that the alteration obliterated or made impossible to decipher. However, it is important to note that section 58 of *WESA* allows a court to recognize any document that gives effect to the testamentary disposition of the deceased, even if it does not comply with the formalities of *WESA*. (See Section III.F: Court's Power to Cure Deficiencies and Rectify Wills, above, which also discusses the power of rectification under section 59).

> **NOTE ON ELECTRONIC WILLS:** Section 54 of *WESA* does not apply to electronic wills. Instead, a will maker seeking to make an alternation to an electronic will must make a new will in accordance with section 37; see Section III.D.2: Electronic Wills, for more information.

V. Court's Power

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

Section 58 of *WESA* gives the court the power to recognize any "record" that gives effect to the testamentary disposition of the deceased, even if it does not comply with the formalities of *WESA* and/or the common law. This means that the court can give effect to a document or other record that contains a testamentary disposition. As such, **individuals should be cautious about drafting documents that may be construed as a testamentary disposition.**

The leading case on section 58 is *Estate of Young* [1], 2015 BCSC 182, in which the court considers case law from Manitoba with a similar provision (section 22 of *The Wills Act*, CCSM W150) in order to interpret section 58.

The court observes that the curative power of section 58 is very fact-sensitive and that the purpose of the section is to cure formal invalidities and not to be used to uphold a will that is invalid for any substantive reasons. For example, the court can uphold a will that does not adhere to the format that a will should take under *WESA*; however, it cannot uphold a will that is deemed invalid because of testamentary incapacity or undue influence.

There are two principal issues for consideration that the court takes into account when assessing whether an impugned document should be recognized:

1. Whether the document is authentic.
2. Whether the non-compliant document represents the deceased's testamentary intentions. The court then goes on to specify: "the key question is whether the document records a deliberate or **fixed and final expression of intention** as to the disposal of the deceased's property on death."

The court includes a non-exhaustive list of factors that may be taken into consideration when assessing a document:

- the presence of the deceased's handwriting;
- witness signatures;
- revocation of previous wills;
- funeral arrangements;
- specific bequests; and
- the title of the document.

Although section 58 gives the court broad powers to give effect to the intentions of the will-maker, this power does have limitations. **Therefore, every effort should be made to follow the proper procedure when drafting a will in order to avoid future complications**. As the court notes in *Estate of Young*, 2015 BCSC 182, "[w]hile imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements, the harder it may be for the court to find it embodies the deceased's testamentary intention." See also *Levesque Estate, Re* [2], 2019 BCSC 927; *Hadley Estate, Re* [3], 2017 BCCA 311; and *Dickinson-Starkey Estate (Re)* [4], 2022 BCSC 93.

Section 59 of *WESA* gives the courts the power to rectify an error or omission in a will in order to give effect to the intentions of the will-maker. Extrinsic evidence is permissible to determine the intent of the will-maker.

This is a significant provision, as it allows the courts to consider evidence that would otherwise not be admissible in order to determine the intent of the will-maker.

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[4] https://www.canlii.org/en/bc/bcsc/doc/2022/2022bcsc93/2022bcsc93.html

VI. Revocation

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

Revocation of wills is governed by sections 55 and 55.1 of *WESA*. These sections outline the only ways in which a will may be revoked. Section 56 of *WESA* provides that if a will-maker gifts, appoints as an executor, or confers power to a person who subsequently ceases to be the spouse of the will-maker under section 2(2) before the will-maker's death, only that gift, appointment, and/or conferment is revoked, not the entire will. The gift to the ex-spouse must be distributed as if they died before the will-maker. The application of section 56 of *WESA* is subject to any contrary intention in the will.

A. By Subsequent Writing

A subsequent instrument in writing that is **not** a subsequent will but is in compliance with the provisions of *WESA* (e.g. signed by two witnesses, etc.) may have the effect of revoking the will (*WESA*, s 55(1)(b)).

Where a will is revoked in this way, a wills notice should be filed with the Department of Vital Statistics to record the revocation of the will (see Section III.G: Filing a Wills Notice).

B. By Destruction or Loss

A will may be revoked by destruction, per section 55(1)(c) of *WESA*. There must be some physical act of destruction: "burning, tearing, or destruction of it in some other manner **by the will-maker**." Though copies need not be destroyed, it would be safer to do so to ensure revocation. If a will is in the will-maker's custody and is found destroyed, or if a lost will was last known to be in the will-maker's custody, it will be presumed that the will-maker destroyed it. **There is a presumption that a lost will has been destroyed and revoked, therefore, care must be taken in storing the will**.

To prevent subsequent litigation, if a will is accidentally lost or destroyed, the will-maker should make a new one even though a copy of the lost or destroyed one survives. The will-maker should maintain clear custody of their will in a safe place known by the personal representative to guard against accidental loss or destruction.

Furthermore, for a will-maker to revoke a will by destruction, the will-maker must have the intention of revoking the will. Though there is a presumption that a will-maker who destroys a will does so with the intention of revoking it, this does not apply where they lack capacity to form the requisite intention.

Also, there is the question of whether the intention to revoke the will was absolute or conditional. If it was absolute, revocation is complete. However, if the intent depended on the condition of reviving an old will or writing a new one and the condition or contingency has not been satisfied, the revocation is ineffective. This is known as the doctrine of dependent relative revocation: see *Jung, Re Estate of Horace Lee* [1], 2005 BCSC 1537.

NOTE ON ELECTRONIC WILLS: Section 55.1 outlines how to revoke an electronic will. To revoke an electronic will, the will-maker or a person in the presence of the will-maker and by the will-maker's direction: can delete one or more electronic versions of the will or of part of the will with the intention of revoking it, or may burn, tear or destroy all or part of a paper copy of the will in some manner, in the presence of a witness, with the intention of revoking all or part of the will. An inadvertent deletion of one or more electronic version of a will is not evidence of an intention to revoke the will, so what is important is the intention of the will-maker; see Section III.D.2: Electronic Wills, for more information.

C. By Subsequent Will

A will may be revoked by another will made in accordance with section 55(1)(a) of *WESA*. Nevertheless, it is common practice to clearly provide for such by the inclusion of a revocation clause at the beginning of a will. **Notwithstanding an express revocation clause, a second will does not necessarily absolutely revoke a former will**. There may be partial revocation only; where the second will does not completely dispose of the estate, both documents may be admitted to probate. The will-maker should, therefore, ensure that the second will disposes of the entire estate, which may be accomplished through the use of an effective residuary clause.

D. Effect of Marriage on Will Revocation

Under *WESA*, a subsequent marriage will no longer revoke a prior will.

E. Effect of Divorce, Separation, and Change in Circumstances on Will Revocation

Neither marriage nor divorce of the will-maker will revoke a will. However, a change in circumstances may lead to an individual no longer being considered a spouse. This will bar the former spouse from a claim to vary a will.

Additionally, if a will-maker wishes to leave anything in a will to a former spouse, wishes to appoint a former spouse as executor, or wishes to confer any powers of appointment on a former spouse, the will-maker should explicitly state that this is being done contrary to section 56(2) of *WESA*.

F. Effect of Family Law Act

According to *Howland Estate v. Sikora* [2], 2015 BCSC 2248: "The death of the claimant, prior to the coming into force of the [*Family Law Act*], does not override the respondent's right to commence an action against the claimant's estate so long as it occurs within the two year period contemplated in s. 198 [of the *Family Law Act*], as happened here." In summary, this means that the *Family Law Act* claims can continue even past death as long as the claimant brings a suit within two years.

References

[1] https://www.canlii.org/en/bc/bcsc/doc/2005/2005bcsc1537/2005bcsc1537.html

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VII. Wills Variation Claims

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

A. Application Under the Act

WESA gives the court the power to vary a will. **Only the spouse of the will-maker or the will-maker's children can commence an action to vary a will**. See **VIII.B. Separated Spouses** for more information on when the spousal relationship ceases for the purposes of WESA. The **limitation period** for commencing an action to vary a will is **180 days** from the grant of probate, per section 61(1)(a) of *WESA*.

A wills variation action is commenced by a claim that the will-maker failed to "make adequate provision for the proper maintenance and support of the will-maker's spouse or children" (*WESA*, s 60).

When determining what constitutes adequate provision in a will, courts have considered the following:

- Actual need, which varies with age and dependency;
- Justifiable expectation based upon a dependency upon the will-maker or an actual contribution made by the claimant to the will-maker's estate;
- Will-maker's intention and reasons for making their will; and
- The size of the will-maker's estate.

See *Lukie v Helgason & Lukie* [1], (1976) 26 RFL 164 (questioned) and *Newstead v Newstead Estate* (1996) 11 ETR (2d) 236 (BCSC) for detailed discussions of the above factors.

The Supreme Court of Canada's decision in *Tataryn v Tataryn Estate* [2], (1994) 93 BCLR (2d) 145 provides a different focus for the determination of a wills variation claim. This is the leading authority in British Columbia on wills variation. The court considered the following factors in deciding what constitutes an "adequate, just, and equitable" provision in a will:

> a) **The will-maker's legal obligations –** maintenance and property allocations which the law would support during the will-maker's lifetime; and
>
> b) **The will-maker's moral obligations –** society's reasonable expectations, based on community standards, of what a judicious person would do in the circumstances.

In the more recent case of *Dunsdon v Dunsdon* [3] 2012 BCSC 1274 (CanLII) [*Dunsdon*], the court provides a list of overlapping considerations that "have been accepted as informing the existence and strength of a testator's moral duty to independent children:

- Relationship between the testator and claimant, including abandonment, neglect and estrangement by one or the other
- Size of the estate
- Contributions by the claimant
- Reasonably held expectations of the claimant
- Standard of living of the testator and claimant

- Gifts and benefits made by the testator outside the will
- Testator's reasons for disinheriting
- Financial need and other personal circumstances, including disability of the claimant
- Competing claimants and other beneficiaries"

As the court notes in *Dunsdon*, "[t]he concept of adequate provisions is a flexible notion and is highly dependent upon the individual circumstances of the case. The adequacy of a provision is measured by asking whether a testator has acted as a judicious parent or spouse, using an objective standard informed by current legal and moral norms. The considerations to be weighed in determining whether a testator has made adequate provisions are also relevant to the determination of what would constitute adequate, just and equitable provisions in the particular circumstances."

Where the size of the estate allows, surviving spouses and children are entitled to an equitable share under *WESA*, **even in the absence of need**.

The court may consider the applicant's character or conduct, and variation may be refused on this basis (*WESA*, s 63(b)). If the estate is large and the spouse or children were not mentioned in the will, or they think they were inadequately or unfairly provided for, they should consult a lawyer. LSLAP cannot assist clients with wills variation claims.

> **NOTE:** In a decision of the BC Supreme Court, *Ward v Ward Estate* [4], 2006 BCSC 448 it was held that a signed pre-nuptial agreement where both parties gave up any right or interest to the other's estate was not determinative in a claim under the *Wills Variation Act*.

B. Definition of Spouse in WESA

The definition of spouse in section 2 of *WESA* reads:

> (1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and
>
> (a) they were married to each other, or
>
> (b) they had lived with each other in a marriage-like relationship for at least 2 years.
>
> (2) Two persons cease being spouses of each other for the purposes of this Act if,
>
> (a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [*Property Division*] of the *Family Law Act*, to arise, or
>
> (b) in the case of a marriage-like relationship, one or both persons terminate the relationship.
>
> (2.1) For the purposes of this Act, spouses are not considered to have separated if, within one year after separation,
>
> (a) they begin to live together again and the primary purpose for doing so is to reconcile, and
>
> (b) they continue to live together for one or more periods, totalling at least 90 days.
>
> (3) A relevant time for the purposes of subsection (1) is the date of death of one of the persons unless this Act specifies another time as the relevant time.
>
> **NOTE:** See *Gosbjorn v Hadley* [5] 2008 BCSC 219 for a list of factors used by the courts to determine if there is a marriage-like relationship. More recently, see the discussion in *Connor Estate* [6], 2017 BCSC 978.
>
> **NOTE:** In *Boughton v Widner Estate* [7], 2021 BCSC 325, the deceased had both a legal wife as well as a common law partner at the time of his death. The court confirmed that it is possible to have two spouses who concurrently meet the definition of a spouse under *WESA* section 2. The deceased's estate was split equally between the two spouses.

NOTE: In *BH v JH* [8], 2015 BCSC 1551, the BC Supreme Court varied the husband's will so that the wife, who was separated from but who had not divorced the husband, was entitled to part of the husband's estate. This significantly deviated from what the wife would have received if they had divorced immediately before the husband's death.

C. Exclusion of Potential Beneficiaries

A will-maker who wishes to exclude a spouse or child should state precisely why the person is being "disinherited," or why they are less than "adequately" provided for. LSLAP's policy is not to draft a will where the will-maker wishes to exclude a spouse or child, or unevenly divide the assets between children. Such clients should be referred to a private lawyer unless the supervising lawyer gives approval.

As per section 60 of *WESA*, the court is not bound by the will-maker's decision and reasons but may consider them. Therefore, the will-maker is not assured of success in their attempt to exclude or less than adequately provide for a spouse or child. For more detail, see above: **Section VI.A: Application Under the Act**.

The chances of the will-maker's will being upheld will be greater if the will-maker provides **reasonable and rational reasons for the exclusion**. For example, where the will-maker has already given the person substantial benefits during their lifetime, where the reason is based upon the person's character, or on the relationship between the will-maker and the potential claimant, the court will be more likely to uphold the will-maker's wishes.

References

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[3] https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc1274/2012bcsc1274.html?autocompleteStr=Dunsdon%20v%20Dunsdon%2C%20(2012)%20BCSC%201274%20&autocompletePos=1
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VIII. Intestacy

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

A. Generally

If a person dies intestate (without a valid will), their assets are distributed to intestate successors in accordance with *WESA*. Where a will exists but does not cover all assets, there will be a partial intestacy and those assets outside the will that do not pass by contract or survivorship will pass according to *WESA's* intestacy distribution scheme.

1. Spouses

Under *WESA*, it is possible to have more than one spouse by having a spouse by marriage in addition to a common-law spouse. It is also possible to have multiple common-law spouses. However, it is not possible to have more than one spouse by marriage.

The spouse of the deceased is always entitled to a preferential share of the estate, as well as the "household furnishings" defined as the personal property usually associated with the enjoyment by the spouses of the spousal home (*WESA*, s 21(1)).

If there are two or more spouses, they must agree as to how to divide the preferential share, otherwise, it will be determined by the courts (*WESA*, s 22). See *Boughton v Widner Estate* [1], 2021 BC2C 325 for an example of the court dividing a deceased's estate among two spouses.

2. Spousal Home

In intestacy, the surviving spouse no longer has a right to the spousal home but has a right to acquire it under section 31 of *WESA*. Section 33 allows the surviving spouse to make an application to retain the spousal home, considering factors such as whether requiring the surviving spouse to purchase the spousal home would be a significant hardship, and whether a greater prejudice would be imposed on the surviving spouse by being unable to continue to reside in the spousal home than would be imposed on the descendants entitled to share in the intestate estate.

3. Preferential Share

If all the descendants of the will-maker are also the descendants of the surviving spouse, the preferential share of the spouse is $300,000 (*WESA*, s 21(3)). If all the descendants of the will-maker are **not** also those of the surviving spouse, the preferential share of the surviving spouse is $150,000 (*WESA*, s 21(4)).

Situation	*WESA* Section	Distribution
Intestate dies leaving a spouse but no descendants.	20	Entire estate passes to surviving spouse.
Intestate dies leaving one or more descendants, all of whom are descendants of the surviving spouse.	21(3)	Household furnishings plus preferential share of $300,000 to the spouse. One half of remainder distributed to the spouse, the other half distributed equally to the descendants.
Intestate dies leaving one or more descendants, some of whom are **NOT** descendants of the surviving spouse.	21(4)	Household furnishings plus preferential share of $150,000 to the spouse. One half of remainder distributed to the spouse, the other half distributed equally to the descendants.
Intestate dies, leaving descendants but no spouse.	23(2)(a)	Estate distributed equally to descendants.
Intestate dies leaving no spouse or descendants.	23(2)	Order of Priority: Parents, siblings, nieces/nephews, grandparents, aunts/uncles, etc. See section 23(2) for complete order of priority. If there are no beneficiaries entitled to the estate, the estate passes to the government subject to the *Escheat Act*, RSBC 1996, c120.

B. Separated Spouse

Under *WESA*, two persons cease being spouses if:

- In the case of a marriage an event occurs that causes an interest in family property, as defined in Part 5 [*Property Division*] of the *Family Law Act*, to arise pursuant to section 2(2)(a) of *WESA*, **or**
- In the case of a marriage-like relationship, one or both persons terminate the relationship.

> **NOTE:** Married couples cease being spouses for the purposes of WESA if they separate or divorce, as s 81 of the Family Law Act indicates that an interest in family assets automatically arises on separation. See *Gosbjorn v. Hadley* [2], 2008 BCSC 219 and more recently *Mother 1 v Solus Trust Company* [3], 2019 BCSC 200 at paras 149-151 for a discussion of when a marriage-like relationship ceases.

C. Miscellaneous Provisions

- Children conceived before the intestate's death but born after the intestate's death and living for at least 5 days, inherit as if they had been born in the lifetime of the intestate and had survived the intestate (*WESA*, s 8).
- Adopted children are the children of the adopting parent (*Adoption Act*, RSBC 1996, c 5, s 37).
- Adopted children are not entitled to the estate of their natural parent except through the will of the natural parent (*WESA*, s 3).

References

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IX. Property

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

A. Joint Tenancy and Tenancy in Common

Where property is owned by more than one individual, it may be held in “joint tenancy” or “tenancy in common”. The main difference between a joint tenancy and a tenancy in common is that, in the case of a true joint tenancy, each joint tenant receives the right of survivorship. The result is that, upon the death of one joint tenant, the other becomes entitled to the whole of the property. The testator’s interest in the property does not form a part of their estate and does not pass under the will. Instead, it passes “outside the will” to the surviving joint tenant(s).

The right of survivorship has its benefits as well as problems. Because the testator’s interest in the property held under joint tenancy does not become a part of the estate, probate fees related to the property can be avoided as the interest passes outside the will. Placing assets in joint tenancy may also avoid costs and delays associated with obtaining probate. Furthermore, a beneficiary of a will who is not satisfied with their gift under the will cannot make a claim under the *Wills Variation Act* to obtain a greater share in the estate for property that passes outside of the estate. One drawback of placing assets in joint tenancy is that the surviving tenant owns the asset and does not need to respect the will-maker’s wishes on how they may have wanted their asset dealt with after their death.

In contrast, where owners hold an interest in the property as tenants in common, each has a separate undivided share. Upon death, each owner’s individual share forms part of their estate.

B. Joint Bank Accounts

When a joint bank account is created, many assume that when one owner dies, the survivor is automatically entitled the remaining balance in the account. However, this is not always the case. In *Pecore v Pecore* [1], 2007 SCC 17, the Supreme Court of Canada held that when a parent creates a joint bank account with an adult child, it is presumed that this arrangement is made out of convenience, and there was not an intent by the parent for the balance of the account to pass to their adult child by way of survivorship. Unless the intention for the account to pass to the adult child through survivorship is clear when the bank account is set up, courts will presume that the balance in the joint account is to be held by the child in a resulting trust for their parent’s estate. It is then up to the child to prove that their parent intended to gift the bank account to them. If the child fails to establish such an intention, the balance of the account forms a part of their parent’s estate and is distributed according to their will or the law of intestacy.

The Court will consider many factors when determining the deceased’s intention in situations involving joint bank accounts. For a detailed discussion of these factors, see https:/ / www. lerners. ca/ lernx/ joint-accounts-is-the-surviving-owner-really-entitled-to-the-money

References

[1] https://www.canlii.org/en/ca/scc/doc/2007/2007scc17/2007scc17.html?autocompleteStr=Pecore%20v%20Pecore%2C%202007%20SCC%2017&autocompletePos=1

X. First Nations and Wills

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

A student must decide whether or not the client comes within the scope of the *Indian Act*, RSC 1985, c I-5. Section 45(3) is the relevant section of the Act; it provides that a will executed by an Indian, as defined by the Act, is of no legal force and effect as a disposition of property until the Minister has approved the will or a court has granted probate pursuant to the *Indian Act*.

The definition of “Indian” in the Act means “a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian”. The *Indian Act* states that “[t]he Minister may accept as a will any written instrument signed by an Indian in which they indicate their wishes or intention with respect to the disposition of their property upon [their] death”. “Instrument” in this context does not mean anything special: letters, wills, and notes are all “instruments”.

The student must be aware of the on-reserve/off-reserve Indian dichotomy. A First Nations person living off-reserve is essentially under the same rules and constraints as any other Testator who isn’t classified as an “on-reserve Indian”.

Finally, if a registered First Nations person “living on reserve dies intestate, or their will is not clear or not valid, the Department of Indian Affairs will apply to the estate the rules set out in the *Indian Act* and the *Indian Estates Regulations*, CRC 1978, c 954”.

For further information on wills for First Nations persons, consult Chapter 29 of the 2020 CLEBC *Wills and Personal Planning Precedents*.

> **NOTE:** It is important to determine whether there exist any applicable treaties that may affect a First Nation client’s will. For example, the Nisga’a Treaty provides that Nisga’a citizen’s cultural property devolves according to Nisga’a law.

XI. Estate Administration

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

A. Testate and Intestacy

The authority to administer the estate of a deceased individual vests with the personal representative, whose identity will depend largely on whether the deceased individual had a valid will when they died.

If the deceased individual died with a valid will, it is said that that individual died "testate". The executor named under the last valid will, if they accept the appointment, will be vested with legal authority over the estate. In theory, an executor takes authority from the will, and accordingly has authority immediately upon death. This concept is expressed through the legal adage that a will "speaks from death." In practice, although an executor has legal authority from the date of death, most third parties (e.g. banks and the Land Title and Survey Authority) will not recognize that authority without a representation grant from the court.

If the deceased individual died without a valid will, they are said to have died "intestate". In such a case, an application must be made to the court for the appointment of an administrator for the estate. As there is no valid will, the authority to deal with the estate originates from the court grant of administration. This concept is codified in section 102 of the *Wills, Estates and Succession Act* (*"WESA"*), which provides that in the case of an intestacy, or if an executor is not named in a will, the estate of the deceased person "vests in the court".

B. Representation Grants Generally

Grants of probate and grants of administration are two types of "representation grants". As a valid will grants authority to the named executor, there is theoretically no need for a named executor to obtain a representation grant from the court. As a practical matter, however, an executor may not be able to accomplish much without a representation grant.

If there is no will, all of the property of the deceased vests in the court (*WESA*, s 102), and accordingly, no person has authority unless the court issues a representation grant to that person.

Two provisions in *WESA* are particularly important to understanding the basic effect of obtaining a representation grant. First, section 136 of *WESA* provides that a representation grant, when issued by the court, gives exclusive authority to the person named in the grant to administer the estate. Second, section 137 of *WESA* provides that a person who transfers estate property or releases a document or information to a personal representative is not liable for any damage that may result. These two sections give legal assurance to third parties dealing with a personal representative.

C. Jurisdiction

An administration grant is usually applied for in the jurisdiction where the deceased was domiciled at the time of death. Where a person was last residing is a good indicator of domicile, but it is not determinative.

If the deceased had assets in multiple jurisdictions, it may be necessary to obtain a representation grant in one jurisdiction, and then to have that grant "resealed" locally in each jurisdiction where assets are located. Furthermore, in such a situation, British Columbia law, including intestacy rules for example, may not apply. These situations are governed by the rules of "conflict of laws".

D. Probate

1. Generally

A grant of probate is a form of representation grant that is issued to the executor appointed by a will. Pursuant to sections 136 and 137 of *WESA*, a grant of probate gives exclusive authority to the named executor to deal with the estate and grants legal protection to third parties who rely upon the grant.

2. Who May Apply?

An executor appointed under a will may apply for a grant of probate. An alternate executor may apply if the conditions set out for the appointment of that alternate executor are satisfied.

3. Solemn Form versus Common Form

Where the validity of a will is uncontested, the registrar of the court may issue the grant of probate (*WESA*, s 129(3)) upon an application being made in the form and manner set out in the Supreme Court Civil Rules.

Although obtaining a grant in this manner will ordinarily be sufficient, it does not conclusively determine that a will is valid. Where a grant has been obtained this way, the will has been proven only in "common form" or "simple form". If the will is later found to have been invalid, or a later will is found, the grant of probate may be revoked. In this situation, the personal representative may be liable for having distributed the estate assets to the incorrect beneficiaries.

Obtaining proof of a will in "solemn form" (also known as "proof in form of law" or "proof *per testes*") gives a greater degree of protection to an executor. This requires a hearing in open court before a judge, with testimony from witnesses to the will. If a will is proven in solemn form, the grant cannot be revoked unless a later will shows up, or it was obtained by fraud (see *Romans Estate v Tassone* [1], 2009 BCSC 194 for a discussion).

E. Administration

1. Generally

A grant of administration is a form of representation grant issued to an individual other than an executor appointed under a will. A grant of administration will be required on intestacy, or where there is a will, but the appointed executor is unwilling, incapable or dead, or where no executor is appointed. The procedure for administration is similar to probate, except that the court must appoint an administrator, and bonding may be required.

The consent of the Public Guardian and Trustee's office is required where a minor's property is involved. The Public Guardian and Trustee's consent is also needed on probate if any minor is a beneficiary and a trustee is not appointed in the will for such minor beneficiary. An administrator's powers and duties are indistinguishable from an executor's and are set out in *WESA*.

2. Who May Apply?

Under sections 130 and 131 of *WESA*, an individual may apply to the court to be appointed Administrator of an estate. Section 130 enumerates the order of priority for applicants of an intestate estate, favouring the spouse of the deceased, followed by a child of the deceased who obtains the consent of the majority of the children of the deceased. Section 131 enumerates the order of priority for applicants of an estate where the appointed executor is unable or unwilling to act. Priority is given to a beneficiary that applies with the consent of the beneficiaries who, along with the applicant's interest, are entitled to a majority interest in the estate.

F. Probate Fees

Before a grant is issued, probate fees must be paid on the value of the deceased's assets as at the date of death. Only secured debts (i.e. debts secured on property by a mortgage) may be subtracted from the value of assets when determining the amount of fees payable. It should also be noted that probate fees in British Columbia are low. As stated in section 2(3) of the *Probate Fee Act*, SBC 1999, c 4.

> 2(3) If the value of the estate exceeds $25 000, whether disclosed to the court before or after the issue of the grant or before or after the resealing, as the case may be, the amount of fee payable for an estate over $25 000 up to $50 000 is
>
> (a) $6 for every $1 000 or part of $1 000 by which the value of the estate exceeds $25 000 but is not more than $50 000, plus
>
> (b) $14 for each $1 000 or part of $1 000 by which the value of the estate exceeds $50 000.

An easy way to calculate probate and application fees for estates over $50,000 is to round the value of the estate to the next $1,000, multiply it by 0.014 and subtract $350 from the result.

G. Assets Passing Outside of Estate

Not all assets of the deceased will form part of the estate. It is not necessary to obtain a representation grant to deal with these assets.

There are four primary categories of assets that fall outside of the estate:

1. Pensions and retirement plans, including Registered Retirement Savings Plans, Registered Retirement Income Funds, for which a beneficiary may be designated. If no designation has been made or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will be an asset of the estate and will vest in the personal representative.
2. Life insurance proceeds, for which a beneficiary or successor may be designated. If no designation has been made or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will form part of the estate.
3. Assets held in joint tenancy with another will pass to the surviving joint tenant.
4. A Tax-Free Savings Account for which a beneficiary has been designated will not form part of the estate. If no designation has been made or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will pass through the estate.

H. Vehicles

A vehicle registered in the name of a deceased owner can be transferred at an Insurance Corporation of British Columbia Autoplan broker. If the motor vehicle is owned jointly, the surviving owner will need to bring the current vehicle registration and the original death certificate or a certified copy of it.

If the estate is valued at less than $25,000, the executor of the estate may transfer the vehicle without obtaining probate of the last will. The executor will need to provide the original death certificate or a certified copy of it, a statutory declaration stating that the estate is not worth more than $25,000 (which can be provided by the Autoplan dealer and must be sworn before a lawyer or notary public), and the original last will.

A summary of other situations in which a vehicle can be transferred without a grant of probate may be found at https://www.icbc.com/vehicle-registration/sell-vehicle/Documents/estate-transfers.pdf.

References

[1] https://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc194/2009bcsc194.html?autocompleteStr=Romans%20Estate%20v%20Tassone%2C%202009%20BCSC%20194%20&autocompletePos=1

XII. Duties of a Personal Representative

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

A. General Duties

The basic duties of an Executor/Administrator are to:

- Obtain a death certificate from the Department of Vital Statistics; However, ordinarily, a funeral home will likely order and provide a death certificate.
- Locate the last will if there is one and apply for a search of wills notices;
- Arrange for the disposition of the deceased's body and the funeral;
- Determine the names and addresses of the beneficiaries and intestate heirs and notify them;
- Cancelling subscriptions, redirecting mail and wrapping up personal matters
- Gather papers relating to assets and ascertain the value of the assets (by way of an inventory, taking into account debts and liabilities);
- Safeguard assets until they are sold or distributed, including the transfer of ownership registration and the collection of any debts;
- Selling assets if it is necessary and distributing the estate;
- Prepare and file tax returns;
- Notify appropriate agencies (pensions, subscriptions, charge accounts, etc.);
- Consider advertising for creditors (see **Section XI.F: Payment of Debts** below)
- Paying all valid debts left to the estate (please note that an executor or administrator may be held personally liable for unsettled debts after the distribution of the estate); and
- Preparing and obtaining approval for the beneficiaries for distribution of estate.

B. CPP Death Benefits

The Canada Pension Plan (CPP) death benefit is a one-time, lump-sum payment to the estate on behalf of a deceased CPP contributor.

If an estate exists, the executor named in the will or the administrator named by the court to administer the estate applies for the death benefit. The executor should apply for the benefit within 60 days of the date of death.

If no estate exists or if the executor has not applied for the death benefit, payment may be made to other persons who apply for the benefit in the following order of priority:

1. The person or institution that has paid for or that is responsible for paying for the funeral expenses of the deceased;
2. The surviving spouse or common-law partner of the deceased; or
3. The next-of-kin of the deceased.

To be entitled to a CPP death benefit, the deceased must have made contributions to the lesser of:

- One-third of the calendar years in their CPP contributory period, but no less than 3 calendar years; or
- 10 calendar years

The amount of the death benefit depends on how long and how much the deceased contributed to their CPP, with the maximum benefit set at $2,500.

As of January 1, 2019, the death benefit for all eligible contributors is set at a flat rate of $2,500.

To apply, complete the Application for a Canada Pension Plan Death Benefit (ISP1200), include certified true copies of the required documentation, and mail it to the closest Service Canada Centre to you. Addresses are provided on the form (ISP1200).

C. Search of Wills Notice

If the deceased made a will, they may have filed a Wills Notice with the Vital Statistics Registry. Note that the Vital Statistics registry does not keep a copy of the will and will only have a record of the date the will was made.

To obtain a representation grant through the court registry, a personal representative needs to provide two copies of a Wills Notice Search, which can be obtained on application to the Vital Statistics Registry. A Wills Notice Search provides the date the person signed the will registered in the wills notice, the location of the will at that time, and the date the Vital Statistics Agency received the wills notice.

If the will-maker is alive, only the will-maker can request a Wills Notice Search. However, a person who provides the documentation and payment listed below can apply for a Wills Notice if the will-maker is deceased:

- A photocopy of the death certificate
- A completed VSA 532 form

To apply for a search, a person has to mail the requested documents to: **Vital Statistics Agency**, PO Box 9657 Stn Prov Govt, Victoria, BC V8W 9P3. Alternatively, they can deliver the requested materials to a Service BC Counter to request for a Search of Wills Notice. Please note that you cannot ask for a search online, unlike filing a Wills Notice.

The cost to conduct a Wills Notice search is $20 per will search, plus $5 for each additional name the will-maker may have used. The results are usually printed within 20 business days. If you are pressed for time, you can also request Courier Delivery. In the case of Courier Deliveries, there is an additional $33 fee for the courier, but it prints next business day.

D. Other Asset Distribution Instruments

If life insurance policies and RRSPs have pre-existing designated beneficiaries, they will not form part of the will-maker's estate and will be administered outside of the probate process.

For life insurance policies with designated beneficiaries, the proceeds do not form part of the estate. A beneficiary designation in a will is invalidated by a subsequent designation made in an insurance policy or is revoked when the will is revoked (see *Insurance Act*, s 61(2)).

Also, a will cannot revoke an earlier life insurance designation unless it complies with section 60 of the *Insurance Act*. It requires that the policyholder file a contract or declaration with the insurance company, designating the beneficiary of the policy irrevocably. If this document is filed, the beneficiary must consent to any change to the designation. However, a general revocation clause that does not specifically refer to the insurance policy or contract does not revoke the designation made prior to the will because it does not meet the definition of "declaration" under the *Insurance Act*; see *Hurzin v Great West Life Assurance Company* [1], (1988) 23 BCLR (2d) 252 (SC).

Those with a significant amount of money in RRSPs should consult a tax lawyer or tax accountant for estate tax planning advice, as there are several tax rules that apply solely to the final year of a person's life.

E. Time for Distributing the Estate

As a rule of thumb, an Executor has one year from the date of death (known as the "Executor's year") to distribute the estate. The concept of the executor's year derives from presumption that an executor will be capable of dealing with the estate's affairs within this period.

The concept of the executor's year has two aspects:

1. A court will ordinarily not compel an executor to make a distribution before the expiry of this period.
2. Except when specifically provided in a will, a legacy will not carry interest until a year after the death of the will-maker.

However, it should also be noted that under section 155 of *WESA*, a personal representative of a deceased person must not distribute the estate of the deceased in the **210 days following the date of the issue of a representation grant** except with the consent of all the beneficiaries and intestate successors entitled to the estate or by an order of the court. This period is to allow any individuals who wish to make a claim against the estate to file a claim. Additionally, the personal representative must not distribute the estate after 210 days without the consent of the court if:

> (a) There is a commenced proceeding to determine if a person is a beneficiary or if a person is an intestate successor,
>
> (b) If relief is sought under a wills variation claim, or
>
> (c) Other proceedings have been commenced which may affect the distribution of the estate

F. Payment of Debts

The personal representative is personally liable for payment of creditors if they pay the beneficiaries before the debts of the estate. Thus, a personal representative should advertise in the British Columbia Gazette under section 154 of *WESA*, wait 30 days from the last publication, pay any claims that arise, and then pay the beneficiaries. Having advertised, the personal representative will not face personal liability. But the personal representative would still be responsible for the debts, regardless whether they have advertised or not, if the personal representative has knowledge of the creditor's claim prior to distribution.

G. Income Tax Clearance Certificate

Section 159(2) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) prohibits distribution of the assets until a certificate is obtained from the Minister of Finance certifying payment of all taxes. Without such a certificate, the personal representative may be personally liable for the unpaid amount.

However, there have been changes in Canada Revenue Agency (CRA) procedure. It is now possible to review information via online terminals, and usually it is not necessary to obtain the return itself from a taxation centre. The clearance request and necessary documents are not filed with the return but are forwarded separately to CRA's district office.

The personal representative needs to file a terminal tax return, as well as an estate tax return for every year following death. Generally, the terminal tax return is due on or before the following dates:

- If the death occurred between January 1 and October 31 inclusive, the due date for the terminal tax return is April 30 of the following year; or

- If the death occurred between November 1 and December 31 inclusive, the due date for the terminal tax return is six months after the date of death

H. Discharge of Personal Representative

When the estate is large, when litigation is involved, or when the estate is insolvent, the personal representative may wish to protect themselves before distributing the estate by obtaining a discharge per section 157 of *WESA*. This discharge is generally not necessary where a small estate is involved.

Generally, a personal administrator can consider their duties at an end once all the residuary or intestate beneficiaries have approved their accounts and signed a release, and when they have obtained clearance from the CRA.

I. Passing of Accounts

Section 99 of the *Trustee Act*, RSBC 1996, c 464 sets out the procedure for the passing of the trustee's accounts. Absent written and approved consent by all beneficiaries or a court order, an executor, administrator, and trustee under a will and judicial trustee must, within two years of the grant of probate or grant of administration or within two years from the date of appointment, pass their accounts. This is often the process by which an executor, administrator and trustee will have their fees approved.

References

[1] https://www.canlii.org/en/bc/bcsc/doc/1988/1988canlii2980/1988canlii2980.html

XIII. Taxation: RRSP & RRIF & TFSA

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

A. RRSP: Registered Retirement Savings Plan

In British Columbia, a person may by will gift a property which they are entitled at law or in equity at the time of their death. This means that the proceeds from a deceased's Registered Retirement Saving Plan ("RRSP") can be distributed to the beneficiary outside of the will if a valid beneficiary designation has been made. However, please note that the deceased's estate will likely need to pay taxes on the value of the RRSP as at the deceased's date of death. This will be taxed as the deceased's income for that year.

A person is "deemed" to have disposed of all assets at the moment before death and is accordingly taxed in the year of death as such. For example, if the deceased owns a rental property, then that rental property is considered to be sold at the moment of the deceased's death and as a result, the deceased may have earned capital gains from this deemed disposition. Taxes will then be paid on these capital gains.

Additionally, the value of any RRSP or RRIF will also be considered to have been earned in the year of death. This is significant because the inclusion of all these capital gains will most likely bump the deceased to the highest tax bracket. In B.C., this bump could mean that an individual is taxed close to 50% of the income.

The major exception to this rule is the "spousal rollover" rule in section 73 of the *Income Tax Act* ("*ITA*"). This rule effectively defers payment of taxes owing from the deemed disposition if the asset is given to the spouse of the deceased until the death of the spouse.

If a beneficiary has been designated to receive the proceeds of a RRSP, those proceeds will pass directly to the beneficiary. However, the deceased will be considered to have earned the entire value of the RRSP during their year of death and the estate must declare the value of the RRSP on the T1 Terminal Tax return. Accordingly, unless a roll-over provision, such as the spousal roll-over, applies, the estate will be liable to pay taxes on the value of the RRSP.

If the estate is unable to pay the taxes, the beneficiary receiving the proceeds will be liable to pay the taxes owing (s 160.2(1) of the *ITA* provides that the estate and a designated beneficiary are jointly and severally liable for tax on the value of the RRSP at the date of death).

B. RRIF: Registered Retirement Income Fund

The same rules apply to RRIFs as they apply to RRSPs.

C. TFSA: Tax-Free Savings Account

TFSAs receive specialized treatment under the *Income Tax Act*. As TFSAs came into effect in 2009, this section of the chapter will not be material to the estate of deceased taxpayers who died in 2008 or earlier.

The fair market value of the TFSA will be received by the estate of the deceased taxpayer or any gains that accumulated in the account will continue to be tax-free until the end of the year following the death of the account holder. The tax-free status of the TFSA is preserved if the deceased taxpayer named their spouse or common-law partner as the successor account holder.

It is unlikely that there will be tax liability for the income generated by the TFSA from amounts contributed to the TFSA during the taxpayer's lifetime. This is different from RRSPs or RRIFs.

XIV. LSLAP File Administration Policy

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

This section is specific to LSLAP clinicians. It sets out internal LSLAP practices and policies regarding Wills & Estates.

A. LSLAP File Administration Policy – Wills and Estate Planning

The only wills and estates issues LSLAP can responsibly provide assistance to the public is the drafting of certain types of simple wills. Students should refer clients to qualified wills and estates lawyers for all other issues. In addition, the student should only prepare a will for persons meeting our income criteria and whose estates are:

- Small (under $25,000); and
- Consist entirely of personal property, no real property (the future as well as present situation must be considered), with all of the estate located in British Columbia.

In addition to simple wills for individuals, LSLAP is only able to prepare "mirror wills" for clients, not "mutual wills". A mirror will is designed for couples with similar wishes. The wills of the couple "mirror" each other: each leaves the same gifts to the other and each names the other as Executor.

By contrast, a mutual will includes a statement that the will-maker agrees not to change or revoke their will without the consent of another party (usually the spouse). This agreement will potentially bind the will-maker even if the other party predeceases the will-maker. Thus, a mutual will has a contractual component, in theory creating a constructive trust. However, a will-maker can always change their will and testament. If a will-maker changes their last will and testament after the other party has died, the will-maker may create a right of action for beneficiaries of the preceding mutual will (which created the constructive trust) for breach of the trust.

Note that signing mutual wills are not a widespread practice. **If a client is seeking LSLAP's assistance in preparing a mutual will, the client must be directed to a qualified practitioner**. It can be suggested that the client should discuss with a qualified practitioner the possibility of creating an *inter vivos* trust instead of preparing a mutual will.

Note that if you are assisting two clients to make mirror wills (or any time you are jointly representing clients), you should provide both clients with a joint representation agreement. This agreement must contain the information required by the Law Society of British Columbia.

LSLAP's policy is that anyone who can afford a lawyer should be referred to one. A practitioner's fee might vary from $300 to $500 for a relatively simple will. However, this material has been prepared for appropriate cases where the client meets LSLAP's income criteria.

Because the law on wills is strictly applied, precedents should be used to provide certainty. Any lack of clarity may defeat the intention of the will-maker, who will not, of course, be available to clarify contentious points once they have passed away. Also, students should not take instructions from a person on behalf of someone else; they can prepare a will only for the client. The final will must then be reviewed with the client to ensure that it reflects their wishes and that they

understand what the document means (see Section III.D: Executing the Will and Section III.E: Attesting the Will).

Important changes to wills and estates law due to *WESA* have been highlighted in this chapter. However, students should refer clients to private lawyers if they are unsure how certain *WESA* provisions should be interpreted.

Finally, LSLAP will not draft a will that disinherits potential beneficiaries. In other words, LSLAP is unable to help with clients wishing to eliminate spouses and children. Clients wishing to disinherit potential beneficiaries should be referred to a private lawyer.

> **NOTE: Before drafting a will for a First Nations person, please consult with the supervising lawyers. The client will most likely have to be referred to an outside lawyer. There are many complexities with First Nations wills, and LSLAP will likely not be able to assist**.
>
> **NOTE: LSLAP's Supervising Lawyer must be consulted on every will and must review the final product before it is sent to the client to be executed**.

B. LSLAP File Administration Policy - Probate and Taxation

LSLAP does not advise clients on probate issues. Such clients should be referred to a private lawyer. The potential liability in administering estates is too great to permit greater student involvement; the client should always be referred to a lawyer.

Estate taxation is complicated. Clients should be referred to lawyers who specialize in these matters or the CRA, which has agents who specialize in estate taxation.

C. Taking Instructions During the Initial Interview

The purpose of the initial interview is for the LSLAP student to complete the Will Instructions Questionnaire (**Appendix A**) with the client in order to later actually draft the will. **Students should never draft a will for a client during the initial interview. All wills must be approved by the supervising lawyer before they can be mailed or delivered to clients**. At the end of the interview, the student should have a clear and full understanding of the client's personal circumstances, assets, and desired distribution of their estate. The student should also have sufficient information to later assess the client's testamentary capacity with the supervising lawyer. **If there is any doubt as to a person's capacity, consult LSLAP's Supervising Lawyer**.

The student should keep the following things in mind during the initial interview:

1. Speak directly with the will-maker, never an intermediary.
2. Interview the will-maker alone, not in the presence of the beneficiaries or spouses, except where taking joint instructions from spouses for mirror wills.
3. Inquire into the nature and extent of the will-maker's property. Ask about any prior wills (to ensure that all property and prior wills are satisfactorily dealt with, and to ensure that the will-maker knows of all the property being disposed of). Ask the will-maker about the existence of property that may not form part of the estate (e.g. real estate in joint tenancy, joint bank accounts with survivorship rights, insurance policies and pension plans with named beneficiaries, Tax-Free Savings Accounts (TFSAs), Registered Retirement Savings Plans (RRSPs), and Registered Retirement Income Funds (RRIFs)). Ensure that the will-maker understands that such properties, if there are valid beneficiary designations in place, do not form part of the estate and their dispositions are independent of the will and its effects.
4. Have the will-maker read the Will Instructions Questionnaire over, section by section, or read it aloud to them.

   NOTE: The LSLAP office has a precedent file, which may be consulted for the structure of various clauses. Clinicians may also see the Legal Support Staff Desk Reference, the Continuing Legal Education wills precedent

book, or any book on will precedents.

D. Undue Influence and Suspicious Circumstances

In order to ensure there is no undue influence, clinicians should follow the British Columbia Law Institute guidelines below when conducting an interview with a client looking for assistance on making a will. Refer to the British Columbia Law Institute's *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* for more details on each of the points listed below. The guide can be accessed at http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf

1. Interview the will-maker alone

This practice allows the interviewer to satisfy themselves that the will-maker has testamentary capacity. The exception to the practice of meeting the client alone is where one is taking joint instructions from spouses for mirror wills. Should it appear that the instructions are not reciprocal, other than differing specific bequest of personal items (e.g. jewellery to daughter, tools to son) one should not take further instructions. Some lawyers will not take instructions for a new will from one of the parties if that lawyer had previously taken mirror or mutual wills instructions for both. Some lawyers will take unilateral instructions that conflict with the earlier mirror will, provided they are also given express instructions to inform the client's spouse that new will instructions have been received.

2. Ask non-leading, open ended questions to determine factors operating on the will-maker's mind

Examples of this type of questions include:

- How/why did you decide to divide your estate this way?
- Why did you choose [proposed executor] as the executor of your will?
- What was important to you in making these decisions?

Again, this ensures what the will-maker tells the interviewer to include in their will what truly represents their wishes.

3. Explore whether the will-maker is in a relationship of dependency, domination or special confidence or trust

Examples of questions to ask include:

- Do you live alone? With family? A caregiver? A friend?
- Has anything changed in your living arrangements recently?
- Are you able to go wherever and whenever you wish?
- Does anyone help you more than others?
- Who arranged/suggested this meeting?
- Does anyone help you make decisions? Who does your banking?
- Has anyone asked you for money? A gift?

4. Explore whether the will-maker is a victim of abuse or neglect in other contexts

When interviewing, the interviewer should be aware of the will-maker's physical safety. If necessary and appropriate, refer the will-maker to support resources. Sample questions to consider include:

- Has anyone ever hurt you? Has anyone taken anything that was yours without asking?
- Has anyone threatened you? Are you alone a lot?
- Has anyone ever failed to help you take care of yourself when you needed help?
- Are there people you like to see? Have you seen these people or done things recently with them?
- Has anyone ever threatened to take you out of your home and put you in a care facility?

5. Obtain relevant information from third parties when possible and if the will-maker consents

6. Obtain a medical assessment if mental capacity is also in question, but remember that mental capacity to make a will is ultimately a legal test

7. Compile a list of events or circumstances indicating undue influence. See section below for red flags.

8. Make and retain appropriate records whenever red flags are present

9. If suspicion remains high after reasonable investigation, decline retainer to prepare the will.

E. Red Flags for Undue Influence

The British Columbia Law Institute's list of red flags below may indicate the presence of undue influence on a will-maker. The list is non-exhaustive, and the presence of some factor does not provide an affirmation of undue influence. Use the list as a cautionary guide when preparing a will. Refer to the British Columbia Law Institute's *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* for more details on each of the facts listed below. The guide can be accessed at http:/ / www. bcli. org/ sites/ default/ files/ undue%20influence_guide_final_cip.pdf

Some examples of red flags that may indicate the presence of undue influence include:

- Will-maker invests significant trust and confidence in a person who is a beneficiary or is connected to a beneficiary (e.g. lawyer, doctor, clergy, financial advisor, accountant, formal or informal caregiver, new "suitor" or partner)
- Will-maker experiences isolation due to dependence on a beneficiary for physical, emotional, financial or other needs
- Physical, psychological and behavioural characteristics of the will-maker
- Circumstances related to the making of the will and/or the terms
- Characteristics of influencers in the will-maker's family or circle of acquaintance
- Interviewer's "gut feeling"

Appendix A: Will Instructions Questionnaire

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

The following document is a questionnaire that is a useful guide for gathering the necessary information of a client for constructing a will.

This appendix is available on Clicklaw Wikibooks for download in PDF.
A permanent archive version is also available at https://perma.cc/AU62-WB93
Readers of the print edition please see the "Supplementary Documents for Appendices" section.

Appendix B: Will Drafting and Execution Checklist

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

This checklist will help ensure students have considered and dealt with all relevant factors when drafting a will. **The checklist is not a substitute for a thorough reading of appropriate sections of the Manual**.

1. Is there a competent Will-maker (testamentary capacity, age)?
2. Were instructions properly taken? Do directions received represent the Will-maker's true wishes?
3. Are there any previous subsisting wills or codicils?
4. Is all property adequately dealt with? Have the Will-maker make a list of assets and any obligations that may bind the estate (agreements, guarantees, etc.).
5. Is there a proper revocation clause, and a clause confirming that this is the last will?
6. Have a suitable Executor and alternative Executor been appointed?
7. Has a 30-day survivorship clause with alternate beneficiaries been included?
8. If minor children are or may be involved, is a proper trust created with a Trustee and a guardian appointed? Note: if the client wants to create a trust for a child, refer the client to a private lawyer.
9. Are all beneficiaries properly identified with proper name, whether adopted, etc? Is a common-law spouse or stepchild properly described?
10. Does the will properly deal with an existing separated legal spouse or a divorced spouse?
11. Is there any provision made for the client's spouse(s) and children? Is it adequate? If not adequate, is there a statement of the Will-maker's reasons for not making adequate provisions or an explanation of why the Will-maker feels the provision made is adequate? Note: if the client wishes to inadequately provide for their spouse(s) and children, refer the client to a private lawyer.
12. Is the will, as a whole, internally consistent? Are mistakes and alterations properly dealt with?
13. Is marriage imminent, or has marriage occurred since the Will-maker's last will?
14. Has there been proper execution followed by proper attestation by disinterested witnesses? Has the will been dated and have the Will-maker and witnesses initialled the bottom of each page? Is each page identified as the X page of the

Will-maker's will?

15. Has the client been advised to keep their will in a safe place known to the personal representative, and to review and possibly update their will as circumstances change (death of Executor or beneficiary, marriage or separation, acquisition of property not adequately dealt with in the will, etc.)?
16. Has a Wills Notice been filed (or delivered to the Will-maker with the completed will)?
17. Is the Will-maker satisfied with the present beneficiary designations made with respect to any insurance policies, RRSPs, or pensions?

Appendix C: Glossary

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 30, 2023.

Administrator

- a person appointed by the court to manage the estate of a person who dies intestate (without a valid will)

Attestation

- an act of authenticating, affirming to be true, genuine, or correct, in an official capacity of a legal document

Beneficiary

- (a) a person named in a will to receive all or part of an estate, or
- (b) a person having a beneficial interest in a trust created by a will Cash legacy – a grant by will of money

Cash legacy

- a grant by will of money

Codicil

- an addition to a will, that changes, explains, revokes, or adds provisions

Equitable title

- a title to property in which a party has a beneficial interest and will eventually acquire legal title. For example, the beneficiary of a trust has an equitable title in assets held in the trust

Estate

- properties of a deceased person

Exclusion clause

- a provision in a will that leaves something or someone out of the will

Execution

- an act of signing and otherwise completing a testamentary document, such as acknowledging the signature if required to make the document valid

Executor

- a person appointed by will to manage the estate of a person who has died leaving a valid will. The executor must ensure that the person's desires expressed in the will are carried out. Practical responsibilities include gathering up and protecting the assets of the estate, obtaining information in regard to all beneficiaries named in the will and any other

potential heirs, collecting and arranging for payment of debts of the estate, approving or disapproving creditor's claims, making sure estate taxes are calculated, forms filed and tax payments made, and in all ways assisting the lawyer for the estate (which the executor can select)

Express powers

- stated rights, authorities and abilities in a will of the Executor to take some action or accomplish something, including demanding action, executing documents, contracting, taking title, transferring, exercising legal rights and other acts

Indemnify

- to guarantee against any loss which another might suffer

Intestacy

- a situation where a person dies without a legally valid will

Joint tenancy

- an ownership of real property in which each party owns an undivided interest in the entire property, with both having the right to use all of it and the right of survivorship

Legal title

- the ownership of real propert, which stands against the right of anyone else to claim the property. In real property, legal title is evidenced by a deed, judgment of distribution from an estate, or other appropriate document recorded in the public records

Living will

- a document in which a person appoints another as his/her proxy or representative to make decisions on maintaining extraordinary life-support if the person becomes too ill, is in a coma or is certain to die. Living wills are not legally valid in B.C. The B.C. equivalent document is called a “Representation Agreement”

Mirror wills

- the wills of an individual and their spouse which are identical except that each leaves the same gifts to the other, and each names the other as executor

Mutual wills

- the wills made by two partners in which each gives their estate to the other, or with dispositions they both agree upon. A later change by either is not invalid unless it can be proved that there was a contract in which each makes the will in the consideration for the other person making the will

Personal representative

- either the Executor named in the will of a deceased individual or a court-appointed Administrator; charged with administering and distributing the estate

Probate

- the process of proving a will is valid and thereafter administering the estate of a dead person according to the terms of the will

Revocation clause

- a provision in a will that cancels any wills previously made

Survivorship

- the right to receive full legal title or ownership of a property due to having survived another person in a joint tenancy

Tenancy in common

- the title to real property held by two or more persons, in which each has an "undivided interest" in the property and all have an equal right to use the property, even if the percentage of interests are not equal or the living spaces are different sizes. Unlike "joint tenancy," there is no "right of survivorship" so that if one of the tenants in common dies, each interest may be separately sold, mortgaged or willed to another

Testamentary capacity

- having the mental competency to execute a will at the time the will was signed and witnessed

Will-maker

- a person who has made a will which is in effect at the time of their death.

Trust

- an entity created to hold assets for the benefit of certain persons or entities, with a trustee managing the trust (and often holding title on behalf of the trust)

Trustee

- a person or entity who holds the assets (corpus) of a trustee for the benefit of the beneficiaries and manages the trust and its assets under the terms of the trust stated in the declaration of trust which created it

Wind up

- to liquidate (sell or dispose of) assets of an entity

Chapter Seventeen – Citizenship

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 19, 2023.

This chapter is primarily intended as a short guide of the basic process for obtaining a citizenship grant. For more detailed information refer to the *Citizenship Act*, RSC 1985, c C-29 [1] and *Citizenship Regulations*, SOR/93-246 [2].

This manual may aid individuals seeking assistance to determine whether they or their family members qualify for Canadian citizenship as well as individuals facing the loss of their citizenship status. Everyone should be encouraged to apply for citizenship as soon as they become eligible. It is important to be as thorough as possible with the initial citizenship application, as this is the best chance for obtaining citizenship.

> **NOTE:** The COVID-19 pandemic has affected the efficiency of Immigration, Refugees and Citizenship Canada ("IRCC") and other organisations that provides assistance relevant to citizenship. Accordingly, there are currently delays in processing citizenship applications. For more details and the latest information, please see the IRCC website [3].

References

[1] http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-29/latest/rsc-1985-c-c-29.html?resultIndex=1
[2] http://www.canlii.org/en/ca/laws/regu/sor-93-246/latest/sor-93-246.html?resultIndex=1
[3] https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19.html

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 19, 2023.

On June 11th, 2015, changes to the *Citizenship Act* [1] that had been phased in over the previous year were completed. Applicants may not be fully aware of these changes, but any applications submitted since June 11th, 2015 are bound by the current legislation. Those whose applications were submitted before this date will have to take careful note of the date, and then review the version of the Act that was in effect at the time the application was submitted.

A. Legislation

The governing legislation is the *Citizenship Act*, RSC 1985, c C-29 [1]. The Act is relevant where an individual wishes to obtain, resume, or retain their citizenship, or to determine how it may be forfeited. Under the Act, citizenship is granted after certain requirements are met, thereby making it a right that cannot be arbitrarily withheld as was possible under its predecessor, the *Canadian Citizenship Act*, RSC 1970, c C-19.

For the purposes of this Chapter, some words have specific definitions:

Citizen:	A Canadian citizen.
Ceremony Room:	An office of the Department of Immigration, Refugees and Citizenship of Canada or other place where a citizenship judge performs his or her duties under the Act.
Citizenship Judge:	Any citizen appointed by the Governor in Council to be a citizenship judge and to perform duties as the Minister prescribes for carrying into effect the purposes and provisions of the Act under s 26.
Minister:	The Minister of Immigration, Refugees and Citizenship of Canada.
Permanent Resident:	A person conferred with this status under the *Immigration and Refugee Protection Act* [2].
Minor:	A person who has not attained the age of 18 years.
Parent:	The father or mother of a child. This includes an adoptive parent. **NOTE:** On July 9, 2020, IRCC announced a change in the interpretation of "parent" under the *Citizenship Act*. The change allows non-biological Canadian parents who are their child's legal parent at birth to pass down Canadian citizenship to their children born abroad in the first generation. This new interpretation helps Canadian parents who have relied on assisted human reproduction to start a family, including members of the LGBTQ2+ community and couples with fertility issues. Until now, a child born abroad was automatically recognized as a citizen at birth only if the child shared a genetic link to the Canadian parent or if the child was born to a Canadian parent in the first generation. For more information, see the below website: [3]
Registrar:	The Registrar of Canadian Citizenship.

B. Resources

Immigration, Refugees and Citizenship Canada

Canadian citizenship law undergoes constant and sometimes unpredictable change. To ensure that you are using the most up to date forms, and the most current policies and procedures, it is important to always check the website of Immigration, Refugees and Citizenship Canada. Here you can find information, downloadable forms, and links to the IRPA, Regulations, and Policy Manuals. Operational Manuals and Bulletins published by IRCC are available online under the Publications heading. They explain the policies and procedures used by immigration officials to interpret the

IRPA.

Online	Website [4] Online Manuals [5]
Address	**Vancouver Offices - Citizenship** 200 - 877 Expo Boulevard Vancouver, B.C V6B 8P8 AND 1148 Hornby Street Vancouver, B.C. V6Z 2C3 **Surrey Office - Citizenship** #70 – 9900 King George Boulevard Surrey, B.C. V3T 0K9 **Case Processing Centre - Citizenship** P.O. Box 7000 Sydney, Nova Scotia B1P 6V6
Phone	Toll-free in Canada: 1-888-242-2100

References

[1] http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-29/latest/rsc-1985-c-c-29.html?resultIndex=1
[2] http://www.canlii.org/en/ca/laws/stat/sc-2001-c-27/latest/sc-2001-c-27.html?autocompleteStr=immigration%20and%20refu&autocompletePos=1
[3] https://www.canada.ca/en/immigration-refugees-citizenship/news/2020/07/citizenship-change-benefits-couples-with-fertility-issues-and-same-sex-couples.html.
[4] http://www.cic.gc.ca
[5] http://www.cic.gc.ca/english/resources/manuals/index.asp

III. Who is a Canadian Citizen?

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 19, 2023.

Section 3 of the Act [1] provides that a person is a Canadian citizen if they meet one of the enumerated conditions. In general, a person is a Canadian citizen if:

- They were born in Canada.
- They became a citizen through the naturalization process in Canada (i.e., they were a permanent resident before they became a citizen);
- They were born outside Canada and one of their parents was a Canadian citizen at the time of their birth because the parent was either born in Canada or naturalized in Canada. Then this person in this case is the first generation born outside Canada;
- A person may be a Canadian citizen if they were born outside Canada from January 1, 1947, up to and including April 16, 2009, to a Canadian parent who was also born outside Canada to a Canadian parent (in this case, the person is the second or subsequent generation born outside Canada).
- A person may be a Canadian citizen if they were adopted outside Canada by a Canadian parent on or after January 1, 1947.

  NOTE: The preconditions of citizenship listed above are not conclusive because there are special rules for people born in Newfoundland and Labrador.

A. Grant of Citizenship vs. Proof of Citizenship

A person who is a Canadian citizen by virtue of being born in Canada or being born outside of Canada to a Canadian parent may apply for **proof of citizenship**. To receive proof of citizenship, it is not necessary to pass the test or to take the oath of citizenship.

Persons who are living outside Canada should contact the Canadian Embassy, high commission or consulate in that country. If there is no Canadian government office in that country, you should contact a Canadian government office in a nearby country or a foreign government office that can provide consular service. For more information, please check Section VIII of this chapter.

Permanent Residents of Canada who have fulfilled the necessary requirements can apply for and may be granted citizenship.

References

[1] http://laws-lois.justice.gc.ca/eng/acts/c-29/page-1.html#h-3

IV. Advantages & Responsibilities

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 19, 2023.

There is no requirement that a permanent resident becomes a Canadian citizen. However, permanent residents may wish to apply to become citizens because:

- Citizens have the right to vote
- Citizens have the right to apply for a Canadian Passport
- Citizens may receive preference over non-citizens for certain jobs within the government
- Citizens cannot be deported from Canada
- Citizens are able to run in elections
- Citizens are not subject to the same residency requirements as a permanent resident

In all cases, individuals should find out prior to applying for Canadian citizenship whether the countries of which they are citizens permit dual citizenship. As Canada allows dual citizenship, an individual is able to acquire Canadian citizenship regardless of his or her possession of another citizenship. However, if the country of which the individual is presently a citizen does not permit dual citizenship, the individual's citizenship of that country may be extinguished if the individual acquires Canadian citizenship.

> **NOTE:** Non-citizens may be subject to deportation from Canada if they are convicted of an offence in Canada. Non-citizens who have already been subject to the Canadian criminal justice system for minor offences may benefit from applying for citizenship as soon as they become eligible in order to be free from the risk of being deported.

V. Citizenship Grants

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 19, 2023.

A. Grant of citizenship under s 5

NOTE: Regulations may change. Please check the regulations and the IRCC website for the most current information on what is required for a grant of citizenship under section 5.

To be granted citizenship, applicants must meet the required qualifications (as set out in s 5(1) of the Citizenship Act). An applicant must:

a) Make an application for citizenship, or, in the case of a minor, has a person empowered to act on their behalf make the application

b) Be a PR with no unfulfilled conditions relating to their status as PR

c) Have, since becoming a permanent resident,

i. been physically present in Canada for at least 1095 days in the five(5) years immediately before the date of submission of the application for citizenship.

ii. file income taxes (if required by the Income Tax Act) for any three taxation years that are fully or partially within the five years before you apply.

iii. Applicants may count each day they were physically present in Canada as a temporary resident or protected person before becoming a permanent resident as a half-day toward meeting the physical presence requirement for citizenship up to a maximum credit of 365 days.

iv. with regard to the period of physical presence, please refer to the Citizenship Act ss. 1.01, 1.02, 1.03, 1.2 & 1.3 for detais of exceptions

d) For those aged 18-54 years old: Submit proof that they can speak and listen at Canadian Language Benchmark (CLB) Level 4 or higher.

e) For those aged 18-54 years old: Take a citizenship test, showing adequate knowledge of Canada and of the responsibilities and privileges of citizenship;

f) Must not be under a removal order; and

g) Must not be under a prohibition (see C. Prohibitions).

NOTE: The Physical Presence Calculator on the IRCC website [1] is currently accepted by IRCC as a method for calculating presence in Canada. Applicants can print off the results of the calculator and include them with their citizenship application.

NOTE: If the individual is between the ages of 18 and 54, they are required to send proof of their ability to speak and *listen* in English or French in the citizenship application. Examples of acceptable documents that satisfy this requirement are the results of IRCC-approved third-party tests; transcripts or diploma from a secondary or post-secondary educational institution in English or French, in Canada or abroad; evidence of achieving Canadian Language Benchmark (CLB)/Niveau de Compétence Linguistique Canadien (NCLC) (http://www.language.ca/) level 4 or higher in certain government-funded language training programs. The full list of acceptable documents can be found on the IRCC website [2].

NOTE: If an applicant studied at a post-secondary program in English or French in or outside Canada, they do not need to write a language test; they can submit their diploma, transcript, or certificate with their citizenship application. If the document is not in English or French, they must be accompanied with a certified English or French translation [3].

B. Resumption of Citizenship, s 11

A person who was a Canadian citizen in the past, but who lost citizenship, may apply for a **grant** of citizenship (resumption) under s 11(1) of the *Citizenship Act* [4]. A former Canadian citizen may resume citizenship if that person:

a) Makes an application for resumption of citizenship,

b) Was a citizen and lost citizenship by means other than revocation,

c) Became a permanent resident after the loss of citizenship,

d) Lived in Canada as a permanent resident for at least one year during the two years immediately before the application, and filed income tax (if required) for the last taxation year immediately before the application,

e) Is not under a prohibition for certain criminal charges and convictions,

f) Is not under a removal order (e.g. deportation), and

g) Does not present a security risk.

Women who lost their citizenship by a law in force before January 1, 1947 because of their marriage or because their husband acquired foreign nationality can resume their citizenship as soon as they notify the Minister of their intention and produce satisfactory evidence to prove they meet the requirements of s 11(2) [4]. The applicant should provide the reasons she wants another certificate of citizenship and should surrender all previous certificates either at the time of application or when she receives her new certificate. Where the applicant has lost or destroyed her certificate of naturalization or citizenship, she must provide the details of that loss or destruction.

C. Prohibitions (ss 19 & 22 of the Act)

Persons will not be granted citizenship under ss 5(1),(2) or (4) or 11(1) of the *Citizenship Act*, or take the oath of citizenship, if the person:

a) Is under a probation order,

b) Is a paroled inmate,

c) Is serving a term of imprisonment,

d) While the person is serving a sentence outside Canada for an offence committed outside Canada that, if committed in Canada, would constitute an offence under an enactment in force in Canada;

e) Is charged with, on trial for, subject to, or a party to an appeal relating to an offence under the *Citizenship Act* or any indictable offence under any Act of Parliament, other than an offence that is designated as a contravention under the *Contraventions Act*, SC 1992, c 47 [*Contraventions Act*];

f) Requires but has not obtained the consent of the Minister of Immigration, Refugees and Citizenship, under s 52(1) of the Immigration and Refugee Protection Act, SC 2001, c 27 [Immigration and Refugee Protection Act], to be admitted to and remain in Canada as a permanent resident;

g) Is under investigation by the Minister of Justice, the RCMP, or the Canadian Security Intelligence;

h) Served or charged with, on trial for, a party to an appeal, or has been convicted of an act or omission referred to in s 7(3.71) of the Criminal Code, RSC 1985, c. C-46, (war crimes or crimes against humanity);

i) Convicted of certain crimes against humanity or war crimes;

j) Misrepresent or withhold important or relevant facts that could induce immigration authorities to make an error in administering immigration laws and regulations with respect to your application; or if during the five years immediately before the application, you were prohibited from being granted citizenship or taking the oath due to misrepresentation;

k) In the four year period immediately preceding the date of the citizenship application, or during the period between the date of the application and the date citizenship would be granted or the oath of citizenship would be recited, the person has been convicted of an offence under s 29(2) or (3) or of an indictable offence under any Act of Parliament, other than an offence that is designated as a contravention under the *Contraventions Act*, or

During the 10 years immediately preceding the citizenship application, ceased to be a citizen pursuant to s 10(1), where the Governor in Council was satisfied that the person has obtained, retained, renounced or resumed citizenship under the *Citizenship Act* by false representation or fraud or by knowingly concealing material circumstances. Time spent in prison, on parole or on probation does not count towards fulfilling the residency requirement.

Additionally, the Minister may make a report to the Review Agency if the Minister is of the opinion that a person should not be granted citizenship will not be granted where there are reasonable grounds to believe that an applicant will engage in activity that:

a) Constitutes a threat to the security of Canada, or

b) Is part of a pattern of criminal activity planned and organized by a number of persons acting in concert to commit any offence that is punishable by indictment under any Act of Parliament.

Persons not approved for these reasons will have any applications or appeals rejected and this declaration will have effect for three years after the date on which it has been made.

D. Minors

With the 2017 Bill C-6 having received royal assent, minors can now apply for citizenship without a Canadian parent, as the age requirement for citizenship has been removed under subsection 5(1). A person having custody of the minor or empowered to act on their behalf by court order, written agreement or operation of law (s, 5(1.04)), can now apply for citizenship on behalf of the minor, unless that requirement is waived by the Minister (ss. 5(1.05) & 5(3)(b)(v)).

The three-year residency requirement does not apply to children under the age of 18. There is no residency requirement for children applying under s 5(2) [5]. Parents who are citizens may apply for citizenship for their child as soon as the child becomes a permanent resident (s 5(2) [5]). Adoptive parents who are citizens may bypass the permanent residency requirement, and may make an application for citizenship on behalf of their child directly (s 5.1(1) [6]). However, in order to do so the adoption must “create a genuine relationship of parent and child”. Additionally, this direct route to citizenship is not available beyond the first generation of Canadians born or adopted abroad (i.e. the parents must derive their own citizenship by being born in Canada or through naturalization).

Children are not required to write the citizenship test, but children who are 14 and over are required to take the oath. If a child turns 18 before the end of the application process, he or she cannot be granted citizenship as a minor, even though they were under the age of 18 at the time of application. They must submit an adult application of citizenship. Stateless applicants under s 5(5) [5] have until age 23 to complete the application process.

E. Special cases

In some cases, the Minister may, at his or her discretion, waive on compassionate grounds (s 5(3) [5]),

> a) The requirements of language and knowledge of Canada or of the responsibilities and privileges of citizenship, and
>
> b) The requirement to take the oath, in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of mental disability.

Section 5(3.1) requires that for the purpose of section 5, if an applicant for citizenship is a disabled person, the Minister to take into consideration the measures that are reasonable to accommodate the needs of that person.

Section 5(4) [5] allows the Governor in Council, in his or her discretion, to direct the Minister to grant citizenship to any person in order to alleviate cases of statelessness or of special and unusual hardship or to reward service of exceptional value to Canada, notwithstanding any other requirements under the Act. The relevant policy guideline of IRCC can be found here [7]. Exceptions are granted so it is always worth considering this. The policy guideline is vital in this consideration.

References

[1] https://eservices.cic.gc.ca/rescalc/resCalcStartNew.do
[2] https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-citizenship/become-canadian-citizen/eligibility/language-proof.html
[3] https://www.canada.ca/en/services/immigration-citizenship/helpcentre/glossary.html#certificate_english_french_translations
[4] http://www.cic.gc.ca/english/citizenship/language.asp
[5] http://laws-lois.justice.gc.ca/eng/acts/C-29/page-2.html#docCont
[6] http://laws-lois.justice.gc.ca/eng/acts/C-29/page-3.html#docCont
[7] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals.html.

VI. Applying for Citizenship Grant

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 19, 2023.

A. The Process

1. Apply Online, If You Can

Most applicants can now apply online to become Canadian citizens. More information on how you can apply online can be found at the IRCC website [1].

2. Apply on Paper

If you apply on paper, your citizenship application must be mailed in using the proper forms provided by IRCC. The new forms are easy to understand and to complete. To order a citizenship application, consult the IRCC website see Section II.B: Resources). In-person application assistance is not available from IRCC.

The IRCC publishes *Discover Canada: The Rights and Responsibilities of Citizenship*, a book that gives general information regarding the right to vote in elections and run for elected office, voting procedures, and chief characteristics of Canadian physical and political geography. It will help the applicant answer questions in the written test he or she must take to become a citizen. This book is mailed to the applicant after the application for a citizenship grant has been received at the case processing centre. Alternatively, Discover Canada is available on IRCC's website [2] and a link to it is provided in a letter from IRCC.

An application should be completed as fully as possible. Only the full legal names of the person seeking citizenship will appear on the certificate of citizenship. The name on the permanent resident document will appear on the certificate of citizenship unless legal name change documents have been submitted.

3. Materials Required with Application

Individuals should carefully fill in all the forms they receive in the mail or from the website. Those forms will be the most current and can be found at: http://www.cic.gc.ca/english/citizenship/become.asp.

The application will list the documents that are needed, which will vary depending on the applicant's particular situation. Any document that is not in English or French must be accompanied by the English or French translation and by an affidavit from the person who completed the translation. Documents that are usually required with all applications are:

a) A birth certificate or other satisfactory proof of the applicant's date and place of birth;

b) Record of Landing or Permanent Resident Card;

c) Satisfactory language evidence;

d) Satisfactory proof of entry into Canada and of lawful admission for permanent residence. This could include passport(s) or a Certificate of Identity;

e) A Certificate of Marriage or legal name change document if the applicant's name has recently changed;

f) Photocopies of all valid and expired passports or travel documents you had in the past 5 years. If you don't have these documents or there are gaps in time between travel documents, an explanation will be needed; and

g) Photocopies of personal identity documents: e.g. driver's license, health insurance card, senior citizen's card, age of majority card.

In addition to these documents, the applicant must supply two identical photographs that:

a) Have been taken within the last six months;

b) The photographs must show the full front view of the head, with the face in the middle of the photograph, and include the top of the shoulders;

c) must be 50 mm (2″) by 70 mm (2 3/4");

d) The size of the head, from chin to crown, must be between 31 mm (1 1/4″) and 36 mm (1 7/16″);

e) Crown means the top of the head or (if obscured by hair or a head covering) where the top of the head or skull would be if it could be seen.

4. Fees

The fee is $630 for an adult grant. This amount includes a $530 processing fee and a $100 Right of Citizenship fee. The fee for children under 18 is only the $100 processing fee. The processing fee is not refundable unless the applicant withdraws his or her application before processing begins. The Right of Citizenship fee is refundable if the applicant is not approved for citizenship. Fees change regularly. The most recent information about applicable fees may be obtained from the IRCC website (see Section II.B: Resources); see also the *Citizenship Regulations*, SOR/93-246 in which the fees are proscribed.

If you go to the IRCC website [3], there is a useful fee list, which may be used to determine the applicable fees for all applicants.

Payment must be made online at ircc.canada.ca/english/information/fees/pay.asp [4].

NOTE: In January 2019, a Federal Court in Ottawa (*Tammy Lynn Mayes and Justice for Children and Youth v The Minister of Citizenship and Immigration*) ruled that a Minister may exercise discretion and waive the applicable processing fees to alleviate cases of statelessness or of special and unusual hardship or to reward services of an exceptional value to Canada.

5. Filing

After the application form is correctly completed and the client collects all the required materials (documents and photographs), the form, all documents, and fee receipt should be sent to the Case Processing Centre in Sydney, Nova Scotia. If a family wishes to be processed together, all applications should be submitted in the same envelope. Starting from June 3, 2013, all family members who apply together on one citizenship application will no longer be approved at the same time. Applicants who pass the test will now be processed independent of other family members.

See also the IRCC website: www.cic.gc.ca/english/citizenship/become-how.asp [5]

6. After Filing the Application

NOTE: It is anticipated that the minimum and maximum age requirements will change soon. Users of this service are advised to seek current information from the IRCC website [6] on the age requirements.

Once the Registrar receives the application and supporting documents, the Department will begin processing the application and determine whether the applicant meets the requirements of the Act. When it has been determined that an applicant is eligible to apply for citizenship, and they have passed the required clearances, they are scheduled for a citizenship test and an interview with a citizenship official. If the applicant is between the ages of 18 and 54, he or she must pass a test about Canada's history, geography and the rights and responsibilities of citizenship. The applicant is given at least seven days (usually two - three weeks) written notice prior to the date of the examination. If the applicant is **55 years or older** he or she does **not** have to write the test, however, they are still required to attend an interview.

Where an applicant has failed to provide all materials relating to the application, the Registrar will give notice to the applicant to provide the appropriate materials. If the applicant fails to comply with this notice, the Registrar will send a second notice. Failure to comply with the second notice will result in the abandonment of the application, and the applicant will have to file a new application.

7. Processing Time

According to the IRCC website, the total processing time for a routine application for citizenship varies (Please refer to the IRCC website to see current processing times). An application is considered routine if:

a) All the necessary documents and correct fees are received by IRCC,

b) The applicant meets the residence requirement,

c) The applicant is not subject to any immigration, security or criminal prohibitions,

d) The applicant passes the citizenship test, and

e) The applicant does not need a hearing with a citizenship judge.

NOTE: Due to COVID-19, IRCC processing times have increased, and there is limited capacity to process citizenship applications and provide processing timelines.

NOTE: If a candidate has an emergency, they can request urgent processing of their citizenship application. More information can be found on the IRCC website [7].

B. The Citizenship Interview and Test

1. Interview and Test

NOTE: Due to COVID-19, citizenship tests and interviews are now conducted online. More information can be found on the IRCC website [8].

All adult applicants and some minor applicants will be scheduled for a meeting with a citizenship officer, which is generally referred to as an "interview". This interview happens the same day that the citizenship test is scheduled, and is conducted at the test location. IRCC is now moving towards online citizenship tests, rather than in-person ones. In that case, your interview may be conducted at a later date.

For the interview, the applicant must bring with them their passports and other documents that they provided as part of their citizenship application. They should be prepared to speak briefly with the citizenship officer conducting the Interview in English or French, and the officer may ask questions about the application (such as requesting clarification on travel dates or other facts that are material to the application).

Where an applicant meets a minimum language requirement (which are assessed at the interview), meets the residency requirements, and has no suspected prohibitions, he or she will be required to take a written examination if his or her age is between 18 and 54 years. Applicants may be able to have an oral test instead if they have problems like difficulty in reading and writing in English or French. The examination consists of multiple-choice questions and true or false questions. It tests an applicant's knowledge of Canada, including aspects of history, geography, economy, government, laws, symbols, and citizens' rights and responsibilities. There will be 20 questions and an applicant needs to get 15 correct answers to pass the test. It is mandatory for citizenship applicants to correctly answer two questions related to s 15(a) of the Citizenship Regulations and one question related to s 15(b). Subsection 15(a) sets out the right to vote and run for elected office and s 15(b) deals with voting procedures. Applicants who fail their first citizenship test, but otherwise met all other criteria, have the opportunity to rewrite the test about 4-8 weeks later before being referred to a citizenship officer. If the applicant passes the test, he or she returns later for the citizenship ceremony.

Questions in the citizenship test are based on the information provided in a free booklet called *Discover Canada: The Rights and Responsibilities of Citizenship*. IRCC will send this booklet to applicants once their applications for citizenship are filed. A PDF version of the booklet [9] can also be downloaded from the IRCC website.

The test takes place in a relatively informal environment where the applicants are required to write the exam on their laps. The majority of people find the 30 minutes provided to be sufficient to finish the exam. However, people who lack adequate knowledge of English or French could experience difficulties with passing the test.

> **NOTE:** A local non-profit organization, the B.C. Civil Liberties Association, publishes *The Citizenship Handbook: A Guide to Democratic Rights and Responsibilities*, a free guide intended to help introduce new Canadians to the country's political process. The handbook is available in English, Chinese, Spanish, Vietnamese, and Punjabi. Call (604) 687-2919 for more information.

2. Citizenship Judge

In situations where the person is illiterate, does not meet the residency requirement, is suspected of some prohibition, or fails the written test, he or she will be requested to attend an oral hearing with a Citizenship Judge. The oral interview offers a second chance to those who fail the written examination. It is to be noted that Citizenship Judges are Canadian Federal Government employees and are not appointed through the methods used for other Federal Judge positions.

It should be noted that diversion to a citizenship judge can add significant time to processing and is not always successful, so if the client can avoid this through adequate preparation they should do so.

The purpose of the hearing is to determine whether or not the applicant fulfils the requirements of the *Citizenship Act* to become a citizen. Friends and relatives of the applicant may ask to attend the hearing but it is the judge's discretion whether to allow them to attend. Applicants should bring all relevant documents to the hearing, such as passport(s), IMM1000 (record of landing), confirmation of permanent residence, permanent resident card, separation or divorce papers, and any additional proof of residency in Canada.

During the interview, the judge will ask the applicant simple oral questions based on the instructional materials to decide if the applicant has adequate knowledge of French or English. The applicant must show that his or her vocabulary in the language is appropriate for conducting day-to-day activities with the general public and that he or she comprehends simple, spoken sentences in the past, present, and future tenses and can express him or herself similarly. The judge will also evaluate whether the applicant has adequate knowledge of Canada and the rights and responsibilities of citizenship, especially the right to vote and participate in the country's political life.

If a client is nervous or needs help preparing for the interview, various school boards, community colleges, and voluntary organizations, such as the Immigration Services Society of B.C., provide training courses for this purpose. This series of

learning classes, held once or twice weekly, is conducted in English or bilingually, so a basic understanding of English is essential to benefit from it. Applicants may phone those organizations for more information.

The applicant must inform the citizenship office if he or she is unable to attend the scheduled hearing. If the applicant does not appear, the file will be held for 60 days. If, at the end of 60 days, the applicant has still not contacted the citizenship office and provided a valid reason for failing to show up, a second notice is sent to the applicant by registered mail. If the applicant still fails to show; the file will be considered abandoned. In the event of abandonment, the applicant must make a new application and pay a new fee, as no further action will be taken with respect to the old one.

C. The Oath of Citizenship and the Citizenship Ceremony

> **NOTE:** Since the COVID-19 pandemic, most applicants will be invited to a video oath ceremony and some applicants may be invited to an in person ceremony. For more information visit the IRCC website [10].

If an application is approved, successful applicants are notified in writing to attend a formal ceremony to receive their citizenship certificates. Successful applicants attending an in person ceremony must bring various documents including their original (or certified) Immigration Record of Landing (if you became a permanent resident before June 28, 2022) or Permanent Resident card or Confirmation of Permanent Residence (COPR) and the Records of any minor children who are becoming citizens with them. Immediately before taking the Oath of Citizenship, the Record of Landing/COPR will be stamped, updating the applicant's status from permanent resident to Canadian citizen.

If the COPR/Record of Landing has been lost or stolen, the applicant must notify the police immediately. When successful applicants come to their ceremony, they must bring satisfactory evidence that they have reported the loss or theft to the police, and will also be required to complete a statutory declaration.

> **NOTE:** If the applicant forgets to bring the COPR/Record of Landing or evidence of a reported loss or theft, local office staff will make arrangements for the applicant to return with the necessary papers to another ceremony or, where applicable, exercise their discretion to allow the applicant to participate in a ceremony with the understanding that he or she will become a citizen, but only receive the commemorative document at that time. In that case, the applicant's file with the citizenship certificate will be kept in the local office until the applicant brings or sends the COPR/Record of Landing to be stamped. Citizenship certificates not picked up within a reasonable time will be destroyed. The client will need to apply for a new certificate.

Citizenship ceremonies are open to the public. Applicants who are 14 years of age or over on the day they are granted citizenship are required to take the oath of citizenship, which is repeated after a judge.

> OATH OR AFFIRMATION OF CITIZENSHIP
>
> "I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada, including the Constitution, which recognizes and affirms the Aboriginal and treaty rights of First Nations, Inuit and Métis peoples, and fulfil my duties as a Canadian Citizen."

D. Judicial Reviews

Where an application for citizenship has not been approved, the applicant will be notified of the decision, the reasons for the decision, and his or her right to judicial review. All judicial reviews are made to the Federal Court of Canada. If an applicant decides to seek judicial review, a Notice of Application must be filed in the Court Registry within **30 days** of the date the notice of refusal was received. All decisions of the Federal Court are final. However, applicants are free to reapply at any time.

References

[1] https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-citizenship/become-canadian-citizen/apply.html
[2] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/discover-canada.html
[3] http://www.cic.gc.ca/english/information/fees/fees.asp
[4] https://ircc.canada.ca/english/information/fees/pay.asp
[5] http://www.cic.gc.ca/english/citizenship/become-how.asp
[6] http://www.cic.gc.ca/english/index.asp
[7] https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-citizenship/become-canadian-citizen/apply/urgently.html
[8] https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19/citizenship.html#tests-interviews
[9] http://www.cic.gc.ca/english/resources/publications/discover/
[10] https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-citizenship/become-canadian-citizen/citizenship-ceremony.html

VII. Loss and Renunciation

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 19, 2023.

There are few reasons for losing Canadian citizenship under the current *Citizenship Act*. These are outlined in Part II of the Act [1], and may occur:

> a)Where a person renounced his or her citizenship by application;
>
> b)Where a person has been admitted to Canada for permanent residence by false representation, fraud, or by knowingly concealing material circumstances;
>
> c)Where a person became a citizen by false representation, fraud, or by knowingly concealing material circumstances.

Note that the Act now provides that if a person obtained their citizenship through false representation, fraud, or knowingly concealing material circumstances (including in the permanent resident process), they cannot re-apply for citizenship for 10 years from the date of their loss of citizenship. A person whose citizenship was revoked cannot apply for resumption of citizenship under s. 11(1) but must meet all requirements of the Act under s. 5(1).

Any person whose citizenship is revoked due to a conviction for terrorism, high treason, treason, or spying offences, depending on the sentence received, or for serving as a member of an armed force of a country or an organized armed group engaged in armed conflict against Canada is permanently barred from being granted citizenship.

> **NOTE:** If a person became a permanent resident by false representation or fraud or by knowingly concealing material circumstances and, because of having acquired that status, the person subsequently obtained or resumed citizenship, then the person has obtained or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances.
>
> **NOTE:** Under amendments introduced in Bill C-6 which are not yet in force, the Federal Court will be the decision-maker in all revocation cases, unless the individual requests that the Minister make the decision. The law will also give Citizenship Officers clear authority to seize fraudulent or suspected fraudulent documents in citizenship applications.

References

[1] http://laws-lois.justice.gc.ca/eng/acts/C-29/page-3.html#h-4

VIII. Proof

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 19, 2023.

If you need to prove your Canadian citizenship, you can apply for a citizenship certificate if you:

- are a Canadian citizen who was born outside Canada
- were born in Canada and need proof besides your Canadian provincial or territorial birth certificate

The Government of Canada has stopped issuing citizenship cards. If you apply to update or replace a citizenship card, you will receive a citizenship certificate instead. There are other documents accepted as proof of citizenship, namely, birth certificates, naturalization certificates issued before Jan 1, 1947, registration of birth abroad certificates issued between Jan 1, 1947 and Feb 14, 1977 and certificates of retention issued between Jan 1, 1947 and Feb 14, 1977.

> **NOTE:** Not knowing for sure whether you or your minor child are citizens does not mean you must apply for a certificate. A provincial or territorial birth certificate should generally be enough to prove Canadian citizenship, but a Canadian citizen born in Canada may still apply for a citizenship certificate. Other documents accepted as proof of citizenship include naturalization certificates issued before Jan 1, 1947, registration of birth abroad certificates issued between Jan 1, 1947 and Feb 14, 1977 and certificates of retention issued between Jan 1, 1947 and Feb 14, 1977. You may also use the “Am I Canadian?” tool [1] on the IRCC website to check whether you or your minor children are Canadian citizens. Despite all the alternative ways of proof, you may still apply for a certificate if you want to.

If you want to apply for a citizenship certificate, you should first get the application package [2], which includes the instruction guide, forms, and document checklist. You must download and print the checklist and the forms, fill out all the forms and include all documents listed in the document checklist. If your documents are not in English or French, you will need to prepare a colour copy, clear and easy-to-read, a translation of the documents, and a sworn statement (affidavit) from the person who did the translation. You cannot have your family members translate for you.

Please check your eligibility before paying the application fee ($75). You can pay your application fee online [3], but you may also be able to pay by other ways depending on where you are applying from.

You can find information about submitting the application at this link [4]. After submitting the application, you will need to wait for processing. If your matter is complex, IRCC may contact you for more information or documentation, and the processing time can be longer. If you want to make an urgent application or submit your application abroad, you can find relevant information on the same website.

> **NOTE:** Due to the COVID-19 pandemic, processing times for citizenship certificates have increased.

References

[1] https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-citizenship/become-canadian-citizen/eligibility/already-citizen.html
[2] https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/application-citizenship-certificate-adults-minors.html
[3] https://www.cic.gc.ca/english/information/fees/pay.asp
[4] https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-citizenship/proof-citizenship/apply.html

IX. Search of Citizenship Record

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 19, 2023.

The search of record service verifies the citizenship status of citizens and non-citizens. There are three basic reasons someone would request a “record letter”:

1. The applicant does not have proof of citizenship;
2. The applicant had proof, but needs a letter that outlines when and how he or she became a citizen, and
3. A third party asks for citizenship confirmation.

All persons requiring a record letter must make an application for search of citizenship records and pay a $75 fee. All search applications are processed at the centre in Sydney, Nova Scotia. After a search, if no record is found, the applicant will be given a “no record” letter, but if a record of citizenship is found, a numbered record letter is issued, which is valid for a specific purpose and stated length of time. Generally, the letter is valid for one month, but it may be valid for a maximum of three months. If a user of this manual is not sure if he or she was registered as a Canadian citizen in the past, that person should make applications for proof of citizenship and search of citizenship record at the same time and pay only one fee ($75). If the search of citizenship record is positive, the user will already be in line to receive a certificate of citizenship.

X. Referrals

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 19, 2023.

Immigrant Services Society of B.C

ISS is a non-profit organization committed to identifying the needs of immigrants and refugees and to developing and providing programs which meet those needs.

Online	Website [1] E-mail: info@issbc.org
Address	2610 Victoria Drive Vancouver, B.C. V5N 4L2
Phone	(604) 684-2561 Fax: (604) 684-2266

MOSAIC

MOSAIC is a multilingual non-profit organization that addresses issues affecting immigrants and refugees in the course of their settlement and integration into Canadian society.

Online	Website [2] E-mail: info@mosaicbc.org
Address	5575 Boundary Road Vancouver, B.C. V5R 2P9
Phone	(604) 254-9626 Fax: (604) 254-3932

Immigration & Refugee Legal Clinic

IRLC is a non-profit organization that provides free legal-aid to low-income people across BC on immigration and refugee matters.

Online	Website [3] E-mail: info@irlc.ca
Address	Head office: 103 - 2610 Victoria Drive Vancouver, B.C. V5N 4L2
Phone	(778) 372-6583

S.U.C.C.E.S.S.

S.U.C.C.E.S.S. is a non-profit social service agency that provides assistance to newly-arrived immigrants and refugees. The agency provides instructions in Cantonese and Mandarin on how to fill out citizenship forms and study for the citizenship test.

Online	Website [4] E-mail: info@success.bc.ca
Address	Head office: 28 West Pender Street Vancouver, B.C. V6B 1R6
Phone	(604) 684-1628

Lawyer Referral Service

The Lawyer Referral Service provides referral to a lawyer who will provide up to 30 minutes of free legal consultation. When requesting a referral, please request for a lawyer who specialize in immigration or citizenship law because citizenship law is an area of law that changes frequently.

Online	Website [5] E-mail: lawyerreferral@accessprobono.ca
Address	Head office: 300 – 845 Cambie Street Vancouver, B.C. V6B 4Z9
Phone	(604) 687-3221

References

[1] http://www.issbc.org
[2] http://www.mosaicbc.org
[3] https://www.irlc.ca/
[4] https://successbc.ca/
[5] http://www.accessprobono.ca/node/385

Chapter Eighteen – Immigration Law

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

This chapter is designed to assist with the following questions pertaining to immigration law in Canada:

- What is my status?
- How do I obtain a Work / Study Permit?
- How do I obtain Permanent Residence?
- How do I appeal an immigration matter?

It is advised that you reference outside sources in addition to this manual if your question is beyond the scope of the questions listed above. It is also important to refer to the main sources of immigration law (listed below) when researching a legal issue as the law may have changed since the printing of this manual. Notes advising users of potential changes to immigration law have been placed throughout the chapter as a warning that further research may be needed.

It is recommended that you contact an immigration lawyer if you require further assistance. Legal advocacy is recommended for appellate proceedings due to the complex nature of this area of law. Furthermore, several programs in British Columbia offer assistance with Temporary and Permanent Residence applications. If you cannot obtain the services of an immigration lawyer, the Law Students' Legal Advice Program [1] and the services listed in Section XIV may be able to provide assistance if you meet their qualifications.

> **NOTE:** The effects of the COVID-19 pandemic are still impacting immigration, refugee, citizenship and passport services, including processing times. For more information, please see here [2]
>
> **NOTE:** This chapter does not cover Quebec immigration matters.

References

[1] http://www.lslap.bc.ca/

[2] https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19/immigration-applicants.html#covid-how

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

A. Main Sources of Immigration Law

Immigration law is a very dynamic area, and it has undergone significant change in the recent past. For this reason, it is imperative to refer to the following sources for the most up to date information about immigration law:

- Immigration and Refugee Protection Act, RSC 2001, c 27 ["IRPA"] [1]
- Immigration and Refugee Protections Regulations, SOR/2002-227 ["IRP Regulations"] [2]
- Operational Bulletins and Manuals [3]

There are six general sources of immigration law and policy: the IRPA, the *IRP Regulations*, the Manuals, the Operational Bulletins, the Ministerial Instructions, and case law. The Canadian Charter of Rights and Freedoms [4] is also applicable to immigration matters as the IRPA and *IRP Regulations* must be consistent with the *Charter* provisions.

1. The Immigration and Refugee Protection Act and Regulations

The Immigration and Refugee Protection Act is the primary source of immigration law and should be referenced first. However, the IRPA is “framework” legislation, i.e. the provisions are general and principled. The IRP Regulations are more detailed than the IRPA and give specific guidance to applicants. Case law in immigration law operates in the same manner as it does in other areas of law. Case law interprets the IRPA and the IRP Regulations. The IRPA is a federal statute, and immigration related cases generally proceed before the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada. The Immigration and Refugee Board has jurisdiction to hear certain immigration matters (consisting of four separate divisions).

The Immigration and Refugee Protection Act, RSC 2001, c 27 (“IRPA”) came into force on June 28, 2002, replacing the former Immigration Act of Canada, 1976. It is important to note which legislation governs a matter. Refer to Part 5 of the IRPA and Part 20 of the Immigration and Refugee Protection Regulations, SOR/2002-227 (“IRP Regulations”) for the transitional provisions if you may be subject to the former *Immigration Act*.

> **NOTE:** Key legislation in this area of law changes frequently. Make sure to check the most recent version of the IRPA and Regulations, and to check the IRCC website for policy changes.

2. Operational Manuals and Bulletins

However, much of the operation of law in the Canadian immigration context takes place through the decision-making apparatus of IRCC, which is a large spatially distributed administrative bureaucracy. IRCC “officers” make decisions on written applications, without significant applicant input, and often without any opportunity to clarify evidence, and so it is vital that applications contain all the evidence required for the status being sought. Much of the law itself is interpreted through the policy of IRCC, which is publicly available through IRCC’s Operational Manuals [5] and between manuals, Operation Bulletins (a link to these bulletins can be found on the Operational Manuals page).

Operational Manuals are drafted by IRCC and provide details on interpretation of the IRPA and IRP Regulations. Immigration Officers and Visa Officers usually consider themselves bound to the Manuals when determining a case. Operational Bulletins are recent developments by IRCC that have not yet been incorporated into the Manuals.

> **NOTE:** The Manuals and Operational Bulletins do not have the force of law and must be consistent with the IRPA and the IRP Regulations. Cases that do not fit the factors listed in the Manuals and Operational Bulletins may therefore still be arguable at law. However, you may never have an opportunity to argue the legal case due to the limited and narrow appeals and review options available, and so it is essential that applicants try to confirm to the policy requirements as much as possible in the circumstances.

3. Ministerial Instructions

The Ministerial Instructions are provided for in s 87.3 of IRPA, and are created through Order in Council. The Ministerial Instructions drive current immigration policy. The Minister uses Ministerial Instructions to make fast, sweeping changes to the immigration system, and so it is very important to ensure that you are working with the most current information on requirements.

B. Resources for Immigration Law

Immigration, Refugees and Citizenship Canada ("IRCC") [6]

- Canadian immigration law is changing constantly and sometimes unpredictably. To ensure that you are using the most up to date forms, policies, and procedures, it is important to always check the website of IRCC: Here you can find information, downloadable forms, and links to the IRPA, Regulations, and Policy Manuals. Operational Manuals and Bulletins published by IRCC are available online under the Publications heading (https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals.html).They explain the policies and procedures used by immigration officials to interpret the IRPA.
- For the latest updates on Immigration, Refugees and Citizenship Canada, the newsroom is available here [7].
- Updates on the Operation Manuals and Bulletins are available here [8].

Immigration and Refugee Board ("IRB") [9]

H.M. Goslett & B.J. Caruso eds., The 2018 Annotated Immigration and Refugee Protection Act of Canada, (Toronto: Carswell, Legal Publications). Available on reserve in the UBC Law Library.

Sharryn J. Aiken, et al. Immigration and Refugee Law: Cases, Materials, and Commentary, 3rd Edition. (Toronto: Emond Publishing) Available at https://emond.ca/Store/Books/Immigration-and-Refugee-Law-Cases-Materials-and

L. Waldman, Canadian Immigration Law and Practice 2018 (LexisNexis).

References

[1] http://laws.justice.gc.ca/eng/acts/i-2.5/
[2] http://laws-lois.justice.gc.ca/eng/regulations/sor-2002-227/
[3] http://www.cic.gc.ca/English/resources/manuals/index.asp
[4] http://laws-lois.justice.gc.ca/eng/const/page-15.html
[5] http://www.cic.gc.ca/english/resources/manuals/index.asp
[6] http://www.cic.gc.ca
[7] https://www.canada.ca/en/immigration-refugees-citizenship/news.html
[8] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates.html
[9] http://www.irb-cisr.gc.ca

III. Players

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

A. Immigration, Refugees and Citizenship Canada (IRCC) and Canada Border Services Agency (CBSA)

Immigration, Refugees and Citizenship Canada (IRCC), under the Minister of Immigration, Refugees and Citizenship is generally responsible for processing permanent resident and temporary visa applications. The Canada Border Services Agency (CBSA) under the Minister of Public Safety and Emergency Preparedness is generally responsible for enforcement, removals, and hearings.

The difference between the CBSA and IRCC is more complicated than what is outlined in this Chapter, and their roles change within Canada's immigration system can change.

B. Immigration and Refugee Board (IRB)

The Immigration and Refugee Board is an independent tribunal with four distinct divisions. It is responsible for decisions on immigration and refugee matters, such as admissibility hearings, detention reviews, immigration appeals, and more. These are outlined in more detail below in Section VII: The Immigration and Refugee Board.

C. Immigration Representatives, Consultants, and “Shadow” or “Ghost” Consultants

Under section 91 of the *IRPA*, the only persons permitted to offer immigration advice or to appear before the Immigration and Refugee Board for consideration (i.e. pay) in relation to an application, are lawyers (and articled students) and members of the College of Immigration and Citizenship Consultants ("CICC"). A person who is not paid may legally provide assistance and advice to an applicant.

Any party appearing as a representative to an applicant must complete an IMM5476E "Use of a Representative" form. This includes both unpaid and paid parties.

For any proceeding in Federal Court, such as judicial review of an IRB decision, **only lawyers and the applicants themselves may appear**.

“Shadow” or “ghost” consulting refers to the practice of offering immigration-consulting services without proper accreditation. While these consultants are not authorized players in the immigration process, their presence is nevertheless significant, and often harmful. Whether acting within Canada or outside Canada, ghost consultants will never appear in the official record of an application. Since many immigrants are unaware of the regulatory requirement for authorized representation, those immigrants are exposing themselves to censure and even findings of "misrepresentation" if they employ ghost consultants, and IRCC and CBSA will aggressively pursue such findings if given the opportunity. Advocates should be entirely sure of their suspicions of the use of a ghost consultant before revealing this fact to IRCC and prejudicing their client. There are methods for pursuing and censuring ghost consultants provided in the IRPA and IRP Regulations, and clients may also have civil remedies against them in certain situations. **Refer to the “small claims” chapter for more information on filing complaints or small claims actions against consultants.**

IV. Categories of Persons

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

There are three legal categories of persons under the *IRPA*: citizens, permanent residents and foreign nationals. "Status" is the term commonly used to describe the category under which someone falls. Every person physically present in Canada falls into one (and only one) of these categories. "Indians" under the *Indian Act* may enter and remain in Canada in ways that are similar to, but not the same as, a permanent resident, and Indians may also apply for citizenship under certain circumstances. However, Indians may also still be foreign nationals even though they are also Indians, and as such are under the legal requirements of foreign nationals.

A. Citizen

A citizen is a person who was born in Canada, born outside Canada to a Canadian citizen parent, or who has been granted citizenship after filing an application for citizenship under the *Citizenship Act*, RSC 1985, c C-29. Various types of people can apply for citizenship. See Chapter 17: Citizenship.

Dual Canadian citizens (persons with multiple citizenships, including Canadian citizenship) travelling to or through Canada are required to enter Canada on a Canadian passport. Canadian citizens should always try to have a passport that will remain valid well beyond any time they plan to spend outside Canada.

B. Permanent Resident

A permanent resident (historically called a “landed immigrant”) is a person who has been granted permanent admission as an immigrant, but who has not become a Canadian citizen. Under *IRPA* section 2, “permanent resident” means a person who has acquired permanent resident status and has not subsequently lost that status under section 46.

Permanent residents have the same rights as Canadian citizens, with a few exceptions. One important exception is that permanent residents cannot vote. Another important exception is that a permanent resident can lose their permanent resident status and be removed from Canada under certain circumstances, most notably, for having committed a serious criminal offence or for not fulfilling their residency requirements. See Section VIII.A: Residency Requirements.

C. Foreign National

Under IRPA s.2, a foreign national is any person who is not a Canadian citizen or a permanent resident, and includes a stateless person. Foreign nationals with Temporary Resident status (such as visitors, persons with a Study Permit or a Work Permit, Convention refugee claimants and many others) must abide by certain conditions as required by law. Foreign nationals may also have no status – however, they are still Foreign Nationals even if their status has expired.

Upon losing their Temporary Resident status for allegedly failing to comply with conditions imposed (a list can be found in *IRP Regulations* 185(a)), a foreign national can apply within 90 days to have their status restored. If the officer finds that the foreign national has not failed to comply with any conditions and meets the initial requirements for their stay, the officer shall restore their Temporary Resident status.

Some types of foreign nationals and their associated conditions are described below:

1. Visitors

Visitors are foreign nationals who enter Canada lawfully as a visitor. Foreign nationals from certain countries require a Temporary Resident Visa ("TRV") under the Visitor Class (sometimes known as a "visitor's visa") before entering Canada; others do not (see IRP Regulations, s.190). Examples of "visa-exempt" countries are the United States, the United Kingdom, Australia, Japan, and most European countries. Foreign nationals with visitor's status can apply to extend their visitor's status from within Canada through a visitor record. A visitor has the condition that they cannot work or study in Canada, with very few exceptions. Importantly, visitors must prove that they will leave Canada at the end of their visit.

Visitors who are exempt from requiring a Temporary Resident Visa will still be required to attain an Electronic Travel Authorization ("ETA"). The only exceptions to this requirement are for United States citizens and lawful permanent residents and for individuals with a valid Canadian visa. Applications to obtain an ETA are made through the IRCC website and applicants will be required to pay a $7.00 surcharge. Electronic Travel Authorizations are not guaranteed and may be denied to travellers with criminal records or existing inadmissibility to Canada. For more information on the ETA process and to apply online visit IRCC [1]

Visitors can only stay in Canada for the duration of time granted when they first enter Canada unless they obtain an extension. The default amount of time granted upon entry is six months, although an immigration officer may specify a different period of time (IRP Regulations s 183). **This includes foreign nationals from visa exempt countries.** It is possible to apply for an extension with IRCC from within Canada. However, a person may apply for an extension without having to leave the country if they apply **before the temporary resident status expires**. If such a person stays in Canada beyond the period of time granted, the person has "overstayed" his or her visit and is subject to the issuance of a removal order for non-compliance (which would result in a mandatory 1-year exclusion from Canada). A successful applicant must prove that they will leave at the end of the visitation period, and that they will have sufficient funds during their visit. Most foreign nationals can apply for Restoration (IRP Regulations s 182) within 90 days of expiry, but person's status is not actually restored until a decision is made, and so they remain at risk of potential enforcement.

A Super Visa allows parents or grandparents of permanent residents or Canadian citizens to visit Canada for up to five years at a time. IRCC grants multiple-entry visas of up to ten years for qualifying individuals. To be eligible for a super visa:

- You must apply for a super visa from outside Canada
- You must be the parent or grandparent of a Canadian citizen or a permanent resident of Canada
- You must have a signed letter from your child or grandchild who invites you to Canada that includes:
    - o a promise of financial support for the length of your visit
    - o the list and number of people in the household of this person
    - o a copy of this person's Canadian citizenship or permanent resident document
- You must take an immigration medical exam.
- You must have medical insurance from a **Canadian** insurance company or a designated international insurance company that is:
    - o valid for at least 1 year from the date of entry
    - o at least $100,000 coverage
    - o have proof that the medical insurance has been paid (quotes are not accepted)

For more information on the Super Visa process and to apply online visit:

https:/ / www. canada. ca/ en/ immigration-refugees-citizenship/ services/ visit-canada/ parent-grandparent-super-visa. html.

2. Students

A foreign national who wishes to study in Canada must apply for their initial study permit from outside Canada at a visa office under the authorization of the Student Class. There are several exceptions to this general rule: in some circumstances a foreign national can study in Canada without a permit (see IRP Regulations ss. 188 to 189); and in circumstances such as extending an existing study permit a foreign national can apply for a study permit from within Canada (see IRP s. 215).

International students enrolled in courses in Canada for six months or less do not need a study permit, as long as those studies began and will end within six months of their entry to Canada. However, they must still have valid temporary resident status in Canada to perform these studies.

To acquire a study permit, a foreign national must have an acceptance letter from a valid academic institution, sufficient funds, and the intention to leave Canada once their permit expires (see IRP Regulations ss. 210 to 222).

Registered Indians (as defined under the Canada Indian Act) who are also foreign nationals are allowed to study in Canada without a study permit. However, those persons must still have valid temporary resident status in Canada.

An international student who graduates from an eligible designated learning institution may be eligible to obtain a Post-Graduation Work Permit (“PGWP”). Applicants can only receive one PGWP in their lifetime. An applicant must submit clear evidence that:

- They have completed a completed an academic, vocational or professional training program that is at least 8 months in duration from a designated learning institution.
- They have maintained full time status in Canada during each academic session of the program except the final academic session.
- They have received a final transcript or an official letter from a designated learning institution confirming that they have met the requirements to complete the program.
- They have 180 days after they have received their final marks to apply for a PGWP.

IRCC made certain exemptions for individuals affected by COVID-19. International students who completed up to 100% of their studies online from outside Canada between spring 2020 and August 31, 2022 were eligible for a temporary COVID-19 policy that was in place until August 31, 2022. The temporary policy changed on September 1, 2022, with new lock in dates for the period of September 1, 2022 until August 31, 2022 and on or after September 1, 2023. For more information on this temporary COVID-19 policy visit:

https:/ / www. canada. ca/ en/ immigration-refugees-citizenship/ services/ study-canada/ work/ after-graduation/ eligibility.html#outside-dl

For more information on the PGWP process and to apply online visit here [2]

We highly recommend paying careful attention to any upcoming changes to this program.

3. Workers

A foreign national who wishes to work in Canada must apply for authorization under the Worker Class, and a work permit from outside Canada at a visa office. There are several exceptions to this general rule: in some circumstances a foreign national can work in Canada without a permit (see IRP Regulations ss. 186 to 187); and in some circumstances a foreign national can apply for a work permit at a port of entry ("POE"), such as airport, land border or sea border (see IRP Regulations s 198), or from within Canada (see IRP Regulations s. 199).

a) Employer Specific Work Permit

The most common type of work permit is based on an employer in Canada applying to obtain a Labour Market Impact Assessment ("LMIA") from Service Canada (Employment and Social Development Canada) and a prospective worker applying for an employer specific work permit through the Temporary Foreign Worker Program.

There are several types of LMIAs and obtaining an LMIA is often difficult, lengthy and expensive. There are several criteria the employer must meet, including evidence of efforts to hire Canadians or permanent residents; that a government-determined minimum wage (not the same as the provincial minimum wage) will be paid (commonly known as the prevailing wage); and that the employer is able to demonstrate it can pay the wages offered. There are additional rules associated with whether the position pays less than or more than the provincial prevailing wage for the occupation.

Employers are also mandated by IRCC to provide all temporary foreign workers with information about their rights in Canada, and are prohibited from acting in reprisal against workers who come forward with complaints, as well as from charging recruitment fees to workers and holding them accountable for the actions of recruiters in this regard. In addition, employers are required to provide reasonable access to health care services. Employers under the Temporary Foreign Worker Program are required to provide private health insurance when needed. The Government of Canada announced efforts to strengthen protections for temporary foreign workers based on new regulations [3] that came into force in September 2022.

Information on the LMIA process (currently called the "Temporary Foreign Worker Program") and the different types of LMIAs available can be found at the Employment and Social Development Canada (ESDC) website [4].

b) Alternative Work Permits

There are other, less common types of LMIA-exempt work permits accessible under the International Mobility Program, such as a professional pursuant to Canada-United States-Mexico Agreement ("CUSMA"); inter-company transfers; Mobilite Francophone, and significant benefit permits, where the foreign national can demonstrate that they will contribute significantly to Canadian culture or the economy. Work permits authorizing self-employment are technically possible but rarely granted. Please see sections 204 and 205 of the IRP Regulations and the Operational Manuals relating to the International Mobility Program [5] for further details:

Workers who have employer-specific work permits may be eligible for an open work permit that is exempt from an LMIA if they are experiencing abuse, or if they are at risk of abuse. The main objective of the open work permits for vulnerable workers program is to provide migrant workers with means to leave their employer if they are facing abuse. It helps migrant workers by reducing the risk and fear of work permit revocation and removal from Canada. Consult the relevant Operational Manual [6] for further details.

> **NOTE:** The Migrant Workers Centre is a non-profit organization dedication to legal advocacy for migrant workers in BC and facilitates access to justice through the provision of legal education, advice and full representation.

https://mwcbc.ca/ [7]

NOTE: Registered Indians are exempt from having to apply for a work permit to work in Canada. Please see section 186(x) of the IRP Regulations for more information.

NOTE: Under the International Mobility Program, all employers, apart from those exempted from the employer compliance regime, who make an offer of employment to a foreign national referred to in IRP Regulations s. 200(1)(c)(ii.1) must comply with the conditions imposed under IRP Regulations ss. 209.2 and 209.4. An employer may be inspected (an inspection may be initiated from the first day of employment for which a work permit is issued up to a maximum of 6 years thereafter) and must ensure they have met these conditions. For more information, see the IRCC website [8]:

NOTE: Under the Temporary Foreign Worker Program, ESDC/Service Canada has the authority to review the activities of any employer using the Temporary Foreign Worker Program, in relation to the treatment of workers, their LMIA or LMIA application by conducting an inspection with or without prior notice to the employer. For more information, see the ESDC website [9]:

NOTE: The International Mobility Workers Unit (IMWU) provides opinions on whether or not an employer and the temporary foreign worker they want to hire are exempt from obtaining a LMIA. You can request an opinion from the IMQU to find out if an LMIA or work permit exemption applies in our situation. For more information [10]

4. Temporary Resident Permit

When a person is determined by IRCC or CBSA to be inadmissible to Canada (see below), a Temporary Resident Permit (TRP) (formerly called a Minister's Permit, and not to be confused with a Temporary Resident Visa) can be issued to a foreign national who is otherwise inadmissible but who has a compelling reason for either entering or remaining in Canada. The TRP can be applied for from either outside or inside Canada (IRPA, s 24). A foreign national is granted a TRP only under **exceptional circumstances**.

5. Convention Refugee Claimants

A Convention refugee claimant is a foreign national who enters Canada and who requests protection but who has not yet had their refugee hearing. Canada is obligated to grant protection to refugees and other persons in need of protection under the IRPA; the obligation originates from various United Nation Conventions and Treaties.

Details of the Convention refugee process are outlined in Section V. F: Convention Refugees.

References

[1] https://www.canada.ca/en/immigration-refugees-citizenship/services/visit-canada/eta.html
[2] https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/work/after-graduation/about.html
[3] https://www.canada.ca/en/employment-social-development/news/2022/09/government-of-canada-strengthens-protections-for-temporary-foreign-workers-as-new-regulations-come-into-force.html
[4] http://www.esdc.gc.ca/eng/jobs/foreign_workers/index.shtml
[5] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/exemption-codes.html
[6] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/vulnerable-workers.html
[7] https://mwcbc.ca/
[8] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/work-without-permit/employer-compliance-inspections.html

[9] https://www.canada.ca/en/employment-social-development/services/foreign-workers/employer-compliance.html
[10] https://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/hire-temporary-foreign/international-mobility-workers-unit.html

V. PR Application

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

Immigrant applicants can be broken down into three general categories (note: these categories are extremely broad): (i.) Economic Class applicants, (ii.) Family Class applicants, and (iii.) humanitarian or refugee applicants. There are several subclasses or subcategories within each of these general headings. All applicants and their dependent family members are subject to medical, criminal, and security checks for admissibility purposes. These are referred to as "statutory requirements" in the legislation.

Amendments to the Act that came into force June 18th 2008, give the Minister authority to establish an order of priority for incoming applications (s 87.3), and relieve IRCC from the obligation to process all applications to a full decision (s 11). For example, priority processing amongst Family Class applications is given to spouses and dependent children; these are commenced immediately upon receipt. See the Operational Manuals for details.

> **NOTE:** It is necessary to inform IRCC about any changes in the application, such as a birth or adoption of a child, marriage or divorce, death of an applicant or dependent as soon as possible.

A. Economic Class Applicants

Foreign nationals who apply under one of the economic classes must prove that they will become financially established in Canada. This general requirement is reflected through a series of criteria. There are three general sub-classes within the economic class: the skilled worker class, investor class, and the self-employed class. Please note that there are Provincial Nominee Programs in operation throughout Canada, including British Columbia. Under these programs, the province nominates an immigrant for Federal screening (see s. 87 of the IRP Regulations). Nomination by a province provides strong evidence of an applicant's ability to become economically established in Canada as required by IRPA s. 12(2). A detailed discussion of these programs is beyond the scope of this Manual.

> **NOTE:** IRCC implemented an online screening and selection process for persons who wish to be considered for permanent resident status in Canada under the Economic Classes of Federal Skilled Worker, Canadian Experience Class, and Federal Skilled Trades Class. This process is called Express Entry ("EE") [1].

EE is a system whereby applicants create an online profile (there is no paper process for creating an EE profile) that assigns points according to "Human Capital Factors" and "Skill Transferability Factors" under a "Comprehensive Ranking System". An applicant can obtain a maximum score of 600 points based on these factors in combination, and a possible extra 600 points by obtaining a special EE-related Provincial Nomination (see Provincial Nominee Programs) or an LMIA (see Workers). These factors and selection criteria were established through Ministerial Instructions, and can be reviewed in detail on the IRCC website [2].

Once the person has created an active EE profile, they may be selected for an Invitation to Apply ("ITA") for permanent resident status under one of the three aforementioned Classes of permanent residence. They will be issued an ITA if their profile score equals or exceeds the score chosen by IRCC at a particular selection pass. Consequently, potential immigrants do not know if they are able to apply for permanent resident status until they receive an ITA. In other words,

there is no guarantee the potential immigrant will receive an ITA.

Upon receiving an ITA, the applicant has 60 days to submit the application for permanent resident status. The application is made entirely online, without written forms, and requires scans of all relevant documents. The applicant will not know exactly what documents are required until they actually receive the ITA, and the documents required may change according to other evidence provided as part of the application. The online submission is often referred to as the "e-APR".

To understand what types of documents are required for an EE PR application before and after the applicant has received an ITA, you can refer [3] to IRCC's "Completeness Check" for these types of applications.

Once the e-APR is submitted, they will be contacted by IRCC with instructions on where to send original documents that may be required (such as original police clearances).

> **NOTE:** As of June 2023, IRCC is inviting candidates into the Express Entry pool who are eligible for a specific category established by the Minister to meet an identified economic goal. Candidates will be invited to apply based on criteria such as: ability to communicate in a specific official language work experience in a specific occupation; education. For more information on these recent changes [4]

1. Federal Skilled Worker Class (Express Entry Required)

The Federal Skilled Worker Program ("FSW") selects immigrants based on their ability to succeed economically in Canada. After meeting the threshold criteria set out in s. 75 of the IRP Regulations, foreign nationals who apply under the skilled worker class are assessed on a point system designed to evaluate their ability to become successfully established in Canada. Applicants are given points on the following criteria: education, language, experience, age, adaptability, and arranged employment. The point structure is set out in the IRP Regulations in ss. 78 to 83. Generally, those who score 67 points or higher may qualify for this program. Points are awarded based on language skills, education, work experience, age, adaptability and employment.

For information on how points are allocated, refer to this link [5].

For complete information on the Federal Skilled Worker Program, please refer to this link [6].

2. Canadian Experience Class (Express Entry Required)

This class is designed to recognize the value of having experience in Canada, and the positive impact this experience is likely to have on a newcomer's prospects of success in Canada. Applicants under this class must be able to demonstrate the following things:

1. At least one year of full-time skilled work experience in Canada, in the last 3 years, in an occupation classified under the Canadian National Occupational Classification (NOC) in a TEER 0, 1, 2, or 3 occupation. The Applicant's work experience must be gained by working in Canada legally and it does not include work experience gained while on a study permit. Full-time work experience is defined as at least 30 hours per week. Further, the skilled work experience can be made up of work in more than one skilled job, but any hours beyond 30 during that week are surplus and are not counted; and
2. The applicant must show a minimum proficiency in either English or French, through providing a test result report from the TEF, IELTS or CELPIP testing systems.

See more IRCC information for the Canadian Experience Class [7].

3.Federal Skilled Trades Class (Express Entry Required)

This class is meant to facilitate the permanent residence of skilled tradespersons in Canada. In order to be eligible for the Federal Skilled Trades Program ("FSTP"), an applicant must

(a) Plan to live outside the province of Quebec;

(b) Meet the required levels in English or French for each language ability (CLB 5 for speaking, and listening, and CLB 4 for reading, writing);

(c) Have at least two years of full-time (30 hours per week) work experience (or an equal amount of part-time work experience) in a skilled trade within the five years before applying;

(d) Meet the job requirements for their predominant skilled trade as set out in the National Occupational Classification ("NOC"), (except for needing a certificate of qualification), **and**

a. Have an offer of full-time employment for a total period of at least one year (up to 2 employers can commit to offer employment, but all offers of employment must be associated with an LMIA).

or

b. A certificate of qualification in their predominant skilled trade issued by a Canadian provincial or territorial authority (such as a Red Seal).

(e) Have sufficient funds for the applicant and the applicant's family to settle in Canada. This requirement is waived if the applicant is working in Canada legally and has a valid job offer from an employer in Canada.

See the IRCC website [8] for more information.

4. Provincial Nominee Programs

All provinces, including British Columbia, have their own selection systems and criteria for new immigrants. Applicants who apply under these classes must still comply with the statutory requirements under the federal legislation (see s. 87 of the IRP Regulations). Section 87(3) permits the federal immigration officer to substitute his/her own evaluation of the applicant's ability to become economically established in Canada for that of the nominating province. B.C.'s Provincial Nominee Program ("BCPNP") has its own categories, which can be different from the federal requirements.

After you are nominated for permanent residence by the BC PNP, both you and your employer must tell the BC PNP about any employment changes by emailing PNPPostNom@gov.bc.ca. This includes a promotion, lay-off, termination or a potential new job with a new employer. Please note that failing to inform BC PNP of a change in your employment status could lead to the withdrawal of your nomination. It could also lead to questions from IRCC when they process your permanent residence application. All post-nomination requests, including requests for work permit support letters, change of employers, and re-nominations, must now be emailed to PNPPostNom@gov.bc.ca. They can also be submitted through the applicant's online BCPNP account.

On 1 February 2017, the BC Provincial Immigration Programs Act and Regulations came into effect. This legislation provides a framework for the operation of the BCPNP, including direction concerning what factors can serve as the basis for a nomination, how fees are set, provides investigatory powers to the Director of the PNP, and allows for an appeal process for refused nominations. Clinicians assisting with PNP applications should familiarize themselves with the "interpretive guidelines" provided on the BCPNP site [9].

Where a BCPNP applicant is refused their application for a nomination certificate, the ability to appeal the decision is provided within their BCPNP online profile, and so it is important for the applicant to log into their profile as soon as possible upon receiving a refusal. They must pay a fee of $200, and provide submissions and evidence as part of the appeal process.

> **NOTE**: A BCPNP nomination can be cancelled after being issued, and this cancellation does not receive consideration under the appeal process. Instead the nominee is given basic procedural fairness protections in the form of an opportunity to be heard before the nomination is cancelled. There is no appeal to the cancellation decision and so it is important to make the best case possible at that time.

The BCPNP program is currently using an online registration and selection process similar to that of Express Entry (see the NOTE in Section V. A. "Economic Class Applicants"). Enrolment in the program is free. Once an applicant has enrolled in the program they wait to be issued an invitation to apply for a provincial nomination. No time estimate for waiting periods can be provided as they vary and depend on the strength of the application. Consolidated guides with all the details necessary to assist with a BCPNP application can be found here [10]. For more information about BC's programs generally, see here [11].

5. Atlantic Immigration Program

The Atlantic Immigration Program is an economic immigration program aiming at fulfilling the need of labour in Atlantic Canada. Skilled foreign workers and international students who want to work and live in New Brunswick, Nova Scotia, Prince Edward Island, or Newfoundland and Labrador may apply for permanent residence through this program.

To participate in this program, an applicant must satisfy the requirements for an international graduate, a high-skilled worker or an intermediate-skilled worker. Also, they must receive a job offer from a designated employer in Atlantic Canada. However, if an applicant receives a job offer from an employer who is not designated yet, they may ask the employer to consider being designated.

For more detailed information about this program, please visit the https:/ / www. canada. ca/ en/ immigration-refugees-citizenship/services/immigrate-canada/atlantic-immigration.html IRCC website].

6. Yukon Community Immigration Pilot Program

The Yukon Community Pilot ("YCP") is a new stream of the Yukon Nominee Program that will allow more flexibility for nominees working in specific Yukon communities. YCP was launched in early 2020 and it will run until June 2025.

The YCP will provide nominees with a work permit for a specific community, rather than a specific employer, and allow them to work for several employers in the same community, while the permanent resident application is being processed.

To participate in this program, an applicant must meet the general requirements for a work permit and receive two to three eligible job offers from the same participating Yukon community of this program and have a signed letter of support from the Government of Yukon.

For more detailed information about this program, please visit the IRCC website [12].

7. Rural and Northern Immigration Pilot Program

The Rural and Northern Immigration Pilot is a community-driven Program. It provides an opportunity for skilled foreign workers to gain permanent residence by working and living in a participating community. Applicants must meet both IRCC eligibility requirements and the community-specific requirements. Further, applicants need to have a community recommendation to apply for permanent residence. Participating communities in British Columbia include Vernon and West Kootenay (Trail, Castlegar, Rossland, Nelson).

For more detailed information about this program, please visit the IRCC website [13].

> **NOTE**: Due to the scope of this chapter, we are not able to provide an overview of all of the economic programs. For other economic programs not listed above, please see the IRCC website [14].

8. Self-Employed Persons Class

This category is designed for individuals who have the intention and ability to be self-employed in Canada in cultural activities or athletics. While it is not explicitly stated on the IRCC website, applicants with exceptional skills, such as Olympic athletes, world-renowned artists and/or musicians, etc. are more likely to be successful under this class. It is not necessary that the applicant actually be self-employed before coming to Canada, so long as they have participated at a "world-class" level in their field of endeavor for at least 2 years. However, persons not actually participating at a "world-class" level may still be successful if they can demonstrate they were self-employed in Category 5 of the Canadian National Occupational Classification ("NOC") (occupations in art, culture, recreation, and sport) for at least 2 years before coming to Canada, and that they are likely to become economically established in Canada.

Please refer to IRP Regulations Part 6 Division 2 (ss. 100 and 101), and to the IRCC website [15].

9. Investor Class

The Investor Program and the Federal Entrepreneur Program has been closed since July 1st 2012.

IRCC has a Start-Up Visa Program under the Business Immigration Program, which is geared at attracting experienced business people to Canada who will support the development of a strong and prosperous Canadian economy. On June 27, 2023, IRCC announced changes to the Start-Up Visa Program. Individuals are advised to check the IRCC website for the latest information.

NOTE: To learn about the Start-Up Visa Program, please visit the follow IRCC websites:

- https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa.html [16]
- https://www.canada.ca/en/immigration-refugees-citizenship/news/2023/06/canadas-tech-talent-strategy.html [17]

B. Caregiver Program

There are two options for a caregiver to come to Canada to become a permanent resident or work temporarily: 1) Home Child Care Provider Pilot; and 2) Home Support Worker Pilot. As of June 18, 2019, an individual may be able to apply for permanent residence through one of the above programs if they meet the eligibility requirements and have a job offer to work in one of these occupations.

Under the Home Child Care Provider Pilot and Home Support Worker Pilot, caregivers will receive a work permit if they have a job offer in Canada and meet the standard criteria for economic immigration programs. Please note an LMIA is not required. As of April 30, 2023, a caregiver can apply for permanent residency after twelve months of qualifying work experience . It is important to note that these programs are subject to caps on number of applications and Applicants should check the status of the program before applying..

These new pilot programs will also benefit from:

- Occupation specific work permits rather than employer specific permits. This will allow a caregiver to change employers if needed; and
- The caregivers' immediate family members will be eligible for open work permits and/or study permits.

Please see Chapter 9: Employment Law for further information on caregivers or the IRCC website [18].

You may also contact the Migrant Workers Centre for more information:

Migrant Worker's Centre (formerly WCDWA)	
302-119 W Pender Street	Telephone: (604) 669-4482
Vancouver, B.C. V6B 1S5	Fax: (604) 669-6456
Website: http://www.wcdwa.ca	E-mail: info@wcdwa.ca

C. Humanitarian and Compassionate Applications

Section 25(1) of the Immigration and Refugee Protection Act (IRPA) allows foreign nationals who are inadmissible or who are ineligible to apply in an immigration class, to apply for permanent residence, or for an exemption from a requirement of the IRPA, based on humanitarian and compassionate ("H&C") considerations.

Humanitarian and compassionate ("H&C") applications are generally applied for from within Canada under section 25(1) of the IRPA, but they can also be applied for from abroad.

This is a highly discretionary category, and generally, only exceptional circumstances will result in an H&C exception. The Supreme Court of Canada in Kanthasamy v Canada (Citizenship and Immigration) 2015 SCC 61 [19] established a broad and comprehensive assessment of all the applicants' circumstances in an H&C application. The former test, which considers whether the foreign national would face "undue, undeserved, or disproportionate hardship" if they were forced to return to their country of habitual residence or citizenship, does not create three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). Accordingly, officers should not look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.

Factors to be looked at include the level of establishment of the person in Canada, family ties in Canada, the best interests of any children involved, and what could happen if the request is not granted. There are other rules applicable to the application, please review the IRCC website [20] for more information.

> **NOTE:** In 2010, s 25 of the IRPA was amended, such that "... the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national". In other words, officers do not determine whether a well-founded fear of persecution, risk to life, danger of torture and risk of cruel and unusual treatment or punishment has been established, but they may take the underlying facts into account in determining whether the applicant will face hardship if returned to their country of origin.

Subsection 25(1.3) applies only to H&C applications made in Canada. Personal risks faced by the claimant that are relevant to a Convention refugee determination can no longer be considered in deciding an H&C application. However, "hardship" must still be considered—see IRPA s. 25(1.3). Thus, discrimination in the foreign national's country of origin that does not constitute persecution may still properly be considered by the Minister in determining whether the foreign national would experience undue, undeserved or disproportionate hardship.

> **NOTE:** Refugee claimants are prohibited from having concurrent H&C applications. Those who have had their claim denied **will be subject to a 1-year bar on submission of an H&C application**. There are some exceptions to the bar. The bar does not apply if:

- you have children under 18 who would be adversely affected if you were removed from Canada, or

- you have proof that you or one of your dependents suffers from a life-threatening medical condition that cannot be treated in your home country.

Unlike applications made under a Pre-Removal Risk Assessment, a person who applies under H&C considerations **may be removed from Canada before the decision on the application is made**.

D. Family Class Applicants

Certain foreign nationals can be "sponsored" under the Family Class by a Canadian citizen or permanent resident. Please see the IRP Regulations, Part 7.

> **NOTE**: Foreign nationals must declare any of their non accompanying family members (i.e. dependent children, spouses, and parents) in their initial application if they wish, at some point to sponsor these individuals themselves. An individual generally cannot sponsor a family member if they failed to declare that family member in their application for permanent residence. However, a pilot project has been launched from September 9, 2019 to September 9, 2021 and subsequently extended to September 9, 2023 which will allow certain newcomers who failed to declare their family members to sponsor undeclared immediate family members. Consult the IRCC website [21] for the latest details on this pilot project, which presently applies only to individuals who became permanent residents under the Convention refugee and Family Classes and who are applying to sponsor undeclared family members.

1. Sponsors

The sponsor must meet certain eligibility requirements. For example, the sponsor must be at least 18 years old, must reside primarily in Canada, must not be bankrupt or receiving provincial welfare benefits, must not be in default of a previous immigration undertaking, etc. (see ss. 130 - 137 of the IRP Regulations for the requirements).

The requirement to reside in Canada only applies to permanent resident applications. Canadian citizen sponsors may reside outside of Canada when they submit the sponsorship, but must demonstrate their intention to return to Canada when the sponsored person becomes a permanent resident (see IRP Regulations 130(2)).

In some circumstances, the sponsor must prove they earn a specific amount of money, depending on his or her family size and the city they are living in. The definition of "minimum necessary income" can be found in s.2 of the IRP Regulations. This is also known as the "low-income cut-off" figure ("LICO"). Generally speaking, the LICO **does not apply** to sponsors who are just sponsoring their spouse or children (IRP Regulations s. 133(4)).

2. Members of the Family Class

The family class is the group of family members that can be sponsored to immigrate to Canada. Family members who are not included in IRP Regulations s. 117(1) cannot be sponsored. Below is a list of members of the family class:

> (a) Spouse, common-law partner or conjugal partner,
>
> (b) Dependent child,
>
> (c) Parents or grandparents,
>
> (d) Brother, sister, niece, nephew, or grandchild who is an orphaned child under 18 and does not have a spouse or common-law partner, or
>
> (e) Relative of any age if the sponsor does not have an aunt, uncle, or family member from the list above who they could sponsor or who is already a Canadian citizen, registered Indian, or permanent resident. This is known as the "lonely Canadian" provision.

A dependent child is defined as a child, both biological and adopted, of the sponsor or sponsor's spouse who is below the age of 22. Exceptions can be made for children who are above the age of 22 but are substantially dependent on their parent due to a mental or physical condition (IRPA s. 1).

When the sponsor is also applying for permanent residency as a Principal Applicant, the sponsor's spouse, common-law partner, or conjugal partner, and the sponsor's dependent children are included on the sponsor's permanent residency application as accompanying or non-accompanying family members. However, a Principal Applicant may be rendered inadmissible if the family members included on his or her application are inadmissible.

> **NOTE**: A major issue that arises in many spousal sponsorship applications is whether the marriage is genuine. Under IRP Regulations, s. 4, a foreign national will not be considered a spouse if the marriage is not genuine or was entered into primarily for the purposes of acquiring any status or privilege under the Act. Applicants must prove that their marriage is valid, both in Canada, and in the country in which it took place (IRP Regulations, s. 2). While an arranged marriage is not inherently less credible, prior acquaintance to the marriage can pose some evidentiary challenges.

3. Procedure

To sponsor a family class member, a potential sponsor must fill out an application to sponsor, and the relative being sponsored must fill out an application for permanent residence. The sponsor must also provide a signed undertaking with the federal government that they will support the prospective immigrant and accompanying dependents, if necessary, for three years if the applicant is a spouse or conjugal/common-law partner, or ten years for most other categories of applicants (see IRP Regulations, Part 7, Division 3). If an application for sponsorship under the Family Class is refused, the **sponsor** may (in most cases) appeal the refusal to the Immigration Appeal Division.

E. "In-Canada" Spouses, Common-law Partners, and their dependents (Spouse or Common-Law Partner in Canada Class)

The statutory "in-Canada" family class sponsorship provisions are outlined under ss. 123 - 125 of the IRP Regulations. The requirements from the sponsor are generally the same, but the Class of persons able to be sponsored through this route is limited to spouses, common-law partners, and the children or grandchildren of those persons. The entire application is processed inside Canada, and the applicants are generally landed at an IRCC office in Canada. It is important to note that, aside from the question of the genuineness of the relationship, in-Canada applications are only successful if the sponsored person resides in Canada with the sponsor.

F. Out of status spouses in Canada – Public Policy

A Canadian citizen or permanent resident can sponsor a spouse regardless of the spouse's status in Canada under a special public policy directive relating to out-of-status applicants. After the sponsored spouse (applicant) receives first stage approval of their application (that is, approval in principle), they are entitled to an Open Work Permit under IRP Regulations s. 207. This means the applicant is entitled to work in Canada in any capacity; in other words, unlike most temporary foreign workers, this work permit is not tied to a particular form of employment with a particular employer.

> **NOTE:** An applicant will generally be granted a sixty (60) day period in which IRCC should determine whether the relationship is genuine if the applicant is out of status and there is a removal order. If it is determined that the relationship is genuine then the removal order will be stayed.

It is important to understand that foreign nationals without status can apply under this class only if the foreign national:

(a) Has overstayed a visa, visitor record, work permit or study permit,

(b) Has worked or studied in Canada without authorization under the IRPA,

(c) Has entered Canada without the required visa or other document required under the IRP Regulations and/or,

(d) Has entered Canada without a valid passport or travel document (provided valid documents are acquired by the time IRCC seeks to grant permanent resident status).

Consequently, foreign nationals who are inadmissible to Canada, entered Canada without permission after having been deported, and foreign nationals who have misrepresented themselves are not permitted to apply under this class. Always look to the most recent version of this policy.

NOTE: Under "in-Canada" classes, there is **no appeal** to the Immigration Appeal Division of a failed sponsorship. The only redress is to file a new application, file an overseas family class application, or if possible, to file for judicial review of the refusal in Federal Court.

NOTE: IRCC will issue spousal open work permits to certain spouse or common-law partner in Canada class applicants at the initial stage of processing. The pilot program has been extended until the regulatory changes have been completed to permanently implement this policy.

G. Convention Refugees (the Process)

The Refugee Protection Division ("RPD") assesses foreign nationals who apply for Convention refugee protection or "protected persons" status. The definition of a Convention refugee is found at s 96 of the *IRPA*. Generally, the person must:

(a) Have a well-founded fear of persecution,

(b) The fear must be objective and subjective,

(c) The fear must be linked to a Convention ground (i.e. race, nationality, religion, political opinion or membership in a particular social group),

(d) There must be no Internal Flight Alternative, i.e. a place in the country of feared persecution where the person can reasonably live safely,

(e) There must be no state involvement or state complicity, and

(f) The state must be unable or unwilling to protect.

If a person has more than one place of citizenship, they must have exhausted options in both of their countries of citizenship (see Canada v Ward [1993] 2 SCR 689 [22]). This is not an exhaustive list; refer directly to the *IRPA*, ss. 95 to 111.

The IRB Chairperson has issued special interpretation guidelines for determining Convention refugee claims of women refugees. Individuals should review these "Gender Guidelines" when assisting women refugee claimants. The Gender Guidelines can be found on the IRB's website, www.irb-cisr.gc.ca, under the heading "Legal and Policy References."

NOTE: A "person in need of protection" has a different definition, outlined under s 97 of the *IRPA*. Review the Convention Refugee and Protected Persons classes in the *IRPA* carefully if dealing with such a case. The Refugee Protection Division has the jurisdiction to consider both ss. 96 and 97 of the *IRPA*.

Significant changes to the refugee determination process have been implemented over the last several years by the Balanced Refugee Reform Act [23], SC 2010, c 8 (BRRA), and, the Protecting Canada's Immigration System Act, SC 2012, c 17 [24].

Key Changes:

- People who make a refugee claim at an office in Canada must submit their completed Basis of Claim form ("BOC") typically before their eligibility interview. Those who make a refugee claim at a port-of-entry must submit their BOC to the IRB no later than 15 days after referral of their claim to the IRB.
- Hearings at the independent Immigration and Refugee Board of Canada ("IRB") will be conducted by public servant decision-makers rather than people appointed by the Governor in Council ("GIC")

In general, refugee claimants have an initial intake interview with an officer, followed by a hearing with a public servant. Due to the increased volume of claims, the RPD has moved to a "first-in, first-out" model where claims are heard in the order they are referred. **If the claimant fails, they will have 15 days to make an appeal to the Refugee Appeal Division ("RAD"). Claimants whose claims are decided by the IRB to be "manifestly unfounded" or have "no credible basis," designated foreign nationals, and those falling under an exception to the Safe Third Country agreement have no right of appeal to RAD but may be able to file for Judicial Review in the Federal Court.**

Please note that the timelines for BOC, Hearings, Document Disclosure, and Postponement Requests are different for Inland claimants and Port-of-Entry claimants.

Any person midway through the application process should consult the IRCC website [25] for the latest information.

1. Entry/Initiation

A foreign national generally requests Convention refugee protection at the Port-of-Entry upon arrival, i.e. at the airport, land border or sea border. However, if a foreign national wishes to make a Convention refugee claim after being admitted into Canada, the person should go to the Immigration, Refugees and Citizenship Office at 1148 Hornby Street, Vancouver, British Columbia and enter a claim for protection. The first step is the eligibility interview.

> **NOTE**: A person, or their legal representative acting on their behalf, can initiate a claim for refugee protection inside Canada by using the IRCC Portal to complete questions and submit documentation online, including the Basis of Claim (BOC) Form [26].

2. Eligibility

Once a foreign national makes a claim for protection, an immigration officer will interview him or her and determine if the person is eligible to make a claim. There are several classes of ineligible people listed at s. 101 of the *IRPA*. For example, if a foreign national has previously made a Convention refugee claim in Canada, and the claim was accepted, refused, withdrawn or abandoned, that person is "ineligible" to make another claim. If a foreign national is determined "ineligible," the process stops.

At the eligibility interview, the interviewing immigration officer will obtain the detailed reasons why the foreign national fears persecution. A foreign national should be prepared to **accurately outline the details** of his or her account of events leading to the claim for protection.

Important changes to the eligibility rules for refugee claimants were introduced in 2019. Anyone who has made a refugee claim previously in a country with which Canada has an information-sharing agreement (US, UK, Australia, and New Zealand) are now **ineligible** to make a refugee claim in Canada. Instead, these individuals will receive only a Pre-Removal Risk Assessment ("PRRA"). We recommend that claimants in this situation consult with a lawyer as soon as possible to understand their options.

3. Basis of Claim Form ("BOC")

Once a foreign national is determined to be eligible to submit a Convention refugee claim, the foreign national will be given a Conditional Departure Order. This is a removal order that only comes into effect if the person loses the claim for protection. The foreign national is now a Convention refugee claimant.

In port of entry cases, the claimant will have **15 days to file the BOC** with the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada. **Completing the BOC is the most important obligation on a Convention refugee claimant, apart from attending their hearing.**

Claimants will require help in preparing their BOC. In the BOC, a claimant must outline the precise reason(s) for their well-founded fear of persecution. This includes a narrative outlining the dates, incidents of persecution, why they are afraid, etc. The **BOC should include facts that support the claimant's fear, and that address the requirements set out in the *IRPA*.** For example, the BOC should address why the claimant has no internal flight alternative, how the state is involved or complicit in the persecution, etc. This account of events will form the basis of the request for protection at the hearing.

4. Refugee Hearing

The Convention refugee claimant will be scheduled for an oral hearing to assess their claim. This hearing is not open to the public. The Presiding Member will question the claimant regarding the BOC. The Minister may also intervene in the hearing and a Hearings Officer may question the claimant if they allege the claimant should be excluded from refugee protection under *IRPA* s. 98 or if they have concerns about the claimant's credibility.

Note that if the claimant wishes to rely on documents, they must file or serve those documents not less than 10 days before the hearing. If the Minister intervenes, they must also be served within the same time frame. If there are documents in other languages, they must be translated (Rule 28).

Claimants may represent themselves at the hearing or be represented by counsel. Representation by counsel is always preferable. Interpreters are provided if required. Claimants may request that a family member or friend be present at the hearing for emotional support.

> **NOTE**: Claimants (and their counsel) must **be very familiar with the content of their BOC before the hearing**. Claimants must be prepared to elaborate on the details outlined in the BOC. A decision maker may interpret inconsistencies with the facts as stated in the BOC as weakening the claimant's credibility.

5. Refugee Appeal Division

The Refugee Appeal Division ("RAD") considers appeals against decisions of the Refugee Protection Division ("RPD") to allow or reject claims for refugee protection. In most cases there will be no hearing, as the RAD will base its decision on the documents provided by the parties involved and the RPD record.

a) Appealing the RPD's decision to the RAD

For appeals of **a decision of the RPD** to the RAD, the following information may be helpful:

- There are **only 15 days** to file a Notice of Appeal after receiving the written reasons for the decision from the RPD,
- After a claimant receives the written reasons from the RPD decision, the claimant has 30 days to file an Appellant's Record,

For a detailed compilation of necessary steps and information for a claimant's appeal, please refer to the IRB website [27]**.**

b) Responding to the Minister's Appeal of the RPD's Decision

The Minister can appeal the RPD's decision to accept a claimant's refugee claim subject to the following exceptions:

> (a) The claimant is a designated foreign national,
>
> (b) The claimant made their claim at a land border with the United States and the claim was referred to the RPD as an exception to the Safe Third Country Agreement, and/or
>
> (c) The claimant's claim was referred to the RPD before the relevant provisions of the new system came into force.

When responding to the Minister's appeal of their RPD decision to the RAD, the following should be considered:

1. A claimant will know the Minister is appealing the RPD decision when the Minister gives the claimant and the RAD a document called a 'notice of appeal'. The Minister has 15 days after they have received the RPD's written decision to take this action.
2. The Minister will then give the claimant any supporting documents that they will be submitting as evidence. The Minister has 30 days after receiving the RPD's written reasons to take this action.
3. After this is done, the claimant will have to submit a "**Notice of Intent to Respond**" and provide the Minister and the RAD with a copy, **no later than 15 days** after the claimant receives the supporting document from the Minister.

For a detailed compilation of all necessary components when responding to an appeal, please refer to the IRB website [28].

H. Pre-Removal Risk Assessment ("PRRA")

A PRRA is a risk assessment application before the removal of a foreign national from Canada. With some exceptions and some restrictions (see ss. 112(2) and 112(3) of the IRPA), every person who is being removed from Canada can submit a paper application describing why they would suffer persecution or danger in the country of destination if returned to that country. The risk(s) are assessed under ss. 96 and 97 of the IRPA. However, very few applications succeed under the PRRA process.

> **NOTE**: Under the IRPA those claimants who have a failed refugee claim will generally be ineligible to make a PRRA claim for **12 months** after the IRB's negative decision. The 12-month bar also applies to those who

- withdrew their refugee claim at the RPD (i.e. after their eligibility interview and referral to the RPD),
- abandoned their refugee claim,
- received a negative PRRA decision,
- received a negative decision from the Federal Court on an application for leave and judicial review regarding their refugee claim or PRRA decision

For further details regarding the 12-month bar and exceptions, please refer to IRCC's manual [29].

1. Process

Once a claimant has received a removal order and has been given **notification**, they have 15 days to apply for a PRRA and another 15 days to make submissions and include documentary evidence. If the person is a failed Convention refugee claimant, the evidence supporting the PRRA must be new or must have not reasonably been available on the date of the hearing; in other words, only “new evidence” is considered.

Once a person has applied for a PRRA, the person cannot be removed from Canada until a decision is made regarding their case. This is called a “stay of removal”.

A person who has been given notice of removal can apply for the PRRA later than the 15-day deadline. However, that person could be removed from Canada before the decision is made (i.e. no stay of removal is issued).

A person who loses the PRRA will be removed. The only redress to a PRRA refusal is to apply for leave and appeal to the Federal Court and request a deferral of removal from the CBSA until a decision is made by the Federal Court. The deadline to apply for leave to the Federal Court is 15 days. If CBSA refuses to defer removal (which is often the case), the client may need to apply for an urgent stay of removal in Federal Court. In such cases, the claimant should contact a lawyer immediately.

2. Status Conferred

If the PRRA is granted, the person will receive the same protection as a Convention refugee. The person will be considered a “protected person” and can apply for permanent resident status from within Canada.

References

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VI. Identifications

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

Unlike other countries, Canada does not issue national identification cards to its residents. Instead, all new permanent residents are issued a Permanent Resident Card since June 28, 2002. The Permanent Resident Card is proof of the individual's status in Canada as a permanent resident and it is required when travelling to Canada by commercial carrier or commercial airline. In general, a permanent resident of Canada cannot return to Canada by commercial carrier or commercial airline without their Permanent Resident Card. Accordingly, in order for a permanent resident without a valid Permanent Resident Card to return to Canada, they would need to apply for a Permanent Resident Travel Document.

A. Permanent Resident Cards

According to IRP Regulations s. 53(1), the Permanent Resident Card ("PR Card") is a document that indicates the holder's permanent residence status in Canada. In general, the PR Card is valid for five years from the date of issue. In order to maintain the permanent resident status, an individual would need to comply with the residency obligation under IRPA s. 28. For more information, see the Residency Obligation section below.

When a permanent resident becomes a citizen of Canada, they must return the PR Card to IRCC at the citizenship ceremony.

A permanent resident should only apply for a PR Card in one of the following situations:

- their PR Card has expired or will expire in less than 9 months;
- their PR Card is lost, stolen, or destroyed;
- they did not receive their PR Card within 180 days of immigrating to Canada; or

- they need to update the PR Card to legally change their name, change their citizenship, change their gender designation, or correct their date of birth.

If a permanent resident finds a mistake on their PR Card, they can request IRCC to issue a new PR Card. Please note shortening a long name to fit the PR card is not considered as a mistake.

For more information about the application process, please see the IRCC website [1].

> **NOTE:** A permanent resident without a valid PR Card is still a permanent resident, so their legal status in Canada will not necessarily change as the card expires.
>
> **NOTE:** New permanent residents are not required to apply for a PR Card upon arriving in Canada. This is because IRCC will automatically send a PR Card to the new permanent resident once they provide IRCC with their mailing address in Canada.

B. Permanent Resident Travel Document ("PRTD")

A PRTD is a document that permanent residents can use to re-enter Canada when they do not possess a PR Card, as their PR Cards may be expired when they are outside of Canada. A PRTD is normally only valid for one single entry. Accordingly, permanent residents should apply for a new PR Card as soon as they return to Canada. Please note in order to apply for a new PR Card, the permanent resident must demonstrate they meet the residency obligation under IRPA s. 28. For more information, see the Residency Obligation section below.

Please note a permanent resident can only apply for a PRTD when they do not have a valid PR Card, are outside of Canada, and will return to Canada by airplane, boat, train or bus.

The PRTD application is submitted outside of Canada at a Visa Application Centre (“VAC”). During the COVID-19 pandemic, the permanent resident could submit the PRTD application by email if the VAC is closed or unable to accept PRTD applications. See instructions below:

1. Submit a scanned PRTD application (see below) and a copy of the permanent resident’s passport bio-data page to IRCC.COVIDPRTD-TVRPCOVID.IRCC@cic.gc.ca. The subject line should read as “PRTD application: (legal name);
2. Scan a copy of the required documents listed in the Document Checklist (IMM5627);
3. Complete and scan the Application for a Permanent Resident Travel Document (IMM5524);
4. Pay the processing fee ($50) and provide a copy of the receipt; and
5. Provide a copy of the confirmed flight ticket/itinerary for travel to Canada that clearly shows the flight number, date of travel, and arrival airport in Canada, if this information is available.

When a permanent resident applies for PRTD through a VAC, a VAC agent will review the application package to ensure the application package is complete and has all the documents specified in the above document checklist. Further, an immigration officer will then assess the PRTD application to determine whether or not the permanent resident met the residency obligation. In some cases, a permanent resident may be required to attend an in-person interview.

For more information about the application process, please see the IRCC website [2].

> **NOTE:** In limited circumstances, a permanent resident can request urgent processing of their PR Card. See the IRCC website [3] for more information.
>
> **NOTE:** The current application fee is $50 for a PR card or a PRTD.

C. Other Identifications

As mentioned above, a permanent resident requires a PR card or PRTD to re-enter Canada by a commercial vehicle, such as an airplane, bus, train, or boat. However, permanent residents may enter Canada via the land border in a private vehicle with a passport and proof of their permanent residence status (i.e. their expired PR card and/or their Confirmation of Permanent Residence "landing" document ("COPR"). Some examples of private vehicles include, but are not limited to: cars, trucks, motorcycles, or recreational vehicles that you own, borrow, or rent, and that are not available for public use.

For more information, please refer to the website of Canada Border Services Agency [4].

References

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VII. IRB

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

The Immigration and Refugee Board of Canada (the "IRB") is made up of four tribunals with distinct jurisdictions. In Vancouver, the active divisions of the IRB are located at 300 West Georgia Street, Vancouver, British Columbia on the 16th, 17th and 18th floors.

A. Immigration Division

The Immigration Division deals with (i) detention reviews and (ii) admissibility hearings.

1. Detention Reviews

If a foreign national or permanent resident is "detained" under the *IRPA*, that person is entitled to a detention review before the Immigration Division. The adjudicator is called the "Presiding Member," and a CSBA officer called "Minister's Counsel" (representing the Minister for Public Safety) presents the case to detain the person concerned, unless an alternative to detention exists.

A person arrested under the *IRPA* provisions is entitled to a detention review within 48 hours after arrest, or as soon as practicable. If the person is ordered detained, he or she receives another detention review in 7 days, then again in 30 days, then again every 30 days thereafter until he or she is either removed or released.

To keep a person in detention, the onus is on the Minister to prove that there are reasonable grounds to believe that the detainee's identity cannot be ascertained, and that the detainee is either a danger, or unlikely to appear for his or her detention review hearing (see IRPA, s. 55 and *IRP Regulations* ss. 244 to 250).

2. Admissibility Hearings

If an immigration officer alleges a foreign national or permanent resident of Canada is “inadmissible” under a provision of the IRPA, the Immigration Division conducts an admissibility hearing to determine whether or not the allegation is founded.

> **NOTE:** There are exceptions where an immigration officer can determine inadmissibility without redress to the Immigration Division. For inadmissibility provisions, please refer to Division 4 of the IRPA.

These hearings are conducted as adversarial tribunals. Persons subject to such a hearing may represent themselves, or they may choose to retain counsel. It is always preferable for such persons to retain counsel.

If a person is found inadmissible, a removal order will be issued. A determination of inadmissibility can be appealed to the Immigration Appeal Division in certain cases. The Minister can also appeal in some circumstances. Only permanent residents or Convention refugees can appeal, with very few exceptions. Foreign nationals who are not Convention refugees, generally, cannot appeal the removal order to the IAD, but can apply for judicial review or a stay from Federal Court.

B. Immigration Appeal Division

The Immigration Appeal Division (“IAD”) hears appeals from the Immigration Division, and some decisions from visa officers and immigration officers. The three most common types of appeals are as follows:

(a) permanent residents who have been determined inadmissible by the Immigration Division for serious criminality;

(b) Canadian citizens or permanent residents appealing a negative decision on a sponsorship application under the family class; and

(c) permanent residents determined inadmissible for not having met the “residency requirements”.

The IAD is a court of competent jurisdiction. Charter issues can be raised. Also, the IAD, in most circumstances, can deal with issues of equity. For example, if a permanent resident is “lawfully” determined inadmissible by the Immigration Division for having committed criminal acts in Canada and lawfully given a deportation order, the IAD can allow an appeal because there are sufficient “humanitarian and compassionate” grounds warranting relief. See Section XI: Appeals.

C. Refugee Protection Division

The Refugee Protection Division (“RPD”) deals exclusively with determining claims for Convention refugee protection. The RPD also deals to a lesser extent with “vacation hearings,” i.e. hearings where an allegation is made that Convention refugee protection should be taken away from someone.

D. Refugee Appeal Division

The Refugee Appeal Division (“RAD”) is an appeal division for some failed Convention refugee claimants, established by the IRPA. Under s.110, the IRPA provision that actually permits an appeal to be made to the RAD, only some refugee claimants will have access to RAD. Designated foreign nationals, those whose claims are deemed to be “manifestly unfounded” or to have “no credible basis” and those whose claims are considered under an exception to the Safe Third Country agreement will have no right of appeal to the RAD. All other claimants have 15 days to submit an appeal to RAD. The appeal will largely be paper-based; hearings will be held only in exceptional cases.

VIII. Loss of PR

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

It is possible for a permanent resident to lose their permanent resident status and can even be removed from Canada in certain circumstances. Further, a permanent resident may also voluntarily relinquish their status as a permanent resident.

A. Residency Requirement

A permanent resident must meet the residency requirements as outlined in the IRPA. **Generally, a permanent resident must be physically present in Canada for 730 days out of every five years.** If a person has been a permanent resident for less than five years, they must demonstrate at examination, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident. The residency requirements can be met in a few different ways. See s. 28 of the *IRPA* for full details.

> **NOTE:** The onus is on the permanent resident to demonstrate with supporting documentation as considered necessary by an officer that they were physically present in Canada for the required number of days or have otherwise met (or will be able to meet) the residency obligation as prescribed in *IRPA*. The permanent resident also bears the onus of presenting documentation that is credible, in the opinion of an officer, to support any assertion(s) made by the permanent resident, or that may have been made on behalf of that permanent resident.

B. Inadmissibility

A foreign national or permanent resident can be determined “inadmissible” to Canada for several reasons, including, but not limited to:

- Committing a serious crime;
- Being found to have misrepresented information in their immigration application;
- Medical reasons that endanger public health and safety;
- If you are unable or unwilling to support yourself and your family members.

Inadmissibility means that a foreign national or permanent resident has contravened the IRPA in some way and may be issued a removal order.

There are three types of removal orders, which are discussed below.

If a permanent resident is deemed inadmissible, they may lose their permanent resident status. The inadmissibility provisions relating to foreign nationals and permanent residents overlap for the most part, but there are some differences. For example, permanent residents will be inadmissible for serious criminality if they commit an indictable offence, while foreign nationals will be inadmissible for committing a less serious summary offence. Refer to the IRPA directly for specific grounds of inadmissibility (ss 34 – 43).

> **NOTE:** Convention refugees are not inadmissible on the same health and criminality grounds as most other kinds of applicants, but they may be excluded from refugee protection in cases of serious criminality or crimes against humanity.

NOTE: A permanent resident sentenced to 6 months or more of incarceration (including time in custody awaiting trial) is inadmissible to Canada and **does not have an appeal to the IAD** of their removal. This means that permanent residents who are arrested and charged with crimes, even relatively minor ones, must ensure their criminal counsel are aware of this consequence from the beginning of the criminal process. A conditional sentence does not equal imprisonment for the purposes of this provision and sentencing must be considered at the time of conviction (see Tran v Canada (Public Safety and Emergency Preparedness), 2017 SCC 50 [1]). Users of this manual should check for developments in this area of the law as it is undergoing continued legal development. See also XIII: Immigration Issues at Sentencing.

References

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IX. In-Canada Temporary Residence Matters

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

For temporary residents in Canada, such as visitors, workers or students, who apply for permanent residency while holding temporary resident statuses in Canada, they may counter various immigration matters, which will be covered in this section.

A. Temporary Residence Extension

In general, a temporary resident who enters Canada as a visitor can usually stay in Canada for up to six months, unless the CBSA officer authorized a different length of stay in Canada. A temporary resident in Canada may apply to extend their stay beyond their initial period of stay granted by the CBSA officer at the POE. The temporary resident extension application must be submitted before the expiry date of the temporary resident's authorized stay in Canada.

For the temporary resident extension application, the applicant submits the application to the Case Processing Centre in Edmonton ("CPC-E") usually online with all of the required documentation and the fee. An agent at CPC-E will review the application. If the application is approved, then CPC-E will request a passport if the applicant is from a temporary resident visa-required country. Conversely, if the applicant is from a temporary resident visa-exempt country, then a Visitor Record will be mailed to the applicant. However, if the application is not approved, then CPC-E will mail a letter to the applicant to inform the applicant of the reasons for refusal and advice of the next course of action.

Please refer to the IRCC website [1] for information on the process to extend the temporary resident status in Canada. These applications are now submitted online.

When the temporary resident submits an extension application before their authorized period of stay expires, then the temporary resident could legally remain in Canada on maintained status until a decision on the temporary resident extension application is made or by the end of the new period authorized for their stay when their application is approved, pursuant to IRP Regulations 183(5). Similarly, a foreign national on a valid temporary work permit or study permit who has applied to extend their status in Canada before their Work Permit or Study Permit is expired could also

continue to work in Canada or study in Canada on maintained status under the same terms and conditions as their temporary status document in Canada until a decision on their application is made.

Please note if a temporary resident with implied status leaves Canada before a decision on their extension application is made, then when they re-enter Canada they cannot study or work until a decision is made on their Study Permit or Work Permit extension application.

Those who are on implied status and wish to leave Canada while their extension application is processing should contact a lawyer for assistance regarding eligibility to re-enter Canada.

For more information on maintained status [2]

B. Loss and Restoration of Temporary Resident Status

Section 47 of the *IRPA* outlines when a foreign national's temporary resident status in Canada is expired; namely:

> (i) At the end of the period for which they are authorized to remain in Canada;
>
> (ii) On a determination by an officer or the Immigration Division that they have failed to comply wth any other requirements of *IRPA*; or
>
> (iii) On cancellation of their temporary resident permit.

Further, if a temporary resident has lost their status based on *IRPA* s. 47 or let their authorization to work or study expire, they may apply to restore that status in accordance with IRP Regulations s. 182. The eligibility requirements for restoration of status are as follow; namely, the applicant must:

- applies within 90 days of having lost their status;
- meets the initial requirements for their stay;
- remains in Canada until a decision is made;
- has not failed to comply with any condition imposed automatically by regulation or an officer other than those listed under R 185(a), R 185(b)(i) to (iii), and R 185(c); and
- continues to meet the requirements of the authorization they want to restore.

The application process is similar to the one of temporary residence extension. If the applicant is not eligible for the restoration, the officer will refuse the application, and the applicant is notified in writing that they must leave Canada immediately. Also, the officer will determine whether a s. 44 report may be warranted due to a possible violation of the *IRPA* or IRPR. The officer may refer the application to a Domestic Network ("DN") officer near the applicant's place of residence for further assessment and interview. If the application is referred to a DN office, the DN officer may call the applicant in for an interview to gather additional information.

For detailed information about eligibility and restoration fees, please check the IRCC website [3].

C. In-Canada Study Permit Applications

In general, the initial Study Permit application is submitted while the foreign national is outside of Canada (see *IRP* Regulations s. 213). However, foreign national may apply for a study permit when entering Canada at the POE if they are a citizen or permanent resident of the United States, a resident of Greenland or a resident of St. Pierre and Miquelon (see *IRP* Regulations s. 214). Further, a foreign national may apply for a study permit after entering Canada if they meet the requirements specified in *IRP* Regulations s. 215. For more information, please see the IRCC website [4].

> **NOTE:** If a foreign national has already had a study permit approved abroad but has not obtained it at a POE on their initial arrival due to different reasons, they may contact the IRCC Call Centre and the Operational Support Centre will assess the foreign national's eligibility against the case management system to verify their status. Once

the eligibility is confirmed, CPC-E may mail a study permit to the foreign national's address in Canada.

NOTE: An application for a study permit renewal does not constitute an application for a TRV. Therefore, visa-required foreign nationals must apply separately for a TRV extension and pay the processing fee.

NOTE: In-Canada visitors are not eligible to apply for a study permit from within Canada unless they are exempt under R215.

D. Working in Canada as an International Student

1. Working On-Campus During Studies

In general, students can work on-campus after they have started their study program in Canada. This means if the students arrived in Canada prior to the program commences they must wait until they have commenced their studies in Canada before they can work on-campus. In order to work on the student's campus without a work permit, the following conditions must be met:

(a) The student is a full-time post-secondary student at a public post-secondary school, private college-level school in Quebec that operates under the same rules as public schools, and is at least 50% funded by government grants, or Canadian private school that can legally award degrees under provincial law;

(b) The student has a valid study permit; and

(c) The student has a Social Insurance Number ("SIN") - this can be obtained at a Service Canada office.

Please note the student must stop working on-campus under one of the below circumstances. If the student continues to work, then this could lead to a removal order for not complying with the terms of the Study Permit.

(a) On the day the student stop studying full-time, unless the student is in their final semester;

(b) When the student's study permit expires;

(c) When the student is on an authorized leave from studies; or

(d) When the student is switching schools and are not currently studying.

IRCC also defines where the student can work on-campus and who they can work for. For more information see the IRCC website [5].

2. Working Off-Campus During Studies

In general, students can work off-campus after they have started their study program in Canada. This means if the students arrived in Canada prior to the program commences they must wait until they have commenced their studies in Canada before they can work off-campus. In order for the students to work off campus, the following conditions must be met:

(a) The student is a full-time student at a designated learning institution;

(b) The student is enrolled in a post-secondary academic, vocational or professional training program, or a secondary-level vocational training program (Quebec only);

(c) The student's study program is at least 6 months long and leads to a degree, diploma or certificate;

(d) The student's Student Permit has a notation that says the student can work off campus;

(e) The student has started studying in Canada; and

(f) The student has a Social Insurance Number ("SIN") - this can be obtained at a Service Canada office.

If the students are eligible to work in Canada off-campus, then they are bound by the below conditions:

1. The student may work up to 20 hours per week off-campus or full-time during regular breaks if they meet the criteria outlined in *IRP* Regulations s. 186(v); and
2. If they meet the eligibility criteria in *IRP* Regulations s. 186(f), (v) or (w) and they must cease working if they no longer meet the above criteria.

From November 15th, 2022 to December 31st, 2023, the student can work more than 20 hours per week of campus during the semester if they meet certain criteria:

1. For students who applied for a study permit (or extension) on or before October 7, 2022 if:

i. The student holds a study permit, or has maintained status

ii. Must be in Canada or have re-entered Canada by December 31st, 2023, and,

iii. Have one of the following conditions printed on their study permit:

1. May work 20hrs. per week off campus, or full time during regular breaks, if meeting criteria outlined in section 186(v) of IRPR

2. May accept employment on or off campus if they meet the eligibility criteria in IRP Regulations s. 186(f), (v) or (w) and they must cease working if they no longer meet the above criteria.

2. For students who applied for a study permit extension after October 7, 2022, the student may be able to work for more than 20 hours per week off campus until their current study permit expires if

i. They are a study permit holder who is studying at a designated learning institute full-time (or if meeting part-time requirements) and

ii. Their current study permit expires between November 15, 2022 and December 31, 2023.

iii.They are in Canada or have re-entered Canada by December 31, 2023

iv. Have one of the following conditions printed on their study permit:

1. May work 20hrs. per week off campus, or full time during regular breaks, if meeting criteria outlined in section 186(v) of IRPR

2. May accept employment on or off campus if they meet the eligibility criteria in IRP Regulations s. 186(f), (v) or (w) and they must cease working if they no longer meet the above criteria.

After the student completes their study, they generally need to stop working. In this scenario, we recommend you speak to a lawyer. For more information, please refer to the IRCC website [6].

NOTE: Students who are taking ESL/FSL language courses for self-improvement, or a course or program as a prerequisite to their enrolment at a DLI are not eligible for the off-campus work permit program for their enrolment in those courses or programs, but it does not affect their eligibility gained by other programs.

3. Working during PGWP Application

A post-graduation work permit ("PGWP") allows students who have graduated from a participating Canadian post-secondary institution to gain valuable Canadian work experience. Students often use this to gain the necessary Canadian work experience in order to immigrate to Canada as a permanent resident under the Canadian Experience Class.

In general, international students who have completed their program of study are allowed to work pursuant to *IRP* Regulations 186(w), while they are waiting for a decision on their PGWP application, provided they meet all of the below criteria:

- they are or were holders of a valid study permit at the time of the PGWP application;
- they were full-time students enrolled at a DLI in a post-secondary academic, vocational or professional training program;
- they were authorized to work off-campus without a work permit; and
- they did not exceed the allowable hours of work.

In general, a student is only permitted to apply for one PGWP in their lifetime. There are specific deadlines that students must meet in order to be eligible to apply for a PGWP. Applicants must apply for a PGWP within 180 days of obtaining written confirmation from their DLI indicating that they have met the requirements for completing their program of study, starting from the earlier time of the day their final marks are issued and the day they receive formal written notification of program completion. The onus is on the student to provide proof of the date of completion of the program to IRCC.

A PGWP is issued based on the length of the study program (including regularly scheduled breaks) and can last between 8 months and 3 years. When determining the length of a post-graduation work permit, officers may confirm the duration of the program of study in Canada with supporting documents, including letter confirming completion of the program and transcript. For details about length calculation and other frequent issues about its validity, please refer to the IRCC website [7].

The PGWP can be applied for while the student is inside Canada or outside Canada.

The requirements that must be met for a student to apply for a PGWP while in Canada are as follow:

- their study permit is still valid,
- they have a valid visitor record because they changed their status to visitor before their study permit expired, while waiting for their notice of graduation from their institution or simply to remain in Canada, subject to R 186(w), or
- they are on implied status (submitted an application to extend or change their status to visitor or student before the expiry date of their study permit and no decision has been made).

If you don't change your status to visitor and your study permit expires, you have up to 90 days after your study permit expires to apply for a PGWP and restore your status as a student. Once the 90 days pass, the student must leave Canada. They must then submit the PGWP application overseas, or apply to restore the student's status as a student and submit the PGWP concurrently.

Application packages can be found at the below websites:

- https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/work/after-graduation/apply.html (in Canada), and
- https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/apply-work-permit-outside-canada.html (overseas).

NOTE: There are some common types of ineligible applicants, including those who have been previously issued a PGWP: https:/ / www. canada. ca/ en/ immigration-refugees-citizenship/ corporate/ publications-manuals/ operational-bulletins-manuals/ temporary-residents/ study-permits/ post-graduation-work-permit-program/ eligibility.html.

NOTE: PGWP holders may leave Canada and return if they satisfy certain requirements: https://www.canada.ca/ en/ immigration-refugees-citizenship/ corporate/ publications-manuals/ operational-bulletins-manuals/ temporary-residents/study-permits/post-graduation-work-permit-program/travel.html.

E. Working in Canada as Foreign Spouses or Partners of Temporary Residents

1. Spouses or Partners of Skilled Workers

Spouses or common-law partners of skilled foreign workers may be authorized to work in Canada without an Offer of Employment (see *IRP* Regulations s. 205(c)(ii)). A spouse or common-law partner is eligible to apply for an open work permit if their spouse (the principal foreign worker) meets the below requirements:

- holds a work permit valid for at least 6 months, or, if working under *IRP* Regulations s. 186 without a work permit, presents evidence that they will be working for a minimum of 6 months;
- is employed in an occupation that falls within skill TEER 0, 1, 2, or 3: (See the IRCC website [8] to determine the NOC), and
- physically resides or plans to physically reside in Canada while working.

For detailed information on the eligibility requirements and application procedures, please visit the IRCC website [9].

2. Spouses or Partners of Full-Time Students

In general, spouses or common-law partners of certain foreign students may be allowed to apply for an Open Work Permit (see *IRP* Regulations s. 205(c)(ii) and LMIA exemption code C42). The applicant must provide evidence that they are the spouse or common-law partner of a study permit holder who is a full-time student at a public secondary institution; a private post-secondary institution that operates under the same rules and regulations as a public post-secondary institution in Quebec; a private or public secondary or post-secondary institution (in Quebec) offering qualifying programs of 900 hours or longer leading to a diploma of vocational studies or an attestation of vocational specialization; or a Canadian private institution authorized by provincial statute to confer degree but only if the student is enrolled in one of the programs of study leading to a degree, as authorized by the province and not in just any program of study offered by the private institution.

For more information, please see the IRCC website [9].

NOTE: The validity of the Work Permit will coincide with the spouse's Study Permit.

F. Revocation of Work Permit due to Public Policy Considerations

In specific circumstances, an officer may revoke a Work Permit if, in the officer's opinion, public policy considerations specified in instructions by the Minister of Immigration, Refugees and Citizenship justify the revocation, including (not an exclusive list):

- the associated LMIA has been revoked;
- the employment is having a significantly greater negative effect than benefit with respect to the development of a strong Canadian economy (applies to LMIA-exempt work permit);
- the employer has provided false, misleading, or inaccurate information;
- the employer's name has been added to the ineligible employer list under *IRP* Regulations s. 209.91(3); or
- the Work Permit is issued on the basis of any foreign national on the basis of their relationship with another foreign national and the principal foreign worker's Work Permit is now revoked (applies to LMIA-exempt Work Permit).

For details, please refer to the IRCC website [10].

> **NOTE:** Revocation of a foreign national's Work Permit does not make the foreign national inadmissible to Canada.
>
> **NOTE:** All in-Canada visitor record, study permit, and work permit applications must be submitted electronically, subject to a limited number of exemptions: https:/ / www. canada. ca/ en/ immigration-refugees-citizenship/ corporate/ publications-manuals/ operational-bulletins-manuals/ temporary-residents/ visitors/ place-application-visa-electronic-travel-authorization-study-permit-work-permit/ exempt-electronic-applications. html.

References

[1] https://www.canada.ca/en/immigration-refugees-citizenship/services/visit-canada/extend-stay.html
[2] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/visitors/implied-status-extending-stay.html
[3] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/visitors/restoration-status.html
[4] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/study-permits/making-application.html#InCanada
[5] https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/work/work-on-campus.html
[6] https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/work/work-off-campus.html#who-can
[7] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/study-permits/post-graduation-work-permit-program/permit.html
[8] https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/find-national-occupation-code.html
[9] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/exemption-codes/public-policy-competitiveness-economy.html
[10] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/work-without-permit/revocation-work-permit-public-policy-considerations.html

X. Removal Orders

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

There are three types of removal orders: (i.) departure orders, (ii.) exclusion orders, and (iii.) deportation orders (*IRP* Regulations, Part 13). The *IRPA* sets out certain types of removal orders that are associated with certain offences created under *IRPA*. For example, if a foreign national is determined inadmissible for having committed a serious criminal offence, the foreign national will automatically receive a deportation order. Similarly, if a foreign national has worked without a Work Permit and without authorization, the foreign national will be issued an exclusion order. Removal orders vary in seriousness and repercussion. However, officers retain a measure of discretion in deciding whether to issue an exclusion order, restrict entry or allow entry for examination. See Operational Manual ENF 6 and ENF 10 for more details.

Removal orders can be stayed either by asking CBSA to defer the removal or by applying for a stay to the Federal Court pending determination of a judicial review or H&C application. Those who are seeking a stay should contact a lawyer for assistance.

A. Departure Order

A departure order requires the individual to leave Canada "voluntarily" within 30 days. The person may be required to sign a "certificate of departure" at the POE (i.e. airport, land border or sea border) when leaving. If a person under a departure order legitimately leaves Canada, they may return to Canada at any time without any specific permission from the Minister, so long as they meet requirements of the *IRPA*.

> **NOTE:** If a person under a departure order does not leave Canada within 30 days of the order coming into effect, the departure order becomes a deportation order. An exact date should be requested from CBSA before administering any time calculation.

B. Exclusion Order

Under an exclusion order, the individual must leave Canada, and cannot re-enter Canada for one year without consent from the Minister in the form of an Authorization to Return to Canada (an "ARC" under s. 52 of the *IRP* Regulations). If the ground of inadmissibility is misrepresentation under s. 40(2)(a) of the *IRPA*, the exclusion order will be in effect for five years from the date of departure or removal. After the period of inadmissibility has passed, the person can apply to re-enter Canada so long as they meet the requirements of the *IRPA*. During any period, an order is in effect, the person concerned can apply for an Authorization to Return to Canada – for more information, see "Deportation Order" below.

C. Deportation Order

A deportation order is the most serious type of removal order. A person under a deportation order is generally removed, but in some circumstances, may leave voluntarily. A person removed on a deportation order can never return to Canada unless they obtain authorization from the Minister (See *IRP Regulations*, s 226(1)); this is also known as an "Authorization to Return to Canada", or "ARC").

If a person who has been removed from Canada by IRCC wishes to return to Canada, and is permitted to do so, they must pay a fee.

> **NOTE:** If a person, who has been removed from Canada under a deportation order or an exclusion order that is still in effect, returns to Canada without permission from the Minister, that person can be charged with offences under s 124 of the *IRPA*.

XI. Appeals

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

The Immigration Appeal Division ("IAD") may allow an appeal and set aside an original decision:

1. based on the grounds of an error in law or fact;
2. if there are sufficient humanitarian grounds (in some cases); or
3. if a breach of a principle of natural justice has occurred. Principles of equity are generally of greater concern in appeals concerning removal orders.

In certain cases, the IAD may also give special relief on the basis of humanitarian and compassionate grounds (i.e. equitable grounds), considering all the circumstances of the case and especially in taking into account the best interests of a child. The IAD can

1. allow an appeal,
2. dismiss an appeal, or
3. stay the removal and impose terms and conditions (*IRPA* s 68).

A. Sponsorship Appeals

If a Canadian citizen or permanent resident (PR) tries to sponsor a member of the family class and the application is refused, the citizen or PR can appeal the refusal to the immigration appeal division. Appeals must be made within **30 days** of the day the sponsor is informed of the refusal. A member will hear the appeal following the tribunal process. Section 63 of *IRPA* specifies that the IAD can consider H&C applications only if the applicant is a confirmed family member.

Some sponsorship appeals follow an Alternative Dispute Resolution (ADR) process, also called Early Resolution. The appellant can always request ADR. The ADR process at the IAD usually involves a one-hour, in-person meeting with a CBSA hearings officer who will review the facts and question the Appellant sponsor. The IAD assigns a member to act as a dispute resolution officer (DRO) for each appeal that is selected for the ADR process. Counsel should also attend, but does not make submissions, and is primarily there to assist the Appellant. Despite this process, many of the cases that

go through ADR will have a final result without the parties having to attend a full oral hearing, so clients may wish to request ADR if they believe the Appeal case is strong, is not especially complex, can be resolved without the direct testimony of the principal applicant (sponsored person), and that it can be dealt with about an hour.

IAD's jurisdiction is limited to errors in law, fact, or mixed law and fact. IAD cannot override a negative sponsorship application on grounds of equity. **Sponsorship applications made from within Canada, i.e. Spouse and Common-law Partner in Canada Class, cannot be appealed to the IAD.**

B. Removal Order Appeals

Permanent residents, Convention refugees, and protected persons who have been ordered removed from Canada may file an appeal with the IAD. These appeals may be based on either legal or equitable grounds.

> **NOTE:** If a person has been convicted and sentenced in Canada to six months imprisonment or more, they will not be able to appeal an order to the IAD. A conditional sentence does not count as a term of imprisonment for determining serious criminality under subsection A36(1). See *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50).

Removal orders may **not** be appealed if the permanent resident has been found inadmissible because of:

1. serious criminality with a sentence of 6 months or more;
2. A foreign conviction (or committing an act outside Canada) carrying a maximum sentence of 10 years or more in Canada;
3. organized criminality;
4. security grounds; or
5. violations of human or international rights.

Appeals must be filed within **30 days** of the removal order being issued.

For a comparison of the former inadmissibility regime to the new inadmissibility regime, please refer to: http://www.cic.gc.ca/english/department/media/backgrounders/2013/2013-06-20a.asp

> **NOTE:** Because of the exclusion from appeal for people sentenced to six months or more, advocates in criminal trials where this may become an issue should ensure that the judge is aware of the immigration status of the accused, as it may affect sentencing (e.g. the judge may reduce the sentence to six months less a day, in which case an appeal of the removal order would be possible). For further details see Section XIII: Immigration Issues at Sentencing.

C. Residency Obligation Appeals

Permanent residents outside of Canada who are determined by a IRCC officer not to have fulfilled their residency obligation have a right of appeal before the IAD.

Appeals must be made within **60 days** of receiving the written decision. Upon application, the IAD can issue an order that the person must physically appear at the hearing. Once the order is given, a travel document will be issued by IRCC allowing the person to enter Canada for the hearing. If the appeal is allowed, the person will not lose permanent resident status. If it is dismissed, the person will lose permanent resident status, and the IAD will issue a removal order.

D. Federal Court (Leave and Judicial Review)

Always contact an immigration lawyer in cases where Federal Court is, or might be involved. Decisions by the IAD (or the Refugee Protection Division and the Immigration Division, where no administrative appeal exists) may be challenged by judicial review in the Federal Court of Canada. **There is a 15-day filing deadline to apply for leave for judicial review of matters decided within Canada, and a 60-day deadline for matters decided overseas (*IRPA*, s 72), so an applicant must act quickly if they seek leave for judicial review.** In the process of judicial review, the court does not try the case *de novo*; the role of the court is not to substitute its own discretion for that of the tribunal, but rather to ensure that the tribunal made a reasonable decision and/or did not exceed its statutory authority. The court simply reviews the case to verify: that it was procedurally fair; that the decision-maker did not make any errors of law or unreasonable findings of fact; and that the decision itself was reasonable. See Chapter V: Public Complaints for a more thorough treatment of judicial review.

On a leave application, all arguments and evidence are submitted to the judge in written form without a personal appearance. The judge reviews the material and, if satisfied that the applicant has made an arguable case, grants leave for a hearing. If the judge decides there is no arguable case, leave will be denied and there can be no further argument in the Federal Court. A decision made by the Federal Court may be appealed to the Federal Court of Appeal only if the Trial Division judge "certifies" a question as being of serious and general importance (s 74(d)).

XII. Offences

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

Part 3 of the *IRPA* outlines various serious offences and penalties for breaches of the Act including human smuggling and trafficking in persons. Other offences created by the *IRPA* include:

1. disembarking a person or group of people at sea for the purposes of entering Canada illegally;
2. possession, use, import/export, or dealing in passports, visas and other documents to contravene the Act;
3. entering Canada at any place other than a Port of Entry without reporting to an immigration officer;
4. gaining admission to Canada through the use of a false or improperly obtained passport, visa or other documents;
5. violating the terms or conditions under which admission was granted;
6. knowingly making false or misleading statements at an immigration examination or admissibility hearing;
7. remaining in Canada after ceasing to be a visitor; and
8. working illegally or employing a person who is not authorized to work.

For lesser offences, s 144 of the IRPA provides that offenders may be ticketed. This provides officers with an alternative to using the other procedures set out in the IRPA or the *Criminal Code*, RSC 1985, c C-46. Fines of up to $10,000 may be assessed under such offences.

XIII. Issues at Sentencing

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

In June 2013, changes to the *IRPA* came into force that severely altered the **permanent residence** consequences of a term of imprisonment of 6 months or more, including credit for time served. Such permanent residents are will be issued a deportation order with **no appeal** of the deportation order to the IAD. Previously, the period of imprisonment required before there was no appeal to the IAD of a removal was 2 years. This change is retroactive, and any permanent resident who had not already been referred to the IAD for an appeal of the removal order will not have that option even if the sentence was imposed before the law changed.

- If a permanent resident has been convicted of an offence in Canada for which a maximum term of imprisonment of more than 10 years could be imposed, they become inadmissible to Canada and will be issued a deportation order. A permanent resident has the right to appeal a deportation order to the IAD under s 63(3) of the IRPA. As noted above, this right of appeal is lost if the permanent resident actually receives a sentence of 6 months or more, and the calculation of 6 months includes pre-trial custody, so an individual who receives a 2-month sentence in addition to double credit for 2 months pre-trial custody, has received a 6-month sentence. A conditional sentence of imprisonment imposed pursuant to the regime set out in ss. 742 to 742.7 of the *Criminal Code* " is not a term of imprisonment" under s. 36(1)(a) of the *IRPA*. The phrase “maximum term of imprisonment” in paragraph A36(1)(a) refers to the maximum term of imprisonment available at the time of the commission of the offence and not the term of imprisonment available at the time of sentencing or the time admissibility is assessed

  NOTE: The accused should actively raise these immigration considerations with criminal defence counsel at the earliest opportunity, and make sure that counsel is engaging these issues whenever the accused is in custody, or faces a possible custodial sentence.

XIV. Contacts

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2023.

Immigration, Refugees and Citizenship Canada (IRCC)

Online	Website [1]
Address	1148 Hornby Street Vancouver, B.C. V6Z 2C3
Phone	

Immigration and Refugee Board of Canada

Online	Website [2]
Address	Library Square, 1600 - 300 West Georgia Street Vancouver, B.C. V6B 6C9
Phone	(604) 666-5946

Canada Border Services Agency (Enforcement)

Address	700 - 300 W. Georgia Street Vancouver, B.C. V6B 6C9
Phone	1-833-995-0002

Vancouver Association for Survivors of Torture (VAST)

Provides medical and/or psychological assistance to refugee claimants who were victims of torture, as well as services to family members of survivors.

Online	Website [3] Email: referrals@vast-vancouver.ca
Address	2610 Victoria Drive Vancouver, B.C. V5N 4L2
Phone	(604) 588-3071

MOSAIC Settlement Services

Online	Website [4] Email: info@mosaicbc.org
Address	5575 Boundary Rd Vancouver, B.C. V5R 2P9
Phone	(604) 254-9626 Fax: (604) 254-3932

Immigrant Services Society of B.C.

ISS is a non-profit organization committed to identifying the needs of immigrants and refugees and to developing and providing programs which meet those needs.
(This Society can no longer assist people whose claim has not been granted).

Online	Website [5] Email: info@issbc.org
Address	2610 Victoria Drive Vancouver, B.C. V5N 4L2
Phone	(604) 684-2561 Fax: (604) 684-2266

S.U.C.C.E.S.S.

S.U.C.C.E.S.S. is a non-profit social service agency that provides assistance to newly-arrived immigrants and refugees. The agency provides instructions in Cantonese and Mandarin on how to fill out citizenship forms and study for the citizenship test.

Online	Website [6] Email: info@success.bc.ca
Address	Head office: 28 West Pender Street Vancouver, B.C. V6B 1R6
Phone	(604) 684-1628

Immigration and Refugee Legal Clinic

Online	Website [7] Email: info@irlc.org
Address	2610 Victoria Drive #103 Vancouver, B.C. V5N 4L2
Phone	(778) 372-6583

Legal Aid (Legal Services Society) Vancouver Regional Centre

Online	Website [8]
Address	Suite 425 (Intake); Suite 400 (Administration) 510 Burrard Street Vancouver, B.C. V6C 3A8
Phone	(604) 601-6206 (Intake) Fax: (604) 601-6000

BC Provincial Nominee Program

Online	Website [9] Email: pnpinfo@gov.bc.ca
Address	Suite 450 - 605 Robson Street Vancouver, B.C. V6B 5J3
Phone	(604) 775-2227 Fax: (604) 660-4092

Lawyer Referral Service

The Lawyer Referral Service provides referral to a lawyer who will provide up to 30 minutes of free legal consultation. When requesting for a referral, please request for a lawyer who specialize in immigration or citizenship law because citizenship law is an area of law that changes frequently.

Online	Website [10] E-mail: lawyerreferral@accessprobono.ca
Address	Head office: 300 – 845 Cambie Street Vancouver, B.C. V6B 4Z9
Phone	(604) 687-3221

NOTE: These organizations may have closed / their mandates may be significantly altered due to changes in funding.

References

[1] http://www.cic.gc.ca
[2] http://irb-cisr.gc.ca
[3] http://vastbc.ca/
[4] http://www.mosaicbc.org/
[5] http://www.issbc.org/
[6] http://www.successbc.ca
[7] http://www.irlc.ca/
[8] http://legalaid.bc.ca/
[9] https://www.welcomebc.ca/Immigrate-to-B-C
[10] http://www.accessprobono.ca/node/385

Chapter Nineteen – Landlord and Tenant Law

I. Residential Tenancy Act

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

Landlord-tenant law was written to protect the rights and identify the responsibilities of both landlords and tenants. The law serves to prevent and resolve disputes that may arise within a tenancy in the clearest and lowest-conflict manner possible. This guide seeks to provide basic legal information, including the rights and responsibilities of tenants and landlords and about the processes available for resolving disputes between tenants and landlords.

The primary source of landlord-tenant law in British Columbia is the *Residential Tenancy Act* [*RTA*]. The *Manufactured Home Park Tenancy Act*, SBC 2002, c 77 [*MHPTA*] is a counterpart to the *RTA* that applies to owners of manufactured homes who rent the site on which their homes sit.

The *RTA* sets out the rights and obligations of landlords and tenants. When a tenancy starts, there should be a tenancy agreement in place. A tenancy agreement means an agreement, whether written or oral, express or implied, between a landlord and a tenant, respecting the possession of a rental unit, the use of common areas and services and facilities. It also includes a licence to occupy a rental unit.

A. Premises and Persons Subject to the *RTA*

1. Effective Date

The *RTA* applies to all residential tenancy agreements entered into before or after the date the *Act* first came into force. The *RTA* was modernized in 2004.

2. Infants

Tenancy agreements entered into by persons under the age of 19 are enforceable under s 3 of the *RTA*.

3. Excluded Premises and Agreements

s. 4 of the *RTA* sets out a list of situations which are not covered by the *RTA*.

Where a tenant is living in a cooperative housing facility and is paying rent, but is not a member of the cooperative, their rental unit may be subject to the *RTA* if the arrangement appears to fit the definition of a tenancy. For more information about what is covered by B.C.'s tenancy laws based on the housing types, visit the following website https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/is-my-tenancy-covered-under-bcs-tenancy-laws.

In situations where a tenant, named in the tenancy agreement, shares accommodations with a roommate who does not have an agreement with the landlord, only the tenant is protected by the *RTA*. Any roommates who do not have a tenancy agreement with the landlord are not covered by the *RTA* and do not have any recourse against the landlord under the *RTA*. Disputes between a tenant and a roommate cannot be brought to the RTB but may be brought to the Civil Resolution Tribunal if the disputed monetary amount is under $5000. Otherwise, the dispute can be brought to Small

Claims Court if it is below $35,000, or to the Supreme Court if it is over $35,000. For more information, see Policy Guideline 19: Assignment and Sublet.

The determination of whether there is a tenancy depends on the circumstances of each case and can only be made by an RTB Arbitrator at a dispute resolution hearing.

A person who is not a tenant (i.e. someone whose housing is excluded from the *RTA* or who is an occupant, such as a roommate) may have a licence to occupy. Licensees' rights and obligations are governed by common law.

Sometimes organizations that provide housing may claim that their accommodation falls under the emergency shelter or transitional housing exceptions. However, only the RTB can make such a determination, and such claims are not necessarily correct. The Residential Tenancy Regulations were updated in December 2016 to include a three-part definition of transitional housing. According to s.1 of the Regulations, "transitional housing" means living accommodation that is provided:

- On a temporary basis;
- By a person or organization that receives funding from a local government or the government of British Columbia or of Canada for the purpose of providing that accommodation, and
- Together with programs intended to assist tenants to become better able to live independently.

Any accommodation must satisfy all three of these criteria to be excluded from the Act, even if a transitional housing agreement has been signed. "Emergency shelter" is defined in Policy Guideline 46 as a facility that "provides a homeless individual with temporary overnight shelter". Residents of these shelters "may have an immediate need for support services" such as nutrition, hygiene, and health services, and "may be required to abide by house rules as a condition of their stay".

A tenant in possession of a strata title lot (i.e., a condominium), whose landlord is the owner of the title and a member of the strata, is subject to both the *RTA* and the *Strata Property Act*. This is a frequent source of problems for tenants. See RTB Policy Guideline 21: Repair Orders Respecting Strata Properties.

- Call the Residential Tenancy Branch information line (604-660-1020 or 1-800-665-8779) if you are unsure whether the rental unit comes under the *RTA*.
- If your issue does not fall under the *RTA*, please see section XIX for additional resources.

4. No Contracting Out

Neither landlords nor tenants can contract out of the RTA or the Residential Tenancy Regulations. Any terms that are inconsistent with the Act or the Regulations are void.

5. Crown

Generally, the *RTA* applies to the Crown.

6. Hotel Tenants and Landlords

Hotel tenants are fully covered by the *RTA* if the hotel is the tenants' primary residence. The following rules apply only to hotel tenants and landlords:

- s 29(1)(c) permits entry into a hotel tenant's room without notice to provide maid service at reasonable times;
- s 59(6) permits an individual occupying a room in a residential hotel to apply for an interim order stating that the *RTA* applies to that living accommodation without notifying other parties.

See Policy Guideline 9: Tenancy Agreements and Licences to Occupy.

B. Discrimination Against Tenants

Although poverty is not a protected ground, a landlord must not discriminate against a (prospective) tenant based on a lawful source of income, such as Income Assistance or similar benefits. The prospective tenant may file a human rights complaint under the *B.C. Human Rights Code*, RSBC 1996, c. 210 [HRC]. Section 10(1) of the HRC also prohibits a person from denying tenancy or from discriminating with respect to a term of the tenancy against a person or class of persons because of their race, sexual orientation, colour, ancestry, place of origin, religion, marital status, physical or mental disability, or sex. Note also, that pets are not covered under discrimination rules. See Chapter 6: Human Rights for more information.

There are three exceptions:

1. Shared Accommodations

Section 10(1) of the *HRC* does not apply where a tenant and landlord will share the use of any sleeping, bathroom or cooking facilities in the space. See *HRC* section 10(2)(a) for more information.

2. Adults Only

The section does not apply to rental spaces in residential buildings in which every unit is reserved for rental by people who have reached 55 years of age or by two or more people, at least one of whom has reached 55 years of age.

3. Units Designed to Accommodate Disability

Section 10(1) does not apply as it relates to physical or mental disability if the space is a rental unit in residential premises, the unit and the residential premises are designed to accommodate persons with disabilities, and the unit is offered for rent exclusively to someone with a disability, or to 2 or more persons, at least one of whom has a physical or mental disability.

II. Tenancy Agreements

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. Protecting the Tenant

A third party should accompany a potential tenant during a rental unit showing, so there is a witness as to the landlord's representations made during the showing. **Important: Get the landlord's promises in writing** if possible but note that landlords are **not** obligated to provide them in writing.

After establishing the tenancy and before the tenant moves their personal possessions into the rental unit, the RTA requires the landlord and tenant to jointly conduct a condition inspection and fill out and sign the RTB's Condition Inspection Report. This report notes the condition of various elements of the rental unit. It is a good idea to take photographs at the initial move-in inspection, as well as the move-out inspection. The landlord must provide the tenant with a copy of the Condition Inspection Report within 15 days.

Fees for cable and internet should be negotiated before the tenancy commences and included in the Tenancy Agreement.

The Residential Tenancy Branch provides a fillable and printable Tenancy Agreement at https://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/forms/rtb1_chrome.pdf.

1. Illegal Application Fees

A potential landlord cannot ask a renter or potential renter for an application fee. If someone has paid an application fee and the landlord will not give it back, one can apply for dispute resolution to have it returned. Applicants will need to know the landlord's proper name and address and have proof that the fee was paid see *RTA*, s 15. If a landlord does this as a business practice, the tenant should report this to the director of the RTB, or to the RTB's Compliance and Enforcement Unit (CEU), who can launch an investigation. (https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/compliance-and-enforcement).

B. General

A lease gives the tenant the right to use, enjoy, and dispose of the property for a fixed duration. The landlord has a freehold in reversion, allowing them to sell their property to someone else. A tenancy continues under the same terms when a rental property is sold in BC. The landlord cannot terminate a lease simply because they want to sell the property. Instead, the new owner will take over as the landlord. No new lease is required to be drafted and signed, though this may happen if both parties agree.

1. Two Methods of Creating a Tenancy Relationship

a) By Formal Contract

Although s1 of the Act defines "tenancy agreement" as an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit. Starting January 1, 2004, a landlord must prepare in writing every tenancy agreement that complies with the Act (RTA, ss 13(1), (2)). Like any valid contract, there must be an offer, acceptance, and consideration.

Vague terms of the tenancy agreement may be framed in the tenant's favour using the principle of contra proferentem (i.e., the agreement will be strictly construed against the party who provided the agreement's wording) and principles of statutory interpretation. The law seeks to recognize and validate the relationship where possible, even where the requirement for a written tenancy agreement has not been met.

b) By Implied Contract

Notwithstanding this obligation to prepare a written agreement, where there have been offers, acceptance, and some kind of meaningful consideration, the law may imply the existence of a valid tenancy agreement.

C. Contractual Nature of the Tenancy Agreement

1. Freedom of Contract and the Agreement

Parties are free to add and alter the terms, covenants, and conditions subject to common law and statute restrictions. Changes in the tenancy agreement must be in writing, signed and dated by both parties. Unilateral changes may only be enforceable if something is offered or given in return.

a) Collateral Contract The parties may enter additional or subsequent oral or written contracts on top of the tenancy agreement. If an Arbitrator determines the terms are reasonable and not unconscionable, as defined within s 3 of the RTR, new landlords or tenants that take over or enter into the same tenancy agreement would be bound by the collateral contract. A remedy for the new landlord would be found in an action against the seller. Oral collateral contracts are hard to prove. **If something is important, it should be recorded in writing.**

2. Terms, Covenants, and Conditions

a) Covenants/Terms

A covenant in a tenancy agreement consists of a promise by a person that a certain thing must or must not be done (the RTA eliminates the word “covenant” and uses the more modern word “term”). A “Material Term”, as used in the RTA, is a term going to the root of the relationship and the tenancy agreement. Landlords and tenants may agree to any term they wish, if it is not unconscionable or contrary to the RTA. Terms contrary to the RTA may not be identified in some cases until dispute resolution, and a tenant is free to argue that a term violates the RTA and should, therefore, be void. The Arbitrator will take this into consideration when determining reasonableness. For more information, see RTB Policy Guidelines 8: Unconscionable and Material Terms.

b) Express, Implied and Statutory Terms

Valid express terms or conditions override any implied terms or “usual terms” that might otherwise apply at common law. For residential tenancies, the RTA deems some express terms to be unenforceable The RTA also establishes statutory terms, deemed to be terms in every agreement, that override any express or implied term to the contrary. For tenancies not governed by the RTA, a court will find implied obligations and insert the usual terms if the parties have failed to expressly agree to certain matters.

c) Express Terms

Parties may write their own tenancy agreement with their own terms or may use a standard form tenancy agreement to which they can add their own extra terms.

The *RTA* requires that all tenancy agreements include standard terms outlining key statutory rights and responsibilities of the tenant and landlord (see *RTA* s 12, and the Schedule to the Regulation). The standard terms cover repairs, payment of rent, rent increases, security deposits, assignment or sub-let, occupants and invited guests, entry of the residential

premises by the landlord, locks, ending the tenancy, and the application of the *RTA*. To assist landlords and tenants, the Ministry created a standard Residential Tenancy Agreement, available online (https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/forms). This Agreement incorporates suggestions put forward by landlord and tenant stakeholders and includes the prescribed terms found in the Schedule of the Regulation.

d) Reasonable Terms

Changes in the *RTA* allow more ability to agree to any term landlords and tenants wish than the repealed Act did. However, a term of the tenancy is unenforceable if (*RTA*, s 6):

> (a) the term is inconsistent with this *RTA* or the regulations;
>
> (b) the term is unconscionable; or
>
> (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

See Policy Guideline 8: Unconscionable and Material Terms.

The following are also examples of express terms that are void and unenforceable:

- a term purporting to hold that the RTA does not apply to the agreement or attempts to avoid the RTA (s 5(1) and (2));
- that the rent remaining for the term of the agreement becomes due and payable if a tenant fails to comply with a term of the tenancy agreement (s 22) (i.e., "accelerated rent terms" are not permitted);
- that the landlord can seize the tenant's personal property for rent owing (s 26(3)(a));
- terms that impose unreasonable restrictions on guests or impose a fee for having guests stay overnight; or
- for a fixed term tenancy, any vacate clauses that require the tenant to move out at the end of the tenancy unless:
  - The tenancy agreement is a sublease agreement; or
  - The fixed term tenancy was created in circumstances where the landlord or landlord's close family plans in good faith to occupy the unit after the tenancy ends, pursuant to RTR s 13.1.

    NOTE: The RTR defines "unconscionable" for the purposes of s 6(3)(b) of the *RTA* as follows: a term of a tenancy agreement is "unconscionable if the term is oppressive or grossly unfair to one party".

e) Pets

In B.C., there is no law that prevents a landlord from prohibiting pets in rental units. *RTA*, s 18 allows a tenancy agreement to include terms that prohibit pets or restrict the size, kind, or number of pets a tenant may keep on the residential property. **If the agreement is silent about pets, then the tenant should be able to obtain one.** If a tenancy agreement doesn't allow pets and a tenant gets one anyway, the landlord can tell the tenant to remove it. If the tenant refuses, the landlord may be able to give an effective eviction notice. *RTA*, s 18 is subject to the rights and restrictions under the *Guide Dog and Service Dog Act*, SBC 2015, c 17, s 3, which states that landlords must not deny tenancy or impose discriminatory terms on a person with a disability who intends to keep a guide dog in the rental unit.

When a landlord permits a tenant to keep a pet after the tenancy has already started, the landlord and tenant together must inspect the condition of the rental unit on or before the day the tenant starts keeping a pet or on another mutually agreed day (*RTA*, s 23(2)). Failure of the tenant or landlord to participate in the inspection may extinguish the right of the failing party to the rights relating to the pet deposit (s 24). The landlord can request pet damage deposit of no greater than ½ of a month's rent, regardless of the number of pets.

f) Rent Increases for Additional Occupants

A rental increase for a new occupant can only be imposed if the contract specifically allows for it. Disputes most often arise upon the birth of a baby, as there is no legal mechanism exempting newborn children from being considered tenants.

3. Cannabis Legalization

As of October 17, 2018, personal possession of cannabis became legal within Canada. Accordingly, changes to the *RTA* were implemented around growing and smoking cannabis.

- If a tenancy agreement entered prior to legalization included a “no smoking” clause and did not explicitly allow for smoking cannabis, then the “no smoking” clause is deemed to apply to smoking cannabis. This also applies to any clauses that restrict or regulate smoking. (*RTA* s 21.1 (2))

    (1) For *RTA* s 21.1 (2), vaporizing a substance containing cannabis is not “smoking cannabis.”

- All existing tenancy agreements would be implied to have terms prohibiting growing cannabis unless:

    (1) the tenant is growing in or on the residential property one or more cannabis plants that are medical cannabis,

    (2) growing the plants is not contrary to a term of the tenancy agreement, and

    (3) the tenant is authorized under applicable federal law to grow the plants in or on the residential property, and the tenant follows the requirements under that law with respect to medical cannabis.

    NOTE: The RTA allows for landlords and tenants to agree upon terms in new tenancy agreements if they do not violate the RTA.

III. Moving In and Moving Out

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. Condition: Moving In

The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day (RTA, s 23 (1)), and once more on a mutually agreed day when the tenant moves out. Landlords can use their own forms as long as they contain all the information required in s 20 of the *RTR*.

NOTE: RTA s 23, Condition Inspection Report: Start of Tenancy, and RTA s 24: consequences if report requirements are not met, do not apply to a landlord or tenant in respect of a tenancy that started before January 1, 2004.

1. Landlord

The landlord must conduct, complete and sign the report even if the tenant refuses to participate. The right of a landlord to claim against a security or pet damage deposit for damage to the residential property is extinguished if the landlord does any of the following acts or omissions contained in RTA ss. 23 and 24(2):

- fails to offer the tenant at least two opportunities for the inspection;
- does not participate in the inspection; or
- does not complete the condition inspection report and give the tenant a copy of it within seven days after the condition inspection is completed.

2. Tenant

The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if the landlord has complied with s 23(3), given two opportunities for inspection, and the tenant has not participated in either occasion.

B. Condition: Moving Out

The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit on or after the day the tenant ceases to occupy the rental unit, or on another mutually agreed day (RTA, s 35(1)).

1. Landlord

Unless the tenant abandons a rental unit, the right of the landlord to claim against a security or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not offer the tenant at least two opportunities for the inspection or does not participate on either occasion, or having made an inspection with the tenant does not complete the condition inspection report and give the tenant a copy of it in accordance with the RTR.

2. Tenant

The right of a tenant to the return of a security deposit or a pet damage deposit, or both is extinguished if the landlord complies with RTA s 35 (provides two opportunities for inspections), and the tenant has not participated on either occasion (s 36(1)).

C. Re-keying Locks for New Tenants

At the request of a tenant at the start of a new tenancy, the landlord must re-key the locks or other means of access given to the previous tenant, and pay all costs associated with the changes. If the landlord at the end of the previous tenancy altered the locking system, the landlord need not do so again (RTA, s 25).

D. Duty to Provide a Copy of the Agreement

Section 13(3) of the RTA provides that within 21 days after a landlord and tenant enter into a tenancy agreement, the landlord must give the tenant a copy of the agreement.

E. Obligations on Move Out

1. Tenant Obligations

- Give proper notice;
- participate in move-out condition inspection;
- leave the unit clean;
- repair damage caused (above normal wear and tear), including damage caused by guests or pets above normal wear and tear levels;
- return all the keys and other means of access; and
- remove all possessions from the rental unit and the residential property.

2. Landlord Obligations

- Give proper notice;
- schedule and participate in the move-out condition inspection and provide the tenant with a copy of the condition inspection report; and
- return security deposit and pet damage deposit or file to retain them in accordance with the RTA.

F. Breaking a Fixed Term Tenancy

If a tenant moves out before their fixed term ends without finding another tenant approved by the landlord to take over the fixed term tenancy, the tenant may be responsible for the landlord's advertising and administrative costs incurred in finding a new tenant, as well as rent (at the tenancy agreement rate) until the unit is rented or the fixed term expires.

> **NOTE:** Refer to the tenancy agreement, as some agreements will have move-out clauses that will express what a tenant's obligations will be upon breaking their fixed term tenancy.
>
> **NOTE:** A landlord cannot evict a tenant except for cause during the term of a fixed-term tenancy. A landlord may not give notice before the end of the fixed term even if the property is sold or the landlord's family wishes to move into the rental unit.
>
> **NOTE:** Effective July 11, 2022, there are now compensation requirements in place that could result in a landlord being ordered to compensate a tenant 12 times the monthly rent if they include a vacate clause in a fixed-term tenancy agreement in accordance with Section 13.1 of the Residential Tenancy Regulation, and they or their close family member do not occupy the rental unit for at least 6 months at the end of the fixed term. See Policy Guideline 50 for more information.

IV. Security Deposits

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. General

A requirement that a tenant pay a security deposit is an express term of the standard agreement. Security deposit is defined in s 1 of the *RTA* very broadly. It can include money or property or almost any other item of value to be held by a landlord for the purpose of securing the performance of a tenant's obligations under the agreement and the *RTA* (e.g. the payment of rent). A security deposit is a deposit which may cover a variety of costs to the landlord. A security deposit does **not** include a post-dated cheque for rent, a pet damage deposit, or a fee prescribed under RTR ss. 6 and 7. See Policy Guideline 29: Security Deposits.

A landlord can only request a security deposit from a tenant as a condition of entering into a tenancy agreement, not after the agreement has been formed. However, pursuant to s 20, if a landlord permits a tenant to keep a pet on the residential property the landlord may require the tenant to pay a pet damage deposit in accordance with s 19 at the time the tenant moves in with a pet, or at the time a tenant acquires a pet.

B. Requirements Under the *RTA*

1. Amount

A security deposit demanded or received must not exceed one-half of the monthly rent (*RTA*, s 19(1)). Only one security deposit can be required for each rental unit (s 20(b)). A landlord can also ask for an additional ½ month rent as a pet damage deposit (s 19(2)).

If a landlord accepts a security deposit or a pet damage deposit that is greater than 1/2 of one month's rent, the tenant may deduct the overpayment from rent or otherwise recover the overpayment. Failure to pay a lawful security deposit is a ground for ending the tenancy (s 47(1)(a)). The landlord may give a one-month eviction notice if the tenant fails to pay the security deposit within 30 days.

C. Return of Security Deposit and Pet Damage Deposit

When a tenant moves out, they must provide their landlords with a forwarding address in writing. The security deposit must be returned to the tenant, **with interest**, or the landlord must file for dispute resolution to retain the deposit, within 15 days of the later of the following two: the date at which the tenancy ends, or the date the landlord receives the tenant's forwarding address, which **must be in writing.**

If a landlord does not comply with s 38(1) of the *RTA* (fails to return deposits within 15 days and fails to file for dispute resolution) and the tenant still has a valid right to the deposit, the tenant may apply for dispute resolution. After this, the landlord may not make a claim against the security deposit or any pet damage deposit and **must pay the tenant double the amount of the security deposit, pet damage deposit, or both** (s 38(6)).

Leases may not include a term providing that the landlord automatically keeps all or part of the deposit at the end of a tenancy (s 20 (e)).

According to *RTA* s 38(8), the landlord can repay security deposits by cheque, personal service methods, or electronic fund transfers.

1. Interest on Security Deposit

Interest on a security deposit is calculated from the date the tenant pays the deposit to the day before the security deposit is paid back to the tenant. If the deposit is disputed at dispute resolution, the interest is calculated from the date the tenant paid the deposit up until the date the Arbitrator orders its return (usually the date of the hearing).

Interest on a security deposit is calculated as follows. For each one-year period beginning on January 1, the rate will be 4.5% below the prime lending rate of the principal banker to the province on January 1st of that year, compounded annually. There is an online deposit interest calculator at http:/ / www. housing. gov. bc. ca/ rtb/ WebTools/ InterestOnDepositCalculator.html

> **NOTE:** The interest payable on security and pet damage for 2023 is 1.95%.
>
> **NOTE:** A tenant has only one year from the time the tenancy ends to supply the landlord with their forwarding address. If the tenant fails to forward the address within the one-year limit the landlord may retain the security or pet damage deposit or both.
>
> **NOTE:** A landlord does not have to return a deposit within 15 days if the tenant's right to the return of the deposit (pet or security) has been extinguished for failing to participate in the condition inspection procedures.
>
> **NOTE:** A pet damage deposit may be used only for damage caused by a pet to the residential property unless the tenant agrees otherwise.

2. Change of Landlord

Where a security or pet deposit is paid to a landlord, and the property is then subsequently sold, the obligations regarding the deposit(s) pass to the new property owner. The new owner is responsible for repaying the initial security and/or pet damage deposit when the tenancy ends (*RTA*, s 93).

D. Non-Refundable Fees

The *RTA* allows landlords to charge some non-refundable fees to a tenant in accordance with section 7 of the *RTA*. For example, a landlord may charge for the direct cost of additional building access devices that are requested by the tenant.

Administration fees for returned cheques ($25) or moving between rental units on a single property can only be charged if the tenancy agreement specifically allows for it (RTR, s 7(1)(d)).

1. Allowable Non-Refundable Fees

- Direct costs of replacement keys;
- Direct costs of any additional keys that a tenant request;
- Bank service fees for NSF cheques plus a maximum late fee of $25; and
- Parking fees.

V. Repair and Service

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. Duty to Provide and Maintain Rental Unit in Repair

1. Landlord

Sections 32(1)(a) and (b) of the *RTA* provide that a landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, housing and safety standards required by law, and having regard to the age, character, and location of the rental unit. It must be suitable for tenant occupation.

A landlord is responsible for repairing:

- the rental structure, and roof;
- heating, plumbing, electricity;
- locks, walls, floors, ceilings;
- fire doors, and fire escapes;
- intercoms, elevators; and
- anything else included in a tenant's rent if identified in the tenancy agreement.

If a landlord is required to make a repair to comply with the above obligations, the tenant should notify the landlord of the need for repair (preferably in writing). If the landlord refuses to make the repair, the tenant may seek an Arbitrator's order. If the tenant fails to notify the landlord and substantial damage results from the lack of repair, the tenant may have to pay for the damage.

When a tenant goes to the RTB to request a repair order, they may also request a rent reduction until the repair is complete. The *RTA* states that a tenant must pay their rent in full and on time, regardless of whether the tenant believes the landlord has fulfilled their obligations. A tenant can only make deductions from their rent if they are expressly authorized to do so under a provision of the *RTA* (such as where a tenant has previously overpaid rent) or if an RTB Arbitrator orders that they may do so.

Landlords are generally responsible for arranging and paying for bed bug treatment. According to section 32 of the Residential Tenancy Act, landlords must ensure that their rental property is suitable for occupation and compliant with health, safety, and housing standards required by law. In addition, Residential Tenancy Branch Policy Guideline 1 says, "the landlord is generally responsible for major projects, such as … insect control." If your landlord believes that you caused the infestation, they should still pay for treatment within a reasonable period of time, and then seek to recover compensation from you after the fact.

2. Tenant

Tenants must maintain "ordinary health, cleanliness and sanitary standards" in their rental unit. Tenants must also repair damage caused to the rental unit and property (this includes common areas) by their or their pet's willful or negligent acts or omissions, or those of a person permitted by them on the rental unit or property (*RTA* s 32(3)). **There is no duty to repair reasonable wear and tear** (s 32(4)).

Tenants are also obligated to maintain the property in a sanitary condition. This includes notifying the landlord of any suspected pest infestation. Upon discovery of a pest infestation, the tenant is obligated to cooperate with the landlord in treating the infestation. If tenants do not cooperate, they could be found liable for the cost of treatment or be evicted. The landlord is obligated to get rid of the infestation unless it can be proven the tenant brought the pests with them when they moved in.

If a landlord refuses to have the suite or building treated, the tenant can apply to the RTB for an order compelling the landlord to do so, or as noted above can get an order from a city inspector. Vancouver Coastal Health no longer does inspections but is available to answer questions over the phone at 604-675-3800.

B. Withholding Rent

A tenant **cannot** withhold rent because of repairs needed unless an Arbitrator gives an order permitting it. Another way to seek repairs can be through the local municipality's Standards of Maintenance bylaw however this is only the case in some municipalities, for example, Vancouver, the City of North Vancouver, and New Westminster. Tenants should check with the municipality to see if there is a Standards of Maintenance bylaw in place. A tenant can call a local municipality and ask for a free inspection if the repair problem relates to structural defects (requiring a building inspector) or fire problems (e.g., fire inspection for fire exits, smoke alarms). The inspection may result in a formal report and may require the landlord to conduct repairs. The inspection report can also be important evidence to present at an RTB dispute resolution when seeking a Repair Order or an Order for a reduction in rent.

> **NOTE:** There is a **risk** attached to calling a City Inspector. The inspection could result in the municipality ordering the suite vacated, resulting in eviction for the tenants.

C. Emergency Repairs

Before advising any tenant on this course of action, an advocate should be aware that this is a rather complicated area. To qualify, the repairs must fall into the categories below and must be urgent and necessary for the health and safety of persons or the preservation and use of the property and rental units. Pursuant to s 33, a tenant may conduct emergency repairs without going to dispute resolution if the landlord fails to make repairs within a reasonable time after a tenant has made a reasonable effort on two or more occasions to contact the landlord. Sometimes there is a discrepancy between what a tenant, landlord, and RTB might consider 'emergency' repairs. **Before a tenant conducts any repairs, they should call the Residential Tenancy Branch, speak to an Information Officer, and make note of the Officer's name and what the Officer tells them.** The specific types of repairs that may qualify as emergency repairs are urgent, necessary for the health, safety or preservation of property and concern:

- major leaks in the pipes or roof;
- damaged or blocked water or sewer pipes or plumbing fixtures;
- malfunction of the central or primary heating system;
- defective locks that give access to the residential premises;
- electrical system repair.

Tenants must follow the exact procedure under s 33(3) of the *RTA*, or the landlord can make a claim against the tenant, or serve a 10-day notice to end tenancy for non-payment of rent. All steps taken should be documented fully. Emergency repairs usually constitute a large repair bill and should only be undertaken by the tenant in the clearest of circumstances. When in doubt, apply first to an Arbitrator for a Repair Order, refer to a Property Use Inspector, or investigate local Standards of Maintenance bylaws.

D. Terminating or Restricting Services or Facilities

A service or facility, as defined in s 1 of the *RTA*, applies to any of the following that are provided or agreed to be provided to the tenant by the landlord:

(a) Appliances and furnishings;

(b) Utilities and related services;

(c) Cleaning and maintenance services;

(d) Parking spaces and related facilities;

(e) Cablevision facilities;

(f) Laundry facilities;

(g) Storage facilities;

(h) Elevators;

(i) Common recreational facilities;

(j) Intercom systems;

(k) Garbage facilities and related services;

(l) Heating facilities or services

(m) Housekeeping services

Sections 27(1)(a) and (b) of the *RTA* provides that a landlord must not terminate or restrict a service or facility if it is essential to the tenant's use of the rental unit as living accommodation, or providing the service or facility is a material term of the tenancy agreement.

Section 27(2) of the *RTA* provides that a landlord may terminate or restrict a service or facility other than one referred to in ss 27(1)(a) or (b) if the landlord gives 30 days written notice, in the approved form, of the termination or restriction, and reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility. The tenant may dispute the restriction or termination on the basis that the service being restricted or terminated constitutes an essential service.

See RTB Policy Guideline 22: Termination or Restriction of a Service or Facility.

VI. Rent Increase

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. Payment and Non-payment of Rent

1. Cash Payment Rules

Section 26(2) of the *RTA* provides that a landlord must provide a tenant with a receipt for rent paid in cash. If a tenant makes a cash payment and receives no receipt, the tenant should send a letter to the landlord confirming the payment or pay with a witness present.

2. Non-Payment of Rent

Whether or not a tenant pays rent in accordance with the tenancy agreement, a landlord must not seize any personal property of the tenant or prevent or interfere with the tenant's access to the tenant's personal property (*RTA*, s 26(3)). The only exceptions are if the landlord has a court order authorizing the action, or if the tenant has abandoned the rental unit and the landlord complies with the regulations: see *RTA* s 26 (4)(a) and (b).

B. Rent Increases and Notice

Landlords can raise rents by a set amount each year and can apply for rent increases above that amount (*RTA*, s 43(1)). A tenant may also agree to pay a greater increase than the percentage permitted; this agreement must be in writing. If the tenant does not agree, the landlord may apply for an additional rent increase (*RTA* s 43 (3)). The percentage for allowable rent increases is usually the inflation rate (Consumer Price Index, or "CPI"), but it is limited to only 2% for 2023. **The maximum allowable increase changes each year on January 1st** and is posted on the Rent Increase webpage (http://bit.ly/1cWKrDB). A landlord can only impose a rent increase 12 months after the date on which the tenant's rent was first payable for the rental unit or the effective date of the last rent increase (s 42(1)). A tenant may not apply for dispute resolution to dispute a rent increase that complies with s 43(1). If a landlord collects a rent increase that does not comply with the *RTA*, the tenant may deduct the entire increase from the rent. The tenant should communicate the reason for the deduction to the landlord before taking this form of action.

The landlord must give written notice of a rent increase at least three full months before the increase becomes effective (s 42(2)). If the notice of rent increase is not written in the approved form, it is invalid and of no effect. If the landlord gives notice of less than three months, or if the increase is to take effect less than 12 months from when the tenant moved in, or from when the tenant's rent was last increased, the original notice will self-correct and will take effect on the earliest lawful date, provided it is otherwise correct. The tenant should notify the landlord about any self-correcting dates.

Section 43(3) of the *RTA* permits landlords to apply for an order allowing a rent increase greater than otherwise allowed under s 43(1). The circumstances under which these applications may be made are set out in ss 23-23.4 of the Regulations, and include:

- the landlord, acting reasonably, has incurred a financial loss for the financing costs of purchasing the residential property if the financing costs could not have been foreseen under reasonable circumstances;
- the landlord, as a tenant, has received an additional rent increase under this section for the same rental unit; or
- the landlord, in the 18 months preceding the application, made a significant capital expenditure incurred for the purpose of installing, repairing, or replacing a major system of component of the rental property.

NOTE: The purpose of the expenditure **must** be necessary to a) comply with health and safety standards, b) repair or replace a malfunctioning or inoperative system or component, c) reduce energy usage or greenhouse gas emissions, or d) improve the security of the residential property.

NOTE: Applications shall not be granted where the need for the capital expenditure arose because of inadequate repair or maintenance on the part of the landlord, or where the landlord has been paid from another source. Capital expenditures may not be claimed again for at least 5 years.

The rent increase formula for Manufactured Home Parks is inflation plus the proportionate amount of the increases to regulated utilities and local government levies.

C. New Lease with Same Tenant and Location

A landlord and tenant may agree to renew a fixed-term tenancy agreement with or without changes, for another fixed term. If a tenancy does not end at the end of the fixed term and no new agreement is entered into, the tenancy automatically continues as a month-to-month tenancy on the same terms. Rent can only be increased between fixed-term tenancy agreements with the same tenant if the notice and timing requirements for rent increases are met.

D. Hidden Rent Increases

The tenant can apply to an Arbitrator under s 27 of the *RTA*, if the landlord starts to charge the tenant for a service or facility previously included in the rent (e.g. for cable television or laundry that was previously free), or takes away a service or facility previously enjoyed by a tenant (e.g. stops providing cable television or laundry that was previously included in the rent, without decreasing the rent proportionately).

If the Arbitrator considers that the failure or reduction has resulted in a reduction of the use and enjoyment of residential premises or of the service or facility, the Arbitrator can provide relief (e.g., allowing the tenant to pay less rent, or ordering the service or facility restored). See also RTB Policy Guideline 22: Termination or Restriction of a Service or Facility.

E. Subsidized Housing

Persons living in publicly subsidized housing paying rent on a scale geared to their income are excluded from the rent increase provisions. They are also excluded from s 34 of the *RTA*, which deals with assignment and subletting. Not all subsidized housing is directly operated by the B.C. Housing Corporation. For a list of subsidized housing options and to apply for subsidized housing, visit: https:/ / www. bchousing. org/ housing-assistance/ rental-housing/ subsidized-housing.

VII. Tenant's Rights

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. Right of Entry

Section 29 of the *RTA* provides that a landlord may not enter a rental unit except where:

- an emergency exists and the entry is necessary to protect life or property;
- the tenant gives either written or verbal consent to enter for a specific purpose one month or less prior to entry, including when the tenant consents at the time of entry
- the landlord provides housekeeping or related services as part of the written tenancy agreement and the entry is for this purpose in accordance with the terms
- the tenant abandons the rental unit;
- the landlord gives written notice of entry for a specified “reasonable purpose” between 30 days and at least 24 hours before the time of entry (s 29(1)(b)).
    - The landlord must arrange a specific time between 8 a.m. and 9 p.m. to enter unless otherwise agreed by the tenant.
    - Note that the clock starts ticking when the tenant receives the notice to enter, not the time when the landlord gives it. The 24 hours starts right away when a landlord hand-delivers the notice; 3 days later when it is delivered by fax or by posting on the tenant’s door, or five days later when sent by regular or registered mail, unless earlier received; or
    - The landlord has an Arbitrator’s order authorizing the entry.

B. Quiet Enjoyment

Section 28 of the *RTA* provides protection of tenant’s right to quiet enjoyment. A tenant’s right includes but is not limited to:

1. reasonable privacy;
2. freedom from unreasonable disturbance;
3. exclusive possession of the rental unit subject only to the landlord’s right to enter the rental unit in accordance with s 29; and
4. use of the common area for reasonable and lawful purposes, free from significant interference.

Landlords have a duty to protect their tenants’ rights to quiet enjoyment, and to not interfere with that right themselves. If a landlord interferes with a tenant’s right to quiet enjoyment by repeatedly entering a rental unit in a manner not in accordance with the *RTA*, the tenant may apply for an order to be permitted to change the locks in the rental unit, and to be permitted to not provide the landlord with a key: see *RTA*s 70.

While tenants have a right to quiet enjoyment, they also have a duty not to disturb other tenants. A landlord may end a tenancy for Cause with one month’s notice if a tenant unreasonably disturbs other occupants or the landlord of the building. This is separate from the right of quiet enjoyment and is a cause for a landlord to evict (*RTA* s 47 (d)(i)).

C. Duty to Provide Access

Under *RTA* s 30 (1) once a tenant has taken possession of a rental unit, a landlord is not allowed to restrict the tenant's access to the residential property unreasonably. Under s 31 of the *RTA*, the landlord cannot change the locks or alter the means of access to the rental unit without the tenant's permission, and a landlord is obligated to provide all tenants with new keys or other means of access to the rental unit. On the request of a tenant at the beginning of a new tenancy agreement, the landlord must re-key or change the locks to the rental unit: see Section III: Moving In and Moving Out. A landlord cannot restrict access even if a tenant has failed to pay rent.

1. Tenant: Changing the Locks

Tenants must not change the locks without the landlord's permission or an Arbitrator's order. This can may be grounds for eviction.

VIII. Subletting and Assignment

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. Right to Assign or Sublet and Duty to Obtain Consent

According to s 34 of the *RTA*, a tenant may assign or sublet their interest in a tenancy agreement with the written consent of the landlord (s.34(1)); in other words, **the landlord's written consent is always required for an assignment or subletting of the agreement.** However, the landlord must not be arbitrary or unreasonable in withholding consent if the tenant has a fixed term tenancy with six months or more remaining (s 34(2)). A tenant may apply for an Arbitrator's order where a landlord has unreasonably withheld consent: see *RTA* s 65(1)(g). Section 34(3) stipulates that a landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease.

Public housing tenants or tenants receiving a rent subsidy (those renting premises owned by the Crown, or by a non-profit organization receiving rental subsidy by agreement with the Crown, or whose landlord is the B.C. Housing Management Commission) are exempt from this assignment and sublet provisions. Generally, this means a subsidized housing tenant cannot assign or sublet a rental unit.

B. Creating a Sublet

Sub-tenants enjoy similar rights against the tenant they rent from as do tenants against the original landlord when they live in the property without the original tenant. However, sub-tenants cannot dispute the actions of the "main" landlord.

Where an individual takes on a roommate, that roommate will not be considered a sub-tenant. **Individuals moving in as roommates may wish to ensure either that they are named on a written lease as a co-tenant or tenant in common.** If they are not named, they will have no recourse against the landlord at the RTB unless they can prove that a tenancy agreement has been created between the two in some other way.

Tenants wanting to create sublets must retain an interest in the tenancy. This is done by making sure that the sublease ends before the first tenant's lease with the original landlord does. For example, if a tenant has a fixed term tenancy agreement that lasts for six more months and wants to sublet to a sub-tenant, that sublease must, at maximum, be for six

months **less a day** so that the tenant still retains an interest in the tenancy. In a periodic tenancy, there must be an understanding that the sublet continues on a month-to-month basis, less one day, to preserve the original tenant's interest in the tenancy. Where a sublet continues for the full period of the tenancy, it likely amounts in law to an assignment instead. See Policy Guideline 19: Assignment and Sublet.

IX. Termination/Eviction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. Tenant Gives Notice (RTA, ss. 45, 45.1)

A tenant can end the tenancy by giving notice:

- Where there is a periodic tenancy, notice will be effective in terminating the tenancy no earlier than one clear month after it is received by the landlord.
  - Additionally, it must take effect no earlier than the day before the day of the month (or another period on which the tenancy is based) that rent is payable under the tenancy agreement.
  - E.g., If rent is payable on the first of the month, notice to end the tenancy given on January 1st will be effective in terminating the tenancy agreement no earlier than February 28th, and rent must be paid throughout the notice period; notice given on May 31st would be effective to end the tenancy on June 30th. Note that the time is calculated **from the time the landlord receives the notice**, not when the notice was sent.
- Where there is a fixed-term tenancy, notice will be effective no earlier than **one clear month** after the landlord receives it.
  - Additionally, it must be no earlier than the date specified in the tenancy agreement as the end date of the tenancy.
  - It must be the day before the day in the month (or in the other period on which the tenancy is based) that rent is payable under the agreement.
- If a landlord breaches a material term of the tenancy agreement, and the tenant wishes to end the tenancy for that reason, the tenant must first give written warning that a term has been breached and request that the breach be corrected within a reasonable period. If the landlord has not corrected the breach before the deadline, the tenant can end the tenancy after the landlord receives a notice in writing.
- Under s 45.1 of the *RTA*, a tenant is eligible to end a fixed-term tenancy early if they are at risk of or fleeing family violence, or if they have a need for or have been accepted into long term care.
  - Tenants must fill out form RTB-49 and submit it to the landlord with one month written notice. Note that the early termination form requires a qualified third party to verify the risk of family violence or the need for long-term care.
  - Section 39 of the Residential Tenancy Regulations lists persons qualified to confirm a risk of family violence.

    NOTE: "Family violence" is defined under the *Family Law Act*, SBC 2011 c. 25 to include:

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

(c) attempts to physically or sexually abuse a family member,

(d) psychological or emotional abuse of a family member, including

(i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,

(ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,

(iii) stalking or following of the family member, and

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence.

- Section 40 of the RTR lists persons qualified to confirm the need for long-term care.
- Ending a tenancy this way means that all individuals subject to the same tenancy agreement must vacate the rental unit when the tenancy ends.
- A landlord cannot apply for dispute resolution with respect to a tenant's eligibility to end their tenancy, but they can apply for dispute resolution if the basis of the claim is that the confirmation statement was made by a person who was not authorized under the regulations to do so, or if the tenant's notice is not provided in accordance with the RTA, or if there are other claims unrelated to the tenant's notice to end tenancy.

B. Landlord Gives Notice

1. Non-Payment of Rent (*RTA*, s 46)

A landlord may give a ten-day notice to end a tenancy if rent is unpaid on any day after the day it is due. If the tenant pays the overdue rent within five days after receiving a notice under s 46 the notice has no effect. If the tenant does not pay within those five days or dispute the notice to end tenancy, the landlord can go to the RTB and make a direct request for an order of possession without a hearing. No evidence from any party would be considered except the landlord's written submissions.

If the tenant decides to pay the overdue rent after the five-day period is over, **the landlord is not obligated to accept the late payment**, and even if the landlord does accept it, this does not cancel the notice.

> **NOTE:** It is possible that a tenant will receive a Notice of Direct Request in circumstances where they should receive a hearing (e.g., all arrears paid in 5 days, application for dispute resolution filed, legitimate dispute on merits). In such a case, it is imperative that the tenant **immediately** write to the RTB and request a dispute resolution hearing. The tenant should explain why their case is not appropriately addressed through the direct request process.

Once an Order of Possession has been given to the landlord and served to the tenant after a wrongful Direct Request, the tenant should tell the landlord that they are reviewing it, so the landlord can't get a writ from BC Supreme Court; The tenant should file a Review Application to the RTB on the basis of landlord fraud and/or inability to attend the original hearing (See Section X. E: Review of Arbitrator's Decision).

2. Cause to End Tenancy (*RTA*, s 47)

Various circumstances can qualify as causes to end a tenancy. For instance, repeatedly not paying rent on time, having an unreasonable number of occupants, and causing extraordinary damage to the rental property. See *RTA* section 47 for the complete list.

> **NOTE:** Eviction due to repeatedly late rent payments has a high threshold. In *Guevara v Louie*, 2020 BCSC 380, e-transfer caused delays to payment that was sent on the days rent were expected to be paid and this was found to not be a valid reason to terminate a tenancy.

3. Landlord's Notice: End of Employment with Landlord (*RTA*, s 48)

A landlord may end the tenancy of a person employed as a caretaker, manager, or superintendent of the residential property of which the rental unit is a part by giving notice to end the tenancy if:

- the rental unit was provided to the tenant for the term of the caretaker's (tenant's) employment,
- the tenant's employment as a caretaker is ended,
- and the landlord intends in good faith to rent or provide the rental unit to a new caretaker, or manager.

An employer may also end the tenancy of an employee in respect of a rental unit rented or provided by the employer to the employee to occupy during the term of employment by giving notice to end the tenancy if the employment is ended.

4. Landlord's Use of Property (*RTA*, s 49)

Notice to end tenancy may be given by the landlord where:

- the landlord sells the property, and the purchaser asks the landlord, in writing, to give the tenant notice because they intend to occupy the property (RTA, s 49(5)(c));
- the landlord or a member of their immediate family (consists only of spouse, child or parent of the landlord or spouse) intends to occupy the property (s 49(3));
- the landlord is a "family corporation (i.e., a corporation where the voting shares are all own by one individual or one individual and their sibling or immediate family) and a person owning voting shares in the family corporation or their immediate family member intends to occupy the property (s 49(4));
- the landlord has all the necessary permits and approvals required by law and intends **in good faith** to demolish the property, convert it into a strata lot or co-op, convert it into non-residential property or a caretaker's premises for more than six months, or renovate the rental unit in a manner that requires it to be vacant (s 49(6)).

  > **NOTE:** As of July 1st, 2021, s. 49 (6)(b) is repealed, and landlords can no longer end tenancy to renovate or repair the rental unit in a manner that requires the unit to be vacant, except in accordance with s. 49.2 (Director's Orders: Renovations or Repairs).

a) Director's Orders: Renovations or Repairs ("Renovictions")

As of July 1st, 2021, under s. 49.2, landlords may make an application for dispute resolution requesting an order to end tenancy if:

- The landlord intends in good faith to renovate or repair the rental unit and has all the necessary permits and approvals required by law to carry out the renovations or repairs;
- The renovations or repairs require the unit to be vacant;
- The renovations or repairs are necessary to prolong or sustain the use of the rental unit or the building in which the rental unit is located; and
- Ending the tenancy agreement is The only reasonable way to achieve the necessary vacancy.

If a landlord is successful in a section 49.2 application, the landlord will get an order of possession effective no earlier than 4 months after the order is made.

A landlord who gives a notice to end a tenancy under s 49 or 49.2 must pay the tenant, on or before the effective date of the notice an amount that is equivalent to one month's rent as compensation (s 51(1)).

> **NOTE:** If the landlord does not take steps within a reasonable time to use the property for the reason stated on the eviction notice or the director's order, the landlord must pay the tenant 12 times the monthly rent payable under the tenancy agreement (s 51(2)). The landlord's use must be for at least six months beginning within a reasonable period of the effective date of the notice, to prevent landlords from simply moving a relative in for a month. However, an Arbitrator can exempt the landlord if extenuating circumstances prevented compliance.
>
> **NOTE:** Some municipalities have additional protection in place for tenants that are being subject to "renovictions" in addition to the protection offered by the *RTA*. One such example is the City of Vancouver's *Tenant Relocation and Protection Policy*. Check if your municipality has similar policies in place.
>
> **NOTE:** A tenant may withhold the last month's rent if the tenant has been given a notice to end tenancy for landlord's use of property or a director's order for renovations or repairs instead of paying the last month's rent and then waiting for the landlord to repay the required one month's compensation.

b) Right of first refusal:

Additionally, if the rental unit is one in a residential property containing 5 or more rental units where the landlord ended the tenancy pursuant to s **49.2**, the tenant has a **right of first refusal** under s. 51.2. This means that the tenant is entitled to enter a new tenancy upon completion of renovation or repair **if they give notice that the tenant intends to enter into a new tenancy prior to the end of tenancy**.

If the tenant gave notice pursuant to s. 51.2, the landlord must give tenant notice at least 45 days before the date of completion informing the tenant the availability date of the rental unit and a tenancy agreement to sign that commences on that availability date.

If the tenant does not enter into a tenancy agreement on or before the availability date, the tenant has no further right.

By s. 51.3, if the tenant gave notice under s. 51.2 and the landlord does not comply with s. 51.2, the landlord must pay the tenant 12 times the monthly rent as compensation. Note that the landlord may be exempted due to hardship as determined by an Arbitrator (s. 51.3(2)).

C. Landlord and Tenant Agree in Writing

According to *RTA*, s 44(1)(c), the landlord and tenant can consent in writing to end a tenancy. Standard form RTB-8 is provided for this purpose, but it is not a mandatory form.

> **NOTE:** There have been some cases in which landlords have coerced or misled tenants into signing Mutual Agreements to get around the *RTA's* provisions on when a tenancy can be ended. Mutual Agreements signed concurrently with a fixed-term lease have been struck down by the RTB as an attempt to contract out of the *Act*, a violation of section 5. Generally, the legitimate purpose of the Mutual Agreement to End Tenancy is to terminate a fixed-term lease based on circumstances arising after the tenancy has begun.

D. Required Notice

1. Form and Basic Requirements

For a notice to end a residential tenancy to be effective, it must be in writing, signed and dated by the landlord or tenant giving notice, include the address of the rental unit, and state the effective date of the notice. When the landlord gives notice, it must state how to challenge the eviction (RTA, s 52). A landlord must state the grounds for ending the tenancy; tenants giving notice are not required to provide any such grounds (RTA, s 45(1) or (2)). An official form is available from the Residential Tenancy Branch. **A landlord must use RTB approved forms** (s 52(e)) when giving a notice to end a tenancy for it to be effective. A mailed notice is presumed to be received 5 days after it is sent, while a notice posted on a door, for example, is deemed received 3 days after being posted. If posted documents are received before they are deemed received, they are considered received on the day they are actually received. A landlord is only required to give the tenant a written notice and a reasonable opportunity to adjust their conduct for a breach of a material term of the tenancy agreement before eviction. However, the landlord can also do this in other circumstances.

If a notice to end tenancy does not comply with the *RTA*, s 52 requirements, an Arbitrator may set aside a notice, amend a notice, or order that the tenancy end on a date other than the effective date shown. A notice to end tenancy can be amended if the Arbitrator is satisfied that the person receiving the notice knew or should have known the information that was omitted from the notice, and it is reasonable to amend the notice (s (68)(2)). Dates are self-corrective, so notice is not void simply because a landlord proposes to have the tenancy end on a date sooner than the RTA allows. **Tenants should never ignore a notice**, even if they believe it is drafted incorrectly.

Tenants and landlords can agree to use the Mutual Agreement to End Tenancy form, but tenants should seek to add a clause barring the landlord from claiming damages.

2. Length of Notice and Time Limits

The RTA sets out when a landlord may issue a notice to end tenancy and the length of the notice period and time limits to apply to the Residential Tenancy Branch for dispute resolution. Certain time limits may be extended in exceptional circumstances. **Time limits to dispute a notice to end tenancy cannot be extended past the effective date of the notice.** See **Residential Tenancy Policy Guideline 36: Extending a Time Period**, which sets out information regarding the meaning of exceptional circumstances.

a) Non-Payment of Rent

If the rent goes unpaid, a landlord can give a **10-day** Notice to End Tenancy for Unpaid Rent or Utilities following the day the rent was due (*RTA*, s 46). The tenant may pay all the rent due within five days of receiving the notice to render the notice void or dispute the notice by applying for dispute resolution within five days of receiving the notice. If they do nothing, then the landlord can go to the Residential Tenancy Branch and make a Direct Request for an order of possession without a hearing. Tenants should request a receipt for any rent they paid in cash if they are concerned that the landlord will try to evict them anyway. **If the tenant does not pay the overdue rent in 5 days, the landlord is not legally obligated to accept the payment and reinstate the tenancy.**

If a tenant fails to pay the utilities, the landlord can give written notice demanding payment, and then, 30 days after the tenant receives the demand for payment, treat any unpaid amount as unpaid rent (*RTA*, s 46(6)).

> **NOTE:** A notice under this section has no effect if the amount of unpaid rent is an amount the tenant is permitted under the *RTA* to deduct from rent. However, tenants still need to file for dispute resolution in this situation, and not simply ignore the notice, or they will be deemed to have accepted the end of the tenancy.

b) Cause

The minimum notice given by a landlord where there is cause is one month, effective on the last day of the ensuing rental period (*RTA*, s 47(2)). Practically speaking, the full month requirement means the notice must be received the day before rent is due, so notice given on May 31 is effective to end the tenancy on June 30, but notice given June 1 would be effective to end the tenancy only on July 31. A tenant may dispute a notice under this section by applying for dispute resolution **within 10 days** after the date the tenant receives the notice. The minimum notice of one month does not apply if the tenant is engaging in illegal activity.

> **NOTE:** The reasons for which a landlord may end a tenancy for cause are enumerated in s 47(1) of the *RTA* and landlords must select one of these enumerated grounds when filling out the required standard form (RTB-33).

c) Landlord's Personal Use of Property

Section 49 of the *RTA* requires that a landlord give at least **two months**' notice if they wish to take back the property for personal use: see s 49 for the permissible forms of landlord use. A tenant has **15 days** to apply for dispute resolution to challenge the notice, unless the landlord intends to demolish the unit or convert it to certain enumerated forms of non-rental property, in which case a tenant has **30 days**.

d) Tenant Ceases to Qualify

Tenants in subsidized housing can be evicted if they no longer qualify for the housing subsidy as defined in the tenancy agreement. In this case, landlords must provide 2 months' notice. Tenants wishing to dispute the eviction have **15 days** to file their dispute. See ss 49.1 and 50 for more information.

e) Director's Orders: Renovations or Repairs

If the landlord is giving notice for *RTA* s 49.2, which would include most forms of building renovations, the landlord must give at least four months' notice. If the tenancy is a fixed term tenancy, the landlord cannot terminate the tenancy before the fixed term is over.

The four-month notice can only be served to the tenant once an order has been made under the requirements of s 49.2(1). A tenant would have **30 days** after receiving the notice to file a dispute. See the above section on Renovictions for more details.

f) End of Employment

Where the ground for eviction is the end of employment (*RTA*, s 48), the tenant must file for dispute resolution to dispute the Notice to End Tenancy **within 10 days** of receiving it (s 48(5)). The notice period must be **at least one month** after the date the tenant receives notice, not earlier than the last day the tenant is employed by the landlord, and the day before the day in the month, or in the period on which the tenancy is based, that rent, if any, is payable under the tenancy agreement.

g) Early End to Tenancy

Under the *RTA*, s 50, if the landlord gives a tenant a notice to end a periodic tenancy under s 49, a tenant may end a tenancy early by giving **10 days**' notice for a date earlier than that specified by the landlord at any time during the period of notice and pay rent up to the end of that 10 days. This does not apply to tenants in a fixed-term tenancy.

A landlord may end a tenancy early by applying to the Residential Tenancy Branch for dispute resolution, seeking an order ending the tenancy early and an Order of Possession. The usual rules about service and notice to the tenant apply. The landlord must prove the tenant has:

- significantly interfered with or unreasonably disturbed another occupant or the landlord;
- seriously jeopardized the safety, rights or interests of the landlord or another occupant;
- engaged in illegal activity that has caused or could cause damage to the property, disturb or threaten the security, safety or physical well-being of another occupant, or jeopardize a lawful right or interest of another occupant or the landlord; or
- caused major damage to the property or put the landlord's property at significant risk.

At the dispute resolution hearing, the landlord must provide convincing evidence that justifies not giving full notice **and demonstrate it would be unreasonable or unfair to wait for a notice to take effect**.

3. Disputing a Notice to End Tenancy

a) By a Landlord

If the tenant wants to end a month-to-month tenancy, they can always give one month's written notice "on or before the last day of a rental payment period to be effective on the last day of an ensuing rental payment period" (e.g., give notice no later than May 31 to move out on June 30). The landlord cannot dispute the tenant's notice. But, if the tenant's notice does not comply with the rules under the RTA (ss 45(1) and 45(2)), the landlord may apply to the RTB seeking a monetary order.

b) By a Tenant

Under s 59 of the RTA, a tenant may dispute a Notice to End a Residential Tenancy from the landlord by applying to the RTB and filing an application for dispute resolution to set aside the notice within the following time limits:

- under s 46 (unpaid rent): **five days**;
- under s 47 (for cause): **10 days**;
- under s 49 (landlord use of property): **15 days**;
- under s 49.1 (tenant causes to qualify for rental unit): **15 days**;
- under s 49(6) (demolition and conversion): **30 days**.

An Arbitrator may extend a time limit established by the RTA only in exceptional circumstances. In respect to a notice given by a landlord for non-payment of rent (s 46(4)(a)), time limits can only be extended if: the landlord has provided written permission for an extension, or the tenant has deducted the unpaid amount because the tenant believed that the deduction was allowed for emergency repairs or under an Arbitrator's order (s 66(2)).

> **NOTE:** An Arbitrator must not extend the time to apply for dispute resolution to dispute a notice to end a tenancy beyond the effective date of the notice.
>
> **NOTE:** A tenant can ask for a delayed order of possession in the alternative that the eviction is upheld. Effective dates for orders of possession have generally been set for two days after the order is received. However, an arbitrator has the discretion to set the effective date based on the point up to which the rent has been paid, the length of the tenancy, and evidence showing that it would be unreasonable to vacate the property in two days.

E. Failure of a Tenant to Deliver Up the Rental Unit: Regaining Possession

A tenant must surrender possession at the end of the tenancy. After tenancy ends, there is no "agreement" ,and the overholding tenant is usually found to be a licensee or mere occupant. A new tenancy agreement could be created (e.g., by the landlord accepting payment of rent), but otherwise, the occupant of residential premises is liable to a landlord's claim for compensation for "use and occupation" (RTA, s 57(3)). If a prospective tenant is suing the landlord for failure to give vacant possession, the landlord can add the overholding tenant as a party to the dispute (s 57(4)). The landlord must not take actual possession of a rental unit that an overholding tenant occupies unless the landlord has a writ of possession issued under the B.C. Supreme Court Rules.

If a landlord gives a notice to end tenancy, they can apply for the Order of Possession after the tenant's limitation period to file for dispute has expired (s 55(2)(b)). This may be 5, 10, 15, or 30 days depending on the reasons for ending the tenancy.

Landlords can, in some circumstances, obtain an Order of Possession without a participatory hearing taking place. An Arbitrator may issue the order directly where the tenant has failed to dispute a Notice to end Tenancy for unpaid rent within the time limits (s 55(4)). Monetary orders for rent in arrears may also be granted without a participatory hearing if

the tenant's time to dispute the notice has passed.

F. Abandonment and End of Tenancy

Abandonment of the rental unit by the tenant is one of the automatic grounds for ending a residential tenancy agreement (*RTA*, s 44(1)(d)). Where a tenant abandons the rental unit before the end of a fixed-term tenancy, or without giving proper notice during a periodic tenancy, a landlord may have a claim against the tenant for outstanding rent. Disputes may arise when the landlord claims the rental unit has been abandoned and the tenant disputes the end of the tenancy and the landlord's finding of abandonment. The landlord's duty to mitigate and re-rent and the landlord's right to remove the tenant's goods both depend on a finding that the rental unit was abandoned. In other words, if a tenant does not clearly communicate to the landlord that they will be abandoning the rental unit, the landlord may not be subject to a duty to mitigate their losses by re-renting the suite until they are sure the rental unit has been abandoned.

Part 5 of the *Residential Tenancy Regulations (RTR)* sets out guidelines to assist the landlord of abandoned personal property, and/or assist the tenant to recover such property.

1. Abandonment of Personal Property

Section 24 of the *RTR* deals with the situation where the tenant has vacated the residential premises at the end of the tenancy but leaves personal property behind. The main issue is whether the tenant has "given up possession" of the property. A landlord may consider that a tenant has abandoned personal property if the tenant leaves the personal property in residential premises that:

> a) the tenant has given up possession of, or that they have vacated after the tenancy agreement has ended or after the term of the tenancy agreement has expired; or
>
> b) for a continuous period of one month, the tenant has not ordinarily occupied and remained in possession of, and in respect of which they have not paid rent, or from which the tenant has removed substantially all of their personal property, and either gives the landlord an express oral or written notice of the tenant's intention not to return to the residential premises, or by reason of the facts and circumstances surrounding the giving up of the residential premises, could not reasonably be expected to return to the residential premises.

Section 24(3) of the *RTR* permits the landlord to remove personal property from residential premises that have been abandoned. This includes removing personal property from storage lockers, etc. If the landlord decides property has been abandoned, the landlord is required by s 25(1)(b) of the *RTR* to make and keep an inventory of such property as soon as the property has been removed from the rental unit, and to keep the particulars of the disposition and inventory for two years. In addition, the personal property, once removed from the rental unit, must be kept in a safe place for a period of not less than 60 days unless the landlord reasonably believes either that the property has a total market value of less than $500, the cost of removing, storing, and selling the property would be more than the proceeds of its sale, or the storage of the property would be unsanitary or unsafe.

Under s 25(2) of the *RTR*, the landlord may sell or dispose of the property stored in compliance with s 25(1) of the *RTR*. The purchaser of such property obtains marketable title, free of all encumbrances, but landlords should be very cautious before selling a tenant's property and should follow the regulations carefully. For example, problems will arise if a landlord sells a tenant's "abandoned" furniture if it turns out that the furniture was only leased.

Some tenants may have little value in their residences and should be aware that the *RTR* allows landlords to dispose of property with a cumulative value of less than $500 (s 25(2)(a)).

The landlord must exercise reasonable care and caution to ensure the personal property does not deteriorate and is not damaged, lost, or stolen (*RTR*, s 25(1)). A tenant may file a claim for their personal property at any time before it is

disposed of under ss 25 or 29 of the *RTA*. **Practically speaking, any claim for return of abandoned property, or for compensation for lost, damaged, or abandoned property should be brought as soon as possible.**

X. Dispute Resolution

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. General

The formal dispute resolution process may be avoided in cases where the application of the law is clear. For example, an Information Officer might call a landlord and tell them that landlords are required by law to provide rent receipts if the tenant pays rent in cash. The Information Officer will not take on the role of an Arbitrator and will only explain the Legislation.

Dispute resolution is the formal method of resolving disputes between landlords and tenants. Any party going to dispute resolution may be represented by an agent, advocate, or lawyer. The Arbitrator may require a representative to provide proof of their appointment to represent a party and may adjourn a dispute resolution hearing for this purpose. To understand the procedure, advocates should read the dispute resolution Rules of Procedure [1] that are available on the Residential Tenancy Branch website. These Rules of Procedure are revised occasionally, be sure that you are relying on the most up to date version.

1. Disputes Covered by Dispute Resolution

Virtually all claims that may arise between tenants and landlords are eligible for dispute resolution (see RTA, s 58). A court does not have and must not exercise any jurisdiction in respect of a matter that must be submitted to dispute resolution under the RTA. The exceptions are as follows:

- The dispute is linked substantially to a matter that is before the Supreme Court; or
- The monetary claim exceeds the monetary limit prescribed in the *Small Claims Act*, RSBC 1996, c. 430, s 3. (Currently the monetary limit is $35,000.)
- As well, the RTB is specifically excluded, pursuant to section 5.1 of the *RTA*, from considering the following:
  - Questions of constitutional law, and
  - Issues arising out of the BC *Human Rights Code*

    NOTE: Some issues that may apparently be under the exclusive jurisdiction of the *RTA* may still be grounded in a different source of law. In such cases, a tenant may be able to elect to proceed with their claim either as an RTB dispute or as a different kind of civil claim that falls under the inherent jurisdiction of another court. For example, if a tenant's claim can be successfully characterized as a claim of negligence, they may be permitted to proceed with an action in Supreme Court. See *Janus v The Central Park Citizen Society*, 2019 BCCA 173 at paras 23-29.

2. Arbitrators

Arbitrators are like judges and base their decisions on evidence and arguments presented by the parties at the dispute resolution hearing. Arbitrators are only bound by legal precedents established by the court, not past decisions. An Arbitrator has the authority to make any findings of fact or law necessary to resolve disputes that arise under the *RTA* or a tenancy agreement. Arbitrators may assist the parties or offer the parties an opportunity to settle their dispute during a hearing. They can record agreements reached by the parties, sign off on the agreement, and record the settlement as an order. Except as otherwise provided by the *RTA*, a decision of the director is final and binding (s 77(3)).

> **NOTE:** Arbitrators are not required to have any formal legal training (though some may). Students intending to make legal arguments should be prepared to do so using as much plain language as possible.

3. Joint Hearings

RTA cannot make orders for landlords and tenants not participating in a hearing, so class action lawsuits do not exist for RTB hearings. However, tenants can seek a joint hearing where they can join their claims into a single hearing. If several tenants seek a joint hearing, under the *RTA*, they must file separately for Dispute Resolution and then apply to join their claims together. The scheduled hearing date may include a preliminary hearing to allow the parties to argue why the matters should or should not be joined. Arbitrators can also decide to hear the cases jointly without the consent of the landlord.

B. Dispute Resolution Procedure

1. Applying for Dispute Resolution

A landlord or tenant who wants a government-appointed Arbitrator to settle a dispute must complete an Application for Dispute Resolution. Most applications for dispute resolution are filed online through the RTB website. Applicants can also apply in person by submitting a paper application for dispute resolution form in person at the RTB office or any Service BC office. The form is available at an RTB office or a Service BC office or online at the RTB website. Note that there are separate forms for the landlord and the tenant.

Online applications can pay with a credit card or an online debit card, but if you wish to apply for a fee waiver, you must also upload proof of income through the Online Portal, or submit it in person. The Downtown Eastside office only accepts applications where a fee waiver applies. Those offices do not handle money payments. The application will not be considered made until the applicant has paid the filing fee or submitted the documents required for a fee waiver. The applicant is usually informed of the date of the hearing within a few days. The RTB created a Monetary Order Worksheet, which is mandatory when applying for a monetary order. The worksheet number is available online at http://bit.ly/1ToyRm9.

For more information about how to apply for dispute resolution and request a fee waiver, see https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/solving-problems/dispute-resolution

The general limitation period for filing the claim at the RTB is **two years** from the end of the tenancy to which the dispute relates (*RTA*, s 60) unless otherwise provided for in the *RTA*.

a) Naming Parties on an Application

Individuals should be named by their full legal names. Businesses should be named using the full legal name of the business, which may include an indication of the type of legal structure the business operates under and maybe a numbered corporation. Where a business carries on business under a name other than the legal name of the business, you may indicate that the party is “doing business as” the other name.

b) Amending an Application for Dispute Resolution

In certain circumstances, applications for dispute resolution that have already been submitted can be amended. Amended applications must be related to existing issues raised in the original application.

To amend an application for dispute resolution, the applicant completes the RTB-42 “Amendment to an Application for Dispute Resolution” form and submits that form along with any accompanying evidence to the RTB. Once the RTB approves the application, the applicant serves the other party with a copy of the application and supporting evidence, not less than **14 clear days** before the hearing. Note that, as the application must be served on each party **14 clear days** before the hearing, and it takes time to have the application approved, it is advisable to apply to amend as soon as possible so as to meet these deadlines.

To learn more about amending an application, see: https:/ / www2. gov. bc. ca/ gov/ content/ housing-tenancy/ residential-tenancies/apply-online/amend-or-update-an-application

2. Direct Request

A tenant may make a Direct Request for an order of possession and/or monetary order for outstanding deposit(s) when they gave the landlord their forwarding address in writing at the end of the tenancy, and, within 15 days after the receipt of the forwarding address, the landlord has not returned the outstanding deposit(s) or made an application to retain part or all of the deposit. See Tenant's Direct Request [2] for more details.

3. The Dispute Resolution Hearing

Hearings are a formal process, though less formal than court. The RTB uses the dispute resolution Rules of Procedure (online at http://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/rop.pdf).

The RTB publishes Policy Guidelines intended to assist Arbitrators in interpreting and applying the law. These Policy Guidelines are available online at: (https:/ / www2. gov. bc. ca/ gov/ content/ housing-tenancy/ residential-tenancies/ calculators-and-resources/policy-guidelines).

These are useful for preparing for a hearing, but Arbitrators have the discretion to decide when and how to apply Policy Guidelines. Most RTB hearings are now conducted via telephone. However, there are still some in-person or written hearings.

> **NOTE:** Prior to an arbitration hearing, an Information Officer may assist landlords and tenants by providing information about the procedure for resolving disputes but will not help complete forms.

a) Telephone Hearings

Parties should join the conference call in a quiet place where they will not be interrupted. Parties should not try to call about 5 minutes before the start of the hearing. It is important that parties check they have the correct telephone code. If a hearing has been adjourned or continued from an earlier hearing, the code may be different than the previous one.

Telephone hearings are usually scheduled for one hour exactly. If the hearing is not finished at this time, the Arbitrator may extend the hearing or schedule another conference call to continue the hearing. This may be several weeks or months after the first hearing. It is important that parties be focused on the outcome they wish to achieve and that their documents are carefully organized and page numbered so that time is not wasted searching for documents and other evidence.

b) In-Person and Written Hearings

In-person or written hearings are rare and will generally only occur at the request of one or both parties, to account for unusual circumstances or needs of one or both parties. For more information on alternative hearing formats, see **RTB Policy Guideline no. 44: "Format of Hearings"** (online at http://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/policy-guidelines/gl44.pdf)

c) Expedited Hearings

Expedited hearings are for applications that are very urgent and if it would be unfair for the applicant to wait for a standard hearing. They are usually limited to early ending of tenancy, an order of possession for a tenant, and emergency repairs. Usually, the branch tries to schedule them for a hearing within 12 days from the date the application is made. In cases where there is evidence that violence has occurred, health and safety are severely jeopardized or there is a demonstrable immediate danger or threat, the branch may schedule it for a hearing within six days. Evidence must be submitted with the application. More details including how to apply are available online at: https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/solving-problems/dispute-resolution/expedited-hearings)

d) Evidence

The RTB Rules of Procedure state that, to the extent that it is possible, an applicant must submit their evidence with their application and serve a copy of that evidence when they serve the Notice of Hearing. However, if this is not possible, the RTB and the respondent must receive a copy of all the applicant's evidence no less than 14 days prior to the hearing; the respondent's evidence must be received by the RTB and the applicant no less than 7 days prior to the hearing. However, arbitrators have the authority to extend the time limit to serve the Notice Package if they find that the Package was sufficiently served for the Act on a later date. Evidence can be submitted online, in person or by mail or fax.

(1) Online

Where possible, parties should submit evidence digitally. Parties can submit evidence online using the dispute access site (https://tenancydispute.gov.bc.ca/DisputeAccess/#login-page) any time before the deadline. Note that RTB imposes restrictions on the format, size, or amount of evidence submitted or exchanged during the dispute resolution process. For more information, visit https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/apply-online/prepare-for-a-hearing/choosing-and-preparing-evidence#digital.

A party must submit digital evidence together with an accompanying description and comply with 3.10.1 of the RTB Rules of Procedure. Parties who serve digital evidence on other parties must provide the information required under Rule 3.10.1 using Digital Evidence Details (form RTB-43) and in a manner that is accessible to the other party. Parties should always confirm that the other party and the RTB have gained access to the digital evidence before the hearing. No additional evidence may be submitted after the dispute resolution hearing starts except as

directed by the arbitrator.

(2) In person

Evidence can be submitted at any Service B.C. office, or at the Residential Tenancy Branch office in Burnaby. The applicants will need their file number and dispute access code.

Parties who submit digital evidence in person must do so by providing a copy of the evidence on a memory stick, compact disk, or DVD or using a method requested by the RTB or Service BC with a printed accompanying description.

(3) Mail or Fax

Evidence can be mailed to "Residential Tenancy Branch #400-5021 Kingsway, Burnaby, B.C. V5H 4A5" or fax to 604-660-2323 (lower mainland) or 1-866-341-1269 (outside the lower mainland).

A party who submits evidence must keep an exact copy of the evidence they submitted for not less than two years after the date on which the dispute resolution proceeding, including any reviews, concludes. The RTB will not return copies of evidence submitted during the dispute resolution process.

Evidence should be clearly marked and numbered so that all parties involved can easily locate the relevant documents when necessary. If evidence submitted is not in an acceptable format or quality to support a fair and appropriate dispute resolution process, the arbitrator may require the person who submitted the evidence to resubmit it in a different format or resubmit exact copies.

All evidence must be relevant to the claim(s) being made in the Application(s) for Dispute Resolution. The arbitrator has the discretion to decide whether evidence is or is not relevant to the issues identified on the application and may decline to consider evidence that they determine is not relevant. An Arbitrator is not bound by the traditional rules of evidence (RTA s 75).

Rule 3.17 requires that both parties must have the opportunity to be heard on the question of prejudice arising from accepting late evidence. In *Khan v Savino*, 2020 BCSC 555, the applicant was late to the 14-day deadline by one day, but the arbitrator failed to seek submissions regarding prejudice arising from accepting the late evidence from both parties at the hearing. This was a ground for voiding the result at the dispute resolution and returning the decision to the RTB for re-determination.

The RTB's definition of "days" is as follows, taken from page 4 of the *Dispute Resolution Rules of Procedure*, located on the RTB's website at https://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/rop.pdf

a) If the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday

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

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

d) In the calculation of time not referred to in subsection (c), the first day must be excluded and the last day included

If a witness cannot attend, the Arbitrator may accept affidavits (however, written statements may suffice) and may take testimony over the phone. If a party thinks a witness has something to contribute to their case but the witness refuses to cooperate, the party can then request in advance or at the hearing that the Arbitrator summon that witness (RTB Rules of Procedure s. 5.3 - 5.5).

The applicant should always submit proof of service (i.e. proof that the other side received the Notice of Hearing package) to the RTB. The proof of service will have to be presented if the respondent does not attend – to prove that the

applicant served the Notice of Hearing on the respondent. If it was served in person, the person who served the documents should be at the hearing or should have provided an affidavit of service to the applicant. Proof of service of any evidence not served with the Notice of Hearing should also be submitted to the RTB.

4. The Arbitrator's Decisions

The Arbitrator may render a decision at the end of the hearing and will make a written decision following the hearing. Pursuant to s 77(1) of the *RTA*, the written decision and reasons must be provided **within 30 days**. If a party, pursuant to s 78 of the *RTA* completes a form requesting correction of a technical error, omission, or clarification **within 15 days** of the decision being given, such amended decision or clarification must be provided **within 30 days**.

The Arbitrator's order is final and binding but may be reviewed in limited circumstances (s 79).

5. Amendments to Decisions/Orders

On an Arbitrator's initiative, or at the request of a party, the Arbitrator may correct technical errors, or within 15 days, clarify a decision, reason, or inadvertent omissions in a decision or order the Arbitrator may also require that notice of a request be given to the other party. The Arbitrator shall not exercise this power unless the Arbitrator considers it just and reasonable in the circumstances (*RTA*, s 78(3)).

The RTB continues to amend its Policy Guidelines on key issues under the *RTA*. There are now over 40 detailed RTB Policy Guidelines available that ensure more consistency in dispute resolution decisions, and which should be reviewed in preparation for any hearing. They can found online at https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/calculators-and-resources/policy-guidelines. However, Arbitrators will not be required to consult the Guidelines.

C. Enforcing the Arbitrator's Order

> **NOTE:** If a successful party has any concerns about the ability to serve an order, they should request an order under *RTA*, s 71(1) and (2) permitting alternate means of service. An example of such an order would be one that permits serving a document at a tenant's workplace rather than at their new home.

1. Enforcing a Monetary Order

The Arbitrator may order the tenant or landlord to pay a monetary amount or to bear all or part of the costs of dispute resolution (*RTA*, s 67). **Enforcement of the order is the sole responsibility of the applicant**. If the monetary order is in favour of a **tenant** still living in the rental unit owned by the landlord that the order is against, the Arbitrator may direct the tenant to deduct the award from the rent (*RTA*, s 65(1)(b)). Rent should not be withheld unless the decision explicitly states this is allowed. If the monetary order is in favour of a **landlord** still holding all or part of the security deposit paid by the tenant, it may be deducted from the tenant's security deposit. If neither of these situations applies, one should give the other party a written request for payment stating the amount owing and requesting payment by the date on the order or within a reasonable time.

If the other party still does not pay, the order can be filed in the Small Claims Court.

2. Enforcing a Repair Order

If a landlord fails to make repairs as ordered by an Arbitrator, the tenant can apply for an order requiring compliance. The order to comply may include an order that the landlord reduces the rent until the repairs are complete.

3. Enforcing an Order of Possession

The purpose of an Order of Possession is to gain vacant possession of the rental premises. The landlord should first give a copy of the Order of Possession to each person named in the order. The best way to do this is to hand the copy to the other parties personally or by registered mail. The RTA also permits for the Order of Possession to be posted on the tenant's door. The tenant should be asked to move out of the rental unit within the period given in the order. If a tenant does not comply with the order, the landlord must not attempt to physically remove the tenant by their own means (RTA, s 57(2)), as this is unlawful. Bailiff services, described below, can be used to remove the tenant lawfully.

a) Use of Bailiff Services

If the tenant does not comply with the order and does not vacate the rental unit on the date specified on the order, the Order of Possession can be filed in the Supreme Court of B.C. Registry. The landlord must obtain a Writ of Possession in the Supreme Court and contact a court bailiff service. The Writ of Possession can then be executed by the court bailiff.

Court bailiffs carrying out an eviction can seize and sell tenants' personal property to pay their fees. Tenants have the right to claim exemptions to protect certain items, and bailiffs will often give tenants an opportunity to claim these exemptions when they first show up at the rental unit. Tenants should contact the bailiff company right away if their belongings are taken before they have a chance to claim the exemptions. Tenants must claim their exemptions within two days of the date they found out that their property was seized.

b) Role of the Police

Neither the police nor the RCMP has the authority to evict tenants. The police may attend the occasion to prevent a breach of peace, but they cannot play any role in evicting the tenant. However, the police will attend and remove the tenant if required to do so by the court bailiff.

4. Non-Compliance

Under s 87(3) and s 87(4) of the *RTA*, administrative penalties of up to $5,000 per day may be imposed against landlords for contravening the *RTA*, the Regulations, or an order. Administrative penalties are rarely, if ever, imposed and according to the RTB guidelines, such penalties are to be used only in response to "serious, repeated non-compliance."

The RTB has established a Compliance and Enforcement Unit to conduct investigations of repeated or serious non-compliance with tenancy laws or orders of the Residential Tenancy Branch, issue warnings to ensure compliance, and if necessary, administer monetary penalties.

The Compliance and Enforcement Unit only handles cases in which all attempts to resolve the issue through the RTB have been made, yet there is still no compliance. Usually, the first step that the unit takes would be simply informing the parties of their responsibilities.

Examples of matters that the unit investigates:

- Renters repeatedly not paying rent
- Landlords repeatedly attempting to evict renters illegally
- Refusal to complete health and safety repairs; and
- Illegal rent increases

D. Serving Documents: Giving and Receiving Notice under the *RTA*

The rules for serving the other party with documents depend on what is being served, and who is being served. This section sets out the basics of service, but for more detail or to check the requirements for your specific situation, you may need to check the Residential Tenancy Branch's Residential Tenancy Policy Guideline 12.

1. Service Methods

Generally, items can be served in any of the ways listed below. Some items must be served in particular ways. For details on items that must be served only in certain ways, see the relevant section below.

Different service methods are "deemed" or considered served at certain times after the date on which they are served. Note that, if there is proof that the document was actually received earlier than the date it is deemed to be received, the document may be considered received on the day it was actually received.

a) Personal Service

For tenants serving a landlord, the tenant must serve by leaving a document by leaving a copy with the landlord or landlord's agent. For a landlord serving a tenant, the landlord must leave a copy with the tenant, and in a case with multiple tenants, with each co-tenant separately.

Personal service requires physically handing a copy of the document to the person being served, and, if the person declines the document, leaving a copy of the document near the person, and informing the person being served of the nature of the document.

Persons can be served anywhere the person serving has legal access to, including in public streets and other publicly- or privately-owned areas open to the public.

b) Registered Mail

You may serve these items by sending them by registered mail (any Canada Post service with delivery confirmation to a named person) to the address for service of the other party. For landlords, this is where the landlord lives or carries on business as a landlord. This address may be listed on the lease or other document related to the tenancy. For tenants, this is the address where the tenant resides at the time of mailing or the forwarding address provided by the tenant.

Records indicating that a person refused to accept a piece of registered mail are considered proof of service. Registered mail is deemed received on the **fifth day after mailing**.

c) Ordinary Mail

This method is the same as service by registered mail, except that it is sent by ordinary postal service. Ordinary mail is deemed received on the **fifth day after mailing**.

d) Leaving a Copy of the Document at the Person's Residence with an Adult Person who Apparently Resides with the Person to be Served

This method involves leaving the document with a person 19 years or older who, from what can be seen, observed, and is evident from all the circumstances, resides with the person to be served. Such documents are considered personally served, and so considered served on the **day they are delivered**.

e) Leaving a Copy of the Document in a Mailbox or Mail Slot

This method involves leaving the document in a mailbox or mail slot. For serving tenants, this would be the place where the person to be served resides at the time of service. For landlords, this would be at the address for service identified in the tenancy agreement or on the Notice to End Tenancy the tenant is contesting, or the place where the person to be served carries on business as a landlord. You must make sure that the mailbox or mail slot truely belongs to the person being served, particularly where there are multiple boxes or slots for one building.

Documents left in a mailbox or mail slot are considered served on the **third day after they are left**.

f) Posting

This method involves attaching a copy of the document to a door or other conspicuous place (a place that is clearly visible and likely to attract notice or attention). Placing a copy of the item under a door is not sufficient for service by "posting". For serving tenants, this would be where the person resides at the time of service, and for serving landlords, this would be at the address for service identified in the tenancy agreement or on the Notice to End Tenancy the tenant is contesting, or the place where they carry on business as a landlord.

Documents served by posting are considered served on the **third day after they are attached**.

g) Fax

You can serve a party by fax if they have provided a fax number as their address for service.

Documents served by fax are considered served on the **third day after faxing them**.

h) Substituted Service

If none of the above options are feasible, the Residential Tenancy Branch may order another type of service. In applying for substituted service, you must show that the party being served cannot be served by any of the methods listed and that there is a reasonable expectation that they will receive the documents if served in the manner being proposed.

i) Email

You can serve a party by email to an email address provided for service. The documents are considered served 3 days later when the tenant does not say or show that they received it on an earlier date.

2. Requirements for Specific Documents

a) Application for dispute resolution or Residential Tenancy Branch decision to proceed with a review of a decision

These items, except for applications by landlords for an order of possession or an order ending a tenancy early, may only be served by personal service, registered mail, or by another service method authorized by an order for substituted service.

b) Application by a landlord for an order of possession or an order ending tenancy early

These items can only be served by personal service, registered mail, posting, or by another service method authorized by an order for substituted service.

3. Address at Which the Landlord Carries on Business as a Landlord

To quote from **RTB policy guideline #12**: "A landlord may operate a business as a landlord from one location and operate another business from a different location. The Legislation does not permit a tenant to serve a landlord in one of the ways set out above at the address where the landlord carries on that other business unless the landlord also carries on their business as a landlord at that same address.

If the landlord disputes that they have been served in one of the permitted ways at the address where they carry on business as a landlord, or if the landlord does not attend the hearing, the tenant will have to provide sufficient evidence to the Arbitrator to prove that the address used is, in fact, the address at which the landlord carries on business as a landlord." (BC Residential Tenancy Branch Policy Guideline no. 12: Service Provisions, BC Residential Tenancy Branch, March 2016).

The address at which the landlord carries on business as a landlord may be:

- Set out in the tenancy agreement;
- The landlord's office or resident manager's suite in an apartment building;
- The address where the landlord resides;
- A separate business address in an office or storefront location.

4. Proof of Service

Where service has been affected and a party fails to appear at a hearing, the other party should be prepared to prove that service was affected.

For personal service, this can be done by having the person who actually served the other party appear as a witness at the hearing or provide a signed statement with details about service. For personal service on another adult apparently residing with the other party, details should be included about the date and time of service, identity of the person served, and description of how it was confirmed that the person apparently resides with the party being served.

For registered mail, a Canada Post tracking printout providing information about the delivery of the registered mail item and the signature of the recipient will suffice. Policy Guideline 12 states that intentional refusal to pick up registered mail does not rebut the deemed receipt provisions, so if the tracking report shows that the mail was refused by the recipient, a party should still be able to argue that the documents were properly served. Proof of service by other methods should include details about the date, time, identity of persons served, address where notice was posted, fax number or mailbox information, and any other relevant information. Photographs of service can be valuable in proving that service occurred.

E. Review of Arbitrator's Decision

1. Application for Review of Arbitrator's Decision

Under the RTA, s 79(2), an application may be made for Review of the Decision or Order, only if:

> a) the party was not able to attend the original hearing due to circumstances that could not be anticipated and were beyond their control;
>
> b) there is new and relevant evidence that was not available at the time of the original hearing; or
>
> c) a party has evidence that the Arbitrator's decision or order was obtained by fraud.

The Application for Review does not include an oral hearing. The written application for review must, therefore, be complete and exact, with all necessary documents attached. Note that an Application for Review is not an opportunity to re-argue the facts of the case.

NOTE: There is a filing fee, which cannot be recovered, but which can be waived under the same circumstances for which the original application fee can be waived.

NOTE: *Martin v. Barnett*, 2015 BCSC 426 stands for the principle that a party must exhaust statutory review procedures before bringing an application for judicial review, but where the RTB does not have the power on reconsideration to encompass the alleged error (i.e. where the alleged error does not fall within one of the three grounds for Review Consideration), then reconsideration cannot be considered an adequate alternative to judicial review, and a party is permitted to proceed directly to judicial review. Where the error does fall within the reconsideration power of the RTB, the party must bring a reconsideration application. If they are dissatisfied with that result, a party can judicially review the review consideration decision. *Wang v. Hou*, 2019 CBC 353 adds that procedural fairness issues that cannot be raised on reconsideration can be the basis for independent judicial review of both original decisions and review consideration decisions if either raise procedural fairness issues.

2. Time Limits for Launching a Review

There are strict time limits in the *RTA* for launching a review. For orders of possession (s 54, 55, 56, 56.1), unreasonable withholding of consent (s 34 (2)) and notice to end tenancy for non-payment of rent (s 46) the time limit is **two days**. For a notice to end a tenancy agreement other than under s 46, repairs or maintenance under s 32, and services or facilities under s 27, the time limit is **five days**. For other orders, the time limit is **15 days** (*RTA* s 80).

A review application is not a stay of proceedings but can act as one since court enforcement of an Arbitrator decision requires the landlord/tenant applying for the enforcement to swear to court that they have confirmed with RTB that there is no review application consideration pending. A stay of proceedings can also be requested separately through the Supreme Court.

3. Successful Application for Review

If a party is successful in their Application for Review, that person will receive a written decision from the Arbitrator permitting the review to proceed. The original decision would be set aside, and a new hearing date would be scheduled.

The Arbitrator's decision permitting review must be served on the other side within three days of receiving the decision. The same method of service must be used as outlined above for a Notice of Hearing package.

4. Review by the Supreme Court of B.C.

An Arbitrator's decision can also be reviewed by the Supreme Court of B.C. under the *Judicial Review Procedure Act*, RSBC 1996, c 241. The *RTA* contains a privative clause (s 84.1) which narrows the scope of the review. It is not a new trial. The Supreme Court of B.C. generally would conduct a review if there were:

- Patently unreasonable error of fact or law
- Breach of procedural fairness

When a decision is overturned by the court, the case is usually returned to an Arbitrator to be reheard. Due to the complexity of operating in the B.C. Supreme Court, a lawyer should be involved for a judicial review in B.C. Supreme Court. It is important to get legal advice and act quickly. The Community Legal Assistance Society (CLAS) (604-685-3425) is available to assist with judicial reviews of Arbitrators' decisions where the decision relates to an eviction notice. TRAC's Housing Law Clinic may also assist with judicial review of RTB Decisions: https://tenants.bc.ca/ get-help/ legal-representation/ . For more information on grounds on grounds for judicial review, see judicialreviewbc.ca [3].

NOTE: Losing a judicial review may result in an award of costs, meaning that the losing party must pay the legal costs of the other party.

5. Filing Complaints to the RTB

Complaints about information officers, dispute resolution hearings, or general services of the RTB must be put into writing and mailed to HSRTO@gov.bc.ca or the Executive Director of the RTB:

P.O. Box 9844 Stn Prov Govt

Victoria, B.C. V8W 9T2

Complaints can also be made to the BC Ombudsperson. More information can be found at www.ombudsman.bc.ca.

Note that the BC Ombudsperson does not review decisions; they can only investigate complaints where a person feels that RTB staff has treated them unfairly.

References

[1] https://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/rop.pdf
[2] https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/apply-online/tenants-direct-request#:~:text=A%20tenant%20can%20use%20a,of%20their%20deposit(s)
[3] https://judicialreviewbc.ca/

XI. Common Law

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

Subject to the *RTA*, the common law respecting landlord and tenant applies (*RTA*, s 91).

A. Implied Surrender: Abandonment

At common law, a lease may be ended by “surrender” due to conduct of the parties, consistent only with a “merging” of the tenancy interest back into the landlord’s (owner’s) estate. Surrender occurs, for example, where the tenant abandons the rental unit, and the landlord repossesses and re-rents. Generally, no further rent or compensation for the unexpired portion of the tenancy may be claimed on surrender. However, claims for lost rentals are allowed.

Abandonment is cause for ending a tenancy, but regardless of the wording of the tenant’s notice, or the wording of the acceptance of surrender, or the absence of a notice, abandonment gives rise to the landlord’s duty to mitigate.

B. Frustration

The doctrine of frustration applies to residential tenancy agreements (*RTA*, s 92) and commercial leases (*Commercial Tenancy Act*, s 30). If some unforeseen event occurs that prevents the agreement from being performed, it will be considered to have been frustrated and is thereby terminated at the time of the event. Frustration will rarely be found where the event appears to be largely self-induced (and the result of acts or omissions which might themselves constitute a breach of covenant, e.g., a municipal closure order made pursuant to a fire bylaw where the landlord failed to install sprinklers). If the event is totally self-induced, the perpetrator will not be able to establish frustration. Two factors to

consider beyond the normal contract law concerns are: 1) the length of the unexpired term at the time of frustration, and 2) the possibility of alternative use of the rental unit. If the lease is one to which the *RTA* doesn't apply, by common law the doctrine of frustration would not apply.

C. The Right to Distrain the Tenant's Personal Goods

Under the *RTA*, a landlord has no right to distrain (i.e., seize) a residential tenant's personal goods for default in rental payment, nor may the landlord seize a tenant's personal goods to satisfy another claim or demand, unless the seizure is made by a person authorized by a court order or an enactment (s 26(3) and (4)). If a landlord seizes goods contrary to s 26(3), the tenant may apply to the court for an order to return the property, and/or for a monetary claim for damages. A landlord may, where the tenant has abandoned personal property, remove it from the residential property, and must deal with it in accordance with the *Residential Tenancy Regulations*, which impose specific obligations on landlords in these circumstances. See Sections 24 and 25 of the *RTR* for specific obligations of landlords.

D. Duty to Mitigate

Under s 7(2) of the *RTA*, any time a monetary claim arises between landlord and tenant, both have a duty to mitigate damages (i.e., minimize losses). For example, if a tenant breaks a lease that was for a fixed term of one year, the landlord could sue the tenant for the balance of the rent payments. Nonetheless, the landlord has a duty under s 7(2) to try to minimize their loss by re-renting the rental unit as soon as possible, rather than just suing the tenant for the whole year's rent. A landlord who makes such a claim must prove that they took reasonable steps to re-rent the unit and was not able to do so. See **RTB Policy Guideline 5: Duty to Mitigate Loss**.

XII. Strata Law

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

The *Strata Property Act* (SPA)and the *Strata Property Regulation (SPR)* govern strata properties. Persons renting a residential condominium are tenants under the *RTA*. Such tenants are also subject to Parts 7 and 8 of the *SPA*. For more information, visit Chapter 22: Strata Law.

Section 138 of the *SPA* allows a strata corporation to evict a tenant of a residential strata lot by issuing a Notice to End Tenancy under *RTA* s 47 for a repeated or continuing contravention of a reasonable and significant bylaw or rule if the contravention seriously interferes with another person's use and enjoyment of a strata lot, the common property, or the shared assets. Although a Strata is not included in the definition of "landlord" in the *RTA*, it is considered a landlord when issuing a notice to end a tenancy under section 47 of the *RTA*, defending any application disputing that notice, and seeking an order and writ of possession about that notice.

If a tenant disputes the Notice to End Tenancy, the director will determine whether:

- The tenant repeatedly or continuously contravened a bylaw or rule; and
- The contravention of that bylaw or rule seriously interfered with another person’s use and enjoyment of a strata lot, the common property or the common assets.

The director does not have jurisdiction to determine whether a strata bylaw or rule is legally valid.

XIII. Assisted Living

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

The *RTA* does not cover tenancies in a community care facility under the *Community Care and Assisted Living Act*, in a continuing care facility under the Continuing Care Act, or in a housing-based health facility that provides hospitality support services and personal health care. This may exclude some Assisted Living facilities. Supportive Housing is covered by the *RTA*. As with any issue of jurisdiction, whether the *RTA* applies turns specifically on the facts of a tenancy and on whether any of the exemptions in *RTA* s 4. If an accommodation is exempt from the *RTA*, the resident receives none of the protections under the *RTA*.

Supportive housing is long-term or permanent living accommodation for individuals who need some support services to live independently. Supports offered on-site by supportive housing providers are non-clinical, and residents are not required to receive support to maintain their housing. Any policies put in place by supportive housing providers must be consistent with the *RTA* and regulations. See **Residential Tenancy Policy Guideline 46** for transitional housing, health facilities, and rehabilitative and therapeutic housing.

XIV. Commercial Tenancies

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

The *RTA* does not cover tenancies that are made for a commercial purpose (i.e., Renting a space to open a store). These tenancies would be covered by the *Commercial Tenancy Act*, RSBC 1996, c 57. Commercial tenancy law is much more complex than residential tenancy law, and individuals who believe they may have a legal issue related to a commercial tenancy are strongly encouraged to seek legal advice relevant to their individual situation.

A. Commercial or Residential Tenancy?

If you are unsure as to whether your tenancy is commercial or residential, and whether it falls within the *Residential Tenancy Act*, you should seek legal advice. For assistance in determining whether your tenancy is commercial or residential, it may be helpful to refer to Residential Tenancy Branch Policy Guideline no. 14: Type of Tenancy: Commercial or Residential.

B. Commercial Tenancy Resources

If you encounter an issue related to a commercial tenancy, resources that may be of assistance are listed in the “Resources” section at the end of this chapter.

XV. Manufactured Homes

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. General

The *Manufactured Home Park Tenancy Act, (MHPTA)* applies to owners of manufactured home parks and owners of manufactured homes who rent the sites on which their homes sit. The *MHPTA* only applies if a tenant only rents the site or "pad" that their manufactured home sits on. If the tenant rents both the pad and the home itself from an owner, then they are covered by the *RTA*, not the *MHPTA*.

A landlord may authorize assignment or sublease of a manufactured home park site in a tenancy agreement. The agreement should also include information about the proportionate amount of increases to regulated utilities and local government levies. The inflation rate for each calendar year is available on the RTB website. See the *Manufactured Home Park Tenancy Regulations*.

B. Definitions

1. Common Area

A Common Area is defined as any part of a manufactured home park the use of which is shared by tenants or by a landlord and one or more tenants.

2. Landlord

Includes the owner of the manufactured home site; the owner's agent or another person who permits occupation of the manufactured home site under a tenancy agreement on the landlord's behalf; the owner's heirs, assignees, personal representatives and successors in title; a person, other than a tenant whose manufactured home occupies the manufactured home site, who is entitled to possession of the manufactured home site and exercises any of a landlord's rights under a tenancy agreement or the *MHPTA* in relation to the manufactured home site.

3. Manufactured Home

Means a structure that is designed, constructed or manufactured to be moved from one place to another by being towed or carried, and used or intended to be used as a living accommodation regardless of if it is equipped with wheels.

4. Manufactured Home Site

This is a site in a manufactured home park, rented or intended to be rented to a tenant for the purpose of being occupied by a manufactured home.

5. Cannabis

With the legalization of cannabis in BC, changes to the *MHPTA* were implemented around growing and smoking cannabis.

- If a tenancy agreement included a "no smoking" clause and did not explicitly allow for smoking cannabis, then the "no smoking" clause is deemed to apply to smoking cannabis. This also applies to any clauses that restrict or regulate

smoking. (*MHPTA* s 18.1 (2))

- For *MHPTA* s 18.1 (2), vaporizing a substance containing cannabis is not "smoking cannabis."

- All existing tenancy agreements entered prior to October 17, 2018, are implied to have terms prohibiting growing cannabis on the **outdoor areas or common areas of the home park or home site** unless:
  1. the tenant is growing, in an outdoor area of the manufactured home park, one or more cannabis plants that are medical cannabis,
  2. growing the plants is not contrary to a term of the tenancy agreement, and
  3. the tenant is authorized under applicable federal law to grow the plants at the manufactured home park and the tenant follows the requirements under that law with respect to the medical cannabis.

C. Moving In and Moving Out

Landlords may require a tenant to provide proof of third-party liability insurance held by the mover as security against damages caused by the move of a home into a park or out of a park (*MHPTA*, s 29).

Prior to a person's entering into a tenancy agreement with a landlord, the landlord must disclose in writing to that person all rules in effect at the time of their entering into the tenancy agreement.

According to *MHPTA* s 30, when moving out the tenant must leave the manufactured home site reasonably clean and give the landlord all the keys or other means of access to or within the manufactured home park that are in the tenant's possession.

> **NOTE:** "To and within the manufactured home park" means that keys or other such items that unlock, for example, a bathroom within the home park are also included in the category controlled by *MHPTA* s 30.

D. Deposits

1. Security Deposits

A landlord cannot require or accept a security deposit in respect of a manufactured home site tenancy. If a landlord accepts a security deposit from a tenant, the tenant may deduct the amount of the security deposit from rent or otherwise recover the amount (*MHPTA*, s 17). If a security deposit was collected before the *MHPTA* became effective in November 2002, it may be retained until the end of a tenancy.

A landlord who does not return or file a claim against the deposit at the end of tenancy could be required to pay the tenant double the amount of the deposit.

2. Pets

Landlords may not charge pet damage deposits but may include terms in the tenancy agreement that prohibits pets or restrict the size, kind, and number of pets. Landlords may also add terms that govern the tenant's obligation regarding keeping their pets on the manufactured home site.

3. Fees

a) Prohibited Fees (MHPTA, s 89(2)(k); *MHPTR*, s 3)

A landlord must not charge:

- a guest fee, regardless if the guest stays overnight; or
- a fee for replacement keys or other access devices if the replacement is required because the landlord changed the locks or other means of access.

b) Refundable Fees

So long as an access device is not a tenant's sole means of access to the manufactured home park, a landlord may charge a refundable fee for that device. The fee cannot be greater than the direct cost of replacing the access device.

Some non-refundable fees are permissible (e.g., a $25 charge for late payment of rent or NSF cheques) if the fees are identified in the tenancy agreement. A list of permissible non-refundable fees is listed in the *Manufactured Home Park Tenancy Regulations (MHPTR)* s 5.

E. During the Tenancy

1. Rent Increases

a) Amount

Usually, landlords can increase rent annually by a percentage equal to the Consumer Price Index (CPI) plus the proportionate increase in local government levies and regulated utilities (*MHPTA*, s 36(1)(a) and see *MHPTR* Part 5). However, the maximum allowable annual rent increase for rent increases with an effective date in 2023 is only 2% plus the proportional amount, not the "inflation rate." A landlord may apply to an Arbitrator for approval of a rent increase in an amount that is greater than the amount calculated under the regulations.

> **NOTE:** A landlord may apply under s 36 of the *MHPTA* for an additional rent increase above the rent increase formula but can only do so under certain circumstances: see *MHPTR*, s 33(1) for a list of requirements for when the landlord is allowed to do so.

b) Notice

A landlord must give a tenant notice of a rent increase at least three months before the effective date of the increase. The notice of increase must also be in the approved form. If the increase does not meet these two requirements, the notice takes effect on the earliest date that it does comply (*MHPTA*, s 35(2)).

c) Timing

A rent increase cannot be imposed for at least 12 months after whichever of the following applies (*MHPTA*, s 35(1)):

- if the tenant's rent increase has not previously been increased, the date on which the tenant's rent was first established; or
- if the tenant's rent has previously been increased, the effective date of the last rent increase made in accordance with this *MHPTA*.

F. Manufactured Home Park Rules and Committee

In accordance with s 31 - 33 of the *MHPTA* and the associated regulations, the landlord and tenants of a manufactured home park may establish and select the members of a park committee. A park committee must make all its decisions by unanimous agreement of all members of the committee (*MHPTR* s 22), except resolutions regarding secret ballots made under *MHPTR*, s 23(8), which must be decided by majority vote.

A park committee, or if none exists, the landlord, may establish, change or repeal a rule if it is reasonable in the circumstances and if the rule has one of the following effects (*MHPTR*, s 30):

- it promotes the convenience or safety of the tenants;
- it protects and preserves the condition of the manufactured home park or the landlord's property;
- it regulates access to or fairly distributes a service or facility; or
- it regulates pets in common areas.

The rule must not be inconsistent with the *MHPTA* or the regulations. A rule established, or changed is enforceable against a tenant only if (*MHPTR* s 30(3)):

- the rule applies to all tenants in a fair manner;
- the rule is clear enough that a reasonable tenant can understand how to comply with the rule;
- notice of the rule is given to the tenant in accordance with s 29 (disclosure); and
- the rule does not change a material term of the tenancy.

G. Tenancy Agreements

Landlords and tenants may agree to any term so long as the term is not an attempt to avoid or contract out of the *MHPTA* or the regulations. Any attempt to avoid or contract out of the MHPTA or regulations is of no effect (*MHPTA*, s 5). Furthermore, a term will not be enforced if it is found to be unconscionable, or the term is not expressed in a manner that clearly communicates the rights and obligations under it. The rights and obligations established by or under the *MHPTA* are enforceable between a landlord and tenant under a tenancy agreement.

1. Liability for Non-compliance

If a landlord or tenant does not comply with the *MHPTA*, the regulations, or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results (s 7(1)).

> **NOTE:** The innocent party always has a duty to mitigate their losses.

2. Tenant's Right to Quiet Enjoyment

A tenant is entitled to quiet enjoyment including but not limited to the following (*MHPTA*, s 22):

- reasonable privacy;
- freedom from unreasonable disturbance;
- exclusive possession of the manufactured home site subject only to the landlord's right to enter the manufactured home site in accordance with *MHPTA* section 23; and
- use of common areas for reasonable and lawful purposes, free from significant interference.

H. Ending a Tenancy

A tenancy ends only if one or more of the following applies (*MHPTA*, s 37(1)):

- the tenant or landlord gives a notice to end the tenancy in accordance with one of the following:
  - s 38 (tenant's notice);
  - s 39 (landlord's notice: non-payment of rent);
  - s 40 (landlord's notice: cause); s 41 (landlord's notice: end of employment);
  - s 42 (landlord's notice: landlord's use of property); or,
  - s 43 (tenant may end tenancy early).

  > **NOTE:** Each of these sections sets out notice requirements. It is important that any notice given meets the form and content requirements set out in *MHPTA*, s 45.
- the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the manufactured home site on the date specified as the end of the tenancy;
- the landlord and tenant agree in writing to end the tenancy;
- the tenancy agreement is frustrated; or
- an Arbitrator orders that the tenancy is ended.
- the tenancy agreement is a sublease agreement.

1. Tenant's Notice

a) Periodic

A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that is:

- not earlier than one month after the date the landlord receives the notice; and
- is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

b) Fixed Term

A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is:

- not earlier than one month after the date the landlord receives the notice,

- is not earlier than the date specified in the tenancy agreement as the end of the tenancy; and
- is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

c) Material Term Breach

If the landlord breaches a material term, the tenant may end the tenancy by giving the landlord a notice to end the tenancy effective on a date that is after the date the landlord receives the notice.

> **NOTE:** Unlike the RTA, the MHTPA does not contain provisions allowing tenants to break a lease when feeling family violence or moving into long-term care.

2. Failure to Pay Rent

A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving a notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives notice (*MHPTA*, s 39(1)). Notice given under this section must comply with the form and content requirements found in s 45. A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under the *MHPTA* to deduct from rent, or if rent is paid within five days of receiving the notice to end tenancy, or if the tenant disputes the notice by applying for dispute resolution.

However, if the tenant does not dispute the notice and does not pay the amount owed the landlord can go to the Residential Tenancy Branch and apply for an Order of Possession without a hearing.

> **NOTE:** After the allocated 5 days to pay overdue rent, the landlord is no longer legally obligated to accept any late rent to continue to tenancy.

3. Landlord's Use

A landlord may end a tenancy agreement by giving notice to end the tenancy agreement if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to convert all or a significant part of the manufactured home park to a non-residential use or a residential use other than a manufactured home park (*MHPTA*, s 42(1)). A notice to end a tenancy under this section must end the tenancy effective on a date that is:

- not earlier than 12 months after the date the notice is received; and
- is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Once a tenant receives a 12-month notice, the tenancy will end 12 months after the notice is received, regardless if it is a periodic tenancy or a fixed term tenancy with a remaining term longer than 12 months, and the tenant must vacate the manufactured home park before that date.

A tenant who is given a 12-month notice may end their tenancy early if they give the landlord 10 days' written notice in accordance with *MHPTA* s 43.

A landlord that makes a 12-month notice must compensate the tenant $20000 on or before the effective date of the notice. The tenant can apply for dispute resolution for additional compensation between the assessed value of the home and $20000 if:

- They are not able to obtain the necessary permits, licenses, approvals, or certificates required by law to move the manufactured home or they are not able to move the manufactured home to another manufactured home site within a reasonable distance of the current manufactured home site; and
- The tenant does not owe any tax in relation to the manufactured home.

If the above situation happens and the home cannot be moved out of the park, the landlord cannot claim reimbursement from the tenant for any cost incurred for removing, storing, advertising, or disposing of the manufactured home.

- If the landlord closes a manufactured home park to be converted for residential or non-residential use (s. 42(1)) but has not taken any steps to accomplish the stated purpose in a reasonable time after the effective date of the notice, the landlord will have to compensate the tenant $5000- or 12-months' rent, whichever is higher. However, if an Arbitrator determines there are extenuating circumstances that prevented the Landlord from accomplishing the stated purpose for ending the tenancy, they can excuse the landlord from paying this compensation.

4. Landlord's Notice: Cause

Refer to s 40(1) of the *MHPTA*; it is similar to the *RT*A s 46 (Landlord's Notice: Cause) and lists the same grounds under which a landlord can issue a notice to end tenancy under this section.

NOTE: Notice to end tenancy must take effect on a date that is:

- not earlier than one month after the date the notice is received, and
- the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

5. Disputing Notice

Notices of termination or eviction can be disputed by applying for dispute resolution, but must be done so within the following set time limits that start running after the date the tenant receives the notice:

- non-payment of rent: **five days**;
- landlord's cause: **10 days**;
- landlord's use of property: **15 days**; and
- landlord's use of property, demolition or conversion: **30 days**.

6. Required Form

In order to be effective, a notice to end tenancy must be in writing and must be signed and dated by the landlord or tenant giving the notice, give the address of the manufactured home site, state the effective date of the notice, except for a notice under s 38(1) or (2) (tenant's notice), state the grounds for ending the tenancy, and **when given by a landlord be in the approved form** (*MHPTA*, s 45).

I. Dispute Resolution

Disputes between landlords and tenants may be resolved by applying to dispute resolution at the Residential Tenancy Branch in the same manner as for an ordinary residential tenancy. The following are typical examples of issues that may lead to a need for dispute resolution:

- rights and prohibitions under the *MHPTA*;
- rights and obligations under the terms of a tenancy agreement that are required or prohibited under this *MHPTA*;
- tenant's use, occupation or maintenance of the manufactured home site; and
- the use of common areas or services.

A dispute between landlord and tenant generally has to be dealt with in dispute resolution unless the claim is for more than the monetary limit under the *Small Claims Act* ($35000 as of June 2019), the application was not filed within the application period before the Supreme Court, or the dispute is linked substantially to a matter that is before the Supreme

Court.

See *MHPTA* s 52(1) on starting dispute resolution proceedings. Proceedings can be started by either the landlord or the tenant filing an application for dispute resolution with the director. The application must be in the approved form and include full particulars of the dispute, and be accompanied by the fee; it is possible for this fee to be waived.

> **NOTE:** If the *MHPTA* does not state a time by which an application for dispute resolution must be filed, it must be filed within two years of the date that the tenancy to which the matters relate ends or is assigned (*MHPTA*, s 53(1)).

XVI. Income Assistance

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. Shelter Aid for Elderly Renters (SAFER)

The SAFER program is a rental assistance program administered by BC Housing. It is intended to help senior citizens (i.e. people over 60). Applicants must be Canadian citizens, authorized to take up permanent residence in Canada, or Convention refugees. Applicants must have lived in B.C. for at least one year prior to applying. An applicant must also be paying over 30 percent of their income towards rent. There is a gross monthly income requirement that varies depending on the location of residence and is subject to being updated.

Residents of subsidized housing, cooperative housing, and manufactured homes (unless they are renting both the trailer home **and** the pad) do not qualify for the SAFER program.

More information and application forms are available from B.C. Housing. Application forms are available in English and Chinese. Application forms may be obtained from the SAFER's webpage at:

https://www.bchousing.org/housing-assistance/rental-assistance-programs/SAFER or contact BC Housing.

> B.C. Housing
>
> Suite 101 - 4555 Kingsway
>
> Burnaby, B.C. V5H 4V8
>
> Toll-free: 1-800-257-7756
>
> Lower Mainland: 604-433-2218

B. BC Housing Corporation's Family Rental Assistance Program (RAP)

The Rental Assistance Program provides eligible low-income, working families with at least one dependent child with assistance to help pay their rent. The maximum gross annual household income level is $ 40,000. A child up to age 25 qualifies as dependant as long as the child is attending school. A child of any age with mental or physical infirmity is accepted as a dependant.

A rental assistance calculator is available on the RAP website as well as other information and application forms see www.bchousing.org/Options/Rental_market/RAP or contact **B.C. Housing** (above).

XVII. Illegal Suites

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

Municipalities all over the Lower Mainland are attempting to regulate secondary suites. In most Lower Mainland municipalities, secondary suites are regulated and may be legal (though some landlords may be operating the secondary suite without approval). The bylaws and policy guidelines are municipality-specific, so clients should be directed to their municipal offices to determine the specific enforcement policies for their municipality.

If a city inspector determines that a suite should be closed down, the landlord may be given notice to shut down the suite by the city, which will allow them to give a One Month Notice to End Tenancy for Cause to the tenant. **The *RTA* applies independently of the legality of the suite.**

For more information on the issue of tenancy agreements relating to illegal or unapproved suites, see RTB Policy Guideline 20: Illegal Contracts.

XVIII. Forms

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

Check the RTB website: https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/forms for current forms and fees. Always ensure you are using the most recent forms. Be aware that some applications require fees (a standard Application for dispute resolution costs $100). Waivers are available for low-income applicants.

The dispute resolution policy guidelines are also available online, as are decisions by Arbitrators. These are useful for preparing for a hearing, but they are **NOT** binding on Arbitrators.

XIX. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 2, 2023.

A. Legislation and Regulations

Residential Tenancy Act, SBC 2002, c 78 [RTA].
Website: https://www.bclaws.ca/civix/document/id/complete/statreg/02078_01

Residential Tenancy Regulation, BC Reg 477/2003, [RTR].
Website: https://www.bclaws.ca/civix/document/id/complete/statreg/477_2003

- The RTA and RTR set out the law of residential tenancies in BC. They will often hold the ultimate answer to questions relating to disputes between landlords and tenants.
- For the current status of the RTA and RTR, refer to CCH British Columbia Real Estate Law Guide, Robert J. Maguire, Rose H. McConnell, loose-leaf (Toronto, ON: CCH, undated).

Manufactured Home Park Tenancy Act, SBC 2002, c 77 [MHPTA].
Website: https://www.bclaws.ca/civix/document/id/complete/statreg/02077_01

Manufactured Home Park Tenancy Regulation, BC Reg 481/2003
Website: https://www.bclaws.ca/civix/document/id/complete/statreg/481_2003

The *Residential Tenancy Act*, SBC 2002, c 78 [RTA] and *Residential Tenancy Regulation [RTR]*, BC Reg 477/2003 as well as the rules of procedure are amended occasionally; check the Residential Tenancy Branch (RTB) website [1] to get the most up to date information.

B. Resources and Policy Guidelines

TRAC Tenant Resource & Advisory Centre

Website: https://www.tenants.bc.ca

Provides a variety of publications relating to tenant law, including the Tenant Survival Guide (also available online as a wikibook, via the Clicklaw website: wiki.clicklaw.bc.ca/index.php/Tenant_Survival_Guide)

Residential Tenancy Branch

Main Office:
400 - 5021 Kingsway
Burnaby, B.C. V5H 4A5
Website: https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies
Office Hours: M-F 9:00 am - 4:00 pm

Information line:

- Metro Vancouver 604-660-1020
- Victoria 250-387-1602
- Elsewhere in BC 1-800-665-8779
- Fax: 604-660-2363
- E-mail: HSRTO@gov.bc.ca

Downtown Eastside Satellite Office:
Four Corners
390 Main Street (Entrance on Hastings)
Vancouver, B.C. V6A 2T1
Office Hours: M-F 12:30 pm - 4:00pm

> **NOTE:** The main office in Burnaby is a full-service office. The Downtown Eastside office is a satellite office and does not handle money. Dispute applications can only be filed there by low-income applicants who are eligible for a fee waiver. Those offices are staffed with information officers.

The RTB website [1] contains forms, legislation and RTB interpretation guidelines, and includes the following useful publications:

- *Residential Tenancy Branch Dispute Resolution Rules of Procedure*
  - Website: https://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/rop.pdf
- *Residential Tenancy Information Sheets*
  - Website: http://bit.ly/1KTmo6l
- *RTB Policy Guidelines: Detailed information on common problem areas; drafted by RTB Arbitrators*
  - Website: https://bit.ly/1ei1NfH
- *RTB Calculators: Help in calculating rent increases, dates, deposits and more*
  - Website: https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/calculators-and-resources/calculators

B.C. Housing

Suite 101 - 4555 Kingsway
Burnaby, B.C. V5H 4V8
Website: https://www.bchousing.org
Toll-free: 1-800-257-7756

Information for tenants living in public, subsidized housing.

Landlord BC
Website: https://landlordbc.ca
E-mail: info@landlordbc.ca
Direct: 1-888-330-6707

Vancouver Office:
1210-1095 West Pender Street
Vancouver, British Columbia V6E 2M6
Telephone: 604-733-9420
Fax: 604-733-9420

Victoria Office:
830B Pembroke Street
Victoria, British Columbia V8T 1J9
Telephone: 250-382-6324
Fax Local: 250-382-6006
Fax Toll-Free: 1-877-382-6006

C. Books

Margaret Carter-Pyne, Residential Tenancy Law in British Columbia: Everything you need to know to prevent a disaster (Victoria, BC: Sunnymead Publishing, 2009).

- A useful resource for tenants in preparing for a hearing.

Allan Wotherspoon, Annotated British Columbia Residential Tenancy Act (Aurora, ON: Canada Law Book, 2005).

- This is a loose-leaf volume updated once or twice annually.

CCH British Columbia Real Estate Law Guide, Robert J. Maguire, Rose H. McConnell, loose-leaf (Toronto, ON: CCH, undated).

- A summary of the state of the RTA and RTR.

References

[1] https://www.gov.bc.ca/landlordtenant

Chapter Twenty – Small Claims and the CRT

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

Most people with legal claims under $35,000 are not lawyers and do not have the benefit of legal representation. It can be challenging to choose how to resolve a dispute and how much to claim. While this guide primarily focuses on the Small Claims Court, it briefly reviews other options for resolving disputes, including the Civil Resolution Tribunal (CRT) for Small Claims up to $5,000 in British Columbia. On April 1, 2019, the CRT's jurisdiction expanded to include certain claims about motor vehicle accidents, including liability and damages claims up to $50,000, minor injury determinations, and accident benefits. This chapter of the manual only covers small claims at provincial court and the CRT's small claims jurisdiction, not the accident claims jurisdiction. The jurisdiction for motor vehicles accidents is complicated.

If you are a party to a small claims action or proceeding, take the time to read this guide in its entirety. If you fail to comply with the rules, the process may be delayed, your claim or defence may be weakened, and you may be liable to pay costs and penalties to the other party. Reading this guide will help you be more prepared and minimize confusion.

This guide is meant to explain the general Small Claims Court process; it is not legal advice. Read the guide along with the Small Claims Court Rules and the Civil Resolution Tribunal Rules and obtain legal advice where necessary.

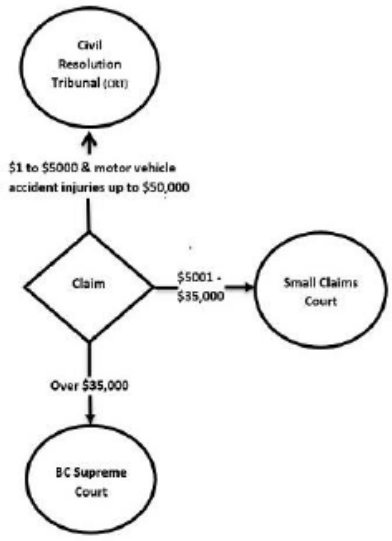

Figure from Provincial Court of BC website: https:/ / www. provincialcourt. bc. ca/ types-of-cases/ small-claims-matters"

Directions for in-person proceedings and filings for small claims court (i.e., claims above $5,000) were significantly affected by the ongoing COVID-19 pandemic; however, many of the restrictions have since been removed. Consult the Provincial Court of BC website for up-to-date COVID-19 related notices, directions, and information. As of the time of writing, the following protocols apply to appearances:

- As of July 18th, 2022, BC Provincial court's operations moved away from telephone/Teams audioconferences as the default method of appearance. Some appearances continue to be remote. For the default method of attendance for each appearance, see https://www.provincialcourt.bc.ca/types-of-cases/small-claims-matters/chief-judge-practice-directions and Appendix "A" of NP 28: https://www.provincialcourt.bc.ca/downloads/Practice%20Directions/NP28.pdf
- For small claims trials, including Rule 9.1 simplified trials, and Rule 9.2 summary trials, and Rule 13 default hearings, the default method of hearing and appearance will be in-person, unless a judge otherwise orders or directs.

For the latest updates, we recommend you contact the court registry or visit: https://www.provincialcourt.bc.ca/. The CRT is fully functional and remained so throughout the pandemic.

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

1. Legislation

Corporations

Business Corporations Act, SBC 2002, c 57. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/02057_00

Canada Business Corporations Act, RSC 1985, c C-44. Website: http://laws-lois.justice.gc.ca/eng/acts/c-44/

Cooperative Associations & Societies

Cooperative Association Act, SBC 1999, c 28. Website: http://www.bclaws.ca/Recon/document/ID/freeside/00_99028_01

Societies Act, SBC 2015, c 18. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/15018_01

Consumer Protection

Business Practices and Consumer Protection Act, SBC 2004, c 2. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/04002_00

Judgments

Court Order Enforcement Act, RSBC 1996, c 78. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96078_01

Court Order Interest Act, RSBC 1996, c 79. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96079_01

The Enforcement of Canadian Judgments and Decrees Act, SBC 2003, c 29. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_03029_01

Court Rules

Bill 19, Civil Resolution Tribunal Amendment Act, 2015, 4th Sess, 40th Parl, British Columbia, 2015 (assented to May 14th, 2015). Website: http://www.bclaws.ca/civix/document/id/lc/billsprevious/4th40th:gov19-1

Civil Resolution Tribunal Act, SBC 2012, c 25. Website: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/12025_01

Civil Resolution Tribunal Rules, (effective May 1, 2023). Website: https://civilresolutionbc.ca/wp-content/uploads/CRT-Rules-in-force-May-1-2023.pdf

Court of Appeal Act, RSBC 1996, c 77. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96077_01

Court of Appeal Rules, BC Reg 297/2001. Website: http://www.bclaws.ca/Recon/document/ID/freeside/297_2001a

Court Rules Act, RSBC 1996, c 80. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96080_01

Judicial Review Procedure Act, RSBC 1996, c 241. Website: http://www.bclaws.ca/civix/document/id/roc/roc/96241_01

Small Claims Act, RSBC 1996, c 430. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96430_01

Small Claims Rules, BC Reg 261/93. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/261_93_00b

Supreme Court Act, RSBC 1996, c 443. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96443_01

Supreme Court Civil Rules, BC Reg 168/2009. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/168_2009_00

Other Important Statutes

Apology Act, SBC 2006, c 19. Website: http://www.bclaws.ca/Recon/document/ID/freeside/00_06019_01

Bank Act, SC 1991, c 46. Website: https://laws-lois.justice.gc.ca/eng/acts/B-1.01/page-1.html

Bankruptcy and Insolvency Act, RSC 1985, c B-3. Website: https://laws-lois.justice.gc.ca/eng/acts/B-3/page-1.html

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28. Website: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/03028_01

Crown Proceeding Act, RSBC 1996, c 89. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96089_01

Employment Standards Act, RSBC 1996, c 113. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96113_01

Evidence Act, RSBC l996, c 124. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96124_01

Insurance (Vehicle) Act, RSBC 1996, c 231. Website: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96231_01

Law and Equity Act", RSBC 1996, c 253. Website: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96253_01

Limitation Act, SBC 2012, c 13. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_12013_01

Local Government Act, RSBC 1996, c 323. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/r15001_00

Motor Vehicle Act, RSBC 1996, c 318. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96318_00

Negligence Act, RSBC 1996, c 333. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/96333_01

Occupier's Liability Act, RSBC 1996, c337. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/96337_01

Personal Property Security Act, RSBC 1996, c 359. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96359_01

Privacy Act, RSBC 1996, c 373. Website: http://www.bclaws.ca/Recon/document/ID/freeside/00_96373_01

Real Estate Services Act, SBC 2004, c 42. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/04042_01

Residential Tenancy Act, SBC 2002, c 78. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02078_01

Sale of Goods Act, RSBC 1996, c 410. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96410_01

Strata Property Act, SBC 1998, c 43. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/98043_01

Wills, Estates and Succession Act, SBC 2009, c 13. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/09013_01

2. Books

Bullen, Leake, Jacob, and Goldrein. *Bullen and Leake and Jacob's Precedents of Pleadings*, 15th ed. (London: Sweet and Maxwell, 2004).

Burdett, E. (Ed.). *Small Claims Act and Rules—Annotated*. (Vancouver, B.C.: The Continuing Legal Education Society of British Columbia, Dec 2014).

Celap, M. and Larmondin, P.J. *Small Claims Court for the Everyday Canadian*. (North Vancouver, B.C.: Self-Counsel Press, 2000).

Fraser, Horn and Griffen. *The Conduct of Civil Litigation in British Columbia*. 2nd ed. (Markham: Butterworths, 2007).

Keating, M. *Small Claims Court Guide for British Columbia*. (North Vancouver, B.C.: Self-Counsel Press, 1992).

Martinson, D.J. (Manual Coordinator). *Small Claims Court—1994*. (Vancouver, B.C.: The Continuing Society of British Columbia, April 1994).

Mauet, Casswell, and MacDonald. *Fundamentals of Trial Techniques* 2d Canadian ed. (Toronto: Little Brown, 1995).

McLachlin and Taylor, *British Columbia Court Forms*. (Markham, Ont.: LexisNexis Canada, 2005).

Moore Publishing. (Ed.) *Small Claims Practice Manual*, 3rd Ed. (Richmond, B.C.: Moore Publishing Ltd, 1999).

UBC Law Review Society. (Eds.) *Table of Statutory Limitations for the Province of British Columbia, Revised and Consolidated*. (Vancouver, B.C.: University of British Columbia Law Review Publication, 2006).

Vogt, J. (Ed.). *Provincial Court Small Claims Handbook*. (Vancouver, B.C.: The Continuing Legal Education Society of British Columbia, January 1997).

3. Websites

British Columbia Court of Appeal and Supreme Court Judgment Database Website: https://www.bccourts.ca/search_judgments.aspx

CanLII - Caselaw and legislation database. Website: https://www.canlii.org/en/

Civil Resolution Tribunal Website: https://civilresolutionbc.ca/

Civil Resolution Tribunal (Solutions Explorer) Website: https://civilresolutionbc.ca/solution-explorer/

Civil Resolution Tribunal Fees Website: https://civilresolutionbc.ca/resources/crt-fees/

Provincial Court Judgment Database Website: http://www.provincialcourt.bc.ca/judgments-decisions

- Contains selected decisions from 1999 to the present.

Provincial Courthouses Directory Website: https://smallclaimsbc.ca/court-locations

- Contains Small Claims Court locations
- Note: www.smallclaimsbc.ca is run by the Justice Education Society and gives information on Small Claims court. It is not run by the small claims court itself.

Small Claims Court Website: http://www2.gov.bc.ca/gov/content/justice/courthouse-services/small-claims

Small Claims Fees Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/261_93_05b

Small Claims Forms Website: http://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-forms/small-claims-forms

Small Claims Pilot Project Website: http://www2.gov.bc.ca/gov/content/justice/courthouse-services/small-claims/pilot

4. Other Resources

UBC Law Library

- Most of the books listed above are available in the Law Library. The *Small Claims Acts and Rules Annotated* and the *Provincial Court Small Claims Handbook*, published by the Continuing Legal Education Society (CLE), are recent publications written by Small Claims Court judges. They include the Act, Rules, and copies of all of the forms. Students can access an online edition of the *Provincial Court Small Claims Handbook* on the UBC Law Library website [1].

Court Registry

- The Small Claims Court registry staff does not give legal advice, but they are experienced with the rules and procedures and are helpful. See Appendix A: Small Claims Registries.

Online Help Guide Small Claims BC

- https://smallclaimsbc.ca/is a website run by Justice Education Society (JES) with guidelines for small claims processes from start to finish

DIAL-A-LAW

- DIAL-A-LAW ((604) 687-4680 or 1-800-565-5297) is a library of pre-recorded messages on a variety of legal topics available by telephone 24 hours a day, seven days a week. Lawyers under the supervision of the Canadian Bar Association, BC Branch, prepare the tapes. Several tapes deal with Small Claims Court. The content of the tapes is also available online: http://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts

Company Search

To search for a **provincially** regulated company, the client may request a company or society search in person:

Surrey Board of Trade

Address	101 – 14439 104th Ave Surrey, BC V3R 1M1
Phone	(604) 581-7130 Toll-free: 1-866-848-7130

Small Business B.C.

Address	54 - 601 West Cordova St Vancouver, BC V6B 1G1
Phone	(604) 775-5525 Toll-free in B.C.: 1-800-667-2272

BC Registry Services

Address	940 Blanshard Street Victoria, BC V8W 2H3

Phone	(250) 387-7848 Vancouver: (604) 660-2421 Toll-free in B.C.: 1-877-526-1526

The client may also write to:

Registrar of Companies
P.O. Box 9431 Station Provincial Government Victoria, BC V8W 9V3

For more information about searching for provincial companies, refer to:

- http://smallbusinessbc.ca/services/
- http://www.bcregistryservices.gov.bc.ca/
- http://www.bconline.gov.bc.ca (online feature now available by opening a new account).

Partnerships and non-profit societies are also registered in the company directory and would show up in a search. In cases that involve franchises, it is important to do a company search to see how the other party is registered; it may be possible to sue the parent company and the individual who owns the franchise rights. The search costs $10, and cheques and/or money orders should be made payable to the Minister of Finance at:

BC Registries and Online Services
Courier: 200 - 940 Blanshard Street, Victoria, BC V8W 3E6
Mail: PO Box 9431 Stn Prov Govt, Victoria, BC V8W 9V3

If Unincorporated:

Online	Website [2]
Address	City of Vancouver Licence Office 515 West 10th Ave Vancouver, BC V5Z 4A8
Phone	(604) 873-7611

To search for a **federally** regulated company, refer to:

Online	Website [3]
Address	Industry Canada C.D. Howe Building 235 Queen Street Ottawa, Ontario K1A 0H5
Phone	

A collection of useful company directories can be found on the Industry Canada website under the “Programs and Services” heading. Federal corporations can be searched free of charge online.

> **NOTE:** If the defendant is a business, it may be worth checking if that defendant has declared bankruptcy. To do so contact Industry Canada’s Head Office of the Superintendent of Bankruptcy at (613) 941-2863 for free.

Translation and Support Services

To find support services and resources, including agencies and people that can provide translation services, please visit:

MOSAIC (Personal/Legal Translation Services)

Online	Website [4]
Address	5575 Boundary Road Vancouver, BC V5L 2Y7
Phone	(604) 254-0469 Toll-free: 1-877-475-6777 Fax: (604) 254-2321 Toll-free fax: 1-877-254-2321

Society of Translators and Interpreters of B.C.

Online	Website [5]
Phone	(604) 684-2940 Fax: (604) 684-2947

DIVERSEcity

Online	Website [6]
Phone	(604) 597-0205 Fax: (604) 597-4299

WelcomeBC

Online	Website [7]
Phone	(604) 660-2421 Toll Free: 1-800-663-7867

OPTIONS

Guildford Location

Online	Website [8]
Phone	(604) 584-5811 Fax: (604) 584-7628

Newton Location

Online	Website [8]
Phone	(604) 596-4321 Fax: (604) 572-7413

S.U.C.C.E.S.S. Translation & Interpretation

Online	Website [9]
Phone	(604)-408-7274 ext 2042

Westcoast Association of Visual Language Interpreters

Online	Website [10]

Citizenship and Immigration Canada

Online	Website [11]
Phone	1-888-242-2100

Affiliation of Multicultural Societies and Service Agencies of B.C.

Online	Website [12]
Phone	(604) 718-2780 1-888-355-5560 Fax: (604) 298-0747

Immigrant Services Society of B.C.

Head Office

Online	Website [13]
Phone	(604) 684-2561 Fax: (604) 684-2266

Vancouver (Terminal) Location

Online	Website [13]
Phone	(604) 684-2561 Fax: (604) 684-2266

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III. Do You Have a Claim?

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

In order to have a legal claim, it must be recognized by the law. A frivolous claim is one that does not disclose a legal cause of action, is incapable of proof, or is otherwise bound to fail. A vexatious claim is one that is brought in order to annoy, frustrate, or antagonize the defendant. A claim may be both frivolous and vexatious.

If a claim is frivolous or vexatious, the claimant will lose and may be penalized up to 10% of the amount of the claim or counterclaim (*Small Claims Rules*, BC Reg 261/93, 20(5) [SCR]). The penalty could be up to $8,750 on a $35,000 claim; it pays to research your cause of action and limit your claim to the proper amount.

A. Types of Claims & Remedies

It is helpful to research each of the following types of claims to ensure that a claim falls within at least one of them. See Appendix G: Causes of Action for a partial list of specific causes of action. If you are unable to fit your claim into one of the listed categories, you should consult a lawyer to see if you have a cause of action.

1. Tort

Torts are offences committed by one person against another. Examples include assault, battery, and negligence. Each tort has its own test and defences. Tort law continues to evolve and a person planning to bring a claim in tort should research what must be proven to be successful and which defences may be available to the defendant. Resources include CanLII.org, the courthouse library, and a practicing lawyer.

2. Contract

Contract law governs voluntary relationships between parties. It is a complicated and nuanced area of the law and a person planning to bring a claim in contract law should research what must be proven to be successful and which defences may be available to the defendant. Resources include CanLII.org, the courthouse library, and a practicing lawyer.

> **NOTE:** Courts will generally not enforce illegal contracts or dishonest transactions (See *Faraguna v Storoz* [1], [1993] BCJ No. 2114). However, *Transport North American Express Inc. v New Solutions Financial Corp.* [2], 2004 SCC 7 states that a court may enforce legal portions of a contract, thus effectively severing the illegal portion. A common example involves contracts purporting to charge interest rates prohibited under s 347 of the *Criminal Code*. The court will not enforce a term in a contract purporting to charge such a rate. (However, section 347.1 exempts payday loans from criminal sanctions, if certain conditions are met; see Section V.G: Regulation of Payday Lenders and Criminal Rate of Interest in Chapter 11: Consumer Protection).

3. Equity

The usual remedy for torts and breaches of contract is monetary damages. In circumstances where monetary damages are inadequate or where a legal remedy is improper in the circumstances, the court may grant other relief such as an injunction. The Small Claims Court, pursuant to s 2 of the *Small Claims Act* [SCA] (*Small Claims Act*, RSBC 1996, c 430), has a limited inherent jurisdiction to grant equitable remedies. The Civil Resolution Tribunal, pursuant to s 118 of the *Civil Resolution Tribunal Act* [CRTA] (*Civil Resolution Tribunal Act*, SBC 2012, c 25), has the same limited

jurisdiction. A party seeking an equitable remedy such as an injunction should consult with a lawyer and will likely need to apply to the Supreme Court for relief.

4. Restitution

The law of restitution applies to circumstances where a party has benefited, the other party has suffered a loss as a result, and there is no legal basis for the party to have benefited (*Nouhi v Pourtaghi*, 2022 BCSC 807). The type of claim commonly pursued for a restitution remedy is referred to as "unjust enrichment" and is a complicated and evolving area of the law. A party planning to attain a restitution remedy should consult a lawyer, research what must be proved to be successful and which defences may be available to the defendant. Resources include CanLII.org, the courthouse library, and a practicing lawyer.

5. Statute

Certain statutes create a right of action that does not exist in the common law. The statute will set out what must be proved, the defences that apply, the types of damages that can be awarded, and how the claim must be brought. A person planning to bring a claim under a statutory cause of action should research the statute as well as how the courts have interpreted it by noting up the applicable provisions. See page 2: "Other Important Statutes". Resources include CanLII.org, the courthouse library, and a practicing lawyer.

6. Declaratory Relief

Declaratory relief, whereby the court defines the rights of the parties to resolve legal uncertainties, cannot be claimed at the Provincial Court of British Columbia or the CRT. This includes declarations of who is liable for an accident and then ordering the defendant (often represented by an insurer) to change its liability determination. Parties seeking declaratory relief must do so at the BC Supreme Court (*Supreme Court Civil Rules*, BC Reg 168/2009, 20-4(1)).

B. Types of Damages

Although the Small Claims Court has the jurisdiction to award $35,000, the monetary awards in most cases are significantly less (*Small Claims Court Monetary Limit Regulation*, BC Reg 179/2005). There must be a principled basis for an award of damages and it is helpful to separate a claim into the following types of damages. Ensuring that there is a legal basis for a claim is a critical step as there are penalties for proceeding through a trial in Small Claims Court on a claim that has no reasonable basis for success (*SCR*, s 20(5)).

1. General Damages

General damages, also called non-pecuniary damages, are those that are not easy to quantify and for which a judge must assess the amount of money that, in the circumstances, will compensate for the loss. A common example of general damages is "pain and suffering". The purpose of general damages is to compensate and not to punish; a party should not expect to profit or realize a windfall through an award of general damages. For both general and special damages, the principle of remoteness of damage relates to both tort and contract law cases. Defendants are generally only accountable for harm brought on by their wrongful acts or contractual breaches when that harm was reasonably foreseeable at the time of the conduct in question, or could have been reasonably contemplated to be a consequence of breaching the contractual term. A person planning to claim general damages should be ready to provide evidence of the loss and research the case law to determine how the courts have assessed damages in cases with similar losses and circumstances. Resources include CanLII.org, the courthouse library, and a practising lawyer.

2. Special Damages

Special damages are generally quantifiable out-of-pocket expenses that must be specifically claimed and strictly proven (*SCR*, s 20(5)). For example, if a person has been put to expense and has receipts showing the amounts spent, these expenses would be classified as special damages. In a personal injury action, this could be medical bills, or in an action involving faulty equipment, repair bills could be classified as special damages. Each and every expense must be strictly proved with documents or other satisfactory evidence. In *Redl v. Sellin*, 2013 BCSC 581 [3], the Court sets out the test with respect to a claimant's claim for special damages. Generally speaking, claims for special damages are subject only to the standard of reasonableness. As with claims for the cost of future care (see *Juraski v. Beek*, 2011 BCSC 982 [4]; *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 (BCSC))], when a claimed expense has been incurred in relation to treatment, evidence of medical justification for the expense is a factor in determining reasonableness.

3. Nominal Damages

Nominal damages are those where a wrong has been committed but there has been no, or insignificant, damages suffered as a result of the wrong. Certain torts, such as trespass, allow claims for nominal damages however there is little reward and much to be lost. A person who has suffered no damages yet still brings a claim may not recover the costs for bringing a claim that wastes the court's and the parties' time and money. Note that cost awards are limited in small claims cases (*SCR*, s 20(2)) and in Civil Resolution Tribunal cases, legal feels will rarely be awarded (*Civil Resolution Tribunal Rules*, Rule 9.4(3) [CRTR]).

4. Debt

Debt is a remedy for breach of contract; see *Busnex Business Exchange Ltd. v Canadian Medical Legacy Corp.*, 1999 BCCA 78 [5]. The requirement for establishing a debt or 'liquidated demand' is that the sum of money is evident or able to be calculated by virtue of the contract. If the amount requires more investigation than mere calculation, the amount is not a debt but 'damages'.

5. Liquidated Damages

Some contracts provide for a genuine pre-estimate of damages in the event of a breach and allow the non-breaching party to claim for that estimate without having to prove the amount they have actually lost. This amount can be recovered as a debt. If the amount of liquidated damages is not a genuine pre-estimate of damages or is manifestly inappropriate in the circumstances, a court may decline to award them. However, the CRT cannot relieve a penalty because it is not a "court" (*Law and Equity Act*, s 24(2)).

6. Statutory Damages

Statutory damages are those that arise from a breach by the defendant of an obligation found in a statute. The statute and relevant case law should be examined carefully to determine what damages, if any, may be claimed and the principles for assessing damages. Note, there are few statutory breaches that trigger statutory damages.

7. Aggravated Damages

Aggravated damages provide additional compensation where the wrongdoer's actions have caused mental distress, injury to dignity, or injury to pride (*Campbell v Read*, 22 BCLR (2d) 214 (CA), 1987 Carswell BC 440 [6]). Awards of aggravated damages are rare and depend heavily on the actions of the wrongdoer and the circumstances. Aggravated damages have previously been awarded in cases of aggravated assault and sexual assault (*Thornber v Campbell*, 2012

BCSC 1449; [7] *B(A) v D(C)*, 2011 BCSC 775 [8]). The claimant must provide actual evidence of mental distress that results from the wrongdoing of the defendant.

A claimant who seeks aggravated damages must ask for aggravated damages in the Notice of Claim (or "Application for Dispute Resolution" in the Civil Resolution Tribunal). Aggravated damages cannot be awarded in addition to the applicable monetary limit at the CRT or small claims.

8. Punitive Damages

Punitive damages, also called "exemplary damages", are reserved for conduct that is so abhorrent that the court must impose an additional penalty to punish the wrongdoer and discourage others from engaging in similar conduct (*Honda Canada Inc. v. Keays*, 2008 SCC 39). Punitive damages are **rarely** awarded. Punitive damages are not compensatory and the amount, if any, is in the complete discretion of the judge.

A claimant who seeks punitive damages must ask for punitive damages in the Notice of Claim (or "Application for Dispute Resolution" in the Civil Resolution Tribunal). Punitive damages **cannot** be awarded in addition to the monetary limit.

C. Limitation Periods

1. Changes Due to COVID-19

> **NOTE:** Due to COVID-19, limitation dates were temporarily suspended. However, as of March 25, 2021, the suspension has been lifted, and limitations dates function as per usual.

To calculate limitations dates that were affected by COVID-19, please refer below guidelines for calculating BC limitation periods from the Law Society of BC website.

- If the limitation period would normally have expired between March 26, 2020 and March 25, 2021, add one year to the expiry year of the limitation period. Thus, persons have the same amount of time remaining after the suspension of limitation periods as they did before.
- If the cause of action arose before March 26, 2020 and would normally expire after March 26, 2021, add one year to the expiry year of the limitation period.
- If the cause of action arose after the suspension of limitation periods but before March 25, 2021, then the limitation period expires March 26, 2023. In this way, a limitation period that began to run during the suspension starts to run when the suspension is lifted.

The CRT remained open and operating normally during the COVID-19 pandemic. The automatic suspension of limitation dates did not apply to the CRT.

2. Limitation Act

After a certain amount of time has passed, a person loses the right to commence a claim. The amount of time that must pass before the limitation period expires depends on which act applies to the claim.

The *Limitation Act*, SBC 2012, c 13 [Limitation Act] came into effect on June 1, 2013. A claim is governed by this Act if the claim was discovered after this date. Under the *Limitation Act*, s 6(1), the basic limitation period that applies to most claims is 2 years after the day on which the claim is discovered.

Discovery occurs the day on which the claimant knew or reasonably ought to have known all of the following:

- That injury, loss or damage had occurred;

- That the injury, loss or damage was caused by or contributed to by an act or omission;
- That the act or omission was that of the person against whom the claim is or may be made;
- That, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage (*Limitation Act*, s 8).

However, there are certain situations where the date of discovery is deemed to be a later date, or where the limitation period is suspended. Under s. 24(1) of the Limitation Act, acknowledgement of liability by the person against whom the claim is made resets the running of the period to the day the acknowledgement is made. The kind of acknowledgement that qualifies here is strictly defined in s. 24(6). Under s. 25(1), the basic limitation period and ultimate limitation period applicable to the claim do not run if the claimant becomes a person with a disability, while the person continues to be a person under a disability.

For more information refer to **Appendix F: Limitation Periods** or consult a lawyer.

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IV. Choosing the Proper Forum

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

There are several options for resolving most civil disputes in British Columbia: Alternative Dispute Resolution, specialised tribunals, Small Claims Court, the Civil Resolution Tribunal and the Supreme Court of British Columbia.

Certain claims must be made through administrative tribunals instead of the courts. See, for example, **Section IV.C: Civil Resolution Tribunal** for small claims matters under $5,000, including certain types of disputes between roomates, certain motor vehicle injury disputes, and strata matters, **Chapter 6: Human Rights** for human rights claims proceeding through the Human Rights Tribunal, **Chapter 7: Workers' Compensation** for workers' compensation claims proceeding through the Workers' Compensation Board, **Chapter 8: Employment Insurance** for EI matters proceeding through the Social Security Tribunal, **Chapter 9: Employment Law** for employment law related matters proceeding through the Employment Standards Branch, and **Chapter 19: Landlord and Tenant Law** for tenancy matters proceeding through the Residential Tenancy Branch.

In order to bring a claim in British Columbia, the court or tribunal must have territorial jurisdiction. If either the subject matter of the claim (e.g., the contract or wrongful act) occurred in British Columbia or the Defendant resides or does business in British Columbia, this may be a sufficient connection for a court or tribunal to assert jurisdiction. It is sometimes unclear whether British Columbia has a sufficient connection to the claim and is the most appropriate forum. If the court's jurisdiction is not clear, a claimant should obtain legal advice and review applicable case law; see *Douez v. Facebook, Inc.*, 2022 BCSC 914 [1].

Where the dispute is contractual, the existence of a "forum selection clause" may provide further jurisdictional difficulties. Forum selection clauses require the adjudication of claims in the named jurisdiction. Such clauses will generally be upheld absent a finding of "strong cause" to hear the matter in the jurisdiction of another court; see *Borgstrom v Korean Air Lines Co. Ltd.*, 2007 BCCA 263 [2]; *Procon Mining & Tunnelling Ltd. v McNeil*, 2007 BCCA 438 [3]). However, where a "forum selection clause" requires arbitration that would be practically inaccessible for reasons of cost or geography, a court may declare the clause invalid and adjudicate the claim (*Uber Technologies Inc v Heller*, 2020 SCC 16 [4]).

A. Small Claims Court

The Small Claims Court is the civil division of the British Columbia Provincial Court and is designed to accommodate unrepresented parties who do not have legal training. The overriding purpose of the Small Claims Court is to resolve disputes in a "just, speedy, inexpensive, and simple manner" (*SCA*, s 2). The Court uses simplified forms, procedures, and rules and encourages settlement.

Small Claims Court is a formal court that applies the law. Although the procedures and rules of evidence are slightly relaxed in order to make it more accessible to the public, it is significantly more formal and principled than the courts portrayed in television programs.

There are three primary considerations when choosing Small Claims Court: the amount claimed, the court's jurisdiction, and costs.

1. Amount Claimed

As of June 1, 2017, Small Claims Court can award a judgment of up to $35,000. A person whose claim exceeds $35,000 may still choose Small Claims Court but must expressly state in the notice of claim or counterclaim that they will abandon the amount necessary to bring their claim or counterclaim within the court's jurisdiction (SCR, Rules 1(4) and 1(5)). Interest and costs are not included in calculating the $35,000 limit.

A claimant must sue all responsible parties for damages arising from a single event in **one** claim; the claimant cannot split claims for damages arising out of a single event into multiple claims in an attempt to circumvent the $35,000 limit. If, however, there are multiple events giving rise to a claim, even if closely related, they may be brought in separate actions (*De Bayer v. Yang*, 2019 BCCRT 298 [5]). For example, if a contractor issues an invoice for $20,000 at the end of January for work done in January and issues another invoice for $20,000 at the end of February for work done in February and both invoices go unpaid, the contractor may sue on each invoice in a separate claim. Rule 7.1(4) permits certain related claims to be heard together.

Where a defendant has pleaded a set-off (the plaintiff owes the defendant money that should be deducted from their award), contributory negligence (the plaintiff's negligence also contributed to their loss), or shared liability (there is another party who is also liable for the same action), the court may consider these defences against the full amount of the claimant's claim provided that the net judgment does not exceed $35,000. This also applies when a set-off forms the basis for a standalone counterclaim. For example, if the claimant proves a $50,000 claim and the defendant establishes a $35,000 set-off, the claimant will have a net judgment of $15,000.

Section 21(2) of the *Small Claims Act* permits the monetary limit to be set by regulation at any amount up to $50,000. Claimants should confirm the current monetary limit prior to filing a claim.

2. Jurisdiction

The Small Claims Court derives its authority from the SCA, the *Small Claims Rules*, BC Reg 261/93 [SCR], and other acts that expressly confer jurisdiction upon the Provincial Court.

The court has express jurisdiction in claims for:

- debt or damages;
- recovery of personal property;
- specific performance of an agreement relating to personal property or services; or
- relief from opposing claims to personal property(*SCA*, s 3(1)).

The Small Claims Court does not have jurisdiction in claims for libel, slander, or malicious prosecution, according to s 3(2) of the SCA, unless such authority is expressly granted in limited circumstances by another statute (e.g., s 171(3) of the *Business Practices and Consumer Protection Act* allows for contraventions of this Act to be heard in Provincial Court even if they involve claims for libel or slander).

The court cannot resolve disputes involving residential tenancy agreements nor can it grant remedies created by statute if there is another dispute resolution mechanism prescribed in the statute. For example, claims for overtime must be claimed through the Employment Standards Branch and not in Small Claims Court. The court has very limited jurisdiction in residential tenancy (*Residential Tenancy Act*, SBC 2002, c 78.), human rights (*Human Rights Code*, RSBC 1996, c 210), and strata property matters. Regarding employment law, the Small Claims Court has jurisdiction over contractual and common law rights.

Other noteworthy areas of law often falling outside the jurisdiction of the Small Claims Division are trusts, wills (i.e., probate), prerogative writs, bankruptcy, and some family law matters. However, the court may have jurisdiction over cases where these areas of law are involved only circumstantially and the essential issues of the case do fall within the

court's jurisdiction. For example, in *AMEX Bank of Canada v Golovatcheva* [6], the claimant alleged that the defendant had committed fraud by running up a debt that she knew she would escape by declaring bankruptcy. The Small Claims court exerted jurisdiction over this case as essentially, the case at bar was a claim in debt, not bankruptcy.

The Small Claims Court cannot grant injunctions or declaratory relief; however, subject to the Small Claims Act and Small Claims Rules, the court may make any order or give any direction necessary to achieve the purpose of these statutes.

3. Fees

The fee to file a claim depends on the amount being claimed. The filing fee is $100 for claims of $3,000 or less and $156 for claims over $3,000. All Small Claims Court fees are listed in Schedule A of the *Small Claims Rules*. See **Appendix H: Small Claim Fees**.

If a person is unable to afford the court's fees, they can file an Application to the Registrar (Form 16) together with a Statement of Finances. If accepted, the party will be exempted under Rule 20(1) from paying fees with respect to that court file.

An unsuccessful litigant must, unless a judge or registrar orders otherwise, pay to the successful party:

- any fees the successful party paid for filing any documents;
- reasonable amounts the party paid for serving any documents; and
- any other reasonable charges or expenses that the judge or registrar considers directly related to the conduct of the proceeding (*Gaudet v Mair*, [1996] BCJ. No. 2547 (QL) (Prov Ct) [7]; *Faulkner v. Sellars* (1998), 9 CCLI (3d) 247 (BC Prov Ct) [8]; *Johnston v. Morris*, 2004 BCPC 511 [9]).

Under no circumstances can any party recover any fees paid to a lawyer with respect to the proceeding: s 19(4) of the *Small Claims Act*; however, reasonable disbursements charged by a lawyer with respect to the proceeding may be awarded to the successful party.

B. Supreme Court of British Columbia

The Supreme Court has broad jurisdiction. It is not bound by any monetary limits and there are few restrictions on the types of claims that it can hear. The Supreme Court can grant injunctions, conduct judicial reviews, and make new laws.

The Supreme Court is not designed with special regard to lay litigants. Parties without legal training or legal advice may find it much more difficult to navigate than Small Claims Court. There are, however, a number of resources (II.4. Other Resources) to help lay litigants bring and defend claims in Supreme Court.

The court fees in Supreme Court are higher than in Small Claims Court; they can be waived, however, for those who cannot afford them.

In Supreme Court, the losing party will often be ordered to pay to the successful party a portion of that party's reasonable legal costs. Costs are awarded using a tariff system and generally on a party and party basis that usually amounts to about twenty percent of the successful party's costs. While it is possible for the successful party to be fully indemnified through an award of special costs, also known as solicitor-client costs, this is rare and should not be expected.

C. Civil Resolution Tribunal

The role of the Civil Resolution Tribunal is to encourage the resolution of disputes by agreement between the parties, and if resolution by agreement is not reached, then to resolve the dispute by deciding the claims brought to the tribunal by the parties. For up-to-date information on the Civil Resolution Tribunal, associated legislative changes, and the official rules please visit their website at https://www.civilresolutionbc.ca/.

1. Jurisdiction

The CRT has jurisdiction over small claims disputes up to $5,000, strata property matters, certain disputes about motor vehicle accidents and injuries, and disputes involving societies and co-operative associations. The tribunal will not determine if they have jurisdiction over disputes until an application for dispute resolution is submitted and the required fee paid. While jurisdictional issues are screened at the intake stage, a tribunal member retains discretion to determine whether the dispute is within the tribunal's jurisdiction. Applicants who want to know if their claim is within the tribunal's jurisdiction before filing a dispute may try using the CRT's Solution Explorer [10] or may need to seek legal advice.

Sometimes, disputes may be "hybrids" in that they include strata, co-operative, motor vehicle injury and/or small claims elements. In general, where a dispute has elements of both a small claim or another type of claim (most commonly strata), the CRT will not consider it a small claim. Applicants should consult the CRT to determine whether two separate applications should be made.

a) Small Claims Matters

The tribunal's small claims jurisdiction is the same as that of the Small Claims Court, however, while the Small Claims Court can resolve claims between $5,001 and $35,000, the CRT is limited in jurisdiction to resolving small claims disputes of $5,000 or under. If a claim is over $5,000 in total value (including contractual interest), it may be reduced to $5,000 or less in order to make an application for dispute resolution at the CRT but this requires abandoning the amount that is over $5,000. This means that part of the claim is gone and can no longer be claimed at the CRT or anywhere else.

The Civil Resolution Tribunal has jurisdiction over the following types of small claims matters:

- Loans and Debt (e.g. a claim for money loaned to someone and not repaid);
- Contract (e.g. A claim for damages caused by the respondent's failure to properly complete a contract);
- Personal Injury;
- Personal property (e.g. a claim for damages caused to the applicant's property or return of personal property);
- Consumer transactions (e.g. a claim for damages for faulty merchandise);
- Insurance Disputes; and
- Some employment.

However, the CRT does not have jurisdiction over claims that

- involve slander, defamation or malicious prosecution (*CRTA*, s 119(a));
- fall within the jurisdiction of other tribunals (i.e., the Residential Tenancy Branch);
- are against the government, or which the government is a party to the dispute (Note: municipalities do not fall within "government" in this context; *CRTA*, s 119(b)); or
- involve the application of the *Canadian Charter of Rights and Freedoms*. Note: the CRT does not have jurisdiction over a question of a conflict between the *Human Rights Code* and another enactment. The CRT also does not have jurisdiction over constitutional questions (*CRTA*, s 114).

b) Strata Property Matters

The CRT can resolve a wide variety of disputes between owners and tenants of strata properties and strata corporations but can only help with disputes where the event triggering the dispute happened in BC. Unlike the Small Claims and Motor Vehicle Injury jurisdictions of the CRT, the Strata Property jurisdiction of the CRT has no monetary limit. A person may make a request for tribunal resolution of a claim that concerns:

- the interpretation or application of the *Strata Property Act* or regulation, bylaw, or rule under that Act;
- the common property or common assets of the strata corporation;
- the use or enjoyment of a strata lot (Note: Recent CRT cases have concluded that the CRT generally does not have jurisdiction under its Strata Property jurisdiction to resolve neighbour disputes if the claim is based in tort, such as an owner claiming against another owner in nuisance or negligence for noise or water leak. If you have a dispute with another resident in a strata you may wish to seek legal advice);
- unfair or arbitrary enforcement, or non-enforcement, of strata bylaws, such as noise, pets, parking, rentals, and compliance with the *BC Human Rights Code*; whether the strata corporation has treated an owner or tenant significantly unfairly;
- money owing, including money owing as a fine, under the *Strata Property Act* or a regulation, bylaw, or rule under that Act;
- financial responsibility for repairs;
- an action or threatened action by the strata corporation, including the council, in relation to an owner or tenant;
- a decision of the strata corporation, including the council, in relation to an owner or tenant; or
- the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

The CRT's ability to resolve the strata disputes listed above is subject to a number of limitations. A person considering tribunal resolution of a claim listed above should review s 122 of the *Civil Resolution Tribunal Act* to ensure that the CRT is not prohibited from deciding on the matter.

c) Motor Vehicle Injury Matters

The CRT has jurisdiction over most vehicle accident claims in British Columbia. In particular, the CRT can resolve disputes regarding accident benefits, minor injury determinations, fault, damages claims up to $50,000, and entitlement to benefits under the Enhanced Care model.

For more information, consult the CRT's Solution Explorer [10], Chapter 12: Automobile Insurance (ICBC), Chapter 13: Motor Vehicle Law, and *Dusdal v. ICBC, 2022 BCCRT 602* [11] which briefly explains recent changes to motor vehicle accident claims.

d) Societies and Cooperative Associations

The CRT can adjudicate disputes about BC societies and cooperative associations. Disputes involving other types of cooperatives, unincorporated societies, societies incorporated outside of BC, and “for-profit” societies are outside of the CRT’s jurisdiction.

The *Societies Act* governs societies in BC, and the CRT may only take disputes about societies that are incorporated in BC with the BC Corporate Registry (*Societies Act*, SBC 2015, c 18, s 14). A person may make a request for tribunal resolution of a claim that concerns:

- the interpretation or application of the BC Societies Act or a regulation, constitution, or bylaw under that Act, including a request to inspect, or to receive a copy of, a record of a society;
- an action or threatened action by the society or its directors in relation to a member; and

- a decision of the society or its directors in relation to a member.

The foregoing list contains a number of limitations. A person considering tribunal resolution of a claim listed above should review s 130 of the *Civil Resolution Tribunal Act* [12] to ensure that a limitation does not deny jurisdiction to the tribunal.

The *Cooperative Associations Act* governs cooperative associations in BC, and the CRT may only take disputes about its provincial housing or community service cooperatives (*Cooperative Association Act, SBC 1999, c 28, s 159.5* [13]*). The Act enables persons to make a request for the tribunal resolution of a claim that concerns:*

- Interpreting legislation, regulations, memoranda or rules about cooperatives;
- Ordering a cooperative to provide access to its records;
- Ordering a cooperative to comply with its bylaws or the *Cooperative Association Act*; and
- the person examining, taking extracts from, receiving a copy of or obtaining the record (*Cooperative Association Act*, SBC 1999, c 28, s 159.5).

The CRT's ability to resolve these disputes is subject to a number of limitations; see s 126 of the *Civil Resolution Tribunal Act*. For example, claims cannot be made with respect to any matter relating to terminating membership, expelling members, winding up the cooperative association, or appealing decisions made by the Registrar of Companies.

e) Non-Consensual Sharing of Intimate Images

On March 30, 2023, the BC legislature passed the Intimate Images Protection Act (IIPA). Under its authority, the CRT will be able to resolve claims about the non-consensual sharing of intimate images.

The IIPA is not yet in force. It will be brought into force by regulation, at a date to be determined. Once in force, under this legislation, victims will have potential recourse against both individuals who share or threaten to share victims' intimate images non-consensually, as well as against technology companies who publish these images. Under the IIPA, a judge or tribunal decision maker can order a technology company to stop distribution and remove an intimate image from its platform. Technology companies in non-compliance with these orders can face penalties.

To obtain such orders, applicants need to show that the image is an intimate image depicting the applicant, and that another person distributed it without their consent.

f) Authority to Refuse Dispute

The CRT has the discretionary authority to refuse to resolve a claim or dispute that otherwise falls within their jurisdiction (Civil Resolution Tribunal Act, s 11). Some of the more common reasons are:

- The claim or dispute has already been resolved through a legally binding process, or the claim is more appropriate for another legally binding process
- The request for resolution does not disclose a reasonable claim or is an abuse of process
- The claim or dispute is too complex or impractical for the CRT

2. Process

Using the tribunal to resolve a dispute within its jurisdiction is mandatory by default. However, if the CRT refuses to resolve a claim it can be brought to another court. A party can also apply to court to be exempted from the CRT. For more information see: https://www.provincialcourt.bc.ca/types-of-cases/small-claims-matters

The tribunal is designed to be more informal, faster, and less expensive than Small Claims Court, and will be conducted primarily using the internet and email. Unlike Small Claims Court, the tribunal generally requires the parties to be self-represented; lawyers are generally not permitted (Civil Resolution Tribunal Act, s 20). There are exceptions to this (see subsections 2 and 3), including where a party is a minor or has impaired capacity, where the rules permit the party to be represented or where the tribunal permits representation because it is in the interests of justice and fairness. If a party wishes to request a representative, they should contact the CRT directly to obtain a Representation Request Form.

In considering a request for permission to be represented by a lawyer or other person, the CRT will consider various factors set under Rule 1.16.

All representatives and helpers must comply with the CRT's Code of Conduct https://civilresolutionbc.ca/wp-content/uploads/CRT-Code-of-Conduct-Apr-2021.pdf

> **NOTE:** Parties may obtain legal assistance and/or advice without submitting a Form, however, their lawyer will not be able to participate directly in the CRT process.

3. General

The first step in the CRT process is filing your claim. Fill in the online application form and pay the fee. Afterward, the CRT will issue the respondent a Dispute Notice. Parties may not bring or continue a claim in court more than 28 days after one of the following applicable dates:

- the date the party receives notice of the decision;
- the date of a court order that the CRT not adjudicate a claim; or

The CRT orders are enforceable as an order of the court.

D. Alternative Dispute Resolution

Alternative dispute resolution is useful because it is efficient, inexpensive, **confidential**, informal, and flexible; the parties have control over the outcome. A trial, on the other hand, is formal, less flexible, and can be more expensive. With few exceptions, everything that is said in a courtroom or written in a filed document can be accessed by any member of the public.

Parties who wish to preserve their relationship, avoid the stress of a trial, keep the details of their dispute private, or resolve their dispute in months instead of more than a year should seriously consider alternative dispute resolution.

1. Negotiations

Negotiation is cost and risk-free. Any contact between the parties should be used to attempt to negotiate a settlement. Parties can negotiate a settlement at any point before a judgment is pronounced. Negotiations are without prejudice, which means they are confidential between the parties and cannot be used against a party in court. Any documentation related to negotiation should have the words "WITHOUT PREJUDICE" written across the top.

Ask the other party if they are represented by a lawyer. If so, all communication should be with the lawyer. If the other party is not represented, ask the other party if they are willing to discuss the claim.

Telephone technique should be **firm** but **not argumentative**. Try to negotiate the best offer possible.

Make a written plan and keep detailed notes of each conversation as it occurs. Plan how best to find out the other side's position and how best to put forward your position.

If a settlement is reached, a letter should be sent to the other party to confirm the agreement. Enclose a duplicate copy for them to sign and return to you. Any settlement should include a mutual release agreement in which both parties agree to not bring any further claims against each other and to withdraw any other proceedings that may have been commenced.

> **NOTE:** If there are multiple defendants, a claimant should obtain legal advice to ensure that an agreement with one defendant does not inadvertently release the other defendants from liability.

2. Mediation

Mediation is a voluntary process in which an independent, neutral party listens to each party's position, focuses on the issues in dispute, and assists the parties to come to a settlement agreement. While the mediator plays an active role in ensuring discussion remains productive, the ultimate responsibility for resolving the dispute rests with the parties. The purpose of mediation is not to determine who wins and loses, but to find solutions that meet the needs of the people involved.

Mediation as an alternative to litigation is often a more expedient, less expensive, and more satisfactory route than litigation. In order to mediate outside of the Small Claims Court process, all parties must agree. The parties typically share the cost of mediation.

The Civil Resolution Tribunal's facilitation process is essentially a mediation. In fulfilling its mandate, the role of the Civil Resolution Tribunal is "to encourage the resolution of disputes by agreement between the parties" (*CRTA*, s 2(3)). The tribunal's mandate is to provide dispute resolution services in a manner that is accessible, speedy, economical, informal, and flexible (*CRTA*, s 2(2)).

The Small Claims Court requires that parties participate in either a settlement conference or mediation. Both processes are highly successful in resolving disputes and there is no additional cost to either party. For information on these processes, see the Small Claims Mediation Guide [14].

Parties who choose to mediate outside of the Small Claims Court process can choose their mediator (Mediate BC website [15]), resolve the dispute sooner and on a more convenient timeline, and spend more time resolving the dispute than the approximately 2.5 hours allocated by the court. Also, since both parties would have agreed to mediate, settlement is more likely than if mediation is compulsory.

3. Arbitration

Arbitration is a voluntary process in which an independent, neutral party will listen to each party's position and resolve the conflict by choosing one of the party's positions. If the arbitrator's decision is binding, the dispute is settled. If the arbitrator's decision is non-binding, the parties may accept it or proceed to litigation. Arbitration can offer a very quick resolution to disputes and encourages both parties to present reasonable offers in order to increase the likelihood that their proposal will be selected. In order to arbitrate, all parties must agree. The parties typically share the cost of arbitration. The Small Claims Court does not require or provide arbitration; parties who wish to arbitrate must do so on their own (the British Columbia Arbitration and Mediation Institute website [16]).

References

[1] https://canlii.ca/t/jpkt8
[2] http://canlii.ca/t/1r9xl
[3] http://canlii.ca/t/1std6
[4] http://canlii.ca/t/j8dvf
[5] https://decisions.civilresolutionbc.ca/crt/crtd/en/item/365284/index.do
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[7] http://pm.cle.bc.ca/clebc-pm-web/manual/42757/reference/casePopup.do?id=1120
[8] http://pm.cle.bc.ca/clebc-pm-web/manual/42757/reference/casePopup.do?id=24429
[9] http://canlii.ca/t/1jpxj
[10] https://civilresolutionbc.ca/solution-explorer
[11] https://decisions.civilresolutionbc.ca/crt/crtd/en/item/521692/index.do
[12] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/12025_01
[13] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/99028_01
[14] https://www2.gov.bc.ca/gov/content/justice/courthouse-services/small-claims/how-to-guides/mediation-between
[15] http://www.mediatebc.com/Find-a-Mediator.aspx
[16] http://www.bcami.com/

V. Starting a Claim

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

A. Pronouns

Both the BC Supreme Court ("BCSC") and BC Provincial Court ("BCPC") have issued practice directives regarding the form of address for parties and counsel in proceedings, effective December 16, 2020. The changes support a shift in professional practice towards asking all people how they should be respectfully addressed. A link to the BCSC practice direction can be found here: PD-59_Forms_of_Address_for_Parties_and_Counsel_in_Proceedings.pdf (bccourts.ca) [1]. A link to the PCSC practice direction can be found here: NP 24 Form of Address for Parties and Lawyers.pdf (provincialcourt.bc.ca) [2]. For example, at the beginning of any in-person or virtual proceeding, when parties are introducing themselves, or lawyers are introducing themselves, their client, witness, or another individual, they should provide the judge or justice with each person's name, title (e.g. "Mr./Ms./Mx./Counsel Jones") and pronouns to be used in the proceeding. If a party or counsel do not provide this information in their introduction, they will be prompted by a court clerk to provide this information.

At the CRT, the staff follows a similar procedure by asking all parties to identify their pronouns and form of address (e.g. "Mr./Ms./Mx./Counsel Jones"). The CRT works with LGBTQ+ organizations to ensure that it approaches this issue in a respectful and inclusive way that is free of assumptions. If a party does not provide this information, the CRT will default to gender neutral forms of address.

B. Settlement Letter

The fastest and least expensive way to resolve a dispute is to tell the other person what you are claiming from them and why you are claiming it. If the other person agrees with the amount or responds in a manner that leads to a settlement, both parties will save the time, effort, expense, and uncertainty of a lawsuit.

Good faith attempts to settle may involve concessions and admissions of liability. For example, a claimant may offer to settle for less than the claim to account for the cost, time investment, and risk of going to trial. A defendant, for example, may admit liability but dispute the amount owed. Whenever parties can agree on certain points, the likelihood of settlement increases.

Because of the strong public interest in settlement, these bona fide settlement attempts are protected by settlement privilege. This means that, if the matter is not settled, any admissions during negotiations cannot be used against the party who made them (*Boles v. Harrison*, 2021 BCCRT 906 [3]). It is prudent to include the words "WITHOUT PREJUDICE" in correspondence involving bona fide attempts to settle to indicate that the party sending the document wishes to rely on settlement privilege; settlement privilege will still apply, however, even if "WITHOUT PREJUDICE" is not included.

Settlement letters should be brief, factual, and clearly state the amount claimed even if that amount exceeds $35,000. Settlement letters should have a courteous tone as a letter that invokes a hostile reaction from the recipient will be counter-productive. A party writing a settlement letter should never threaten criminal or regulatory penalties; **extortion is a criminal offence**. If a settlement between the two parties is not successful, then you may consider drafting a notice of claim.

C. Identifying the Defendant(s)

If a settlement letter is unsuccessful, parties will be required to file a Notice of Claim through Small Claims Court if the claim is for between $5,001 and $35,000; see Section V.G.: Drafting the Notice of Claim. If the amount claimed is $5,000 or less, a party will apply for CRT dispute resolution; see Section V.E: Civil Resolution Tribunal.

When drafting a Notice of Claim and throughout the litigation process, it is important to stick to the **relevant** facts. Court is not a forum for airing grievances that do not give rise to a claim. For example, in a claim for breach of contract, the fact that the defendant acted rudely is generally not relevant to the claim. Including irrelevant facts confuses the issues, wastes time, raises tensions, and makes it more difficult to successfully prove the claim. A good rule to follow for each type of claim is to include **only the facts necessary** to satisfy the legal test for that type of claim; brief is better.

It is important to make your cause of action (i.e., negligence, breach of contract, etc.), type of damages, and amount of damages very clear. Do not let the judge guess what you want.

1. Suing a Business

a) Corporation

A corporation is a legal entity that is separate from its shareholders and employees. It is identified by a corporate designation such as Incorporated, Limited, Corporation, their abbreviations Inc., Ltd., or Corp., or their French equivalent following the business name.

A corporation can enter into contracts and can sue or be sued. Generally speaking, a corporation's shareholders, officers, directors, and employees are not liable for the actions or liabilities of the corporation or their own actions while acting within the scope of their office or employment. A person who feels that a shareholder, director, officer, or employee of a corporation might be liable should obtain legal advice.

Corporations may be either provincially or federally incorporated. A federal company is incorporated under the *Canada Business Corporations Act*, RSC 1985, c. C-44 [CBCA]. A BC corporation is incorporated under the *Business Corporations Act*, SBC 2002, c 57 [BCBCA]. Corporations may also be registered under the laws of the other provinces and territories.

Because a corporation can have multiple locations, every corporation, including non-BCBCA corporations, doing business in BC must provide an address where it can be served with notices of claim and other important documents.

To sue a corporation, a claimant must perform a company search to obtain the registered name and address for the defendant corporation (*SCR*, Rule 1(2.1); and Rule 5(2.1)). The corporation's registered name and address must be the ones on the notice of claim form and a corporate search must be included when filing the notice of claim.

To search for a **provincially** regulated company, the client may request a company or society search in person:

Surrey Board of Trade

Address	101 – 14439 104th Ave Surrey, BC V3R 1M1
Phone	(604) 581-7130 Toll-free: 1-866-848-7130

Small Business B.C.

Address	54 - 601 West Cordova St Vancouver, BC V6B 1G1

Phone	(604) 775-5525 Toll-free in B.C.: 1-800-667-2272

BC Registry Services

Address	940 Blanshard Street Victoria, BC V8W 2H3
Phone	(250) 387-7848 Vancouver: (604) 660-2421 Toll-free in B.C.: 1-877-526-1526

The client may also write to:

Registrar of Companies
P.O. Box 9431 Station Provincial Government Victoria, BC V8W 9V3

For more information about searching for provincial companies, refer to:

- http://smallbusinessbc.ca/services/
- http://www.bcregistryservices.gov.bc.ca/
- http://www.bconline.gov.bc.ca (online feature now available by opening a new account).

Partnerships and non-profit societies are also registered in the company directory and would show up in a search. In cases that involve franchises, it is important to do a company search to see how the other party is registered; it may be possible to sue the parent company and the individual who owns the franchise rights. The search costs $10, and cheques and/or money orders should be made payable to the Minister of Finance at: BC Registries and Online Services, Courier: 200 - 940 Blanshard Street, Victoria, BC V8W 3E6, Mail: PO Box 9431 Stn Prov Govt, Victoria, BC V8W 9V3.

If Unincorporated:

Online	Website [4]
Address	City of Vancouver Licence Office 515 West 10th Ave Vancouver, BC V5Z 4A8
Phone	(604) 873-7611

To search for a **federally** regulated company, refer to:

Online	Website [5]
Address	Industry Canada C.D. Howe Building 235 Queen Street Ottawa, Ontario K1A 0H5
Phone	

b) Partnership

A partnership can exist between one or more persons and is governed by the *Partnership Act*, RSBC 1996, c 348 [PA].

The rules for determining whether a partnership exists are set out in s 4 of the PA. Generally speaking, all partners are personally liable for the debts of the business: s 7 of the PA. As it is often impossible to tell whether a business is a partnership or a sole proprietorship from the name alone, a claimant should perform a company search to learn the true structure of the business as well as the name and address of each partner.

The proper way to list each partner on the notice of claim is:

> Jane Doe d.b.a. XYZ Partnership
>
> John Doe d.b.a. XYZ Partnership
>
> ABC Company Ltd. d.b.a. XYZ Partnership
>
> **NOTE:** "d.b.a." stands for "doing business as"
>
> **NOTE:** One should be careful to not confuse partnerships with limited partnerships (LP) or limited liability partnerships (LLP).

c) Sole Proprietorship

A sole proprietorship allows a single person to do business under a business name. Sole proprietorships are registered under Part 4 of the PA. A sole proprietor is personally responsible for the debts of the business.

As it is impossible to tell whether a business is a partnership or a sole proprietorship from the name alone, a claimant should perform a company search to learn the true structure of the business as well as the name and address of the proprietor.

The proper way to list a sole proprietor on the notice of claim is:

> Jane Doe d.b.a. XYZ Company
>
> John Doe d.b.a. XYZ Company
>
> ABC Company Ltd. d.b.a. XYZ Company
>
> **NOTE:** "d.b.a." stands for "doing business as"

d) Other

For other forms of businesses such as limited partnerships (LP), limited liability partnerships (LLP), and unlimited liability corporations (ULC), legal advice is recommended.

2. Suing a Person over 19 Years Old

Do not use titles such as Mr., Mrs. or Ms. Use full names, not initials (i.e., "Dr. D. Smith" should be "Doris Smith"). Claimants may sue more than one defendant if the claim against each defendant is related. Divide the "To" space in half and use one half for the name and address of each defendant; alternatively, the notice of claim filing assistant makes it convenient to add multiple defendants (see https://justice.gov.bc.ca/FilingAssistant/).

3. Suing a Society

A society is a type of not-for-profit corporation registered pursuant to the *Societies Act*, SBC 2015, c 18. The procedure and principles for suing a society are the same as for corporations. A company search is required to ascertain the society's registered address (*SCR*, Rule 1(2.2) and Rule 5(2.2)).

4. Suing I.C.B.C.

The legal name of ICBC is the Insurance Corporation of British Columbia. It is a special type of corporation and the usual corporate designation such as Inc. is not required.

5. Suing the Government

a) Federal Government

The federal government should be named as either "Attorney General of Canada" or "Her Majesty in right of Canada". If an agency of the Crown is to be sued and **if a federal Act permits**, the agency may be sued in the name of that agency; see *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 23(1); *Goodhead v Law Society (British Columbia)*, [1997] BCJ No. 1779 (BCSC) [6].

b) Provincial

The provincial government should be named as "Her Majesty the Queen in right of the Province of British Columbia" (*Crown Proceeding Act*, RSBC 1996, c 89, s 7).

It should be noted that the CRT cannot resolve disputes where the claim is against the government or the government is a party to the dispute. See Section IV.C.: Civil Resolution Tribunal for more information on the jurisdiction of the CRT.

6. Suing the Police

The "Royal Canadian Mounted Police" is not a legal entity that can sue or be sued (*Dixon v Deacon Morgan McEwen Easson*, [1990] B.C.J. No. 1043 (BCSC) [7]. A claimant who wishes to sue for damages arising from the conduct of a police officer should sue the Minister of Public Safety and Solicitor General. The individual police officer and the Attorney General of Canada may be named in cases alleging gross negligence or willful misconduct on the part of the police officer (*Amezcua v Taylor*, 2010 BCCA 128 [8]; *Roy v British Columbia (Attorney General)*, 2005 BCCA 88) [9]. The Minister of Public Safety and Solicitor General is the proper defendant in a civil action involving the RCMP or RCMP members as of Dec 11, 2015 (*Order of the Lieutenant Governor in Council*, No. 762/2015).

RCMP officers are immune from liability for anything done in the performance of their duty except where the officer has been guilty of dishonesty, gross negligence, or malicious or willful misconduct, or the cause of action is libel or slander. See *Police Act*, RSC 1996, c327, s 11 and s 21; *Crown Liability and Proceedings Act*, RSC 1985, c. C-50, s 3 and s 10; *Acumar Consulting Engineers Ltd. v The Association of Professional Engineers and Geoscientists of British Columbia (APEGBC)*, 2014 BCSC 814 at para 49 [10].

A claimant who is suing a municipal police force should sue the individual police officers as well as the municipality employing the police officers.

7. Suing a Municipality

Municipalities are special corporations. A claimant should search the BC Gazette to obtain the legal name of the municipality.

It is critical that a claimant provide written notice to the city within *two months* of the time, place, and manner in which the damage has been sustained. As well, all legal actions must be commenced within 6 months after the cause of action first arose (*Local Government Act*, RSBC 2005, c 1, s 735, s 736). For more information, please see **Chapter 5: Public Complaints**.

8. Suing a Young or Mentally Incompetent Person

A minor, also called an infant, is a person who is under 19 years of age at the time the claim is filed. Mentally incompetent persons, as well as minors, are persons with a legal disability. When suing such persons, the following rules of the *Supreme Court Civil Rules*, BC Reg 168/2009 [SCCR] apply:

- Rule 4-3 (2)(f) for serving documents by personal service;
- Rule 7-2 (9) for examination of mentally incompetent persons for discovery
- Rule 12-5 (50) for evidence from examinations for discovery for mentally incompetent persons
- Rule 20-2(8) for the lawyer for a person under disability
- Rule 20-2(10) if a party to a proceeding becomes a mentally incompetent person
- Rule 25-2 (10) and (11) when delivering notice of applying for an estate grant or for the resealing of a foreign grant in relation to the estate.

Persons with a legal disability must be represented by a litigation guardian (*Supreme Court Civil Rules*, BC Reg 168/2009, Rule 20-2(2)). With some limitations, a litigation guardian can be any person ages 19 years or older who is ordinarily resident in British Columbia. The litigation guardian must complete and submit the Litigation Guardian Declaration form (*CRT Rules (effective May 1, 2021)*, Rule 1.13(2)).

If the claim involves personal injury, SCCR Rule 20-2(4) applies and requires that the litigation guardian act by a lawyer unless the litigation guardian is the Public Guardian and Trustee.

A party cannot take a step in default against a person with a legal disability without the court's permission. A settlement with a party under a legal disability is not binding unless the court approves it.

9. Suing an Insurance Company other than ICBC

Claims against insurers for coverage can be complicated. A claimant should be aware that claims against insurers may have a shorter limitation period. A claimant should research the law surrounding an insurer's duty to defend, and an insurer's duty to indemnify.

10. Suing an Unknown Person

If a claimant does not know the identity of one or more parties, the claimant can still file a claim using a misnomer. For example, the claimant would list the unidentified defendant as either John Doe or Jane Doe as the case may be. If there are multiple unknown parties, the claimant could add a number to each misnomer (e.g., John Doe 1; John Doe 2). Misnomer also applies to unknown companies.

A claimant should research the law surrounding misnomers and ensure that both the unidentified party and its actions are described in as much detail as possible.

If the party is unknown because of a motor vehicle hit and run, the claimant may sue ICBC as a nominal defendant.

D. Can the Defendant(s) Pay?

One cannot squeeze blood from a stone. If a defendant has insignificant assets or income, the defendant may have no means to pay a judgment; such a person is "judgment-proof" and a claimant with an uncollectible judgment is said to be holding an "empty judgment". A claimant should consider whether it is worth the time, expense, and stress of suing a judgment-proof defendant.

A judgment is enforceable for ten years after it is issued (*Limitation Act*, RSBC 1996, c 266, s 7; *Limitation Act*, SBC 2012, c 13, s 7). After this time, unless it is renewed, the judgment expires and becomes uncollectible. On some occasions, a previously judgment-proof defendant will "come into money" by receiving an inheritance or winning the lottery. This is a rare occurrence and a claimant must invest time and effort to monitor the defendant's circumstances over the ten years that the judgment is enforceable. A more common change in a judgment-proof defendant's circumstances is the defendant securing a higher-paying job.

A claimant should also consider the likelihood of the defendant going bankrupt. If the defendant goes bankrupt, the claimant may recover little or none of the amount of the judgment. For more detail on bankruptcy, see Section XVII: Enforcement of a Judgment.

A claimant must decide whether to sue before the limitation period expires. If the limitation period expires, a claimant cannot later sue on that cause of action if the defendant's circumstances change.

E. Civil Resolution Tribunal

The Civil Resolution Tribunal is designed to facilitate dispute resolution in a way that is accessible, speedy, economical, and flexible for amounts of $5,000 and under. It relies heavily on electronic communication tools. It focuses on a resolution by agreement of the parties first, and by the Tribunal's binding decisions if no agreement is reached. Thus, there are several steps to the CRT process before actually applying for dispute resolution with the tribunal.

1. Self Help

A claimant must first attempt to resolve the dispute using the tribunal's online dispute resolution services. The claimant may use the website's resources to gather information and diagnose their claim.

a) Solution Explorer

The Solution Explorer, available on the CRT website, includes free legal information and self-help tools, such as guided pathways, interactive questions and answers, tools, templates, and other resources. Applicants can apply to the CRT for dispute resolution right from the Solution Explorer.

Small Claims Solution Explorer website: https://civilresolutionbc.ca/solution-explorer/

Strata Solution Explorer website: https://civilresolutionbc.ca/solution-explorer/strata/

Motor Vehicle Injury Solution Explorer website: https://civilresolutionbc.ca/solution-explorer/vehicle-accidents

Societies and Cooperative Associations Solution Explorer https:/ / civilresolutionbc. ca/ solution-explorer/ societies-and-cooperative-associations/

b) Online Negotiations

The parties may then engage in an online negotiation that is monitored but not mediated or adjudicated. Online negotiations connect parties in order to encourage negotiated settlement. This tool will guide the parties through a structured, low-cost negotiation phase.

2. Dispute Resolution – Case Management

If a claimant's attempt at online dispute resolution has been unsuccessful, the claimant must formally request resolution of the claim through the tribunal and pay all required fees. Generally, a claimant cannot request tribunal resolution if there is a court proceeding or other legally binding process to resolve the claim and a hearing or trial in that court or other legally binding process has been scheduled or has occurred to decide that claim.

During the case management phase, the case manager will attempt to facilitate a settlement between the parties by clarifying the claim, providing facilitated mediation, and asking the parties to exchange evidence. If the dispute is not resolved during facilitation, the case manager will help prepare the parties for the tribunal decision process.

If parties do not resolve the claim during the case management phase, the claim will proceed by tribunal hearing (*CRTA*, s 30). If a party to a dispute fails to comply with an order or direction of the tribunal made during the case management phase, the case manager may (after giving notice to the non-compliant party) refer the dispute to the tribunal for resolution, where the tribunal will: (a) proceed to hear the dispute; (b) make an order dismissing a claim in the dispute that is made by the non-compliant party; or (c) refuse to resolve a claim of the non-compliant party or refuse to resolve the dispute (*CRTA*, s 36).

The CRT takes an active role in the dispute resolution process and ensuring the claim is resolved in a timely manner. Parties must ensure they respond promptly during the CRT process. If a party fails to respond to communications with the case manager, the tribunal may decide the claim without their participation.

The tribunal retains the authority to refuse to resolve a claim or dispute and may exercise this authority at any point before making a final decision resolving the dispute. The general authority for refusing to resolve a claim or dispute is set out in Civil Resolution Tribunal Act s 11.

a) Applying for Dispute Resolution

To request dispute resolution by the tribunal an applicant must provide to the tribunal a completed Dispute Application Form, and pay the required fee.

> **NOTE:** Parties drafting an application to the CRT should review the guidelines set out in **Section V.C: Identifying the Defendant(s)** for advice regarding what information should be included.

(1) Application Costs and Where to Apply

Applications may be made online or a paper application form can be found online at https:/ / civilresolutionbc. ca/ resources/forms/#apply-for-crt-dispute-resolution.Fees vary slightly by the method of application. The cost to apply for dispute resolution online is $75-125, while the cost by paper application is $100-150.

If you are using a paper application, it may be sent to the CRT by mail:

PO Box 9239 Stn Prov Govt

Victoria, BC V8W 9J1

(2) After an Application is Received

After an initial review of the Dispute Application Form, the tribunal will provide to the applicant one of the following:

(a) a request for more information about the application;

(b) a Dispute Notice with instructions; or

(c) an explanation as to why the Dispute Notice will not be issued

Once a Dispute Notice is issued by the tribunal, they will serve it on the respondent if:

(a)the applicant has provided the name and address information required for service by ordinary mail,

(b)the mailing address for the respondent is in Canada, and

(c)the respondent is a person, corporation, strata corporation, partnership, society, co-operative association or municipality.

(3) Serving the Respondents

The CRT usually tries to serve respondents by regular mail. If the tribunal advises the applicant that they must serve the Dispute Notice and instructions for response, the applicant must:

(a) serve the Dispute Notice and instructions for response on every respondent named in the dispute and not served by the tribunal within 90 days from the day the Dispute Notice is issued by the tribunal,

(b) complete the Proof of Service Form and provide it to the tribunal within 90 days from the day the Dispute Notice is issued by the tribunal, and

(c) provide any other information or evidence about the Dispute Notice or service process requested by the tribunal

A Dispute Notice can be served on a respondent by e-mail, registered mail requiring signature, courier delivery requiring a signature, or personal delivery. Notice by e-mail is acceptable proof that the notice requirements are met only if the respondent replies to the email, contacts the CRT about the dispute, or confirms receipt of the Dispute Notice in some other way. Additional rules regarding notice delivery can be found here: https:/ / civilresolutionbc. ca/ help/

how-do-i-serve-a-dispute-notice/.

If you have unsuccessfully tried to deliver a Dispute Notice to a respondent, you should contact the CRT to request an alternative method of delivery.

b) Permitted Methods of Service

(1) Individual Under 19 Years Old

The applicant must provide the Dispute Notice (by any above method) to that respondent's parent or guardian unless the tribunal orders otherwise.

(2) Individuals Over 19 Years Old with Impaired Mental Capacity

If an applicant knows that a respondent has a committee of estate, a representative appointed in a representation agreement, or an attorney appointed in an enduring power of attorney, the applicant must provide the Dispute Notice to that person

An applicant must also provide the Dispute Notice to the respondent or the person with whom the respondent normally resides, and the Public Guardian and Trustee.

(3) Companies defined by the *Business Corporations Act*

An applicant can serve these parties by the following methods:

- by registered mail requiring signature, courier delivery requiring a signature or delivery in person to the address shown for the registered office with the Registrar of Companies;
- by delivery in person at the place of business of the company, to a receptionist or a person who appears to manage or control the company's business there;
- by delivery in person to a director, officer, liquidator, trustee in bankruptcy or receiver-manager of the company (*Business Corporations Act*, SBC 2002, c 57).

(4) Extraprovincial Corporation defined by the *Business Corporations Act*

An applicant can serve these parties by the following methods:

- by registered mail requiring signature, courier delivery requiring a signature or delivery in person to the address shown for the head office in the office of the Registrar of Companies if that head office is in British Columbia;
- by registered mail requiring a signature, courier delivery requiring a signature or delivery in person to the address shown in the office of the Registrar of Companies for any attorney appointed for the extraprovincial company; by delivery in person to the place of business of the extraprovincial company, to a receptionist or a person who appears to manage or control the company's business there;
- by delivery in person to a director, officer, liquidator, trustee in bankruptcy or receiver-manager of the extraprovincial company. *(Business Corporations Act, SBC 2002, c57)*

(5) Society incorporated under the *Societies Act*

An applicant can serve these parties by the following methods:

- by registered mail requiring signature, courier delivery requiring a signature or delivery in person to the address for service with the Registrar of Companies;
- by delivery in person to a director, officer, receiver manager or liquidator of the society (*Societies Act*, SBC 2015, c. 18, s 252).

(6) Partnerships

An applicant can serve these parties by the following methods:

- by registered mail requiring signature, courier delivery requiring a signature or delivery in person to a partner;
- by delivery in person to the partnership's place of business, to a receptionist or to a person who appears to manage or control the partnership's business there.

(7) Any Other Type of Party

Follow the directions provided by the Tribunal.

(8) ICBC (Motor Vehicle Accident-Related Claims)

An applicant must also provide the Dispute Notice to the Insurance Corporation of British Columbia (ICBC) by:

- sending a copy of the Dispute Notice by registered mail requiring signature or courier to 800 – 808 Nelson Street, Vancouver, BC V6Z 2H1; or,
- delivering a copy of the Dispute Notice in person to an employee at any ICBC claim centre.

c) Negotiation and Facilitation

The purpose of the case management phase is to facilitate an agreement between the parties and to prepare for the tribunal hearing should it be required. The Preparation for Tribunal Hearing phase may be conducted at the same time as the Facilitated Dispute Resolution phase.

A case manager will determine which processes are appropriate for a particular dispute and has the authority to require the parties to participate. They can adjust or modify the facilitation directions at any time during facilitation. Negotiation and facilitation may be conducted in writing, by telephone, via videoconferencing, via email, via other electronic communication tools, or a combination of these methods. These negotiations will be mediated by the case manager.

The case manager can direct any party in a dispute to provide to the tribunal and to every other party any information and evidence, including explanations of that information or evidence, information about a party's ability to pay an amount reached by agreement or ordered by the tribunal, responses to another party's information and communications, and that party's position on any proposed resolution of a claim in the dispute. During facilitation, the facilitator can refer any matter requiring a decision or order to a tribunal member, including a party's non-compliance with directions. The information shared during facilitated mediation is confidential and is generally not allowed to be included in the Tribunal Decision Plan, unless it is relevant evidence that would be disclosed in any event.

If the parties reach a resolution by agreement on any or all of the claims in their dispute, they can ask the tribunal to make a consent resolution order to make the terms of their agreement an order of the tribunal, and pay the required fee. If the parties agree to resolve some, but not all, claims by agreement, the case manager can record their draft agreement based on the terms agreed upon by the parties, and provide a draft consent resolution order to a tribunal member immediately, or along with the Tribunal Decision Plan.

If the case manager decides the parties cannot resolve their dispute by agreement, they will inform the parties that activities aimed at finding a resolution by agreement are over and ask the applicant to pay the tribunal decision fee. If the applicant does not pay the tribunal decision fee, a respondent can pay it. If no party pays the tribunal decision fee within the time period set by the case manager, the tribunal may refuse to resolve or dismiss the dispute. If a party pays the tribunal decision fee, the process to prepare the dispute for a tribunal decision will begin.

F. Preparation for Tribunal Hearing

If the negotiation and facilitation process does not result in a settlement, the case manager will assist the parties in preparing for adjudication by ensuring the parties understand each other's positions and by directing the exchange of evidence. Generally, this exchange and communication will occur online. To prepare the dispute for a tribunal decision, the case manager can support the parties in identifying and narrowing the claims or issues that will be decided in the tribunal decision process, identifying the facts relevant to resolving the claims or issues in the tribunal decision process, and taking any other steps to prepare for the tribunal decision process.

As well, the case manager will give the parties a Tribunal Decision Plan, which sets out required information, steps, and timelines to prepare the dispute for the tribunal decision process. Parties must include in the Tribunal Decision Plan all relevant evidence they possess regarding their claim, including evidence that does not support their position (*CRTR*, Rule 8.1(1)). Common kinds of evidence include photos or videos, contracts, correspondence regarding the dispute, and statements from witnesses or experts. All evidence and materials relied on must be translated into English (*CRTR*, Rule 1.7(5)). More information about evidence can be found at https:/ / civilresolutionbc. ca/ help/ what-is-evidence. In particular, the CRT has specific rules regarding expert evidence. See Section XIII.B.: Expert Witnesses.

For motor vehicle injury claims, pertinent medical information should also be provided. Note that for this class of dispute there are limits on both the amount of expert evidence that can be submitted and the amount of money that the CRT can order one party to reimburse another for fees and expenses. A party wishing to adduce expert evidence to support a motor vehicle injury claim should consult https:/ / civilresolutionbc. ca/ blog/ expert-evidence-and-expenses-in-mva-personal-injury-disputes for more information. For strata disputes, copies of strata meeting minutes and any complaint letters and/or bylaw infraction letters should be included in the Tribunal Decision Plan.

Once the case manager has given the Tribunal Decision Plan to the parties, they cannot add any other party or claim without permission from the tribunal. The tribunal may at any time order that a party be added to the dispute and make directions as to the process to be followed.

If a party does not comply with the Tribunal Decision Plan the tribunal may do any of the following:

> (a) the tribunal can decide the dispute relying only on the information and evidence that was provided in compliance with the Tribunal Decision Plan;
>
> (b) the tribunal can dismiss the claims brought by a party that did not comply with the Tribunal Decision Plan; and
>
> (c) the tribunal can require the non-complying party to pay to another party any fees and other reasonable expenses that arose as a result of a party's non-compliance with the Tribunal Decision Plan.

Facilitation ends when the case manager determines that the Tribunal Decision Plan is complete.

G. Drafting the Notice of Claim

The Notice of Claim is the document that starts an action in Small Claims Court. The Notice of Claim form is comprised of several sections and each section must be completed. The form can be either typed or handwritten. Hard copies are available from the court registry (see Appendix A: Small Claims Registries) and an electronic copy is available online at http:/ / www2. gov. bc. ca/ gov/ content/ justice/ courthouse-services/ documents-forms-records/ court-forms/ small-claims-forms.

Where possible, a claimant should type the Notice of Claim form. You can use the Small Claims Filing Assistant to complete a claim online which may then be printed and submitted in person or by mail:https://justice. gov. bc. ca/ FilingAssistant/index.do.

A sample Notice of Claim (see Appendix C: Sample Notice of Claim) is attached and may be a helpful guideline when drafting a Notice of Claim.

1. "From"

This section must contain the claimant's full legal name, address, and telephone number. The claimant has an ongoing duty to notify the court registry of any changes to the information in this section. Failure to provide the registry with current and accurate contact information may result in the claimant's claim being dismissed and/or the claimant being liable for costs or penalties.

2. "To"

The claimant must list the full legal name, address for service, and, if available, the telephone number for each defendant. If additional space is required, the claimant may attach a piece of paper listing this information for each defendant. Alternatively, the Notice of Claim filing assistant (visit https://justice. gov. bc. ca/ FilingAssistant/) can neatly add multiple defendants onto one Notice of Claim form.

Failure to list the proper legal name of a defendant may result in the claimant's claim against that defendant being dismissed or the judgment against that defendant being unenforceable. If the limitation period has already expired, the claimant may not be able to correct the error (see Appendix F: Limitation Periods).

If you are suing a corporation, the corporation's registered name must be listed here. This registered name can be found by completing a company search. A copy of the company search must be included when filing the notice of claim. See Section II: 4. Other Resources for how to complete a company search.

3. "What Happened?"

In this section, the claimant must list the facts that support the claimant's cause(s) of action and the damages that the claimant has suffered. The claimant should adhere to the following general rules:

1. Don't plead evidence – state what you will prove, not how you will prove it
2. Don't plead law – unless you have a statutory cause of action
3. Use paragraphs – use one paragraph to state each fact that you will prove - Number each paragraph beginning at 1
4. Claimant must prove every fact – therefore, stick to material facts (see below)

In this section, one must set out the facts that give rise to the cause of action, and the loss or damage that resulted. This description should be brief but must inform the opposing party of the case to be met and give the judge an outline of what will be argued. A material fact is one that, if established, could affect the outcome of the proceedings. For examples, in the sample Notice of Claim in Appendix C, paragraphs 1-3 detail facts that go towards the existence and

terms of the contract. Paragraphs 4-6 detail facts that go towards the claimant's performance of the contract and the defendant's failure to perform. The Notice of Claim (Form 1) has little space for the facts, but the facts can continue onto another piece of paper. The additional facts must be attached to each copy of the Notice of Claim. In general, the pleadings should be brief, complete, and as accurate as possible.

The facts as alleged must give rise to a legal cause of action. For example, if the legal cause of action is a breach of contract: the claimant must show in the facts the existence of the contract, the specific term alleged to have been breached, and the acts of the defendant that constitute that breach. After the facts, state the legal cause of action(s) that entitle you to the relief you are seeking. If there is more than one cause of action, plead the strongest one and plead the other ones in the alternative. For example, in a claim for a bad car repair, a claimant can sue for breach of contract and negligence. A pleading might read: "In addition, or in the alternative, the claimant claims damages as a result of the defendant's negligent repair of the automobile".

The pleadings should describe:

(a) the relationship of the parties (e.g., buyer and seller); and

(b) the dates, places, and details of amounts, services, or practices involved.

Claimants will usually be bound by the facts in the pleadings. If the facts or legal basis need to be changed, the claimant may be able to amend the Notice of Claim (*SCR*, Rule 8).

When there is more than one defendant, the claimant should make it clear whether their liability is joint, several, or joint and several. This distinction affects the enforcement of a judgment and any subsequent actions arising out of the same cause. Liability is stated as joint and several is more inclusive.

If liability is joint, the defendants must be sued as a group however the claimant can recover the full amount from any or all of the defendants.

Where liability is several, the claimant can sue any or all of the defendants however each defendant is obligated to repay only their own portion of the debt.

Where liability is joint and several, the claimant may sue any or all of the defendants and may recover the full amount from any or all of the defendants. The debtors can then litigate among themselves to apportion the debt between them.

4. "Where?"

The claimant should enter the name of the municipality as well as the province where the cause of action arose. If the cause of action arose outside of British Columbia, the claimant must state in the "What Happened?" section how the court has jurisdiction over the claim (*Dreambank* [11], supra.)

5. "When?"

List the date or dates when the cause(s) of action arose. Unless the date is very clear or the limitation period is about to expire, stating the month and year is sufficient. It is prudent to state the date as follows:

- when the date is known: "On or about August 15, 2012";
- if only the month is known: "In or about August 2012"; or
- if the cause(s) of action arose over time: "From about May 2012 to August 2012".

6. "How Much?"

This is where the claimant describes the remedy. In most cases, this will be an amount of money. However, a claimant may request an alternative remedy. For example, the claimant could request the return of an item or, in the alternative, the value of it, as well as damages. A claimant who wants items returned should consider what condition they will be in and whether they really want them back.

a) Interest

If there is no mention of interest in a contract between the parties, the court will award interest to the successful claimant from the date the cause of action arose until the date of judgment (*Court Order Interest Act*, RSBC 1996, c 79, s 1(1); *Red Back Mining Inc v Geyser Ltd.*, 2006 BCSC 1880 [12]). This is called "pre-judgment interest". Interest in a claim for debt is calculated from the date the debt became due and, in a claim for damages, from the date the damages arose.

The court sets the interest rate every six months and publishes a table listing the rates applicable to each six-month period. The Notice of Claim should indicate a claim for "Interest pursuant to the *Court Order Interest Act*" but leave the amount area blank; the registry will calculate the amount according to the table.

> **Note:** While a claimant may be paying a higher interest rate on a credit card or loan as a result of the defendant's actions, the claimant is limited to the pre-judgment interest rate set by the court unless the parties have expressly agreed that interest will be paid.

If the parties have agreed on a rate of interest, the Notice of Claim should indicate a claim for contract interest, the applicable interest rate, and the date from which the interest began to accrue. The amount of interest that has accrued up to the date of filing should be included on the Notice of Claim as well as the amount of interest that accrues each day. It is important to note that a claim for contract interest is, in substance, a claim for contractual damages. Accordingly, the claim for contract interest together with the principal amount must be within the Small Claims Court's monetary jurisdiction. If a claim for contract interest has or could cause the total claim to exceed the court's monetary jurisdiction, it would be prudent to state on the Notice of Claim that the claimant abandons the amount necessary to bring the claim within the Small Claims Court's monetary jurisdiction.

If the parties have agreed that interest will be paid but have not agreed on a rate of interest, the rate of interest is five percent per annum (*Interest Act*, RSC 1985, c I-15, s 3).

Generally, even if the parties agree to a rate of interest expressed with reference to a period other than one year (e.g., 2% per month), a claimant can only recover a maximum of five percent per annum unless the contract expressly states a yearly rate or percentage of interest that is equivalent to the other rate (e.g., 24% per annum) (*Interest Act*, RSC 1985, c I-15, s 4).

It is a criminal offence to receive, or enter into an agreement to pay or receive, interest at a rate that exceeds 60% per annum (*Criminal Code*, RSC 1985, c C-46, s 347(1)). Interest has a broad definition and includes fees, fines, penalties, commissions, and other similar charges including costs relating to advancing credit.

If the judgment is not paid immediately, post-judgment interest may be awarded. The court has the discretion to vary the rate of interest or to set a different date from which the interest commences (*Court Order Interest Act*, RSBC 1996, c 79, s 8).

b) Claims between $5,001-$35,000

In order to sue in Small Claims Court for a claim exceeding $35,000, the claimant must state, "The Claimant abandons the portion of any net judgment that exceeds $35,000" (*SCR*, Rules 1(4) and (5)). At any time prior to trial, the claimant can decide to sue for the full amount and apply to transfer the claim to the Supreme Court of British Columbia (*Der v Giles*, 2003 BCSC 623). Once the trial has been heard, however, the abandonment is likely permanent.

There is an exception to the $35,000 limit. If more than one claimant has filed a Notice of Claim against the same defendant(s) concerning the same event, or, if one claimant has filed Notices of Claim against more than one defendant concerning the same event, the judge may decide each claim separately, even though the total of all the claims (not including interest and expenses) exceeds $35,000 (*SCR*, Rule 7.1(4)). Such claims often have a trial at the same time although the claimant(s) must request this.

(1) Filing Fees

Filing fees are those fees paid to file the Notice of Claim and are either $100 or $156 unless the fees have been waived (*BC Reg.* 261/93, s 1). Payments can be made with cash, debit card, cheque (including certified cheque), money order, or bank draft. Cheques and money orders should be payable to the Minister of Finance. The registry staff will enter this amount. Filing fees are recoverable if the claimant is successful (see Appendix H: Small Claims Court Fees).

Please note that fees for the CRT are different (see Appendix I: Civil Resolution Tribunal Fees).

(2) Service Fees

Service fees are an estimate of the cost of serving the defendant(s). The amount varies based on the method of service and the number of defendants. For information about the costs, refer to sections 15 and 16 of the *Court Rules Act* and *Small Claims Act*. The registry staff will enter this amount. Service fees are recoverable if the claimant is successful; however, as the claimed amount is only an estimate, a judge has discretion to either increase or decrease the allowed service fees.

(3) Other Expenses

Unless a judge or the Registrar orders otherwise, an unsuccessful party **must** pay to the successful party (Rule 20(2)):

- any fees the successful party paid for filing any documents;
- reasonable amounts the successful party paid for serving any documents (Rule 20(2); and
- any other reasonable charges or expenses directly related to the proceedings (Rule 20(2); *Barry v Rouleau*, [1994] BCJ No. 1212 (QL) (Prov Ct); *Gaudet v Mair*, [1996] BCJ No. 2547 (QL) (Prov Ct); *Johnston v. Morris et al.*, 2004 BCPC 511 [13]).

An example of a reasonable expense related to the proceedings is a company search. Another example is costs to purchase cases used in argument (*Faulkner v Sellars* (1998), 9 CCLI (3d) 247 (BC Prov Ct) [14]). If such expenses are known at the time of filing, they should be stated on the Notice of Claim. If they occur afterward, the successful party may request them at the conclusion of the trial.

Although legal fees **cannot** be recovered, legal disbursements may be recoverable if they fit one of the criteria above.

Parties are not compensated for the time they spend preparing for or attending court.

H. Filing a Notice of Claim

1. Cost

The cost to file a notice of claim is $100 if the claim is for $3,000 or less. The cost increases to $156 for claims above $3,000 and up to $35,000. A person who is unable to afford the filing or other fees may apply to the registrar for a fee waiver (*SCR*, Rule 20(1)) by filing an Application to the Registrar and a Statement of Finances. See Appendix H: Small Claims Court Fees.

2. Where to File

A claimant must file the notice of claim (*SCR*, Rule 1(2)) at the Small Claims registry (see Appendix A: Small Claims Registries) nearest to where:

- the defendant lives or carries on a business (*DreamBank* [15]; or
- the transaction or event that resulted in the claim took place.

This can sometimes be unclear in the case of contracts that are executed by fax or email or in other claims, such as negligence, where the conduct complained of took place in a number of locations; see *DreamBank* [15]; *Rudder v Microsoft Corp.*, [1999] 47 CCLT (2d) 168 (ON SC) [16]; *Simpson-Sears Ltd. v. Marshall* (1979), 12 BCLR 244 (SC)) [17]. A claimant may wish to obtain legal advice if there is any uncertainty regarding where to file.

If two different Small Claims registries have jurisdiction, the claimant should choose the one that is most convenient. If the defendant disputes the claimant's choice, the defendant can file an application for change of venue and a judge will decide the most appropriate location.

A company can live in multiple locations including where it is registered, where it carries on business, and where its records are kept (*DreamBank* [15], supra; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s7).

3. How to File

The claimant must file at least four complete and identical copies of the notice of claim. One copy is for the court, one is for the claimant, one is a service copy, and one is required for **each** defendant.

Once the notice of claim has been filed and stamped by the registry and the fee unless waived, has been paid, the claimant must, within one year, serve a copy on the defendant.

I. Serving a Notice of Claim

A copy of the filed Notice of Claim together with a blank Reply form (available from the registry) must be served on each defendant (*SCR*, Rule 2(1)). A claimant has 12 months from the date of filing to serve the defendants (*SCR*, Rule 2(7)). If more time is required, the claimant can apply to the registrar for an extension (*SCR*, Rules 2(7), 16(2)(a), and 16(3)). The permissible methods for serving a defendant depend on who the defendant is. The table below sets out how each category of defendant can be served. If a defendant is evading service or, after a diligent search, cannot be found, a claimant may apply to a judge for an order for substitutional service.

Defendant	Permitted Methods of Service
Individual Over 19 Years Old	• Personal service • Registered mail requiring signature to residence (*SCR*, Rule 2(2))
Individual Under 19 Years Old	• Personal service on the minor's mother, father, or guardian • Personal service on another person as directed by a judge upon application(*SCR*, Rules 2(6) and 18(2))
Individual outside BC	• See "Individual Over 19 Years Old" or "Individual Under 19 Years Old" • Defendant has 30 days to respond (*SCR*, Rule 3(4)))
BC Corporation	• Leaving a copy at the **delivery address** for the registered office • Registered mail requiring signature to the **mailing address** for the registered office • Personal service on a receptionist or manager at the company's place of business • Personal service on a director, officer, liquidator, trustee in bankruptcy, or receiver manager • If the company's registered office has been eliminated, as directed by a judge on application (*SCR*, Rule 2(3))
Extraprovincial Corporation	See *SCR*, Rule 2(4)
Unincorporated Company (Proprietorship)	• Personal service on proprietor • Registered mail requiring signature to proprietor's residence (*SCR*, Rule 2(2))
Unincorporated Company (Partnership)	• Personal service on a partner • Personal service on a receptionist or manager at the place of business • Registered mail requiring signature to a partner's residence (*SCR*, Rule 2(5))
Company outside BC	See *SCR*, Rule 18(6.1)
Strata Corporation	• Personal service on a council member • Registered mail requiring signature to its most recent mailing address on file in the Land Title Office (*Strata Property Act*, SBC 1998, c 43, s 64)
Society	• Personal service on anyone at the address for service • Personal service on a director, officer, receiver manager, or liquidator • Registered mail requiring signature to the address for service (*Societies Act*, SBC 2015, c 18; *SCR*, Rule 18(3))
Unincorporated Association	• Personal service on an officer • Registered mail requiring signature to the registered office (*SCR*, Rule 18(5))
Incorporated Cooperative Association, Housing Cooperative, Community Service Cooperative	• Personal service or by registered mail requiring signature to the registered office of the association (*Cooperative Association Act*, SBC 1999, c 28, s 28)
Trade Union	• Leaving with the business agent (*SCR*, Rule 18(5))
Municipality	• Personal service on the Clerk, Deputy Clerk, or similar official (*SCR*, Rule 18(1))
ICBC	• Personal service on a receptionist at 800 – 808 Nelson Street, Vancouver, BC V6Z 2L5
Estate	• Personal service on the administrator, executor, or executrix • Registered mail to the residence of the administrator, executor, or executrix (*Wills Estate and Succession Act*, SBC 2009, c13, s 61(1))

If a defendant is served incorrectly, a claimant cannot obtain a default order until after the defendant has been properly served. If the defendant has been served incorrectly but files a Reply, the claimant does not have to serve the defendant again.

1. Personal Service

Personal service is effected when the claimant gives the Notice of Claim and blank reply form to the defendant in a manner that ensures that the nature of the document is brought to the defendant's attention. For example, a notice of claim inside an unmarked and sealed envelope or rolled inside of a newspaper is not properly served.

If a defendant knows the nature of the document and has touched it, service has likely been affected. If the defendant knows of the nature of the document and refuses to touch it, the claimant may place it at the defendant's feet.

Personal service can be affected by any adult who is not under a legal disability. A claimant may wish to have a friend or a process server serve the Notice of Claim.

> **NOTE**: Personal service should not be used as a means of intimidating or exacting revenge on a defendant. While it may seem satisfying to personally serve the defendant, alternative methods should be employed if there is a risk of a heated exchange. Such an exchange may lead to physical violence and, in any event, negative encounters in the course of the litigation will be counterproductive to settlement discussions.

2. Registered Mail

Registered mail is a service offered by Canada Post. In order to prove that a document was served by registered mail, a party must either obtain a copy of the signature obtained by Canada Post at the time of delivery or obtain a printout of the delivery confirmation from http://www.canadapost.ca.

3. Substitutional (Alternate) Service

When, after a diligent search, a claimant is unable to locate the defendant or the defendant is evading service, the claimant can apply to the registrar (*SCR*, Rule 16(3)) for permission to serve the defendant in another manner (*SCR*, Rules 16(2)(e) and 18(8)). An affidavit and a hearing are not required.

The alternate method of service that is ordered should be sufficient to bring the claim to the defendant's attention. Suggested methods of alternate service include a Facebook message, email, facsimile, regular mail, and text message to all known addresses and phone numbers for the defendant. Other methods include posting the Notice of Claim on the defendant's door. The claimant should seek an order requiring service in as many methods as will be reasonably necessary to make the defendant aware of the claim.

J. Amending a Notice of Claim

Anything in a Notice of Claim, reply or another document that has been filed by a party may be changed by that party (a) without any permission, before a settlement conference, mediation, trial conference, or trial, whichever comes *first*; or (b) with the permission of a judge (*SCR*, Rule 8(1)). If permission of a judge is required, the applicant must complete an application form (Form 16), follow the instructions on the form, and file it at the registry with the amended document (*SCR*, Rule 8).

If a Notice of Claim or Reply is being amended, changes must be underlined, initialled, and dated on the revised document and, if there is an order authorizing the change, the document must contain a reference to it (*SCR*, Rule 8(2)). The document must then be filed at the registry and served again on each party to the claim before any further steps are made in the claim. The other party may then change their reply through the same process if they choose, or they may rely on their original reply.

A party wishing to withdraw their claim or other filed document may do so at any time before a judgement has been rendered or formal acceptance of offer has been filed, by filing a copy of a notice of withdrawal at the registry and

serving the notice on the parties that were served with the document that is being withdrawn (*SCR*, Rule 8(4)).

K. Proof of Service

Once the defendant has been served, the claimant can complete a Certificate of Service and file it along with the service copy of the Notice of Claim. Find Form 4 at https://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-forms/small-claims-forms. If there are multiple defendants, the claimant should file a Certificate of Service and service copy of the Notice of Claim for each defendant. Other methods of written proof of service are available (*SCR*, Rule 18(14)). Rarely, a judge may allow sworn oral evidence of personal service (*SCR*, Rule 18(15)).

If the defendant files a reply, it is assumed that the claimant served the claim and therefore the claimant is not required to file a Certificate of Service. Therefore, if the claimant expects the defendant to reply there is no need to immediately file a Certificate of Service. If the defendant does not reply, a Certificate of Service must be filed before seeking a default judgement.

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[4] http://vancouver.ca/doing-business/licenses-and-permits.aspx

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[14] http://pm.cle.bc.ca/clebc-pm-web/manual/42757/reference/casePopup.do?id=24429

[15] http://canlii.ca/t/frv57

[16] http://canlii.ca/t/1w8rg

[17] http://canlii.ca/t/23chv

VI. Responding to a Claim

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

If a party is responding to a claim over $5,000, proceed to **Section VI.B.: Possible Strategies**.

A. Civil Resolution Tribunal

A respondent who receives a Dispute Notice must within 14 days of receiving it (or if notice was provided outside British Columbia within 30 days) complete a Dispute Response Form and provide the Dispute Response Form to the tribunal. CRT forms can be accessed on their website at https://civilresolutionbc.ca/resources/forms/.

A party named as a respondent to a dispute who fails to respond to a properly delivered Dispute Notice by the date shown on the notice is in default. If every respondent is in default, an applicant may request a default decision and order from the tribunal. However, if there are multiple respondents and only one respondent is in default, the entire dispute is assigned to a tribunal member, unless it is otherwise settled in the facilitation process. See Section VII: Default Order for more information

However, if a respondent requires more time to respond, they can request an extension from the tribunal before the deadline to respond (*CRTR*, Rule 3.1(2)).

B. Possible Strategies

1. Notify Insurance Company

Many insurance policies cover more liabilities than their description would suggest. For example, many homeowner and tenant policies cover claims for damages or injuries arising from acts or omissions by the insured anywhere in the world. An example would be accidentally tripping a person who falls and breaks their hip. These policies also tend to include most people in the household including young children and foster children.

There are many exclusions and limitations but it is always best to let the insurer know about a claim against you. If the insurer will defend you, the insurer will bear the costs of your defence and possibly pay any damages that are awarded.

> **Note**: It is important to contact the insurer as soon as possible and to not make any admissions that might jeopardize a defence. Failing to promptly notify the insurer, admitting liability, or taking steps in the claim may permit the insurer to deny coverage.

2. Apologising

Many lawsuits arise or continue because a wrongdoer has not apologized to the party who was wronged. In BC, a person may apologize for a wrongful act or failure to act without the apology becoming an admission of liability (*Apology Act*, SBC 2006, c 19, 2(1) and (2)). A sincere apology can often avert litigation or form an important foundation for a settlement. Under the act, such an apology may include words that admit or imply an admission of fault.

Admissions of fact: however, at common law, the courts and CRT have drawn a distinction between apologies covered by the the *Apology Act*, (admissions of fault or liability) and those that include admissions of fact. The courts have found that factual admissions ("*I am sorry, I was looking at my phone while driving*") can be considered by decision makers. Explanatory statements that accompany apologies such as " *I was in a hurry*" or "*I was angry*" go beyond admissions of fault excluded by the *Apology Act* and may be accepted into evidence (*Schnipper v. Nadeau*, 2022 BCCRT 173)

3. Option to Pay all or Part

If a defendant pays the entire amount of the claim directly to the claimant, the defendant need not file a Reply (*SCR*, Rule 3(1)(a)). The defendant should retain a receipt as proof of payment and request that the claimant withdraws the claim. Only the claimant may withdraw a claim and, if a withdrawal is filed, all parties who were served with the Notice of Claim must be served with a copy of the withdrawal.

When considering this option, a defendant should be aware of other possible problems aside from the lawsuit. For example, if the claimant has placed derogatory information on the defendant's credit file, the defendant should ask the claimant to remove this negative information as part of the settlement. If the claimant is unwilling to remove the information, the defendant may still settle the claim but may find it difficult or impossible to remove the information from the credit file. The process for removing incorrect information from a person's credit file is outside the scope of this guide.

In Small Claims Court, if the entire claim is admitted but the defendant requires time to pay or only part of a claim is admitted (*SCR*, Rule 3(1)(b) or (c)), the defendant must file a reply form but may also propose a payment schedule for what is admitted. The payment schedule must detail how the amount will be paid back. The Registrar can order the proposed payment schedule if the claimant consents to it (*SCR*, Rule 11(10)(b)). If the claimant does not consent to the proposal or no payment schedule is proposed, the claimant may summon the defendant to a payment hearing (see Section XVII: Enforcing a Judgment). Similarly, at the CRT the defendant may file a response admitting the claim which the applicant can enforce through Small Claims Court.

4. Option to Oppose all or Part

A defendant who opposes all or part of the claim (*SCR*, Rule 3(1)(d)) must file a Reply form detailing what is admitted, what is opposed, or what is outside the defendant's knowledge. The reply should list reasons for any parts that are opposed. A defendant should avoid a general denial of the entire claim; a detailed examination of each element of the claim and why the defendant thinks it is wrong is much more persuasive.

Before deciding to oppose a claim, a defendant should ensure that there is a legal defence to the claim. A penalty can apply if a defendant proceeds through trial with a Reply that is bound to fail (*SCR*, Rule 20(5)).

5. Counterclaim

If the defendant wants the court to order something other than a dismissal of the claimant's claim, the defendant will need a counterclaim. A counterclaim means that, in addition to the defendant disputing the claim, the defendant seeks to sue the claimant. A defendant may file a counterclaim whether they agree or disagree with all or a part of the claim (*SCR*, Rule 4(1)). Counterclaims are claims filed by the defendant against the applicant; they are generally based on the same underlying facts as the applicant's claim. A defendant who wishes to counterclaim should review **Section III: Do You Have a Claim?** and Section IV: Choosing the Proper Forum. A counterclaim is essentially a Notice of Claim but in a different form. A counterclaim must have a legal basis; there are penalties for proceeding to trial if there is no reasonable basis for success (*SCR*, Rule 20(5)).

Although a defendant can start a separate claim either in Small Claims Court or another forum instead of counterclaiming, if the parties and witnesses are the same and the claim falls within the Small Claims Court jurisdiction, it is preferable that the defendant file a counterclaim so that both matters are heard together. If the defendant has commenced an action in a different forum, this should be mentioned in the Reply (see https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/courthouse-services/court-files-records/court-forms/small-claims/scl002.pdf)

A counterclaim is made on the Reply form by following the instructions and paying the required fee. The fee for a counterclaim is the same as the fee for a Notice of Claim and is eligible for a fee waiver. For more information about making a counterclaim, refer to Guide #2 - Making a claim for proceedings initiated in small claims court (https://www2.gov.bc.ca/gov/content/justice/courthouse-services/small-claims/how-to-guides/making-a-claim) and Guide #3 - Making a claim for proceedings previously initiated before Civil Resolution Tribunal (https://www2.gov.bc.ca/gov/content/justice/courthouse-services/small-claims/how-to-guides/making-a-claim-crt).

The relationship between a counterclaim and a set-off should be noted. A counterclaim is a standalone claim and it is possible for a defendant to succeed on a counterclaim even when the claimant has been unsuccessful on the primary claim. A set-off, on the other hand, is a defence. If the defendant is successful, a set-off will reduce the amount payable to the claimant. In other words, the amount that the defendant claims the claimant owes them is subtracted from any damages claimed by the claimant. If the claimant is unsuccessful, the set-off defence does not apply; the defendant is not awarded the amount of the set-off. For more information about set-offs see: Jamieson v. Loureiro, 2010 BCCA 52 [1].

a) Filing and Service

As the counterclaim is on the reply form, it must be filed at the same time as the Reply (*SCR*, Rule 4(1) and (2)), within the time allowed for filing a Reply (*SCR*, Rule 3(4)), and at the registry where the notice of claim was filed (*SCR*, Rule 3(3)).

The registry will serve the claimant with the reply and counterclaim within 21 days of it being filed (*SCR*, Rules 3(5) and 4(2)).

b) Replying to a Counterclaim

Once served, the claimant (now a defendant by counterclaim) must follow the same rules as replying to a Notice of Claim (*SCR*, Rule 5(7)). The claimant should review this section of the guide in its entirety.

6. Counterclaims through the Civil Resolution Tribunal

Once served, the applicant (now a respondent by counterclaim) must follow the same rules as replying to a Dispute Notice (*SCR*, Rule 1.1(32) and (33)). The applicant should review this section of the guide in its entirety.

Unless the tribunal directs otherwise, within 30 days of providing the Dispute Response Form to the tribunal, a respondent can request a “counterclaim” by:

- indicating in a completed Dispute Response Form that the respondent will add at least one claim in the dispute;
- completing an Additional Claim Form;
- providing the Additional Claim Form to the tribunal; and
- paying the required fee to add a claim (see Appendix I: Civil Resolution Tribunal Fees). Note: a counterclaim is not necessary if the respondent is only claiming fees and dispute-related expenses; a respondent may claim fees and dispute-related expenses in the tribunal decision process.

7. Third Party

If the defendant who has filed a Reply believes that a person or legal entity other than the claimant should pay all or part of the claim, they may make a claim against that other party by completing a Third Party Notice. Find Form 3 at https://www2. gov. bc. ca/ gov/ content/ justice/ courthouse-services/ documents-forms-records/ court-forms/ small-claims-forms. If a settlement conference, mediation session, or a trial conference has not been held, leave of the court is not required (*SCR*, Rule 5(1)(a)). If any of these have been held, the defendant must apply to the court for an order permitting the counterclaim to be filed against the third party (*SCR*, Rule 5(1)(b)).

A third-party claim is different from a claim against the incorrect defendant. A third party claim is made when a defendant believes that a third party should reimburse them if they are found to be liable to the claimant. For example, if a defendant is sued for a credit card debt, the defendant may request that the third-party, the cardholder who actually spent the money, gives rise to the debt.

A defendant who wishes to issue a third party notice should review **Section III. Do You Have A Claim?** and Section IV. Choosing The Proper Forum. A third-party claim is essentially a Notice of Claim but in a different form. A third party claim must have a legal basis and there are penalties for proceeding to trial if there is no reasonable basis for success.

a) Filing and Service

To start a third-party claim, the defendant must complete Form 3 and file it in the same registry where the Notice of Claim was filed (*SCR*, Rule 5(2)). The defendant must serve the third party with a copy of the filed Form 3, a blank Reply form, a copy of the Notice of Claim, a copy of the Reply to the Notice of Claim, and all of the documents and notices the other party would have received (*SCR*, Rule 5(3)); all of these documents are to be served in the same manner as serving a Notice of Claim (SCR, Rule 5(4)). A defendant has only 30 days after filing to serve the third party and file a certificate of service at the registry (*SCR*, Rule 5(5)); find Form 4 at https://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-forms/small-claims-forms. If the third party is not served and the certificate of service is not filed within **30 days**, the third party notice expires but can be renewed (*SCR*, Rule 5(5.1)).

The registry will serve the claimant with the third party notice within 21 days of its being filed (*SCR*, Rule 5(6)).

b) Replying to a Third Party Notice

Once served, a third party must follow the same rules as replying to a Notice of Claim (*SCR*, Rule 5(7)). The third-party should review this section of the guide in its entirety.

c) Adding a Third Party through the Civil Resolution Tribunal

A respondent who believes another person is responsible for a claim can request resolution of the claim against that other person, often referred to as a “third party claim” by:

(i) indicating in a completed Dispute Response Form that the respondent will apply for dispute resolution against the other person,

(ii) completing an Additional Claim Form identifying the other person and describing any claims against that person,

(iii) providing the Additional Claim Form to the tribunal, and

(iv) paying the required fee to add a claim (see Appendix I: Civil Resolution Tribunal Fees).

A respondent who adds an additional party to a claim must complete the steps for applying for CRT Dispute Resolution, except the time frame for providing notice to the other person is 30 days instead of 90 days, and the original Dispute Notice and any responses must be provided along with the Dispute Notice for the additional claims.

C. Time Limits

Unless a defendant pays the amount of the claim directly to the claimant and asks the claimant to withdraw the claim (*Small Claims Rules, supra*, Rule 3(1)(a)), the defendant must file a Reply within the required time limit. **Failure to file a Reply may result in the claimant obtaining a Default Order.**

The time limits for filing a Reply are generally the same whether the defendant is:

- a defendant served with a Notice of Claim (*SCR*, Rule 3(4));
- the claimant served with a counterclaim (*SCR*, Rule 4(3.1)(b)); or
- a third party served with a third party notice (*SCR*, Rule 5(7)).

If the defendant was served inside British Columbia, a Reply must be filed within **14 days after service** (*SCR*, Rule 3(4)). If the defendant was served outside British Columbia, a Reply must be filed within **30 days after service** (*SCR*, Rule 3(4)). The one exception is where the claimant is served with a counterclaim. The claimant is required to file a Reply within 14 days after service even if the claimant is served outside British Columbia.

D. Defences

For every cause of action, there is usually at least one possible defence. Some of the more common defences are listed here however a defendant should research the claimant's cause of action or obtain legal advice to determine which defences might be applicable.

1. Common Defences

a) Contributory Negligence

Where a claimant was careless and this carelessness contributed to the damages suffered, a defendant might plead the defence of contributory negligence. An example is where a claimant tripped over a bag that was carelessly left in a walkway. The defendant may be liable but the claimant may have been contributorily negligent for failing to keep watch for obstacles.

A defendant who believes that the claimant was partially at fault should state in the reply: "The defendant pleads and relies upon the Negligence Act" (*Negligence Act*, RSBC 1996, c 333). Each party is liable to the degree that they are at fault; where degrees of fault cannot be determined, liability is apportioned equally (s 1(2)).

b) Consent

Where, by express or implied agreement, a claimant knew of and understood the risk they were incurring and voluntarily assumed that risk, the defendant will not be liable. Because voluntary assumption of risk is a complete defence, it is very difficult to prove.

c) Criminality

Where a claimant stands to profit from criminal behaviour or compensation would amount to an avoidance or disavowal of a criminal sanction, the claimant cannot recover damages (*Hall v Hebert*, [1993] 2 SCR 159 [2]; *British Columbia v Zastowny*, [2008] 1 SCR 27 [3]). This is narrowly construed and a claimant should read *Hall v Hebert* [3] before relying upon it.

d) Inevitable Accident

If the defendant can show that the accident could not have been prevented even if the defendant had exercised reasonable care, the defendant cannot be liable (*Rintoul v X-Ray and Radium Industries Ltd.*, [1956] SCR 674) [4]. For this defence to apply, the defendant must have had no control over whatever occurred and its effect could not have been avoided even with the best effort and skill.

e) Illegality

If the claimant is suing on a contract that is illegal (i.e., it calls for a criminal interest rate), the defendant may ask the court to decline to enforce the illegal provision or possibly the entire contract. Depending on the circumstances, the court may consider modifying the contract to remove the illegality.

f) Self Defence

If the defendant honestly and reasonably believed that an assault or battery was imminent and used reasonable force to repel or prevent the assault or battery, the defendant may not be liable for any injuries or damage suffered by the claimant as a result (*R. v Lavallee*, [1990] 1 SCR 852 [5]; *Wackett v Calder*, [1965] 51 D.L.R. (2d) 598 [6]; *Brown v Wilson,* [1975] BCJ No. 1177; *R v Beckford*, [1987] All ER 425).

g) Defence of Third Parties

The same general rules apply as for self-defence provided that the use of force is reasonable (*Gambriell v Caparelli*, [1974] 54 D.L.R. (3d) 661 [7]).

h) Mitigation

A claimant who alleges to have suffered harm has a duty to take reasonable actions to minimize their losses. This applies, for instance, if the claimant was injured in a personal injury matter or if the claimant suffered harm from a breach of contract. The defendant bears the onus of proving on a balance of probabilities that the claimant did not mitigate their losses. If it is found that the claimant did not take reasonable steps to minimize their losses, such as seeking medical care to assist with their injuries in a personal injury action, then the damages payable to the claimant may be reduced.

E. Filing a Reply

The Reply must be filed in the same registry where the Notice of Claim was filed (*SCR*, Rule 3(3)). There is a filing fee except where the defendant admits and agrees to pay the entire claim or obtains a fee waiver.

Generally, a Reply cannot be filed late however, in practice, the registry may allow a Reply to be filed late as long as the registrar has not made a default order or set a date for a hearing (*SCR*, Rule 3(4)(b)).

F. Serving a Reply

The registry will serve the Reply and Counterclaim, if any, on each of the other parties within 21 days (*SCR*, Rules 3(5) and 5(6)).

References

[1] https://canlii.ca/t/27vgj
[2] http://canlii.ca/t/1fs4g
[3] http://canlii.ca/t/1vmgv
[4] http://canlii.ca/t/1tvmf
[5] http://canlii.ca/t/1fsx3
[6] http://canlii.ca/t/gwf9z
[7] http://canlii.ca/t/g1905

VII. Default Order

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

A default order is a court or tribunal decision that is available to apply for when the opposing party fails to respond to the dispute notice or Notice of Claim by the required date. However, it is good practice to take extra measures to ensure the opposing party is truly electing not to respond. Even if a default order is granted, the party in default generally has a low bar to meet when applying to cancel it.

A. Civil Resolution Tribunal

A party named as a respondent to a dispute who fails to respond to a properly delivered Dispute Notice by the date shown on the notice is in default. If every respondent is in default, an applicant may request a default decision and order from the tribunal by

> (a) providing a completed Request for Default Decision and Order form together with supporting evidence of dispute-related expenses and the value of non-debt claims,
>
> (b) if the applicant served the Dispute Notice, providing a completed Proof of Notice Form, and
>
> (c) paying the required fee to request a default decision and order.

If the applicant's claim is for something other than debt, they will need to provide evidence to support their requested remedy. An applicant must request a default decision within 21 days of being requested to do so, or the tribunal may dismiss or refuse to resolve the application.

1. Requesting Cancellation of a Default Order

If the party in default seeks to cancel the default order, they may request the cancellation of a default order by

> (a) completing and submitting the Request for Cancellation of Final Decision or Dismissal Form,
>
> (b) providing a completed Dispute Response Form if one has not already been provided to the tribunal,
>
> (c) providing evidence to support their request,
>
> (d) paying the required fee, and
>
> (e) following any other directions provided by the tribunal.

The tribunal will consider several factors when deciding whether to cancel a default order. In reviewing the request for cancellation, a tribunal member will consider whether

- the requesting party's failure to respond to the Dispute Notice or to comply with the Act, rules, or regulations was willful or deliberate,
- the request was made as soon as reasonably possible after the requesting party learned about the decision and order, and
- the Dispute Response Form shows a defence that has merit or is at least worth investigating, in the case of a default decision (*Civil Resolution Tribunal Rules (effective May 1, 2021)*, Rule 10.2).

The requesting party has the burden to provide sufficient evidence on the factors above (see Section VI.D: Defences).

B. Small Claims Court

If a defendant chooses not to defend a claim, the claimant wins by default. Evidence of the defendant's choice not to defend the claim can include the defendant's failure to file a Reply.

A claimant should not rush to the registry to file an Application for Default Order. Sometimes, a defendant may have a good reason for not filing a Reply on time and may have a defence to the claim that the court wishes to explore. In these circumstances, the court will set aside the default order and the claim will proceed in the ordinary course. A default order should only be used where the defendant has truly elected not to defend against the claim.

Where a defendant has not filed a Reply on time, it is a good idea to contact the defendant to determine why the Reply was not filed and to advise the defendant that a default order will be obtained if a Reply is not filed.

A default order can also be obtained if a defendant does not attend a mediation session (*SCR*, Rules 7.3(40)). If the defendant does not attend a settlement conference (*SCR*, Rule 7(17)), trial conference (*SCR*, Rule 7.5(17)), or trial (*SCR*, Rules 9.1(26), 9.2(11), and 10(9))., the judge or justice of the peace may grant a payment order instead of the claimant having to apply for a default order.

1. Requesting a Default Order

Unless the defendant was served outside of British Columbia or the court has otherwise ordered, a defendant has fourteen full days to file a Reply. This does not include the date the Notice of Claim was served and the date that the Application for Default Order is filed (*SCR*, Rule 17(10)).

To apply for a default order, the claimant must file Form 5 and pay a $25.00 fee. A certificate of service (Form 4) confirming service of the Notice of Claim and blank Reply form must also be in the file (*SCR*, Rule 6(3)). The claimant can ask the court to add the $25.00 fee plus reasonable expenses to the amount of the default judgment. If the claim is for a specific amount of debt, the registrar will grant a default order for the amount claimed plus expenses and interest (*SCR*, Rule 6(4)). If the claim is for anything other than a specific amount of debt, the registrar will schedule a hearing before a judge (*SCR*, Rule 6(5)). Once a hearing has been set, the defendant cannot file a Reply without a judge's permission (*SCR*, Rule 6(8)). If another defendant to the claim has filed a Reply and a date has been set for either a settlement conference, trial conference, or trial, the hearing will be held on that date (*SCR*, Rule 6(6)). A defendant who has not filed a reply is not entitled to notice of the hearing date (*SCR*, Rule 6(7)).

At a hearing, a default order is not automatic. The claimant must give evidence and produce documents to prove the amount owing as well as convince the court that the default order should be granted (*SCR*, Rule 6(9)).

2. Setting Aside Default Orders and Reinstating Claims

If a party obtains a default order or a hearing for assessment of damages is scheduled, the party in default can apply to a judge to set aside the default order (*SCR*, Rules 16(6)(j) and 17(2)) and file a Reply (*SCR*, Rule 16(6)(d)). The party in default must file the application as soon as possible upon learning of the default order and attach to the application an affidavit containing:

- a reasonable explanation for not filing a Reply (or failing to attend a mediation session, trial conference, or trial);
- a reasonable explanation of any delay in filing the application;
- the facts supporting the claim, counterclaim, or defence; and
- why permitting the order would be in the interests of justice (*SCR*, Rule 17(2)(b); *Miracle Feeds v D. & H. Enterprises Ltd.*, [1979] 10 BCLR 58 (Co. Ct.) [Miracle Feeds]; *Nichol v Nichol*, 2015 BCCA 278 [1]).

The party in default must show that:

- the failure to file a Reply (or failure to attend a mediation session) was not wilful, deliberate or blameworthy *(Miracle Feeds*, supra; *Hubbard v Acheson*, 2008 BCSC 970 [2]; *McEvoy v McEachnie*, 2008 BCSC 1273 [3]; *Anderson v T.D. Bank*, 70 BCLR 267 (BC CA) [4]; *Doyle v Lunny Design and Production Group Inc.*, 2009 BCSC 925 [5]; and *Innovest Development Corp. (Receiver of) v Lim*, 1999 CanLII 5356 (BCSC) [6]);
- the application to set aside the default order was made as soon as reasonably possible after obtaining knowledge of the default order (*Camnex Marketing Inc. v Aberdeen Financial Group*, 2009 BCSC 763 [7]);
- if there has been a delay in applying to set aside the default order, an explanation for the delay; and
- if the party in default is the defendant, there is a defence that is not bound to fail.

Where the party in default is a defendant who has not filed a Reply, the defendant should also bring copies of the Reply and be prepared to file them immediately if the judge grants permission.

If the default order is canceled, the party who obtained it may ask the court to award reasonable expenses that relate to the cancellation. These expenses may include the cost of filing the application for default order, significant traveling expenses, and lost wages that were incurred only as a result of the cancellation.

References

[1] http://canlii.ca/t/gk0z0
[2] http://canlii.ca/t/1zt5x
[3] http://canlii.ca/t/20rz1
[4] http://canlii.ca/t/213m6
[5] http://canlii.ca/t/24c11
[6] http://canlii.ca/t/1d43b
[7] http://canlii.ca/t/23whc

VIII. How a Claim Proceeds

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

A number of pilot projects have been implemented at some of the busier court registries. To anticipate how your claim will proceed and which rules will apply, find the court location where your claim will be heard and the heading that best describes your claim.

The length of time it will take to resolve a claim depends on:

1. how busy the court is (to find out how far ahead dates are being set at your location, ask at the court registry or the Judicial Case Manager);
2. how much time the trial is expected to take (a matter requiring a full day trial will often be scheduled later than a simpler matter);
3. whether the documents can be served without delay;
4. whether the claim is disputed; and
5. the number of applications filed.

Complying with all of the court's rules and orders will ensure that the claim is heard as soon as possible.

A. Vancouver (Robson Square) and Richmond Small Claims

1. Claims of $5,001-$10,000

Where the claim and counterclaim, if any, are each $5,001 – $10,000 (not including interest or expenses) and are not for either personal injury or financial debt, a simplified trial will be scheduled pursuant to Rule 9.1 of the *SCR*. The trial is conducted without complying with formal rules of procedure and evidence, but if the adjudicator (meaning a judge or a justice of the peace) deems it appropriate, the adjudicator may conduct the trial with a formal examination and cross-examination of parties and witnesses.

Before the trial begins, an adjudicator will (a) review the documents filed by the parties; (b) determine whether the parties are able to settle the matter; and (c) if the parties are able to settle the matter, make a payment order or other appropriate order in the terms agreed to by the parties (*SCR*, Rule 9.1(21)).

Except for the trial, no other court appearances are typically required. The trial will be held for one hour before an adjudicator. To learn who decides the case and how long it takes, visit http:/ / www. smallclaimsbc. ca/ trial/ simplified-trial.

2. Claims Exceeding $10,000

Any party to a proceeding where the amount of a claim, counterclaim, or third-party notice exceeds $10,000 may initiate Rule 7.3 of the *SCR* which is mediation. Following mediation or if mediation is not initiated, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10 of the *SCR*.

3. Claims for Financial Debt

If the claimant or counterclaimant is in the business of lending money or extending credit and is suing for a debt that arises from a loan or the extension of credit, a summary trial will be scheduled pursuant to Rule 9.2 of the *SCR*; except for the trial, no other court appearances are typically required. The trial will be held before a judge and usually takes fewer than 30 minutes to complete.

B. Surrey, North Vancouver, Victoria, or Nanaimo

1. Claims of $10,000 or Less

After a Notice of Claim is filed and the opposing party responds, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10 of the *SCR*.

2. Claims Exceeding $10,000

Any party to a proceeding where the amount of a claim, counterclaim, or third-party notice exceeds $10,000 **may** initiate Rule 7.3 of the *SCR* which is mediation. Following mediation or if mediation is not initiated, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10 of the *SCR*.

C. Other Registries

1. Claims of $10,000 or Less

If the claim does not proceed by way of Simplified Trials (Rule 9.1) or if the claim does not proceed by way of Summary Trial for Financial Debt, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed (*SCR*, Rule 7(2)(b)). If the claim relates to a motor vehicle accident where only liability for property damage is disputed, the registrar will set the claim for trial.

All parties must attend the settlement conference and must be prepared. If a settlement conference cannot be conducted properly because a party is not prepared for it, a judge may order that unprepared party to pay the reasonable expenses of the other parties (SCR, Rule 7(4), (5) & (6)). At a settlement conference, a judge may: (a) mediate any disputed issues; (b) decide on issues that do not require evidence; (c) make a payment order or other appropriate order in the terms agreed by the parties; (d) order that the claim is set for trial conference; (e) set at trial date if a trial is necessary; (f) order a party disclose documents and records; (g) if damage to property is involved in the dispute, order a party to permit a person chosen by another party to examine the property damage; (h) dismiss any claims; and (i) make any other orders (*SCR*, Rule 7(14)).

The final step is a trial pursuant to Rule 10.

2. Claims Between $10,000 and $35,000

Any party to a proceeding where the amount of a claim, counterclaim, or third party notice is between $10,000 and $35,000 may initiate Rule 7.3 of the *SCR* mediation by filing a "Notice to Mediate for Claims Between $10,000 and $35,000" (Form 29) and delivering a copy of that filed notice to every other party named on a notice of claim, reply or third party notice that has been filed in the proceeding.

If the parties do not reach an agreement at mediation on all issues, the registrar may set (a) a settlement conference (if a settlement conference has not been completed); (b) a trial (if a settlement conference has been completed); or (c) a trial conference (*SCR*, Rule 7.3(53)).

D. Civil Resolution Tribunal ($5,000 or less)

The Civil Resolution Tribunal is designed to facilitate dispute resolution in a way that is accessible, fast, economical, and flexible. It relies heavily on electronic communication tools. It focuses on the resolution by agreement of the parties first, and by the tribunal's binding decisions if no agreement is reached.

Adjudicators will decide most cases by reviewing the evidence and arguments submitted through the tribunal's online tools. Tribunal members may have their staff request additional evidence via email; however, this is rare. The tribunal member may order a telephone, video, or face-to-face hearing if warranted by the circumstances. Again, this is rare, and if parties seek such a hearing, they should request it during their case management. The tribunal can determine all matters relating to the tribunal decision process and, if at any time before or during the tribunal decision process, the tribunal decides that a dispute requires further facilitation, it can refer the dispute back to facilitation, and suspend the tribunal decision process until a facilitator refers the dispute back to the tribunal decision process.

The tribunal member also has the authority to refuse to resolve the dispute on the basis of jurisdiction, or for reasons outlined in section 11 of the *Civil Resolution Tribunal Act*.

IX. Pre-Trial

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

A. Offers to Settle

If a party rejects a formal offer to settle, the trial judge may order a party who rejected an offer to settle to pay a penalty of up to 20 per cent of the offer (*SCR*, Rule 10.1(7)). However, this rule does not apply if the proceeding was started by a notice of civil resolution tribunal claim, or if Rule 9.1 of the *Small Claims Rules* applies (the amount of the claim and counterclaim, if any, are each for $10,000 or less, and if one of the following applies: the claim was started after November 25, 2007 and is for $5,000 or less; the claim was started on or after June 1, 2017 and is for more than $5,000; or the claim is part of a proceeding started by a notice of civil resolution tribunal claim and, on or after June 1, 2017) (*SCR*, Rule 9.1(2)). This can happen in one of two ways. If the defendant makes an offer that the claimant rejects and, at trial, the claimant is awarded an amount including interest and expenses that is equal to or less than the offer, the penalty is deducted (*SCR*, Rule 10.1(5)). If the claimant makes an offer the defendant rejects, and the claimant is awarded a sum including interest and expenses that equals or exceeds the claimant's offer, the penalty is added onto the award (*SCR*, Rule 10.1(6)).

A formal offer to settle must be made using Form 18 and served on the party to whom the offer is made as if it were a Notice of Claim (*SCR*, Rule 10.1(1)). The party offering to settle may also fill out a certificate of service. Neither Form 18 nor the certificate of service is filed at the registry; if the party making the offer wishes the penalties to apply, these forms should be presented to a judge for the first time after a decision is given at trial.

A formal offer must be made within 30 days of the conclusion of a:

- settlement conference;
- trial conference.

Once the first of any of these hearings has concluded and 30 days have elapsed, formal offers cannot be made without the permission of a judge (*SCR*, Rule 10.1(2)). However, the parties can continue to make and accept informal offers to settle up until the point a judgement is rendered. Parties making formal offers are not permitted to shorten the acceptance deadline on Form 18 - the allotted period for accepting a formal offer is 30 days after the date the offer was served.

B. Withdrawing a Claim, Counterclaim, Reply, or Third Party Notice

A party may withdraw a claim, counterclaim, reply, or third party notice at any time (*SCR*, Rule 8(4)). To do so, a party must file a notice of withdrawal (*SCR*, Rule 8(4)(a), Form scl019)at the registry and then promptly serve the notice of withdrawal on all parties who had been previously served with the claim, counterclaim, reply, or third party notice (*SCR*, Rule 8(4)(b)). A Notice of Withdrawal may be served by ordinary mail or personal service (*SCR*, Rule 18(12)).

Once a pleading is withdrawn, it cannot be reinstated, used, or relied upon without the permission of a judge (SCR, Rules 8(6) and 16(7)).

Withdrawing a claim does not result in the dismissal of a counterclaim. The counterclaim may still proceed unless it is also withdrawn (*Ishikawa v Aoki and Japanese Auto Centre Ltd.*, 2002 BCPC 683 [1]). In the CRT, a party who wants to withdraw its claim can do so in adherence with the CRT Rules. Before the end of case management, the party can request permission to withdraw the claim (CRT Rules (effective May 1, 2021), Rule 6.1). After the dispute has been assigned to a tribunal member, the party must obtain the tribunal member's permission to withdraw its claim. If the party seeks to

pursue a withdrawn claim, they must obtain permission from the tribunal. The tribunal will consider many factors, including the reason for the withdrawal, any prejudice to the other parties, expired limitation periods, the tribunal's mandate, and the interests of justice and fairness.

C. Adjournments and Cancellations

Once a date for a hearing, settlement conference, or trial has been set, any party can apply for an adjournment or to cancel the hearing (*SCR*, Rule 17(5)).

If seeking an adjournment, try to first obtain the consent of the opposing party prior to applying to a judge. If consent is given, Form 17 must be filed in the registry as soon as possible.

A trial will only be adjourned if a judge is satisfied that it is unavoidable and if an injustice will result to one of the parties if the trial proceeds (*SCR*, Rule 17(5.1)). There is a $100 fee for adjournments where the application is made less than 30 days before a trial and notice of the trial was sent 45 days before the trial's date (*SCR*, Schedule A, Line 14; Rule 17(5.2)). The fee must be paid within 14 days of the granting of the adjournment (*SCR*, Rule 17(5.3)). If a party fails to pay this fee, a judge may dismiss the claim, strike out the reply, or make any order they deem fair (*SCR*, Rule 17(5.4)).

D. Pre-Judgment Garnishment

If the claim is for debt, a "garnishing order before judgment" may be issued at the same time a Notice of Claim is filed. Except for wages and interest, almost any debt can be garnished before a judgment. Since injustice can sometimes occur from the procedure, few garnishing orders are issued before judgment. Practically, the court will grant a garnishing order before judgment in only certain circumstances, for instance where the claimants will be unable to collect if they succeed (*Webster v Webster*, [1979] BCJ No 918 [2]; *Affinity International Inc. v Alliance International Inc.*, [1994] MJ No 471 [3]; *Intrawest Corp. v Gottschalk*, 2004 BCSC 1317 [4]; and *Silver Standard Resources Inc. v Joint Stock Co. Geolog*, [1998] BCJ No. 2887 [5]).

To obtain a pre-judgment garnishing order, the claimant must file an affidavit stating: if a judgment has been recovered or an order made, that it has been recovered or made, and the amount is unsatisfied; or if a judgment has not been recovered, that an action is pending, the time of its commencement, the nature of the cause of action, the actual amount of the debt, claim or demand, and that it is justly due and owing after making all just discounts. In either case, the claimant must also state: that any other person is indebted or liable to the defendant (the garnishee), the judgment debtor or person liable to satisfy the judgment or order, and is in the jurisdiction of the court; and with reasonable certainty, the place of residence of the garnishee (*Court Order Enforcement Act*, RSBC 1996, c 78, s 3(2)).

If the registry grants the order, the claimant must serve both the garnishee and the defendant. If the garnishee is a bank, the garnishing order must be served on the branch where the account is located (*Bank Act*, SC 1991, c 46, s 462(1)). If the garnishee is a credit union, the order must be served at its head office. A separate order must be obtained for each garnishee. The Garnishee must pay the greater of the amount owed to a Defendant and the amount shown on the garnishing order to the Court Registry. It is extremely important to find out the correct legal name of the Garnishee. This is because if you use the wrong name on the Garnishment documents, the Garnishee can refuse to pay to the Court money owed to Defendant. If Garnishee is a company, a search at the BC Corporate Registry Office would be useful.

In some cases of fraud, the Supreme Court can issue a Mareva Injunction freezing the defendant's worldwide assets (*Aetna Financial Services v Feigelman*, [1985] 1 SCR 2 [6]; *Silver Standard Resources Inc. v Joint Stock Co. Geolog*, [1998] BCJ No. 2887 [5]; *Fernandes v Legacy Financial Systems*, Inc., 2020 BCSC 885) [7]; this prevents the defendant from dealing with any of their assets in any way.

It is also possible to apply for a "garnishing order before action". This is a separate form from a pre-judgment garnishment. This form is used before a Notice of Claim has been registered at a Small Claims Court Registry (see http://www.courts.gov.bc.ca/supreme_court/self-represented_litigants/Supreme%20Court%20Document%20Packages/Garnishment%20Package.docx).

E. Transfer to Supreme Court

A judge at the settlement/trial conference, at trial, or after application by a party at any time, must transfer a claim to Supreme Court if they are satisfied that the monetary outcome of a claim (not including interest and expenses) may exceed $35,000 (*SCR*, Rule 7.1(1)). However, the claimant may expressly choose to abandon the amount over $35,000 to keep the action in the Small Claims Court (*SCR*, Rule 7.1(2)). For personal injury claims, a judge must consider medical or other reports filed or brought to the settlement conference by the parties before transferring the claim to Supreme Court (*SCR*, Rule 7.1(3)).

If a counterclaim for more than $35,000 is transferred under this rule, the original claim can still be heard in Small Claims Court if the claim is $35,000 or less (*Shaugnessy v Roth*, 2006 BCCA 547 [8]).

F. Amendments

If a party wants the court or tribunal to order something different or in addition to what is in the initiating document, then the party must amend the claim as early in the process as possible. This would occur if, for example, the claimant sought to change the amount of the existing claim. Failure to do so may result in the additional claim not being heard for procedural fairness reasons. Only in extraordinary circumstances will the CRT amend a claim during the decision phase (*CRT Rules (effective May 1, 2021)*, Rule 1.19(3)). A party who wants to amend, change, add, or remove anything in a filed document, such as the amount, the name of a party, or a fact, must follow Rule 8 (*Royal Bank of Canada v Olson*, [1990] 44 B.C.L.R. (2d) 87 (BCSC) [9]).

1. Permission to Amend

Anything in any filed document can be changed by the party who filed it. Permission is not required unless **any** of the following have begun (Rule 8(1)):

- a settlement conference;
- a mediation under Rule 7.4;
- a trial conference under Rule 7.5;
- a trial under Rule 9.1; or
- a trial under Rule 9.2 (*SCR*, Rule 8(1)).

If any of these steps have commenced, the party must apply to a judge for permission to amend the document (*SCR*, Rules 8(1)(b) and 16(7)).

2. Amendment Procedure

Changes to the document must then be underlined, initialed, and dated (*SCR*, Rule 8(2)). If a judge has allowed the amendment, the document should reference the order. For example, the document might state, "Amended Pursuant to Rule 8(1)(b) by Order of the Honourable Judge Law on September 1, 2012." For the specific amending procedure for the CRT, see Rule 1.19 of the CRT Rules.

3. Serving Amendments

Before taking any other step in the claim, the party must serve a copy of the amended document on each party to the claim (*SCR*, Rule 8(3)). If the amended document is a Notice of Claim, Counterclaim, or Third Party Notice, it must be served as if it was an original. If the amended document is a Reply or some other document, it can be sent by regular mail to the address of each party to the action (*SCR*, Rule 18(12)(b)). Documents served by ordinary mail are presumed served 14 days after being mailed unless there is evidence to the contrary (*SCR*, Rule 18(13)). While proof of service is not required, it is recommended.

4. Responding to Amendments

Generally, there is no obligation to respond to an amendment (*SCR*, Rule 8(3.1)). For example, a defendant's current Reply may satisfactorily respond to a minor change to a Notice of Claim. If the defendant chooses not to file an amended Reply, the claimant cannot apply for a default order (*SCR*, Rule 8(3.2)).

A party who wishes to respond to an amendment should follow the same procedures outlined in this section.

References

[1] http://canlii.ca/t/1fw54
[2] http://canlii.ca/t/24mt3
[3] http://canlii.ca/t/g9xlc
[4] http://canlii.ca/t/1j00m
[5] http://canlii.ca/t/1f0vk
[6] http://canlii.ca/t/1fv1d
[7] http://canlii.ca/t/j888g
[8] http://canlii.ca/t/1q3w6
[9] http://canlii.ca/t/1dt0n

X. Mediation

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

Mediation is available through the courts for claims between $10,000 and $35,000. Rule 7.2, which mandated mediation for certain claims under $10,000, was repealed effective January 1st, 2019. Parties are also free to meditate on their own. See Section IV.D.: Alternative Dispute Resolution.

A. Claims Between $10,000 and $35,000 – Rule 7.3

This rule applies to all registries except the Vancouver (Robson Square) court registry. See Section IV.D.: Alternative Dispute Resolution.

Any party to a proceeding where the amount of a claim, counterclaim, or third-party notice exceeds $10,000 may initiate mediation by filing a Notice to Mediate (Form 29) and serving it on every other party to the proceeding (*SCR*, Rules 7.3(2), (3), and (5)). If mediation has been scheduled all parties must select a mediator, attend the mediation, and agree on the amount that each party will pay towards the costs of mediation (*SCR*, Rules 7.3(9)-(10), (17)-(23), and (33)-(36)). By default, the parties will split the cost (*SCR*, Rule 7.3(35)(b)(i)). If the parties cannot agree on a mediator, the BC Mediator Roster Society may be requested to appoint one (*SCR*, Rule 7.3(10)).

Parties must attend the mediation session in person unless an application is filed for adjournment (*SCR*, Rule 7.3(30)), for a teleconference (Rule 7.3(25)), or for an exemption (Rule 7.3(28)). If a party fails to attend as required, the mediator will fill out a verification of default (Form 31) and provide it to the party in attendance (*SCR*, Rule 7.3(37). After filing Form 31, the party in attendance can file a request for judgment or dismissal (Form 23) which dismisses the claim if the party not attending is the claimant or gives a default order if the party not attending is the defendant (*SCR*, Rules 7.3(38)-(41)).

B. Preparing for Mediation

Preparation is essential in order to achieve the most from mediation. Each party should provide copies of relevant documents to the other party. Parties have the ability to create their own resolution and should consider creative settlement options. Mediation is not a forum to assess blame or resolve legal questions; it is designed to end the dispute in a manner that satisfactorily addresses the interests, legal and otherwise, of each party. It is important to listen to the other party expressing their interests and allow the mediator to help the parties resolve the dispute.

C. Procedure

Mediation is a flexible process that allows the mediator to help the parties achieve a settlement. A mediator is not necessarily a lawyer but is a skilled, experienced professional. Although mediation sessions can vary with respect to the process, there are generally some standard steps that are followed.

All parties and representatives will be seated at a table with one to three mediators. The mediators will describe the mediation process, and ask each person attending to sign an Agreement to Mediate. This must be signed in order for the mediation process to proceed. The Agreement to Mediate form includes a confidentiality clause (any information disclosed in the session that is not otherwise discoverable is inadmissible and mediators cannot be called to testify in later proceedings) and ensures that the parties present have full authority to settle the case.

After signing the Agreement to Mediate, both parties will have a short time to tell their story. The mediator will summarize the key points in dispute. Once the main issues are identified, the mediator will look for common interests in an attempt to assist parties to resolve the dispute. The mediator will assist the parties to negotiate and reach an amicable resolution. During the process, it is not uncommon for a mediator to have a private conference with each party.

If the parties agree to a resolution, the mediator will draft an Agreement setting out the terms of the resolution. It may include monetary and non-monetary terms and may have a non-compliance clause setting out consequences for failing to fulfill the obligations set out in the Agreement. If there is no non-compliance clause, the default amount will be the original amount claimed in the action. The mediator will file the agreement in the Small Claims Court registry after each party signs the agreement.

XI. Settlement Conferences

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

Settlement conferences are held in all court registries and are mandatory for all cases for all cases barring select exceptions: i) motor vehicle accident cases where only liability for property damage is disputed, and ii) simplified or summary trials (under now Rule 9.1 and 9.2) unless a judge orders otherwise.

A. Who Must/Can Attend

The registry will serve the parties by mail with a Notice of Settlement Conference (Form 6) at least 14 days in advance (*SCR*, Rule 7(3)).

All parties, with or without legal representation, must attend the settlement conference, although there is are exceptions for: claims resulting from a motor vehicle accident, the defendant is disputing the amount of the claim but not a liability, and a person appointed by ICBC attends instead of the defendant (*SCR*, Rule 7(4)). If a party is not an individual (i.e., a company), someone who has authority to settle the claim for the company must attend (*Kamloops Dental Centre v Mcmillan*, [1996] 28 BCLR (3d) 60 (BCSC)). If a party sends a lawyer or articled student and does not attend personally or send a company representative, that party will be deemed to have not attended the settlement conference. A party may appear by telephone if an application is made to and approved by the Registrar prior to the date set for the conference (*SCR*, Rule 16(2)(c.1)). If a party does not attend or does not have full authority to settle, the judge can dismiss a claim, grant a payment order, or make any other appropriate order (*SCR*, Rules 7(17)). If a party attends but is unprepared, a judge may order the unprepared party to pay the other party's reasonable costs (*SCR*, Rules 7(6) and 20(6)).

Witnesses cannot attend except in unusual and exceptional cases. A witness who does attend the settlement conference will usually be asked to wait outside.

Support persons: unless a judge orders or directs otherwise, a litigant may have a support person with them at any small claims or family proceeding except for settlement/trial conferences, family case conferences, or family settlement conferences. Litigants must inform the judge before the commencement of the proceedings that a support person is present with them. Rules for the conduct and role of support persons can be found in NP11 (https:/ / www. provincialcourt.bc.ca/downloads/Practice%20Directions/NP11.pdf).

B. What to Bring

Each party must bring to a settlement conference all relevant documents and reports whether the party intends to use them at trial or not (*SCR*, Rule 7(5)). Documents include any contracts, invoices, bills of sale, business records, and photographs.

Each party should prepare a brief chronological summary of its case and support it with evidence. Claimants should bring more than one written estimate or quote if there is a large sum of money involved.

Pursuant to Small Claims Rule 7(5), each party must submit all relevant documents and reports to the registry at least 14 days before the date of the conference, and serve all relevant documents and reports on the other parties at least 7 days before the settlement conference.

Note: settlement conferences held via Teams may have different deadlines for filing and service, as well as restrictions on the length of documents. Parties should adhere to the specific requirements set out in the notice of settlement/trial conference and any relevant orders made in respect to the conference. For more information on requirements for documents for use in settlement conferences and small claims proceedings generally, see: https://www.provincialcourt.bc.ca/downloads/Practice%20Directions/SMCL03.pdf

Note: subject to specific orders for disclosure, the content of a party's settlement conference documents is somewhat a matter of discretion. However, providing a convincing array of evidence can be strategically beneficial in presenting a strong case and a greater incentive to the other parties to settle.

If the claim is for personal injury, the claimant must file and serve a Form 7 certificate of readiness and required records before a settlement conference will be scheduled (*SCR*, Rule 7(5)). There can be consequences for failing to file the certificate of readiness on time (*SCR*, Rule 7(5)).

C. What May Happen

A settlement conference is scheduled for 30 to 60 minutes before a judge in a conference room at the courthouse. The judge at the settlement/trial conference will not be the judge at trial if a trial is necessary. The parties will sit at a table with the judge. The judge will say a few words and ask each party to give a brief summary of their case. The claimant generally goes first. The judge may then lead both the claimant and defendant into a discussion on what, if anything, the parties can agree on. If the parties agree on the final result, the judge will make the order. However, the parties may agree on some issues and leave issues in dispute to be resolved at trial. The judge will assess how much time is required for trial.

A judge at a settlement conference may make any order for the just, speedy, and inexpensive resolution of the claim (*SCR*, Rule 7(14)). This includes mediating and making orders regarding admissibility of evidence, inspections of evidence, or production of evidence to the other party. The judge may also dismiss a claim that discloses no triable issue, is without reasonable grounds, is frivolous, or is an abuse of the court's process (*SCR*, Rule 7(14)((i); *Belanger v AT&T Canada Inc.*, [1994] BCJ No. 2792; *Cohen v Kirkpatrick*, 1993 CanLII 2059 (BCSC); and *Artisan Floor Co. v Lam*, [1993] 76 BCLR (2d) 384 (BCSC)). Examples include claims that are outside the court's jurisdiction, where the claimant presents no evidence, or where the limitation period at the date of filing the Notice of Claim had expired. A judge cannot dismiss a case at the settlement conference on the basis of issues relating to the credibility of witnesses or evidence.

A judge may also order that multiple claims be heard at the same time, or consolidated into one claim (*Schab v Active Bailiff Service Ltd.*, [1993] BCJ No. 2936). The distinction is important. Claims heard at the same time may each individually be awarded up to $35,000, while claims which are consolidated into one claim may only be awarded $35,000 combined.

Any agreement valid under contract law can result in a binding settlement. Agreements entered into by lawyers with their client's knowledge and consent are binding but can be set aside in some circumstances (*Harvey v British Columbia Corps of Commissionaires*, 2002 BCPC 69 [1]).

If all claims are not settled, the parties should acquire a record of the settlement conference, which may outline all of the issues in the case, all admissions, the number of witnesses, the anticipated length of the trial, and anything that must be disclosed.

> **NOTE:** If the settlement pertains to an action against a lawyer for which a complaint has been filed with the Law Society, a party cannot use complaint withdrawal as a bargaining technique; it is improper during settlement negotiations to offer to withdraw a complaint against a lawyer as a part of the settlement (*Gord Hill Log Homes Ltd. v Cancedar Log Homes*, 2006 BCPC 480 [2]).

D. Disclosure

Trial by ambush is not permitted. Each party is entitled to know the evidence for and against its position. If the parties cannot reach a settlement, the focus will turn to trial preparation. The judge at a settlement conference has the power to order the production of documents and evidence. Each party should attend the settlement conference with a list of documents and evidence that is believed to be in the possession of the other party.

A judge will order the parties to exchange copies of all documents or allow for their inspection before trial. The disclosure must be timely (*Golden Capital Securities Ltd. v Holmes*, 2002 BCSC 516 [3]). These documents should be compiled in a tabbed binder for easy reference at trial.

Each party must be prepared to disclose the name of each witness that that party intends to call, indicate what evidence each witness will give, and provide a time estimate. If expert evidence will be used, it is helpful if a written report (or at least a draft copy) is available for the settlement conference. If an expert report is not available, parties will be ordered to exchange those reports prior to trial. There is a minimum deadline of 30 days before trial (*SCR*, Rules 10(3) and (4)); however, the judge at the settlement conference can be asked to change the time limits.

If a party does not comply with a disclosure order, a judge may adjourn the trial, the settlement conference, or both, order that party to pay expenses, order the trial to proceed without allowing that evidence to be used, or dismiss the action.

> **NOTE:** For case law relating to the disclosure of medical documents and ethical obligations of physicians to their patients see *Halliday v McCulloch*, [1986] BCJ No 223 (BCCA) [4], *Hope v Brown*, [1990] BCJ No. 2586 [5], *Davies v Milne*, 1999 CanLII 6654 (BCSC) [6], and *Cunningham v Slubowski*, 2003 BCSC 1854. [7]
>
> **NOTE:** For case law on obtaining disclosure from the Crown (e.g., from a related criminal case) in a civil case see *Huang (litigation guardian of) v Sadler*, [2006] BCJ No. 758 (BCSC) [8] and *Wong v Antunes*, 2008 BCSC 1739 [9].
>
> **NOTE:** For case law pertaining to the admissibility of evidence obtained through electronic surveillance (e.g., recording telephone conversations and videotaping) and whether it will be considered a violation of the *Privacy Act*, RSBC 1996, c 373, see *Watts v Klaemt*, 2007 BCSC 662 [10], and *Cam v Hood*, 2006 BCSC 842 [11]. For case law on obtaining evidence from third parties see *Lewis v Frye*, 2007 BCSC 89 [12].

A judge may also order the exchange of all case law prior to the trial date.

Parties should consider writing to the other side after the settlement conference to confirm the deadline, the documents required, and remedies that will be pursued if there is no disclosure. When sending documents, it is important to include a list or outline of what material is enclosed.

E. Enforcing a Settlement Agreement

If an agreement is reached at a settlement conference includes payment, and if a party does not comply, the agreement can be canceled (*SCR*, Rule 7(20)). After filing an affidavit describing the non-compliance, the person entitled to payment may file a payment order for either the amount agreed to by the parties as the default amount and noted on the record as the default amount endorsed by the judge at the settlement conference or the full amount of the original claim if there was no default amount endorsed by the judge.

References

[1] https://www.canlii.org/en/bc/bcpc/doc/2002/2002bcpc69/2002bcpc69.html?searchUrlHash=AAAAAQAySGFydmV5IHYgQnJpdGlzaCBDb2x1bWJpYSBDb3JwcyBvZiBDb21taXNzaW9uYWlyZXMAAAAAAQ&resultIndex=1

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[10] http://canlii.ca/t/1rfst

[11] http://canlii.ca/t/1nh0s

[12] http://canlii.ca/t/1q91l

XII. Trial/Pre-Trial Conferences

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

A. Trial Conference

A trial conference only applies to claims at the Vancouver (Robson Square) registry. Parties should see Section XI: Settlement Conferences for information regarding the purpose of, preparation for, and conduct of a trial conference. A trial conference is similar to a settlement conference with a few notable exceptions, such as:

- the focus will be on trial preparation rather than on settlement.
- a party does not have to attend if a lawyer, articling student, or other representative attends on that party's behalf (*SCR*, Rule 7.5(12));
- a Trial Statement (Form 33) must be filed at least 14 days before the trial conference and served on all other parties at least 7 days before the trial conference (*SCR*, Rules 7.5(9) and (10)). The trial statement form must include 4 sections: a statement of facts, amount claimed and calculation of the amount, a witness list, and the documents intended to be relied on at trial;
- a certificate of readiness is not required as it will have been provided prior to Rule 7.4 mediation;
- the judge may require the parties to jointly retain an expert (*SCR*, Rule 7.5(14)(e)(ii)); and
- the judge may give a non-binding opinion regarding the probable outcome of the trial (*SCR*, Rule 7.5(14)(j)).

There may be consequences for failing to file and serve the Trial Statement on time (see *SCR*, Rule 20(6); *Yewchuk v Cleland*, 2002 BCPC 200 (CanLII); *Irving v Irving*, 1982 CanLII 475 (BCCA); and *Busse v Robinson Morelli Chertkow*, [1999] BCJ No. 1101 (BCCA)). The Registrar must serve a Notice of Trial Conference (Form 32) at least 30 days prior to the date set for the conference. A judge may make any order for the just, speedy, and inexpensive resolution of the claim including those enumerated in Rule 7.5(14).

B. Pre-Trial Conference

At most registries, a pre-trial conference will be scheduled for claims with trials that are scheduled to be longer than one half-day. In many ways, this is similar to a settlement conference. There are basically no rules for pre-trial conferences. The general purpose is to ensure that the parties are prepared for trial, that all orders have been complied with, that all disclosure has been made, and that all witnesses will attend the trial. The judge will try to narrow the number of witnesses to reduce court time. In practice, it is a good idea to review the witnesses on your list and be prepared to address whether the evidence that each witness will give is redundant or conflicts with any rule of evidence. One of the more common issues that arises is hearsay. In addition, the judge will review the admissibility of documentary evidence, particularly that of written evidence. The judge will also ensure that the matter falls within the jurisdictional limits of the Small Claims Court and that the claim is not beyond its limitation period. Finally, even at this late date, the judge will encourage the claimants and defendants to settle the matter. The parties may receive an order allowing another 30 days after the pre-trial conference to serve a formal settlement offer to the opposing party. The offer to settle must be made according to Rule 10.1 and penalties may apply to parties who refuse the formal offer to settle. For example, if the court after trial grants the claimant a sum that is equal to or less than the defendant's formal settlement offer, the claimant can be ordered to pay the defendant a penalty of up to 20 percent of the settlement offer.

It is not uncommon for judges at a pre-trial conference to decide the case based on the law without hearing any evidence. Some consider this to be an improper use of pre-trial conferences. However, as stated above, there are no rules governing pre-trial conferences so you should be aware of this going into a pre-trial conference.

XIII. Trial Preparation

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

Many, if not most, litigants find trials to be extremely unnerving. While a small claims trial is not predictable, preparing well in advance can help a party to avoid surprises, present a more compelling case, and alleviate fears about the process.

It is important to consider the merits of a claim before proceeding to trial. If there is no reasonable or admissible evidence, the claim is bound to fail (i.e., a statute prohibits recovery), or a limitation period has passed, the judge may impose a penalty. A penalty of up to 10 percent of the amount of the claim may be imposed if a party proceeds to trial without any reasonable basis for success (*SCR*, Rule 20(5)).

A. Trial Binder

A tabbed trial binder helps a party to effectively present its case at trial. A suggested format is:

Tab 1:	Opening Statement: a brief summary of the issues in the case.
Tab 2:	Pleadings: all filed documents in chronological order with a list or index.
Tab 3:	Orders: all court orders that have been made.
Tab 4:	Claimant's Case: anticipated evidence of the claimant and claimant's witnesses, including reminders for the introduction of exhibits and blank pages for taking notes of the cross-examination.
Tab 5:	Defendant's Case: blank pages for notes of the direct examination of defendant and defendant's witnesses and anticipated cross-examination questions.
Tab 6:	Closing Arguments/Submissions: a brief review of the evidence, suggested ways to reconcile conflicts in the evidence, a review of only the most persuasive case law and its application to the facts.
Tab 7:	Case Law: prepare three copies of each case relied on (for you, the judge, and the opposing party). Carefully scrutinize the need for multiple cases to support your argument and limit yourself to as few as possible.
Tab 8:	Exhibits: you will need the original (the exhibit) and three copies (for you, the judge, and the opposing party). You need to be able to prove when, why, and by whom the exhibit was created, and also be able to argue why it is relevant (i.e. document plan or photograph).
Tab 9:	Miscellaneous: any additional documents, notes, lists, and correspondence.

B. Expert Witnesses

Expert witness testimony is not admissible unless their expertise and special knowledge are: (1) necessary for the court to understand the issues (i.e., the subject matter of the dispute is outside the knowledge of an ordinary person) (*R. v Mohan*, [1994] 2 SCR 9 [1]) or (2) provides useful **context** to difficult evidence for the benefit of the trier of fact *Anderson v Canada (Attorney General)*, 2015 CarswellNfld 381 (NLTD) [2]).

Whether expert evidence is necessary is a contextual consideration and it can sometimes be unclear when it is required; however, it can be very important as a failure to provide expert evidence when it is required can result in the failure of a party's claim. If you are unsure about whether you need expert evidence for your claim, seek legal advice.

Expert evidence is generally required to establish the standard of care of a professional, such as a contractor. The main exceptions to this rule are when the professional's work was obviously substandard or when the issue is not technical [(https://canlii.ca/t/hxlzj Schellenberg v. Wawanesa Mutual Insurance Company, 2019 BCSC 196)].

The expert's testimony cannot include the expert's assessment of the credibility of either the claimant or the defendant (*Movahed v Leung*, [1998] BCJ No. 1210; *Brough v Richmond*, 2003 BCSC 512 [3]; and *Campbell v Sveinungsen*, 2008 BCSC 381 [4]). Expert witness testimony is inadmissible if it relates to issues that the court is capable of understanding and analyzing without assistance (*Sengbusch v Priest*, [1987] 14 BCLR (2d) 26 (BCSC)).

For more information on expert testimony, see the Provincial Court's Small Claims Guide (https:/ / www. provincialcourt. bc. ca/ downloads/ smallclaims/ Small%20Claims%20Guide. pdf). Expert evidence is addressed on pages 11-13 and sample expert reports are provided on pages 56-60 and 65-66.

1. Small Claims

Evidence may be given by an expert at trial or through a written report. An expert report must be the opinion of only **one** person. Written reports or notice of expert testimony must be served at least 30 days before trial (*SCR*, Rules 10(3) and (4)).

An expert witness report should include the resume or qualifications of the expert, a brief discussion of the facts of the case supporting the opinion or conclusion, the opinion or conclusion itself, and what was done to arrive at that conclusion.

An exception to the "in-person" rule for expert witnesses is permitted for estimates and quotes. A party may bring a written estimate for the repair of damage or a written estimate of the property value and present it as evidence at trial without calling the person who gave the estimate or quote. Parties should obtain more than one estimate or quote, especially if the sum of money involved is large. Estimates of repairs or value of the property are not considered to be expert evidence (*SCR*, Rule 10(8)) but must be served on all other parties at least 14 days before trial.

If the claimant does not serve the estimate in time, they can ask the trial judge for permission to present it anyway at trial. The claimant may or may not get permission to do so. The other party may ask for a trial adjournment to obtain their own estimate or quote. If the adjournment is granted, the claimant could be penalized and ordered to pay the other party's expenses.

2. Civil Resolution Tribunal

Experts giving evidence at a CRT hearing are there only to assist the tribunal and should not advocate for a particular side or party (*Civil Resolution Tribunal Rules* [CRTR], Rule 8.3(7)). Expert evidence may only be relied on if the party relying on it provides it to all other parties, unless the tribunal decides otherwise, by the other deadline set by the case manager (*CRTR*, Rule 8.3(1)). In addition, the person providing it must provide their qualifications and it must be accepted by the tribunal as qualified by education, training, or experience to give that opinion (*CRTR*, Rule 8.3(2) and

(3)).

The case manager may require that a party providing written expert opinion evidence also provide a copy of the expert's invoice and any correspondence relating to the requested opinion to every party (*CRTR*, Rule 8.3(4)) by a certain date. The tribunal can direct one or more parties to obtain expert opinion evidence and decide how the cost for these witnesses will be borne (*CRTR*, Rule 8.3(5) and (6)).

For motor vehicle injury claims, the tribunal will determine whether additional expert evidence is reasonably necessary and proportionate through a consideration of factors which include:

- the type of bodily injury or injuries;
- the nature of the claim to be decided by the tribunal;
- the other evidence available;
- the amount claimed;
- the timeliness of the request; and
- any other factors the tribunal considers appropriate (*CRTR*, Rule 8.4(1)).

In addition, for disputes filed under the CRT's motor vehicle injury jurisdiction, the tribunal may order an independent medical examination on its own behest or at the request of one of the parties (*CRTR*, Rule 8.5(1)). A party who cannot afford to pay the cost of obtaining expert evidence in a motor vehicle injury dispute can ask that the tribunal order another party to pay, although this is contingent on the other party's ability to pay and the likelihood that the requesting party's claim will be successful (*CRTR*, Rule 8.6).

C. Witness Preparation

For Small Claims trials, a party should review the evidence of its witnesses at least one week before trial and confirm the witnesses' attendance. Witnesses should understand how a trial is conducted, the role of a witness, and the requirement that witnesses tell the truth.

CRT disputes on the other hand, are almost always done in writing. Therefore, witnesses should provide signed statements setting out their evidence.

1. Ensuring Attendance

Each party must ensure that its witnesses will attend court. If a party is not absolutely certain that a witness will attend, the witness should be personally served with Form 8: Summons to a Witness together with reasonably estimated traveling expense at least 7 days before the witness is required to appear (*SCR*, Rules 9(1)-(3)). The minimum traveling expenses must cover round-trip, economy fare such as bus fare to and from the court. While lost salary and other expenses do not have to be paid, a party should be reasonable and generous if possible to avoid making a witness bear the cost of litigation.

If a witness who has been served with a summons does not appear at trial, the summoning party may ask the judge for an adjournment or a warrant of arrest (Form 9; *SCR*, Rules 9(7) and 14)).

2. Telling the Truth

Giving evidence in court is a solemn and serious affair. Lying to the court can be a criminal offence and result in imprisonment. A witness must be well prepared to give evidence.

To emphasize the formality of the proceeding, witnesses must either swear an oath to or solemnly affirm that they will tell the truth. Sworn and affirmed testimony are equally regarded; the choice of whether to swear or affirm is the witness'.

Swearing an oath involves the witness placing their right hand on a religious text and swearing to tell the truth with reference to their chosen religion. While the bible is the default, several religious texts are available if pre-arranged with the court. The standard oath, "Do you swear that the evidence you are about to give the court, in this case, shall be the truth, the whole truth and nothing but the truth, so help you God?", can be modified according to religious preference. A witness who does not want to swear a religious oath should give a solemn affirmation. The wording of the solemn affirmation is: "Do you solemnly affirm that the evidence you are about to give the court, in this case, shall be the truth, the whole truth and nothing but the truth?".

A witness does not need to know the details of each party's position. If a witness has been told the merits and legal arguments of each side, there is a risk that the witness may advocate for a party by including arguments while testifying. Such conduct is not persuasive, suggests that the witness may be biased, and may undermine the witness' credibility.

3. Arranging an Interpreter

Trials and hearings are conducted in English. If a party or the party's witness does not speak English, the party must arrange for an interpreter to be present. There is a list of interpreters available from the court registry however the court does not certify interpreters (*Sandhu v British Columbia*, 2013 BCCA 88 [5]). A party may use any person who is competent to reliably, accurately, and competently translate what is said in court; the judge has, however, discretion to reject the party's choice of an interpreter.

An interpreter should be prepared to testify as to their experience and training. An interpreter who is related to a party may be rejected on the basis of potential bias and an interpreter who is inexperienced or untrained may be rejected on the basis of incompetence. If a party does not arrange an interpreter for a hearing or if the court rejects the interpreter, the party may be liable for a penalty and the reasonable costs of the other party. The party requiring an interpreter should ask the judge at the settlement or trial conference to decide whether the chosen interpreter is acceptable.

The party requiring the interpreter is responsible for the costs of the interpreter; these costs can be, however, recovered if the party is successful at trial.

4. General Advice for Witnesses

- Discuss whether the witness will swear or affirm their testimony.
- The microphones in court do not amplify; they are for recording purposes only. Face the judge when testifying and speak slowly, clearly, and loudly enough for the judge to hear.
- Witnesses should wear appropriate business attire.
- Witnesses should never guess, assume, or argue with the judge or one of the lawyers.
- If a lawyer or other party says, "Objection", or the judge starts speaking, the witness should stop testifying and wait for the judge's instructions.
- On direct examination, the witness should answer questions fully.
- On cross-examination, the witness should answer as briefly and succinctly as possible.

D. Documentary Evidence

Each party should have the original and three copies of each document to be entered as an exhibit. The original will be marked as an exhibit and the other three are for the judge, the opposing party, and you to work from during the trial. Keep track of the exhibits and always refer to them by the correct number.

Before a document can be marked as an exhibit, it must be authenticated. The witness must identify its origins and that it is a true copy. Give the original document and a copy to the clerk and ask the clerk to show the original to the witness. Ask the witness to identify it: "I'm showing you a letter dated...", "Do you recognize it?", "Is this your signature?" or "Is it addressed to you?" When the witness has identified its origins and there are no objections, ask the judge to accept it as an exhibit: "May this be marked exhibit #1?"

Unless the court orders otherwise, Affidavits and Exhibits in small claims proceedings must be no longer than 25 pages in total, cannot be provided on a USB stick or other electronic data storage device, including a video or audio file. For more rules on the content and format of documentary evidence, see https://www.provincialcourt.bc.ca/downloads/Practice%20Directions/SMCL03.pdf.

> **NOTE:** In exceptional circumstances, the judge may permit a witness to provide evidence by affidavit rather than testifying at trial (*Withler and Fitzsimonds v Attorney General (Canada)* [6], 2005 BCSC 1044 (CanLII), para 18; and *Sangha v Reliance* [7], 2011 BCSC 371).
>
> **NOTE:** A judge may examine and compare headshots or handwriting, but should only place very limited weight on their own judgment in these situations (*R. v Nikolovski* [8],[1996] CanLII 158 SCC; and *R. v Abdi* [9], [1997] CanLII 4448 Ont CA).

The CRT decides whether the hearing is held in writing, orally, or a combination of the two (*CRT Rules (effective May 1, 2021)*, Rules 9.1). CRT disputes are almost always done in writing. As such evidence rules differ from those at Court. Refer to Part 8 of the CRT Rules for information about evidence: https:/ / civilresolutionbc. ca/ resources/ rules-and-policies/.

References

[1] http://canlii.ca/t/1frt1
[2] http://canlii.ca/t/glj0n
[3] http://canlii.ca/t/5c62
[4] http://canlii.ca/t/1w9v9
[5] http://canlii.ca/t/fw93h
[6] http://canlii.ca/t/1l561
[7] http://canlii.ca/t/fkr60
[8] http://canlii.ca/t/1fr59
[9] http://canlii.ca/t/6hcz

XIV. Trials

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

A trial is often very difficult, stressful, and unpredictable. If possible, it is generally in the best interests of all parties to settle. However, if the matter cannot be resolved at the settlement/trial conference, a trial will be scheduled (*SCR*, Rule 10). The notice of trial will be sent by mail to the parties' address on file. If a claimant does not attend the trial, the claim will be dismissed. If a defendant or third party does not attend, the claim will be allowed and judgment granted against the absent party.

Statements made by the claimants or the defendants at the settlement/trial conference are protected by settlement privilege and **cannot be used at trial**. A statement made during the settlement/trial conference is not admissible in cross-examination. Also, the judge at the settlement/trial conference will not be the trial judge. This allows the parties to discuss all issues without fear that their statements will be used against them at trial.

Parties should remember that settlement is possible at any time before the judge decides the case. This includes after evidence and arguments are heard at trial.

Parties should watch at least one trial in order to familiarize themselves with the correct procedure.

A. Simplified Trial for Claims: $5,001 - $10,000

Vancouver (Robson Square) and Richmond hold simplified trials pursuant to Rule 9.1. Simplified trials are set for one hour before an adjudicator. An adjudicator will usually be a justice of the peace but may occasionally be a judge. A justice of the peace adjudicator is referred to as “Your Worship”. Simplified trials are held in the evening in Vancouver and during the day in Richmond.

The parties must each file a Trial Statement (Form 33) at least 14 days before the trial date and serve each other party at least 7 days before the trial (*SCR*, Rules 9.1(17) and (18)). There are penalties for failing to comply with these timelines (*SCR*, Rule 9.1(19)).

The trial does not need to comply with formal rules of procedure and evidence (*SCR*, Rule 9.1(20)). The adjudicator will ask questions and control the proceedings to stay within the one-hour timeframe.

B. Summary Trial for Financial Debt

At the Vancouver (Robson Square) registry, financial debt claims will be set for a half-hour summary trial before a judge. Financial debt claims are claims in which one of the parties is in the business of loaning money or extending credit. Often, little in the way of defence can be offered in situations of financial debt and the summary trial may in some ways come to resemble a payment hearing. Where a defence with some merit is advanced, the judge may send the claim to mediation, order a trial conference, or order a traditional trial (*SCR*, Rule 9.2(13)). The judge may conduct the trial without complying with the formal rules of evidence or procedure (*SCR*, Rule 9.2(9)). Note the rules requiring early disclosure of all relevant documents (*SCR*, Rules 9.2(7) and (8)).

C. Regular Trial

Rule 10 trials are held at all registries and are the most common form of small claims trial.

1. Courtroom Etiquette

- Be on time. If you are late, apologize and be prepared to give an excellent explanation.
- Introduce yourself and state your name clearly. Remember to spell your surname for the record.
- Use simple words; do not use “legalese”.
- Do not speak directly with opposing parties. Make submissions only to the judge and have them ask questions to the opposing party.
- Never call witnesses by their given name. Use Mr., Ms., Miss, Mrs., or their preferred title followed by their last name.
- A judge of the Provincial Court is referred to as “Your Honour” and the clerk is referred to as “Madame Clerk” or “Mister Clerk”. When referring to another party, use Mr., Ms., Miss, or Mrs. followed by their last name or refer to them according to their status in the claim (e.g., the defendant).
- Generally you should limit objections to issues that are of central importance to your case. If you have an objection, stand up quickly and say “objection”. The judge will acknowledge you and may ask for the reason you are objecting.

2. Court Room Layout

The judge’s bench is usually elevated above the rest of the court so the judge has a good view of the proceedings. The litigants’ table is in front of the judge, and the parties will come and sit there when their case is called. Often there is a raised lectern to hold papers when a litigant stands to ask questions. The court clerk's table is beside the witness box and between the litigants’ table and the judge’s bench. The witness box will be on either the judge’s left or right. The public gallery will fill up the remaining part of the courtroom. Parties will wait in the gallery until their case is called.

There will be microphones throughout. They do not amplify your voice and are for recording purposes only. **Speak at a moderate speed and project your voice.**

3. Check-In Procedure

The court clerk will ask ahead of time for the names of each party and, if they have one, their lawyer. Each party must tell the court clerk or judge as soon as possible if there are any preliminary motions or applications that should be heard first, whether there are any problems with witnesses and possible delays, and whether the number of witnesses or issues has changed from the settlement conference. This will help to determine the schedule of cases for the day and avoid as many delays as possible.

If all matters on a given day proceed to trial, the courtroom will often be overbooked, and you will be asked about the urgency of your trial. If you are not heard first, you may be given a choice to wait and see if another judge becomes available or to adjourn to another date. If the trial has been previously adjourned, or expert or out-of-town witnesses are present, the trial will likely be given priority.

When the clerk has everyone organized, the judge will be called in. The clerk will announce, “order in court” and everyone must stand. The judge will bow before sitting and all parties should then bow in return before sitting. Next, the court clerk will call out the name of a case, at which time all parties, in that case, will come to the front and identify themselves to the judge.

4. General Order of Proceedings

b) Claimant's Case

- Claimant's opening statement
- Claimant's direct examination of its witnesses
- Defendant's cross-examination of the claimant's witnesses
- Claimant's re-examination of its witnesses
- Defendant's re-examination of the claimant's witnesses

c) Defendant's Case

- Defendant's opening statement
- Defendant's direct examination of its witnesses
- Claimant's cross-examination of the defendant's witnesses
- Defendant's re-examination of its witnesses
- Claimant's re-examination of the defendant's witnesses

d) Closing Arguments

- Claimant's closing
- Defendant's closing
- Claimant's rebuttal

5. Opening Statement

The claimant's opening statement should summarise the facts surrounding the claim, the legal basis for the claim, and the relief that is sought. The defendant's opening statement should summarise the defendant's version of the facts and the reasons it opposes the claimant's claim or the relief the claimant is seeking.

The opening statement should also alert the court to the types of evidence that will be presented and from whom the court will hear. Opening statements should not contain legal arguments and should be as brief as possible.

If there are witnesses other than the parties, the claimant should ask for an order excluding those witnesses from the courtroom.

6. Direct Examination

When each party is examining its own witness, it is that party's direct examination. The party calling the witness should tell the court whether the witness will swear or affirm their testimony.

Witnesses can be led on matters that are not in issue (i.e., their name, where they work, etc.). Leading questions tend to be ones where the answer is either yes or no. Leading the witness at the start will help the witness to relax.

When asking questions about issues that are in dispute or are related to a party's claim or defence, that party should refrain from suggesting answers to the witness. The witness must be allowed to give evidence in their own words.

A witness must authenticate all documents that are entered into evidence unless the parties have agreed to their authenticity. When authenticating a document, pass three copies to the clerk: one for the judge, one for the court record, and another for the witness. Once the witness has identified the document, it will be entered into evidence and given an exhibit number.

When the other party is conducting its direct examination, take detailed notes for cross-examination and closing arguments.

7. Cross-Examination

Once the direct examination of a witness has concluded, the witness may be cross-examined by the other party. There are two main purposes of cross-examination: to point out inconsistencies and omissions and to introduce facts or conclusions. If the witness has performed poorly or has not been damaging, it may not be necessary to cross-examine that witness.

Some questions can make the situation worse. A witness should never be asked to repeat what they said in "chief". This only emphasizes the point and allows the witness to clarify or minimise weaknesses

At some point in cross-examination, the opposing version of the facts should be put to the witness to allow them to comment. This is known as the rule in *Browne v Dunn* [1] and, if not followed, can result in less weight being placed on a witness' evidence or the recall of adverse witnesses (*Budnark v Sun Life Assurance Co. of Canada* [2], 1996 CanLII 1397 (BCCA)).

A witness should not allow the cross-examiner to misconstrue their evidence. If a question is unclear, the witness should ask for clarification. Only the question asked should be answered and additional information should not be volunteered. It is okay if the witness does not know the answer to a question; the witness should not guess the answer.

> **NOTE:** Parties must not speak to their witnesses after cross-examination and before or during re-examination about the evidence or issues in the case without the court's permission (*R. v Montgomery* [3], 1998 CanLII 3014 (BCSC)). If such a discussion occurs, the witness' evidence may be tainted and the court may not believe it.

8. Re-Examination

If new evidence is introduced during cross-examination that was not reasonably anticipated in direct examination or if a witness' answer needs to be clarified or qualified, the judge may give permission to re-examine the witness on the new evidence (*R v Moore* [4],[1984] OJ No. 134; and *Singh v Saragoca* [5], 2004 BCSC 1327 (CanLII) at para. 40). During re-examination, leading questions cannot be asked.

9. Closing Arguments

Closing arguments are an opportunity for each party to persuade the judge of its position. Evidence that strengthens the case should be highlighted and evidence that weakens the case should be explained and addressed. The weaknesses should be addressed in the middle of the closing so that the closing may start and finish on positive notes.

It may be necessary to comment on the credibility of witnesses, conflicts in testimony, and the insufficiency of evidence. The comments should be factual and allow the judge to arrive at a conclusion.

It is also important to summarise the relevant law and refer to specific cases that are on point. All case law should have been shared with all other parties well in advance of the trial.

Closing is not an opportunity to introduce new evidence. If something has been omitted, it can only be introduced if the judge grants permission to re-open that party's case.

10. Judgment

When the evidence, submissions, and closing arguments are finished, the judge must give a decision. The judge may give a decision orally at the end of the trial, at a later date, or in writing (*SCR*, Rule 10(11)). The registrar will notify the parties of the date to come back to court for reasons or if the decision is in writing when it was filed in the registry (*SCR*, Rules 10(12) and (13)).

When payment from one party to another is part of the judgment, the judge must make a payment order at the end of the trial and ask the debtor whether they need time to pay (*SCR*, Rules 11(1) and (2)). If the debtor does not require time to pay, the judgment must be paid immediately (*SCR*, Rule 11(7)). If time to pay is needed, the debtor may propose a payment schedule, and if the successful party agrees, the judge may order payment by a certain date or by installments (*SCR*, Rules 11(2)(b), (3), and (4)). If the creditor does not agree to the debtor's proposal, the judge may order a payment schedule or a payment hearing (*SCR*, Rule 11(5)).

If a payment schedule is not ordered, the debt is payable immediately and the creditor is free to start collection proceedings (*SCR,* Rule 11(7)).

D. CRT- Tribunal Process

Written hearings: the CRT hearing process is different as its hearings are generally done in writing. These hearings occur if the parties do not reach an agreement in the negotiation and facilitation stages.

In preparation for the hearing, a case manager will help each party access the online platform and create a Tribunal Decision Plan. The case managers will guide the parties in the following process:

1. The applicant submits their arguments and their evidence
2. The respondents reply to the arguments and submit their own evidence
3. The applicant gives a final reply to the respondents' arguments
4. The case manager might create a Statement of Facts to help the tribunal member identify what things the participants agree and disagree on

During this process, the case manager will provide parties with a timeline for when to provide evidence and arguments to the CRT member. If a party needs more time, they can ask the case manager for extension, which will be subject to the case manager's discretion.

As per the CRT Rules, parties must provide all relevant evidence to the CRT, even if it might hurt their case (*CRT Rules (effective May 1, 2021)*, Rule 8.1(1)). In fact, it is an offence under the *Civil Resolution Tribunal Act* to provide false or misleading information to the CRT. Evidence should be relevant and may include contracts, correspondence, photos/videos, and statements; see the CRT webpage "Evidence" at https://civilresolutionbc.ca/help/what-is-evidence/ .The total evidence should be presented in a digital copy, ideally, such as a Word document or a PDF. Keep in mind the maximum size per file is 250MB. If you need to upload a larger file, see https://civilresolutionbc.ca/contact-us.If a party seeks to alter the evidence, such as highlighting a pertinent section, the party must add a description of what alterations they made for the tribunal.

Parties will have a chance to respond to evidence and arguments by the opposing party or parties; see the CRT webpage "Get a CRT Decision" at https://civilresolutionbc.ca/tribunal-process/tribunal-decision-process/. Parties seeking to submit expert evidence do so at this time. Expert evidence is evidence from a party not involved in the dispute with some experience with the specific disputed problem; it can be helpful to a case. This evidence should be in the form of a written opinion or statement. Parties that submit expert evidence must also submit any correspondence that they had with that expert about the requested opinion.

The CRT member will then make a decision based on the evidence and arguments. Their decision does not include communications between parties from the negotiation and facilitation phases as those are confidential. The decision is usually available online, in writing. This final decision is binding and enforceable. For more information about the process, visit https://civilresolutionbc.ca/help/what-is-a-final-decision/.

References

[1] http://canlii.ca/t/h6kw6
[2] http://canlii.ca/t/1f0lz
[3] http://canlii.ca/t/1f6s8
[4] http://canlii.ca/t/g945z
[5] http://canlii.ca/t/1j0fr

XV. Costs and Penalties

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

The court expects parties to act reasonably and follow the rules. Parties who do not follow the rules or are unsuccessful may be liable for certain costs and penalties.

A. Costs to Successful Party

Generally, the unsuccessful party must pay the successful party's expenses (*SCR*, Rule 20(2)). Any reasonable expenses directly related to the proceedings may be claimed. This includes filing fees, costs for document reproduction, and other costs incidental to the trial process.

A list of expenses should be brought to trial and can include expenses incurred due to the lateness, unpreparedness, or general misconduct of a party (Rule 20(6)) as long as the party claiming the expenses has actually spent that amount of money (*Weeks v Ford Credit Canada Ltd*, [1994] BCJ No 1737).

Wages lost for attending court cannot generally be recovered (*McIntosh v De Cotiis Properties Ltd* [1], 2002 BCPC 57 (CanLII)). Where a claim before the small claims court has been withdrawn and there are no appropriate grounds to recall it, neither costs nor penalties can be assessed (*SCR*, Rule 8; and *Northwest Waste Systems v Szeto* [2], 2003 BCPC 431 (CanLII)).

In circumstances where the successful party has acted unfairly, withheld information, misled the court, or wasted the court's time, the successful party may have to pay the unsuccessful party's costs (*Tilbert v Jack*, [1995] BCJ No 938).

> **NOTE:** A lawyer's fees cannot generally be claimed as expenses (*Small Claims Act*, s 19(4); and *Weeks v Ford Credit Canada Ltd.*, [1994] BCJ No 1737). The only exception is where the contract between the parties requires the reimbursement of legal costs however this only applies to legal **fees** that are not related to the claim (*Wetterstrom et al. v Craig Management Enterprises Ltd.* [3], 2009 BCPC 165 (CanLII)).

B. Frivolous Claims

A judge has the discretion to order a penalty of up to 10 percent of the amount claimed or the value of the counterclaim if the party proceeded through trial with no reasonable basis for success (*SCR*, Rule 20(5)).

C. Failure to Settle

If there has been a formal offer to settle under Rule 10.1 that was not accepted, a penalty, in addition to any other expenses or penalties – up to 20 percent of the amount of the offer to settle – may be imposed if the offer was the same or better than the result at trial.

The CRT has the power and discretion under the *Civil Resolution Tribunal Act* and Rules to allow fees and dispute-related expenses, so long as they are reasonable. If a dispute is not resolved by agreement and a tribunal member makes a final decision, the tribunal member will usually order the unsuccessful party to pay the successful party's tribunal fees and reasonable dispute-related expenses (*CRT Rules (effective May 1, 2021)*, Rule 9.5(1)). In addition, one party may have to pay the other party tribunal fees, expenses relating to witnesses and summonses, and other reasonable costs paid by the other party (Rule 9.5(2)). It is rare that the CRT would order a party to pay the opposing party's legal fees to make these fee determinations, the CRT will consider a variety of factors including the complexity of the dispute, the degree of involvement by the representative, and whether a party or representative's conduct has caused unnecessary delay or expense (Rule 9.5(3)).

D. Civil Resolution Tribunal Costs

The CRT can award fees and dispute-related expenses, so long as they are reasonable. If a dispute is not resolved by agreement and a tribunal member makes a final decision, the tribunal member will usually order the unsuccessful party to pay the successful party's tribunal fees and reasonable dispute-related expenses (CRT Rules (effective May 1, 2022), Rule 9.5(1)). In addition, one party may have to pay the other party's expenses relating to witnesses and summonses, and other reasonable costs paid by the other party (Rule 9.5(2)). It is rare that the CRT would order a party to pay the opposing party's legal fees. In deciding those claims, the CRT will consider a variety of factors including the complexity of the dispute, the degree of involvement by the representative, and whether a party or representative's conduct has caused unnecessary delay or expense (Rule 9.5(3)).

References

[1] http://canlii.ca/t/5sx2
[2] http://canlii.ca/t/1g7cp
[3] http://canlii.ca/t/24391

XVI. Appeals

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

A. CRT Small Claims Decisions and Appeals

A party who is dissatisfied with a ruling can seek judicial review in the Supreme Court of British Columbia. There are various standards of review applicable to different cases (standard of review refers to the level of scrutiny a reviewing court will apply to a decision). The standard of review is variable because courts have struggled with the interpretation of s 58 of the *Administrative Tribunals Act*. For example, BCSC has ruled that the standard of review for CRT decisions on strata property matters is patent unreasonableness (*The Owners, Strata Plan VR320 v. Day*, 2023 BCSC 364). The Supreme Court of Canada has defined this to apply to decisions that "contain an immediately obvious defect, which is "so flawed that no amount of curial deference can justify letting it stand" and almost borders on the absurd (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52). However, generally speaking, the standard of review for CRT decisions is correctness, unless the issue under review relates to:

- findings of fact, in which case the finding must either be unreasonable or made without any evidence to support it in order for a reviewing court to reverse it. In such cases, the reviewing court may remit the decision back to the CRT or replace it with the court's own decision;
- discretionary decisions, in which case the decision must be arbitrary, made in bad faith, be based entirely or predominantly on irrelevant factors, or fail to comply with a statute in order for a reviewing court to reverse it; or
- natural justice and procedural fairness which are considered with the tribunal's mandate in mind (Administrative Tribunals Act, SBC 2004, c 45, s 58(2)).C

B. Appealing from Small Claims Court

Any party to a proceeding may appeal to the Supreme Court an order to allow or dismiss a claim if the judge made the order after a trial (*SCA*, s 5). An appeal must be started within 40 days, beginning on the day after the order of the Provincial Court is made (*SCA*, s 6). A review of the order under appeal may be on questions of fact or law (*SCA,* s 12(a)). A mistake of fact could involve a misunderstanding by the Judge of evidence given by a witness. For example, if a witness reported that a particular event happened and, in the decision, the judge bases their decision on the fact that the event didn't happen, there could be a basis for an appeal. A mistake of law occurs where the Judge makes an error in deciding which law should apply. Not every error made by a Small Claims Court judge will be the basis for a successful appeal. The test which the Supreme Court Judge must apply is called the "clearly wrong test". If the Small Claims Court judge's decision about the facts or the law is not clearly wrong, the appeal will fail. An appeal is usually not a new trial; it will be based on the transcripts of the trial in Small Claims Court. The Supreme Court may, however, exercise its discretion to hear the appeal as a new trial (*SCA*, s 12(b)). No new evidence may be adduced at the appeal without leave of the court (Practice Direction: Standard Directions for Appeals from Provincial Court; *SCA*, s 12).

For claims that do not fit the criteria for an appeal, the *Judicial Review Procedure Act*, RSBC 1996, c 241, allows the Supreme Court of British Columbia to review decisions made by Provincial Court judges prior to trial. This includes interlocutory orders, the dismissal of a claim at a settlement conference, and adjudicator decisions in Simplified Trials under Rule 9.1. The appropriate standard of review for orders subject to judicial review is reasonableness. For further information on judicial review, see (*0763486 BC Ltd. v Landmark Realty Corp* [1], 2009 BCSC 810 (CanLII); *Wood and Lauder et al v Siwak* [2], 2000 BCSC 397 (CanLII); *Der v Giles*, [2003] BCJ No 938; and *Nicholson v Lum*, [1996] BCJ

No 860).

If an order dismissing a claim is appealed to the Supreme Court, that appeal does not automatically appeal the counterclaim to the Supreme Court, nor vice versa. Each appeal is a separate matter and needs to be filed separately in the Supreme Court. Both appeals will, of course, be heard together. (*Shaughnessy v Roth* [3], 2006 BCSC 531 (CanLII)).

1. Filing an Appeal

You must act quickly if you wish to appeal a decision as there are many steps involved and only a short period of time. Within 40 days of the order being made (*SCA*, s 6), an appellant must, in one day, do all of the following:

- file a Notice of Appeal in the Supreme Court registry closest to the Provincial Court where the order being appealed was made (*SCA*, s 7);
- deposit with the Supreme Court $200.00 as security for costs plus the amount of money required to be paid by the order under appeal (*SCA*, s 8(1) and (2)) or apply to the Supreme Court to reduce the amount required to be paid (*SCA*, s 8(3));
- apply to the registrar of the Supreme Court for a date for hearing the appeal that is at least 21 days, but not more than 6 months, after the filing date (*SCA*, s 10);
- file a copy of the Notice of Appeal in the Provincial Court registry where the order under appeal was made (*SCA*, s 7(b)).

An application to reduce the amount required to be deposited does not need to be served on any person; however, if the court reduces the amount required to be deposited, the appellant must serve notice of this order on the other parties to the appeal (*SCA*, s 8(6)).

The cost to file a Notice of Appeal in Supreme Court is $200.00 and the cost for filing an application to reduce the amount of the deposit is $80.00. An appellant who cannot afford these fees can apply to the Supreme Court registrar for indigent status.

A copy of both the Notice of Appeal and the Notice of Hearing must be served on every respondent affected by the appeal (*SCA*, s 11(1)). Fourteen days after filing the Notice of Appeal, the appellant must provide the Registrar with proof that the Notice of Appeal and the Notice of Hearing have been served on the respondents.

The Appellant must also order transcripts of the oral evidence given at the Small Claims Court trial and the Judge's reasons for judgment. The Appellant must pay for a copy of the transcript for the Court and one for each party to the appeal. Transcripts cost several dollars per page. So, depending on how long the trial lasted, the transcript could be many, many pages and cost hundreds and even thousands of dollars.

For a detailed checklist of the steps you must take to make an appeal, please see Appendix L: Small Claims Appeals.

2. The Decision of the Supreme Court

On hearing an appeal, the Supreme Court may make any order that could be made by the Provincial Court, impose reasonable terms and conditions on an order, make any additional order it considers just, and award costs to any party under the *Supreme Court Civil Rules* (BC Reg 168/2009 and amendments thereto). **There is no further appeal from a Supreme Court order** (*SCA*, s 13(2)).

References

[1] http://canlii.ca/t/242ln
[2] http://canlii.ca/t/52tl
[3] http://canlii.ca/t/1mzjn

XVII. Enforcement of a Judgement

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

A judgment is valid for 10 years (*Limitation Act*, RSBC 1996, c 266, s 3(3)(f)). During that time, a judgment creditor may use whatever means permitted by law to enforce the order (*Court Order Enforcement Act*, RSBC 1996, c 78). First, the successful party must fill out a payment order form (Form 10) and file it in the registry. Interest and expenses need to be included, and a plain piece of paper showing those calculations should be attached. Although it is called a "payment order", the form is used even if no payment of money is ordered. There is space at the bottom of the form for a description of a non-monetary order. The registry will compare it with the court record for accuracy and it will then be signed and ready for pick-up or mailed within a day or two.

The judgment creditor should send a copy of the payment order with a demand letter to the debtor. If the court did not give the debtor a deadline, the judgment debt is due immediately (*Court Order Enforcement Act*, RSBC 1996, c 78, s 48(1)). The demand letter should warn that, if payment is not received by a certain date (i.e., 10 days later), other enforcement proceedings will be pursued.

The Small Claims Court has an excellent procedural guide entitled "Getting Results [1]". Once an enforcement strategy has been decided upon, a judgment creditor should consult the booklet for detailed instructions on how to commence enforcement proceedings.

To enforce payment, a creditor may use any of the following methods (*SCR*, Rule 11(11)):

A. Prohibition on Enforcement

While a debtor is in compliance with a payment schedule, the judgment creditor cannot take any additional steps to collect the debt (*SCR*, Rule 11(6)). If a payment hearing is ordered because the creditor did not agree with the debtor's proposed payment schedule, the creditor may not take any steps to collect the debt before the hearing (*SCR*, Rule 11(8)). If a summons to a payment hearing is otherwise filed, the creditor may not attempt to collect the judgment debt until after the hearing is over or the summons is either withdrawn or canceled (*SCR*, Rule 11(17)).

If the debtor defaults on the payment schedule, the balance becomes due immediately and the creditor may then take other steps to collect the balance (*SCR*, Rule 11(14)).

The Small Claims Court may be **unable** to enforce a mediation agreement if doing so would exceed its jurisdiction. Other mediation agreements and the decisions of adjudicators in simplified trials can be enforced (*Carter v Ghanbari* [2], 2010 BCPC 266; *Wood v Wong* [3], 2011 BCSC 794).

It may not be possible to enforce a judgment against a debtor who has discharged the judgment debt in bankruptcy. A judgment creditor who learns that a judgment debtor plans to file for bankruptcy should review the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 178 and obtain independent legal advice.

B. Order for Seizure and Sale

An order for seizure and sale allows for personal property belonging to the debtor to be seized by a bailiff and sold at a public auction. Examples of personal property that can be seized include vehicles, furniture, and electronics. A personal judgment debtor (i.e., not a corporation) is entitled to retain certain personal property up to a certain value set by regulation (*Court Order Enforcement Act*, RSBC 1996, c 78: s 71(1); *Court Order Enforcement Exemption Regulation*, BC Reg 28/98, s 2).

The net proceeds (after deduction of the bailiff's fees and expenses) are given to the judgment creditor. Once a judgment creditor has filed Form 11, the registrar can grant an order for seizure and sale if there is no payment schedule or if the debtor has not complied with a payment schedule (*SCR*, Rules 11(11)(a) and 11(14)(b)).

The debtor is not notified of the order prior to seizure. A seizure and sale is not carried out by the creditor and must be done by private bailiffs. Before an order is issued, the creditor must deposit the estimated fees and expenses of the bailiffs. An order for seizure and sale is valid for one year.

C. Garnishment After Judgment

Garnishment requires a third party, often the debtor's employer or bank, to pay money owing to the debtor into court instead of to the debtor. The creditor must file an affidavit that describes the amount of the payment order, the amount still owing, and the name and address of the garnishee. The affidavit must be sworn before a notary, a lawyer, or a justice of the peace at the registry. Certain assets such as social assistance payments (welfare, disability) and joint accounts may not be garnished. With some exceptions, only 30 percent of the debtor's salary can be garnished (*Court Order Enforcement Act*, RSBC 1996, c 78, ss 3(5)-(7)).

The creditor must also fill out a garnishing order identifying the garnishee (the bank or the employer) with its full legal name and address. In the case of a bank, the specific branch must be identified and must be located in British Columbia. The garnishee will pay the entire amount it owes the debtor (i.e., the positive balance in a bank account). The garnishing order does not freeze the account; the claimant may re-garnish the bank at any time.

Once the creditor receives a garnishing order, they must serve both the garnishee and the debtor either personally, or by registered mail requiring signature.

Once an order for garnished wages is served on the garnishee, the order is only valid for wages due and owing within **seven** days (*Court Order Enforcement Act*, RSBC 1996, c 78, s 1) – it is therefore critical to have some knowledge relating to the debtor's pay schedule. If the garnishee owes money to the debtor, they must pay the amount owed to the court. All money paid into court is held until further order of the court.

A creditor may apply for the garnishment of a debtor's bank account and accounts receivable **before** a judgment is reached. This is called a pre-judgment garnishing order. For more information, see **Chapter 10, Section III.B.5.: Garnishment of Bank Accounts and Other Accounts Receivable**.

D. Payment Hearing

A payment hearing may be scheduled before a judge or justice of the peace (*SCR*, Rule 12). The default method of appearance is by telephone or Teams audio or videoconference. The payment hearing will determine the debtor's ability to pay and whether a payment schedule should be ordered (*SCR*, Rule 12(1)). Such a hearing may be requested by a creditor or debtor or ordered by a judge (*SCR*, Rule 12(2)). However, if a creditor has an order for seizure and sale, they must get the permission of a judge to also have a payment hearing. The debtor must bring records and evidence of income and assets, debts owed to and by the debtor, any assets the debtor has disposed of since the claim arose, and the

means that the debtor has, or may have in the future, of paying the judgment (*SCR*, Rule 12(12)). Costs to the applicant in such a proceeding are added to the sum of the judgment.

A creditor who requests a hearing must file Form 12: Summons to a Payment Hearing. The registry will set a date on the form and the person named in the summons must be served personally at least seven days before the date of the hearing (*SCR*Rules 12(7) and 18(12)(b)); service by mail is not permitted.

If the debtor is having difficulty paying, they can request a hearing by filing Form 13: Notice of Payment Hearing which must be served on the creditor at least seven days before the date of the hearing, but may be served by regular mail as long as it is mailed at least 21 days in advance of the hearing date (*SCR*Rules 12(11), 18(12)(b), and 18(13)).

If a person who was properly summoned or ordered by the court to attend a payment hearing does not attend, the creditor may ask that the judge or justice of the peace issue a warrant (Form 9) arrest that person (*SCR*, Rule 12(15)).

If a creditor does not appear, the hearing may be held, canceled, or postponed (*SCR*, Rule 12(14)).

E. Driver's Licence Suspension

If damages are a result of a motor vehicle accident involving property damage exceeding $400, bodily injury, or death (*Motor Vehicle Act*, s 91(1)), the creditor may apply to the Superintendent of Motor Vehicles within 30 days of the judgment to have the debtor's driver's license suspended. The Superintendent may suspend the license upon receiving the judgment.

F. Default Hearing

If the debtor does not comply with a payment schedule, the creditor may request a default hearing by filing Form 14: Summons to a Default Hearing. The creditor should request from the debtor the same documents as would be requested for a Payment Hearing. The summons must be served personally by **either** a court bailiff or a sheriff (i.e., not the creditor) at least seven days before the hearing (*SCR*, Rule 13(5)). The judge at the hearing may confirm or vary the terms of the payment schedule (Rule 13(7)) or imprison the debtor if the defendant does not appear or if the reason for failing to comply with the payment schedule amounts to contempt of court (Rules 13(8) and (9)).

The Registrar's authority to waive fees extends only to registry services and **not** court bailiff or sheriff's services. If a creditor cannot afford a court bailiff's or the sheriff's services, the claimant can complete an Application to a Judge seeking, pursuant to Rule 13(8), to hold the debtor in contempt and obtain a Warrant of Imprisonment to imprison the debtor for up to 20 days. This application can be served personally by the applicant to avoid the court bailiff's or sheriff's fees. If the creditor will testify at the hearing as to the debtor's failure to comply with the payment schedule, an affidavit is not required.

G. Execution Against Land

If the debtor owns land in British Columbia, the creditor can register the judgment against the land (*Land Title Act*, RSBC 1996, c 250, ss 197 and 210). If you do not know whether the debtor owns the land, you can do a name search at the land title office, for a fee. If the property is sold or transferred after registration of the certificate of judgment, some or all of the judgment may be paid. Registering a certificate of judgment prevents the Debtor from selling or mortgaging the land unless the debt owed to the Creditor is paid off. Even if the Debtor owns land jointly with another person, it may be useful to register a certificate of judgment against the land. A certificate of judgment is subject to a prior registered mortgage and the rights of a bona fide purchaser who, before registration of the certificate of judgment, has acquired an interest in land in good faith and for valuable consideration under an instrument not registered at the time of the

registration of the judgment (*Court Order Enforcement Act*, RSBC 1996, c 78, s 86).

Once the judgment is registered, the creditor may apply for an order to sell the property, but only through the Supreme Court of BC. It is outside the jurisdiction of the Provincial Court to order a lien to be placed or removed against the property. The process of having a Debtor's land sold to pay off a debt owed to a creditor is very complicated, costly and time-consuming. For example, if the land is used by the Debtor as a principal residence in the Capital Regional District or the Greater Vancouver Regional District, and the Debtor's equity in the land is less than $12,000 the land is exempt from being taken and sold. If the land is located elsewhere in BC and is used by the Debtor as a principal residence and the Debtor's equity is less than $9,000 the land is exempt from being taken and sold (*Court Order Enforcement Act*, RSBC 1996, c 78, s 71.1). Because of this complicated process, legal advice should be obtained to determine whether it would be financially worthwhile to apply for an order to sell.

A certificate of judgment can be obtained at the Small Claims Court Registry from the Registrar. The cost is $30.00. The certificate of judgment can then be registered at the Land Title Office where the land is registered. The cost of filing the certificate of judgment at the Land Title Office is $25.00. The certificate is effective for two years. After the two years expires, a new certificate of judgment must be obtained and filed again.

H. Bankruptcy

If a person files a consumer proposal or becomes bankrupt, the law automatically puts in place a "stay of proceedings". With a few exceptions, a stay prevents any legal action from being commenced or continued against the bankrupt party. The person's trustee will send legal notice of the stay to any person or business currently engaged in legal action against the person declaring bankruptcy. The stay is also sent to the Court that is handling the person's legal action and if a creditor has already obtained a judgment against the person, a copy is sent to debtor's employer as well to stop the garnishee.

The Stay of Proceedings is only effective against debts that are dischargeable (i.e., can be eliminated) by bankruptcy law. Things like child support, spousal support, restitution orders, repayment of debts based on fraud or misrepresentation, and some others are not stopped by a stay. A complete list of the debts can be found under the Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 178.

There are ways for creditors to circumvent a Stay of Proceedings. However, individuals with a judgment awarded in Small Claims Court are advised to speak with a trustee and discuss the mechanism of submitting a proof of claim. This form must be filled out to share in the dividends and vote at the first meeting of creditors (if one is held). The form contains the name of the creditor and the bankrupt and the nature and amount of the claim, as well as other information. A list of instructions is usually included. You must attach a Statement of Account providing the details of the claim along with supporting documents or other evidence that establishes the validity of your claim.

I. Debt collection

Part 7 of the *Business Practices and Consumer Protection Act* (BPCPA) deals with debt collection practices and applies to all transactions, including consumer to consumer, business to consumer, and consumer to business. A collector is defined as "any person, whether in British Columbia or not, who is collecting or attempting to collect a debt". Collectors should be aware of the prescriptions in this BPCPA because there are penalties and fines associated with violating the provisions. For example, Part 10 s 171 of the Act gives rise to a statutory cause of action in Provincial Court to recover damages caused by contraventions of the Act and also gives the Provincial Court jurisdiction for defamation and malicious prosecution.

J. Civil Resolution Tribunal

Under the *Civil Resolution Tribunal Act*, section 58.1, a CRT order may be enforced by filing it in the BC Provincial Court. This can be done if a party has either a consent resolution order, or a final decision. The BC Provincial Court must be provided with a validated copy of the order. A validated copy of a CRT order is sent with the CRT decision. Once a small claims order is received, it can be filed immediately. Effective from July 1st, 2022, the BC government amended the CRTA to remove a previously existing process for parties to dispute the decision by making a Notice of Objection. As such, the only remaining option to appeal CRT decisions now is through application for judicial review.

When a CRT order is filed with the BC Provincial Court, it has the same force and effect as if it were a judgment of the BC Provincial Court. The enforcement procedures are within the Court's jurisdiction. That is, the CRT has no powers of enforcement for its own orders, or for orders from other tribunals such as the Residential Tenancy Branch.

References

[1] http://www2.gov.bc.ca/gov/content/justice/courthouse-services/small-claims/how-to-guides/getting-results
[2] http://canlii.ca/t/2d6vb
[3] http://canlii.ca/t/flxlq

Appendix A: Registries

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

METRO VANCOUVER

ABBOTSFORD		
32203 South Fraser Way Abbotsford, BC,V2T 1W6	Telephone:	(604) 855-3200
	Fax:	(604) 855-3232
CHILLIWACK		
46085 Yale Rd Chilliwack, BC,V2P 2L8	Telephone:	(604) 795-8350
	Fax:	(604) 795-8345
NEW WESTMINISTER		
651 Carnarvon St New Westminster, BC V3M 1C9	Telephone:	(604) 660-8522
	Fax:	(604) 660-1937
NORTH VANCOUVER		
200 East 23rd St North Vancouver, BC V7L 4R4	Telephone:	(604) 981-0200
	Fax:	(604) 981-0234
PORT COQUITLAM		
Unit A – 2620 Mary Hill Rd Port Coquitlam, BC V3C 3B2	Telephone:	(604) 927-2100
	Fax:	(604) 927-2222
RICHMOND		
7577 Elmbridge Way Richmond, BC V6X 4J2	Telephone:	(604) 660-6900
	Fax:	(604) 660-1797
SURREY		
14340 57th Ave Surrey, BC V3X 1B2	Telephone:	(604) 572-2200
	Fax:	(604) 572-2280
VANCOUVER (ROBSON SQUARE)		

Box 21, 800 Hornby St Vancouver, BC V6Z 2C5 Telephone: Fax: (604) 660-8989 (604) 660-8950

REST OF BC

ATLIN

Box 100 Third Street Atlin, BC V0W 1A0 Telephone: Fax: (250) 651-7595 (250) 651-7707

BURNS LAKE

508 Yellowhead Hwy PO Box 251 Burns Lake, BC V0J 1E0 Telephone: Fax: (250) 692-7711 (250) 692-7150

CAMPBELL RIVER

500 – 13th Ave Campbell River, BC V9W 6P1 Telephone: Fax: (250) 286-7650 (250) 286-7512

CLEARWATER

Box 1981, RR #1 363 Murtle Cres Clearwater, BC V0E 1N1 Telephone: Fax: (250) 674-2113 (250) 674-3092

COURTENAY

420 Cumberland Rd, Room 100 Courtenay, BC V9N 2C4 Telephone: Fax: (250) 334-1115 (250) 334-1191

CRANBROOK

102 11th Ave S, Room 147 Cranbrook BC V1C 2P3 Telephone: Fax: (250) 426-1234 (250) 426-1352

DAWSON CREEK

1201 103 Ave, Room 125 Dawson Creek, BC V1G 4J2 Telephone: Fax: (250) 784-2278 (250) 784-2339

DUNCAN

238 Government St Duncan, BC V9L 1A5 Telephone: Fax: (250) 746-1258 (250) 746-1244

FORT NELSON

Bag 1000 Fort Nelson, BC V0C 1R0 Telephone: Fax: (250) 774-5999 (250) 774-6904

FORT ST. JOHN

10600 100 St Fort St. John, BC V1J 4L6 Telephone: Fax: (250) 787-3231 (250) 787-3518

GOLDEN

837 Park Dr Box 1500 Golden, BC V0A 1H0 Telephone: Fax: (250) 344-7581 (250) 344-7715

KAMLOOPS

223 – 455 Columbia St Kamloops, BC V2C 6K4 Telephone: Fax: (250) 828-4344 (250) 828-4332

KELOWNA

1 – 1355 Water St Kelowna, BC V1Y 9R3 Telephone: Fax: (250) 470-6900 (250) 470-6939

MACKENZIE

64 Centennial Dr Box 2050 Mackenzie, BC V0J 2C0 Telephone: Fax: (250) 997-3377 (250) 997-5617

MASSET

1066 Orr St Box 230 Masset, BC V0T 1M0 Telephone: Fax: (250) 626-5512 (250) 626-5491

NANAIMO

35 Front St Nanaimo, BC V9R 5J1 Telephone: Fax: (250) 716-5908 (250) 716-5911

NELSON

320 Ward St Nelson, BC V1L 1S6	Telephone: Fax: (250) 354-6165 (250) 354-6539
PENTICTON	
100 Main St Penticton, BC V2A 5A5	Telephone: Fax: (250) 492-1231 (250) 492-1378
PORT ALBERNI	
2999 4th Ave Port Alberni, BC V9Y 8A5	Telephone: Fax: (250) 720-2424 (250) 720-2426
PORT HARDY	
9300 Trustee Rd Box 279 Port Hardy, BC V0N 2P0	Telephone: Fax: (250) 949-6122 (250) 949-9283
POWELL RIVER	
103 – 6953 Alberni St Powell River, BC V8A 2B8	Telephone: Fax: (604) 485-3630 (604) 485-3637
PRINCE GEORGE	
250 George St Prince George, BC V2L 5S2	Telephone: Fax: (250) 614-2700 (250) 614-2717
PRINCE RUPERT	
100 Market Pl Prince Rupert, BC V8J 1B8	Telephone: Fax: (250) 624-7525 (250) 624-7538
QUESNEL	
350 Barlow Ave Quesnel, BC V2J 2C2	Telephone: Fax: (250) 992-4256 (250) 992-4171
ROSSLAND	
2288 Columbia Ave Box 639 Rossland, BC V0G 1Y0	Telephone: Fax: (250) 362-7368 (250) 362-9632
SALMON ARM	
550 – 2nd Ave NE PO Box 100 Stn Main Salmon Arm, BC V1E 4S4	Telephone: Fax: (250) 832-1610 (250) 832-1749
SECHELT	
5480 Shorncliffe Ave PO Box 160 Sechelt, BC V0N 3A0	Telephone: Fax: (604) 740-8929 (604) 740 8924
SMITHERS	
3793 Alfred St No. 40 Bag 5000 Smithers, BC V0J 2N0	Telephone: Fax: (250) 847-7376 (250) 847-7710
TERRACE	
3408 Kalum St Terrace, BC V8G 2N6	Telephone: Fax: (250) 638-2111 (250) 638-2123
VALEMOUNT	
1300 4th Ave PO Box 125 Valemount, BC V0E 2Z0	Telephone: Fax: (250) 566-4652 (250) 566-4620
VERNON	
3001 27th St Vernon, BC V1T 4W5	Telephone: Fax: (250) 549-5422 (250) 549-5621
VICTORIA	
2nd Floor, 850 Burdett Ave Victoria, BC V8W 9J2	Telephone: Fax: (250) 356-1478 (250) 387-3061
WESTERN COMMUNITIES	
1756 Island Hwy PO Box 9269 Victoria, BC V8W 9J5	Telephone: Fax: (250) 391-2888 (250) 391-2877
WILLIAMS LAKE	
540 Borland St Williams Lake, BC V2G 1R8	Telephone: Fax: (250) 398-4301 (250) 398-4459

Appendix B: Demand Letter

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

123 Parliament Way
Richmond, British Columbia
V6K 1H6

18 June 2007

WITHOUT PREJUDICE

Mr. Wilfred Laurier
321 Confederation Drive
Vancouver, BCV1K 5L2

Attention : Mr. Laurier

Dear Sir:

Re: Contract with Macdonald Painting & Restoration. Dated January 5, 2000, and amended by way of an oral contract.

On January 5, 2000, you signed a detailed Contract with me outlining the work that was to be completed for $6000.00. In addition, in August 2000, you asked me to repair some damage that a moving company had created and to pressure wash the house. At that time I informed you that this additional work would cost $1400.00.

On or about January 5, 2000, you issued me a $2500 cheque as a deposit for the work to be completed on the home and garage at 321 Confederation Drive. There were problems with the work that was done. I corrected the problems you listed and on March 10, 2000, I notified you that there was $4900.00 due. This amount has not yet been paid.

I am considering starting a legal action in the Small Claims Division of the Provincial Court for debt. Such action could result in a judgment in the amount of $4900.00 plus all disbursements, costs, and interest.

I do not want to litigate and will forgo further action upon receipt of $4,900 in the form of a certified cheque or money order made payable to Mr. Macdonald and mailed to 12345 Macdonald Street, Vancouver, British Columbia, V6T 1Z1. Non-payment within 14 days of the receipt of this letter will result in the commencement of action without further notice. Correspondence should be directed to my attention at my office. If you have any questions or comments do not hesitate to call.

Yours truly,

Mr. John A. Macdonald

Appendix C: Notice of Claim

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

This appendix is available on Clicklaw Wikibooks for download in PDF.
A permanent archive version is also available at https://perma.cc/R39W-CPXP
Readers of the print edition please see the "Supplementary Documents for Appendices" section.

1. Claims in Debt

Claims in debt are quantified. Usually, the parties can agree on the amount owing.

> **SAMPLE:** The claimant's claim is for a debt in the amount owing to the claimant on account for (or, for the price of) goods sold and delivered (or services rendered) by the claimant to the defendant at their request. The goods sold (or services rendered) were: (description of goods or services) and were delivered (or rendered) on or about the 29th day of July 2007 at 3875 Point Grey Road in the City of Vancouver, BC. The claimant has demanded payment of this sum by the defendant but the defendant has refused or neglected to pay.

If the defendant has partially paid the original amount owing, this should be detailed in the Notice of Claim.

2. Claims for Damages

Damages are a claim for a loss where the parties do not agree on an amount owed. These claims often refer to breach of contract, misrepresentation, or negligence.

> **SAMPLE:** The claimant's claim is against the defendant(s) (and each of them jointly and severally) for the sum of $3,000 for damages to the claimant's house resulting from a roof installed on or about the 10th day of June, 2007, at (or near) 2120 West 2nd Avenue in the City of Vancouver, British Columbia, due to the roof being negligently installed by the defendant... causing damages of the above amount. The defendant's said negligence consisted of... (i.e., improper installation or materials).

> **SAMPLE:** The claimant had a contract with the defendants to paint the claimant's house for $3,000. The defendants never painted the house. The claimant had to pay XYZ Painters $3,950 to paint the house. This happened in Coquitlam, British Columbia, in May of 2007.

The statement of facts should be broken down into separate paragraphs. Facts should be listed as one fact per numbered paragraph.

In a claim for damages, the claimant may not know what the amount should be. In such cases, the claimant should claim a figure that they would accept in the settlement, or if doubtful of the amount, $35,000 should be claimed and the court will determine the appropriate amount of damages. Furthermore, Small Claims Court can award aggravated and punitive damages. Aggravated damages are considered compensatory and may be awarded even if not plead specifically; see *Epstein v Cressey Development Corp.* [1] [1992] 2 WWR 566 (BCCA). Punitive damages are not compensatory and must be pleaded specifically; see *Gillespie v Gill Et. Al.* [2] [1999] B.C.P.C. No. 2021. For a discussion of aggravated damages see *Kooner v Kooner* [3] [1989] B.C.S.C. No.62. For a discussion of aggravated and punitive damages, see *Siebert v J & M. Motors Ltd.* [1996] B.C.J. No.876.

3. Other Remedies

The Notice of Claim is designed for claims in debt and for damages, but other claims are available, such as specific performance of a contract, quantum meruit or return (recovery) of an item.

> **SAMPLE:** The claim is against the defendant for the return of their lawnmower, which was borrowed by the defendant who refused to return it. This happened in Surrey, British Columbia, in July of 2007.

In cases such as this, ignore the dollar amount for the “How Much” section. Indicate instead what the claimant seeks, i.e., “The claimant asks for an order that their lawn mower be returned to them”. You should consider the possible condition of the goods when deciding whether or not to ask for damages instead.

References

[1] http://canlii.ca/t/1d9n9
[2] http://canlii.ca/t/23zp0
[3] http://canlii.ca/t/gd3rv

Appendix D: Reply to Claim

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

This appendix is available on Clicklaw Wikibooks for download in PDF.
A permanent archive version is also available at https://perma.cc/9CTT-YM8V
Readers of the print edition please see the "Supplementary Documents for Appendices" section.

Appendix E: Glossary

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

ADJOURNMENT

- In court settings, postponement of an appearance date until a later, fixed, date.

AMENDMENT

- Modification of submitted materials. Amendments can consist of additions, deletions, and corrections.

BALANCE OF PROBABILITIES

- The civil standard of proof. To prove a civil case, it need only be established that the case is more probable than the other.

CAUSE OF ACTION

- Legal cause for which an action may be brought. The legal theory giving basis to a lawsuit.

CIVIL LAW

- The system of law concerned with relations between individual parties, rather than criminal affairs.

COMMON LAW

- Law derived from custom and judicial decisions rather than statutes.

COMPLETE DEFENCE

- An argument, which, if proven, will effectively end the litigation in favour of the defendant.

CONTINGENCY

- In legal circles, is commonly used to refer to a contingent fee,which is a fee for legal services provided only if the legal action is settled favourably or out of court.

CONTRIBUTORY NEGLIGENCE

- Negligent behaviour of the plaintiff that contributes to the harm resulting from the defendant's negligence.

COUNTERCLAIM/COUNTERCLAIMANT

- A claim by a defendant seeking relief from the plaintiff. Generally made as a response to the same facts that make up the issue the plaintiff originally claimed for.

CROWN

- Generally a reference to the government or state acting as a party in legal proceedings.

DEBTOR

- A person judged to owe money after the resolution of a civil case.

DEDUCTIBLE

- In an insurance policy, the amount that must be paid out-of-pocket before an insurer will pay any expenses. Generally, a clause used by insurance companies as a threshold for policy payments.

DEFAULT

- Often used in legal contexts as a verb meaning to fail to fulfill an obligation, generally referring to failure to pay a loan or make a court appearance.

DISBURSEMENT

- Money paid to cover expenses for goods and services that may be currently tax-deductible. Commonly used in the context of business expenses.

DISGORGEMENT

- Stolen money that must be repaid to victims of theft, fraud, or other financial crime.

DISMISS

1. The discharge of an individual or corporation from employment.
2. Judgment in a civil or criminal proceeding denying the relief sought by the action.

EQUITY

- Can mean different things in different contexts. The most common definitions for equity include:

1. The broad concept of fairness
2. An alternative legal system that originated in the English courts as a response to the common-law system

ESTATE

- The degree, quantity, or nature of interest that a person has in real or personal property.

EX PARTE

- In the interests of one side only or an interested outside party.

EXECUTOR/EXECUTRIX

- A person specifically appointed by a will to carry out its wishes. Some of the administrative responsibilities typically added to executor's duties include:
- Gathering up and protecting the assets of the estate;
- Locating beneficiaries named in the will and/or potential heirs;
- Collecting and arranging for payments of debts to the estate;
- Approving or disapproving creditors' claims; and/or
- Making sure estate taxes are calculated.

EXTRAPROVINCIAL CORPORATION

- A corporate body that is not incorporated in the province where action has been started.

GARNISHEE

- A third party ordered to surrender money or property lost by a defendant. The third party must possess the money or property but the defendant must own it.

HEARSAY

- A statement made out of court that is offered in court as evidence to prove the truth of the matter asserted. Hearsay evidence is generally inadmissible but there are many exceptions to the hearsay rule.

IN FORCE

- Commonly refers to when a law becomes legally applicable.

INDEMNIFY

- Contract with a third party to perform another's obligations if called upon to do so by the third party, whether the other has defaulted or not.

INDIGENT

- Used in legal contexts to identify a person with no reasonable ability to pay; often used to identify those deserving of legal aid or waived filing fees.

INJUNCTION (MANDATORY, PROHIBITORY, MAREVA, ANTON PILLER)

- A court order requiring an individual to either perform or not perform a particular act.

JUDGMENT PROOF

- Commonly used to refer to defendants or potential defendants who are financially insolvent.

JUDICIAL REVIEW

- A process where a court of law is asked to rule on the appropriateness of a decision of an administrative agency, tribunal, or legislative body.

LEAVE

- Commonly used in the context of leave of the court. Generally refers to permission to perform an action or make a statement.

LITIGANT

- Any party involved in a lawsuit.

MALICIOUS PROSECUTION

- A cause of action relating to a civil suit or criminal proceeding that has been unsuccessfully committed without probable cause and for a purpose other than bringing the alleged wrongdoer to justice.

MISNOMER

- An inaccurate use of a word or term.

PARTNERSHIP

- An association of two or more persons engaged in a business enterprise in which the profits and losses are shared proportionally.

PRIMA FACIE

- Based on first glance; presumed as true until proven otherwise.

PROPRIETORSHIP

- An unincorporated business owned by a single person who is responsible for its liabilities and entitled to its profits.

QUANTUM MERUIT

- Latin for “what one has earned.” The amount to be paid for services where no agreement exists.

QUANTUM VALEBAT

- Latin for “what it was worth.” When goods are sold without a price specified, the law generally implies that the seller will pay the buyer what they were worth.

REGULATION

- A law on some point of detail, supported by an enabling statute, and issued not by a legislative body but by an executive branch of government.

RELIEF

- A legal remedy – the enforcement of a right, imposition of a penalty, or some other kind of court order – that will be granted by courts in response to a specific action.

ROYAL ASSENT

- In Canada, where the Lieutenant Governor signs a bill to bring it into law. New legislation can exist as a bill but not as binding law if it has not received Royal Assent.

SET-OFF

- A claim by a defendant in a lawsuit that the plaintiff owes the defendant money which should be subtracted from the amount of damages claimed.

SPECIFIC PERFORMANCE

- A legal remedy that compels a party to complete their specific duty in a contract rather than compensate the claimant with damages. Often used when a unique remedy is at issue.

STAND DOWN

- In court, when a matter is postponed for a short period of the time. Differs from adjournment in being less formal; to stand a matter down is usually to postpone it for a short, indefinite period, while adjournments are often for longer fixed periods.

STATUTE

- A written law passed by a legislative body.

STAY OF PROCEEDINGS

- Stoppage of an entire case or a specific proceeding within a case.

SUBROGATE

- To substitute one party for another in a legal proceeding. The facts of each case determine whether subrogation is applicable.

SUBSTITUTIONAL SERVICE

- Under court authorization, serving an alternate person when the original named party cannot be reached.

TORT

- A private, civil action stemming from an injury or other wrongful act that causes damage to person or property.

UBERRIMAE FIDEI

- Utmost good faith; commonly used as the standard for dealing in insurance contracts.

WITHOUT PREJUDICE

- A reservation made on a statement that it cannot be used against in future dealings or litigation.

Appendix F: Limitation Periods

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

1. Small Claims

The *Limitation Act*, SBC 2012, c 13 [Limitation Act] came into effect on June 1, 2013. A claim is governed by this Act if the claim was discovered after this date, unless the facts underlying the claim arose before the effective date and the limitation period under the old *Limitation Act*, RSBC 1996, c 266 has expired (s 30(3-4).

Under the *Limitation Act*, the basic limitation period for most causes of action is 2 years from the date of **discovery** of the claim. Discovery is defined as the day on which the claimant knew or reasonably ought to have known *all* of the following:

> (a) that injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the person against whom the claim is or may be made;
>
> (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage (*Limitation Act*, s 8).

Other limitations include:

- enforcement of civil judgements (s 7): 10 years from date of judgement;
- debts owed to government (s 38): 6 years;
- maximum limitation period (s 21(1)): 15 years after the original act or omission giving rise to the claim occurs. Applies to all claims falling under the (new) *Limitation Act*.

Under the *Limitation Act*, the running of both the basic and ultimate limitation periods may be delayed for minors (s 18), persons while under disability (ss 19, 25), and for fraud or wilful concealment of facts on the part of the defendant (ss 12, 21(3)). Both the basic 2 year limitation period and the 15 year ultimate limitation period are renewed if the defendant gives written and signed acknowledgement of liability (s 24). A counterclaim may be brought even though the limitation period has expired if the counterclaim relates to the claim to which it responds and that claim is within its applicable limitation periods (s 22). The Act generally does not apply to sexual assault claims, child or spousal support claims, or fines under the Offence Act (s 3). The Act also does not apply to limitation periods established under other legislation.

The Notice of Claim must be **filed** before the limitation period expires. If a notice of claim has not been **served** within 12 months after it was filed, it expires, but the claimant may apply to have it renewed (*SCR*, Rules 16(2)(a), 16(2)(a.1) and 16(3)).

2. Civil Resolution Tribunal

The *Limitation Act* applies to the CRT; however, for claims brought under the CRT, the limitation period does not run after a party asks the tribunal to resolve a claim. A party has 28 days following the tribunal's decision, the date on the court order, or the date the tribunal certifies that the parties have completed the tribunal's process to bring or continue a claim in court.

3. Other Legislation

Certain Acts will overrule the *Limitation Act*. The *Vancouver Charter*, SBC 1953, c 55; the Police Act, RSBC 1996, c 367; and the *RCMP Act*, RS 1985, c. R-10, all have their own limitation periods and notice provisions, and must therefore be consulted before bringing an action against a party covered by one of these statutes. For limitation dates pertaining to employment, human rights complaints or residential/tenancy disputes, see the corresponding chapters of this manual.

The *Local Government Act*, RSBC 1996, c 323, sets a limitation date for claims against a municipality in BC (s 285) of 6 months after the cause of action arose. Notice of damages must be delivered to the municipality within 2 months from the date on which the damage was sustained unless the damage resulted in death, the claimant has a reasonable excuse, or the municipality is not unfairly prejudiced by the lack of notice (s 286(1-3)).

	Limitation Act:
Application:	Applies if discovery occurred after June 1, 2013
Basic Limitation Period:	2 years after discovery*
Damages to Personal Injury or Property:	2 years after discovery
Debts owed to government:	6 years, including ICBC claims for vehicle indebtedness, student loans and medical fees
Counterclaims:	Not barred by expiry of limitation period if counterclaim connected to the claim to which it responds and the limitation period for that claim has not expired.
Ultimate Limitation Period:	15 years after original events occurred
Enforcement of Judgements:	10 years after judgment

*See Limitation Act, SBC 2012 c 13 for exceptions

Appendix G: Causes of Action

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

The cause of action is the claimant's reason for bringing a suit against the defendant. While there must always be a cause of action, in Small Claims it is generally sufficient to cite the facts; Small Claims judges and CRT tribunal members will take a liberal view of pleadings and allow litigants to assert claims in non-legalistic language. However, the judge must still be able to find a cause of action in the facts the claimant alleges. Potential claimants should therefore review the following, non-exhaustive list of causes of action to determine if they have a valid claim. Claimants may claim for more than one cause of action on a notice of claim and are advised to do so if they believe more than one cause of action applies or are not sure which one is valid; it is easier to name superfluous causes of action on the notice of claim than to get the claim amended after filing it. The following causes of action may be brought in Small Claims unless the amount claimed is over $35,000 or it states otherwise in the list. They are organized into 3 categories: (1) common; (2) rare; and (3) see a lawyer.

Defences

For each cause of action there are usually a number of possible defences. Both Claimants and Defendants should be aware of the defences. Below are defences to some of the more common causes of action.

1) Common causes of action

a) Breach of Contract

Contract law governs voluntary relationships between parties. It is a complicated and nuanced area of the law. To bring a claim for breach of contract, a party must demonstrate that the other party failed to perform a contractual obligation. Depending on the type of term that is breached, the other party may be able to "terminate" the contract. Terms that go to the heart of a contract are usually called "conditions". Breach of a condition by one party entitles the other party to terminate the contract and end their obligations. A party is also able to terminate the contract in the event of a fundamental breach, which is a breach so significant that it deprives the innocent party of the entire benefit of the contract Svenson v. Powell, 2021 BCCRT 318 [1]. Less important terms are called "warranties". Breach of a warranty does not give the other party a right to terminate. However, the party not in breach can still sue the other party for breach of contract Ketchum v. Nordblad, 2022 BCCRT 223 [2].

Defences:

1. **No consideration:** In order for a promise or any other contractual obligation to be enforceable by courts, there must be consideration. Consideration is what is given in exchange for a promise that makes the promise binding. If there is no consideration for a promise, the promise will not be enforced by the courts, even if the parties have an otherwise valid contract.
2. **Void contract:** A contract can be void and therefore unenforceable for several reasons, including lack of mental capacity, uncertainty of terms, illegality.
3. **Unconscionability:** A contract is said to be unconscionable and therefore unenforceable where the circumstances surrounding the creation of the contract gave rise to a grave inequality in bargaining power between parties. This is complicated area of contract law, and legal advice should be sought.

4. **Misrepresentation:** If the other party made a statement to you before the contract came into existence that you relied on on entering the contract and that turned out to be false, you may be able to have the contract set aside.
5. **Frustration:** frustration occurs when an unforeseen event renders contractual obligations impossible or radically changes the primary purpose of the contract. Frustration is also another complicated area in contract law. Legal advice should be sought.
6. **Undue Influence:** If one of the parties to a contract was unduly influenced by someone else (either the other party of the contract or a third party), the contract can be set aside on the grounds that the unduly influenced party had their consent vitiated due to an inability to exercise their independent will. This is a complicated area of contract law, and legal advice should be sought.

b) Breach of Employment Contract (implied terms)

The courts cannot enforce statutory rights such as those found in the *Employment Standards Act*, as the Employment Standards Branch was created to rule on these types of claims and has exclusive jurisdiction over them. However, many parallel rights exist at common law and may be enforced by the courts. At common law, employment contracts contain numerous implied terms that are actionable through Small Claims, such as the requirement to give reasonable notice or payment in lieu upon the termination of an employee. Many employment contracts include express terms regarding notice which can override common law implied terms.

The fact that no written employment contract was signed does not disqualify an employee or former employee from claiming for breach of these terms. This is because an employee who is an "employee" under employment standards legislation will be entitled to the benefit of the statutory minimum notice provisions v. British Columbia Research Council *(1989), 38 B.C.L.R. (2d) 208 (B.C. S.C.)* [3]; reversed on other grounds 52 B.C.L.R. (2d) 138 (B.C. C.A.) [4]. See Chapter 9: Employment Law for more details.

Defences:

1. **Just cause:** If an employer terminates an employee for just cause the employer is not required to give the terminated employee reasonable notice or pay in lieu. The onus to prove just cause is on the employer, and the standard is generally hard to meet. See Chapter 9 – Employment Law for more details.

c) Debt

Debt claims arise where the defendant owes the complainant a specific sum of money, often for a loan or for unpaid goods or services. There may be some overlap between debt and breach of contract.

Defences: As there likely will be some overlap between debt and breach of contract, see the defences above under breach of contract.

2) Rare Causes of Action

a) Breach of Confidence

Breach of confidence occurs when the defendant makes an unauthorized use of information that has a quality of confidence about it and was entrusted to them by the claimant in circumstances giving rise to an obligation of confidence.

b) Nuisance

Nuisance may be private or public. Private nuisance is defined as interference with a landowner or occupier's enjoyment of their land that is both substantial and unreasonable. It can include obnoxious sounds or smells or escaping substances but does not usually arise from the defendant's normal use of their own property. An interference with the enjoyment of land is "substantial" if it is not trivial; that is, it amounts to something more than a slight annoyance or trifling interference. Whether the interference is "unreasonable" depends on the circumstances. Factors that courts will consider (but are not bound to) in assessing reasonableness include the seriousness of the interference, the neighbourhood and surrounding area, and sensitivity of the plaintiff.

Public nuisance may be thought of as a nuisance that occurs on public property or one that affects a sufficient number of individuals that litigating to prevent it becomes the responsibility of the community at large.

c) Trespass to Chattels

Where the defendant interferes with the claimant's goods without converting them to the defendant's personal use.

d) Trespass to Land

Trespass to land is actionable even where it occurred by the defendant's mistake. The claimant does not need to show a loss, although their award may be reduced commensurately if the trespass does not cost them anything.

e) Conversion

Conversion is defined as wrongful interference with the goods of another in a manner inconsistent with the owner's right of possession. This includes theft; it also includes instances where the defendant genuinely believes the goods belong to them, even if they purchased them innocently from a third party that stole them. It also applies when the defendant has sold the goods or otherwise disposed of them. The remedy is usually damages for the value of the goods and possibly for losses incurred by the detention of the goods. The value of the goods is assessed from the time of the conversion.

f) Unjust Enrichment

Where the defendant was enriched by committing a wrong against the claimant, the claimant suffered a corresponding loss, and there was no juristic reason for the enrichment.

3) Causes of action to see a lawyer about

a) Assault

Contrary to its criminal law equivalent, civil assault is defined as intentionally causing the claimant to have reasonable grounds to fear immediate physical harm. Mere words or verbal threats are not sufficient; there must be some sort of act or display that suggests the defendant intends to carry through with their threat; banging on a door or raising a fist may suffice.

b) Battery

Battery is defined as any intentional and unwanted touching, including hitting, spitting on the claimant or cutting their hair.

Defences:

1. **Lack of Intent:** Battery is an intentional tort which means that the plaintiff must prove the defendant acted with intent in committing battery. The defendant need not intend to cause the plaintiff harm. Rather intent refers to the desire to engage in whatever act amounts to battery. If the defendant can show that they did not act with intent, the claim for battery will unlikely be successful. For example, if the physical contact was involuntary or an accident.
2. **Self-defence:** The defendant can defeat a battery claim if they can show that the battery was an act of self-defence. There are three basic elements to self-defence which the defendant must prove:

    (i) You honestly and reasonably believed that you were being or about to be subject to battery;

    (ii) There was no reasonable alternative to the use of force; and

    (iii) The use of force was proportional to the actual or perceived threat.

c) Breach of Privacy

Privacy rights are governed by the *Privacy Act*, RSBC 1996, c 373. Two common law causes of action are codified under this act:

- Intrusion upon seclusion: includes spying upon, observing or recording a person where they have a reasonable expectation of privacy.
- Appropriation of likeness: where a person's personal image, including portraits, caricatures, photos or video footage, are used for commercial gain without their consent.

Breach of privacy is outside the jurisdiction of Small Claims Court.

d) Defamation

Defamation, libel and slander are outside the jurisdiction of Small Claims Court.

e) Detinue

Detinue occurs when the defendant possesses goods belonging to the claimant and refuses to return them. There is some overlap between detinue and conversion, but conversion still applies where the defendant no longer has goods, while detinue generally does not. The remedy for detinue may be the return of the goods or damages for the value of the goods and possibly for losses incurred by the detention of the goods. The value of the goods is assessed at the time of the trial.

f) False Imprisonment/False Arrest

Where a person is illegally detained against their will. Peace officers have broad authority to arrest. Private citizens, including security guards, have limited authority to arrest in relation to a criminal offence or in defence of property. Usually, a party who is detained and is not convicted of the offence for which they are detained has grounds for a claim in false imprisonment/arrest unless the defendant is a peace officer or was assisting a peace officer in making the arrest.

g) Negligence

Negligence is a complicated but frequently litigated area of law. Put very simply, it is based on the careless conduct of the defendant resulting in a loss to the claimant. Claims in negligence may be for personal injury or for economic loss. Claimants are advised to consult a lawyer before bringing a claim in negligence. Negligence consists of the following components:

1. **Duty of Care –** the claimant must prove that the defendant owed them a duty of care arising from some relationship between them. Many duties of care have been recognized, including but by no means limited to the following:

   (a) Duty towards the intoxicated

   (b) Peace officer's duty to prevent crime and protect others

   (c) Negligent Infliction of Psychiatric Harm/Nervous Shock

   (d) Manufacturer's and Supplier's Duty to Warn

   (e) Negligent Performance of a Service

   (f) Negligent Supply of Shoddy Goods or Structures

   (g) Negligence of Public Authority

2. **Standard of Care –** Once a duty of care is established, the level of care that the defendant owed to the claimant must be determined. This is usually based on the standard of care that a reasonable person would exercise, such as avoiding acts or omissions that one could reasonably foresee might cause the claimant a loss or injury. The level of care expected of professionals in the exercise of their duties is usually higher.

3. **Causation –** The claimant must show that the defendant's carelessness actually caused the claimant loss or injury. The basic test is whether the claimant's loss would not have occurred without the defendant's action and no second, intervening act occurred that contributed to the loss.

4. **Remoteness –** Remoteness is a consideration of whether the loss caused by the defendant's actions was too remote to be foreseeable as a result of the defendant's negligence. If so, the court may not award damages for the loss even though it was a direct result of the defendant's carelessness.

5. **Harm –** Unlike some causes of action, negligence requires the claimant to prove that the defendant's carelessness caused them harm, whether it is personal injury, pure economic loss or otherwise.

h) Misrepresentation

Misrepresentation applies where a claimant was induced to enter a contract on the basis of facts cited by the defendant that turned out to be untrue. Misrepresentation can be claimed in contract law or in torts generally, or in both concurrently. In contract law, the remedy is a declaration that the contract is void (rescission). In torts, the remedy may be damages for the claimant's consequential losses. If the claim is brought in contracts, a distinction must be made between representations, which are statements that induce one to enter a contract, and the terms of the contract, the violation of which gives rise to a claim in breach of contract but not in negligence. There are three specific categories of

misrepresentation:

- **Fraudulent misrepresentation –** where the defendant made the statement knowing it was untrue. This is the hardest category of misrepresentation to prove, as the claimant must prove the defendant's state of mind prior to the formation of the contract.
- **Negligent misrepresentation –** where the defendant made the untrue statement carelessly, without regard to whether it was true. This category of misrepresentation is more easily proved than fraudulent misrepresentation. See the section on Negligence below for the basic principles.
- **Innocent misrepresentation –** where the defendant made the untrue statement in the genuine belief that it was true. This form of misrepresentation is the easiest to prove, but it may only be claimed in contract law, so the remedy for a successful claim is always the setting aside of the contract (rescission).

4) Excluded Causes of Action

Certain causes of action are outside the jurisdiction of Small Claims, including:

- Claims for malicious prosecution,
- Claims involving residential tenancy agreements,
- Claims for statutory rights in employment law (i.e., overtime and statutory holiday pay),
- Claims in divorce, trusts, wills or bankruptcy,
- Claims for breach of privacy, intrusion upon seclusion, or appropriation of likeness,
- Human rights complaints (discrimination), and
- Most disputes between strata lot owners and strata corporations

Not all claims that are barred from Small Claims must be brought in Supreme Court. Administrative tribunals such as the Employment Standards Branch, Residential Tenancy Branch, and BC Human Rights Tribunal have exclusive jurisdiction over many types of claims. Claimants should consider the nature of their claim and review the corresponding chapter of the LSLAP Manual to determine the proper forum for their complaint.

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[2] https://canlii.ca/t/jmq7t
[3] https://www.canlii.org/en/bc/bcsc/doc/1989/1989canlii2778/1989canlii2778.html?searchUrlHash=AAAAAQBVU3VsZW1hbiB2LiBCcml0aXNoIENvbHVtYmlhIFJlc2VhcmNoIENvdW5jaWwgKDE5ODkpLCAzOCBCLkMuTC5SLiAoMmQ resultIndex=1|"Suleman
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Appendix H: Court Fees

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

1. Fee Waiver

There are no settlement, trial conference or trial scheduling fees, unless an adjournment is requested. If a trial date is reset less than 30 days before the date of the proceeding, the party adjourning the trial must pay $100 to the court. This fee does not apply if the matter must be reset due to the unavailability of a judge, or if the party requesting the change was not notified of the trial date at least 45 days in advance (Rule 17(5.2)). There are no fees for "interlocutory" applications. There are fees for some collection orders. Filing fees, interest, disbursements and, in most cases, reasonable expenses may be recovered from the unsuccessful party (Rule 20(2)). Legal (i.e. a lawyer's) fees are not recoverable. If a party cannot afford the court's fees, they may apply to the registrar to be exempt from paying the fees (Rule 20(1)) by completing a Form 16 (Rule 16(3)).

2. Common Fees

a) For filing a notice of claim

1. For claims up to and including $3,000: $100
2. For claims over $3,000: $156

b) For filing a reply, unless the defendant has agreed to pay all of the claim

1. For claims up to and including $3,000: $26
2. For claims over $3,000: $50

c) For filing a counterclaim or a revised reply containing new counterclaim

1. For counterclaims up to and including $3,000: $100
2. For counterclaims over $3,000: $156

d) For filing a third party notice

$25

e) For resetting a trial or hearing with less than 30 days' notice before the date of the proceedings as set on the trial list unless the matter must be reset due to the unavailability of a judge

$100

f) For personal service of a sheriff

1. For receiving, filing, personally serving one person, and returning the document together with a certificate or affidavit of service or attempted service: $100
2. For each additional person served at the same address: $20
3. For each additional person served not at the same address: $30

For a full list of fees see the **Small Claims Rules Schedule A:** https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/261_93_05#ScheduleA

Appendix I: Tribunal Fees

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

1. Fee Waiver

If a tribunal form or rule indicates a fee is required in order to take a step, the fee shown in the CRT Fees must be paid before the step will be completed. A claimant who cannot afford to pay a fee can ask the tribunal to waive payment of fees by completing the steps required by the Fee Waiver Request Form, and providing any other information requested by the tribunal. In deciding a request to waive the payment of fees, the tribunal will consider the person's ability to pay, based on the information about that person's financial situation. If the tribunal decides that a person should not have qualified for a fee waiver, the tribunal may order that person to pay the fees. The Fee Waiver Request Form can be found at the following link: https://civilresolutionbc.ca/resources/forms/#apply-for-crt-dispute-resolution.

If a dispute is not resolved by agreement, and a tribunal member makes a final decision, the unsuccessful party will be required to pay the successful party's tribunal fees and reasonable dispute-related expenses unless the tribunal decides otherwise.

This can include some or all of the following:

- any tribunal fees paid by the other party in relation in the dispute,
- any fees and expenses paid by a party in relation to witness fees and summonses (for a summons fee to qualify for a Fee Waiver, a summons must be reasonably issued. The CRT's processes are relatively informal and flexible, and it is usually unlikely that a party would need to incur a formal expense of a summons), and
- any other reasonable expenses and charges that the tribunal considers directly related to the conduct of the tribunal dispute resolution process.

Except in extraordinary cases, the tribunal will not order one party to pay to another party any fees charged by a lawyer or another representative in the tribunal dispute process.

2. Small Claims Fees

a) Application for Dispute Resolution - Claims of $3,000 or less

1. Online: $75
2. Paper: $100

b) Application for Dispute Resolution - Claims of $3,000-5,000

1. Online: $125
2. Paper: $150

c) For filing a Dispute Response

1. Online: $0
2. Paper: $25

d) For filing a counterclaim or third-party claim - Claims of $3,000 or less

1. Online: $75
2. Paper: $100

e) For filing a counterclaim or third-party claim - Claims of $3,000-5,000

1. Online: $125
2. Paper: $150

f) To request a default decision

1. Online: $25
2. Paper: $30

g) Filing for a Consent Resolution Order

1. Online: $25
2. Paper: $25

h) Requesting a Tribunal Decision Process (hearing)

1. Online: $50
2. Paper: $50

i) Requesting a default decision to be set aside

1. Online: $50
2. Paper: $50

3. Motor Vehicle Injury Fees

a) Application for Dispute Resolution (Damages & Liability)

1. Online: $125
2. Paper: $150

b) Application for Minor Injury Determination

1. Online: $75
2. Paper: $100

c) Application for Accident Benefits claim

1. Online: $75
2. Paper: $100

d) Application for Dispute Resolution (Damages & Liability) + Minor Injury Determination and/or Accident Benefits claim

1. Online: $125
2. Paper: $150

e) To respond to a claim

1. Online: $25
2. Paper: $25

f) Tribunal Decision for Minor Injury Determination

1. Online: Free
2. Paper: Free

g) Tribunal Decision for Dispute Resolution (Damages & Liability) + Minor Injury Determination and/or Accident Benefits claim

1. Online: $50
2. Paper: $50

Appendix J: Settlement Conference

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

Settlement Conference Preparation Checklist

1. Be prepared to define the issues

2. List who will attend settlement conference

3. Authority to settle: obtain instructions and ensure a representative with authority to settle is in attendance

4. List who will speak to what issues

5. Witnesses: how many and names/evidence

6. Expert witnesses: bring report or summary of opinion expected

7. Expected schedule for delivery of expert reports

8. Documents to be sought and schedule for delivery

9. List documents to bring

10. Consider admissions or seek agreed facts, or alternative methods of proof

11. Time estimate for trial, available dates for counsel and witnesses

12. Other orders: in advance of trial, consider if a separate hearing will be required for one or more of the following:

    (a) summary judgment or dismissal

    (b) production of other documents or evidence

(c) addition of parties or amendment of pleadings

(d) change of venue

(e) consolidation of claims, joining trials

(f) inspection or preservation of property

(g) independent medical examination

13. Ask the judge to review the prospect of the penalties in Rules 10.1, 20(5) and 20(6)

SOURCE: *Small Claims Court - 1994*, Continuing Legal Education Society Manual.

NOTE: The Small Claims BC website has its own Settlement Conference Checklist [1]

NOTE: For **trial conferences** under the pilot project in Vancouver (Robson Square), at least 14 days in advance of the conference, each party is required to complete a Trial Statement (Form 33) and file it, along with **all relevant documents**, at the registry (Rule 7.5(9)). Each party must serve the other parties to the claim with a copy of the trial statement and attachments at least 7 days before the trial conference (Rule 7.5(10)).

References

[1] https://smallclaimsbc.ca/sites/default/files/2021-07/Settlement%20Conference%20Checklist%20-%20NEW.docx.pdf

Appendix K: Payment Hearing

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

Both the debtor and the creditor can request a payment hearing, or a judge may order one. A creditor may request a payment hearing to ask the debtor about their ability to pay or to disclose the debtor's assets so they may be seized or garnished. Either the creditor or the debtor may request a payment hearing to propose a payment schedule or changes to a payment schedule. Due to COVID-19, the procedure has changed. Please consult https://www.provincialcourt.bc.ca/COVID19 for updates in the protocol.

Creditor Checklist

1. Before the Payment Hearing:

- If you are the party requesting a payment hearing, you must complete and file a summons in Form 12 at the registry: http://www.smallclaimsbc.ca/court-forms.
- If the debtor is a corporation, you may name an officer, director, or employee to appear and give evidence on behalf of the debtor (*SCR*, Rule 12(5)).
- After you file the summons, you must serve it on the debtor at least 7 days before the date of the payment hearing (*SCR';, Rule 12(7)).*

If the person who serves the summons on the debtor will not be at the hearing to provide oral evidence, you should have them prepare an affidavit of service, available at the website above, and file it at the registry in case the debtor does not show up to the hearing; otherwise, you will not be able to get a warrant for their arrest.

2. At the Payment Hearing:

- Bring a list of questions you wish to ask the debtor about their assets. Lists of the types of questions that may be asked can be found at: http://www.lawsociety.bc.ca/docs/practice/checklists/E-5.pdf (designed for Supreme Court but may be adapted for Small Claims).
- Be prepared to propose a payment schedule and defend it or argue why one should not be ordered.

3. After the Payment Hearing:

- If the debtor misses a payment, the balance of the judgment becomes due immediately and you may proceed to collections. See **Chapter 10: Creditor's Remedies and Debtors' Assistance** for information on collections procedures.

Debtor Checklist

1. Before the Payment Hearing:

- If you are the party requesting a payment hearing, you must complete and file a notice in Form 13 at the registry: http://www.smallclaimsbc.ca/court-forms.
- After you file the notice, you must serve it on the creditor at least 7 days before the date of the payment hearing (Rule 12(11)).
- If the person who serves the summons on the creditor will not be at the hearing to provide oral evidence, you should prepare a certificate of service (Form 4), available at http://www.smallclaimsbc.ca/court-forms, and file it at the registry in case the creditor does not show up to the hearing.

2. At the Payment Hearing:

- Be prepared to answer questions about your finances such as contained in the lists in Creditor Checklist – Section 2 above.
- Bring financial records and evidence of income and assets, including:
  - Bank records
  - Credit-card statements
  - Tax returns and supporting documents
  - Property, sales of property, and mortgages
  - Receipts for insurance, medical bills, and utilities
  - RRSP, TSFA, and other investment statements
  - Debts you owe and debts that are owed to you (including future debts)
  - Assets you have disposed of since the claim arose
  - Employment and pay-stubs
  - Evidence of means that you have or may have in the future of paying the judgment
- Prepare a statement of finances, available at https://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-forms/small-claims-forms
- Be prepared to suggest a payment schedule or changes to the payment schedule that you can manage
- Be prepared to argue why your financial circumstances justify the schedule or changes you are proposing
- If you are on welfare or other income assistance, be sure to bring this to the judge's attention

3. After Judgement:

- If you are having difficulty managing your debts, see Chapter 10: Creditor's Remedies and Debtors' Assistance.

Appendix L: Appeal

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

Note: This information was taken with permission from the Small Claims Factsheet 14 produced by the Law Centre at the University of Victoria Faculty of Law.

There are two main grounds of appeal: an error of fact and an error of law. In order to appeal a decision from the Small Claims Court, one must argue that the Judge made either an error of fact or an error of law. The following provides a step by step guide on how to appeal a decision from Small Claims Court.

Step 1:

Obtain a copy of the written Order made by the Small Claims Court Judge which is being appealed.

If you do not already have a copy of the Order that you want to appeal, you should go to the Court Registry in the Court House where the Order was made. Ask the Clerk for a copy. There may be a small photocopying fee which you will have to pay.

Step 2:

Obtain and fill in a Notice of Appeal form.

Step 3:

File the Notice of Appeal at the Supreme Court Registry closest to the place where the Small Claims Court Order was made.

Step 4:

Pay the $200 Filing Fee (*Supreme Court Civil Rules*, BC Reg 168/2009, Appendix C) and $200 Security for Costs (*SCA*, s 8(1)).

Also, deposit with the Court Registry the amount of money the Small Claims Court Judge ordered to be paid to the Respondent. Alternatively, bring an application to a Judge to reduce the amounts payable.

If you cannot afford the filing fee, you may want to apply to a Supreme Court Judge to reduce the amount to be paid.

To succeed in reducing the filing fee, you must be able to prove that you are indigent (see *Supreme Court Civil Rule* 20 -5). The BC Court of Appeal has considered the meaning of that word in a case called *Johnston v. Johnston* [1]. The Court said "indigent" means "a person who has some means but such scanty means that [they are] needy and poor." The Court refused to approve any particular standard for determining whether a person is "indigent", and each case will be looked at individually. However, if you receive social assistance or persons with disabilities benefits and you prove this to the court, you are likely to be declared indigent.

If you cannot afford to pay the security for costs (or the amount required to be paid to the Respondent by the Small Claims Court Order) you may want to apply to a Supreme Court Judge to reduce the amounts to be paid.

It is not clear what test the Court will apply to succeed in an application to reduce these amounts. However, it is clear that evidence of an inability to pay the amount required will be vital.

Step 5:

File the Notice of Appeal in Small Claims Court on the same day it was filed in Supreme Court.

When you file the Notice of Appeal, be sure to attach the Supreme Court Practice Direction, Standard Directions for Appeals from Provincial Court pursuant to the *Small Claims Act*.

Section 7 of the *Small Claims Act* says that the Notice of Appeal must be filed in the Small Claims Court Registry on the same day that it is filed in the Supreme Court Registry. However, in a case decided in 1993 called *First City Trust v. Bridges Café Ltd.* [2]*, [1993] BCJ No 1353*, the court recognized that in certain places in British Columbia the distance between the location of the Supreme Court Registry and the Small Claims Registry was so great as to make it very difficult to comply with s 7. In that case, the filing took place on the next day. The Court held that the right of appeal would not be lost, even if the filing did not occur on the same day, as long as the Respondent was not prejudiced. Therefore, every reasonable effort should be made to file the Notice of Appeal in the Small Claims Court Registry on the same day or at the latest the day after the Notice of Appeal was filed in Supreme Court Registry.

Step 6:

Within 7 days of filing the Notice of Appeal, serve the Notice of Appeal on each person who was a party to the lawsuit in Small Claims Court who will be affected by the Appeal.

If you need more time to serve the Notice of Appeal, you must bring an application to a Supreme Court Judge. See Step 4 above.

The Appellant can serve the Notice of Appeal, or can have a process server or a friend give the documents to the Respondent. If you decide on using a process server, look in the yellow pages under "Process Servers." To save money you should telephone several process servers to get quotes about how much it will cost to have the documents served because prices vary. You should also confirm that the process server will provide you with a sworn Affidavit of Service. An Affidavit of Service is a document that proves to the Court that the documents were served on the Respondent.

The person who is going to serve the document should be given two copies of the document. They should compare the two copies to ensure that they are the same. This is because one copy will be given to the Respondent to be served and the second copy will be attached to an Affidavit of Service. In the Affidavit of Service the person serving the document will be swearing that they gave a copy of the document to the Respondent. Unless they first compare the documents, they will not know that the copy of the documents attached to the Affidavit of Service are the same as those given to the Respondent.

If the person delivering the documents does not already know the Respondent, they should confirm that the documents are being given to the right person. This can be done simply by asking the name of the person being given the documents.

After leaving a copy of each document with the Respondent to be served, the person serving the document must make a note of the time, date, and place (street address, city, and province) where the documents were served. This information will be needed to prepare an Affidavit of Service

Step 7:

Apply to the Registrar for a date for hearing the Appeal.

That date cannot be less than 21 days after applying for the date. Before the Registrar will set a hearing date, the Appellant must prove the money to be deposited in Step 4 has been deposited (or an Order has been obtained which reduces the amount required to be deposited).

Step 8:

Serve the Notice of Hearing of Appeal on the Respondent.

Also, serve any Order obtained under Step 4. Be sure to act quickly. There is a deadline which must be met (unless a Judge grants an Order extending the time). See Step 10 for instructions on how to serve the documents.

Step 9:

The Appellant must order transcripts of the oral evidence given at the Small Claims Court trial and the Judge's reasons for judgment.

The Appellant must pay for a copy of the transcript for the Court and one for each party to the appeal. Act quickly.

Transcripts are prepared by Court Reporters. You will have to make arrangements with the Court Reporters who work in your area of the Province to prepare the transcripts that you will need. To find out who may do the work in your area you may wish to speak to the Court Registry staff. Alternatively, you may wish to telephone Court Reporters listed in the yellow pages under "Reporters-Court & Convention."

Step 10:

Within 14 days of filing the Notice of Appeal, the Appellant must prove to the Registrar that the transcript has been ordered and that the Notice of Appeal, Notice of Hearing of Appeal, and the Order reducing the amount of money to be paid under Step 4 (if any) has been served on the Respondent.

See the Practice Direction of the Chief Justice regarding Standard Directions for Appeals from Provincial Court Pursuant to the Small Claims Act, which can be found at http:/ / www. courts. gov. bc. ca/ supreme_court/ practice_and_procedure/ practice_directions/ civil/ PD%20-%2021%20Standard%20Directions%20for%20Appeals%20from%20Provincial%20Court%20-%20Small%20Claims%20Act.pdf.

To prove that the Notice of Appeal, Notice of Hearing of Appeal and Order (if any) have been served, you will need to file an Affidavit of Service. A process server usually will prepare and have sworn an Affidavit of Service as part of the work they do for you. If you or a friend serve the documents, you will have to prepare your own Affidavit of Service.

Step 11:

Prepare a Statement of Argument.

Before you can prepare your Statement of Argument you must first pick up the transcript from the Court Reporter. Next, you must carefully read your copy of the transcript. You should make a note of the pages in the evidence or the Judge's reasons for judgment that contain the error in fact or law that you say should result in your appeal being successful. You should also look at copies of any exhibits which were given to the Judge during the Small Claims trial (like contracts, photos, reports, affidavits) to see if the exhibits contain evidence which would help your appeal.

When completing a Statement of Argument, the first step is to decide whether parts of the Small Claims Order are acceptable, or whether you do not agree with the entire Order. Then, on the Statement of Argument, list what you do not agree with.

Then, on the Statement of Argument you should list the evidence and the page and line numbers in the transcript, which will show the Supreme Court Judge where the Small Claims Court Judge made an error. This will become more clear to you if you view the sample and complete your Statement of Argument in the same way. The sample is based on the case described earlier in this Factsheet in which the Judge failed to apply the *Limitation Act*.

Finally, in the portion of the Statement of Argument dealing with the nature of the Order you are seeking, you should state what you want the Judge to do. For example, if you brought a lawsuit in Small Claims Court and you lost, you may want the Supreme Court Judge to make an Order for what you sued for. So, if you were owed money and you sued for $8000 and you lost, you would ask in your Statement of Argument for an Order that the Respondent pay you $8000. On the other hand, if you were the Defendant in the same lawsuit and you lost at the trial, you might want an Order dismissing the claim.

It would be very useful to get some legal advice when filling in the Statement of Argument.

Step 12:

Within 45 days of filing the Notice of Appeal, the Appellant must:

1. File at the Supreme Court Registry the original copy of the transcript;
2. File a Statement of Argument; and
3. Serve a copy of the transcript and Statement of Argument on the Respondent. See the Practice Direction of the Chief Justice regarding Standard Directions for Appeals from Provincial Court Pursuant to the Small Claims Act, which can be found at http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions/civil/PD%20-%2021%20Standard%20Directions%20for%20Appeals%20from%20Provincial%20Court%20-%20Small%20Claims%20Act.pdf

After you have prepared the Statement of Argument make a photocopy for yourself and each Respondent. Take the original and each copy, plus a copy of the transcript to the Supreme Court Registry. The Registry will date stamp the Statement of Argument. You can then serve the Statement of Argument and transcript on the Respondent.

Step 13:

At this point the Respondent will have to prepare a Statement of Argument.

The Respondent must file the Statement of Argument and deliver a copy to the Appellant not less than 14 days before the hearing of the appeal. A Respondent's Statement of Argument is a document which sets out:

1. What paragraphs the Respondent disagrees with in the Appellant's argument;
2. Why the Respondent disagrees with the Appellant's argument; and,
3. What Order the Respondent would like to see the Supreme Court Judge make.

The Respondent should start to prepare the Respondent's Statement of Argument by first carefully reading the Appellant's Statement of Argument. Note where you think errors were made. The Respondent should then read the transcript and review all the exhibits and list the page and line on the transcript that supports the Respondent's case. Then fill in the form in a manner similar to that in which the Appellant's Statement of Argument was completed.

It would be very useful to get some legal advice when filling in the Statement of Argument.

Step 14:

Prepare for the hearing.

The hearing will not be a new trial. A Judge could order a new trial at the end of the hearing, but the trial would occur at a later date. Thus, the hearing will have a different format than what you experienced at the trial. For example, no witnesses will be called to give evidence. Instead, what usually happens is that the Appellant first tells the Judge what the trial was about. The Appellant then tells the Judge what decision(s) made by the Small Claims Court Judge that the Appellant disagrees with and why. The Appellant may go through the Appellant's argument set out in the Statement of Argument. The Judge might read the portions of the transcript and the exhibits which the Appellant refers to in the Statement of Argument. The Judge may also ask the Appellant questions. The Appellant might conclude by noting the Order that the Appellant would like the Judge to make.

It would then be the Respondent's turn. The Respondent might take the Judge through the Respondent's argument asset out in the Respondent's Statement of Argument. The Respondent would answer questions the Judge had. The Respondent would conclude by telling the Judge what Order the Respondent would like the Judge to make.

To prepare for this type of hearing you should carefully review your Statement of Argument and any exhibits that you are going to refer to. You might also make notes of what you want to say.

Small Claims appeals do not happen often. However, if you can watch one before your case occurs it will help to give you a good idea of what is likely to happen. To find out if an appeal will happen before your case goes ahead, call the Supreme Court Registry and ask to speak to the Trial Coordinator.

Step 15:

Appear in Court.

Make sure you bring your copy of the Statement of Argument, transcript, and exhibits to Court with you on the day of your hearing. Arrive earlier than the time appointed for the hearing to begin.

Find the trial list, which will usually be posted somewhere in the Court building. This list tells which cases are to be tried on that date and in which particular Courtroom they will take place. If your case is not on the list, then you should immediately check with the Court Clerk or Registry. Otherwise, go to the proper Courtroom and be seated in the gallery.

When your case is called move forward to the Counsel table. Stand while speaking to the Judge. Introduce yourself to the Court. In Supreme Court, Judges are officially called "Justices" and can be referred to as "Justice", "Madam Justice", or "Mr. Justice".

The Judge probably will have read both Statements of Argument and will have some familiarity with the case. The Appellant will then present their case first, followed by the Respondent.

References

[1] http://canlii.ca/t/1dzv9
[2] http://canlii.ca/t/1dk56

Appendix M: LSLAP File Administration Policy

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 24, 2023.

This chapter is specific to LSLAP clinicians. It sets out internal LSLAP practice and policy regarding Small Claims.

1. Representation (LSLAP Assistance)

The general rule is that parties at the CRT are not allowed to have a representative, without asking for CRT permission, unless they are a minor or someone with impaired mental capacity. If a party is wanting to request a representative, they can request one in the online intake system or by filling out a Representation Request Form.

If a party is using a lawyer as their representative, the lawyer will be able to communicate with the CRT on their behalf.

CRT parties can also hire a lawyer and use them as a helper. If they are using a lawyer as a helper, the lawyer will not be able to speak on their behalf. The CRT also won't be able to talk to your helper about your case; the tribunal's communications are with the parties themselves. A helper can help them keep organized, take notes, provide you with emotional support, help you fill out online forms, as well as other tasks. For LSLAP's purposes, we can provide legal advice to the party while the CRT matter is underway. This includes advising how to draft pleadings, corresponding with the other party, advising on settlement offers, and drafting submissions that the party can present on their own to the CRT.

Chapter Twenty One – Welfare Law

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1st, 2023.

This chapter gives a general overview of a very complex area of law governed by lengthy and detailed legislation. Users should not read it on its own. Users of this chapter should be sure to refer to the applicable welfare legislation in each case.

This chapter only deals with BC welfare law. If one is applying to the Canada Pension Plan (CPP) for disability (or other) benefits, they should refer to the following link: https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-disability-benefit/eligibility.html.

Please be advised that the Law Student Legal Advice Program is not able to help with CPP disability benefits issues. If one requires assistance with CPP disability, they should reach out to Disability Alliance B.C. [1]

A. What is Welfare?

Welfare is a basic form of income support provided by the state to those in need. In BC, the provincial government administers welfare via the Ministry of Social Development and Poverty Reduction (the Ministry). **Welfare is a "payer of last resort,"** which means that in order to receive welfare, a person must demonstrate they have exhausted almost all other forms of support. This chapter will use the term "welfare" to describe all forms of income support provided by the BC government under the province's welfare legislation.

B. Welfare Policy

While the government's policy on welfare is not law, it is an important lens for understanding welfare law in BC. Ministry policy sets out the practical details of how the ministry administers welfare. The Ministry's welfare policies are contained in the "**BC Employment and Assistance Policy and Procedure Manual**," which is available at: http://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual.

The Policy and Procedure Manual incorporates MSDPR policy with the rules set out in the welfare legislation. It is an extremely useful tool for researching welfare law and policy.

C. Types of Welfare Benefits

Under the current welfare legislation in BC, the following types of welfare benefits are available to those who qualify:

1. Income Assistance

This basic monthly support and shelter allowance is provided under the *Employment and Assistance Act* [*EAA* [2]]. This is the benefit most people get when they receive welfare.

On income assistance, a single person under age 65 currently can receive up to **$1060 per month**, consisting of **$560.00 per month for support, plus a minimum of $75 and up to a maximum of $500 for shelter costs**. This total amount is to cover housing, utilities, food, transportation, clothing, and all other basic necessities.

The amounts available to one receiving income assistance will depend on one's family size. Income assistance rates based on family size can be found here: https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-employment-and-assistance-rate-tables/income-assistance-rate-table

Recipients of income assistance also receive PharmaCare prescription coverage with no deductible through what is called Plan C.

2. Disability Assistance (For Persons with Disability Designation - PWD)

This is a slightly higher, but still modest, monthly support and shelter allowance provided under the *Employment and Assistance for Persons with Disabilities Act* [*EAPWDA* [3]] to those who meet the definition of "person with disabilities" in s 2 [4] of that Act. To determine if one is eligible for PWD designation, please refer to **Section III. M. Persons with Disabilities (PWD) Designation**

On disability assistance, a single person under age 65 can receive up to $1483.50 per month, consisting of **$983.50 per month** for support, plus a minimum of $75 and up to a maximum of $500 for shelter costs. This total amount is to cover housing, utilities, food, clothing, and all other basic necessities.

The amounts available to one receiving disability assistance will depend on one's family size. Disability assistance rates based on family size can be found here: https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-employment-and-assistance-rate-tables/disability-assistance-rate-table

A person with the PWD designation who receives disability assistance can obtain a bus pass or $52 per month more if the person chooses not to have a bus pass. (https://www2.gov.bc.ca/gov/content/transportation/passenger-travel/buses-taxis-limos/bus-pass/people-with-disabilities)

An outline of other possible benefits available to those with the PWD designation can be found in Section X: Health Supplements, or one can refer to: https://disabilityalliancebc.org/hs3./.

3. Persons with Persistent Multiple Barriers (PPMB) Assistance

This is a slightly higher income assistance rate for people with "persistent multiple barriers" to employment for those who meet the PPMB definition set out in s 2 [5] of the *Employment and Assistance Regulation* [EAR [6]]. It is for people with a medical condition that makes it difficult or impossible to look for work or to keep a job. Technically, it falls within the definition of "income assistance" but this chapter will refer to it as a distinct form of welfare benefits.

On PPMB assistance, a single person under age 65 currently can receive up to **$1110.00 per month, consisting of $610.00 per month for support, plus a minimum of $75 and up to a maximum of $500 for shelter costs**. This total amount is to cover housing, utilities, food, transportation, clothing, and all other basic necessities.

The amounts available to one receiving PPMB assistance will depend on one's family size. PPMB assistance rates based on family size can be found at the link below, in column B of the table: https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-employment-and-assistance-rate-tables/income-assistance-rate-table

4. Hardship Assistance

This is a support and shelter allowance provided under s 5 of the EAA [7] and s 6 of the EAPWDA [8] to persons who are not otherwise eligible for income assistance, PPMB, or disability assistance (see also part 4 of the EAR [9] and part 4 of the EAPWDR [10]). Some (but not all) categories of hardship assistance are repayable, i.e. a person receiving hardship assistance may accrue a debt owing to the government. It is usually temporary assistance. People with the PPMB or PWD designation may also receive hardship assistance, if they are not otherwise eligible for PPMB or PWD benefits. Therefore, there are different rates of hardship assistance

On regular (income assistance) hardship assistance, a single person under age 65 currently receives a maximum of **$1060 per month** to cover housing, utilities, food, transportation, clothing, and all other basic necessities.

On PPMB hardship assistance, a single person under age 65 currently receives **$1110 per month** to cover housing, utilities, food, transportation, clothing, and all other basic necessities.

On disability hardship assistance, a single person under age 65 currently receives **$ 1,483.50 per month** to cover housing, utilities, food, clothing, and all other basic necessities (plus a bus pass, or $52 per month more if the person chooses not to have a bus pass – see Section VIII: Rates and Payment Issues. B: Persons with Disabilities Transportation Supplement

5. Health Supplements

Recipients of income assistance, PPMB, and disability assistance may qualify for various health supplements from the Ministry. See Part 5, Division 5 of the EAR [11], and Part 5, Division 4 of the EAPWDR [12].

6. Supplements

The ministry may provide these other forms of assistance on a case-by-case basis for specific purposes set out under the EAA [2] and EAPWDA [3] and their associated regulations. See especially, Part 5 of the EAPWDR [13] and the Ministry website (http://www2.gov.bc.ca/gov/content/family-social-supports/income-assistance/on-assistance/supplements).

References

[1] https://disabilityalliancebc.org/
[2] https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-laws/bc-employment-and-assistance-act-263-2002
[3] https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-laws/employment-and-assistance-for-persons-with-disabilities-act
[4] https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-laws/employment-and-assistance-for-persons-with-disabilities-act#section2
[5] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/263_2002#section2
[6] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/263_2002
[7] https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-laws/bc-employment-and-assistance-act-263-2002#section5
[8] https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-laws/employment-and-assistance-for-persons-with-disabilities-act#section6
[9] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/263_2002#part4
[10] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/265_2002#part4
[11] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/263_2002#division_d2e10033
[12] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/265_2002#division_d2e8911
[13] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/265_2002#part5

II. Governing Legislation and Resources

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1st, 2023.

A. Governing Legislation

The following statutes and regulations govern welfare law in BC and are available at www.bclaws.ca [1]:

Employment and Assistance Act, SBC 2002, c 40 [EAA [2]];

Employment and Assistance Regulation, BC Reg 263/2002 [EAR [3]];

Employment and Assistance for Persons with Disabilities Act, SBC 2002, c 41 [EAPWDA [4]]; and

Employment and Assistance for Persons with Disabilities Regulation, BC Reg 265/2002 [EAPWDR [5]].

See also the *Child in the Home of a Relative Transition Regulation*, BC Reg 48/2010.

B. Tips for Navigating Welfare Law Issues

Please keep in mind the following important points when dealing with a welfare law issue.

- **Be current.** The statutes and especially the regulations governing welfare in BC can change often. Therefore, it is very important to check the BC Laws website and confirm that one is dealing with the most current legislation.
- **Be comprehensive.** Be sure to read the relevant section of the appropriate act or regulation in its entirety and to scan the legislation for other relevant sections. The legislation is complex and often a number of provisions work together to govern a particular program or benefit.
- **Be alert to mandatory versus discretionary wording.** Welfare legislation contains a mix of mandatory provisions (requiring the government to do or provide something) and discretionary provisions (which permit, but do not require, the government to act in a particular way). Consider whether the legislative provisions relevant to the client's case are

mandatory or discretionary.

C. Referrals to Other Organizations

See **Chapter 23: Referrals** for additional referrals.

Community Legal Assistance Society (CLAS)

- May advise on general welfare matters and help clients with judicial reviews.

Online	Website [6]
Address	300 - 1140 West Pender Street Vancouver, B.C., V6E 4G1
Phone	(604) 685-3425 Fax: (604) 685-7611

Disability Alliance of BC

- Offers one-on-one assistance to individuals applying for benefits or appealing the denial of benefits. Particularly experienced in appeals about eligibility for the Persons with Disabilities ("PWD") designation from MSDPR needed to qualify for welfare disability assistance. Disability Alliance of BC also hosts a disability law clinic that may assist with general welfare issues and judicial reviews.
- Has also created a library of useful help sheets about disability assistance from the Ministry, and guides to applications and appeals ([7])

Online	Website [8]
Address	1450 - 605 Robson Street Vancouver, B.C. V6B 5J3
Phone	Advocacy Access Program: (604) 872-1278 Fax: (604) 875-9227 TTY: (604) 875-8835

First United Church

- Serves the Downtown Eastside, providing advocacy and assistance for welfare, housing, and other poverty law issues. Have shifted primarily to remote intake, with limited in-person intake for urgent issues (eviction or loss of income).

Online	Website [9] E-mail: advocacy@firstunited.ca
Address	542 East Hastings Street Vancouver, B.C., V6A 1P8
Phone	(604) 251-3323 Fax: (604) 251-2488

Kettle Friendship Society Advocacy Centre

- Advocacy focused on welfare, debt, housing, and child protection problems for clients with mental health issues. Also has a weekly Pro Bono Legal Clinic (please call ahead if you wish to refer a client).

Online	Website [10]
Address	1725 Venables Street Vancouver, B.C., V5L 2H3
Phone	(604) 253-0669 Housing Division Telephone: (604) 251-5664 Fax: (604) 251-6354

Downtown Eastside Women's Centre

- Focuses on providing legal and non-legal support and advocacy for women with mental health issues.

Online	Website [11]
Address	**Drop-in centre:** 302 Columbia Street Vancouver, BC, V6A 4J1 **Emergency shelter** 412 Cordova Street Vancouver, B.C., V6A 4J1
Phone	(604) 423-4807 Fax: (604) 681-8470

ATIRA Women's Resource Society

- Focuses on providing support for abused women and women on the downtown eastside. Their legal advocate program can provide advice, advocacy, and support with appealing welfare issues, and other poverty law issues.

Online	Website [12] E-mail: legaladvocate@atira.bc.ca
Address	101 East Cordova Street Vancouver, B.C., V6A 1K7
Phone	(604) 331-1407 ext 114

AIDS Vancouver

- Can provide case management services and possible short-term financial assistance to persons living with HIV/AIDS.

Online	Website [13] E-mail: contact@aidsvancouver.org
Address	1101 Seymour Street Suite 401, 4th floor Vancouver, B.C., V6B 0R1
Phone	(604) 893-2201

Povnet: Find an Advocate

- A service for finding other advocates and organization that can help with welfare issues in all parts of BC.

Online	Website [14]

D. Useful Publications and Outside Agencies

In addition to this LSLAP manual chapter, other useful publications include:

- **BC Disability Benefits Help Sheets**. Disability Alliance BC publishes 20 guides available at http://disabilityalliancebc.org/category/publications/help-sheets/which over many areas relating to applying for benefits and appealing decisions.
- **How to Apply for welfare, Welfare Benefits and When You're on Welfare:** plain language guides published by Legal Aid BC for welfare applicants are available at the following links.
  - **How to Apply for Welfare:** https://legalaid.bc.ca/publications/pub/your-welfare-rights-how-apply-welfare
  - **Applying for Welfare Online:** https://legalaid.bc.ca/publications/pub/your-welfare-rights-applying-welfare-online
  - **Welfare Benefits:** https://legalaid.bc.ca/publications/pub/your-welfare-rights-welfare-benefits
  - **When You're on Welfare:** https://lss.bc.ca/publications/pub/your-welfare-rights-when-youre-welfare

E. Notable Changes to BC Welfare Law

1. Benefit rate and supplement rate changes

Effective August 1, 2023, there is an increase of $125 per month in the maximum shelter rate for all family units who receive welfare benefits. This change was made by Order in Council 402/2023. For more information see Section VIII.D. Calculating the Shelter Allowance.

Also effective August 1, 2023, the monthly amount of several supplements increased, including:

- Crisis supplements for food rose from a maximum of $40 per month to $50 per month for each person in a family unit;
- The monthly rates for all special diet supplements rose (e.g. high protein diet, diabetic diet, gluten free diet etc)
- The natal supplement for people who are pregnant increased, and is now available until a newborn is one year old (up from 6 months)
- The school start up and winter supplement (formerly called the Christmas supplement) increased

The Ministry has a useful chart showing the new supplement rates payable as of August 1, 2023, and how they have changed: https:/ / www2. gov. bc. ca/ assets/ gov/ british-columbians-our-governments/ policies-for-government/ bc-employment-assistance-policy-procedure-manual/additional-resources/summary_of_changes_ppm.pdf

For more detail on diet and nutritional supplements see Section X: Health Supplements below. For more detail on eligibility criteria for crisis supplements, see Section IX. B: Crisis Supplements.

2. Forthcoming increase in earnings exemptions

Effective January 1, 2024, the earnings exemption for people receiving income assistance, PPMB and PWD benefits will increase. This change was made by Order in Council 402/2023. See Section III. D. 3: Earnings Exemptions on earnings exemptions below for more detail.

3. Expanded welfare eligibility for people fleeing armed conflict

Effective July 1st, 2023, immigration status requirements for welfare have been amended to allow persons in Canada under a temporary resident visa issued through an emergency authorization process for humanitarian reasons related to armed conflict to qualify for all forms of welfare. This category was created when Canada was receiving many people fleeing the war in Ukraine.

Prior to this change, people with this immigration status were only eligible for a limited duration of hardship assistance. As a result of their expanded eligibility for welfare, previous sections in the legislation dealing with hardship assistance for people fleeing armed conflict have been repealed. This change was made through Order in Council 343/2023. See Section III. E: Immigration Status Requirements for more information.

4. New legislation exempting Indigenous Financial Settlements

As of 2023 'Indigenous Financial Settlements' are exempt as both income and assets when determining eligibility for welfare. Section 1(1) of the EAR and the EAPDR define "Indigenous financial settlement' and associated terms very precisely. Before 2023, only specific settlements named in the legislation were exempt. Order in Council 218/2023 amends both the EAR and the EAPDR to exempt money paid under or from Indigenous financial settlements more generally. See Section III. C. 1: Exempt Assets for more details.

5. New Federal Benefit Exemptions

Effective December 19th, 2022, new sections were added to the EAR and EAPWDR which exempt the new federal Rental Housing Benefit and Dental Benefit as either income or assets for all forms of welfare. Receiving benefits under these new programs should not affect a person's welfare eligibility or the amount of assistance they are entitled to receive. This change was made through Order in Council 681/2022.

6. Housing Stability Supplement formally added to the legislation

The Housing Stability Supplement formally codifies a supplement that was previously only available under BCEA policy. It was introduced through Order in Council 56/2023. The Housing Stability Supplement may be provided to an eligible family unit in certain scenarios if there is a temporary absence of member of the family unit from the usual place of residence or there is a death of a member of the family unit. See Section X. A: Housing Stability Supplement for more information.

7. Changes to Disability and Income Assistance Shelter Payments

Before May 2022, one could only receive shelter payments if they could show that they were paying for rent, a mortgage, or various other related expenses. This meant there was a minimum of $0 for a single person. Now, no matter what your shelter costs are, a single person is guaranteed a minimum $75 shelter allowance each month. Larger family units (e.g., couples, or single parents and couples with kids) have a higher minimum shelter rate. This change means that people who are unhoused or living in vehicles, for example, will have some access to shelter benefits. For maximum shelter rates see Section I. C. 1: Benefit rate and supplement rate changes and Section VIII. D. Calculating the Shelter Allowance.

8. Security, Pet, and Utility Deposits

Previously, a person on welfare usually could not have more than two repayable security deposits outstanding with the ministry, and the ministry was not able to pay pet damage deposits that a landlord can require under the Residential Tenancy Act. The government has since removed the limit on the number of housing security deposits people on assistance can access and has introduced a repayable supplement for pet damage deposits.

The monthly repayment rate for deposit debt, including for repayable security deposits, pet damage deposits and utility deposits is $20 unless a greater amount is consented to.

For more information on repayable pet deposit supplements, visit the Ministry policy at: https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/general-supplements-and-programs/pet-damage-deposits.

References

[1] http://www.bclaws.ca
[2] https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-laws/bc-employment-and-assistance-act-263-2002
[3] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/263_2002
[4] https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-laws/employment-and-assistance-for-persons-with-disabilities-act
[5] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/265_2002
[6] http://www.clasbc.net/
[7] https://disabilityalliancebc.org/category/publications/help-sheets/
[8] http://www.disabilityalliancebc.org/
[9] https://firstunited.ca/how-we-help/legal-advocacy/
[10] http://www.thekettle.ca/
[11] http://www.dewc.ca/
[12] https://atira.bc.ca/what-we-do/program/legal-advocacy/
[13] http://www.aidsvancouver.org/
[14] http://www.povnet.org/find-an-advocate/

III. Eligibility

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1st, 2023.

This section deals with eligibility for income assistance, PPMB assistance, and disability assistance, but not for hardship. Please see Section VI: Hardship for information on eligibility for hardship assistance.

To be eligible for income assistance, PPMB assistance, or disability assistance, applicants must show that they meet the following:

- Asset limits;
- Income limits;
- Immigration status requirements; and
- Age requirements.

To be eligible, applicants must also:

- Pursue other forms of support;
- Complete a three-week work search (with some exceptions as discussed below); and
- Comply with employment-related obligations and an employment plan (with some exceptions, discussed below).

Those wishing to receive disability assistance or PPMB assistance must first show they qualify for PPMB or PWD status under the relevant sections of the legislation (s 2 of the EAR for PPMB status) (s 2 of the EAPWDA for Persons with Disability (PWD) status).

The above eligibility criteria are described in greater detail below. Certain applicants who do not meet the eligibility criteria for income assistance, PPMB assistance, or disability assistance may still be eligible for hardship assistance. See Part 4 of the EAR and Part 4 of EAPWDR for details.

A. Application Process

Applicants for income assistance, PPMB assistance, and disability assistance must comply with the application process set out in s 4 of the EAR [1] and s 4 of the EAPWDR [2], and are subject to the numerous eligibility requirements set out below.

Applications may be filed online, by telephone, or in person. For more detail, see the Legal Aid BC publication How to Apply for Welfare (https://www.legalaid.bc.ca/publications/pub/your-welfare-rights-how-apply-welfare).

Applicants who have an urgent need for food, shelter or urgent medical attention should ask the Ministry for an Immediate Needs Assessment when they first apply for welfare. This is discussed in greater detail in **Section III.J: Immediate Needs Assessment**. Doing so can expedite your application. Without an immediate needs assessment, it may take over four weeks to receive any financial help from the Ministry. See the Ministry policy on Immediate Needs Assessments at https:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/ application-and-intake/ immediate-needs?keyword=immediate& keyword=needs& keyword=assessment

Applicants who are fleeing an abusive relationship with a spouse or other relative should inform the Ministry of this when they apply for welfare. They will be exempt from the work search requirement and should have their application expedited on a critical basis. See the relevant Ministry policy at https://www2.gov.bc.ca/gov/content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/ case-administration/ persons-fleeing-abuse?keyword=fleeing&keyword=abuse

1. **Online Application**
   Online applications can be filled out at myselfserv.gov.bc.ca. Applicants must create a My Self Serve account, which requires an email address, Social Insurance Number (SIN), and information about the applicant's spouse (including common law partners), if they live together.
2. **Phone Application**
   To make a phone application, applicants may call toll-free at 1-866-866-0800. After the initial call, a ministry worker will call back within three business days to fill out the application form with the applicant. Five business days after the phone application, the applicant must go to the ministry office or Service BC Center to sign the application form. If it is difficult to get to either place, the ministry can fax the documents to another "trusted third party," such as another government worker, or a doctor, nurse, or a registered social worker, and the applicant can sign the documents with that person.
3. **In Person Application**
   An applicant can go to their local ministry office to start the application process in person. You can find the locations for these offices at: https://www2.gov.bc.ca/gov/content/family-social-supports/income-assistance/ access-services#office

If the applicant has access to a phone, a ministry worker will call within three business days to fill out the application form with the applicant. Five business days after the phone application, the applicant will need to go to the ministry office or Service BC Center in person to sign the form. If it is difficult to get to either place, the ministry can fax the documents to another "trusted third party," such as another government worker, or a doctor, nurse, or a registered social worker, and the applicant can sign the documents with that person.

If the applicant does not have access to a phone the applicant may make an appointment to meet with a ministry worker in person. At the appointment the ministry worker will fill out the application form with the applicant.

B. Obligation to Provide Information to the Ministry

Section 10 of the EAA [3] and Section 10 of the EAPWDA [4] empower Ministry staff to require welfare applicants and recipients to demonstrate eligibility by providing relevant information. Ministry employees also have the power to independently verify that information.

At the same time, welfare recipients must respond to enquiries by the Ministry, submit reports to the Ministry as requested, and alert the Ministry to any changes in their circumstances that may affect their eligibility (s 11 of EAA [5] and s 11 of EAPWDA [6]). Section 33(1) of the EAR [7] provides that by the fifth day of each calendar month a recipient of income assistance or PPMB assistance must submit a report (in a prescribed form) giving relevant information about eligibility. Meanwhile, s 29 of the EAPWDR [8] requires that those on disability assistance submit the form only when there is a change in their circumstances that may affect their eligibility for benefits (e.g. change in their assets, income, or family situation).

If an applicant fails to comply with the Ministry's requirements to provide accurate information on factors affecting eligibility, this may result in the suspension or reduction of benefits.

Note that a "trusted third party" must witness many of the Ministry forms. This can be a welfare worker (EAW) or other Ministry staff. If an applicant cannot get to a Ministry office in person, the Ministry may accept a signature from another government worker or a prescribed professional (doctor, nurse, nurse practitioner, social worker, psychologist, chiropractor, or physical/occupational therapist).

C. Asset Limits

In order to be eligible for income assistance, PPMB assistance, or disability assistance, applicants must exhaust their assets below certain asset limits. As noted above, welfare is a "payer of last resort". The EAR (ss 11-13) [9] and the EAPWDR (ss 10-12) [10] set out limits on which assets a person can possess and remain eligible for income assistance, PPMB assistance, or disability assistance.

Asset limits vary depending on the size of the family unit receiving welfare and the type of welfare the family unit is applying for or receiving.

Read the EAR (ss 1 and 11-13) and the EAPWDR (ss 1 and 10-12) carefully to identify the asset criteria. Note the definitions of "asset", which are set out in s 1 of the EAR and EAPWDR.

The following table summarizes the asset limits for different family sizes applying for or receiving other forms of welfare. A more detailed table is available at: https:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/ bc-employment-and-assistance-rate-tables/ asset-limits-table

Applicant (or recipient) Household	Assistance Type	Maximum Allowable Assets
Single Person	Income Assistance	$5,000
Single Person	PPMB	$5,000
Couple, or one or two parent families	Income Assistance	$10,000
Couple, or one or two parent families	PPMB	$10,000
Family unit with one person applying for the PWD designation, or receiving disability assistance	Disability	$100,000
Family unit with two adults applying for the PWD designation, or receiving disability assistance	Disability	$200,000

1. Exempt Assets

Sections 11(1) of EAR [9] and s 10(1) of EAPWDR [10] should be reviewed in detail to see if any of a person's assets are exempt, i.e., do not count toward their asset limit. The BCEA Policy & Procedure Manual section on Asset Treatment & Exemptions [11] is a useful resource.

Some key exempt assets are:

- One-time payment for loss of GIS benefits
- Clothing and necessary household equipment
- One vehicle per household and only if used for day-to-day transportation needs
- A family unit's place of residence
- A child tax benefit or GST credit under the Income Tax Act (Canada)
- A BC early childhood tax benefit
- A Canada rental housing benefit
- A Canada dental benefit
- A sales tax credit under the Income Tax Act (British Columbia)
- A registered disability savings plan or "RDSP" (see http://www.rdsp.com/for more information)
- An uncashed life insurance policy with a cash surrender value of $1 500 or less
- Business tools
- Indigenous financial settlements, as defined in section 1(1) of the EAR and EAPDR
- Tenant compensation

Disability Trusts are Exempt Assets

Under s 13 of the EAR [12] and s 12 of the EAPWDR [13], assets of up to $200 000 can be held in a non-discretionary trust for a person with PWD status (or an applicant for PWD status, or for another individual with disabilities in certain circumstances) without disqualifying the person from income assistance or disability assistance. In certain circumstances, the Ministry can authorize a non-discretionary trust to hold more than $200 000. There is no limit on the amount held in a discretionary trust.

Money received from the federal Memorial Program for First Responders is exempt as both income and as an asset

This exemption relates to family members of police officers, fire fighters and paramedics (including volunteers and auxiliaries) who died in the line of duty on April 1 2018 or after. Certain next-of-kin of first responders who die as a result of their duties are eligible to receive a one-time lump-sum direct payment of $300,000 from the federal Memorial Grant Program.

All such payments are exempt as both income and assets for all forms of welfare benefits.

Source: EAR, s 11(1)(eee); Schedule B, s 1(a)(lvi); and Schedule D, s 6(ddd). See also EAPWDR, section 10(1)(eee); Schedule B, section 1(a)(lx); and Schedule D, section 6(hhh)

Indigenous Financial Settlements are exempt as both income and as assets

Before 2023 only specific settlements named in the legislation were exempt. Order in Council 218/2023 amends both the EAR and the EAPDR to exempt money paid under or from Indigenous financial settlements more generally.

Indigenous Financial Settlements are defined as payments resulting from an order of a court, an award or order of a tribunal or arbitrator or a settlement agreement that meet the following conditions:

1. The payments relate to one or more of the following:

- Indigenous identity;
- Indigenous rights and/or land claims; or
- Obligations or breach of obligations to Indigenous Peoples;

and

2. The terms of the order, award or settlement agreement require the federal/provincial/territorial government or crown corporation to make the payment to an Indigenous governing body (an entity that is authorized to act on behalf of Indigenous Peoples) or to an individual who is a member of a class of persons on whose behalf the order, award or agreement is made.

Examples of these payments include but are not limited to:

- Indian Day School Settlements;
- Indian Residential School Settlements;
- Sixties Scoop Settlement Agreement;
- Treaty No.8 Agricultural Benefits Settlement; and
- Williams Treaties Settlement Agreement.

Interest accrued on settlements held by an Indigenous governing body prior to distribution is also exempt.

Source: EAR, s 11(1)(ooo) and s 11(5); Schedule B, s 1(a)(lxv) and s 1(b.1); and Schedule D, s 6(mmm) and 6.1. See also EAPWDR, s 10(1)(nnn) and s 10(4); Schedule B, s 1(a)(lxviv) and s 1(b.1); and Schedule D, s 6(qqq) and s 6.1.

LGBT Purge Class Action Final Settlement Agreement is exempt as both income and as an asset

This exemption relates to money that is paid or payable to a person through the LGBT Purge Class Action Final Settlement Agreement made June 22, 2018.

All such payments are exempt as both income and assets for all forms of welfare benefits.

Source: EAR s 11(1)(oo.1); Schedule B,, s.1(a)(xxxvii.1); and Schedule D, s 6(k.1). See also EAPWDR, s. 10(1)(oo.1); Schedule B, s 1(a)(xii.1); and Schedule D, s 6(k.1)

Certain pandemic benefits exempted as assets for some recipients For people who were recipients of income assistance or disability assistance, or who had the PWD designation, on April 2, 2020, the following forms of pandemic benefits are exempt as assets (and also exempt as income):

- Canada Emergency Response Benefits;
- Canada Recovery Benefits;
- Canada Worker Lockdown Benefits;
- Indigenous Emergency Assistance;
- Federal one-time payment for seniors;
- Federal one-time payment for persons who have disabilities; and
- BC Recovery Benefits

See sections 2.1 to 2.7 of the Employment and Assistance Regulation, and ss 2.01 to 2.07 of the Employment and Assistance for Person with Disabilities Regulation.

D. Income Limits

In order to be eligible for income assistance, PPMB assistance, or disability assistance, applicants must exhaust all other sources of income to support themselves and their dependants, except for income specifically exempted by legislation or policy.

The net income limits for welfare recipients are set out in s 10 of the EAR [14] and s 9 of the EAPWDR [15]. Schedule B in both regulations sets out the way a person's net income is calculated for the purpose of welfare eligibility.

1. Types of Income Relevant to Income Limits

The Ministry distinguishes between earned and unearned income for the purpose of the net income calculation.

a) Earned Income.

EAR, s 1 and EAPWDR, s 1 define "earned income" as:

- Any money or value received in exchange for work or the provision of a service
- Pension plan contributions refunded because of insufficient contribution to create a pension
- Money or value received from providing room and board at a person's place of residence
- Money or value received from renting rooms that are common to and part of a person's place of residence

b) Unearned Income.

EAR, s 1 and EAPWDR, s 1 define "unearned income" as any income that is not earned income. They give a non-exhaustive list of examples including:

- Any type of CPP benefits
- WCB benefits and other disability payments and pensions
- Inheritances
- Rental income from land or property
- Education or training allowances, grants, loans, bursaries, and scholarships
- Winnings from lotteries and other forms of gambling
- Criminal injury compensation or crime victim compensation
- "Any other financial awards or compensation"
- Funds received from a sponsor under a sponsorship agreement pursuant to the *Immigration and Refugee Protection Act*.

2. Deductions and Exemptions from Income

The Ministry deducts earned and unearned income dollar-for-dollar from a recipient's monthly cheque, subject to a list of deductions and exemptions set out in ss 1-9 of Schedule B [16] of EAR and in ss 1-9 of Schedule B of EAPWDR [17]. **Clinicians should carefully review these sections to determine if the applicant's income is exempt from or subject to deductions.**

Money withdrawn from a disability trust for certain purposes is also exempt as income. See s 13 of the EAR [12], and s 12 of the EAPWDR [13]. Also see s 7(1)(d) of Schedule B [16] to the EAR and the EAPWDR [18].

Money from structured settlement annuity payments that is used for certain purposes is also exempt as income. See Schedule B, s 7 of the EAR [16] and EAPWDR [17] for details. The following are **some** examples of income exempted by

Schedule B of the EAR [16] and EAPWDR [17]. This list is far from exhaustive.

> **NOTE:** An applicant or recipient of welfare benefits **must** report their receipt of all income to the Ministry, even if it is exempt.

- Income tax refunds;
- Universal child care benefits;
- Canada child benefits;
- Withdrawals from a Registered Disability Savings Plan;
- Child support payments CPP orphan's benefits and CPP disabled contributor's child's benefit
- Gifts (including recurring gifts) and inheritances are exempt as income for recipients of disability assistance only. For people receiving income assistance and PPMB benefits, inheritances and recurring gifts are NOT exempt as income and a one-time gift is exempt only if it does not make the recipient exceed their asset exemption level
- A refund from Fair Pharmacare;
- EI maternity and parental benefits, and EI benefits for caring for a critically ill child
- Amount paid or payable to a person who is or was a tenant, lessee, licensee or occupant, or a person who has or had a similar right or permission to use the premises for residential purposes

For a complete list of income exemptions refer to ss 1-9 of Schedule B of the EAR [16] and ss 1-9 of Schedule B of EAPWDR [17]

3. Earnings Exemptions

Recipients of income assistance, PPMB assistance, and disability assistance all have an earnings exemption.

The Ministry calculates exemptions for income assistance and PPMB assistance monthly. As of January 1, 2015, the Ministry calculates exemptions for recipients of disability assistance yearly (i.e., annual earnings exemption).

The exemptions apply to all "earned income," including wages from employment, money received from providing room and board at a person's place of residence, or money received from renting rooms that are common to the person's place of residence.

For recipients of disability assistance, "earned income" also includes WCB Temporary Wage Loss Replacement Payments issued under ss 191 and 192 of the Workers Compensation Act.

For recipients of income assistance and PPMB assistance, there is a one month waiting period to claim any earnings exemption. This means that a family unit cannot claim an earnings exemption for the first month in which they become eligible for income assistance or PPMB assistance but can claim an earnings exemption for any subsequent months.

For recipients of disability assistance, there is a one-month waiting period to claim an earnings exemption unless:

- A member of the family unit has received disability benefits at any point in the past OR
- A member of the family unit received income assistance or PPMB assistance in the month before the family unit became eligible for disability assistance.

There will increases in the earnings exemptions for income assistance, PPMB assistance and disability assistance effective January 1, 2024, pursuant to Order in Council 402/2023. Current earnings exemptions, and earnings exemptions as of January 1, 2024, are as follows:

- Family units, without children, receiving income assistance: $500/month, increasing to $600/ month on January 1, 2024;
- Family units receiving income assistance who have a dependant child or are caring for a supported child: $750/month, increasing to $900/month on January 1, 2024.

- **Exception:** a single parent of a dependent child or supported child who has a disability that prevents the parent from working more than 30 hours per week has an earnings exemption of $900/month while receiving income assistance (this will increase to $1080/month on January 1, 2024).
- Family unit receiving PPMB assistance: $900/month, increasing to $1080/month on January 1, 2024.
- Family unit receiving disability assistance:
  - $15,000 per calendar year for a single adult (or single parent) with the PWD designation; this will increase to $16, 200 per year on January 1, 2024.
  - $18,000 per calendar year for a family unit with two adults where one adult has the PWD designation, and the other adult does not. This will increase to $19, 400 per year on January 1, 2024.
  - $30,000 per calendar year for couples (and couples with children) where both adults have the PWD designation. This will increase to $32, 400 on January 1, 2024.

If a child is under 19 and in school full-time, a family unit can keep the entirety of that child's income without it affecting their benefits (although the child's income must still be reported to the Ministry). If a child is under 19 and not in school full time, then any income the child earns counts toward the family unit's earnings exemption. For more information on earnings exemptions, see EAPWDR schedule B [17], s 3, and EAR, schedule B [16], s 3. **Applicants must report all income to the Ministry, including earned income even if it is below a person's earnings exemption.**

E. Immigration Status Requirements

Under s 7 of the EAR [19] and s 6 of the EAPWDR [20], at least one person in a family unit that is applying for or receiving income assistance, PPMB assistance, or disability assistance must be a:

- Canadian citizen;
- Permanent Resident;
- Convention refugee;
- Person on a Temporary Resident Permit;
- Refugee claimant;
- Person in Canada under a temporary resident visa that was issued through an emergency authorization process for humanitarian reasons related to armed conflict (this category was introduced on July 1, 2023 when Canada was welcoming many people fleeing armed conflict in the Ukraine); or
- Person under a removal order that cannot be executed.

The only exception to these immigration status requirements is that some single parents without immigration status who have left an abusive relationship may be eligible for temporary assistance (see below).

Where an applicant for, or recipient of, income assistance, PPMB assistance, or disability assistance meets the immigration status requirements, but an adult dependant of the applicant does not, assistance and supplements may be issued for the other members of the person's family unit, but not for the adult dependant who does not meet the citizenship requirements. However, the Ministry will include the assets and income of the person not meeting the citizenship requirements when determining the household's income and assets.

1. Abused Single Parents without Status

A single parent who does not meet the requirements for citizenship, permanent residency, refugee status, or temporary residence might be eligible for welfare on a temporary basis if they have:

- a dependent child who is a Canadian citizen; AND
- left an abusive spouse; AND
- applied for status as a permanent resident; AND
- cannot leave BC because of ONE of the following:
  - another person who lives in BC has parenting (also called custody and access) or contact (visitation) rights with at least one of the person's dependent children through a court order, agreement, or other arrangement, AND leaving BC with their children would go against the court order; OR
  - another person who lives in BC is claiming parenting or contact rights regarding the child or children; OR
  - The parent or child is receiving treatment for a medical condition and leaving BC would be dangerous to that person's physical health.

For more information, see s 7.1 of the EAR [21], and s 6.1 of the EAPWDR [22].

NOTE: The Ministry should also excuse the parent from the work search requirement.

F. Age Requirements

Generally, a person must be 19 years of age in order to apply independently for welfare, but there are some circumstances where those under 19 may apply for welfare. See s 5 of EAR [23] and s 5 of EAPWDR [24]. Minors under 19 who do not live with their parents or guardians have the right to apply for income assistance from the Ministry. To qualify, the Ministry must be convinced that their parents will not support them.

1. Income Assistance for Children and Youth

Minors under 19 who do not live with their parents or guardians have the right to apply for income assistance from the Ministry. Before granting assistance to such a minor, the Ministry must make reasonable efforts to have the minor's parents or guardians assume financial responsibility for the minor's support. If the parents or guardians are unwilling to support the minor, the Ministry may grant the minor income assistance.

The Ministry will refer minors under 17 who apply for income assistance to a social worker with the Ministry of Child and Family Development before providing assistance. The Ministry will refer minors between 17 and 19 to a social worker only if it considers there to be child protection issues.

Note that as of 1 April 2010, the Ministry will no longer pay Child in the Home of a Relative benefits to new applicants.

2. Disability Assistance for Youth 18 and Over

Disabled youths may be eligible for the PWD designation and disability assistance at the age of 18, even if they live with their parents. To qualify, a youth must have a severe mental or physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least two years. Additionally, this impairment must directly and significantly restrict the person's ability to perform daily living activities either continuously or periodically for extended periods, in the opinion of a health professional. Finally, as a result of those restrictions, the person must require help to perform those activities (see s 2(2) of the EAPWDA [25]). An application for the PWD designation can start 6 months before the youth's 18th birthday.

3. Welfare for Teenaged Parents Living at Home

If a child is under 19, has a dependent child, and lives with their own parent who is also on income assistance, PPMB assistance, or disability assistance, the Ministry may consider the two sets of parents as separate family units. This means that both the parent and grandparent may receive a shelter allowance of their own in addition to a support allowance. The Ministry's decision will depend on the child's age. For more information, see s 5 of the EAR [23].

4. MCFD Youth Agreements for 16- to 18-year-old Youths

Youths aged 16 to 18 years who have left home and do not have a parent or other persons willing to take responsibility for them, or who cannot return home for reasons of safety, may be eligible for a Youth Agreement with the Ministry of Child and Family Development ("MCFD"). A Youth Agreement assists at-risk youth to live independently, return to school, and gain work experience or life skills. For more information on whether a person qualifies, contact the nearest MCFD office. Also see https://www2.gov.bc.ca/gov/content/safety/public-safety/protecting-children

5. MCFD Extended Family Program

If a young person under 19 lives with extended family members or close friends, the caregiver may be eligible for benefits to care for the young person under MCFD's Extended Family Program. The child's parent(s) must live elsewhere, must request these benefits from MCFD, and must agree with the placement. Extended Family Program benefits are usually temporary. A caregiver who is also the child's legal guardian is not eligible for Extended Family Program benefits. For more information, see: https://www2.gov.bc.ca/gov/content/family-social-supports/fostering/out-of-care-kinship-care-options-for-children-and-youth-in-bc/temporary-out-of-care-arrangements#:~:text=Extended%20Family%20Program%20(EFP),unable%20to%20care%20for%20them.

6. MCFD Benefits for Those Ages 19-26

There are some supports in place until age 26 for those that were in foster case. Youth that were in care that are now over the age of 19 and up to 26 years old, may be eligible for further benefits from MCFD. Please see Section IV. B: Adults Aged 19-26 Who Were in Foster Care for further information.

G. Obligation to Pursue Other Support and Not Dispose of Property

Applicants are eligible for all forms of welfare only after they take full advantage of most sources of income, asset, or other means of support that are or might become available to them or to their dependants.

Applicants may become ineligible for assistance if they "dispose of property" for consideration that the Ministry thinks is inadequate. This means that a person cannot, for example, give away a valuable asset in order to become eligible for welfare. For details, see EAA, ss 13-14 [26]; EAR, ss 29 [27] and 31 [28]; EAPWDA, ss12-13 [29]; and EAPWDR, ss 25 [30] and 27 [31].

If an applicant or their dependants fail to take advantage of other resources that they might use to support themselves, or if they dispose of assets for inadequate consideration, the Ministry may reduce the amount of assistance granted to the family unit or declare the family unit ineligible for a period set by the regulations (see EAR, ss 29 [27] and 31 [28]; EAPWDR, ss 25 [30] and 27 [31]). The Ministry may consider some ineligible persons for hardship benefits if they agree to repay the amount they receive.

1. No Obligation to Assign Child or Spousal Support Rights

Until May 1, 2015, the Ministry required applicants for and recipients of welfare to assign to the Ministry any rights they had to pursue or respond to legal proceedings involving maintenance for their dependent children (i.e. child support) and for themselves (i.e. spousal support). That requirement no longer stands. Currently, a person applying for or receiving welfare has the choice whether to assign their right to pursue child or spousal support to the Ministry. See section 20 of the EAR [32] and section 17 of the EAPWDR [33].

a) Child Support Not Considered Income

As of September 1, 2015, the Ministry no longer considers child support payments received to be unearned income, and will not deduct child support from welfare cheques.

If a client wants the Ministry to provide them with legal help in pursuing an order or agreement for child support (or possibly varying an old Court order or agreement), the client can contact the Ministry and ask to voluntarily assign their child support rights to the Ministry. The guidelines the ministry will apply in deciding whether to accept a voluntary assignment of child support rights are at http://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/general-supplements-and-programs/family-maintenance-services.

If a client already has a child support order or agreement enrolled for enforcement with the Family Maintenance Enforcement Program (FMEP) as of May 1, 2015, the client can now choose to either:

a) continue to have the order enforced, or;

b) withdraw the order from FMEP.

If a client decides to withdraw an order or agreement from registration with FMEP, the client can still try to enforce the order themselves through the court (i.e. collect on child support payments or arrears) procedures set out in the *Family Maintenance Enforcement Act*, RSBC 1996, c 127.

b) Spousal Support Still Considered Income

While the Ministry no longer requires an applicant for or recipient of to assign their right to pursue spousal support to the Ministry, any spousal support received is still considered unearned income and will be deducted dollar-for-dollar from all welfare benefits. If the Ministry considers that a person has a right to spousal support, but the person does not pursue it (either independently or by assigning their spousal support right to the Ministry), the Ministry may reduce the amount of assistance granted to the person's family unit or declare the family unit ineligible for a period set by the regulations (see EAR, ss 29 [27] and 31 [28]; EAPWDR, ss 25 [30] and 27 [31]).

If an applicant for or recipient of welfare is interested in assigning their spousal support rights to the Ministry so they can get legal help obtaining a court order or agreement for spousal support, the client can contact the Ministry and ask to voluntarily assign their right to spousal support. Where that person's ex-partner is abusive toward them, it is important for the person to disclose this to the Ministry. Ministry policy provides discretion not to pursue spousal support under an assignment where doing so could put the applicant or recipient at risk. For more information, see the Ministry's risk assessment policy at: http:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/general-supplements-and-programs/family-maintenance-services

H. Two Years' Past Financial Independence Requirement

As of January 1, 2020, regulation change OIC # 705 [34] (B.C. Reg. 270/2019) removed the two-year financial independence eligibility requirement.

Applicants are no longer required to demonstrate that they have been financially independent for at least two consecutive years prior to applying for assistance.

I. Three-Week Work Search

All new applicants, including persons with disabilities, must go through the two-stage application process set out in ss 4, 4.1 and 4.2 of the EAR [1] and ss 4 [2], 4.1 [35] and 4.2 [36] of the EAPWDR. (See the Legal Aid's "How to Apply for Welfare" information booklet for more information: https:/ / legalaid. bc. ca/ publications/ pub/ your-welfare-rights-how-apply-welfare).

All applicants for welfare must (unless they are exempt as set out below) wait three weeks to apply for benefits after completing stage 1 of the welfare application. During this three-week period they must complete a job search.

An applicant required to do a job search must keep clear records to prove to the Ministry what they have done to look for work. The Ministry assesses the reasonableness of a job search on a case-by-case basis. Generally, a reasonable work search usually includes things like writing up a resume; looking for jobs on the internet, by phone, and through personal contacts; submitting applications or resumés; going to job search workshops; going to employment agencies; asking for "job shadowing opportunities"; and going to job interviews.

Certain groups are exempt from work search requirement. See ss 4.1(4),(5), and (6) and s 4.2(5) of each Regulation (EAR [37] and EAPWDR [35]). An applicant does not have to do a work search if they:

- Face prohibition from working in Canada;
- Are age 65 or over;
- Have a physical or mental condition that precludes the person from completing a search for employment as directed by the minister;
- Are fleeing an abusive spouse or relative; OR
- Are the single parent of a child under three (this includes foster children and some children placed in their care by MCFD).

J. Immediate Needs Assessment

If someone who is applying for welfare has an immediate need for food, shelter, or urgent medical attention, their application can be expedited. A person in this situation should request an **"immediate needs assessment"** from the Ministry. If they are not exempt from the 3 week work search, they may qualify for (non-repayable) hardship assistance from the Ministry while they do their work search. If they are exempt from the work search. , they are to proceed directly to their stage 2 eligibility interview. The Ministry's service standard is that a person requesting immediate needs assessment should have their situation assessed by the Ministry through a stage 2 eligibility interview, **within one business day.** If the Ministry is not able to do that, the service standard provides the Ministry should meet the person's immediate need (e.g. by vouchers for food, bus tickets, shelter referral etc.) until the eligibility interview is conducted. See the Ministry's policy on immediate needs assessments at http:// www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/bcea-policy-and-procedure-manual/application-and-intake/immediate-needs

K. Ongoing Employment Obligations: Employment-related Obligations and Employment Plans

If the Ministry considers a recipient of welfare benefits to be employable, the person will have "employment-related obligations" under s 13 of the EAA [26] and s 29 of the EAR [27]. This means that they must actively look for work and accept any job offer that the Ministry considers "suitable" (appropriate). They must also not refuse suitable employment. For more information, see "Failure to meet employment-related obligations" under section III below.

The Ministry exempts certain persons from having employment-related obligations; see EAR s 29(4) [27] for details. For example, people with PPMB status or the PWD designation, single parents of children under 3, and people 65 and over do not have employment-related obligations. Recipients of assistance who have employment-related obligations must also have an Employment Plan (EP) under s 9 of the EAA [38]. The Ministry may require even recipients with certain barriers to employment, such as drug and alcohol problems or other medical conditions, to follow an EP. However, the Ministry must tailor the EP to the abilities and skills of the recipient. EPs for recipients under the age of 19 focus on completing high school.

An EP outlines the conditions (activities and expectations) that the Ministry thinks a person must complete to become employed or more employable and includes a timeframe. The EP may include independent work search, referral to job placement programs, specific training for employment, or other services. Recipients must complete an activity report monthly while they are looking for work, and every second month once they obtain work, until they become independent of income assistance.

The Ministry does not require people with the PPMB or PWD designation to have an employment plan. The Ministry may encourage them to sign a "voluntary participation plan", however this is not mandatory. The Ministry may, however, require a voluntary participation plan to access certain training programs.

The Ministry has established various programs for employment, self-employment, and volunteering by people on income assistance, PPMB assistance, and disability assistance. These programs are optional if the person does not have employment related obligations.

L. Single Parent Employment Initiative

Effective September 1, 2015, the Ministry introduced a "single parent employment initiative." Under this initiative, if a single parent on income assistance, PPMB or disability assistance is assessed as needing training in order to gain employment in certain fields, they may be eligible for the Ministry to pay tuition for their training, and to continue receiving income assistance, PPMB benefits or disability assistance for up to 12 months while participating in an approved training program. Single parents may be eligible for additional childcare and transportation supports while participating in the training program or paid work experience program. Single parents that are eligible for the childcare subsidy may also have access to additional child care supports during their training period and their first year of their employment.

For more details on this program, see https:/ / www2. gov. bc. ca/ gov/ content/ family-social-supports/ income-assistance/on-assistance/employment-planning/spei

M. Persons With Disabilities (PWD) Designation

To obtain disability assistance, a person must first show that they qualify under s 2(2) of the EAPWDA [25] definition of "person with disabilities" ("PWD"). This section defines a "person with disabilities" as a person over 18 with a severe mental or physical impairment that:

a) In the opinion of a medical practitioner or nurse practitioner is likely to continue for at least two years; and

b) In the opinion of a prescribed professional (a doctor, psychologist, physical or occupational therapist, social worker, nurse, nurse practitioner, or chiropractor):

1. Directly and significantly restricts the person's ability to perform daily living activities either

A. continuously; or

B. periodically for extended periods; and

2. As a result of those restrictions, the person requires help to perform those activities.

People who wish to receive disability assistance must complete an extensive application form with the assistance of a doctor and another health professional and satisfy the Ministry that they meet the above definition.

"Requiring help" includes:

- Help from an assistive device (like a wheelchair);
- Significant help from another person; OR
- Help from an assistance animal (such as a guide dog).

NOTE: In *Hudson v. Employment and Assistance Appeal Tribunal*, 2009 BCSC 1461, the BC Supreme Court made several important findings about the eligibility criteria for persons with disabilities designation under the EAPWDA [39]. For a helpful summary of the findings in Hudson, the Community Legal Assistance Society has published a summary online at: http:/ / d3n8a8pro7vhmx. cloudfront. net/ clastest/ pages/ 79/ attachments/ original/1401252006/PWD_Eligibility_Summary_HUDSON.pdf?1401252006

1. Simplified PWD Application for Certain Applicants

As of September 1, 2016, certain applicants need only complete a simplified two-page form to qualify for designation as a Person with Disabilities for the purposes of s 2(2) of the EAPWDA [25]. Under the EAPWDR s 2.1 [40], an applicant must be one of the following to qualify for the simplified form:

1. A person considered disabled under s 42 (2) of the Canadian Pension Plan (Canada) (that is, the person is receiving CPP disability benefits);
2. A persons enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, BC Reg. 73/2015;
3. A person who has at any time been determined to be eligible for payments from the Ministry of Children and Family Development's At Home Program;
4. A person who has at any time been determined by Community Living British Columbia (CLBC) to be eligible to receive community living support under the Community Living Authority Act;
5. A person whose family has at any time been determined by Community Living British Columbia (CLBC) to be eligible to receive community living support under the Community Living Authority Act.

N. Persistent Multiple Barriers (PPMB) Designation

To obtain PPMB (Persons with Persistent Multiple Barriers to employment) assistance, a person must first qualify for the PPMB designation under s 2 of the EAR [41]. The criteria for the PPMB designation changed significantly on July 1, 2019. Many people who could not qualify for the PPMB designation under the old definition, may be able to meet the new July 2019 criteria if they re-apply for the PPMB designation.

To qualify for the PPMB designation a person must:

- Be receiving income assistance or hardship assistance;
- Have a health condition that a health professional has confirmed
  - has continued for at least one year and is likely to continue for at least 2 more years, or
  - has occurred frequently in the past year and is likely to continue for at least 2 more years;
- Have the ministry agree that their health condition is a barrier that seriously impedes the person's ability to search for, accept or continue in employment, and
- Face a circumstance that the ministry agrees is a circumstance that seriously impedes the particular individual's ability to search for, accept, or continue in employment. Such circumstances may include, but are not limited to:
  - being homeless or having been homeless in the past 12 months;
  - experiencing domestic violence now or in the past 6 months;
  - Needing English language skills training;
  - not having basic skills for employment;
  - having a criminal record;
  - having an education below grade 12;
  - having accessed emergency health, mental health or addiction services multiple times in the past 12 months;
  - having been found to be a Convention refugee or having been such a refugee in the past 24 months, or being in the process of having a claim for refugee protection, or application for protection, decided under Canadian immigration law; or
  - being a person who was a "child in care" under the Child, Family and Community Services Act, RSBC 1996, c-46 or received similar care under an enactment of another Canadian jurisdiction.

References

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IV. Special Situations

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1st, 2023.

A. People Living on a First Nations Reserve

People (whether aboriginal or non-aboriginal) living on a First Nations reserve must seek welfare benefits through the Band Social Development Program, administered by Indigenous and Northern Affairs Canada.

For First Nations persons living off a reserve, the usual policies and procedures for qualifying for welfare through the Ministry apply. For more information, see the following Legal Aid Publications:

Aboriginal Legal aid in BC website:
Income assistance on reserve section at:
https://aboriginal.legalaid.bc.ca/benefits/socialAssistance.php

B. Adults Aged 19-26 Who Were in Foster Care

Youth that were in care when they turned 19, and that are now aged 19 to 26 years old, may be eligible for further benefits from the MCFD. One can apply for these if one was in any of the following arrangements:

- The custody of a director or permanent custody of the Superintendent;
- The guardianship of a director of adoption;
- The guardianship of a director under the Family Relations Act; or
- A Youth Agreement.

If one meets the two requirements above, then they may be eligible for $1,250 a month in supports from the MCFD. For further information please see the following link:

https:/ / www2. gov. bc. ca/ gov/ content/ family-social-supports/ youth-and-family-services/ teens-in-foster-care/ agreements-with-young-adults

V. Eligibility Factors

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1st, 2023.

A. Family Units, Dependency, and Spousal Relationships

Under welfare legislation, the Ministry pays assistance not to individuals, but rather to “family units”. The legislation deems family units to include a welfare applicant or recipient, their “dependent children” and their “spouse.” Currently, the legislation considers couples living in a marriage like relationship with several aspects of dependence or interdependency to be spouses after they have lived together for **twelve months**.

> **NOTE:** Previously, the legislated time requirement for two unmarried people living together in a marriage-like relationship was only 3 months. Currently, the Ministry cannot deem two people who live together, but are not married, “spouses” until they have lived together for one year.

If two or more people are part of the same family unit, their **combined** assets and monthly income will be used to determine their ongoing eligibility for assistance and their monthly benefit amount will be calculated as a lump sum for a family unit of that size.

See the definitions of “applicant”, “dependent”, “dependent child” “family unit”, and “recipient” in s 1 of the EAA [1] and the definition of “spouse” in s 1.1. The same definitions exist in the corresponding sections of the EAPWDA [2].

A "family unit" includes a person who is applying for or getting welfare as well as that person's dependants. A "dependant" can be a spouse or a dependent child.

> **NOTE:** The Ministry does not consider other relatives, such as parents or adult children as dependants, even if they live with and rely upon the applicant.

To be considered a "dependent child", a child must:

- Be under 19 years old (unless the child is 18 and getting PWD benefits);
- Rely on the applicant for food, shelter, and clothing; AND
- Live with the applicant for more than half of each month.

Where separated parents have shared 50% custody of a child, if only one of the parents receives welfare, the child is deemed to be that parent’s dependent child. Where both parents receive welfare, the child is the dependent child of the parent that is agreed to in writing (EAR ss 1(2) and 1(2.1) [3]; EAPWDR ss 1(2) and 1(2.1)) [4].

Married couples who have separated but continue to live separate and apart under the same roof may qualify for welfare as individuals (not spouses) under section 1(5) of the EAR, and section 1(4) of the EAPWDR. Also see the Ministry’s policy about “separated married spouses” at https:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/ support-and-shelter/ family-composition?keyword=family&keyword=composition

If roommates do not want the Ministry to consider them a family unit, they must be able to show that they do not fit the definition of “spouse” in s 1.1 of the EAA [5] and EAPWDA [6]. In determining whether two people who live together fit the definition in s 1.1, the Ministry may look at common-sense indicia of a spousal relationship such as:

- Whether the parties have separate bedrooms;
- Whether they have separate bank accounts, divide bills, etc.;
- Whether have they acknowledged a common law or sexual relationship as existing between them, either socially or for any other purpose;

- Whether they share household responsibilities on a consistent basis, i.e. childcare, meal preparation, laundry, shopping, house cleaning, etc.; and
- Whether either party has an ongoing sexual relationship with another person.

Cases where a disabled person lives with a roommate who helps with their disability caregiving needs can be tricky. Consider referring such cases to an organization such as Disability Alliance BC. Ministry policy provides that when it is assessing whether a disabled person is in a spousal relationship with a roommate, the Ministry must consider whether any interdependency in their relationship is attributable to the person's disability caregiving needs (not a marriage like relationship) (see Ministry Procedures under "completing an assessment to determine if applicants or recipients are spouses" at https:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/support-and-shelter/family-composition?keyword=family&keyword=composition)

B. Failure to Meet Employment-Related Obligations

Under EAA s 13 [7], EAPWDA, s 12 [8], EAR s 29 [9] and EAPWDR s 25 [10], the Ministry may reduce assistance (for households that include dependent children) or declare a household ineligible for a period set by regulation (for households with no dependent children) if a recipient or adult dependant who has employment-related obligations:

- Fails to accept suitable employment;
- Voluntarily leaves employment without just cause;
- Is dismissed from employment for just cause; or
- Fails to demonstrate reasonable efforts to search for suitable employment.

"Suitable employment" is not defined in the income assistance legislation, but a past Ministry operational directive defined suitable employment as "available employment which the person is able to perform, that pays at least the minimum wage, and which will maximize the person's independence from assistance".

"Just cause" for leaving employment is not defined in the legislation, but the Ministry Policy and Procedure Manual [11] states in the "reasons for sanctions" policy section that just cause for leaving employment includes:

- A physical or mental condition which precludes maintaining employment;
- Sexual or other harassment;
- Discrimination;
- Dangerous working conditions;
- Following a spouse to new employment;
- Leaving an abusive or violent domestic situation;
- Having to care for a child or other immediate family member who has a mental or physical condition which requires the person to care for them; or
- Reasonable assurance of another job.

If the Ministry decides that the person's boss fired them for just cause or they quit a job without just cause, penalties may apply, including:

- If the person does not have dependent children, the Ministry may not allow the person to apply for income assistance or hardship assistance for two calendar months.
- If the person does have dependent children, the Ministry can allow them to apply for income assistance or hardship assistance, but will reduce benefits by $100 for two months.

The details of the sanctions that the Ministry may apply under EAA s 13 [7], EAPWDA s 12 [8], EAR s 29 [9], and EAPWDR s 25 [10] are summarized in the Ministry's Policy and Procedures Manual [11] in a table under "reasons for sanctions".

NOTE: The above employment-related sanctions do not apply to recipients listed in EAR s 29(4) [9].

C. Failing to Accept or Pursue Income or Assets or Disposing of Property

Section 14 of the EAA [12] (s 13 of the EAPWDA [13]) and s 31 of the EAR [14] (s 27 of the EAPWDR [15]) outline the sanctions that the Ministry may apply to applicants who fail to pursue income or assets or who dispose of property for inadequate consideration.

The details of the sanctions that the Ministry may apply under EAA s 14 [12] (s 13 of the EAPWDA [13]) and EAR s 31 [14] (s 27 of the EAPWDR [15]) are summarized in the Ministry's Policy and Procedures Manual [11] in the table as above, indexed under "Reasons for Sanctions".

D. Conviction or Civil Judgement for Welfare Fraud

As of Sept 1, 2015, a person is no longer ineligible for income assistance, PPMB assistance or disability assistance ONLY because of either:

- A conviction under the *Criminal Code* in relation to obtaining welfare benefits by fraud or false or misleading representation (i.e. the former "lifetime ban" has been repealed);
- A conviction of a statutory offence under the EAA [16] or EAPWDA [17] (or prior welfare legislation); OR
- A declaration of ineligibility by the Ministry following the Ministry obtaining a civil judgment against them for a welfare overpayment.

People convicted of such offences either before or after September 1, 2015, or with declarations of ineligibility related to a civil judgment, can now qualify for regular income assistance, PPMB or disability assistance, if they meet all other eligibility requirements.

These family units are liable to repay the government, under section 27 of the EAA [18] (s 18 of the EAPWDA [19]), the amount or value of the overpayment that was the subject of the Criminal Code conviction and/or conviction under the EAA/EAPWDA and/or civil judgment. This amount is known as an “offence overpayment.”

Section 89, 89.1 and 89.2 of the EAR [20] (74, 74.1 and 74.2 of the EAPWDR [21]) detail a minimum monthly welfare benefit deduction and repayment structure that applies to an “offence overpayment,” as well as the exemptions from those deductions. The basic rule is a reduction of $100 per month reduction in welfare benefits for each person in a family unit who has an “offence overpayment.” Where a person was convicted under the *Criminal Code*, that deduction continues until the amount of the overpayment is repaid in full. Where a person was convicted of a statutory offence under the EAA or EAPWDA, that deduction continues for:

- 12 months for a first conviction (unless the overpayment is repaid in less than 12 months)
- 24 months for a second conviction, (unless the overpayment is repaid in less than 24 months); and
- For a third or subsequent conviction, until the amount of the third or subsequent overpayment is repaid.

There is some degree of ministerial discretion to waive the minimum $100 repayment requirements in a given benefit month. The minister may waive the repayment for the following reasons:

- The minister is satisfied that the family unit is homeless or at risk of becoming homeless
- The minister is satisfied that a deduction would result in danger to the health of a person in the family unit; OR
- A recipient in the family unit is liable for an offence overpayment but the person convicted of the criminal code offence or Act offence that resulted in the offence overpayment is not a member of the family unit for the benefit month.

Clinicians should consult the above-reference sections of the EA and EAPD legislation to see what specific repayment structure matches the client's current family unit and welfare benefit status, and what exemptions the legislation might entitle them to.

E. Providing Inaccurate or Incomplete Information to the Ministry

If a family unit provides inaccurate or incomplete information regarding eligibility (under s 10 [22] or 11 of the EAA [23] or EAPWDA [24]), and as a result receives assistance for which it was not eligible, the Ministry may apply sanctions under s 15.1 of the EAA [25] (s 14.1 of the EAPWDA [26]) and ss 32-34 of the EAR [27] (ss 28-30 of the EAPWDR [28]).

NOTE: The details of the sanctions that the Ministry may apply under s 15.1 of the EAA [25] (s 14.1 of the EAPWDA [26]) and ss 32-34 of the EAR [27] (ss 28-30 of the EAPWDR [28]) are summarized in the Ministry's Policy and Procedures Manual at: http:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/eligibility/sanctions

F. Outstanding Warrants

Since 1 June 2010, the legislation (EAA, s 15.2 [29] and EAPWDA, s 14.2 [30]) has provided that where there is an outstanding warrant for a person under the *Immigration and Refugee Protection Act* or any other enactment of Canada in relation to an indictable offence, that person will be ineligible to receive income assistance, disability assistance, or hardship assistance. Exceptions to these rules include people under 18, pregnant people, and people in the end stage of a terminal illness (see the EAR, s 38.1 [31] and EAPWDR, s 34.1 [32] for details).

If a person is ineligible to collect assistance due to an outstanding warrant, or a family unit's benefits are reduced because a person within the family unit has an outstanding warrant issued against them, they may be able to collect two other forms of financial help:

1. The Ministry may pay a repayable monthly supplement if a family unit can show that without financial help, they will experience undue hardship. Normally, the Ministry may only pay this form of assistance for three consecutive months, unless the Ministry authorizes payment for up to three additional months. The amount of the repayable warrant supplement provided is up to the amount of assistance the family unit would normally receive if none of the adults in the family unit were warrant holders; OR
2. A repayable transportation supplement may be available to those whose warrants were issued in a jurisdiction other than the one in which they live and who are not able to cover the expense of traveling to that jurisdiction to deal with the warrant. The Ministry limits the amount of this supplement to the cost of the least expensive mode of travel.

If the Ministry denies a person's application for these two supplements, an applicant may file a request for reconsideration, but if that fails, they cannot appeal to the EAAT.

If a person has a warrant that makes them ineligible for welfare, other people in their family unit can still get welfare at a reduced amount. Visit the below link to view a table of reduced welfare amounts for family units where an individual holds a warrant. These rates can be compared to the amount of assistance the family unit would normally receive if none of the adults in the family unit were warrant holders to ascertain the amount of repayable warrant supplement you may be eligible for: https:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/ bc-employment-and-assistance-rate-tables/ income-assistance-warrant-holder-rate-table

For more information about how an outstanding warrant may affect a person's eligibility for income assistance, the Community Legal Assistance Society has a detailed fact sheet at http:/ / clasbc. net/ wp-content/ uploads/ 2019/ 06/ Outstanding_warrants_fact_sheet_FINAL. pdf. Also see the Ministry's policy at: https:/ / www2. gov. bc. ca/ gov/

content/governments/policies-for-government/bcea-policy-and-procedure-manual/eligibility/warrants

G. Labour Disputes

Applicants are not eligible for income assistance, PPMB assistance, or disability assistance if they or their adult dependant are on strike or locked out (EAR, s 14 [33] and EAPWDR, s 13 [34]). An applicant in this situation may, however, qualify for hardship assistance under s 45 of the EAR [35] or s 40 of the EAPWDR [36]. If a person is not on strike themselves but cannot go to work because their union is honouring another union's picket line, they can apply for income assistance.

H. Being in Prison or "Other Lawful Place of Confinement"

A person in a "lawful place of confinement" or on temporary leave from such a place is not eligible for assistance: s 15 of EAR [37] and s 14 of EAPWDR [38]. However, pre-release prisoners are eligible to apply for welfare on an expedited basis, based on an immediate needs assessment (see the Ministry's policy at http://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/application-and-intake/immediate-needs). This is to ensure they receive welfare immediately upon release. The John Howard Society (http://www.johnhowardbc.ca) provides pre-release planning assistance for prisoners, including help with welfare applications.

I. Being a Full-Time Student

Recipients of disability assistance and their dependants may study either full-time or part-time. The rules for recipients of income assistance and PPMB assistance are more complicated. Generally, unless they meet very specific criteria (see below), full time students who are eligible for student loan funding are not eligible for income assistance or PPMB assistance during the school term (EAR s 16). This limitation does not affect the dependent children of income assistance and PPMB recipients.

Part-time students remain eligible for income assistance provided they meet other eligibility requirements, including employment obligations. One should still notify the ministry that they are attending part-time studies. Section 16 of the EAR sets out the period during which a full-time student is, in most cases, ineligible for income assistance or PPMB benefits. Ful-time students who are no longer eligible for student loan funding because they have used up their allowable loans, bursaries or grants may be eligible for income assistance or PPMB benefits during summer break if they cannot find work.

Students who are enrolled in unfunded programs (where student loans are not available) – such as high school completion, and adult basic education or English as a second language, may remain eligible for income assistance or PPMB benefits if they have received prior approval from the ministry.

When can a full-time student in a funded program of studies receive income or PPMB assistance?

As of July 12, 2021, if someone is already receiving income or PPMB assistance, they may be eligible to ask the Ministry for pre-approval to attend full-time studies for which student loans may be available, for up to two years. To be eligible, the person's employment plan must have a condition requiring them to attend this program, and they must have been on assistance for the last 3 months (though that criteria can be waived in exceptional circumstances). For more information, see https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/eligibility/education-and-training?keyword=students

J. Student Funding and Income Exemptions

If someone receiving welfare benefits is authorized to attend full or part time studies, and they receive funds related to being a student, some of those funds can be exempted to account for their school-related expenses. The rules here are quite complicated and depend on whether the studies are funded or unfunded, and also depend on the kind of welfare benefits the student receives.

For students who receive **disability assistance,** the following things are all exempted as income: education and training allowances, scholarships, grants, bursaries and money from an RESP. However, student loans advanced to recipients of disability assistance are only exempt as income up to the amount of the person's "education costs" and "daycare costs." Section 8 of Schedule B to the EAPDWR defines both terms.

For students on **income assistance or PPMB** assistance who are authorized to attend full-time funded studies (see above), if the student receives funds such as money from an RESP, a training allowance, or grants, bursaries, or scholarships (other than grants, bursaries or scholarships under the Canada Student Financial Assistance Act), the Ministry can exempt those funds up to the total of their "day care costs," "education costs," and "education-related living costs" (see EAR, Schedule B, s 8 for definitions).

Other students who receive income assistance or PPMB benefits can have funds from training allowances, student loans, grants, bursaries, scholarships, or RESPs exempted by the Ministry as their income up to the amount of their "education costs" and "childcare costs." Section 8 of Schedule B to the EAR defines those terms. This applies if:

- The student is the dependent child (under 19) of a recipient of income assistance or PPMB benefits (note: dependent children may also have education and childcare costs exempted from any federal or provincial student loans they receive);
- The person is a part-time student in a program that is not eligible for student loan funding;
- The person has received prior permission from the Ministry to enroll as a full-time student in a program that is not eligible for student loan funding;
- The Ministry excuses the student from having employment-related obligations under s 29(4) of the EAR, and the student enrolls part-time in a program that is eligible for student loan funding (note: people in this category (which includes people with the PPMB designation) may also have education and childcare costs exempted from any federal or provincial student loans they receive); or
- The student is on income assistance and is a part-time student in a program that is eligible for student loans (note that students in this situation cannot have any money received from Canada or provincial student loans exempted as income).

K. Leaving the Province for More Than 30 Days

Welfare recipients who leave British Columbia for more than a total of 30 days in a calendar year usually cease to be eligible for benefits (EAR, s 17 [39] and EAPWDR, s 15 [40]).

If a recipient wishes to leave the province for more than 30 days in a calendar year and still get welfare, they must try to obtain prior authorization for continued assistance. The minister has discretion to authorize absences required to avoid undue hardship, to allow participation in a formal education program, or to obtain medical therapy prescribed by a medical practitioner.

L. If the Ministry Refuses Income Assistance, PPMB Benefits, or Disability Assistance

If the Ministry finds someone ineligible for income assistance, PPMB benefits, or disability assistance, ensure that they receive this in writing, as they may want to challenge this decision as discussed in Section XI: Appeals. They may also still be eligible for hardship assistance.

References

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VI. Hardship Assistance

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1st, 2023.

Applicants who do not qualify for regular monthly income assistance, PPMB benefits or disability assistance under the EAA [1] or EAPWDA [2] might still qualify for hardship assistance. See s 5 of the EAA [3] and Part 4 of the EAR [4], and s 6 of the EAPWDA [5] and Part 4 of the EAPWDR [6].

The Ministry provides hardship assistance only for the month the applicant requests it. Applicants who are still in need the following month must apply again. Hardship rates are different for people with and without PWD or PPMB status. Schedule D of the EAR [7] and of the EAPWDR [8] lists the maximum rates of hardship assistance. Section 1 of Schedule D in each Regulation states that the Ministry does not entitle applicants in this category to a specific amount of hardship assistance and the actual amount is at the discretion of the Ministry, based on the financial need of the applicant. However, in practice, the Ministry usually grants eligible applicants the maximum hardship rate. A table showing the maximum hardship rates is available online at this link: http:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/bcea-policy-and-procedure-manual/bc-employment-and-assistance-rate-tables

The minister may require that applicants for hardship assistance enter an agreement to repay any assistance received under s 5 of the EAA [3] and s 6 of the EAPWDA [5]. Only some categories of hardship assistance are repayable, as set out in Part 4 of the EAR [4] and EAPWDR [6].

In order to qualify for hardship assistance, one must:

1. Be at least 19;
2. Live in BC;
3. Meet the citizenship requirements for income assistance; AND
4. Fall into at least ONE of the following categories:

    a) The person has an immediate need for food, shelter or urgent medical attention and cannot complete the three-week work search without hardship assistance (“immediate needs assessment”)

    b) They are waiting for a Social Insurance Number or other identification documents

c) They have applied for money from another source (e.g., Employment Insurance or Old Age Security), but they have not received it yet (They will need to pay this hardship assistance back)

d) They are on strike or locked out and they do not have money to support themselves (They will need to pay this hardship assistance back)

e) They have more income or assets than the Ministry allows people applying for welfare to have, but they have a dependent child or children and cannot use the income or assets to support themselves or their family (this hardship assistance will have to be paid back)

f) Their immigration sponsor cannot or will not support them and they are waiting for the Ministry to decide about the application made for income assistance

NOTE: If the Ministry declares that someone does not qualify for hardship assistance, this decision can be reconsidered and appealed.

A. Hardship Assistance and Supplements

Previously, hardship assistance recipients were not eligible for supplements for addiction treatment and special care. As of January 1, 2020, supplements for addiction treatment and special care were expanded to recipients of hardship assistance. Recipients of hardship assistance now have the same access to supplements for alcohol or drug addiction treatment and counselling or related services as recipients of income assistance. In addition, hardship assistance recipients are also now eligible for the following supplements: Prenatal shelter supplement, winter supplement, clothing supplement for people in special care, transportation to drug and alcohol treatment and reconsideration or appeal supplement.

Effective January 1, 2020, the following health supplements have also been extended to people receiving hardship assistance: Denture supplement, diet supplement, short term nutritional supplement, tube feed nutritional supplement, and natal supplement.

References

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VII. Overpayments and Fraud

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1st, 2023.

A. What is a Welfare Overpayment?

If a person is not entitled to any form of welfare benefit or supplement they receive, those benefits are an overpayment. Overpayments can range from a few dollars to tens of thousands of dollars. **Many overpayments arise not out of fraud by the welfare recipient but rather out of an honest error on the part of either the recipient or the Ministry.**

When a person has received an overpayment from the Ministry for any form of benefit under the welfare legislation, the overpayment is a debt owed to the Crown. According to EAA, ss 27-28 [1] and EAPWDA, ss 18-19 [2], the government may recover the debt by deducting funds from subsequent payments of income assistance or pursuing a court action.

Where a person has received an overpayment of benefits due to Ministry error, Ministry policy has since February 1, 2019 recognized that the person may have an estoppel defence to the overpayment under section 89 of the Financial Administration Act RSBC 1996, c-138. Estoppel can arise where the person received benefits they were not entitled due to error by the Ministry, and the person can show detrimental reliance on the Ministry's decision. The Ministry policy on estoppel defences is in the Ministry's Policy and Procedures manual under the section called "Reasons not to Recover an Overpayment", https:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/compliance-and-debt-management/recoveries.

> **NOTE:** If a client faces a civil lawsuit for a welfare overpayment resulting from failure to provide complete or accurate information, refer them to a lawyer at the Community Legal Assistance Society.

B. Repayment Agreements and Notifications of Other Overpayments

The Ministry may ask people suspected of having received some welfare overpayments to sign a repayment agreement acknowledging the alleged debt. Before signing a repayment agreement, clients should ask to review the Ministry's evidence and its reasons for the determination that there is an overpayment and, if possible, get legal advice or help from an advocate. The Ministry can often make errors in its overpayment determinations. See the Ministry's policy on recoveries and overpayments at http:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/compliance-and-debt-management/recoveries

In many situations, it is advisable to not sign an acknowledgment. However, if the client does choose to sign an acknowledgment and repay the overpayment, the monthly repayment rate for overpayments is $10. The Ministry is not presently charging interest on repayments.

C. Categories of Debt Repayment

Effective January 1, 2020, the Ministry has formulated three different monthly rates of debt repayment. $10 monthly payments will be made for overpayments, $20 monthly payments will be made for deposit debts including repayable security deposits, pet damage deposits and utility security deposits, and $100 monthly payments will be made for offence overpayments. Only one type of monthly payment can be collected at a time and the Ministry cannot heighten the repayment amount unless they obtain your consent (EAR, ss 89-89.2 [3] and EAPDR ss 74-74.2 [4]).

Further, the Ministry now also has the discretion not to deduct debts from ongoing welfare benefits where the family unit is homeless or at risk of being homeless or where a deduction in welfare benefits would put the health of someone in the

family unit in danger. In addition, no deductions will be made from someone in a special care facility for extended care, or for alcohol or drug treatment (EAR, s 89.1 [5] and EAPDR s 74.1 [6])

D. Appealing an Overpayment Decision

A welfare recipient can apply for reconsideration and appeal of a decision by the Ministry that they owe an overpayment. However, the Ministry's decision about the amount of a person's overpayment is **not open to appeal** (EAA, s 27(2) [1] and EAPWDA, s 18(2) [2]), although a person can apply for a reconsideration of the amount of an overpayment (for more on reconsiderations and appeals, see Section IX below).

As stated above in section A, where a person is notified that they have received an overpayment of benefits, and the overpayment was due to Ministry error, the person may have an estoppel defence to the alleged overpayment. That can be done at all stages of the process: i.e. when the Ministry is first investigating an overpayment allegation, on reconsideration, and on appeal. The Ministry policy on estoppel defences is in the Ministry's Policy and Procedures manual under the section called "Reasons not to recover an Overpayment", found at https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/compliance-and-debt-management/recoveries.

E. Welfare Fraud

Some overpayments result not out of an honest error, but rather out of a recipient's knowing failure to provide the Ministry with accurate information about their eligibility.

Section 31 of the EAA [7] and s 22 of the EAPWDA [8] set out when a person commits the statutory offence of welfare fraud. Welfare recipients can also receive charges of fraud under the Criminal Code.

Where the Ministry receives information regarding potential fraud or non-disclosure, it will investigate and may take one or more of the following steps:

- refer to the Crown for charge approval under the *Criminal Code*, the EAA [9] or the EAPWDA [10];
- take civil action to recover the overpayment;
- enter into a repayment agreement with the recipient;
- Overpayment notification and deduction of established overpayment(s) from future benefits; or
- Deduction for offence overpayments, where the person is convicted of a charge under the Criminal Code, EAA [9] or EAPWDA [10]

If a client has criminal welfare fraud charges (whether under the Criminal Code or for a statutory offence under the welfare legislation) this creates a potential "loss of livelihood" issue, so **refer them to Legal Aid BC** to see if they are eligible for a legal aid criminal lawyer. If the client is not eligible for Legal Aid, LSLAP may be able to assist them.

References

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[2] https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-laws/employment-and-assistance-for-persons-with-disabilities-act#section18
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VIII. Rates and Payment Issues

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1st, 2023.

A. Income Assistance, PPMB Assistance, and Disability Assistance Rates

People who are eligible for income assistance, PPMB assistance, or disability assistance are entitled to the assistance amounts determined in Schedule A of the EAR [1] or EAPWDR [2], minus any non-exempt income.

All rates are monthly and set out in Schedule A of the EAR [1] and EAPWDR [2]. The Ministry divides the rates into a portion for shelter, and a separate portion for support (which the Ministry intends to cover all living expenses other than shelter, including food, clothing, etc.). The shelter portion listed is a maximum. The Ministry will only pay the lesser of a person's actual shelter costs or the maximum listed shelter allowance. Below are examples of monthly rates for different family configurations:

- For a single person under age 65 on income assistance: $560.00 for support plus up to $500.00 for shelter, for a total of **$1060.00 per month**.
- For a single person under 65 on PPMB assistance: $610.00 for support plus up to $500.00 for shelter, for a total of **1110.00 per month**.
- For a four-person family (two parents, both under age 65, and two children) on income assistance: $1055.00 for support plus $840.00 for shelter, for a total of **$1895.00 per month**.
- For a single person under 65 on disability assistance: $983.50 for support and $500 for shelter, for a total of **$1458.50 per month**.

Helpful rate tables are online at the following link: http:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/bcea-policy-and-procedure-manual/bc-employment-and-assistance-rate-tables.These show the shelter support and shelter rates for all forms of assistance under the EAA [3] and EAPWDA [4]

B. Persons with Disabilities Transportation Supplement

People with the PWD designation who receive disability assistance are also eligible for a transportation supplement of $52 per month. This and can be used for an annual bus pass or for other transportation needs. It can be received as cash or as an in-kind bus pass, and individuals can apply for or cancel their bus pass at any time during the year. See section 54.2 of the EAPDWR.

People who stop receiving disability assistance benefits for certain reasons may be able to keep this transportation supplement for a period of time. See the Ministry's policy about the "transitional transportation support" at the following link: https:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/ general-supplements-and-programs/ transportation-supplement?keyword=transporation&keyword=supplement

C. Canada Child Benefit

In addition to the support allowance, families may also receive the Canada Child Benefit for children under 18, which includes the old Universal Child Care Benefit for children under 6, the former Canada Child Tax Benefit, and what the government called (until 2016) the national child benefit supplement. If a family's Canada Child Benefit for a given month is less than what sections 1 of the EAR [5] and EAPDR define as the "BC child adjustment amount" (see table below) for each child aged two months to 18 years, (e.g. because a child is ineligible, or a check is delayed), then the Ministry may issue a top up to that amount, as per the chart below. See also EAR Schedule A [6], section 2(2).

Note that the amount of the maximum BC child adjustment amount is adjusted every year on July 1, by the percentage increase, if any, of the consumer price index for the 12-month period ending September 30 of the previous year. The amounts shown below are for July 1, 2023, to June 30, 2024. See https://www2.gov.bc.ca/gov/content/governments/ policies-for-government/ bcea-policy-and-procedure-manual/ bc-employment-and-assistance-rate-tables/ general-supplements-and-programs-rate-table.

Number of Children	Maximum BC child adjustment amount)
One	$213.25 per month
Two	$401.92 per month
Each additional child beyond two	An additional $179.42 per additional child, per month

D. Calculating the Shelter Allowance

Recipients of income assistance, PPMB assistance, and disability assistance are eligible for a monthly shelter allowance equivalent to their actual shelter costs, **up to the maximum set out in the Regulations** for their household size:

Family Unit Size	Minimum Shelter Allowance	Maximum Shelter Allowance
1 person	$75	$500
2 person	$150	$695
3 person	$200	$790
4 person	$225	$840
5 person	$250	$890
6 person	$275	$940
7 person	$300	$990
8 person	$325	$1040

Recipients are eligible for the full monthly shelter amount only if they are paying at least that much in shelter costs. Schedule A, s 5 of the EAR [1] and EAPWDR [2] set out what expenses and items can be included when calculating shelter costs. They are: rent, mortgage payments, house insurance premiums, property taxes for the recipient's own home, utility costs, and the actual cost of maintenance and repairs for the recipient's own home **if** these costs have been approved.

Note that the definition of "utility costs" in Schedule A, s 5(1) of the EAR [1] and EAPWDR [2] is quite broad. The ministry's policy on determining someone's "actual shelter costs" was broadened as of May 1, 2022. The policy formally recognizes that a "place of residence" for which MSDPR can pay "actual shelter costs" can include, for example, living in a tent, boat, car or recreational vehicle. Examples of actual shelter costs listed in the policy include camp site or dock fees; hook up fees such as water or septic; wood and/or fuel (gas, disel, propane) for cooking and heating.

Where someone does not have any shelter expenses that are recognized as such in the welfare legislation, they are still entitled to receive the minimum amount for shelter allowance set out in the table above.

Where two or more family units share the same place of residence, the Ministry calculates family units' shelter costs according to s 5(4) of Schedule A of the EAR [1] and EAPWDR [2].

E. Rates for People Receiving Room and Board

Schedule A, s 6 of the EAR [1] and EAPWDR [2] set out the method for calculating the income assistance and disability assistance rates for a family unit receiving room and board.

Until July 1, 2019, recipients who received room and board from a parent or adult child, were only entitled to a support allowance for a family unit of their size. As of July 1, 2019, they are entitled to payments up to the maximum support and shelter allowances for a family unit of their size, calculated in the same manner as anyone else in a room and board situation.

People with the PWD designation who receive room and board are also eligible for the Persons with Disabilities Transportation Supplement described in section B above.

F. Rates for People Living in Emergency Shelters and Transition Houses

Schedule A, s 9 of EAR [1] and EAPWDR [2] provide for the level of assistance for a family unit that is receiving accommodation and care in an emergency shelter or transition house.

G. Rates for People in a Special Care Facility

Section 1 of each regulation defines “Special care facility” as “a facility that is a licensed community care facility under the Community Care and Assisted Living Act or a specialized adult residential care setting approved by the minister under subsection (3).” Schedule A, s 8 of EAR [1] and the EAPWDR [2] sets out what the Ministry will cover for shelter and support for a person residing at such a facility.

H. Children in the Home of a Relative (CIHR) - repealed

Until 31 March 2010 the EAA [3] provided that if a child was supported in the home of a relative other than the child’s parent and no parent of the child was able to pay the total cost of the child’s care, the Ministry would pay income assistance according to the child’s age:

Age Group	Monthly Rate
Birth – 5 years	$257.46
6 – 9 years	$271.59
10 – 11 years	$314.31
12 – 13 years	$357.82
14 – 17 years	$402.70
18 years	$454.32
	(less any financial contribution by parents)

The BC government repealed the CIHR provisions on 1 April 2010 (BC Reg 48/2010). **However, these provisions still apply to families that include children who were approved under the old provision prior to 31 March 2010, or who filed their applications prior to 31 March 2010 and were subsequently approved** under the old provision (see the Child in the Home of a Relative Transition Regulation). The following repealed sections contained key provisions dealing with Children in the Home of a Relative: EAR s 6 [7]; s 11(1)(b)(iv) [8]; s 27 [9]; s 29 [10]; s 33 [11]; s 34 [12]; s 34.1 [12]; 49 [13]; 50 [14]; 60 [15]; 61 [16]; 67 [17]; 67.1 [18]; 68 [19]; 71 [20]; 73 [21]; 74.01 [22]; 75 [23]; and Schedule A, s 11 [1].

I. Method of Payment of Assistance

The Ministry's standard method of payment is by direct deposit by Electronic Funds Transfer (EFT) into the recipient's bank account. Applicants can generally get an exemption where EFT payment is not appropriate for them. Such recipients typically receive their benefit cheque by picking it up from the Ministry office, or by mail. The Ministry also commonly pays recipients' shelter allowances directly to their landlords. This is optional.

J. Lost or Stolen Cheques

Section 92 of the EAR [24] and s 77 of the EAPWDR [25] authorize the issuance of a replacement of an unendorsed assistance cheque if:

1. In the case of theft, the victim reported the matter to police; and
2. In the case of loss or theft, the recipient

    a) Makes a declaration of the facts; and

    b) Undertakes to promptly deliver the lost or stolen cheque to the Ministry if it is recovered.

References

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IX. Additional Benefits

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1st, 2023.

The Ministry may provide a number of additional supplements in certain specific circumstances. This section will outline some of these supplements. However, Part 5, Divisions 1-4 and 6 of the EAR [1] and Part 5, Divisions 1-3 and 5 of the EAPWDR [2] will need to be reviewed for complete details.

A. Housing Stability Supplement

Ordinarily a family unit's benefit entitlement is reduced when a member is absent or passes away. This sudden shift can be disruptive to the family's finances. The Housing Stability Supplement (HSS) may be provided to an eligible family unit in certain scenarios if there is a temporary absence or death of a member of the family unit. The amount that may be provided is up to the maximum combined shelter and support allowance (or equivalent) at the rate prior to the temporary absence or death.

The HSS may be provided if a child within the family unit is being cared for under the Child, Family, and Community Service Act. There are no time limitations for this scenario; the HSS may be provided so long as an MCFD social worker confirms that the parent is actively working toward the child's return, and the child remains in temporary care under the legislation (so, for example, the HSS would end if a continuing custody order was made).

The HSS may be provided for up to three months in the following scenarios:

- A member of the family unit is in a special care facility, (e.g., temporary residential care, alcohol and drug treatment facility);
- A member of the family unit is in a private hospital (e.g., nursing home or convalescent home) or is hospitalized receiving extended care;
- A member of the family unit has been temporarily incarcerated; or
- A member of the family unit passes away.

The HSS may be provided for up to an additional 3 months in extenuating circumstances, which may include, but are not limited to:

- A client in a special care facility (e.g., temporary residential care, or an alcohol and drug treatment facility) is scheduled to be discharged during the fourth month.
- A client with a deceased spouse has found a new accommodation but it will not become available for four months.

For more information consult the Housing Stability Supplement section of the BCEA Policy & Procedure Manual [3].

B. Crisis Supplements

A crisis supplement is a one-time grant for a welfare recipient who requires an "unexpected item of need" and is unable to obtain it due to lack of money or assets or inability to obtain credit. The Ministry provides crisis supplements pursuant to s 59 of the EAR [4] and s 57 of the EAPWDR [5] and do not have to be repaid.

Before issuing a crisis supplement, the Ministry must decide that failure to obtain that item will result in:

- Imminent danger to the physical health of any person in the family unit or
- Removal of a child under the *Child, Family and Community Service Act*.

A person might be eligible for a crisis supplement to buy necessities like winter coats, baby cribs, or a new appliance. If a recipient loses possessions in a fire, runs out of food or fuel, receives a Hydro cut-off threat, or must make an essential house repair, they may ask the Ministry for a crisis supplement.

The legislation sets out maximum amounts for crisis supplements. As of August 1, 2023 those rates are:

- For food, $50 per person per month;
- For clothes, $110 per person per year or $400 per family per year, whichever is less;
- For shelter, the family unit's monthly benefit rate (i.e. shelter portion plus support portion).

If a recipient needs a crisis supplement to pay for fuel for heating or cooking meals, hydro, or water, the amount of the crisis supplement can exceed the limit that applies to crisis supplements for shelter. See EAR section 59(7) [4] and EAPWDR section 57(7) [5]. Also see the note below about BC Hydro's Customer Emergency Fund.

If the crisis supplement is for clothing or furniture, the Ministry may ask the applicant to look for second-hand goods. They may ask the applicant to get three estimates for the cost of the service of goods required.

There is no yearly limit to how much a family unit can receive in crisis supplements

The amount of a crisis supplement is not subject to appeal, but an applicant can appeal the denial of a crisis supplement.

1. BC Hydro Customer Crisis Fund

BC Hydro has a "Customer Crisis Fund" ("CCF"), which helps pay off hydro arrears for residential customers who are experiencing a "temporary financial crisis" due to a "life event" within the past 12 months (e.g. a death in the family, unanticipated medical expenses, loss of income… etc.). The CCF assists customers who are overdue on their payments and facing disconnection of their services. Maximum annual grants are $500 for customers with non-electrical heat in their homes, or $600 for those heating their homes with electricity. Customers do not need to be on welfare to apply for this grant. More information on eligibility and applications for the Customer Crisis Fund can be found on the BC Hydro Website: https://app.bchydro.com/accounts-billing/bill-payment/ways-to-pay/customer-crisis-fund.html

C. Other Supplements

Apart from crisis supplements, other supplements that may be available under the legislation include:

- A pre-natal shelter supplement;
- A Christmas supplement;
- School start-up supplements;
- Clothing and transportation supplements for people confined to special care facilities;
- Supplements where a person needs to obtain new proof of identity;
- Supplements associated with an employment plan or a confirmed job;
- Moving and transportation supplements;
- Supplements for security deposits, including pet deposit supplements;

- Advances for lost, stolen, delayed, or suspended family bonus cheques;
- Supplements for guide animals;
- Seniors' supplements;
- Funeral, burial, or cremation supplements; and
- Transportation supplements.

NOTE: This is a non-exhaustive list. Some of these supplements are repayable and others are not. See Part 5 of the EAR [1] and EAPWDR [2] for details.

References

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X. Health Supplements

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1st, 2023.

A. Introduction

Schedule C of the EAR [1] and EAPWDR [2] set out the availability of supplements for health and dental services, including optical and orthodontic services. See also Part 5, Division 5 of the EAR [3] and Part 5, Division 4 of the EAPWDR [4].

B. General Health Supplements

Section 67 of the EAR [5] and s 62 of the EAPWDR [6] set out the eligibility criteria for general health supplements. Applicants should review these criteria carefully in relation to any issue relating to a health supplement.

C. "Medical Services Only"

Section 66.3 of the EAR [7] and s 61.1 of the EAPWDR [8] provide that persons may be eligible for "medical services only" in certain circumstances when they cease to be eligible for income assistance, PPMB, or disability assistance for specific reasons.

D. Optical Care

If the person is between 19 and 64 and gets income assistance, hardship assistance, PPMB, or PWD benefits OR has Medical Services Only Status, they can receive an eye exam every 24 months. Further, children may receive one pair of glasses per year and adults may receive one pair of glasses every three years.

Sections 67.1 and 67.2 [5] of the EAR and ss 62.1 [9] and 62.2 [10] of the EAPWDR set out eligibility criteria for certain optical benefits. See also ss 2.1 and 2.2 of Schedule C of the EAR [1] and ss 2.1 and 2.2 of Schedule C of the EAPWDR [2].

E. Dental Care

Sections 68 [11], 68.1 [12], 69 [13], 70 [14], and 71 [15] of the EAR and ss 63 [16], 63.1 [17], 63.2 [18], 64 [19], and 65 [20] of the EAPWDR set out eligibility criteria for supplements for dental work, crown and bridgework, dentures, emergency dental and denture work, and limited orthodontic work. See also ss 4, 4.1, 5, 6, and 7 of Schedule C of the EAR [1] and ss 4, 4.1, and 5 of Schedule C of the EAPWDR [2].

F. "Healthy Kids" Supplements

Sections 72 [21], 72.1 [22], and 77.03 [23] of the EAR provides for certain optical, dental, hearing instrument, and alternative hearing assistance supplements for dependent children of welfare recipients. See also Schedule C [1].

G. Alternative Hearing Supplement

Sections 77.02 of the EAR [24], section 70.02 of the EAPWDR [25], and section 11 of Schedule C to both the EAR [1] and EAPWDR [2], allow a $100 supplement for applicants with profound hearing loss. The Ministry provides this supplement may only where the applicant has profound hearing loss in both ears and would not benefit from a hearing instrument.

H. Diet and Nutrition

Sections 73 [26], 74 [27], 74.01 [28], 74.1 [29], and 75 [30] of the EAR and ss 66 [31], 67 [32], 67.01 [33], 67.1 [34], and 68 [35] of the EAPWDR set out eligibility criteria for supplements for diet supplements, nutritional supplements, supplements for those who require tube feeding, infant health supplements, and natal supplements for pregnant people. See also ss 8, 9, and 10 of Schedule C of the EAR [1] and ss 6-9 of Schedule C of the EAPWDR [2].

The Ministry has a useful chart showing all special diet supplement rates as of August 1, 2023 here: https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/policies-for-government/bc-employment-assistance-policy-procedure-manual/additional-resources/summary_of_changes_ppm.pdf

> **NOTE:** A "monthly nutritional supplement" of up to $205 per month may be available to some people with the PWD designation who receive disability assistance. To qualify, there must be medical confirmation that the person requires the supplement for a "chronic, progressive deterioration of health on account of a severe medical condition". It can be very hard to meet the requirements for this supplement. See s 67(1.1) of the EAPDWR [32] for more information. Disability Alliance BC has a useful help sheet regarding the monthly nutritional supplement, at http://disabilityalliancebc.org/category/publications/help-sheets/.

As of July 1, 2019, registered dieticians are added as health professionals who can confirm someone's need for diet supplements, short term nutritional supplements, infant formula supplement, and the monthly nutritional supplement. Prior to this change, eligibility for most diet and nutrition related supplements could only be confirmed by medical practitioners or nurse practitioners. In order to be considered a "registered dietician," a dietician must be a "registrant of the College of Dieticians of BC established under the Health Professions Act." Effective August 1, 2023, a midwife registered with the British Columbia College of Nurses and Midwives can also confirm a child's eligibility for infant formula supplement.

Sources: EAR, ss 1(1), 73(2)(b), 74(b), 74.01(3)(a), Schedule C ss 8(2) and 10(a). See also EAPWDR, ss 1(1), 66(2)(b), 67(1.1), 67(2), 67.001(b), 67.01(3)(a), Schedule C ss 6(2) and 9(a).

I. Medical Equipment and Devices

Where a person meets eligibility criteria (see s 67 of the EAR [5] and s 62 of the EAPWDR [6]), the Ministry may provide funding for certain medical equipment and devices. Sections 3 through 3.12 of Schedule C [2] of each regulation list the devices and eligibility criteria. The devices may include:

- canes, crutches, and walkers;
- wheelchairs;
- scooters;
- bathing and toileting aids;
- hospital bed;
- pressure relief mattresses;
- floor or ceiling lift devices;
- positive airway pressure devices;
- apnea monitors;
- nebulizers;
- positioning items on a bed, positioning chairs, and standing frames;
- ventilator supplies;
- orthoses; and
- hearing aids.

> **NOTE:** In order to qualify for these supplements, a qualified medical practitioner must supply a prescription and the cost must be pre-approved by the Ministry. The Ministry provides very detailed eligibility criteria in Schedule C [2] of both Regulations.

J. Medical and Surgical Supplies

Certain “disposable or reusable” medical supplies may be provided if they are necessary to prevent the recipient from becoming very ill (to avoid what the Ministry calls “an imminent and substantial danger”) and if a doctor prescribes them. See s 2(1)(a) of Schedule C of each Regulation.

The supplies are only available if an applicant needs them for one of these following purposes: wound care; ongoing bowel care required due to loss of muscle function; catheterization; incontinence; skin parasite care; or limb circulation care.

The supplies must be the least expensive ones appropriate for the purpose. Exclusions to this list include nutritional supplements, food, vitamins and minerals, and prescription medications

K. “Direct and Imminent Life-Threatening Health Need”

Section 76 of the EAR [36] and s 69 of the EAPWDR [37] provide that the Ministry may provide certain health supplements to a person who is otherwise ineligible for the supplements (or indeed, for welfare benefits), if the person can show that the person faces an **imminent and life-threatening need** that cannot be addressed except by the supplement. See the Regulations for details.

L. Alternative and Complementary Therapies

Up to 12 visits per calendar year are payable by the minister for any combination of physiotherapy services, chiropractic services, massage therapy services, non-surgical podiatry services, naturopathy services, and acupuncture services for which a medical practitioner or nurse practitioner has confirmed an acute need. See Schedule C, s 2 of each Regulation, especially s 2(c).

M. Transportation to Medical Appointments

Under Schedule C, s 2(f) of each Regulation, the Ministry may cover the cost for the least expensive mode of transportation to and from the office of a local medical practitioner, nurse practitioner, specialist, general hospital, rehabilitation hospital, provided that:

- The transportation is to enable the person to receive a benefit under the *Medicare Protection Act* or a general hospital service under the *Hospital Insurance Act*; AND
- There are no resources available to the person's family unit to cover the cost.

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XI. Appeals

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1st 2023.

A. What Applicants Can Appeal

It is possible to appeal most Ministry decisions that deny, reduce, or discontinue welfare benefits of any kind, including supplements. Refusals of the PPMB of PWD designation can also be appealed. See s 17 of the EAA [1] and s 16 of the EAPWDA [2].

The legislation list certain supplements for which applicants cannot appeal decisions to the Employment and Assistance Appeal Tribunal: see EAR, s 81 [3], and EAPWDRA, s 73. Note however that a person may still apply for reconsideration of decisions related to those supplements. In addition, one cannot appeal decisions regarding the terms of employment plans to the Tribunal, but the Ministry can reconsider them (see s 9 [4] and 17(1)(e) [1] of the EAA).

> **NOTE:** If a client would like a review of a decision that is not open to reconsideration and/or appeal, they may still request an internal administrative review by registering a complaint with the supervisor at a local Ministry office. This may be particularly useful for service quality issues. This is entirely separate from the appeal process.

B. Two-Level Appeal Process

There is a two-level appeal process for reviewing decisions by the Ministry. The levels are:

- reconsideration (which is an administrative review done within the Ministry) and
- appeal to the Employment and Assistance Appeal Tribunal or “EAAT” (an independent tribunal).

To seek reconsideration, a person must obtain and complete a “Request for Reconsideration” form and return it to the Ministry **within 20 business days of notification of a decision**, along with relevant documents, to request a reconsideration of a Ministry decision. Applicants can pick up "Request for Reconsideration" forms at Ministry Offices.

To appeal a reconsideration decision to the EAAT, a person must submit a Notice of Appeal form within **seven business days** of notification of the reconsideration decision.

C. Reconsideration and Appeal Supplements (Benefits While an Appeal is Pending)

If a recipient is seeking reconsideration or appeal of a decision to discontinue or reduce a benefit or supplement, they may continue to receive the benefit or supplement while awaiting the outcome of the reconsideration or appeal. This is a "reconsideration supplement" or "appeal supplement".

Before paying a reconsideration or appeal supplement, the Ministry requires people to sign an agreement saying they will repay the benefit if the appeal fails. See s 54 of EAR [5] and s 52 of EAPWDR [6].

D. Commonly Appealed Decisions

Some decisions for which people commonly seek reconsideration and appeal are:

- A decision denying someone PWD status under s 2 of the EAPWDA [7];
- A decision denying someone a special supplement for which they have applied;
- A decision that a person is in a "dependent" relationship with someone they live with (e.g. a spousal relationship), and the Ministry must treat them as being in the same family unit; and
- A decision that a person has received a welfare overpayment that they must repay.

There are many other types of decisions that applicants can appeal.

> **NOTE:** Whenever a client asks about appealing a decision, begin by checking s 17 of the EAA [1], s 16 of the EAPWDA [2], s 81 of the EAR [3], and s 73 of the EAPWDR [8] to ensure the decision is appealable. Then, review the legislation to understand the law affecting the decision.

E. Appeal Level 1: Reconsideration

Reconsideration is a "paper review" by the Ministry with no hearing. To request reconsideration, the client needs to fill in Request for Reconsideration form. They may need to ask for this form, although often it will come with the Ministry decision.

The client **must** submit the completed request for reconsideration to the Ministry **within 20-business days from the day the client was informed of the decision.**

A client should submit the following with a request for reconsideration:

1. **Evidence:** clients should submit any relevant documentary evidence with the request for reconsideration. It is essential to provide complete evidence at this stage, and cover all possible evidentiary issues, as the Ministry allows only limited evidence at the next appeal stage; AND
2. **Argument:** it is also good to provide a written summary outlining why the client is eligible for the benefit.

If a client is not able to submit all relevant evidence and argument to the Ministry within the 20 business day deadline, they can request (in writing) an extension to do so of up to 10 business days. They must still submit the completed Request for Reconsideration form to the Ministry within the initial 20 business day deadline, but can indicate on that form that they require an extension of time to provide supporting evidence and argument.

Once a client submits a complete Request for Reconsideration form to the Ministry, the Ministry must provide a written response to the reconsideration request within 10 business days. Section 80(b) of the EAR [9], and s 72(b) of the EAPWDR [10] provide that, with the agreement of both parties, the Ministry may have up to an additional 10 business days to make its decision. These are the sections that are relied upon when requesting an extension of time to provide additional evidence and argument in support of a client's completed Request for Reconsideration form.

NOTE: While going through this process, it is also well worth contacting the Supervisor at the client's Ministry office to try and negotiate a solution, particularly if the decision appears to be obviously unfair and out of line with the legislation.

F. Appeal Level 2: Appeal to the EAAT

The EAAT is an independent tribunal. See its website at http://www.gov.bc.ca/eaat. Its website has many useful materials including a set of practices and procedures, guidelines, forms, and a member code of conduct.

The EAAT holds oral and written hearings. Oral hearings may be in person or by teleconference. An oral hearing should always be available if the client requests one. Oral in-person hearings may be important in circumstances where there are issues as to credibility (e.g. the seriousness of a disability).

To request an appeal, file a Notice of Appeal with the EAAT or deliver it to a local Ministry office. The EAAT or the Ministry must receive the notice of appeal within 7 business days from the day the client gets the reconsideration decision. One does not need to file evidence or argument at the same time as filing the Notice of Appeal, although one could do so.

The EAAT will hold the hearing within 15 business days of the notice of appeal, unless it is adjourned.

If an applicant needs more time once they have filed the notice of appeal, the Tribunal has an adjournment request form online. Ideally the applicant should get the Ministry to consent to the adjournment and send the form in at least 24 hours before the hearing. Applicants can also ask for an adjournment on the day if there is good reason. See section 85 of the EAR.

The following are some notes about the EAAT process:

- Appeal panels typically have 3 members, but sometimes have 2 or even 1 member;
- The EAAT applies the income assistance legislation and common law;
- It cannot apply the Charter or Human Rights Code (see the Administrative Tribunals Act);
- While an EAAT hearing is formal, it is less formal than court. Rules of evidence do not strictly apply;
- The Ministry sends a representative to advocate for its point of view at most EAAT hearings; and
- An advocate or legal counsel may represent appellants before the EAAT. LSLAP students may act in this capacity for clients.

Parties can give evidence at an EAAT hearing in the following forms:

- **Documentary evidence**, which parties should send to EAAT at least three business days before the hearing, if possible. AND
- **Oral evidence** from client or witnesses.

Previously, the EAAT was not supposed to admit completely new evidence, but only evidence "supporting" what parties put forward at reconsideration. As of January 1, 2020, the EAAT can consider such "evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal". See section 22(4) of the EAA [11]. Generally speaking, new evidence will be admissible if it is related to the issue on appeal. The EAAT has a guideline on this issue, at http://eaat.ca/guidelines-for-members/

Further, this broadening of what evidence can be considered at the EAAT is supported by section 19.1(d.1) of the EAA [12] which makes section 40 of the Administrative Tribunals Act [13] applicable to the EAAT. s.40(1) of the Administrative Tribunals Act [14] states that "the tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law".

It may be acceptable to submit written evidence on the day of a hearing if there are enough copies for the three panel members and the Ministry representative, and it is not too voluminous. If evidence is submitted at the last minute, the EAAT may consider an adjournment to allow time for the Ministry to review the evidence before proceeding. There is a guideline on this issue at http://www.eaat.ca/members/guidelines-for-members

The EAAT must decide whether the Ministry's reconsideration decision:

- Is reasonably supported by evidence OR
- Is a reasonable application of the legislation to the circumstances of the person appealing the decision (s 24 of the EAA [15]).

If so, the panel must uphold the Ministry's decision, and if not, the panel must rescind the Ministry's decision. If the Ministry cannot implement a decision of the tribunal without some further determination, then the tribunal must refer the further determination back to the Ministry.

The EAAT panel must render its decision within five business days of the conclusion of the hearing. The EAAT chair then has five business days to mail a copy of it to all parties.

What applicants can appeal to the EAAT:

- A denial of PPMB or PWD status;
- A denial of a monthly benefit or supplement;
- A reduction of the amount of money received for monthly benefits or for a supplement;
- The existence of an alleged overpayment; OR
- A cancellation of a monthly benefit or supplement.

What applicants cannot appeal to the EAAT:

- Whether someone must sign an employment plan or have certain conditions in the employment plan;
- Refusing to change or cancel an employment plan once signed;
- How much of an overpayment a client owes to the Ministry;
- Refusing to take part in a program set up under the welfare laws;
- Refusing certain benefits while the case is under reconsideration or appeal; OR
- Not giving a person a supplement related to their employment plan or to a confirmed job.

G. Judicial Review (if the Appeal to the EAAT is Unsuccessful)

If the EAAT decision is unfavourable, the appellant has 2 options:

OPTION 1 - RE-APPLICATION: Where the Ministry denies an application, and where it is important for them to get the benefit right away, they may be able to re-apply. If there is new evidence on which to base a new application, applicants must submit that. If a re-application is made without any new evidence, the appeal rights on the new application will be limited if they cannot show that there has been a change in the client's circumstances relevant to the appeal since they last appealed to the EAAT (see section 17 of the EAPWDA [16] and section 18 of the EAA [17]).

OPTION 2 - JUDICIAL REVIEW: Where the decision is very seriously problematic (see below) and there is some benefit to having a court overturn the original decision, students can advise the client to seek judicial review in the BC Supreme Court.

A judicial review may be possible where the Tribunal decision has very serious problems with it, such as:

- Issues of procedural fairness;
- Errors of law; or

- Glaring errors of fact that a judge would be able to see just by reading the decision and looking at the documentary evidence.

Note there is a **60 day time limit** for bringing judicial reviews. LSLAP should refer clients interested in applying for judicial review of an EAAT decision to the Community Legal Assistance Society's Community Law Program to have their case assessed for merit. LSLAP is not able to assist clients with judicial review.

H. Tips for the LSLAP Student Representative

- Representatives should read Part 6 of the EAR [18] carefully to offer advice on the appeal process.
- The representative should determine what the issues are and read all the relevant sections of the EAA [19] or the EAPWDA [20] and the associated Regulations.
- A representative should have the client fill out a "Consent to Disclosure of Information- Service Authorization" (HR3189A) form authorizing the representative to examine the client's Ministry file and to make service requests on behalf of the client (i.e. requests for reconsideration or appeal). The "Consent to Disclosure" (H3189) form authorizes only the release of information and does not authorize representatives to make service requests on the client's behalf, so LSLAP students will generally want to use the former. These forms can be found here: https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/master-lists/forms-and-letters-master-list.
- Also, if the case is at the EAAT level, applicants should complete a "Release of Information" form from the EAAT website. These forms are necessary for communicating with the Ministry and the EAAT about the client's case.
- If a client has received a decision from the Ministry but has not yet taken any appeal steps, the representative should advise him or her to obtain a "Request for Reconsideration" form from the Ministry and complete and return it to the Ministry. This must be done within 20 business days of getting the decision and can be done online or in person. It is very helpful if you can help the client to fill in the Request for Reconsideration. Remember you can request an extension of time to submit further evidence and argument in support of a reconsideration.
- If an applicant has already received a reconsideration decision, and the matter is appealable (see above) advise them to complete a Notice of Appeal form and to submit it to the EAAT within seven business days of getting the reconsideration decision.
- With the law as set out by the Act and regulation in mind, the representative should get copies of all relevant documents and review the details of the client's case. It is vital to have a clear, comprehensive account of the facts as your client understands them.
- If the applicant submits additional documentation as evidence, such as medical reports, statutory declarations, or receipts, make enough copies for the Ministry's representatives and the tribunal members. Because there is no registry for administrative support for the tribunal system, advocates must assume responsibility for seeing that all documentation is well-organized.
- At all levels of appeal, it is best to have a written statement of one's presentation of the facts in case there is a judicial review. The EAAT does not otherwise record hearings.
- See above for specific tips on each level of appeal.

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Chapter Twenty Two – Strata Law

I. Introduction

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

In a strata development, owners own their individual strata lots. As a strata corporation, owners also collectively own the strata corporation's common property and assets. This blend of individual and common ownership has led to a wide-reaching legal framework that governs the relationship between owners in a strata corporation.

The popularity of strata developments continues to rise in British Columbia. The benefits of living in strata housing are easy to understand. First, it allows people and families that own strata units to have a more direct involvement in decision-making than they otherwise would in a traditional apartment complex or shared living space. The rules under which strata developments operate also provide a great deal of flexibility. To be discussed in this chapter, strata owners and strata council can, with many important exceptions, enact bylaws separate from the legislation governing them to create a living environment that best suits the owners' interests and lifestyle. Finally, the sharing of common property in a strata development can create a strong sense of community, giving residents more opportunities to develop relationships with their neighbours.

Living in strata housing, however, also comes with its legal challenges. Due to its self-governed nature, disagreements in various aspects of strata living commonly arise. Many of these disagreements and challenges are resolved between parties without the need for legal action, but many also cannot be decided between disputing parties, leaving the courts to make decisions on strata disputes on an ongoing basis. Ever since its 2016 introduction as Canada's first online administrative tribunal, the Civil Resolution Tribunal ("CRT") has decided thousands of strata property matters, providing more accessible dispute resolution options for strata matters than traditional court proceedings.

The purpose of this chapter is to give an overview of the current state of strata property law in British Columbia. This chapter can be broken down into three large sections that are then further divided into more specific areas of strata law. Sections 3 – 5 give an overview of what a strata development is, including details on the strata plan and the concept of common property. Sections 6 – 10 give details on the governance of a strata corporation, which includes its finances, bylaws, and rules. Sections 11 – 14 discuss common topics in strata living, including insurance issues and the duty to repair and maintain. Finally, sections 15 and 16 overview dispute resolution in a strata, including where the Civil Resolution Tribunal or the courts are involved.

II. Governing Legislation

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

Strata Property Act, SBC 1998, c 43 [1] [*SPA*]

Strata Property Regulation, BC Reg 116/2023 [2] [*SPR*]

Business Corporations Act, SBC 2002, c 57 [3] [*BCA*]

Real Estate Development Marketing Act, SBC 2004, c 41 [4] [*REDMA*]

Land Title Act, RSBC 1996, c 250 [5] [*LTA*]

Residential Tenancy Act, SBC 2002, c 78 [6] [*RTA*]

Human Rights Code, RSBC 1996, c 210 [7] [*HRC*]

Real Estate Services Act, S.B.C. 2004, c. 42 [8] [*RESA*]

Real Estate Services Rules, B.C. Reg. 209/2021 [9] [*RES Rules*]

Real Estate Services Regulation, B.C. Reg. 506/2004 [10] [*RES Regulation*]

Personal Information Protection Act, S.B.C. 2003, c. 63 [11] [*PIPA*]

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III. Strata Concept

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. The Strata Property Act

The *Strata Property Act*, SBC 1998, c 43 [1] [*SPA*] is the piece of legislation that governs strata housing in British Columbia.

The sections of the *SPA* are divided into 17 thematic Parts. The following chart roughly summarizes the kinds of provisions found in each of the Parts:

No.	Part Title	Provisions Contained
1	Definitions and Interpretation	Definitions of terms that are given specific meanings in this Act
2	The Strata Corporation	Basic provisions about the establishment, responsibilities and governance of a strata corporation
3	The Owner Developer	Responsibilities of the owner developer towards a newly established strata corporation, such as holding the first annual general meeting at which the first strata council is elected
4	Strata Corporation Governance	Strata councils; contracts made on behalf of the strata corporation; annual and special general meetings; information the strata corporation must give upon request
5	Property	Provisions relating to property ownership, such as strata lot boundaries and common property
6	Finances	Strata corporation budget and finances, and the owners' obligation to contribute
7	Bylaws and Rules	Enactment, amendment, and enforcement of strata bylaws and rules
8	Rentals	Provisions governing strata lot owners who rent their unit to tenants
9	Insurance	A strata corporation's obligation to obtain property insurance
10	Legal Proceedings and Dispute Resolution	Lawsuits by or against a strata corporation
11	Sections	Creation, administration, and cancellation of strata corporation sections
12	Leasehold Strata Plans	Applies to strata plans situated on land leased from a government body or public authority
13	Phased Strata Plans	Applies to strata plans where the strata development is constructed in phases
14	Land Titles	Relates to a strata corporation depositing strata plans in the Land Title Office
15	Strata Plan Amendment and Amalgamation	Relates to a strata corporation amending its strata plans
16	Cancellation of Strata Plan and Winding Up of Strata Corporation	Governs the dissolution of a strata corporation
17	General	Miscellaneous provisions

Many provisions of the *SPA* mention "the regulations," which often refers to the *Strata Property Regulation*, BC Reg 116/2023 [2] [*SPR*]. The provisions of the *SPA* can only be fully understood when read in conjunction with the *SPR*.

At the end of the *SPA* is the Schedule of Standard Bylaws, which lists the bylaws that would apply to a strata corporation unless it files different bylaws to replace them.

B. Property in a Strata Development

Every strata plan consists of two types of property: strata lots, and common property. Whether property in a strata development is categorized as part of a strata lot or part of common property has several legal implications, such as who is responsible for repair, whether an owner is permitted to make modifications, and the way the strata corporation may enforce bylaws and rules.

1. Strata Lot

The definition of a "strata lot" is simply a lot shown on a strata plan (*SPA*, s 1(1)). A strata lot may be contained in a building and defined with reference to its walls, ceilings, and floors, as in a conventional strata plan. However, a strata lot may also be defined with reference to a plot of land, as in a bare land strata plan.

2. Common Property

All owners in a strata corporation own the common property as tenants in common. An owner's share of the common property is determined by dividing the unit entitlement of their strata lot by the total unit entitlement of all strata lots in the strata corporation (*SPA*, s 66). The responsibility for managing and maintaining the common property generally falls on the strata corporation.

Common property may be designated as limited common property, limiting their use to an exclusive subset of one or more strata lot owners. A strata corporation may also enter into an agreement with an owner or tenant to grant the owner or tenant exclusive use of or special privileges in common property for a limited period.

3. Unit Entitlement

Unit entitlement is a strata lot's ownership share of the strata corporation's common property, expenses, and liabilities (*SPA*, s 1(1)). Unless otherwise agreed at an annual or special general meeting, a strata lot's unit entitlement is used in several formulas prescribed by the *SPA* to determine that lot's required contribution to the strata corporation budget.

Every strata plan must include a Schedule of Unit Entitlement that lists the unit entitlement for each strata lot. Section 246 of the *SPA* provides three ways that a strata corporation may establish unit entitlement:

1. A whole number that is the same for every strata lot;
2. In square metres: the total habitable area (for residential strata lots) or the total area (for non-residential strata lots);
3. Any other allocation that the Superintendent of Real Estate approves as fair.

For the purposes of unit entitlement, "habitable area" excludes patios, balconies, garages, parking stalls, and storage areas that are not closets (*SPR*, s. 14.2).

For strata corporations created before July 1, 2000, the Schedule of Unit Entitlement can be obtained as one of the pages of a strata plan. For strata corporations created after July 1, 2000, Schedules of Unit Entitlement are filed separately. Thus, it is first necessary to obtain the general index of the strata plan, and then use the registration number of the Form V to request a copy from the Land Title and Survey Authority.

C. The Strata Plan

1. Overview

Every strata corporation has a strata plan that consolidates its fundamental documents. Among its functions include mapping the physical space of a strata corporation. A strata corporation's strata plan is valid when filed in the Land Title Office.

Common property may be designated as limited common property, where the common property is reserved for the exclusive use of the owners of one or more strata lots while keeping its designation as common property. How property is designated on the strata plan affects legal rights and obligations, such as who bears the responsibility of repair and the extent to which the strata corporation can control the property.

The legend of a strata plan, generally found on the first or second page, will indicate how different property designations are labelled. The legend would usually also indicate designated areas such as balconies, patios, parking spaces, and elevators.

2. Bare Land Strata Plans

A bare land strata plan is a strata plan that is defined with reference to land survey markers rather than floors, walls, or ceilings (*SPA*, s 1(1)). A bare land strata plan will not depict buildings located within a strata lot, including if the building existed when the bare land strata plan was created. However, a bare land strata plan will depict buildings located on common property.

3. Phased Strata Plans

A phased strata plan is used for strata developments that are constructed in stages. In such a strata development, the land is divided into multiple segments containing one or more strata lots, and each segment is constructed in sequence. As each segment is completed, the phased strata plan would add the new strata lots to the original strata corporation, rather than create a new strata corporation every time a strata plan is filed in the Land Title Office.

4. Amendments

The *SPA* allows strata plans to be amended. For example, strata lots can be added, divided, or combined. Common property can be incorporated into a strata lot, and a strata lot can be incorporated into common property. Designations of limited common property can be added or removed.

A strata corporation can designate common property as limited common property without needing to amend the strata plan. It is only necessary to file a sketch plan.

D. Bylaws and Rules

Strata corporations must have bylaws, as required by section 119 of the *SPA*. Bylaws may provide for the control, management, maintenance, use, and enjoyment of the strata lots, common property, and common assets of the strata corporation. They may also govern the administration of the strata corporation (*SPA*, s. 119).

1. Standard Bylaws

All strata corporations automatically adopt the Standard Bylaws except to the extent that different bylaws are filed in the Land Title Office (*SPA*, s 120(1)). This applies to all strata corporations created after July 1, 2000.

The Standard Bylaws are listed in the Schedule of Standard Bylaws, found at the end of the *SPA*.

2. Amending Bylaws

A strata corporation can make changes, deletions, or additions to its bylaws, including Standard Bylaws (*SPA*, s 126). Bylaw amendments must be approved at an annual or special general meeting, and do not take effect until they are filed in the Land Title Office (*SPA*, s 128). A strata corporation must inform owners and tenants of any approved bylaw amendments as soon as feasible (*SPA*, s 128 (4)).

The required threshold to approve bylaw amendments depends on the types of strata lot that make up the strata corporation (*SPA*, s 127):

- In a strata plan composed only of residential strata lots, amendments must be passed by a ¾ vote.
- In a strata plan composed only of non-residential strata lots, amendments must be passed by a ¾ vote unless another threshold is provided for in the bylaws.
- In a strata corporation containing both types of strata lots, amendments must be approved by both the residential owners and the non-residential owners: the residential owners must pass the amendments by a ¾ vote, and the non-residential owners must pass the amendments by either a ¾ vote or an alternative threshold if provided for in the bylaws.

3. Unenforceable Bylaws

A bylaw is unenforceable if it does one or more of the following (*SPA*, s 121(1)):

1. Contravenes any law or enactment, such as the *SPA* or the *SPR*;
2. Destroys or modifies an easement created under section 69 of the *SPA*;
3. Prohibits or restricts the right of an owner of a strata lot to freely sell, lease, mortgage or otherwise dispose of the strata lot or an interest in the strata lot.

The third restriction does not apply to bylaws governing activities relating to the sale of a strata lot, although the bylaw still must not prohibit or unreasonably restrict those activities. Bylaws that restrict the posting of “for sale” signs or the holding of open houses are specifically allowed (*SPA*, ss 121(2)(b), 122).

There are some further restrictions on the enforceability of bylaw amendments. For example:

- A bylaw that restricts pets cannot apply to any pet that, at the time the bylaw was passed, was already living with a resident without contravening any prior pet prohibition bylaws (*SPA*, s 123(2));
- A bylaw that restricts the age of strata lot residents is unenforceable, unless the bylaw is a requirement for one or more persons living in a strata lot to be aged 55 or older. Similarly to pet prohibitions, such a bylaw cannot apply to any person who, at the time the bylaw was passed, was already living in a strata lot without contravening any prior age restriction bylaws (*SPA*, ss 123.1, 123.2(a));

- An age restriction bylaw also cannot apply to any caregiver who resides in a strata lot for the purpose of caring for a person who requires caregivers due to disability, illness, or frailty (*SPA*, s 123.2(b)).

People with certain relationships with "specified residents" are also exempt from age restriction bylaws. Section 7.01 of the *SPR* defines the term "specified resident" to mean a resident of a strata lot who has either reached the minimum age in an age restriction bylaw, or whose eligibility to live there is grandfathered by section 132.2(a) of the *SPA*. An age restriction bylaw must not apply to the following classes of people:

- A person under 19 years of age whose caregivers include a specified resident;
- A person 19 years of age or older

    a) whose caregivers while they were under 19 years of age include a specified resident, and

    b) who currently resides with the specified resident;

- A person who is married to or in a marriage-like relationship with a specified resident.

4. Rules

As primarily governed by section 125 of the *SPA*, a strata council can create rules, which function similarly to bylaws. Some key differences include:

- Rules can only govern the use, safety, and condition of common property and common assets, and therefore cannot govern the management, control, or use of a strata lot;
- In the event of a conflict between a bylaw and a rule, the bylaw prevails;
- A rule expires at the first annual general meeting after its creation, unless it is ratified by a majority vote at that annual general meeting or at a prior special general meeting. A ratified rule remains in force indefinitely until it is repealed, replaced, or amended;
- A strata corporation can only fine up to $50 for a breach of a rule, in contrast with the larger maximum fine for a breach of a bylaw (*SPR*, s 7.1(a)).

The strata corporation must inform owners and tenants of any new rules as soon as feasible (*SPA*, s 125(4)).

E. Strata Property Parties and Duties

1. The Strata Corporation

A strata corporation has the duty to manage and maintain the common property and common assets for the benefit of the owners. This includes repairing common property, as well as maintaining property insurance on common property, common assets, buildings shown on the strata plan, and certain fixtures.

A strata corporation must also perform its financial and administrative duties. This includes:

- Paying common expenses;
- Establishing operating and contingency reserve funds;
- Maintaining financial and other records;
- Holding general meetings;
- Enforcing the strata corporation's bylaws.

A strata corporation has the power to enter into contracts, sue, and be sued. The *Business Corporations Act*, SBC 2002, c 57 [3] does not apply to strata corporations except as otherwise provided for in the *SPA* (*SPA*, s 291).

The powers and duties of a strata corporation are initially performed by the owner developer, and afterwards, by the strata council.

2. The Strata Lot Owners

The members of a strata corporation are the owners of the constituent strata lots. From section 1(1) of the *SPA*, by default an owner is either one of the following:

1. The person registered in the Land Title Office as the freehold owner (whether in a personal or representative capacity);
2. The leasehold tenant in the case of a strata lot in a leasehold strata plan.

The main way in which owners govern a strata corporation is by electing the strata council at each annual general meeting. Furthermore, the *SPA* requires certain decisions to be approved by the owners, with various thresholds ranging from majority vote to unanimous consent. For example, a proposed budget must be approved by the owners with a majority vote (*SPA*, s 103), whereas approval for a special levy requires at least ¾ consent (*SPA*, s 108). For these decisions, the strata council is unable to act on their decision-making power alone, allowing for owners to provide more direct input.

Section 27 of the *SPA* allows for owners to direct the strata council or restrict its powers and duties by passing a resolution by majority vote at an annual or special general meeting. However, such a modification cannot force the strata council to act in a way that contradicts the SPA, the SPR, or the bylaws. Such a resolution is also subject to a few other limitations that protect a strata council's power to determine responsibility for cases of breaches of bylaws or rules.

The courts have not recognized other mechanisms for owners to direct the actions of strata councils: see *Enefer v The Owners, Strata Plan LMS 1564*, 2005 BCSC 1866 [4] and *Nomani v The Owners, Strata Plan LMS 3837*, 2007 BCSC 276 [5].

3. Strata Lot Tenants and Occupants

"Tenant" means a person who rents part or all of a strata lot, including subtenants; "occupant" means anyone besides an owner or tenant who occupies a strata lot (*SPA*, s 1(1)).

A strata corporation may fine an owner for bylaw or rule violations by tenants and occupants of their strata lot (*SPA*, s 130). It may also be possible for the strata corporation to enact bylaws making owners liable for tenant damage more generally.

4. Sections Within a Strata Corporation

Part 11 of the *SPA* enables strata corporations to establish sections, which create smaller corporate structures nested within the strata corporation. Sections act as smaller governance structures that represent groups of owners within a strata corporation that share similar interests due to owning similar types of strata lot.

From section 194 of the *SPA*, a section is a corporation, the provisions of the SPA generally applying to them as if they were strata corporations. Accordingly, some of their powers include:

- Creating a budget to which their owners must contribute;
- Entering into contracts;
- Suing or being sued;
- Enforcing bylaws and rules.

A section can only be created to group strata owners along the following categories (*SPA*, s 191):

1. Owners of residential strata lots and owners of non-residential strata lots;
2. Owners of non-residential strata lots that have significantly different purposes;
3. Owners of different types of residential strata lots.

The different types of residential strata lots that may be grouped into a section are as follows (*SPR*, s 11.1):

1. Apartment-style strata lots;
2. Townhouse-style strata lots;
3. Detached houses.

The owner developer can create sections if, at the time the strata plan is deposited, the owner developer also files bylaws that provide for the creation and administration of the section.

After a strata corporation is created, the owners can amend the bylaws to create sections by approving a resolution by both of the following thresholds:

1. ¾ of all eligible voters in each of the proposed sections; and
2. ¾ of all eligible voters in the strata corporation overall.

5. Strata Managers

From its capacity to enter contracts, a strata corporation can enter into contracts with management companies to carry out duties that otherwise must be carried out by strata council members. Strata managers are agents of the strata corporation.

F. Kinds of Strata Lot

Strata lots can be designated as residential, or otherwise be non-residential. A strata development may have a mix of both types of strata lots.

Whether a strata lot is designated as a residential strata lot is significant. For example:

- Bylaw amendments must be approved by a ¾ threshold among both residential strata lot owners and non-residential strata lot owners;
- Designation of strata lots as residential also determines the way sections may be formed in the strata corporation;
- Whether a strata lot is a residential strata lot determines how the unit entitlement is calculated, ultimately determining the lot owner's share of common assets and expenses.

"Residential strata lot" is defined as a strata lot that is designed or intended to be used primarily as a residence (*SPA*, s 1(1)). There is no definition of a non-residential strata lot, so it would simply be a strata lot not designated as a residential strata lot. However, whether a strata lot is a residential strata lot might not be clear in some cases.

The designation of a strata lot depends in part on the strata development's zoning permissions. However, zoning is not sufficient by itself to determine whether a strata lot is a residential strata lot for the purposes of the SPA: see *East Barriere Resort Limited v The Owners, Strata Plan KAS1819*, 2017 BCCA 183 [6] at para 46, where the BC Court of Appeal ruled that the residential intention or design behind a strata lot must be interpreted using the documents at and around the strata corporation's creation, although the applicable zoning regulations are a useful aide for that interpretation.

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IV. Strata Plan

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. Common Property

1. What Constitutes Common Property

On a strata plan, all space within the strata development's land parcel that does not fall within a strata lot is common property. All strata lot owners own this common property as tenants in common, proportionally to their respective unit entitlements.

In a conventional strata plan, common property would typically consist of the space outside the buildings, as well as any circulation, utility, and common areas within the buildings like amenities, lobbies, and elevators.

In a bare land strata plan, common property is typically limited to roadways, utilities, and common facilities. If the strata lots completely envelop the buildings situated on the bare land strata plan, the common property would consist of the grounds, leaving strata lot owners with significant control over aspects of their respective buildings such as building designs and finishes.

2. Decks, Patios, and Balconies

Decks, patios, and balconies may be shown on the strata plan as either part of a strata lot, undesignated common property, or limited common property. Typically, the strata corporation is responsible for repairing and maintaining decks, patios, and balconies under its bylaws regardless of how they are designated.

Due to section 14.2 of the *SPR*, the following are excluded from counting towards the "habitable area" formula of unit entitlement when they form part of a strata lot:

1. Patios;
2. Balconies;
3. Garages;
4. Parking stalls;
5. Storage areas other than closet space.

When these structures are designated as common property, section 71 of the *SPA* would require a ¾ vote at an annual or special general meeting before the strata corporation may make a significant change in their use or appearance: see *Frank v The Owners Strata Plan LMS 355*, 2016 BCSC 1206 [1].

3. Building Systems

When utility systems serve multiple strata lots or the common property, they are considered common property, even when located within a strata lot. These are not shown on the strata plan, and it can be difficult to delineate where common property starts and ends. For instance, see *Fudge v Owners, Strata Plan NW2636*, 2012 BCPC 409 [2], where the court held that a washing machine discharge pipe found inside a strata lot was nevertheless common property due to being integrated with the building's wastewater collection systems.

A building component that only serves one strata lot despite being located outside the lot's boundaries may nevertheless still be common property if it is a fixture at common law. If the component is sufficiently attached to the building, and the intention behind its attachment is more for the better use of the building rather than for facilitating its own use, the component may be a fixture at common law: see *La Salle Recreations Limited v Canadian Camdex Investments Limited*, [1969] BCJ No 421 (QL), 1969 CanLII 740 (BC CA) [3]. For instance, a heat pump attached to common property for the benefit of only one strata lot may nevertheless be classified as common property: see *Warren v The Owners, Strata Plan VIS 6261*, 2017 BCCRT 139 [4].

Section 72 of the *SPA* allows bylaws to make an owner responsible for limited common property that they have the right to use, but not undesignated common property except as permitted in the *SPR*. Thus, a fixture found on limited common property may be an individual owner's responsibility, but a fixture found on undesignated common property is unlikely to be any individual owner's responsibility. The courts have ruled that section 72 does not prevent a strata corporation from assigning responsibility for common property to entire sections: see *Norenger Development (Canada) Inc. v Strata Plan NW 3271*, 2018 BCSC 1690 [5].

If such a building component is not a fixture, such as being insufficiently attached to the building or being primarily attached to facilitate its own use, it may instead be considered a chattel owned by the strata lot owner. The responsibility to repair and maintain falls on the owner, although the strata corporation may have authority to remove it under its bylaws, subject to the prohibition against significantly unfair action: see *Estrin v The Owners, Strata Plan LMS3758*, 2023 BCCRT 350 [6].

B. Parking and Storage Facilities

Issues arising from parking stalls often arise from how owner developers allocate stalls for sale.

When a strata lot contains one or more parking lots, the strata lot may be subject to strata fees, special levies, property taxes, other municipal levies, and municipal business licensing regulation.

Since January 1, 2014, strata corporations are required to disclose an Information Certificate, Form B of the *SPR*, listing which parking stalls and storage lockers have been allocated to a strata lot to prospective buyers of a strata lot. Parking is often contentious, depending on how parking stalls are designated and allocated.

1. Common Property

If parking is common property, the strata corporation has the authority to allocate stalls. The strata corporation must review and renew this allocation annually under section 76 of the *SPA*. This authority is limited by the strata corporation's bylaws, and allocations that are significantly unfair to any strata lot owner may be challenged. This authority does not enable the owner developer to sell additional stalls.

2. Limited Common Property Designated on Strata Plan

If parking is designated on the strata plan as limited common property for a given strata lot, that strata lot owner has the full right to use the parking stall in accordance with the bylaws. This designation can only be modified by an amendment to the strata plan, which requires unanimous consent of all the owners.

3. Leases and Licenses of Parking Stalls

Often in larger developments where parking stalls have higher value, the owner developer makes the first allocation of parking stalls by granting a 99-year lease to an entity they control. With each strata lot initial purchase, the owner developer grants licenses or partial lease assignments to the purchaser. When an owner sells their strata lot, the new purchaser must receive not only a transfer of the strata lot, but also a further assignment of the parking stall lease or license. As a result, the owner developer retains control of the parking stalls, even past the first annual general meeting.

Such an arrangement of parking stall leases and licenses may not be evident from the strata plan or the common property record, as they are typically not registered in the Land Title Office to minimize property transfer tax. Instead, the owner developer must disclose the arrangement as part of their disclosure statement under the *Real Estate Development Marketing Act*, SBC 2004, c 41 [7].

Note that for leases entered into before the strata plan is deposited, the *SPA* section 80 requirements for the strata corporation to approve of common property disposal do not apply. This is because strata corporations do not exist before their strata plan is deposited. Once the strata plan is deposited, the strata corporation assumes the role of landlord under any pre-existing parking stall lease arrangements.

Although the bylaws do not need to refer to the lease arrangement, provisions may include:

- A requirement for the strata corporation to place before the owners a resolution to designate stalls as limited common property for the owners with lease assignments or licenses from the owner developer;
- A requirement for the strata corporation to maintain a register of parking stalls allocated by lease assignments or licences from the developer.

Surface parking can only be placed in the owner developer's control by licence, not lease. This is because sections 73 and 73.1 of the *Land Title Act*, RSBC 1996, c 250 [8] [*LTA*] forbid the assignment of leases of land that is both less than the entire legal parcel and not for the purpose of leasing a building or part of a building. Because a license does not create an interest in land, the strata corporation may revoke such a parking stall licence without needing to provide notice to the strata lot owner.

Section 20 of the *LTA* raises questions about whether this common practice of unregistered parking stall leases is enforceable. In *Hill v Strata Plan NW 2477 (Owners)*, 2 BCAC 289, 1991 CanLII 529 (BC CA) [9], the court ruled that an owner developer could not arrange with a particular owner for the exclusive use of common property; despite being a case on the *Condominium Act*, it continues to be applicable to the *SPA* (*The Owners, Strata Plan VIS 3437 v Townsite Marina Ltd.*, 2018 BCCRT 166 [10]). In *TownsiteMarina Ltd. v The Owners, Strata Plan VIS3437*, 2018 BCSC 2160 [11] at paras 27 to 28, the BC Supreme Court recognized that such a practice has some acceptance, "possibly even a consensus," among legal practitioners as valid, although the court also ultimately left the question open.

4. Parking Stalls and Storage Lockers as Part of Strata Lot

A parking stall or storage locker may appear on the strata plan as part of a strata lot. Parking stalls that are part of a strata lot may be leased or licensed by the owner of the strata lot.

When a parking stall is part of a residential strata lot, the parking stall is excluded from unit entitlement calculations due to the definition of "habitable area" from section 14.2 of the *SPR*. Because unit entitlement calculations for non-residential strata lots use the total area of the lot, parking stalls would be counted in that strata lot's unit entitlement calculation.

C. Schedule of Unit Entitlement

Unit entitlement is the basic measure of a strata lot's share in the strata corporation's common property, common assets, common expenses, and liabilities. Depending on the asset or liability, a strata lot's share may be determined by dividing the lot's unit entitlement by the sum of all unit entitlements in the strata corporation, or by the sum of all unit entitlements in a smaller subset of strata lots affected by the matter.

A Schedule of Unit Entitlement (Form V of the *SPR*) must be filed in the Land Title Office with each strata plan. Older strata plans that have not yet been amended under the *SPA* have the Schedule of Unit Entitlement as Form 1.

Unless modified, unit entitlement determines the following:

1. The ownership interest of each strata lot owner in the common property and common assets (*SPA*, s 66);
2. The liability of each owner for judgments against the strata corporation (*SPA*, s 166);
3. The contribution of each owner to the strata corporation's operating fund and contingency reserve fund (*SPA*, s 99; *SPR*, ss 11.2 – 11.3);
4. The contribution of each owner to a strata corporation's expenses that relate solely to a section (*SPA*, s 195; *SPR*, ss 11.2 – 11.3);
5. The contribution of each owner to special levies (*SPA*, s 108);
6. The owner developer's share of expenses attributable to common facilities of earlier phases of a phased strata plan, until later phases are deposited (*SPA*, 227).

The mechanisms that can override or modify the application of unit entitlement include:

- Unanimous votes under section 100 of the *SPA*;
- Establishing sections;
- Bylaws establishing distinctions between types of strata lot;
- Sections 6.4, 6.5, 11.2, and 11.3 of the *SPR*;
- Situations where using unit entitlement is significantly unfair.

1. Changing Unit Entitlement

In scenarios such as enclosing decks and converting crawlspaces and attics into living space, a strata corporation may seek to amend the Schedule of Unit Entitlement. However, the *SPA* only provides a few circumstances in which that amendment is possible:

1. For a residential strata lot: an application to the BC Supreme Court under section 246(7);
2. For a residential strata lot: a unanimous vote to amend the Schedule of Unit Entitlement under section 261;
3. For either type of strata lot: a filing under s 264, as consequential to certain fundamental changes to the strata plan:

    a) Adding to, consolidating, or dividing a strata lot (*SPA*, s 259);

    b) Making land held by the strata corporation into a new strata lot (*SPA*, s 262);

c) Adding a strata lot to common property (*SPA*, s 263).

If the Schedule of Unit Entitlement allocates expenses in a significantly unfair manner to one or more strata lot owners, the court or the CRT may make an order under section 164 of the *SPA* to allocate some or all expenses using a different method: see *Strata PlanVR1767 (Owners) v Seven Estate Ltd.*, 2002 BCSC 381 [12], *Southern Interior ConstructionAssociation v Strata Plan KAS 2048*, 2007 BCSC 792 [13], and *Klassen v The Owners, Strata Plan LMS 1710*, 2022 BCCRT 705 [14].

In *King Day Holdings Ltd. v The Owners, Strata Plan LMS3851 (Re)*, 2018 BCSC 1772 [15] (affirmed in 2020 BCCA 342 [16]), the court overturned two special levies for being significantly unfair to King Day Holdings Ltd., even though the levies were passed by the respondent strata corporation at its annual general meeting.

Ultimately, it is rare that a strata corporation dividing expenses by unit entitlement will create significantly unfair results. This is because the fact that an owner must contribute towards expenses that do not benefit them is insufficient by itself to constitute significant unfairness: see *Smith v The Owners, Strata Plan KAS 2503*, 2023 BCCRT 146 [17].

Strata corporations are required to disclose such court judgments in their Information Certificates under section 59(3)(j) of the *SPA*, although the judgment binds purchasers even if the Information Certificate fails to disclose this information.

D. Schedule of Voting Rights

By default, section 53 of the *SPA* governs voting in a strata corporation, giving each strata lot one vote. This cannot be overridden using bylaws.

If the strata corporation contains at least one non-residential unit, a Schedule of Voting Rights, Schedule W of the *SPR*, may be filed to determine the voting rights of strata lot owners and override section 53. On older strata plans that have yet to be amended under the *SPA*, the Schedule of Voting Rights is found on the strata plan as Form 3.

For strata corporations that only contain residential strata lots, a Schedule of Voting Rights may only be filed following certain strata plan amendments in accordance with section 264 of the *SPA*.

1. Mixed Residential/Non-residential Strata Plan

By default, section 53 of the *SPA* gives every strata lot one vote in a strata corporation containing both residential and non-residential strata lots. Under section 247(2)(a) of the *SPA*, the owner developer may, without needing approval, file a Schedule of Voting Rights that conforms to the following formula:

1. Each residential strata lot gets one vote;
2. The number of votes that each non-residential strata lot gets is equal to its unit entitlement divided by the average (mean) unit entitlement of all the residential strata lots.

This Schedule of Voting Rights has the following effect:

1. The residential strata lots have equal voting power;
2. The ratio of total residential votes to total non-residential votes is equal to the ratio of total residential unit entitlement to non-residential unit entitlement;
3. Non-residential votes are allocated between non-residential strata lots according

to unit entitlement.

The Superintendent of Real Estate may approve a Schedule of Voting Rights that allocates votes on some other basis, as long as they are satisfied that the distribution is fair (*SPA*, s 248). An owner developer might pursue this kind of Schedule of Voting Rights to ensure a certain bloc of strata lot owners has enough voting power to defeat resolutions requiring ¾ approval.

E. Land Title Office Records

The Land Title Office maintains a common property record (*SPA*, s 252) and a strata plan general index (*SPA*, s 250) for each filed strata plan. Before 1995, these documents were found in the strata plan itself.

1. Common Property Record

The common property record tracks interests and transactions concerning the common property separately from the strata lots. It contains an endorsement with respect to the following:

1. Any charge or interest that separately charges the common property;
2. Any freehold disposition of common property (*SPR*, s 14.14);
3. Any designation of limited common property under section 74 of the *SPA* (*SPR*, s 14.14);
4. Any removal of a limited common property designation under section 75 of the *SPA* (*SPR*, s 14.14).

2. General Index

The general index records certain documents that the SPA requires to be deposited in the Land Title Office along with the strata plan. Some of these documents were part of the strata plan itself under previous legislation. The general index contains an endorsement with respect to the following:

1. The Schedule of Unit Entitlement and any amendments to it;
2. The Schedule of Voting Rights and any amendments to it;
3. The strata corporation's mailing address;
4. The bylaws filed by the owner developer, and any amendments to them;
5. Amalgamation agreements under section 269 of the *SPA*;
6. Orders of the registrar under section 276 of the *SPA*, or of the Supreme Court under section 279 of the *SPA*;
7. Any resolutions required to be filed in the Land Title Office by the *SPA* or the *SPR*;
8. Any freehold disposition of common property;
9. Any designation of limited common property under section 74 of the *SPA*;
10. Any removal of a limited common property designation under section 75 of the *SPA*;
11. Any other document required to be filed in the Land Title Office that is not endorsed in other Land Title Office records.

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V. Common Property and Assets

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. Introduction to Common Property and Common Assets

Generally, property in a strata corporation that is not part of a strata lot is common property. Common property is a frequent source of disputes between strata lot owners and strata corporations, often over whether a strata owner has the right to use it or who is responsible for repairs or maintenance. Generally, the responsibility for repairs and maintenance are divided as follows: the strata corporation is responsible for the common property, while strata owners are responsible for their respective strata lots.

While common property is usually for the use and benefit of all the strata lot owners of a strata corporation, a strata corporation may grant short- or long-term exclusive use of common property or a common asset to a one or more owners. A strata corporation may also restrict access to common property areas where there are reasonable, operational reasons for doing so, such as mechanical rooms.

1. Definition and Use of Common Property

Section 1(1) of the *SPA* defines common property as follows:

> (a) that part of the land and buildings shown on a strata plan that is not part of a strata lot, and
>
> (b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located
>
> (i) within a floor, wall or ceiling that forms a boundary
>
> (A) between a strata lot and another strata lot,
>
> (B) between a strata lot and the common property, or
>
> (C) between a strata lot or common property and another parcel of land, or
>
> (ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property.

a) "Not Part of a Strata Lot"

The areas of a strata plan that do not fall within a strata lot are automatically common property. This can include areas of the strata corporation that are not explicitly shown on the strata plan: see *Chan v Owners, Strata Plan VR-151*, 2010 BCSC 1725 [1], where the court ruled that the airspace above a strata lot owner's yard was common property.

Nevertheless, strata plan legends typically provide a way of designating common property areas, often using letters like "CP" or "C" on common spaces such as hallways, stairwells, elevators, and parking stalls. In a conventional strata plan, the land is common property.

In a bare land strata plan, the land itself is divided into strata lots. As a result, much of a building constructed on a strata lot, including even the exterior, are not considered common property. The common property would be limited to roads, sidewalks, and recreational facilities that do not fall within a strata lot. Underground services that service more than one strata lot would also be common property.

When a component of a system or service, such as water, mechanical, or electrical systems, is located on the common property, they are common property even if it only serves on strata lot: for instance, see *Newman v The Owners, Strata Plan EPS 680*, 2017 BCCRT 122 [2]. The location of these physical components is typically not marked on the strata plan, so it is necessary to refer to the original mechanical drawings.

Fixtures as Common Property

The SPA does not replace the common law relating to fixtures. Because the law considers fixtures to be part of the land, a strata lot owner who affixes their personal belongings onto the strata corporation's common property may cause those belongings to become common property. However, if the object does not become a fixture, it remains a chattel, which remains as the strata lot owner's personal property. The courts use a two-part test to determine whether an object is a fixture: see *Royal Bank of Canada v Neilson (Trustee of)*, 43 BCLR (2d) 363, 1990 CanLII 1932 (BC CA) [3].

Firstly, the court considers the object's degree of attachment to the land or building. If an object stays in place by its own weight only, it is presumed to be a chattel unless it can be proven to be intended as part of the land. If the object has any amount of additional affixation to the land, it is presumed to be a fixture unless it can be proven to be intended to remain considered a chattel.

Secondly, the court considers the purpose of any affixation. If the affixation is for the better use of the land or building, the object is a fixture. If the affixation is for the better use of the object as itself, the object is a chattel.

For instance, in *Young v The Owners, Strata Plan 111*, 2022 BCCRT 793 [4], the tribunal ruled that a chimney and deck installed on common property by a previous owner had become common property due to being a fixture. As a result, the strata corporation's bylaw to make the subsequent owner responsible for their repair and maintenance was unenforceable due to the limitations from section 72 of the *SPA* on a strata corporation's ability to make individual owners responsible for common property that is not limited common property.

b) "Pipes, Wires, Cables, Chutes, Ducts and Other Facilities"

"Within a Floor, Wall or Ceiling that Forms a Boundary"

When these components are found inside a wall that divides a strata lot from another strata lot, the common property, or another land parcel, the components are considered common property. This remains true even if the component in question only benefits one strata lot. The Civil Resolution Tribunal has found a number of such "well-embedded objects" to be common property:

- Shower diverters (*Lorenz v The Owners, Strata Plan NW 2001*, 2017 BCCRT 65 [5]);
- Shower mixing valves (*Robinson v The Owners, Strata Plan NW 3308*, 2019 BCCRT 238 [6]);
- Pressure reducing valves (*Hufton v The Owners, Strata Plan NW 644*, 2019 BCCRT 1096 [7]);
- Radiant heating system pipes in certain locations (*Bindra v The Owners, Strata Plan EPS3829*, 2021 BCCRT 1113 [8]);
- Toilet water supply line (*Groven v The Owners, Strata Plan LMS 2460*, 2022 BCCRT 1270 [9]);
- Dryer duct (*Kill v The Owners, Strata Plan LMS2472*, 2022 BCCRT 753 [10]).

In a bare land strata plan, the exterior walls of a building might lie entirely within the strata lot, so components found inside exterior walls may not necessarily meet this definition of common property.

"Wholly or Partially Within a Strata Lot"

If a component such as a pipe, wire, or cable is found entirely within a strata lot, it can still be common property if it is intended to and capable of being used for the benefit of another strata lot or the common property.

For instance, the court ruled in *Fudge v Owners, Strata Plan NW2636*, 2012 BCPC 409 [11] that a drainage pipe located within the plaintiff's lot was still considered common property, because the pipe was most properly seen as part of an integrated network of plumbing pipes intended to benefit all the lot owners as a whole, indivisible system.

Because these components are often closely integrated with systems servicing the strata complex, they are frequently found to be common property despite being located within a strata lot. See the following such examples:

- Hot water pipes (*Taychuk v Owners, Strata Plan LMS 744*, 2002 BCSC 1638 [12]);
- Drain pipes under a toilet (*Perri v The Owners, Strata Plan KAS 3313*, 2022 BCCRT 1257 [13]);
- Heat pumps whose operation had some degree of effect and reliance on heat pumps servicing other strata lots (*Lin v The Owners, Strata Plan LMS 4071*, 2020 BCCRT 690 [14]);
- Fan coil units connected to heat pumps found on common property (*Bowie v The Owners, Strata Plan VIS 5766*, 2020 BCCRT 733 [15]);
- Perimeter drainage in a yard that also benefits other strata lots and the common property (*Chapel v The Owners, SP VIS 1517*, 2017 BCCRT 5 [16]).

However, when such components are found to be not sufficiently integrated with the common property system, their location within the strata lot and servicing of only one strata lot renders them part of the strata lot. See the following such examples:

- Taps and sinks located entirely within the strata lot (*Jaggard v The Owners, Strata Plan EPS1954*, 2022 BCCRT 510 [17]);
- Hot water tanks (*Sparacio v The Owners, Strata Plan LMS 4383*, 2021 BCCRT 528 [18]);
- The drain pipe attached to a drain pipe that was common property (*Sha v The Owners, Strata Plan NW 644*, 2022 BCCRT 196 [19]);
- The water shut-off valve under a sink (*The Owners, Strata Plan LMS 1880 v Harper*, 2022 BCCRT 956 [20]).

In the case of a bare land strata plot, such systems are more likely to reside entirely within one strata lot and only serve that strata lot. This means that such components are less likely to be common property. For instance, see *Beach et al v The Owners, Strata Plan KAS 722*, 2018 BCCRT 2 [21], *Weideman v The Owners, Strata Plan K 495*, 2022 BCCRT 140 [22], and *Punta Del Mar Estates Ltd. v The Owners, Strata Plan LMS 483*, 2019 BCCRT 1020 [23].

Determining whether a component found inside a strata lot is part of an integrated whole system likely requires consulting an expert in that kind of system.

2. Designation of Limited Common Property

The strata corporation can designate common property as limited common property ("LCP") for the exclusive use of one or more strata lot owners. This is different from the *SPA* section 76 procedure to grant short-term exclusive use of common property.

Section 1(1) of the *SPA* defines LCP as common property "designated for the exclusive use of the owners of one or more strata lots." Because LCP is created by designation, common property that happens to be physically accessible to only a subset of strata lot owners does not automatically make it LCP: see *The Owners, Strata Plan LMS 1162 v Triple P Enterprises Ltd.*, 2018 BCSC 1502 [24] at paras 24 – 26 and *Poole v Owners, Strata Plan VR 2506*, 2004 BCSC 1613 [25].

Section 73 of the *SPA* provides for four methods to designate limited common property:

1. By the owner developer on the strata plan deposited in the Land Title Office;
2. By the owner developer designating parking stalls as limited common property under section 258;
3. By an amendment to the strata plan under section 257;
4. By a resolution passed by a ¾ vote under section 74.

For instance, in a strata plan containing residential strata lots, non-residential strata lots, and sections, the strata plan may allocate LCP for all the strata lots of a section. One possible purpose might be to designate some parking as visitor parking, or to restrict owners of commercial strata lots from facilities only intended for owners of residential strata lots.

Because an LCP designation may be created by a ¾ vote resolution that does not amend the strata plan, it is necessary to consult both the strata plan and the common property record to determine whether a piece of common property is LCP.

As noted in *Macdonald v The Owners, EPS 522*, 2019 BCSC 876 [26], a designation of limited common property is more permanent when created by a strata plan amendment as opposed to a resolution: a strata plan amendment can only be reversed by a unanimous vote, but section 75(2) of the *SPA* allows a limited common property designation created by section 74 to be reversed by another resolution passed by a ¾ vote.

3. Definition of Common Asset

A common asset is property that is held by or on behalf of the strata corporation. Like common property, the owners of the strata corporation collectively own the strata corporation's common assets as tenants in common (*SPA*, s 66). From section 1(1) of the *SPA*, common assets may come in the following forms:

1. Personal property;
2. Land that is not shown on the strata plan;
3. Land that is shown as a strata lot on the strata plan.

A somewhat common example of a common asset is a strata lot owned by a strata corporation as a caretaker's suite or a guest suite for owners' visitors. Common assets may also come in the form of rights of easements. Sometimes, a strata corporation might co-own a strata lot with another strata corporation, each strata corporation co-owning a share of the common asset. Examples of personal property common assets include equipment and websites owned by the strata

corporation.

B. Responsibilities of the Strata Corporation

Whether through the owner developer or the strata council, the strata corporation has a duty to manage and maintain the common property and common assets for the benefit of all the owners (*SPA*, s 3). This includes:

- Repair and maintenance (*SPA*, s 72(1));
- Obtaining and maintaining insurance, including for common property, common assets, and buildings shown on the strata plan (*SPA*, s 149(1)).

If an owner developer enters the strata corporation into a long-term lease of common property or assets, the lease may be rendered void and unenforceable if a court finds that it benefits the owner developer to the detriment of present or future owners. However, such leases may also be upheld if the owner developer gave sufficient notice through the disclosure statement or the land title registry: see *The Owners, Strata Plan VIS2968 v K.R.C. Enterprises Inc.*, 2007 BCSC 774 [27].

Section 72(2)(a) of the *SPA* enables a strata corporation to pass a bylaw to make an owner responsible for limited common property that the owner has a right to use. However, a bylaw that purports to make an owner responsible for repair and maintenance of common property without a designation as limited common property is unenforceable: although section 72(2)(b) enables a bylaw to make an owner responsible for undesignated common property if identified in the *SPR*, no such regulation has passed as of July 11, 2023. On the other hand, a strata corporation may pass bylaws to make a section responsible for repairing and maintaining common property, as confirmed in *Norenger Development (Canada) Inc. v Strata Plan NW 3271*, 2018 BCSC 1690 [28].

It may be possible for an owner to be responsible for repairing common property that they have altered, to the extent that the damage is attributable to the owner's modifications rather than general wear, tear, and deterioration over time: see *Elahi v Owners, Strata Plan VR 1023*, 2011 BCSC 1665 [29] at para 55.

C. Responsibilities of Strata Lot Owners

The responsibility of strata lot owners towards common property and common assets can vary depending on the strata corporation's bylaws. The Standard Bylaws contain a number of provisions relating to owners' responsibility for common property and common assets, but these provisions would not apply to any strata corporation that has amended them out.

Section 130 of the *SPA* makes owners and tenants responsible for contraventions of bylaws or rules, including those by visitors they have invited. Under Standard Bylaw 3, owners, their tenants, occupants, or visitors must not do any of the following regarding strata lots, common property, or common assets:

- Cause a nuisance or hazard to another person;
- Cause unreasonable noise;
- Unreasonably interfere with the rights of other persons to use and enjoy the common property, common assets or another strata lot;
- Do anything illegal;
- Contradict the express or implied purpose of a strata lot or common property;
- Cause damage greater than reasonable wear and tear to any property that is the responsibility of the strata corporation;
- Exceed the prescribed number of pets or leave animals unsecured on common property.

Standard Bylaw 6 requires owners to obtain the strata corporation's written approval before making any alteration to any common property. This is best conducted through a resolution of the strata council that is recorded in the strata council

meeting minutes, along with any terms and conditions. Typically, an unauthorized alteration to common property or common assets would be a violation of the strata corporation's bylaws, meaning that the responsible owner may be subject to the strata corporation's enforcement measures such as fines. The strata may also remove the alteration and charge the cost of doing so to the owner.

Standard Bylaw 8 makes the strata corporation responsible for repairs and maintenance of limited common property if the repair or maintenance occurs less than once per year, or if the repair or maintenance occurs on certain exterior structural elements. Generally speaking, this means that owners are only responsible for regularly occurring repairs or maintenance of interior limited common property.

D. Ownership of Common Property

1. Nature of Common Property Ownership

Each strata lot owner owns the common property and common assets of the strata corporation as a tenant in common, proportionate to their unit entitlement (*SPA*, s 66). To determine a strata lot's share of the common ownership, its unit entitlement is divided by the sum of all unit entitlements in the strata corporation. The strata corporation retains control over use and maintenance of the common property and common assets.

Because a strata corporation must manage common property for the benefit of the owners as a whole, it cannot make any guarantees to strata lot purchasers about exclusive use of common property, other than through designations of limited common property: see *Hill v Strata Plan NW 2477 (Owners), 2 BCAC 289*, 1991 CanLII 529 (BC CA) [30].

Residents have a reasonable expectation of privacy in areas of the common property that would normally only be accessed for repair or maintenance purposes. As a result, pursuant to section 8 of the *Canadian Charter of Rights and Freedoms* [31], a search warrant is typically required for police investigations in such areas: see *R v DiPalma*, 2008 BCCA 342 [32]. In contrast, for areas of the common property where it is expected that visitors might be admitted, such as hallways and secured parking lots, the expectation of privacy may not exist: see *R v Hugh*, 2014 BCSC 1426 [33].

When a strata lot owner sells their strata lot, their share of the common property is automatically transferred to the new owner due to section 66 of the *SPA*: see *Christian v Calvano*, 2014 BCSC 2392 [34].

E. Boundaries of Common Property

1. Strata Lot Boundaries

Section 1(1) of the *SPA* defines common property as "that part of the land and buildings shown on a strata plan that is not part of a strata lot." This may raise questions of the boundaries of a strata lot with respect to adjacent building components that are not shown on the strata plan.

Section 68 of the *SPA* provides that unless the strata plan shows otherwise, the boundary between a strata lot and another strata lot, the common property, or another land parcel is the midpoint of the structural portion of the dividing wall, floor, or ceiling. In the absence of a dividing wall, floor, or ceiling, the boundary is defined by the strata plan.

Accordingly, the inside of a wall is not inherently common property, although components found inside boundary walls are likely common property.

The boundaries of strata lots on bare land strata plans must be delineated with reference to survey markers, as approved by the Surveyor General.

2. Windows, Doors, and Skylights

Windows, doors, and skylights may be situated on top of a strata lot boundary, raising potential questions about ownership and responsibility. A door seemingly attached to a strata lot may nevertheless be common property due to being situated on the exterior side of the strata lot boundary in the midpoint of the wall: see *Aminolashrafi v The Owners, Strata Plan BCS152*, 2022 BCCRT 695 [35] at para 15.

If Standard Bylaw 8 is still in effect for a strata corporation, such building components are the responsibility of the strata corporation in all situations. Otherwise, the strata corporation may pass an alternative bylaw charging it with responsibility for windows, doors, and skylights that are part of a strata lot, as permitted by section 72(3) of the *SPA*.

The CRT has found windows, doors, and skylights that straddle strata lot boundaries to be common property: see for instance *Seymour et al v The Owners, Strata Plan VR2697*, 2018 BCCRT 227 [36] at para 25. This makes any bylaw making individual owners responsible for their repair and maintenance unenforceable due to section 72(2)(b) of the *SPA*.

F. Implied Easements

Section 77 of the *SPA* require owners to give the strata corporation reasonable access to common property in order to perform its duties, such as the duty to repair limited common property whose responsibility still rests on the strata corporation as per its bylaws. This is largely relevant for situations where common property is only accessible through a strata lot, such as a limited common property balcony accessible only through one strata lot.

What constitutes "reasonable access" depends on the bylaws. In Standard Bylaw 7, 48 hours' notice of a valid reason for entry requires an owner, tenant, occupant, or visitor to grant the strata corporation access to property that is under the responsibility of the strata corporation. If the owner continues to refuse access, the strata corporation may apply for a court or CRT order to obtain access.

In *Poole v Owners, Strata Plan VR 2506*, 2004 BCSC 1613 [25], the court upheld that an owner with authorized access to limited common property has a similar right to refuse unreasonable access by the strata corporation to common property.

G. Various Uses of Common Property

The following all affect how a particular piece of common property may be used in a strata corporation:

1. The strata plan;
2. The bylaws and rules;
3. The location of the common property;
4. The strata corporation's duty to manage and maintain common property and assets for the benefit of the owners;
5. The owner developer's disclosure statement.

1. Recreational Facilities

Many strata developments have recreational facilities for the owners' use. They are typically subject to rules that may, for instance, govern hours of operation or usage by guests. Recreational facilities may be common property, limited common property, another strata lot, or even a common asset on another land parcel.

When a recreational facility is intended the be used and accessed by more than one strata corporation, there may be easements granting mutual access to the facility. These easements must be registered to be enforceable, and once registered, they continue to bind future owners until removed.

2. The Roof

Roofs are common property, unless designated as limited common property on the strata plan for the benefit of all strata lots of a section. As common property, roofs are the responsibility of the strata corporation; as limited common property, the roof is the responsibility of its assigned section.

3. Gardens and Back Yards

A garden or back yard adjacent to a strata lot is common property, unless designated on the strata plan as limited common property or part of the adjacent strata lot. The air space above a yard that is part of a strata lot is common property: *Chan v Owners, Strata Plan VR-151*, 2010 BCSC 1725 [1].

Unless exclusive use is granted under section 76 of the *SPA*, the owner of the strata lot beside a common property garden or yard is not entitled to exclusive use. As with all other common property, alterations to a common property garden or yard requires the approval of the strata corporation. Therefore, it is advisable for a strata lot owner to ascertain whether a garden or yard is part of their strata lot or the common property before proceeding with alterations.

H. Alterations to Common Property

Under the Standard Bylaws, a strata lot owner cannot alter any common property or assets without the strata corporation's prior written permission. In contrast, the strata corporation is only limited by sections 71, 96, 97, and 98 of the *SPA* in its ability to alter common property.

1. Alterations by the Strata Corporation

Sections 96 to 98 of the *SPA* enumerate spending restrictions on a strata corporation in the course of altering common property.

The main restriction on a strata corporation's authority to alter common property is section 71 of the *SPA*: significant changes in the use or appearance of common property or common assets require ¾ approval of the strata lot owners. This includes limited common property: see *BOWIE v The Owners, Strata Plan VR1122*, 2019 BCCRT 1342 [37]. If there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage, only the strata council acting for the strata corporation is required to approve the change.

To determine whether a proposed change is "significant," the court listed the following factors in *Foley v The Owners, Strata Plan VR 387*, 2014 BCSC 1333 [38] at para 19:

1. Whether the change is visible to residents or the general public;
2. Whether the change affects the use or enjoyment of any strata lots;
3. Whether the change caused any direct interference or disruption to use;
4. Whether the change impacted the marketability or value of the strata lot;
5. The number and types of strata lots in the strata corporation;
6. Past precedent from the strata corporation's prior governance.

The following are examples of alterations that have been ruled to not be a significant change requiring approval of the owners:

- Planting shrubbery (*Reid v Strata Plan LMS 2503 (Owners)*, 2001 BCSC 1578 [39]);
- Trimming hedges (*Muscardin v The Owners, Strata Plan LMS3758*, 2022 BCCRT 912 [40]);
- Changing storage lockers from wood to wire (*Kaminski v The Owners, Strata Plan K 577*, 2021 BCCRT 1246 [41]).

In contrast, the following alterations have been found to be significant:

- Removing windows (*Basran v The Owners, Strata Plan NW 1868*, 2020 BCCRT 573 [42]);
- Changing carpet to carpet tiles (*Porcheron et al v The Owners, Strata Plan KAS 2716*, 2018 BCCRT 161 [43]);
- Changing the paint colour of the exterior trim (*Solvberg v The Owners, Strata LMS 753*, 2018 BCCRT 309 [44]).

2. Alteration by Owners

Under the Standard Bylaws, owners must receive prior written consent of the strata corporation before making any alterations to common property, including limited common property or common assets. Significant changes must be approved by ¾ of the strata lot owners, regardless of the bylaws of the strata corporation.

The strata council or the strata lot owners (in the case of a significant change) may reject a proposed alteration to common property, although it is possible for such a rejection to be struck down as a "significantly unfair act" under section 164 of the *SPA*. For instance, a section 164 claim might arise if a strata council rejects an alteration despite approving similar alterations in the past.

Owners should ensure to obtain all required municipal permits and approvals before proceeding with alterations; failure to do so can lead to problems. For instance, in *Kaufmann v Strata Corporation, Strata Plan 770*, 2008 BCSC 863 [45], an alteration was approved by the strata corporation but later found to violate the building's zoning. The court refused to order the strata corporation to apply for the necessary rezoning to accommodate the alteration, on the grounds that such an undertaking would be unduly burdensome for the strata corporation.

3. Previously Approved Alterations

Repairs and maintenance to common property may sometimes require the removal of previously approved alterations. An owner must re-apply for permission to reinstall the removed alteration, and cannot assume a right to reinstall the alteration due to approval of its previous installation (*Baker v The owners, Strata Plan NW3304*, 2002 BCSC 1559 [46]).

However, before a strata corporation commences such repairs, it must consider the possibility of proceeding without removing the previously approved alteration; failure to do so may cause the removal to constitute a significantly unfair act (*The Owners, Strata Plan VR 663 v Murphy*, 2012 BCSC 1294 [47]).

4. Indemnity Agreements Related to Alterations

A strata corporation is permitted to require a strata lot owner to assume responsibility for any expenses arising from alterations of common property. For the purposes of owner or tenant insurance policies, such an indemnity agreement should list the items and amounts to be covered.

Under section 59(3)(c) of the *SPA*, the Information Certificate that a strata corporation issues must disclose these indemnity agreements. If a strata corporation fails to make this disclosure to a strata lot purchaser, the new owner could be exempt from the indemnity agreement due to not being a party to the original agreement: see *Nguyen v The Owners, Strata Plan Vr 97*, 2022 BCCRT 260 [48].

I. Duty to Repair

The classification of property as part of a strata lot, common property, or limited common property will determine whether the strata corporation or the strata owners have the duty to repair it.

1. Repair of Common Property

From section 72 of the *SPA*, the strata corporation must repair and maintain common property and common assets. Bylaws may make the strata corporation responsible for the repair and maintenance of specified portions of a strata lot. Bylaws may also make an owner responsible for the repair and maintenance of the following:

1. Limited common property that the owner has a right to use;
2. Common property other than limited common property, but only as identified in the *SPR* and subject to prescribed restrictions.

As of July 11, 2023, no regulation has been passed to give effect to section 72(2)(b). Therefore, a bylaw purporting to make an owner responsible for common property is unenforceable. Strata corporations nevertheless sometimes enter into an agreement with an owner for that owner to be responsible for the expenses of repairing and maintaining alterations to common property, under the grounds that this responsibility would not be imposed by bylaw; it is an open question as for whether this practice is permitted by the *SPA*.

The standard of a strata corporation's section 72 duties is reasonableness, not perfection: see *Weir v Owners, Strata Plan NW 17*, 2010 BCSC 784 [49]. This means that a strata corporation is not limited to the "best" solution to a repair situation. Their duty to act in the interests of the owners does not reach as far as a fiduciary duty (*Petersen v Proline Management Ltd.*, 2007 BCSC 790 [50]), and a strata corporation that acts reasonably does not become liable for claims of negligence caused by defective repairs (*Wright v The Owners, Strata Plan #205*, [1996 [51] BCJ No 381 (QL), 1996 CanLII 2460 (BC SC)]). Because a strata council is made up of volunteers who are not expected to have expertise in building maintenance and repair, the strata council is entitled to rely on the advice of its contractors and other professionals: see *Dolnik v The Owners, Strata Plan LMS 1350*, 2023 BCSC 113 [52] at para 69.

In some situations, a strata corporation's failure to satisfy its duty to repair can constitute a significantly unfair act under section 164 of the *SPA*. However, failing to reasonably repair and maintain common property is not automatically significantly unfair: see *Jobanputra v The Owners, Strata Plan VR 911*, 2023 BCCRT 602 [53].

J. Bylaws and Rules on Common Property and Common Assets

Any Standard Bylaw does not apply to a strata corporation that has amended it out.

1. Schedule of Standard Bylaws

Under Standard Bylaw 2(2), an owner who has the use of limited common property is by default responsible for its repair and maintenance, except as provided in other bylaws.

Under Standard Bylaw 8(c), the strata corporation is responsible for repairs and maintenance of limited common property that occur less frequently than once a year, as well as all repairs and maintenance of a variety of exterior building elements.

2. Repair and Maintenance by Owner

The conjunction of Standard Bylaws 2(2) and 8(c) make an owner responsible for frequently occurring repairs and maintenance of limited common property elements. Standard Bylaw 3(2) may make an owner responsible for repairs to any damage to the strata corporation's common property and common assets that they, a tenant, an occupant, or a visitor caused.

K. Granting Short-term, Exclusive Use of Common Property

For common property that is not designated as limited common property, section 76 of the *SPA* enables the strata corporation to grant exclusive use to an owner or tenant. This permission can be made subject to conditions. Generally, this permission should be made in writing and recorded in strata council meeting minutes.

Permission for short-term exclusive use of common property can last for a maximum of one year. Afterwards, the strata corporation may choose to renew that permission, possibly with a different period or set of conditions. Short-term exclusive use of common property may be revoked by the strata corporation providing reasonable notice to the owner or tenant enjoying exclusive use, as long as doing so is not significantly unfair.

The most common use of section 76 is to assign owners to parking stalls that are common property. Another possible use of section 76 is common property that is only accessible through one strata lot, such as some yards or patios. Section 76 enables the strata corporation to regulate the area's use differently across time.

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VI. Governance

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. Role of the Strata Council

The strata corporation operates through the strata council (*SPA*, s. 4) and has the power and capacity of a natural person of full capacity (*SPA*, s. 2(2)). Where the SPA references “the strata corporation,” it is referring to decisions of the strata council that exercise the strata corporation’s powers. The strata council is responsible for exercising the powers and performing the duties of the strata corporations, including enforcing the bylaws (*SPA*, s. 26), and conducts business of the strata corporation subject to directions from the owners of the strata lots.

In exercising their powers, strata councils are empowered to make many decisions that affect the lives of the owners of the strata corporation. For instance, they may make decisions regarding the allocation and use of common property, or decisions concerning compliance with bylaws.

Strata councils are elected at annual general meetings, including the first annual general meeting called by the owner developer.

1. Mandate and Limitations

Under s. 4, the powers and duties of a strata corporation must be exercised by the strata council except where the *SPA*, the *SPR*, or the strata corporation's bylaws provide otherwise.

Every reference to the *SPA*, the *SPR*, and a strata corporation's bylaws to a "strata corporation" must be read as a reference to the strata council unless a clear contrary intention exists. For sections, the equivalent of the strata council is called the section executive.

a) Strata Council Duties

Unless there is a bylaw limiting its authority, the duties of a strata council include the following:

- Managing, maintaining, and repairing common property (s. 3);
- Establishing and maintaining an operating fund and a contingency reserve fund;
- Obtaining and maintaining liability insurance, and property insurance on the common property, common assets, and original building, including fixtures;
- Convening annual general meetings (s. 40) and special general meetings in response to owner demands (s. 43);
- Maintaining strata corporation and section records (s. 35) and making them available (s. 36);
- Enforcing bylaws and rules of the strata corporation.

b) Matters Requiring Owner Approval

Strata lot owner approval is often required when making decisions in a number of areas, including finances, dealing with property, litigation, and strata plan changes. When owner approval is required, the strata council carries out the action in the name of the strata corporation. Often, authorizing resolutions are drafted to authorize one or two council members to execute the action.

The strata council must continuously decide whether they have jurisdiction over matters. Many sections of the *SPA* require approval only if certain criteria is met, like making "significant change" (s. 71), or whether an immediate expenditure is "necessary to ensure safety" (s. 98(3)). In cases like these, the strata council may need legal counsel to give guidance over whether the strata council has jurisdiction.

c) Matters Requiring Bylaw Authority

Some matters may be dealt with by the strata council only if authorized by the strata corporation bylaws, including:

1. Charging interest on arrears (s. 107);
2. Taking collection proceedings against an owner in Small Claims Court (s. 171(4)).

d) Conflicts of Interest

Under s 31 of the *SPA*, strata council members are required to act honestly and in good faith with a view to the best interests of the strata corporation. Acting in good faith, under Standard Bylaw 22, relieves a council member of liability for anything done in the performance of their duties.

From section 32 of the *SPA*, strata council members are required to disclose any direct or indirect conflicts of interest they may have in a contract or transaction with the strata corporation. In any other matter, if a duty or interest that contradicts their duty or interest as a strata council member may arise, that strata council member must similarly disclose the conflict of interest. In strata corporations that have formed sections, strata council members who are also part of a section may find that their interest as a section member frequently conflicts with their interest as a strata council member.

Strata council members with a conflict of interest must promptly disclose to the council the full nature and extent of the interest. They must then abstain from voting on the matter, as well as leave the strata council meeting during discussion and voting on the matter, unless the council requests the member to provide information (*SPA*, s 32).

If a strata council member fails to disclose their conflict of interest in a contract or transaction, the other owners may ratify it by a ¾ vote at an annual or special general meeting after receiving full disclosure of the conflict. If the owners fail to ratify the contract or transaction, the strata corporation or an owner can apply to the court for a remedy under section 33 of the *SPA*.

If the court finds that the contract or transaction was unreasonable or unfair to the strata corporation, it may order a remedy such as:

- Setting aside the contract;
- Ordering the strata council member to compensate the strata corporation's resulting losses; or
- Ordering the strata council member to pay any of their resulting profits to the strata corporation.

e) Standard of Care for Strata Council

Section 31 of the *SPA* requires strata councils must act towards the best interests of the strata corporations, with honesty and good faith. In doing so, the strata must exercise the care, diligence, and skill of a reasonably prudent person in similar circumstances. See *Dockside Brewing Co. Ltd. v Strata Plan LMS 3837*, 2007 BCCA 183 [1] for an application of section 31, which the Supreme Court of Canada would decline to overturn.

In *Rochette v Bradburn*, 2021 BCSC 1752 [2] at para 83, the court clarified that section 31 does not create a standalone right for a strata owner to sue a strata council over breaches of its standard of care. While section 31 does inform the standard of conduct from sections 32 and 33, a court action still must satisfy the requirements from section 33: a strata council member failing to adequately discharge their duty to disclose conflicts of interest, and the remaining owners failing to ratify the affected decision.

2. Strata Council Size and Composition

a) Composition and Terms of Office

Section 25 of the *SPA* provides that a full council must be elected at each annual general election. There are, however, bylaws that some strata corporations have adopted providing for staggered, multi-year terms of council members that help preserve continuity on the strata council.

Each strata council member must be elected, meaning that a bylaw purporting to appoint council members without election is unenforceable: see *Marook Super Pty. Ltd v The Owners, Strata Plan KAS 2205*, 2019 BCCRT 906 [3].

b) Eligibility

S. 28 states that the only persons who may be council members are owners, individuals representing corporate owners, and tenants who have been assigned a landlord's right to stand for council under s. 147 or s. 148. Bylaws can be made, however, to permit others to sit on the strata council, although *Paget v Strata Plan LMS 1951*, 2021 BCSC 2111 [4] held that a person acting under the authority of a power of attorney cannot sit as a member of a strata council.

If two or more persons own a strata lot, only one of them can sit on the strata council unless all strata lot owners are on the strata council. This includes corporate owners, who may only elect one representative to sit on the strata council with respect to each strata lot.

c) Size

Standard Bylaw 9 of the *SPA* states that the strata council must have at least three and no more than seven members. This gives the strata corporation the ability to choose to acclaim any eligible candidate if there are less than seven members or establish resolutions and adopt bylaws as mechanisms to determine the size of the council.

d) Elections of Strata Council Members

The first strata council is elected at the first annual general meeting, and thereafter at each annual general meeting, subject to the bylaws.

If the strata corporation's bylaws provide for a range of council members, as Standard Bylaw 9 does, there may be no mechanism for determining the actual size of the strata council. A common practice, in this case, is to name all nominees to the council if there are fewer nominations than the maximum number specified in the bylaw or by Standard Bylaw 9.

The issue raised from naming all nominees to council is that someone could be elected to council despite opposition from a majority of the owners. This could be addressed by a bylaw amendment mandating that the number of council members may range from three to seven, as fixed from time to time by majority vote resolution at a general meeting, or a bylaw amendment mandating a specific form of balloting. Both methods could be subject to challenge under s. 164 if it is a departure from the established norm.

S. 50(1) of the *SPA* requires decisions at general meetings to be made by majority vote. This does not include elections by acclamation, as decided by the court in *Yang v Re/Max Commercial Realty Associates (482258 BC Ltd.)*, 2016 BCSC 2147 [5], although the court also said that it was still better practice to still require a vote unless a majority of the owners approve a resolution to have the election proceed by acclamation.

e) Removal

Standard Bylaw 11 provides that, unless all strata lot owners are on the strata council, one or more council members can be removed by a majority vote at a general meeting, although some strata corporations may pass bylaws requiring a higher threshold. The CRT in *Wong's Insurance Services Ltd. v Strata Plan LMS 3259*, 2022 BCCRT 831 [6] held that there is a reasonable expectation that a strata council would provide to owners reasons for removal based on true facts.

f) Vacancies

Standard Bylaw 12 gives the strata council authority to fill vacancies created by the resignation or incapacitation of a council member, and preserves the ability of the remaining council members to do so even if they lack a quorum.

g) Renumeration

S. 34 of the *SPA* provides that any remuneration paid to a member of council for the member's exercise of council powers of performance of council duties must be approved in advance of payment in the budget, in the bylaws, or by a resolution passed by a ¾ vote at an annual general meeting.

3. Strata Council Powers

a) Capacity to Contract

S. 2 provides that a strata corporation has the power and capacity of a natural person of full capacity, subject to any limitation under the *SPA* or *SPR*. S. 38(a) clarifies the strata corporation's ability to enter contracts, providing that it may enter into contracts in respect of its powers and duties under the *SPA*, the *SPR*, and the bylaws.

b) Joining Organizations

S. 38(b) also clarifies s. 2 by proving that a strata corporation may join organizations to further its purposes under the *SPA*, the *SPR*, and its bylaws.

B. Strata Corporation Meetings

1. General Meetings of the Strata Corporation or a Section

a) Conduct of General Meetings

The *SPA* and Standard Bylaws do not have guidelines on the following matters:

- Whether and how business can be tabled to a future meeting;
- To what extent the meeting can amend the agenda prepared by the strata council;
- Whether and how a ruling of the chair can be challenged;
- How elections of strata council and section executive members are conducted.

If these matters are not addressed by the strata corporation's bylaws, they are determined by the chair, subject to the right of any voter to initiate legal proceedings to challenge the conduct of the meeting. In legal proceedings, common law applicable to corporate proceedings, such as *Robert's Rules of Order* can be expected to govern as long as they are not taken advantage of to undermine democratic principles governing strata meetings, as held in *The Owners, Strata Plan NW 971 v Daniels*, 2009 BCSC 1235 [7].

b) Strata Corporation and Section Meetings

The strata council is not permitted to call meetings of sections. Section meetings are convened by the section executive, and are considered separate meetings with separate notices, agendas, proxied, quorums, resolutions, and minutes.

c) Types of General Meeting

Annual General Meeting

The first annual general meeting of a strata corporation is convened by the owner developer within a specified period following either the first conveyance or conveyance of 50 per cent plus one of the strata lots. Then, the strata council is responsible for holding annual general meetings within two months following each fiscal year-end (s. 40).

Special General Meeting

A special general meeting is any general meeting that is not an annual general meeting. It can be convened at any time by the strata council (s. 42) or demanded by the strata lot owners (s. 43). These are usually called to deal with a special levy, a contingency reserve fund expenditure, or a litigation matter.

d) Chair of General Meeting

Standard Bylaw 25 provides that the president chairs a general meeting of the strata corporation; in the absence of the president, the vice president in absence of both, a chair selected by the meeting. It should be noted, if a third party is selected, that the president and vice president both declined to chair.

e) General Meeting Notice and Delivery

S. 45 states that at least two weeks' written notice of a general meeting must be given to:

1. Strata lot owners;
2. Tenants who have been assigned the right to vote under s. 147 and 148;
3. Mortgagees who have requested notifications of meetings under s. 60.

S. 45(2) permits that any person entitled to be notified can waive notice by a written notice, though such a waiver is revocable.

S. 61(1) provides how notice can be given to a strata lot owner or tenant entitled to notice. S. 61(1)(b) provides that if the strata lot owner or tenant has not given an address outside the strata plan for notice, it can be hand delivered, put under the door, mailed, put through a mailbox, faxed to a number provided by the person, or emailed to an address provided by the person.

S. 61(1)(a) provides that is the strata lot owner or tenant has given an address outside the strata plan, only personal service or mail delivery are permitted. *Azura Management (Kelowna) Corp. v Strata Plan KAS 2428*, 2009 BCSC 506 [8] includes email delivery as part of the "mail" delivery requirement in 61(1)(a), going against the *Interpretation Act*, RSBC 1996, c 238 [9], which defines "mailing" as sending prepaid through the Canada Post Office.

S. 61(3) provides that a meeting notice is given, where not directly hand-delivered, four days after mailing, faxing, or emailing.

Notice of an annual or special general meeting must include (s. 45(3)):

1. A description of the matters that will be voted on at the meeting, including the proposed wording of any resolution requiring a ¾ vote, 80% vote, or unanimous vote;
2. The date, time and, if applicable, place of the meeting;
3. If attendance by telephone or other electronic means will be permitted, instructions for attending the meeting by electronic means.

This provision must be strictly adhered to, as the BCSC declared a bylaw amendment voted on at a general meeting to be void because the bylaw amendment was not included in the notice before the meeting in *453881 B.C. Ltd. v Strata Plan LMS 508*, 1994 CanLII 1412 (BC SC) [10]. However, the court held in *Azura Management* that a ¾ vote approval had been approved despite not being referred to in the notice, so the current strength of s. 45(3) is unclear.

f) General Meeting Agenda

S. 46(1) provides that the strata council determines the agenda for a general meeting unless a resolution is proposed by a demand of owners under s. 46(2) or the meeting is demanded and called by voters under s. 43.

Then, once the meeting has begun, Standard Bylaw 28 provides that approval of the items in the agenda is one of the first items of business at a general meeting of a strata corporation.

g) Resolutions from the Floor

A general meeting notice must include a description of the matters that will be voted on (s. 45(3)). This requirement makes it clear than any resolution requiring a ¾ vote, 80% vote, or unanimous approval must be included in the meeting notice and cannot be raised from the floor. *Leung v Strata Corp. LMS 2835*, 2001 BCSC 1602 [11] confirms this, as a council member was removed from his position during a heated debate at a general meeting, and the courts determined that the member should be reinstated.

It is not clear, however, if matters that require only majority vote approval are permitted from the floor. It may be the case that if a resolution from the floor directing the strata council under s. 27, that is to control their own powers, is

related to an item of business included in the meeting notice, the resolution may be able to stand if it is amended to only require majority vote approval.

h) Owner Demands

Owners in a strata corporation can propose a resolution or raise a matter under s. 46(3) or demand a general meeting to consider a resolution or matter under s. 43 if the proposal/demand is signed by persons holding at least 20% of the strata corporation's votes. The owner is restricted from signing as part of the 20% if the strata corporation has a bylaw suspending the vote for a strata lot if the strata corporation is entitled to a lien.

S. 63(1) of the *SPA* provides the requirements for delivering a demand to a strata corporation. The demand can be:

- Hand-delivered to a council member;
- Mailed to the address of the strata corporation on record in the Land Title Office;
- Faxed to the number provided by a council or filed in the Land Title Office;
- Delivered using a mail slot or mailbox used by the strata corporation;
- Emailed to the strata corporation's email address or to an email address provided by a strata council member for that purpose.

If not hand-delivered, the demand is deemed to have been given four days after mailing, faxing, mail-slotting, or emailing.

A s. 46 demand proposing a resolution or raising matter must be complied with at the next general meeting, whether that be annual or general.

A s. 43 demand compels the strata council to hold a special general meeting to consider the matter or resolution four weeks after the demand is given. If this is not complied with, the persons who signed the demand can set a special general meeting themselves held under the applicable provisions of the *SPA* and the bylaws.

i) Proxies

S. 56 permits strata lot owners, tenants, and mortgagees entitled to vote at a general meeting to do so by proxy, where the proxy:

1. Must be in writing and signed by the person appointing the proxy;
2. Can be general or for a specific meeting or resolution;
3. Is always revocable (a later proxy must be considered to revoke an earlier one).

Text messages do not qualify a proxy, per *Hedberg v The Owners, Strata Plan 511*, 2021 BCCRT 340 [12]. Unless limited by a strata corporation's bylaws to specify how a grantor's vote is to be exercised on one or more specific resolutions, a proxy appointment is unlimited and permits the proxy to participate fully in the meeting. Further restrictions on the limits of proxies in general meetings include:

- Proxies are not ballots, so they should not be drafted with "check boxes" for various resolutions (see *Curll v The Owners, Strata Plan NW 2926*, 2021 BCCRT 504 [13]);
- If a strata lot is owned by more than one person, either may give a proxy, but if both do, neither is valid;
- If the strata corporation has a bylaw suspending the vote for a strata lot if the strata corporation is entitled to register a lien, a proxy holder may not vote with respect to that strata lot.

As of July 18, 2023, the *SPR* does not contain any provisions governing the selection of proxies. As a result, the effect of section 56(3) of the *SPA* is that voters are permitted to appoint anyone as a proxy, except for employees of the strata corporation or persons who provide management services to the strata corporation. Strata corporations are not allowed to make any further restrictions on whom a voter may appoint as a proxy: see *The Owners, Strata Plan VR320 v Day*, 2023

BCSC 364 [14] at para 50.

j) Electronic Attendance

S. 49 of the *SPA* permits attendance at a general meeting to be done electronically by speakerphone, telephone conference, video conference, and web conference, as long as:

- The notice or the meeting given under s. 45 includes instructions for attending by electronic means;
- The electronic means permits all participants to communicate with each other;
- The electronic means allows the meeting's chair to identify whether a participant attending by electronic means is an eligible voter.

An eligible voter attending by electronic means does not need a voting card and is not required or entitled to vote by secret ballot (s. 49(3)).

k) Quorum for a General Meeting

Unless specified differently in the strata corporation bylaws, s. 48 provides that a quorum for a general meeting is one-third of the votes, except where there are fewer than four strata lots or strata lot owners, in which case quorum is two-thirds.

Unless specified differently in the strata corporation bylaws, s. 48(3) provides that if there is no quorum within 30 minutes after the time specified in the meeting notice, the meeting is adjourned to the same day in the next week at the same place and time, if applicable. If, on that day, there is no quorum within 30 minutes after the specified time, the eligible voters then present constitute a quorum.

Under, s. 51(9), a meeting convened under s. 51 for the purpose of reconsidering a ¾ vote resolution is cancelled if it does not have a quorum within 30 minutes of the specified time. No bylaw can override this provision.

l) Eligible Voters

Defined

Voters at a general meeting are all "eligible voters", defined in s. 1(1) as all persons who may vote under ss. 53 to 58:

1. By default under s. 54, the registered owners of all strata lots, each with the voting power set out in the schedule of voting rights, if any, filed in the Land Title Office unless someone else is entitled to vote with respect to that strata lot as set out below;
2. Tenants who have the right to vote under s. 147 or 148;
3. Mortgagees whose mortgages give them the right to vote, if the requirements of ss. 54(1)(c) and 60 are met; and
4. The parent, guardian, or legal representative of one of the voters described above, or a voter appointed by the court.

Tenants

S. 147 provides that a tenant may be assigned a strata lot owner's right to vote, effective when written notice is given to the strata corporation setting out the tenant's name and specific details on the duties assigned and time period of assignment. If the tenant is leasing a residential strata for a fixed period of three years or more, the tenant is automatically entitled to exercise the powers of the owner under the *SPA* during the lease (s. 148), provided the strata corporation receives written notification.

Mortgage

A mortgagee may exercise the vote for a strata lot only for a matter in relation to finance, insurance, maintenance, or other matters affecting the mortgagee's security if:

1. The registered mortgage gives the mortgagee the right to vote; and
2. The mortgagee gives written notice to the strata corporation or section, to the owner, and to any tenant who has the right to vote, at least three days before the meeting.

Suspension of Voting Rights for Arrears

A strata corporation may, under s. 53(2), adopt a bylaw to automatically suspend the vote for a strata lot if the strata corporation is entitled to register a lien against that strata lot. In order for the strata corporation to be "entitled to register a lien" under s. 116(1), notice must have been given under s. 112(2) and at least two weeks must have passed. This excludes the day the notice was sent and the meeting day (s. 25 of the *Interpretation Act*). Delivery rules under s. 61 should govern as well.

Shared Vote

S. 57 provides that if two or more persons are entitled to vote with respect to a strata lot, only one can vote on a particular matter, and they can change who votes for each respective matter. If they disagree on how to cast their vote on a particular matter, their vote is not counted.

BBR Management Inc. v Strata Plan KAS 3359, 2022 BCCRT 1254 [15] held that the rules provided by s. 57 apply where two or more persons share a vote of one, and not where multiple owners share multiple votes.

m) Voting and Types of Resolution

Polls and Secret Ballots

Standard Bylaw 27 provides for default voting by a show of voting cards, although the floor of the meeting may request for a "precise count" in which the chair is to decide the voting method. In any event, the bylaw gives any voter the right to demand a secret ballot.

If a secret ballot is held, a private area must be provided for voters to tender their ballots. If the secrecy of the ballots is not maintained, the vote and resulting resolution may be rendered void (*Imbeau v Strata Plan NW 971*, 2011 BCSC 801 [16]).

Majority Vote

"Majority vote" is defined in s. 1(1) of the *SPA* as a vote in favour of a resolution by more than one-half of the votes cast by eligible voters present in person or by proxy, and who have not abstained from voting. Abstention drops the threshold for passage of a resolution. For example, if 10 voters are present and one abstains, five votes is enough to make a majority vote. Majority vote is the default threshold for decisions at general meetings of a strata corporation (s. 50(1)). If the majority vote resolution had 50 per cent support, the president or vice president has a second vote under Standard Bylaw 27.

¾ Vote

"¾ vote" is defined in s. 1(1) as a vote in favour of a resolution by at least three-quarters of the votes cast by eligible voters present in person or by proxy, and who have not abstained from voting. The same abstention rules of majority votes apply, however, if abstentions result in a ¾ vote being passed with less than 50 per cent of the total votes in the strata corporation, s. 51 provides that the vote may be reconsidered at another general meeting. The proposed wording of any ¾ vote resolution must be included in the meeting notice, per s. 45(3).

80% Vote

"80% vote" is defined in s. 1(1) as a vote in favour by at least 80% of all eligible voters, unlike 80% of those in attendance in person or by proxy for majority vote or ¾ vote. This also means that abstentions and no-shows do not drop the threshold, but instead act as a vote against the resolution. 80% votes are required only in respect of a strata plan cancellation pursuant to s. 272 (without a liquidator) or s. 277 (with a liquidator). The proposed wording of any 80% vote resolution must be included in the meeting notice, per s. 45(3).

Unanimous Vote

Unanimous vote is defined in s. 1(1) of the *SPA* as a vote in favour by all votes of eligible voters. Similar to the 80% vote, abstentions do not lower the threshold and instead act as a vote against the resolution. Per s. 57(2) of the *SPA*, if two or more persons are entitled to vote, only one of them still may vote, and that vote must be in favour without a sense of disagreement. The proposed wording of a unanimous vote must be included in the meeting notice, per s. 45(3).

There is an exception in s. 52 allowing the strata corporation to pass a unanimous vote without getting affirmative votes from all eligible voters. The court can order that a unanimous vote proceed without receiving if votes in favour from all eligible voters if the following conditions are met:

1. More than 95% of the votes are in favour of the passage of the unanimous resolution in a strata corporation consisting of lots with at least 10 votes;
2. Its passage is in the best interest of the strata corporation;
3. Its passage would not unfairly prejudice the dissenting voter or voters.

Consent Resolutions

Under ss. 41 and 44, the owners in a strata corporation can waive the holding of an annual or special general meeting to pass a unanimous vote via unanimous written consent if the consent resolution is signed by all strata lot owners registered on title or entities assigned the right to vote. This consent resolution can be initiated by any eligible voter, and abstentions and no-shows are counted as votes against the consent resolution.

This is contrary to the requirement of a meeting in the mortgagee notification procedure in s. 54(1)(c). To get around this, written consent should be obtained of every mortgagee if the matter is in relation to insurance, maintenance, finance, or other matters affecting the security of the mortgage.

An owner of a strata lot whose vote is suspended for a lienable strata lot maintains its ability to vote on resolutions requiring a unanimous vote (s. 53). S. 53 also lists sections in which such strata lot's vote is not counted, and ss. 41 and 44 are not included in that list. It follows, then, that written consent must be obtained from such owners to pass a consent resolution.

2. Council and Section Executive Meetings

Under s. 26, strata council business must be conducted in accordance with the *SPA*, the *SPR*, and the bylaws.

a) Elections of Officers

Although the *SPA* does not require a strata corporation to have officers, Standard Bylaw 13 refers to officers and mandates elections of a president, vice president, secretary, and a treasurer. The president has the deciding vote in council meetings (Standard Bylaw 18(2)) and general meetings (Standard Bylaw 27(5)).

In absence of bylaw provisions stating otherwise, officers can be removed by majority vote at a council meeting.

b) Calling

Any council member can call a strata council meeting on one week's notice (Standard Bylaw 14).

Azura Management (Kelowna) Corp. v The Owners, Strata Plan KAS 2428, 2009 BCSC 506 [8] and *Yang v Re/Max Commercial Realty Associates (482258 BC Ltd.)*, 2016 BCSC 2147 [5] both confirm that meetings can be done over email as long as minutes are provided for them, but the CRT in *Starr v The Owners, Strata Plan EPS 59*, 2019 BCCRT 778 [17] advised that any decisions made during an official meeting over email should be validated and voted on.

c) Right to a Hearing

Under s. 34.1 of the *SPA*, if a strata lot owner requests a hearing at a council meeting in writing stating the reason for the request, the council must hold a meeting within four weeks to hear the applicant. This right cannot be repealed by a bylaw amendment. Within one week of the hearing, the council must provide a written decision (*SPA*, s. 34.1(3)).

d) Quorum for Strata Council Meetings

Quorum for strata council meetings is governed by their bylaws. Standard Bylaw 16 defines the quorum as:

1. One, if the strata council consists of one member;
2. Two, if the strata council consists of two, three, or four members;
3. Three, if the strata council consists of five or six members; or
4. Four, if the strata council consists of seven members.

e) Electronic Means

Provided all council members can communicate with each other, electronic attendance is permitted at meetings (Standard Bylaw 17). This bylaw also discourages polling council members on issues by telephone or email, because the rest of the members cannot communicate with each other.

Asynchronous meetings are permitted as long as all parties can communicate with each other over a period of time, review all discussion on a particular matter, and votes can be recorded using chat-room or meeting software.

f) Strata Council Meeting Attendees

Chair

It is open to the strata council to organize meetings as it sees fit, and there is no requirement for the president or any other council member to chair council meetings.

No Proxies

Bylaw 16(2) requires council members to be present to be counted in the quorum, and Standard Bylaw 18 permits only those present (including by electronic means) to vote. Therefore, proxies are not permitted under the Standard Bylaws.

Observers

While the *SPA* contains no provisions regarding observers, Standard Bylaw 17 provides that observers to meetings must be excluded when dealing with bylaw contraventions and other matters if the observers' presence would unreasonably interfere with an individual's privacy.

Owners Adverse in Litigation

Under ss. 169 and 176 of the *SPA*, a strata lot owner who is adverse to a strata corporation in litigation or arbitration is not entitled to attend those portions of strata council meetings dealing with the litigation.

g) Voting

Majority

While the *SPA* does not have provisions on the decision-making processes at council meetings, Standard Bylaw 18 mandates decisions by majority vote of those council members present, either by electronic means or in person.

Casting Vote

The president of a strata corporation has a casting vote in the case of a tie, except in the case of a two-lot strata plan (Standard Bylaw 18).

C. Meeting Minutes

1. Meetings that Require Minutes

S. 35 provides that minutes must be taken at every general meeting and every council meeting. Committees of the council and informal discussions among council members need not have minutes taken.

2. Contents of Minutes

S. 35(1) provides that, at a minimum, minutes must contain any votes taken at a strata council meeting or general meeting. The CRT in *Claridge v The Owners, Strata Plan LMS 223*, 2020 BCCRT 161 [18] found that if a strata corporation includes minutes more detailed than the minimum provided by s. 35(1), the minutes must be reasonably accurate so that they do not mislead the owners.

D. Strata Corporation Recordkeeping

1. Retention of Records

Under s. 35, every strata corporation must prepare the following records and retain them for the periods indicated under s. 4.1 of the *SPR*:

1. Minutes of general meetings and strata council meetings (six years);
2. A list of council members with phone numbers and/or emergency contact details under s. 4.1(1) of the *SPR*;
3. A list of strata lot owners and tenants, mortgagees who have requested notices of meetings and money owing under s. 60, and assignments of voting rights to tenants under ss. 147 and 148;
4. Books of account (six years).

Under s. 35, a strata corporation must retain copies of the following, for the periods indicated, under s. 35 of the *SPA* and s. 4.1 of the *SPR*:

1. The strata plan and amendments (permanently);
2. The *SPA* and *SPR* (current copies);
3. The strata corporation's bylaws and rules (current copies);
4. Common property resolutions under ss. 71, 74, and 75 of the *SPA* (permanently);
5. Waivers of general meeting notices and consents resolutions under ss. 41, 44, and 45 (six years);
6. Contracts including insurance policies (six years after termination);
7. Decisions of judges, arbitrators, and the CRT in matters to which the strata corporation is a party, and legal opinions obtained by the strata corporation (permanently);
8. Budgets and financial statements (six years);
9. Income tax returns (six years);
10. Correspondence (two years);
11. Bank statements and supporting documents (six years);
12. Form B information certificates (six years);
13. Building permit plans obtained from the owner developer under s. 20 (permanently);
14. As-built drawings obtained from the owner developer (permanently);
15. Contracts, including insurance policies, entered into by the owner developer on behalf of the strata corporation (six years after termination);
16. Disclosure statements filed by the owner developer (permanently);
17. Information on contractors who supplied labour and materials to the project, obtained from the owner developer (permanently);
18. Warranties related to common property and assets, obtained from the owner developer (until expiration of warranty or disposal of asset);
19. Manuals and plans related to common property and assets, obtained from the owner developer (until disposal of the asset);
20. Financial records obtained from the owner developer (six years);
21. Depreciation reports under s. 94 (permanently) and any reports respecting maintenance or repair of major items (until the items are disposed of or replaced).

2. Location of Records

The *SPA* does not specify the location at which records must be kept, but the onerous requirements of s. 35 make some approaches (like retaining records in the possession of one or more strata council members) riskier than others.

3. Records Disclosure and Production Requirements

All s. 35 records must be available to:

1. Strata lot owners;
2. Tenants who have been assigned an owner's right to inspect records under s. 147 or 148, and anyone authorized by them in writing;
3. Former owners and former tenants, with respect to documents relating to their period of ownership or tenancy.

The strata corporation must comply with requests for access to records within two weeks (s. 36) or, if the request if regarding the rules or bylaws, within one week. The CRT has held in *Slack v The Owners, Strata Plan EPS 4413*, 2022 BCCRT 681 [19] that document requests must be reasonable, and it was not reasonable to essentially request to review all records that the strata corporation was required to keep under s. 35.

A strata corporation has no obligation to retain, create, or disclose any documents not listed in section 35 of the *SPA*.

4. Keeping and Producing "Controversial" Records

Strata corporation records may be considered controversial for several reasons, although these reasons generally do not affect the strata corporation's disclosure requirements:

1. They may contain information related to litigation that is privileged under s. 169 of the *SPA*;
2. They may contain information, such as legal advice, obtained by the strata council in contemplation of litigation;
3. They may contain documents that include potentially defamatory statements;
4. They may contain strata lot owners' submissions and other information related to bylaw contraventions or fines;
5. They may contain "personal information" under the *Personal Information Protection Act*, S.B.C. 2003, c. 63 [20].

With respect to information related to litigation that has not yet commenced (such as legal opinions), *The Owners, Strata Plan VR 1120 v Mitchinson*, 2022 BCSC 2054 [21] held that this kind of information protected by common law solicitor-client privilege cannot be disclosed to the owner adverse to the strata corporation in the dispute.

5. Consequences of Refusal to Produce Records

If a strata corporation refuses to give access to information to a person entitled to is under s. 36, the person is entitled to seek a court order under s. 165 compelling the strata corporation to comply, and likely gain an award of costs. They can also seek an order to provide documents from the CRT.

As discussed, the corporation can claim solicitor-client privilege over communications with legal counsel in appropriate circumstances, but *Mason v Strata Plan BCS 4338*, 2017 BCCRT 47 [22] held that the corporation cannot redact personal information from complaint letters and other records of a strata corporation.

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VII. Management

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. Introduction to Strata Management

The most common type of management of a strata corporation in British Columbia, and the primary focus of this section, is a professional, third-party strata manager who is licensed by BF Financial Services Authority ("BCFSA") and bound by the provisions of the *Real Estate Services Act*, SBC 2004, c 42 [1] ("*RESA*") and the *Real Estate Services Rules*, BC Reg 209/2021 [2] ("*RES Rules*"). This manager is contractually engaged by a strata corporation to provide "strata management services" as defined in s. 1 of *RESA*.

Less commonly, in other cases, strata corporations can choose to be self-managed with no licensing requirements. S. 2.17 of the *Real Estate Services Regulation*, B.C. Reg. 506/2004 [3] ("*RES Regulation*") permits an unlicensed individual to provide strata management services to a maximum of two strata corporations to which the person is an owner.

1. Definition of Strata Management

Neither the *SPA* nor the *SPR* provide definitions for the term "strata management", but there are references to the term in each. For example, s. 37 of the *SPA* and s. 4.3 of the *SPR* both refer to the strata management as "providing the strata management services".

B. The Contractual Relationship

1. Power and Capacity of a Strata Corporation to Contract

S. 2(2) of the *SPA* states that a strata corporation has the power and capacity of a natural person of full capacity. This includes the ability to enter into contracts in respect of its powers and duties under the *SPA*, the *SPR*, and the bylaws. Therefore, the strata corporation is permitted to enter into contracts for the provision of strata management services.

2. Contract Decisions

The *SPA* and the courts (*Enefer v The Owners, Strata Plan LMS 1564*, 2005 BCSC 1866 (Chambers) [4]) give the strata council permission to make decisions regarding contracting parties, including with which parties the strata corporation will contract.

If funds being spent by a strata corporation occur more frequently than once a year, the *SPA* requires that the expenditure is approved in a budget before funds are spent. Only after the expenditure is approved and the budget that includes the expenditure is approved by the strata low owners, can the strata council enter into a contract with a strata manager of its choice.

3. Termination of Strata Management Contract

S. 39.1 of the *SPA* permits a strata management contract to be terminated by a strata corporation on two months' notice if the cancellation passes a ¾ vote at an annual or special general meeting, regardless of any termination provisions in the strata management contract. The other party can terminate on two months' notice without prior approval.

S. 39.2 clarifies that the only time a ¾ vote is not needed by the strata corporation to cancel a contract is when the contract could be terminated according to its terms if they are not onerous.

Within four weeks of the termination of a contract, s. 37 confirms that the person(s) providing strata management must return the strata corporation's records, subject to a $1,000 penalty if they do fail to do so per s. 4.3 of the *SPR*.

C. Role of the Strata Manager

1. Exercise of Delegated Power and Duties

A strata manager exercises delegated powers and duties of a strata corporation and can often act as chair of general meetings and facilitate part of the strata council's business, although the strata manager is under the instruction of the strata council.

2. Principal/Agency Relationship

Unless specifically stated otherwise, a strata manager acts as an agent of the strata corporation, authorized to act on the strata corporation's behalf when dealing with other parties, issuing forms and records, and entering into contracts.

The common law has developed duties that an agent (strata manager) owes to its principal (strata corporation), referred to as fiduciary duties. S. 56 and s. 58 of the *RES Rules* give examples of those fiduciary duties in the disclosure of renumeration and disclosure of the nature and extent of benefits in relation to rental property management services and strata management services.

Further, s. 30 of the RES Rules set our requirements for a “brokerage” and its “related licensees”, in this case the strata manager, when providing services to a client. S. 33 and s. 34 add additional requirements to act honestly and with reasonable care and skill when providing real estate services, respectively.

3. Strata Management Correspondence

The strata manager will receive and send correspondence on behalf of the strata corporation or strata council. Such correspondence will form part of the records of the strata corporation, unlike communication amongst strata council members, as held by the CRT in *Hamilton v The Owners, Strata Plan NWS 1018*, 2017 BCCRT 141 [5].

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VIII. Finances

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. Introduction to Strata Corporation Finances

A strata corporation collects funds from the owners to fulfill many of its duties. Funds are collected and allocated to the strata corporation’s operating fund, contingency reserve fund, or a special levy fund. The funds are spent in accordance with the authority granted at an annual or special general meeting and within the confines of the *SPA* and the *SPR*.

B. Operating Fund

1. Purpose of Operating Fund

Each strata corporation must establish an operating fund (*SPA*, s 92) to be used for common expenses that occur either once a year or more often than once a year. Examples include landscaping, management fees, annual inspection fees, and office and administrative expenses.

a) Common Expenses

Under s 1(1) of the *SPA*, "common expenses" is defined as those expenses:

1. Relating to the common property and common assets of the strata corporation; or
2. Required to meet any other purpose or obligation of the strata corporation.

b) Strata Fees

To create the operating fund, each owner contributes fees that are determined by reference to the budget approved at the annual general meeting. These fees are generally a strata corporation's primary source of income. The default formula to calculate strata fees is set out in s 99:

$$\frac{Unit\ Entitlement\ of\ Strata\ Lot}{Entitlement\ of\ all\ Strata\ Lots} \times Total\ Contributions$$

Per s 107(1), interest can be charged by bylaw on late payments so long as the rate of interest does not exceed what is set out by the SPR, which is currently 10% per annum, compounded annually.

2. Approval Requirements

S 13(1) of the *SPA* requires the owner developer to prepare an interim budget for the strata corporation for a 12-month period beginning on the first day of the month following the month in which the first conveyance of a strata lot to a purchaser occurs. This interim budget must include:

- The estimated operating expenses of the strata corporation for the 12-month period;
- The contribution to the operating fund for the 12-month period, which must be at least 5% of the estimated operating expenses;
- Each strata lot's monthly share of the expenses calculated by the formula in s 99.

For every fiscal period following the first annual general meeting, a strata corporation must prepare a budget for the coming fiscal year (s 103(1)), which is to be distributed with the notice of the annual general meeting in accordance with s 45 and approved by a resolution passed by a majority vote at each annual general meeting. If a budget is not approved at an annual general meeting, a subsequent special general meeting must be held to approve a budget (s 104).

The budget must include the following information (*SPR*, s 6.6(1)):

1. The opening balance in the operating fund and the contingency reserve fund;
2. The estimated income from all sources other than strata fees, itemized by source;
3. The estimated expenditures out of the operating fund, itemized by category of expenditure;
4. The total of all contributions to the operating fund;
5. The total of all contributions to the contingency reserve fund;
6. Each strata lot's monthly contribution to the operating fund;
7. Each strata lot's monthly contribution to the contingency reserve fund;

8. The estimated balance in the operating fund at the end of the fiscal year;
9. The estimated balance in the contingency reserve fund at the end of the fiscal year.

3. Amendment of Budget

Before the budget is put to vote at an annual general meeting, the proposed budget may be amended by majority vote of the owners at the meeting (s 103(4)). There is nothing in the *SPA* that allows for amendments to the budget after it is approved at the annual general meeting, although the CRT suggested at para 64 in *Gulf Manufacturing Ltd v The Owners, Strata Plan BCS 1348*, 2019 BCCRT 16 [1] that a special general meeting could be called and a revised budget could be approved.

4. Failure to Approve Budget

If the proposed budget is not approved by a majority vote at an annual general meeting, the strata corporation must prepare a new one within 30 days and place it before a special general meeting for approval by a resolution passed by a majority vote, unless a longer period was approved by a resolution passed by a ¾ vote at the annual general meeting (s 104(1)). If the fiscal period ends before a new budget is approved, the previous budget continues in effect.

5. Operating Fund Expenditures Not Approved in the Budget

If an expenditure is not in the budget, it can be made from the operating fund if it is approved by a resolution passed by a ¾ vote at an annual or special general meeting (s 97(b)) and complies with s 98. The total amount of unapproved expenditures must be:

1. Less than the amount set out in the strata corporation's bylaws; or
2. If the bylaws are silent, the lesser of

    i) $2,000, or

    ii) 5% of the total contribution to the operating fund of the current year.

S 98 also allows for "emergency"-type expenditures (s 98(3)) if there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage. The strata corporation must inform owners as soon as feasible about any expenditure of this type being made (s 98(6)).

6. Surpluses and Deficits

Unless accrued in the period before the first annual general meeting or otherwise determined by a resolution passed by a ¾ vote at an annual or special general meeting (s 105(1)), a surplus (actual expenses are less than contributions to the operating fund) must be dealt with in one or more of the following ways:

- Transferred into the CRF;
- Carried forward as part of the operating fund as a surplus;
- Used to reduce the total contribution to the next fiscal year's operating fund.

For surpluses accruing during the period before the first annual general meeting, the strata corporation must refund the surplus to the strata lot owners in amounts proportional to their contributions, unless no strata lot owner is entitled to receive more than $100 in total (s 14(6)), then the surplus can be deposited in the CRF (s 14(7)).

Unless accrued in the period before the first annual general meeting, the strata corporation must eliminate the deficit during the next fiscal year (s 105(2)) by one of the following ways:

- Transferred from the CRF, provided the transfer is approved by a ¾ vote;

- Increasing strata fees to include payment towards the deficit;
- Assessing a special levy against the strata lot owners to eliminate the deficit, provided that the strata corporation approves the levy by a ¾ vote.

For deficits accrued during the period before the first annual general meeting, the owner developer must pay the difference to the strata corporation within eight weeks of the first annual general meeting (s 14(4)). If the actual expenditures for this period before the first annual general meeting exceed budget expenditures by between 10 and 20%, the owner developer must pay twice the actual deficit to the strata corporation, and if the expenditures exceed the budget by more than 20%, the owner developer must pay three times the actual deficit to the strata corporation (s 14(5)).

7. Interfund Transfers

Funding can be transferred from one fund to another is they are included in the approved budget or were approved by a resolution that was passed by a ¾ vote at a general meeting. Transfers from the CRF must be approved by a ¾ vote resolution unless (*SPR*, s 6.3):

1. The loan is repaid by the end of that fiscal year of the strata corporation; and
2. The loan is for the purpose of covering temporary cash flow shortages as described in

the provision.

8. User Fees and Other Income

Other than strata fees, a strata corporation may have other sources of income that include user fees, interest income, rental income, and fines, and more.

User fees cannot be collected from the strata corporation for the use of common property or common assets unless, per s 6.9 of the *SPR*, the fee is objectively reasonable and set out in a bylaw or rule that has been ratified by majority vote at an annual or special general meeting.

Interest earned on money held on a special levy or CRF form part of their respective funds (s. 95(3) and s. 108(7)).

C. Special Levies

1. Approval and Form of Resolution

A special levy is money collected from strata lot owners for a specific purpose and for shared common expenses. Strata corporation may raise money from the strata lot owners by means of a special levy (*SPA*, s 108(1)) as long as it is approved by the owners by way of a resolution passed at an annual or special general meeting. A special levy that is calculated using the formula in s 99 of the *SPA* or a different formula that meets s 100 of the *SPA* must be passed by a ¾ vote at an annual or special general meeting (s 108(2)(a)).

If the corporation is unable to approve a special levy resolution to effect repairs and maintenance that are necessary to ensure safety or prevent significant loss of damage, s 173(2) allows a strata corporation to apply to the Supreme Court for an order to approve the special levy resolution. There is no need to prove that the repairs are “crucial” or the threat of loss or damage is “immediate” (*The Owners, Strata Plan VIS 114 v John Doe*, 2015 BCSC 13 [2]).

2. Purpose of Special Levies

The special levy must be used only for the specific use stipulated in the resolution that approved the special levy. A special levy is useful in that it gives the strata corporation the ability to undertake expenses that cannot be funded from the either the operating fund or the CRF.

3. Reporting Requirements

A strata corporation must inform the strata lot owners about the expenditure of the funds collected by way of special levy and any interest earned on the special levy (s 108(4)(d) and (7)). The funds can only be invested in investments permitted by the *SPR* or insured accounts with savings institutions in British Columbia, or both (s 108(4)(b)).

4. Payment When Strata Lot Sold

If a special levy is approved before a strata lot is conveyed to a purchaser, s 109 of the *SPA* provides that:

1. The person who is the owner of the strata lot immediately before the date the strata lot is conveyed owes the strata corporation the portion of the levy that is payable before the date the strata lot is conveyed, and
2. The person who is the owner of the strata lot immediately after the date the strata lot is conveyed owes the strata corporation the portion of the levy that is payable on or after the date the strata lot is conveyed.

5. Disposition of Surplus Funds

Funds that are surplus from a special levy must be paid to each strata lot owner the portion of the unused amount proportional to the contribution made to the special levy in respect of that strata lot (s 108(5)). If no strata lot owner is entitled to receive more than $100, the strata corporation can instead deposit the total surplus funds into the CRF (s 108(6)). If the owner is new, *Gaudin v The Owners, Strata Plan LMS 2140*, 2020 BCCRT 607 [3] confirmed that it is the strata lot owner at the time the refund is made that is entitled to receive the refund.

D. Borrowing by Strata Corporation

The strata corporation may borrow money required to exercise its powers and perform its duties after approval by a resolution passed by a ¾ vote at an annual or special general meeting (*SPA*, s 111). A strata corporation can lend money from its CRF to the operating fund (s 95(4)) if the amount is repaid by the end of the strata corporation's fiscal year and the loan is used for the purpose of covering temporary shortages in the operating fund (*SPR*, s. 6.3).

E. Contingency Reserve Fund

The contingency reserve fund (CRF) is the fund established by the strata corporation to meet its obligations to pay for common expenses that occur less often than once a year or that do not usually occur (ss. 1 and 92).

1. Annual Budget Contributions

The amount of the annual contribution to the CRF for the fiscal year following the first general meeting must be determined as follows (*SPR*, s 3.4):

1. if the amount of money in the contingency reserve fund at the time of the first annual general meeting is less than 25% of the estimated operating expenses for the 12 month period set out in the interim budget, the annual contribution to the contingency reserve fund under the first annual budget must be at least 10% of the total amount budgeted for the contribution to the operating fund for the 12 month period covered by that budget;
2. if the amount of money in the contingency reserve fund at the time of the first annual general meeting is at least 25% of the estimated operating expenses for the 12 month period set out in the interim budget, additional contributions to the contingency reserve fund may be made as part of the annual budget approval process after consideration of the depreciation report, if any, obtained under section 94 of the *SPA*.

The amount of the annual contribution to the CRF for any other fiscal year must be determined as follows (*SPR*, s 6.1):

1. if the amount of money in the contingency reserve fund at the end of any fiscal year after the first annual general meeting is less than 25% of the total amount budgeted for the contribution to the operating fund for the fiscal year that has just ended, the annual contribution to the contingency reserve fund for the current fiscal year must be at least the lesser of

    a) 10% of the total amount budgeted for the contribution to the operating fund for the current fiscal year, and

    b) the amount required to bring the contingency reserve fund to at least 25% of the total amount budgeted for the contribution to the operating fund for the current fiscal year;

2. if the amount of money in the contingency reserve fund at the end of any fiscal year after the first annual general meeting is equal to or greater than 25% of the total amount budgeted for the contribution to the operating fund for the fiscal year that has just ended, additional contributions to the contingency reserve fund may be made as part of the annual budget approval process after consideration of the depreciation report, if any, obtained under section 94 of the *SPA*.

2. Capital Planning and Depreciation Reports

Depreciation reports tell a strata corporation what common property and assets it has and what are the projected maintenance, repair, and replacement costs over a 30-year time span. These reports help assist strata corporations plan for major expenses and plan when to use their contingency reserve fund.

It is mandatory for most strata corporations to obtain a first depreciation report (s 94) and subsequent depreciation reports no later than three years after the date of the strata corporation's previous report (s. 94(2)). Strata corporations consisting of fewer than five strata lots are exempt (s 94(3)), and a strata corporation can waive the requirement by a resolution passed by a ¾ vote at a general meeting held in the one-year period immediately preceding the date the depreciation report is due (s 94(3)(a)).

Depreciation reports must be prepared by a "qualified person" (s 94(1)) defined in s 6.2(6) of the SPR as: "any person who has the knowledge and expertise to understand the individual components, scope and complexity of the strata corporation's common property, common assets and those parts of a strata lot or limited common property, or both, that the strata corporation is responsible to maintain or repair under the *SPA*, the strata corporation's bylaws or an agreement with an owner."

Other requirements and standards of depreciation reports can be found in s 6.2 of the *SPR*.

3. Approval of Expenditures

There are exceptions to the rule in s. 96 that permit expenditures to be made from the CRF only if they are first approved by a resolution passed by a ¾ vote at an annual or special general meeting. A majority vote can be sufficient if the expenditure is necessary to obtain a depreciation report under s 94 or related to the repair, maintenance, or replacement of common property or common assets that is recommended in the most recent depreciation report. In addition, if there are reasonable grounds to believe an immediate expenditure is necessary to ensure safety or prevent significant loss or damage, the expenditure can be made out of the CRF is the expenditure is for a common expense that occurs less often than once a year or does not normally occur (s 98(3)) and the expenditure does not exceed the minimum amount needed to ensure safety or prevent significant loss or damage (s 98(4)).

F. Allocating Expenses

1. Two Main Issues with Allocating Expenses

a) Unit Entitlement or Not

Generally, all owners must contribute to the costs of repair and maintenance in accordance with unit entitlement, as decided by the courts in *Owners, Strata Plan LMS 1537 v Alvarez*, 2003 BCSC 1075 [4].

b) Everyone, or Allocate to Individuals

There are, however, exceptions in which common expenses are allocated using a different formula than the formula in s 99 (s 100(1)). For example, certain common expenses that relate to and benefit only limited common property can be allocated to only those strata lot owners entitled to the use of that limited common property. If different "types" of strata laws are distinguished by the bylaws, common expenses that relate to and benefit a particular type of strata lot can be allocated to only the strata lots of that type.

2. Unit Entitlement

a) Relating to Owners

"Unit Entitlement" is the number used in calculations to determine the strata lot's share of common property, common assets, common expenses, and common liabilities of the strata corporation (s 1(1)). The *SPA* and the *SPR* require the calculation of contributions to the operating fund, the contingency reserve fund, and a special levy to be based on unit entitlement. Otherwise, if a strata corporation has failed to calculate contributions to the operating fund in accordance with unit entitlement, the owner may be able to obtain an order from the CRT requiring the corporation to determine the correct strata fee calculations.

b) Relating to Limited Common Property

Provided there is no alternate formula adopted by way of a s 100 resolution, the *SPR* allows for the formula in s 99 to be amended for operating fund expenses that relate to and benefit only limited common property as follows:

$$\frac{\text{Unit entitlement of strata lot}}{\text{Total unit entitlement of all strata lots whose owners are entitled to the use of limited common property to which the contribution relates}} \times \text{contribution to operating fund}$$

That formula cannot be used for contributions to the contingency reserve fund and special levies. Instead, the contributions are allocated among all of the owners as follows:

$$\frac{\textit{Unit entitlement of strata lot}}{\textit{Total unit entitlement of all strata lots}} \text{ X } \textit{Total contribution to CRF or special levy}$$

3. Section 100 Resolutions

S 100 of the *SPA* allows a strata corporation to adopt a different formula than the default one set out in 99 if such is approved by a resolution passed by a unanimous vote after the first annual general meeting (s 100(1)).

a) Operating Fund

S 100 resolutions can provide an alternate formula for the entire operating fund, such that no expenses outlined in the budget are apportioned by unit entitlement, or for only certain expenses from the operating fund. Courts can also impose s 100 resolutions, like in *Shaw v The Owners Strata Plan LMS 3972*, 2008 BCSC 453 [5] when the court found unit entitlement allocation of expenses to be significantly unfair due to the strata corporation consisting of two sections, residential and commercial.

b) Contingency Reserve Fund

Similarly, s 100 resolutions can apply to either all contributions to the CRF or only with respect to certain expenses. S 100 resolutions can allocate expenses relating to limited common property to only those strata lot owners that have exclusive use of the limited common property, and s 100 resolutions can allocate expenses that would benefit specific types of strata lots to only strata lots of that particular type.

c) Special Levies

Section 100 resolutions may also apply to special levies under s. 108(2)(a) of the *SPA*. This suggests that if all common expenses are subject to an alternate formula under s. 100, the contribution to a special levy, by default, will be allocated in the same way. However, s. 100 itself does not refer to special levies.

Section 108(2)(b) provides a similar mechanism to a s. 100 resolution. If there is another way that establishes a fair division of expenses for a particular special levy, the strata corporation may use that alternate division, but in order to do so, the special levy must be approved by a resolution passed by unanimous vote at an annual or special general meeting.

References

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[2] https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc13/2015bcsc13.html
[3] https://www.canlii.org/en/bc/bccrt/doc/2020/2020bccrt607/2020bccrt607.html
[4] https://www.canlii.org/en/bc/bcsc/doc/2003/2003bcsc1085/2003bcsc1085.html
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IX. Collections

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. When Strata Lot Owners are Indebted to the Strata Corporation

1. How Strata Lot Owners Become Indebted to the Strata Corporation

A strata lot owner may become indebted to the strata corporation in several ways, including:

- The owner may be in arrears of strata fees or special levies;
- The owner could owe interest on outstanding strata fees;
- The owner may owe money for fines or costs of remedying if they have contravened a bylaw.

2. Treatment of Debt Owed to a Strata Corporation

a) Methods of Debt Collection by a Strata Corporation

A strata corporation can collect a dent by a:

1. Forced sale proceeding;
2. Arbitration proceeding; or
3. Action in debt.

Owners and strata corporations can also resolve disputes over debts at the Civil Resolution Tribunal.

b) When the Strata Corporation is a Respondent

A strata corporation can also be named as a respondent in a foreclosure proceeding commenced by a mortgagee, during which the strata corporation can ensure the court makes an order to pay certain amounts that may be owing to the strata corporation.

B. Forced Sale Proceedings

Forced sale proceedings can only be used as an action taken to enforce a Certificate of Lien (Form G of the *SPR*). A strata corporation can only register a Certificate of Lien against an owner's strata lot if the owner fails to pay any of the following (*SPA*, s 116(1)):

1. Strata fees;
2. A special levy;
3. A reimbursement of the cost of work referred to in s 85 of the *SPA*;
4. The strata lot's share of a judgement against the strata corporation.

C. Court and Arbitration Proceedings

1. Amounts Owing Under the Certificate of Lien

Instead of proceeding directly with forced sale proceedings, the strata corporation may commence an action in debt in the Provincial Court (if the amount claimed is less than $35,000), Supreme Court, or initiate arbitration proceedings. For any of these options, the commencement must be authorized by a ¾ vote resolution in accordance with s 171. The commencement of a lawsuit in Provincial Court does not need a ¾ vote if the corporation has a bylaw that dispenses of that requirement. The limitation period for an action in debt is two years.

Alternatively, such actions can be claimed at the Civil Resolution Tribunal, which has no monetary limit.

2. Collection of Non-Lienable Amounts

An owner can be indebted to a strata corporation for several items that cannot be included in a Certificate of Lien, including:

1. Fines;
2. Costs of remedying bylaw contraventions;
3. Insurance deductibles;
4. Administrative fees;
5. User fees;
6. Move-in or move-out fees;
7. Claims for damage to property caused by an owner or a person an owner is responsible for;
8. Interest charged on debts other than outstanding strata fees and special levies;
9. Legal fees;
10. NSF charges;
11. Other chargebacks.

A strata corporation can commence an action in court for the amounts in the same methods as a Certificate of Lien, in addition to the CRT. A ¾ vote resolution is not required to commence proceedings under the CRT.

For each non-lienable amount, a strata corporation must have the authority under the bylaws or *SPA* to charge is to the account of the strata lot owner and the must endure they comply with notice provisions under s 135 of the *SPA*. The strata corporation must also have a valid and enforceable bylaw or rule to create the debt, such as a “user fee” for the use of common property and common assets that is objectively foreseeable, as was the case in *The Owners, Strata Plan LMS 3883 v De Vuyst*, 2011 BCSC 1252 [1].

D. Certificate of Payment

When a strata lot is being transferred, a Certificate of Payment must be filed at the Land Title Office (*SPA*, s 256) and must be provided by the strata corporation within one week of the request of the purchaser if not money is owing to the strata corporation or if money is owing but certain arrangements have been made to pay or to dispute the amount owing (s 115(1)). The strata corporation can charge a fee no greater than $15 for the Certificate of Payment (s 115(3)).

A strata corporation can refuse to provide the Certificate of Payment until all of the outstanding arrears are paid or satisfactory arrangements for payments have been made. Often, the owner will pay to negotiate a settlement with the strata corporation. If court proceedings have commenced to resolve any disputed fines or costs, the owner can pay the strata corporation “in trust” until a dispute is resolved, requiring the strata corporation to then provide a Certificate of Payment (s 115(1)(b)(i)). If no legal proceedings have started, a strata lot owner disputing fines or costs of remedying a

bylaw contravention has no option other than payment.

E. Foreclosure Proceedings

A mortgagee can commence foreclosure proceedings against a strata lot owner that owes money to the strata lot and to the mortgagee on title. If a Certificate of Lien is registered by the strata corporation to a strata lot, the strata corporation gets named as a respondent in the mortgagee's foreclosure proceedings. The money owing under the Strata corporation's Certificate of Lien has priority over the mortgage (*SPA*, s 116).

It used to be the case that a strata corporation was required to give the mortgagee a Certificate of Payment when a foreclosed strata lot was sold. However, if there was money owed to the strata over and above the amount owed under a Certificate of Lien, strata corporations would refuse to provide a Certificate of Payment. As a result, the Land Title Office would refuse to register the transfer of the strata lot without a Certificate of Payment. *Peoples Trust Co. v Meadowlark Estates Ltd.*, 2005 BCSC 51 [2] resolved this dilemma by deciding that a change of ownership arising from a foreclosure proceeding does not trigger the requirement under the PSA to file a Certificate of Payment. This means that if a Certificate of Lien is not filed by the strata corporation at the time of the sale, they lost their opportunity to claim for any money owed to it.

F. Principles of Allocation of Payments

If there is no bylaw dealing with allocation of payments from owners, the strata corporation will apply the payment as directed by the owner.

Many strata corporations have adopted bylaws stating that payments will be allocated to fines first. This is allowed, per *Chorney v The Owners, Strata Plan VIS 770*, 2011 BCSC 1811 [3], as long as the bylaw does not prevent an owner from contesting or refusing to pay fines while continuing to pay strata fees. A bylaw that allocates payments cannot override an owner's express of implied direction to apply payments to strata fees and special levies.

References

[1] https://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1252/2011bcsc1252.html
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X. Bylaws and Rules

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. Overview of Bylaws and Rules

Bylaws and rules govern the everyday life of a strata community, which often often comes as a surprise to new occupants of strata lots who are not used to this type of regulation. S 164 of the *SPA* allows an owner or tenant to have a court review what the owner or tenant considers to be a significantly unfair enforcement of a bylaw. The unfairness, the courts have decided, must be significant enough to warrant court intervention if they are going to take action. Strata councils must enforce bylaws to create a predictable living environment, but "enforcement vigour must be tempered with prudence and good faith" (*Abdoh v The Owners, Strata Plan KAS 2003*, 2013 BCSC 817 [1] at para 36).

B. What Are Bylaws and Rules?

1. Bylaws and Governance

A strata corporation must have bylaws (*SPA*, s 119(1)) and the bylaws may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property, and common assets of the strata corporation and for the administration of the strata corporation (119(2)).

2. Differences Between Bylaws and Rules

Bylaws govern strata lots, common property (including limited common property) and common assets. Rules only govern common property and common assets. Bylaws take precedence and govern if inconsistent with a rule (*SPA*, s 125(5)). Neither bylaws or rules are enforceable to the extent that they contravene the *SPA*, the *SPR*, the *Human Rights Code*, RSBC 1996, c 210 [2], or any other enactment or law.

Strata corporations must have bylaws, but they do not need to have rules. Bylaws can be amended by a passage of a ¾ resolution of the owners (s 128(1)) and have no effect until they are filed in the Land Title Office. Rules are created by the strata council, subject to majority ratification of the owners (s 125(6)) and take effect immediately and continue once ratified.

3. Schedule of Standard Bylaws

Section 120(1) of the *SPA* provides that "the bylaws of the strata corporation are the Standard Bylaws except to the extent that different bylaws are filed in the Land Title Office". Owner developers may file bylaws that different from the standard bylaws.

Standard bylaws comprise seven divisions and an aggregate of 30 bylaws. The divisions are:

1. Duties of Owners, Tenants, Occupants and Visitors;
2. Powers and Duties of Strata Corporation;
3. Council;
4. Enforcement of Bylaws and Rules;
5. Annual and Special General Meetings;
6. Voluntary Dispute Resolution;

7. Marketing Activities by Owner Developer.

4. Creation and Amendment of Bylaws

Bylaws are amended by a ¾ vote of the owners where the resolution requiring a vote must be passed at an annual general meeting or special general meeting, and the proposed wording amending the bylaw must be included in the notice of such meeting.

The strata corporation can also make rules, which are usually made by the presiding strata council under s 26 of the *SPA*. The rules must then be ratified by a majority vote of the owners at the next annual general meeting or special general meeting (s 125(6)), and are effective immediately until it is repealed, replaced, or altered by the council (s 125(7)).

5. Registration of Bylaws

In order to be enforceable, a bylaw amendment had to be filed in the Land Title Office within 60 days of being passed. Until filing, the amendment has no effect. There is nothing in the *SPA* that speaks to the registration of rules. However, they must be in a written document and capable of being photocopied.

6. Repeal of Bylaws

A repeal of a bylaw is a form of amendment of a bylaw (s 126). A Standard Bylaw can be revealed (s 120(1)) by the owner developer or the strata corporation. A Standard Bylaw can be repealed by the Legislature, as well.

7. Prohibited and Unenforceable Bylaws

Any bylaw that contravenes the *SPA*, the *SPR*, the *Human Rights Code*, or any other enactment or law is unenforceable (SPA, ss 121(1), 141). More restrictions include:

- Bylaws cannot destroy or modify an easement under s 69 of the *SPA*;
- Bylaws cannot prohibit or restrict the right of an owner to freely sell, lease, mortgage, or otherwise dispose of the strata lot or an interest in the strata lot;
- Bylaws cannot prohibit or restrict short-term accommodations.

Case law has also provided that:

- Bylaws that attempt to provide the strata corporation with authority over an area they do not own are unenforceable (*East Barriere Resort Ltd. v The Owners, Strata Plan KAS 1819*, 2016 BCSC 1609 [3]);
- Bylaws that charge a “move-in fee” for a strata corporation where there is no use or wear of an elevator or other common property related to moving is unenforceable (*The Owners, Strata Plan LMS 3883 v De Vuyst*, 2011 BCSC 1252 [4]).

8. Bare Land Strata Bylaws

a) Exclusions from the Schedule of Standard Bylaws

Bare land strata developments involve different types of issues than regular strata plans, so many other bylaws might not apply to them. For example, Standard Bylaw 5 explicitly excludes bare land strata developments. Meanwhile, Standard Bylaw 8(d) refers to common walls in a sense of a conventional strata development, which do not exist in a bare land strata development.

Many bare land strata corporations will exclude bylaws that are not necessarily excluded by the *SPR*.

9. Interpretation of Bylaws and Rules

In *Semmler v The Owners, Strata Plan NES3039*, 2018 BCSC 2064 [5], the court ruled that strata bylaws must be interpreted similarly to statutory interpretation. See *The Owners, Strata Plan LMS 2333 v 1016711 B.C. Ltd.*, 2022 BCCRT 1352 [6] for an application of this principle, where the tribunal decided it must interpret the plain and ordinary meaning of the words in an individual bylaw within the context of the entire bylaws.

C. Why Have Bylaws and Rules?

1. Compulsion

The strata corporation must have bylaws (*SPA*, s 119(1)).

2. Predictability

One of the advantages of bylaws is that owners can understand the standards with which they must comply, and that those rules are going to be enforced. Metropolitan Toronto Condominium Corp. No 776 v Gifford (1989), 6 RPR (2d) 217 (Ont. Dist. Ct.) addressed this by saying in para 224 that “people will only move into the building if they are prepared to live by the rules of the community which they are joining. If they are not, they are perfectly free to join another community whose rules and regulations may be more in keeping with their particular individual needs, wishes, or preferences”.

3. Governance

Bylaws and rules are intended to govern those who live in a strata community. The strata lot owners can amend the bylaws and rules to reflect any uniqueness of the community. The strata council enforces the bylaws, basically governing the owners.

Bylaws may sometimes be “cousins” to provisions in the *SPA*, meaning they relate to similar issues but have some differences in their wording. Case law has determined that in this case, both the bylaw and the *SPA* should be read together, if possible, and if not possible, the *SPA* cannot be changed and will prevail.

D. Bylaw Enforcement

1. Who Enforces Bylaws?

In July 2016, the CRT joined the courts as the bodies that can determine whether bylaws were contravened, enforceable, or even valid. CRT rulings are like court injunctions – they can decide whether a party must do something, not do something, and/or pay money.

a) Enforcement by Strata Manager or Strata Council

S 26 of the *SPA* provides that the council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws and rules.

Standard Bylaw 20(4) states that a strata council may not delegate its powers to determine whether a person has contravened a bylaw or rule, whether a person should be fined, the amount of the fine, or whether a person should be denied access to a recreational facility.

b) Enforcement by Strata Corporation as Landlord

A residential strata lot landlord is entitled to give valid notice to a tenant under the *Residential Tenancy Act*, SBC 2002, c 78 [7] if the tenant has repeatedly contravened or continues to contravene a reasonable and significant bylaw or rule (*SPA*, s 137). Section 138 of the *SPA* provides that a repeated or continuing contravention of a reasonable and significant bylaw or rule by a tenant of a residential strata lot that seriously interferes with another person's use and enjoyment of a strata lot, the common property, or the common assets is an event that allows the strata corporation to act as a landlord and give a tenant notice under s 47 of the *Residential Tenancy Act*.

c) Enforcement by Strata Council

The court in *Abdoh v The Owners of Strata Plan KAS 2003*, 2014 BCCA 270 [8] found that a strata council has the discretion to choose not to enforce a bylaw, although this discretion is heavily limited by its standard of care from section 31 of the *SPA*.

This discretion to decide whether to enforce a bylaw is limited where the strata owners have a reasonable expectation that the bylaw that will be consistently enforced (*The Owners, Strata Plan LMS 3259 v Sze Holding Inc.*, 2016 BCSC 32 [9]). The CRT has also began awarding owners damages where the strata council had failed to fairly apply or enforce its bylaws, like in *LeTexier v The Owners, Strata Plan LMS 284*, 2019 BCCRT 940 [10].

d) Appoint Administrator

An administrator is an individual who essentially acts as the strata council. If the strata council is not discharging its obligations to enforce bylaws and rules, and the court is of the opinion that it is in the best interests of the strata corporation to appoint an administrator, the court may do so under sections 164 and 174.

e) Court Enforcement

If the strata corporation is not enforcing bylaws and rules, they could be sued (*SPA*, s 163). The court can also regulate the conduct of the strata corporation's future affairs (s 164) and order a strata council to enforce bylaws and rules (s 166).

f) Referral to Arbitrator

A dispute may be referred to arbitration if it concerns interpretation or application of bylaws and rules, the use or enjoyment of a strata lot, or money owing with respect to fines for contravention of bylaws and rules (s 177(3)). An arbitrator can make whatever decision they consider just, having regard to bylaws and rules (s 185).

2. Enforced Against Whom?

Owners and tenants may be fined, should they contravene a bylaw or a rule. This includes a contravention by a guest of an owner or tenant, or an occupant if the strata lot is not rented by the owner to a tenant or a rented strata lot is not sublet by a tenant to a subtenant (s 130). The landlord, if they pay some or all of the fines or costs levied against their tenant, can recover their payments from the tenant.

Owners can also be fined for their tenant's transgressions if the owner permits that transgression like in *The Owners, Strata Plan BCS 3202 v Taheri*, 2021 BCCRT 38 [11] when the tenant used the rented suites for Airbnb short-term rental stays in violation of the strata bylaws.

3. Enforcement Measures

A strata corporation may enforce its bylaws by imposing fines (*SPA*, s 130), taking direct action to remedy a contravention of its bylaws or rules (*SPA*, s 133(1)), or deny access to a recreational facility (*SPA*, s 134). Fines are subject to maximum amounts (*SPA*, s 132), and the strata corporation may additionally require the person who is fined to pay the reasonable costs of remedying their contravention (*SPA*, s 133(2)). A strata council's discretion in enforcing bylaws must be reasonable and fair.

a) Fines

Under s 130 of the *SPA*, fines can be levied against the strata lot owners or tenants, with respect to their personal conduct or conduct of their guests of occupants of their strata lots.

Standard Bylaw 23 states that the maximum a strata lot owner or tenant can be fined is $50 for each bylaw contravention and $10 for each rule contravention. However, a strata corporation can set out in its bylaws a different maximum amount it may fine an owner or tenant for a contravention for a bylaw or rule (s 132(1)).

Standard Bylaw 24 states that if an activity that constitutes a contravention of a bylaw or rule continues, without interruption, for longer than seven days, a fine may be imposed every seven days. Intermittent but consistent issues like noise complaints are not a continuing contravention. A strata corporation can set out in its bylaws the frequency at which fines may be imposed for a continuing contravention of a bylaw or rule (s 132(2)(b)).

Both the maximum fine and maximum frequency of imposition of fines must not exceed the maximums set out in the *SPR* or the bylaws (*SPA*, s 132(3)). The courts have also been reluctant to award the total fines levied if the aggregate total fines are substantial, like in *Kok v Strata Plan LMS 463 (Owners)*, 1999 CanLII 6382 (BCSC) [12], when the court said: "The imposition of fines does not serve to correct, remedy, or cure violations of the Bylaws but, rather, their purpose is to discourage violations of the Bylaws.

b) Doing Work to a Strata Lot, Common Property, or Common Assets

In remedying a contravention of a bylaw or rule, a strata corporation can do work to a strata lot, common property, or common assets, or remove objects from common property or common assets (*SPA*, s 133).

It is recommended that before work is done to a strata lot or limited common property designated for the exclusive use of one owner, the strata corporation obtain an injunction. Injunctions can include terms that if an owner refuses to do work to a strata lot, then the strata corporation can do it and charge the cost of such work back to the owner.

c) Injunctions

S 133 states that the strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws and rules. This includes an injunction. For example, injunctions have been granted against owners from commencing further appeal court actions against the strata corporation (*Bea v The Owners, Strata Plan LMS 2138*, 2010 BCCA 463 [13]), and against owners to do things that have led to them constantly and continually contravening bylaws.

d) Recovery of Legal Costs

Generally, the requirement for an offending person fined under s 130 to pay reasonable costs of remedying the contravention does not include legal costs, as it includes, at most, tariff costs. However, the court in Strata Plan NW 1260 v Neronovich (31 October 2001), Vancouver L012803 (BCSC) determined there are some significant circumstances and serious contraventions sufficient to warrant actual costs incurred, including legal costs, to be recovered.

e) Denial of Access to Recreational Facility

Under section 134 of the *SPA*, the strata corporation may, for a reasonable length of time, deny a strata lot owner, tenant, occupant, or visitor access to a recreation facility that is common property or a common asset. Usage of this measure is limited to transgressions of bylaws or rules that relate to use of that facility.

f) Eviction

Under sections 137 and 138 of the *SPA*, tenants who repeatedly or prolongedly contravenes a "reasonable and significant" bylaw or rule may be evicted, pursuant to section 47 of the *Residential Tenancy Act*, SBC 2002, c 78 [7]. There is no case law outlining the difference between a significant bylaw and an insignificant bylaw, and one would expect such a determination to be one based in each case on its facts. Either the landlord or the strata corporation may carry out the eviction.

4. Enforcement procedure

Section 135(1) of the *SPA* prevents a strata corporation from immediately fining, ordering payment of the costs of remedying, or denying access to a recreational facility upon becoming aware of a possible contravention. The strata corporation must first satisfy the following:

1. Receive a complaint about the contravention;
2. Disclose the owner or tenant the particulars of the complaint in writing;
3. Give that person a reasonable opportunity to answer the complaint, including holding a hearing if requested by that person;
4. In the case of a contravention by a tenant: give notice of the complaint to their landlord.

If the strata corporation does not strictly follow section 135, any resulting enforcement actions are invalid: see *Terry v The Owners, Strata Plan NW 309*, 2016 BCCA 449 [14].

a) Due Diligence

The strata council has its obligations and duty of care reflected in section 31 of the *SPA*. Part of this is to collect as much data as it can when making a determination. If a strata council decides a bylaw or rule has been contravened, then enforcement procedures set out in sections 129 and 138 commence. Complainants alleging the strata council has wrongly decided there is no rule or bylaw contravention, the complainant has remedies as reflected in ss. 163 and 189 of the *SPA*.

b) Particulars of Contravention

S 135(1)(e) provides that an owner or tenant must be given the particulars of a complaint. There is no definition of "particulars", but in *Terry v The Owners, Strata Plan NW 309*, 2016 BCCA 449 [14] at para 28, the court held that the owner or tenant must give particulars "sufficient to call to the attention of the owner of tenant the contravention at issue."

c) Hearings

The CRT in *Eastman v The Owners, Strata Plan PGS 217*, 2019 BCCRT 655 [15] found that the "hearing" should be defined as "an opportunity to be heard in person at a council meeting." If the complaint is against a strata council member, the member must not participate in the hearing decision (*SPA*, s 136).

A strata council does not need to grant a hearing in every possible circumstance. In *Hales v The Owners, Strata Plan NW 2924*, 2018 BCCRT 92 [16], the strata council was justified in denying an owner a hearing due to the following facts:

1. The owner has not been fined, nor has he been penalized; 2. The owner has made previous requests and was granted a hearing; 3. The owner acted abusively at the August 2015 hearing and the council could expect the same conduct at the four requested hearings; 4. The owner wished to discuss alleged contraventions of the strata and reparations to the owner due to the alleged contravention; and 5. The reasons for the requests were with respect to the governance of the strata and would be more properly addressed at a meeting of the owners, or by majority direction of the owners.

E. Miscellaneous Issues on Bylaws and Rules

1. Retroactivity

Bylaws do not typically create exemptions based on retroactivity except for the main examples in section 123(1) and (2) which address retroactivity with respect to pet and age requirements. The issue of retroactivity is largely up to the courts, like in *The Owners, Strata Plan NW 243 v Hansen*, 1996 CanLII 2957 (BC SC) [17] when a bylaw prohibiting hot tubs was passed subsequent of the placement of a hot tub, and it would be unreasonable to force Hansen to remove the hot tub.

F. Acceptable Bylaws

Some provisions in the *SPA* permit strata corporations to influence their governance though bylaws not included in the Standard Bylaws.

1. Strata Council

Section 28(2) of the *SPA* permits a strata corporation to allow a class of persons, other than those referred to in s 28(1), to be strata council members. This does not permit a strata corporation to create a bylaw reserving positions on a strata council for owners of a section or type of strata lot.

Section 28(3) permits a strata corporation by bylaw to prohibit a person from standing for strata council or continuing as a strata council member with respect to a strata lot if the strata corporation is entitled to register a lien against that strata lot under s. 116(1).

2. Voting and Quorum

Section 53(2) permits a strata corporation by bylaw to prohibit a vote being exercised for a strata lot, except on matters requiring a unanimous resolution, if the strata corporation is entitled to register a lien against that strata lot under s. 116(1). That strata lot's vote must not be considered for the purposes of determining a quorum (s. 53(3)).

Section 48(2) provides that a quorum for an AGM or SGM is eligible voters holding 1/3 of the strata corporation's votes, present in person or by proxy unless there are fewer than four strata lots or four owners (in which case it is eligible voters holding 2/3 of the strata corporation's votes present in person or by proxy).

Section 48(3) provides that in the case of a lack of quorum within 1/2 hour from the time appointed for a general meeting, then the meeting is adjourned one week. If 1/2 hour passes without a quorum at the meeting a week later, then those present constitute a quorum. Holding two meetings is expensive, so many strata corporations pass a bylaw that calls for those present after 1/2 hour passes in the first meeting to constitute a quorum.

3. Financial Considerations

Section 98(2) prohibits expenditures from the operating fund in excess of the lesser of $2,000 or five per cent of the annual operating fund budget, unless a bylaw states otherwise. A large strata corporation may wish to pass a bylaw increasing the limit, if the budget is substantial.

Section 107(1) permits the strata corporation by bylaw to establish a schedule of strata fees that sets out a rate of interest, not to exceed the rate set out in the *SPR*, to be paid if the owner is late paying strata fees and special levies.

4. Commencing Action in Small Claims Court

Section 171(2) provides that before a strata corporation sues under s 171 for money owing including a fine, the suit must be authorized by a resolution passed by a ¾ vote at an annual general meeting or special general meeting.

5. Maximum Fines

The Standard Bylaws provide that a strata corporation may fine a maximum of $50 for contravention of a bylaw and $10 for contravention of a rule. Section 132 of the *SPA* permits the strata corporation by bylaw to provide maximum fines in excess of the amounts noted in the Standard Bylaws, to a maximum set out in the *SPR*. Section 7.1(1)(a) of the *SPR* notes the maximum fines to be set out in bylaws are (with specified exceptions) $200 for contravention of a bylaw and $50 for contravention of a rule. Section 7.1(1)(c) provides that the maximum fine that a strata corporation may set out in bylaws for each contravention of a bylaw that prohibits or limits use of all or part of a residential strata lot for remuneration as vacation, travel, or temporary accommodation is $1,000.

The maximum frequency that a bylaw can set out for the imposition of a fine for a continuing contravention of a bylaw or rule is every seven days (s 7.1(2)(a)). However, in the case of contravention of a bylaw that prohibits or limits use of all or part of a residential strata lot for remuneration as vacation, travel, or temporary accommodation, the frequency may

be daily under s 7.1(2)(b).

6. Insurance

Section 149(4)(b) provides that property insurance obligations must include major perils, as set out in the *SPR*, and any other perils specified in the bylaws of a strata corporation. “Major perils” as defined in s 9.1(2) of the *SPR* does not include earthquakes. It is recommended that a strata corporation pass a bylaw requiring it to obtain insurance against earthquakes.

7. Limitation of Liability

A strata corporation may pass a bylaw limiting the strata corporation’s liability to owners on property loss claims. This was confirmed by the CRT in *Guemas v The Owners, Strata Plan NW 2382*, 2021 BCCRT 655 [18].

G. Rules

1. Mechanics

As the strata council exercises the powers and performs the duties of the strata corporation (*SPA*, s 26), the strata council may make rules governing the use, safety, and condition of the common property and common assets that do not contravene the *SPA*, the *SPR*, the *Human Rights Code*, or any other enactment or law.

A rule made by a strata council is valid only until the first general meeting (annual or special) after the rule is made. At that general meeting, the rule must be passed by a majority vote of the strata lot owners, or it will cease to have effect (s. 125(6)). Once the rule is so ratified, it is effective until it is repealed, replaced, or altered, without need for further ratification (s. 125(7)).

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XI. Rentals and Accommodations

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. Introduction to Residential Strata Lot Rentals and Use for Short-Term Accommodation

Restricting the rental of any strata lot is prohibited under s 141 of the *SPA*. As a result, a bylaw that restricts the rental of a strata lot is not enforceable. Effective November 24, 2022, a strata corporation also may not prohibit or otherwise restrict the rental of a residential strata lot, but may, by bylaw, limit the use of residential strata lots.

B. No Restriction on Rentals

1. Bylaws that Limit Disposition of Strata Lots

Section 121(1)(c) of the *SPA* provides that a bylaw is not enforceable to the extent that it prohibits or restricts the right of a strata lot owner to freely sell, lease, mortgage, or otherwise dispose of a strata lot or an interest in a strata lot. There are no exceptions related to rentals.

A strata corporation may also not adopt bylaws that require a strata lot owner to seek the corporation's approval of prospective tenants or establish screening criteria for tenants.

2. Bylaws Requiring the Approval of Rentals of Tenants

Section 141 of the *SPA* provides that a strata corporation must not, among other things, require the approval of tenants. Even if a strata corporation is not requiring the approval of specific tenants, there is no justification for a bylaw requiring strata council approval of strata lot rentals, as a bylaw limiting the number of rentals is not enforceable.

In *Skipsey v The Owners, Strata Plan 1538*, 2020 BCCRT 247 [1], the revised wording of a bylaw up for contention at the CRT read as follows:

"Rentals will be considered by the strata council, on a case-by-case basis. Any approved rental will have a maximum period. Rental management to be approved by the council. Additional strata charges may be charged for rental units. No owner shall lease or rent a strata lot without the written permission of the strata council or a motion at a strata council meeting."

This bylaw was found to be unenforceable.

C. Use of Strata Lots for Short-Term Accommodation

While a bylaw cannot restrict the rental of a strata lot, a strata corporation may, by bylaw, restrict the use of a strata lot by prohibiting licensing the use of all or part of a strata lot for short-term accommodation purposes. The question becomes what the difference is between a strata lot rental and a licence.

In *The Owners Strata Plan VR 2213 v Duncan & Owen*, 2010 BCPC 123 [2], the court held that the accommodation in question was akin to hotel-type accommodation, and this type of accommodation was subject to a licensing agreement and could be restricted by a strata corporation. Further, in *The Owners, Strata Plan VR 812 v Yu*, 2017 BCCRT 82 [3], the CRT held that a strata lot owner using their strata lot as an Airbnb unit was in contravention of a strata corporation's bylaw prohibiting the use of a strata lot except as a "private dwelling home" and another of the strata corporation's bylaw

prohibiting the use of a strata lot for short-term accommodation.

A strata corporation may also be able to rely on *Nanaimo (Regional District) v Saccomani*, 2018 BCSC 752 [4] as authority that hotel-type accommodation is not a "residential use," so even absent a bylaw, would be contrary to the intended use of the strata lot if a strata plan shows, expressly or by necessary implication, that a strata lot or common property is intended for a residential purpose.

D. Age Restrictions and Rentals

A strata corporation may adopt a bylaw that requires one or more persons residing in a strata lot to have reached a specified age that is not less than 55 years (ss. 121(2)(c) and 123.1). This does not apply to someone if they were residing in the strata lot when the bylaw was passed, and is not required to vacate the strata lot if they do not meet the age requirement.

E. Tenants

1. Definition of Tenant

A "tenant" is defined in s. 1(1) of the *SPA* as a person who rents all or part of a strata lot and includes a subtenant. A roommate falls within the definition of "tenant" under the *SPA*.

A "tenant" should not be confused with an "occupant." Section 1(1) defines an "occupant" as a person, other than an owner or a tenant, who occupies a strata lot. Therefore, an "occupant" may be a spouse, child, or friend of an owner or tenant.

2. Creating a Tenancy

In s. 1 of the *Residential Tenancy Act*, SBC 2002, c 78 [5] ("*RTA*"), "tenancy" means a tenant's right to possession of a rental unit under a tenancy agreement. A "tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit and use of common areas and services and facilities and includes a licence to occupy a rental unit.

Based on the decision in *The Owners, Strata Plan VR 2213 v Duncan & Owen*, 2010 BCPC 123 [2], a bylaw prohibiting the use of all or part of a strata lot for short-term accommodation will not be effective to prevent rental of a strata lot if the parties' relationship is determined on consideration of all relevant circumstances to create a tenancy.

3. Notice of Tenant's Responsibilities

Before a landlord rents all or part of a residential strata lot, the landlord must give the tenant a copy of the current bylaws and rules and a Notice of Tenant's Responsibilities (Form K of the *SPR*) (s. 146(1)(a) and (b)). Within two weeks of renting all or part of a residential strata lot, the landlord must give the strata corporation the Notice of Tenant's Responsibilities, executed by the tenant (s. 146(2)).

4. Assignment of Landlord's Duties and Powers

An owner of a strata lot, as landlord, may assign to a tenant some or all of the powers and duties of the strata lot owner that arise under the *SPA* or by virtue of bylaws and rules (s. 147(1)). The assignment is not effective until the landlord gives the strata corporation written notice stating the name of the tenant, the nature of the powers and duties assigned, and the time period during which the assignment is effective. There is no prescribed form for this purpose (s. 147(2)).

5. The Long-term Residential Lease

Under s. 148, an assignment of a landlord's powers and duties is automatic for a long-term residential lease. A "long-term lease" is a lease of three years or more (s. 148(1)). A residential strata lot under a long-term lease is a deemed assignment of the landlord's powers and duties, but the tenant must give the strata corporation written notice of the assignment before it is effective (s. 148(3)). There is no prescribed form for this purpose.

The strata corporation must give a copy of the notice received from the tenant to the landlord and to the strata lot owner if the owner is not the landlord (s. 148(4)); for example, in the case of subletting.

There are some powers and duties that the owner may not assign, such as liability for fines or the costs incurred by the strata corporation to remedy a tenant's contravention of bylaws or rules. Similarly, the tenant with an automatic assignment under s. 148 may not exercise the powers or duties of an owner in a few specified instances that deal with disposition of an interest in land by the strata corporation, unless the owner consents (s. 148(6)).

6. Election to Strata Council

A residential or commercial tenant may be elected to strata council (s. 28), provided that the landlord has assigned, in writing, the landlord's specific right to be on the strata council (s. 147). The decision in *Jay v The Owners Strata Plan NW 3353*, 2018 BCSC 780 [6] provides that there must be a tenancy agreement between the landlord and tenant to appoint the tenant as a representative to be elected to the strata council.

7. Authority to Receive Documents and Records

A tenant or former tenant who has or who had the benefit of an assignment from the landlord is entitled to all the same information that the *SPA* makes available to a strata lot owner. A list of records and documents that a strata corporation must prepare and retain can be found in section 35 of the *SPA*.

A tenant or formal tenant may also request a copy of the rules and bylaws or to inspect the rules and bylaws. This must be provided within one week of the request. For former tenants, these documents can only be relating to the period of time during which the former tenant was a tenant (s 36(1.1)).

8. General Meetings

Annual or special general meetings require two weeks' written notice. The notice must go to a tenant if the tenant has an assignment of the landlord's rights and the strata corporation has received notice of the assignment (s. 45(1 (c)). A tenant with an assignment from a landlord of the landlord's right to vote may vote at a general meeting, provided that the strata corporation has received notice of the assignment (s. 45(1)(c)).

Tenants may also attend general meetings with or without eligibility to vote under Standard Bylaw 26, but must leave the meeting if they are ineligible to vote and those present, by majority vote, request the tenant to do so.

9. Right to Be Heard

A tenant may request, in writing, a hearing of strata council and attend a council meeting for that purpose (s. 34.1).

10. Short Term Use of Common Property

Section 76 of the *SPA* authorizes the strata corporation to give a tenant permission to use exclusively or have special privileges in connection with common assets or common property. The permission may be for up to one year initially and have conditions attached to it. Strata council may revoke the permission on reasonable notice or renew it for a fixed

duration and/or on conditions.

11. Right to Benefit of Insurance

According to s. 155, a tenant is another named insured on the strata corporation's insurance policy. Therefore, where a tenant occupies a strata lot and suffers damage as a result of a loss, the tenant is entitled to claim on the strata corporation's insurance in circumstances where the owner of the strata lot could do so, despite not being an owner in the strata corporation.

F. Legal Proceedings on Tenancy Disputes

1. Taking Legal Action

A tenant may sue a strata corporation by application to the Supreme Court to seek a remedy or seek to prevent a significantly unfair action or decision of the strata corporation in relation to the tenant (s. 164(1)).

The *Civil Resolution Tribunal Act*, SBC 2012, c 25 [7] also permits a tenant to initiate a tribunal proceeding against a strata corporation as well as a former tenant if it is regarding a matter that occurred when the person was a tenant, per *Gill v The Owners, Strata Plan EPS 4403*, 2020 BCCRT 228 [8].

2. Appointing an Administrator

A tenant, as a person with an interest in a strata lot, may apply to the Supreme Court for the appointment of an administrator to exercise the powers and perform the duties of the strata corporation (s. 174(1)).

3. Arbitration

Both the tenant and a strata corporation can refer a dispute between each other to arbitration under s 177 of the *SPA*.

G. Powers of the Strata Corporation

1. Collecting Money Owed by a Tenant

If a tenant owes money to the strata corporation, the strata corporation must give the tenant two weeks' written notice demanding payment and indicating that action may be taken if payment is not made within two weeks (s. 112(1)). If the money is not paid, the strata corporation can pursue a lawsuit, arbitration, or initiate a proceeding against the tenant.

2. Evicting a Tenant

A repeated or continuing contravention by a tenant of a reasonable and significant bylaw or rule allows the landlord to give the tenant notice terminating the tenancy agreement under s. 47(1) of the *RTA* (s. 137). The strata corporation can stand in the place of the landlord if the tenant repeatedly contravenes a significant and reasonable bylaw or rule that seriously interferes with another person's use and enjoyment of a strata lot or the common property.

3. Fining a Tenant

A strata corporation may fine a tenant if a bylaw or rule is contravened by the tenant; a person visiting the tenant or a person admitted to the premises by the tenant for social, business, or family reasons or any other reasons; or an occupant, if the strata lot is not sublet by the tenant to a subtenant (s. 130(2)). The strata corporation may also require a tenant to pay reasonable costs of remedying a bylaw or rule contravention under s. 133(2). If the strata corporation fines a tenant

or requires the tenant to pay such costs, it may collect the fine or costs from the tenant (s. 131(1)). However, the strata corporation may not collect from both the landlord and the tenant in excess of the amount owing (s. 131(1)). The strata corporation must strictly follow section 135 when enforcing a bylaw against a tenant. It is not permissible to enforce a tenant's bylaw contraventions against the tenant's landlord: see *The Owners, Strata Plan KAS 1622 v Kamloops (Pacific No. 52) Branch of the Royal Canadian Legion*, 2022 BCCRT 205 [9].

If a strata corporation fines a tenant, it may collect the fines from the owner.

4. Denying Access to Facilities

A strata corporation may, for a reasonable length of time, deny a tenant the use of a recreational facility that is common property or a common asset if the tenant has contravened a bylaw or rule relating to the recreational facility (s. 134).

5. Enforcing a Short-term Accommodation Bylaw

A strata corporation can set out in its bylaws a maximum fine of $1,000 per day for the contravention of a bylaw that prohibits or limits use of all or part of a residential strata lot for renumeration as vacation, travel, or temporary accommodation.

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XII. Privacy

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. Overview of Privacy Obligations

There are two main aspects to privacy within a strata context, one concerning "the right to be left alone" and the other concerning the collection, use, disclosure, and protection of personal information.

1. The "Right to be Left Alone"

Heckert v 5470 Investments Ltd., 2008 BCSC 1298 [1] defines "privacy" at para. 72 as: "the right to be let alone, the right of a person to be free from unwarranted publicity … the right of an individual (or corporation) to withhold himself and his property from public scrutiny, if he so chooses."

Further, the *Privacy Act*, RSBC 1996, c 373 [2] provides for a statutory cause of action for violation of privacy in s. 1(1): it is a tort, actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of another. Only the BC Supreme Court can hear claims about *Privacy Act* breaches.

2. Personal Information

"Personal information" is any information, whether fact or opinion, regarding an identifiable individual. The only exception is business contact information. "Business contact information" is a person's name and business address, business telephone, business fax number, and business email address. Under the *Personal Information Protection Act*, SBC 2003, c 63 [3] ("*PIPA*"), the most recent enactment of the *Privacy Act*, business information is not personal information and can be disclosed freely.

A strata corporation is required by the *SPA* to collect certain personal information, including names and addresses of strata lot owners, tenants, and occupants. In addition, strata corporations frequently collect other personal information, such as banking information, letters of complaint, and emergency contact information.

PIPA also holds strata corporations responsible for any personal information it collects and any personal information collected on its behalf. Three matters of importance when assessing compliance with *PIPA* are:

1. A strata corporation must obtain proper consent before collecting, using, or disclosing personal information from or about an individual. The strata lot owner, tenant, or occupant is entitled to know what is being done with their personal information;

2. A strata corporation should have proper system in place to ensure that all the personal information in its possession is protected;

3. A strata corporation must be prepared to respond to request from individuals for access to their own personal information. An organization under *PIPA* must provide upon request:

    a) The personal information of that individual that the strata corporation has in its possession;

    b) The ways in which the personal information is being used; and

    c) The names of individuals and organizations to which the personal information has been disclosed.

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XIII. Insurance

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. Division of Insurance

Section 149 of the *SPA* outlines the property insurance that the strata corporation is required to obtain and maintain. The strata corporation's duty to insure does not cover the same areas as the strata corporation's duty to repair and maintain common property.

The strata corporation is required to insure:

- Common property;
- Common assets;
- Buildings shown on the strata plan (which, in a conventional strata plan, covers the entirety of all strata lots);
- In the case of a conventional strata plan: fixtures on each strata lot that were installed by the owner developer as part of the original construction of the strata lot.

Note that for the purpose of section 149, "fixtures" does not take its common law definition, and instead takes a specific definition from section 9.1(1) of the *SPR*. This definition of "fixtures" refers to elements attached to the building and necessarily includes floor and wall coverings, and electrical and plumbing fixtures. However, for any other item, if it can be removed without causing damage to the building, it will not count as an original construction fixture that the strata corporation must insure.

The strata corporation's property insurance must protect against "major perils" (*SPA*, s 149(4)(b)). The *SPR* defines "major perils" in section 9.1(2) as any of the following:

1. Fire or explosions;
2. Smoke;
3. Lightning, windstorms, or hail;
4. Water escape;
5. Strikes, riots or civil commotion;
6. Impact by aircraft or vehicles;
7. Vandalism or malicious acts.

Under section 161(1) of the *SPA*, owners may obtain insurance for:

- Loss or damage to their strata lot in excess to that covered by the strata corporation's insurance;
- Fixtures in their strata lot that are not covered by the strata corporation's insurance;
- Improvements to fixtures referred to in section 149(1)(d);
- Loss of rental value by the owner's strata lot in excess to that covered by the strata corporation's insurance;
- Property damage and bodily injury occurring on either their strata lot or common property.

B. Insurance Deductibles and Co-Insurance Clauses

1. Insurance Deductibles

Most strata corporation insurance policies have deductibles that apply to the various coverages under the policy. The minimum deductibles are typically determined by market conditions and can be increased by a strata corporation, but if determined to be excessive, it can be argued that the strata corporation has failed its duty to obtain insurance, per *Stevens v Simcoe Condominium Corp. No. 60*, 1998 CanLII 18852 (ON SC) [1].

The payments of insurance deductibles is set out in s 158(1) and (2) of the *SPA*:

1. Subject to the *SPR*, the payments of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense to be contributed to by means of strata fees calculated in accordance with s 99(2) or s 100(1);
2. Subsection (1) does not limit the capacity of the strata corporation to sue an owner in order to recover the deductible potion of an insurance claim if the owner is responsible for the loss or damage that gave rise to the claim.

References

[1] https://www.canlii.org/en/on/onsc/doc/1998/1998canlii18852/1998canlii18852.html

XIV. Repair and Maintain

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. The Duty to Repair and Maintain

As a general principle, the *SPA* provides that a strata corporation is responsible for the repair and maintenance of the common property, while the strata lot owner is responsible for their own lot. This principle is subject to more detailed provisions of the *SPA*, the *SPR*, and bylaws adopted by a strata corporation.

1. Developing a Plan for Repair and Maintenance

a) Information from the Owner Developer under the Strata Property Act

The *SPA* recognizes the owner developer as an initial source of information with respect to repairs and maintenance of strata developments. The owner developer is required by s. 20(2)(a) to deliver the following documents at the first annual general meeting:

1. All plans that were required to obtain a building permit and any amendments to the building permit plans that were filed with the issuers of the building permit;
2. Any document in the owner developer's possession that indicates the "as built" location of pipes, wires, ducts, cables, chutes, and other facilities for the passage or provision of services, if the owner developer has reason to believe that these facilities are not located in the places shown on the building permit plans or any amendments to the building permit plans;
3. The names and addresses of all contractors, subcontractors, and persons who supplied labour or materials to the project as required by the *SPR*;

4. warranties, manuals, schematic drawings, operating instructions, service guides, manufacturers' documentation, and other similar records regarding the construction, installation, operation, maintenance, repair, and servicing of any common property or common assets.

b) Provision of Manual and Warranty under the Homeowner Protection Act

In addition, Part 8 of the *Homeowner Protection Act*, SBC 1998, c 31 [1] requires anyone offering a new home for sale to provide a home warranty with certain minimum coverage, including:

1. Defects in materials and labour for a period of at least two years after the date on which the warranty begins;
2. Defects in the building envelope, including defects resulting in water penetration, for a period of at least five years after the date on which the warranty begins;
3. Structural defects for a period of at least 10 years after the date on which the warranty begins.

2. Depreciation Reports

To assist a strata corporation in undertaking its repair and maintenance obligations, s. 94 of the *SPA* requires a strata corporation to obtain a depreciation report to estimate the service life and anticipated maintenance, repair, and replacement costs for specified components of the strata corporation. This helps the strata corporation to better plan for the future and fund its contingency reserve fund accordingly. The strata corporation can only temporarily exempt itself from the requirement to obtain a depreciation report if, within the one-year period prior to the date on which the report is required to be obtained, the owners adopt a ¾ vote resolution at an annual or special general meeting (*SPA*, s. 94(3)).

The requirements for a depreciation report are set out in section 94 of the *SPA*, including:

1. The report must be obtained from a "qualified person", a term defined in s. 6.2(6) of the *SPR* as "any person who has the knowledge and expertise to understand the individual components, scope and complexity of the strata corporation's common property, common assets and those parts of a strata lot or limited common property, or both, that the strata corporation is responsible to maintain or repair under the *SPA*, the strata corporation's bylaws or an agreement with an owner and to prepare a depreciation report that complies with [s. 6.2(1) to (4) of the *SPR*]" (s. 94(2)).
2. A strata corporation must obtain a depreciation report in accordance with the following timelines (SPA, s. 94(2), SPR, s. 6.2(7)):

    a) when a strata corporation was established on or before December 14, 2011, the first depreciation report must have been obtained no later than December 14, 2013, and

    b) when a strata corporation has already obtained at least one depreciation report, the next depreciation report must be obtained no later than three years after the date of the last report.

3. A depreciation report is required to include all of the following (SPR, s. 6.2(1)):

    a) a physical inventory and evaluation that complies with s. 6.2(2);

    b) a summary of repairs and maintenance work for common expenses respecting the items listed in s. 6.2(2)(b) that usually occur less often than once a year or do not usually occur;

    c) a financial forecasting section that complies with s. 6.2(3);

    d) the name of the person from whom the depreciation report was obtained and a description of that person's qualifications, errors and omissions insurance coverage, if any, and relationship with the strata corporation;

e) any other information or analysis that the strata corporation or the person providing the depreciation report considers appropriate.

B. Repair and Maintenance of Common Property and Common Assets

1. Strata Property and Standard Bylaws

a) Essential and Fundamental Obligation of the Strata Corporation

The BC Supreme Court has recognized the duty to repair and maintain common property as an essential and fundamental obligation of the strata corporation (*Royal Bank of Canada v Holden*, 1996 CanLII 3440 (BCSC) [2]). These repairs may be purely aesthetic in nature (*Kornylo v The Owners*, Strata Plan VR 2628, 2019 BCCRT 1215 [3]). This duty applies to common assets as well (*The Owners, Strata Plan KAS 2827 v Couchman*, 2018 BCCRT186 [4]).

A strata corporation may delegate to a strata lot owner its responsibility for maintenance and repair of limited common property that the owner has a right to use (s 72(2)(a)) as well as common property other than limited common property subject to the *SPR* (s 72(2)(b)). However, no regulations have been adopted permitting a corporation to do the latter, so the strata corporation cannot purport to make an owner responsible for the repair and maintenance of common property through the bylaws. This makes the distinction between limited common property and common property important.

However, the adjudicator in *Tagle v The Owners, Strata Plan EPS 2604*, 2022 BCCRT 161 [5] stated that there was nothing in the *SPA* that prevented the strata corporation from permitting owners to assume responsibility for common property maintenance and repair, and it will have acted reasonably in relying on those repairs (*Wu v 238998 Investments Ltd.*, 2021 BCCRT 205 [6]).

The obligation on a strata corporation to repair and maintain will be assessed on a standard of reasonableness, that is, to do all that can reasonably be done. The court in *The Owners, Strata Plan LMS 3539 v Ng*, 2016 BCSC 2462 [7] held that a strata corporation can be liable in the tort of private nuisance to a strata lot owner for losses arising out of the failure of a common property pipe resulting in significant damage to the owner's strata lot.

b) Bare Land Strata Plans

In a bare land strata plan, the boundaries of a strata lot are determined by reference to survey markers, and not the midpoints of walls, ceilings, and floors, as is typically the case in a conventional strata plan. The same "reasonableness" standard of repair in the context of a "conventional" strata plan applies to bare land strata plans, per the CRT's application in *Stubbert v The Owners, Strata Plan KAS 2750*, 2021 BCCRT 564 [8].

However, as the exterior walls, roofs, windows, and doors of the building on a bare land strata lot form part of the strata lot, the strata corporation is not responsible for repair and maintenance of a strata lot's exterior unless that obligation is assumed by operation of a properly approved bylaw.

C. Repair and Maintenance of Limited Common Property

The *SPA* allows a strata corporation to designate areas of common property as limited common property, intended for the exclusive use of one or more strata lots.

1. Strata Property Act and Standard Bylaws

In general, the *SPA* contemplates that the strata corporation will be responsible for the repair and maintenance of limited common property. However, unlike in the case of common property, a strata corporation is permitted by bylaw to make an owner responsible for the repair and maintenance of limited common property that an owner has the right to use (s. 72(2)(a)).

A strata corporation is responsible for the repair and maintenance of limited common property, again to a reasonableness standard, that occurs less frequently than once per year, as well as for the repair and maintenance of the following areas of limited common property no matter how often the repair or maintenance ordinarily occurs:

1. The structure of the building;
2. The exterior of the building;
3. Chimneys, stairs, balconies, and other things attached to the exterior of the building;
4. Doors, windows, and skylights on the exterior of the building or that front on the common property;
5. Fences, railings, and other similar structures that enclose patios, balconies, or fences.

2. Repair and Maintenance Expenses

The funds necessary for the repair and maintenance of the common property and common assets form part of the "common expenses" of a strata corporation (s. 1(1)). See section 7 (Strata Corporation Finances) for a detailed breakdown of how strata corporation can raise funds to fulfill their duties, including repair and maintenance expenses, through the:

1. Operating Fund;
2. Contingency Reserve Fund; and/or
3. Special Levies.

a) Sections and Types

The general principle that all owners must contribute to the costs and repair and maintenance in accordance with unit entitlement has exceptions where sections or types of strata lots have been created by the operation of bylaws.

Sections

Section 191 permits the creation of sections to represent the different interests of:

1. Residential strata lot owners and non-residential strata lot owners;
2. Non-residential strata lot owners, if they use their strata lots for significantly different purposes (for example, strata lots used as retail stores, as distinguished from strata lots used for parking stalls);
3. Residential strata lot owners where there are different types of strata lots.

Although the *SPA* provides no guidance on what constitute "significantly different purposes" for non-residential strata lots, s. 11.1 of the SPR sets out the following "different types" of residential strata lots recognized by the *SPA* for the purpose of creating sections:

1. Apartment-style strata lots;
2. Townhouse-style strata lots;

3. Detached houses.

Part 11 of the *SPA* does not contain an express requirement that a section repair and maintain any particular property. Section 194(2)(a) does provide that the section has the same powers and duties of the strata corporation to establish its own operating fund and contingency reserve fund for common expenses of the section, so it may be inferred that a section has the obligation to repair and maintain common property designated for all strata lots within the section.

Types

Unlike a strata corporation and section, the recognition of "types" within a strata corporation does not give rise to separate legal entities. Instead, the adoption of a bylaw that acknowledges the existence of different types of strata lots empowers a strata corporation (or a section) to allocate operating fund expenses relating solely to a particular type of strata lot to only the strata lots of that type.

In *Fraser v Strata Plan VR 1411*, 2006 BCSC 1316 [9], the court rejected an attempt to create "types" for the sole purpose of allocating responsibility for undertaking and paying for the cost of repair and maintenance of common property. In addition, s. 11.2(3) of the *SPR* provides that contributions to the contingency reserve fund and to a special levy, even if raised to pay for the repair and maintenance of types within a section, must be levied against all strata lots in the section, regardless of type.

b) Windows, Doors, and Skylights

The *SPA*'s definition of "common property" does not expressly deal with windows, doors, and skylights, making it difficult to decide how to repair and maintain these. This decision is very fact-dependant based on where a window, door, or skylight is installed, and it will be argued in different cases whether the window, door, and skylight is completely within a strata lot, on the boundary between the strata lot or completely within the common property.

Standard Bylaw 8(c)(ii)(D) of the *SPA* makes the strata corporation responsible for all aspects of the maintenance of windows, doors, and skylights that are on the exterior of a building or that face common property. Even if the exterior-facing windows, doors, and skylights form part of the strata lot, the strata corporation would be responsible for the repair and maintenance of these areas (*The Owners of Strata Plan NWS 254 v Hall*, 2016 BCSC 2363 [10]).

c) Alterations to Common Property or Common Assets Made by Strata Lot Owners

Standard Bylaw 6 requires a strata lot owner to obtain the permission of the strata corporation before undertaking any alteration to common property, including limited common property, or to common assets. A strata corporation is permitted to require an owner to assume in writing responsibility for any expenses relating to the alteration.

In addition, to further enforce the obligations being assumed with respect to the alteration, consideration should be given to amending Standard Bylaw 5(2)) to provide that owners are responsible for undertaking and paying for the cost of maintaining and repairing any alterations made to common property by the owner or a prior owner of the strata lot.

References

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XV. Dispute Resolution

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. Basics of Strata Dispute Resolution

This section discusses a variety of issued related generally to dispute resolution involving strata corporations. It combines discussion of issues specific to strata corporations under the *SPA* and general practice issues arising in the context of the affairs and dealings of strata corporations.

1. Methods of Dispute Resolution

Four methods currently available for resolving disputes are court litigation, arbitration, mediation, and the Civil Resolution Tribunal (CRT).

a) Court Litigation

Litigation in court involves resolving a dispute using public institutions with independent decision-makers who have considerable legal knowledge, but may or may not know anything about the area the dispute involves.

b) Arbitration

The *SPA* provides rules for arbitration in the strata context. Arbitration gives parties more control than court litigation, as they can choose arbitrators that have knowledge about strata law or a particular subject that is of question in a dispute. Arbitration decisions are also kept privately unlike court and CRT litigation, unless appealed to a court after the arbitrator makes its decision.

c) Mediation

Mediation is a voluntary process in which an independent person is chosen by the parties to help them reach an agreement. Mediators do not have the authority to make binding decisions, and can occur at any time before, during, or after court proceedings.

d) Civil Resolution Tribunal

Until July 2016, the BC Supreme Court and BC Provincial Court resolved strata disputes. After that date, the CRT has assumed jurisdiction over many strata property matters once within jurisdiction of the courts.

e) Voluntary Dispute Resolution Bylaw

Section 124 of the *SPA* permits strata corporations to create dispute resolution bylaws. Standard Bylaw 29 creates such a bylaw, and provides as follows:

- A dispute among owners, tenants, the strata corporation or any combination of them may be referred to a dispute resolution committee by a party to the dispute if

    a) all the parties to the dispute consent, and

    b) the dispute involves the *SPA*, the *SPR*, the bylaws or the rules.

- A dispute resolution committee consists of

    a) one owner or tenant of the strata corporation nominated by each of the disputing parties and one owner or tenant chosen to chair the committee by the persons nominated by the disputing parties, or

    b) any number of persons consented to, or chosen by a method that is consented to, by all the disputing parties.

- The dispute resolution committee must attempt to help the disputing parties to voluntarily end the dispute.

Strata corporations do not have to use this Standard Bylaw and can wish to create their own voluntary dispute resolution bylaw.

2. Remedies Available at Court

The courts have a wide range of remedies available when dealing with disputes under the *SPA*, in addition to any that may be available at common law. The remedies available will depend on what section of the SPA is used and what sections of the *SPA* are alleged to have been breached by the offending party.

a) Declarations

A declaration that a strata lot owner or the strata corporation has breached the *SPA* or a bylaw is a common starting point. It sets the foundation for the rest of the orders sought.

b) Order for Payment or Reimbursement of Money

If a strata lot owner had paid for something that the court finds should have been paid for something that the court finds should have been paid for by the strata corporation, or vice versa, it may be possible to obtain an order requiring reimbursement, like in *Blackmore et al v Owners, Strata Plan VR 274*, 2004 BCSC 1121 [1].

c) Injunction-like Orders

Injunctions requiring that a strata lot owner or strata corporation stop contravening a section of the *SPA* or fulfill a duty under the *SPA* are common.

d) Damages

Damages are available to a strata lot owner in a negligence of contract claim. The CRT has also awarded damages for significant unfairness for breaching the SPA (*Lozjanin v The Owners, Strata Plan BCS 3577*, 2019 BCCRT 481 [2]), although the Supreme Court has not ruled on whether those types of damages are allowed.

e) Costs

The fact that strata lot owners still must live together, work together, and/or get along with each other after decisions are made, makes it necessary for judges to deal with costs carefully. Paras 32 and 33 of *Lum v Strata Plan VR 519 (Owners of)*, 2001 BCSC 493 [3] demonstrate costs should be awarded while remaining sensitive to what is in the best long-term interests of the parties in a claim.

3. Remedies Available at the CRT

Section 123 of the *Civil Resolution Tribunal Act*, SBC 2012, c 25 [4] ("*CRT Act*") permits the CRT to make an order requiring a party to do or refrain from doing something, or requiring a party to pay money.

B. Section 164 - Significantly Unfair Acts

If strata lot owners are unhappy with their treatment by a strata corporation, they can use section 164 of the *SPA* to remedy "significantly unfair" actions or decisions. On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair

1. Action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant; or
2. Exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

The CRT has the same authority to make orders about significantly unfair acts and decisions under the *CRT Act*.

1. Legal Test for Significant Unfairness

The legal test for significant unfairness is the same between the courts and the Civil Resolution Tribunal (*Dolnik v The Owners, Strata Plan LMS 1350*, 2023 BCSC 113 [5]).

The basic test for whether an action is significantly unfair is whether it is "burdensome, harsh, wrongful, lacking in probity or fair dealing, or done in bad faith, or conduct that is unfairly prejudicial in that it is unjust or inequitable" (*Kunzler v The Owners, Strata Plan EPS 1433*, 2021 BCCA 173 [6]). The owner's reasonable expectations are a relevant factor, but they are not determinative.

The following questions can be used to assess whether the owner's reasonable expectations were breached (*Dollan v The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 [7]):

1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair?

See *Collins v The Owners, Strata Plan NES 2865*, 2023 BCCRT 577 [8] for an application of this test for significant fairness.

2. Proper Parties in Significant Unfairness Claims

Section 164 allows a strata lot owner or tenant to apply for an order regarding a significantly unfair action by the strata corporation, including the strata council, or a person who holds 50 per cent or more of the votes at a general meeting. Strata owners should not include as defendants individual strata council members unless those members have "personally benefitted to the detriment of the Strata Corporation as a result of a breach of their duties and obligations owed to the Strata Corporation" (*Azura Management (Kelowna) Corp. v Owners of the Strata Plan KAS 2428*, 2009 BCSC 506 [9] at para 9).

3. Remedies Available under Section 164

Section 164 gives the court broad discretion to fix a problem caused by a strata corporation that has acted in a significantly unfair fashion. This could include compensation in the form of damages, moulding the remedy to suit the problem, making an order to regulate the strata corporation's future conduct, and more.

4. Bylaws to Collect Legal Fees

Many strata corporations have bylaws that allow them to collect not just costs but legal fees back from owners involved in disputes with the strata corporation. In Hammer*berg & Co. v Margitay*, 2001 BCSC 1312 [10], an example of this bylaw was held to be valid, but it could be argued that if costs have already been awarded by the court against a strata lot owner, it might be significantly unfair for the strata corporation to recover legal fees from that same owner.

5. Scope of Judge/Tribunal's Power to Remedy Significant Unfairness

The court or CRT have a broad range of powers to prevent or remedy a significantly unfair action of the strata corporation, arising from s 164 of the *SPA* and s 48.1 of the *CRT Act*. The CRT's remedial power includes awarding general damages.

It is important to note that just because a strata corporation is following the *SPA*, they may still be acting significantly unfair and breaching section 164. A variety of factors should be considered in every scenario to determine whether a strata corporation could be acting significantly unfair under section 164, including:

- The knowledge of the strata lot owner at different times;
- The involvement of the owner in creating the situation;
- How the strata council has dealt with other owners in similar situations; and
- The involvement of individual strata council members or other in their role as owners in creating the situation.

6. Cases Decided under Section 164

A few examples of cases decided under s 164 include:

Name of Case	Issue	Significantly Unfair?
Reid v Strata Plan LMS 2503 (Owners), 2001 BCSC 1578 [11]	Strata council resolution giving the owners permission to place planters, etc. on common property patio not significantly unfair to owner whose windows looked over area	No
Als v Strata Corporation NW 1067, 2002 BCSC 134 [12]	Strata council refused permission to rent strata lot; not significantly unfair	No
Strata Plan VR1767 (Owners) v Steven Estate Ltd, 2002 BCSC 381 [13]	Assessment of contribution to costs of building envelope repair based on erroneous unit entitlement registered at the land titles office in the strata plan is significantly unfair	Yes
McGowan v Strata Plan NW1018 (Owners), 2002 BCSC 673 [14]	Bylaw allowing balcony enclosure; different treatment of some owners justified by safety issues	No

C. Responsibility for Judgements

All strata lot owners are responsible for their proportionate share of the total judgement based on their unit entitlement. When a judgement is granted against a strata corporation, it can be registered against the title to all strata lots. When a judgement is in favour of a strata lot owner, that owner is not responsible for legal costs payable by the strata corporation or for a proportionate share of the judgement (ss. 169 and 171(6)).

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XVI. Recourse to the Courts

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 24, 2023.

A. Matters That the Court May Determine at First Instance

1. Inherent Jurisdiction

The BC Supreme Court may exercise its inherent jurisdiction as a superior court to determine strata property claims and disputes. The CRT also has the authority to handle strata disputes between owners of strata lots and corporations for a variety of matters.

2. Legislative Authority

Administrative tribunals have no inherent or equitable jurisdiction and can exercise only the powers conferred on them by their legislation.

a) Civil Resolution Tribunal Jurisdiction

The CRT shares non-exclusive jurisdiction over strata property claims with the courts. The courts can dismiss a claim and order it to be instead resolved by the CRT if it is under their jurisdiction.

S. 121(1) of the *SPA* outlines the CRT's jurisdiction to resolve certain claims, including the following:

- The interpretation or application of the Strata Property Act or a regulation, bylaw or rule under that Act;
- The common property or common assets of a strata corporation;
- The use or enjoyment of a strata lot;
- Money owing, including money owing as a fine, under the *Strata Property Act* or a regulation, bylaw or rule under that Act;
- An action or threatened action by a strata corporation, including the council, in relation to an owner or tenant;
- A decision of a strata corporation, including the council, in relation to an owner or tenant;
- The exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

On the other hand, the following types of claims are excluded by s 122 of the *CRT Act* and must be determined by the BC Supreme Court:

- S. 33 *[accountability]*;
- S. 52 *[unanimous votes]*;
- S. 58 *[court appointed voter]*;
- S. 89 *[removal of claim of lien after purchase from owner developer]*;
- S. 90 *[removal of liens and other charges]*;
- S. 117 *[forced sale of owner's strata lot to collect money owing]*;
- S. 160 *[court orders respecting rebuilding damaged property]*;
- S. 173(2) *[court order when special levy resolution receives more than 1/2 but less than 3/4 of votes]*;
- S. 174 *[appointment of administrator for strata corporation]*;
- S. 208 *[orders respecting requests from leasehold landlords]*;
- S. 209 *[leasehold landlord's remedies on leasehold tenant's default]*;

- The following provisions of Part 13 *[Phased Strata Plans]*:
    - i)s. 226(1)(c) and (d) *[release of security for common facilities]*;
    - ii) s. 232 *[amendment of declaration to extend time for election]*;
    - iii) s. 233 *[other amendments respecting Phased Strata Plan Declaration]*;
    - iv) s. 235 *[orders if owner developer elects not to proceed with next phase]*;
    - v) s. 236 *[order to compel completion of a phase]*;
- S. 246 *[order for amendment of Schedule of Unit Entitlement]*;
- The following provisions of Part 16 *[Cancellation of Strata Plan and Winding Up of Strata Corporation]*:
    - i) s. 272 *[vote to cancel strata plan]*;
    - ii) s. 273.1 *[confirmation by court]*;
    - iii) s. 278.1 *[confirmation by court]*;
    - iv) s. 279 *[order vesting authority in liquidator]*;
    - v) s. 284 *[application for court order to wind up strata corporation]*.

b) Court Order that Civil Resolution Tribunal Not Resolve Claim

The Supreme Court may order the CRT not resolve a strata property claim if the CRT lacks jurisdiction to resolve the claim (s 16.2(1)(a)) or if it is not in the "interests of justice and fairness" that the CRT resolves the claim (s 16.2(1)(b)).

c) Court Order that Court Not Resolve Claim

The CRT is deemed to have specialized expertise with respect to strata property claims within its jurisdiction, so the court must dismiss a proceeding if it is under the CRT's jurisdiction, unless it is not in the "interests of justice and fairness" per s 16.2(1)(b).

3. Interests of Justice and Fairness

When considering whether the court resolution of the claim is in the interests of justice and fairness, the Supreme Court may consider the following under s 16.3 of the *CRT Act*:

1. Whether an issue raised by the claim or dispute is of such importance that the claim or dispute would benefit from being adjudicated by that court to establish a precedent;
2. Whether an issue raised by the claim or dispute relates to a constitutional question or the *Human Rights Code*;
3. Whether an issue raised by the claim or dispute is sufficiently complex to benefit from being adjudicated by that court;
4. whether all of the parties to the claim or dispute agree that the claim or dispute should be adjudicated by the tribunal;
5. Whether the claim or dispute should be heard together with a claim or dispute currently before that court;
6. whether the use of electronic communication tools in the adjudication process of the tribunal would be unfair to a party in a way that cannot be accommodated by the tribunal.

4. Civil Resolution Tribunal Refusal to Hear Claim

The CRT may also, under s 11(1) of the *CRT Act*, refuse to hear a claim that is otherwise within its jurisdiction.

B. Court Proceedings for Strata Property Matters

1. Applicable Levels of Court

Recourse to the courts (the Provincial Court, Supreme Court of British Columbia, or the Court of Appeal of British Columbia) is needed when the dispute is not within the jurisdiction of the CRT and neither of the parties has issued a notice to arbitrate or sought mediation.

The Supreme Court can hear any dispute that is not excluded from its jurisdiction by legislation, while the Provincial Court can only hear cases that the *Provincial Court Act*, RSBC 1996, c 379 [1] and other legislation may grant it. Appeals from the Provincial Court decisions are heard at the Supreme Court, while appeals from the Supreme Court are heard at the Court of Appeal.

2. Bylaw to Sue in Small Claims Court Without a ¾ Vote Resolution

A strata corporation may sue in either Provincial or Supreme Court for money owed to the strata corporation if the lawsuit is first approved by a 3/4 vote at an annual or special general meeting (see s. 171(2)).

Section 171(4) provides, however, that a 3/4 vote resolution is not required to commence a proceeding in Small Claims Court if the strata corporation has passed a bylaw by passing a ¾ vote resolution at either an annual or special general meeting dispensing with the need for authorization, and the terms and conditions of that bylaw are met.

3. Parties/Style of Cause/Standing

The proper name for a strata corporation is “The Owners, Strata Plan [number]” (*SPA*, s 2(1)(b)). Failure to name parties properly may result in default proceedings being set aside or a judgment being granted against a nonexistent party.

Generally, if relief if sought against someone asking the court to order someone to do something, that person should be named as a party to the claim.

Further, different sections of the SPA also permit different entities to bring a claim. A strata lot owner can bring a claim against the strata council where the council members is in breach of the ‘conflict of interest’ sections of s 32 of the *SPA* (*Wong v AA Property Management Ltd.*, 2013 BCSC 1551 [2]).

4. Petition versus Notice of Civil Claim

Proceedings in Supreme Court can be started by a petition or notice of claim. Strata disputes must be brought to court by petition if the SPA permits “an application” to the Supreme Court, which is often the case for strata disputes. Proceedings commenced under petitions have unique rulings, like no automatic right to cross-examine on affidavits or to issue subpoena or to examine witnesses.

Claims brought by a notice of civil claim can take longer to resolve than one brought by petition. Evidence in a trial is normally given orally when brought by a notice of civil claim, whereas a petition is usually heard in Supreme Court chambers on the basis of affidavits instead of oral evidence.

5. Section 171 and 172 Approval and Funding of Litigation

Sections 171(2) and 172(1)(b) require a strata corporation to obtain a 3/4 vote resolution authorizing litigation brought under these sections before starting the action.

Section 171 should be used when there is a "representative action", as described in *Strata Plan LMS 1468 (Owners) v Reunion Properties Inc.*, 2002 BCSC 929 [3]. For example, this is the section under which a "leaky condo" action would be brought. In other words, even though there may be individual claims as well, if it can be said that "if one wins, they all win", the claim falls under s 171.

a) Types of Actions That Require a ¾ Vote

The requirement for a ¾ vote makes it difficult for a strata corporation to pursue litigation, so the courts have held that sometimes, this approval is not required. In *The Owners, Strata Plan VR 1008 v Oldaker*, 2004 BCSC 63 [4], the strata corporation did not need ¾ vote approval to bring a petition under s. 117 to sell a strata lot to enforce a lien. Essentially, when the *SPA* authorizes a strata corporation to bring a proceeding against an owner for a specific purpose, approval under s 171 is not required.

b) Ending an Action

A majority vote under s. 27 may be sufficient in some cases to authorize discontinuance of an action (*The Owners, Strata Plan LMS 1468 v Reunion Properties Inc.*, 2001 BCSC 788 [5]). However, if a claim seeks damages or payments of money to the strata corporation, s. 82 may require a ¾ vote to approve a settlement or discontinuance of a lawsuit.

c) Retroactivity of Approval

The requirement for approval under s. 171(2) or 172(1)(b) before starting litigation remains. However, in a situation of urgency such as an injunction to preserve the status quo in the face of a threatened action that cannot easily be undone, or because of the possible imminent expiry of a limitation period, a strata corporation can start an action or petition and then proceed to obtain the 3/4 vote approval of the litigation retroactively.

6. Practice Issues in Strata Litigation

a) Litigation Privilege and Requests for Access to Records

Sections 35 and 36 of the *SPA* allow strata lot owners and tenants (including former owners and tenants) to obtain documents of the strata corporation, including legal opinions obtained by the strata corporation. However, attorney-client privilege is a fundamental principle of our legal system, so the court in *The Owners, Strata Plan VR 1120 v Mithcinson*, 2022 BCSC 2054 [6] held that legal opinions obtained by a strata corporation and requested under s. 36 are only to be produced as follows:

1. Opinions relating to litigation between the strata corporation and the requesting owner are not disclosable, as specifically provided by s. 169(1)(b) of the *SPA*;
2. opinions relating to disputes between the strata corporation and the requesting owner that did not result in litigation are not disclosable, as protected by solicitor-client privilege; and
3. opinions relating to contemplated or ongoing disputes between the strata corporation and other owners are not to be provided to the requesting owner until the litigation is fully resolved and all avenues of appeal fully exhausted, at which time the opinions may be provided to a requesting owner. Upon disclosure, the requesting owner is not to share the legal opinions received with any other person or organization.

b) Cross-Examination on Affidavit

There is no right to cross-examine a deponent on their affidavit, but it may be possible to obtain consent to do so from the parties or an order from the courts. The test for determining whether cross-examination is justified is, from *Brown v Garrison*, 1967 CanLII 849 (BCCA) [7].

In exercising its discretion, the court will consider whether there are material facts in issue, whether the cross examination is relevant to an issue that may affect the outcome of the substantive application, or whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue.

c) Evidence

Evidence and how to properly get it before the court is a common issue in strata dispute resolution. Often times, strata claims are about novel issues and what needs to be included as evidence continues to involve.

General rules of evidence still apply to strata disputes, and hearsay evidence should not be used in an affidavit.

d) Discovery Process

There are a number of different parties that can act as a strata corporation, including the strata lot owners, members of the strata council, agents hired by the strata corporation, or employees of the strata corporation. Issues can arise about who would be an appropriate representative for examinations of discovery. However, when a strata corporation is a plaintiff, every strata lot owner may be examined for discovery (*Owners, Strata Plan VR 368 v Marathon Realty Co.*, 1982 CanLII 493 (BC CA) [8]).

e) Relief Sought

It is very important to figure out what kind of relief to seek before filing a petition or notice of claim. A judge is usually reluctant to order remedies that are not asked for in some fashion in the petition or notice of claim.

f) Stay of Proceedings

To avoid inconsistent results when multiple actions are brought for interrelated issues involving a single strata corporation, a stay of some of the proceedings may be ordered. To determine if a stay is approp riate, the following issues should be considered (*Peh v The Owners, Strata Plan LMS 3837*, 2008 BCSC 291 [9] at paras 69 to 99):

1. Will a decision in one case substantially determine, or reduce the issued to be decided in, the other case or cases?
2. Is the stay sought for tactical reason?
3. What is the most “logical, efficient, and cost-saving” way to proceed?
4. Where is the balance of convenience?

C. “Tadeson” Orders

A Tadeson order is a common name for a court order under section 165 of the SPA, named after *Tadeson v Owners, Strata Plan NW 2644*, 30 RPR (3d) 253 1999 CanLII 6999 (BC SC) [10] ("*Tadeson*"). Under this section, an ownerm tenant, mortgagee of a strata lot or other interested person may apply to the Supreme Court to order that a strata corporation do any of the following:

1. Perform an act required by the *SPA*, *SPR*, bylaws, or rules;
2. Stop violating the *SPA*, *SPR*, bylaws, or rules;
3. Any other order necessary to give effect to the above.

A Tadeson order is often used for "leaky condo" situations, where a strata corporation fails to make necessary repairs under its responsibility.

In *Tadeson*, a bloc of strata lot owners repeatedly blocked resolutions to pay for repairs to defective walls and balconies that allowed water to enter the building. Finding a failure to discharge its duty to repair, the court allowed the petition to pay for repairs and ordered costs against the owners who opposed the petition.

D. Section 173 Appications

Section 173(1) of the *SPA* operates similarly to a section 165 Tadeson order, but the court order compels a strata lot owner, tenant, or other person to comply with or cease violations of the *SPA*, *SPR*, bylaws, or rules.

A strata corporation must first satisfy three conditions before it may apply to the BC Supreme Court for a section 173 order:

1. It proposes a resolution to approve a special levy to raise money for repairs to common property or common assets that are necessary to ensure safety or prevent significant loss or damage;
2. The resolution fails the required ¾ vote of the strata lot owners, but does receive more than half of the votes cast;
3. Not more than 90 days have passed since the resolution was voted upon.

The strata corporation has the burden of proving on a balance of probabilities that the repairs are required, although it is not necessary to prove that the repairs were required immediately: see *The Owners, Strata Plan VIS114 v John Doe*, 2015 BCSC 13 [11].

An application under s. 173(2) is typically commenced by a petition, and all registered owners must be served with a copy of the court materials by "personal" service under the Supreme Court Civil Rules.

E. Judicial Review from the Civil Resolution Tribunal

1. The Nature of Judicial Review

Provincial superior courts have an inherent jurisdiction to review the decisions or actions of delegates, including administrative tribunals such as the CRT for strata disputes.

2. Time Limit for Review

There is a 60-day time limit for commencing a judicial review of a decision of the CRT from the date the decision is issued. However, under s. 57(2) of the *Administrative Tribunals Act*, SBC 2004, c 45 [12] ("*ATA*"), the court may extend the time for filing the petition for judicial review if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay, and no substantial prejudice or hardship will result to a person affected by the delay.

3. Standard of Review

For strata cases decided by the CRT, the applicable standard of review pursuant to s. 56.7 of the *CRT Act* is "patent unreasonableness" by establishing the CRT as an "expert tribunal" with "specialized expertise in relation to questions of law and fact.

However, the rule of law requires a correctness standard of review for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies. Where the court does apply the correctness standard of review, they may substitute its own view for that of the CRT. For example, in *The Owners, Strata Plan VR 1120 v Mitchinson*, 2022 BCSC 2054 [6], the court found that questions of solicitor-client privilege fall into the general category of questions of law, to the court applied the correctness standard and substituted its own opinion for that of the CRT.

F. Enforcement or Cancellation of Civil Resolution Tribunal (CRT)

1. Enforcing or Cancelling Orders of the CRT at Court

Sections 57 to 60 of the *CRT Act* provides means by which parties may enforce orders of the CRT in the Supreme Court of British Columbia or the Provincial Court of British Columbia.

An order of the CRT may be enforced by filing a validated copy of the "order giving effect to the final decision" in the Supreme Court of British Columbia (*CRT Act*, s 57). The following conditions must be met:

1. The final decision is an approved draft consent resolution order;
2. The time to appeal the decision has expired or leave to appeal has been denied.

If on appeal, the Supreme Court has varied the CRT decision, the varied decision can be enforced by filing both a validated copy of the CRT decision and the Supreme Court order.

If the CRT order is for financial compensation or the return of personal property and the value of the payment or property is less than the monetary limit from the *Small Claims Act*, RSBC 1996, c 430 [13], the order may instead be filed in the Provincial Court (CRT Act, s 58).

For a more complete discussion of enforcing decisions of the CRT, refer to Chapter 20: Small Claims and the CRT.

a) Contempt of Court

In extreme cases of non-compliance with a CRT order, it may be necessary to commence proceedings of contempt of court. Section 60 of the *CRT Act* provides that:

1. A person who fails or refuses to comply with an order of the tribunal is liable, on application to the Supreme Court, to be punished for contempt as if in breach of an order or judgement of the Supreme Court;
2. Subsection (1) does not limit the conduct for which the Supreme Court may make a finding of contempt in respect of a person's conduct in relation to a tribunal proceeding.

In this scenario, the applicant must be prepared to demonstrate the elements of contempt beyond a reasonable doubt (*The Owners Strata Plan LMS 2768 v Jordison*, 2013 BCSC 487 [14] at para. 34). The elements are set out at para 19 of *The Owners, Strata Plan NW 2395 v Nikkel*, 2020 BCSC 282 [15], citing *Carey v Laiken*, 2015 SCC 17 [16]:

1. The order breached must be stated clearly and unequivocally concerning what should and should not be done: para. 33. If an order is unclear or is missing essential detail about where, when, or to whom it applies; if it incorporates overly broad language or if external circumstances obscured its meaning, the alleged contemnor may be excused;

2. The person must have actual knowledge of the order: para 34. It may be possible to infer knowledge in some circumstances or if the contemnor has been wilfully blind; and
3. The party alleged to be in breach must have done the act intentionally: para 35. Intent to interfere with the administration of justice is not an element of civil contempt and the lack of contumacy is not a defence: para. 47.

Punishments for contempt include fines and, as a last resort per *The Owners, Strata Plan VR 812 v Yu*, 2019 BCSC 693 [17], the forced sale of an owner's strata lot.

2. Authority to Enforce or Cancel an Order of the CRT

Section 171(2) of the *SPA* states that before the strata corporation sues as representative of all owners, the suit must be authorized by a 3/4 vote resolution. This does not apply to the Civil Resolution Tribunal. From sections 189.1 and 34.1 of the *SPA*, a strata corporation, owner, or tenant may request the CRT to resolve any dispute concerning a strata property claim within its jurisdiction, although requests by an owner or tenant must be preceded by either a request for a council hearing or a CRT direction that the council hearing may be exempted.

The CRT can cancel an order under s. 37 of the *CRT Act*. A strata corporation must then file the cancelled order and not take any further steps to enforce the order.

References

[1] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96379_01
[2] https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc1551/2013bcsc1551.html
[3] https://www.canlii.org/en/bc/bcsc/doc/2002/2002bcsc929/2002bcsc929.html
[4] https://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc63/2004bcsc63.html
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[17] https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc693/2019bcsc693.html

Chapter Twenty Three – Referrals

I. General

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Access Pro Bono's Lawyer Referral Service

Telephone: 604-687-3221 Toll-Free: 1-800-663-1919 Website: https:/ / www. accessprobono. ca/ our-programs/ lawyer-referral-service

- Consultation with a lawyer for up to 30 minutes for free, during which time fees are negotiated for further consultation, but a few well-organized questions can be answered
- Any ongoing legal assistance will require paying the lawyer's regular fees

Access Pro Bono

Telephone: 604-482-3195 Toll-Free: 1-877-762-6664 Website: https://www.accessprobono.ca

- **Summary Legal Advice Program:** Volunteer lawyers provide up to a half-hour of free legal advice to clients at summary legal advice clinics
- **Roster Program:** Pro bono representation for Court of Appeal, family law, Federal Court of Appeal, judicial review and wills and estates issues
- **Civil Chambers Program:** Civil (non-family) chambers litigation matters before the Supreme Court and the Court of Appeal in Vancouver
- **Employment Standards Program:** Volunteer lawyers and students provide free legal representation to employees at the Employment Standards Branch
- **Mental Health Program Telephone Clinic:** Free legal advice appointments over the phone to people detained under the Mental Health Act or their relatives
- **Residential Tenancy Program:** Legal representation for low-income tenants and landlords appearing before the Residential Tenancy Branch
- **Solicitors' Program:** Connects non-profit organisations with pro-bono legal services
- **Wills Clinic:** Appointments for low-income seniors and people with terminal illnesses. Trained lawyers and articling students draft and execute simple wills and representation agreements. (604-424-9600)

Legal Services Society (Legal Aid)

Legal Aid Applications: Telephone: 604-408-2172 Toll-Free: 1-866-577-2525 General Inquiries: Telephone: 604-601-6000 Website: https://legalaid.bc.ca/

- A range of free legal services provided to all British Columbians, with priority given to people with low incomes
- **Information:** Variety of publications available online to get general information about the law
- **Advice:** Legal advice on criminal, family and immigration issues from duty counsel lawyers and family advice lawyers
- **Representation:** A lawyer may be able to take your case and provide representation for criminal charges, mental health and prison issues, serious family problems, child protection matters and immigration problems

Community Legal Assistance Society (CLAS)

Telephone: 604-685-3425 Toll-Free: 1-888-685-6222 Website: https://clasbc.net/

- Legal assistance for issues including housing, income security, employment insurance, workers' compensation, mental health, human rights
- CLAS generally provides assistance with judicial review of decisions from tribunals like the RTB, EAAT, SST, WCAT, EST, and the BC and Canadian Human Rights Tribunals. This makes CLAS a good referral for LSLAP clients after we receive tribunal decisions.
- Review decisions from a review panel under the Mental Health Act or Criminal Code, challenge certificates of incapability from the Public Guardian and Trustee, or assist with individuals detained under the Adult Guardianship Act.
- Can assist low-income homeowners facing foreclosure, members of housing co-ops whose membership has been terminated, and tenants with an order of possession requiring them to leave their home.

Law Students' Legal Advice Program (LSLAP)

Telephone: 604-822-5791 Website: https://www.lslap.bc.ca

- Free legal assistance through appointments for low-income individuals in the Greater Vancouver area, including representation, document drafting, summary advice, and referrals
- Help with criminal law (summary offences), tenancy, employment, small claims, welfare, human rights, immigration, and more
- No family law, personal injury, supreme court, business law, real property, or criminal law where there is a risk of jail time
- Operates a Criminal Code s. 684 project which helps convicted individuals fill out s. 684 applications for a court to assign counsel to act for an accused in an appeal

Vancouver Justice Access Centre

Telephone: 604-660-2084 Toll-Free: 1-800-663-7867 (ask for Justice Access Centre) Virtual Initial Needs Determination: 1-844-747-3963 Website: https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/justice-access-centres/how-to-find-us/vancouver

- Legal information, self-help and other resources; limited legal advice on family and civil law issues (low-income eligibility requirements apply). No legal advice for criminal matters, small claims court forms and filings, or personal injury matters.
- Can give advice on family and civil justice issues such as separation or divorce, guardianship, child or spousal support, parenting after separation, protection orders, income security, employment, housing, debt, human rights, consumer issues, wills and estates, EI, worker's compensation, and immigration/refugee issues.

Seniors First BC

Telephone: 604-437-1940 Toll-Free: 1-866-437-1940 Website: https://seniorsfirstbc.ca/

- Provides services to people age 55 and over
- Helps victims of abuse or a crime to access the justice system
- Provides practical and emotional support
- Preparation and support for older adults who will be testifying in court about abuse or other crime
- Can assist with tenancy/housing, debt, pensions, assisted living, discrimination, abuse/neglect, financial exploitation, consumer complaints, and guardianship/capacity.
- Does not prepare wills or power of attorneys, or give advice on estate administration, real estate, criminal law or family law matters

Dial-A-Law

Telephone: 604-687-4680 Toll-Free: 1-800-565-5297 Website: https://dialalaw.peopleslawschool.ca/

- General information on a variety of topics on law in British Columbia
- Library of legal information prepared by lawyers

Clicklaw

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

- Legal information and education for British Columbians
- Available in multiple languages

The Kettle Society

Telephone: 604-253-0669 Website: https://www.thekettle.ca/advocacy

- Advocacy and support, with a focus on mental health
- Family, tenancy, tax, welfare, ID replacement, and human rights

Amici Curiae

Telephone: 778-522-2839 Website: https://www.legalformsbc.ca

- Free assistance in completing legal forms (no criminal law, elder law, or wills and estates)

The Law Centre (University of Victoria)

Telephone: 250-385-1221 Website: https://www.uvic.ca/law/about/centre

- Law students at the University of Victoria provide legal assistance to low-income individuals with criminal, family, and civil law issues, including help with human rights, employment insurance, tenancy, welfare, and other administrative tribunals

PovNet

Website: https://www.povnet.org

- Comprehensive source of legal referrals

First United Church Advocacy

Telephone: 604-251-3323 Website: https://firstunited.ca/how-we-help/legal-advocacy

- Broad range of legal advocacy for low-income and vulnerable people in the Downtown Eastside Vancouver
- Focus on tenancy and social assistance

St. Paul's Advocacy Office

Telephone: 604-683-4287 Website: https://www.stpaulsanglican.bc.ca/ministries/advocacy-office

- Supports people facing difficulties in day-to-day living
- This includes accommodation needs, landlord-tenant disputes, health and disability issues, and access to government services

Together Against Poverty Society (TAPS)

Telephone: 250-361-3521 Website: https://www.tapsbc.ca

- Legal advocacy in Victoria
- Income assistance, disability benefits, employment standards, tenancy, and income tax

Civil Resolution Tribunal

Telephone: 1-844-322-2292 Website: https://www.civilresolutionbc.ca

- Tribunal which handles small claims matter under $5,000
- Solution explorer for alternative dispute options
- Start your claim online
- Also handles motor vehicle injury under $50,000, strata disputes, societies and cooperative associations disputes, and shared accommodations and some housing disputes

II. Family Law & Women

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Family LawLINE (Legal Services Society)

Telephone: 604-408-2172 Toll-Free: 1-866-577-2525 Website: https://family.legalaid.bc.ca/

- Free legal advice over the telephone
- Lawyers give brief "next step" advice

Vancouver Justice Access Centre

Telephone: 604-660-2084 Toll-Free: 1-800-663-7867 (ask for Justice Access Centre) Website: https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/justice-access-centres/how-to-find-us/vancouver

- Legal information, self-help and other resources; limited legal advice on family law issues (low-income eligibility requirements apply). No legal advice for criminal matters, small claims court forms and filings and personal injury matters.
- Advice on family issues such as separation or divorce, guardianship, child/spousal support, parenting after separation, and protection orders under the *Family Law Act*.

Family Justice Centres

Telephone: 1-604-660-2421 (ask for Family Justice Centre) Toll free: 1-800-663-7867 (ask for Family Justice Centre) Website: https:/ / www2. gov. bc. ca/ gov/ content/ life-events/ divorce/ family-justice/ who-can-help/ family-justice-centres

- Family Justice Centres operate across BC to provide services to British Columbians going through separation or divorce. Each centre is staffed by accredited Family Justice Counsellors, specially trained to help families with parenting arrangements, contact with a child, guardianship, and support issues. They can help parents resolve disagreements without going to court.

Family Law in British Columbia (Legal Services Society)

Website: https://familylaw.lss.bc.ca/

- Information about family law issues, the legal system, and alternatives to court

The Family Mediation Program (MediateBC)

Telephone: 604-684-1300 Toll-Free: 1-877-656-1300 Website: https://www.mediatebc.com/

- Affordable mediation services for families. A family law mediator will assist families in a formal dispute resolution process to resolve family law issues after separation.

British Columbia Family Maintenance Enforcement Program

Telephone: 604-678-5670 Toll-free: 1-800-663-9666 Website: https://www.fmep.gov.bc.ca/

- Free service from BC Ministry of the Attorney General to help families and children entitled to support under a maintenance order or agreement.

Ann Davis Transition Society

Administration/Counselling: 604-792-2760 Immediate Help (Shelter): 604-792-3116 Website: http://www. anndavis. org

- Provides shelter and support for abused women and their children (in Chilliwack)
- Individual and group counselling for women, children, youth, couples and families
- Advocacy in family law and tenancy issues

North Shore Women's Centre

Telephone: 604-984-6009 Website: http://www.northshorewomen.ca Email: info@northshorewomen.ca

- Women's drop-in resource centre
- Runs a family law clinic which provides information, support, and legal advice about family law issues
- In North Vancouver

B.C. Men's Resource Centre

Telephone: 604-878-9033 Website: https://menbc.ca/

- Individual, couple and family counselling (no legal advice)

Battered Women’s Support Services

Telephone: 604-687-1867 Toll-Free: 1-855-687-1868 Website: https://www.bwss.org

- Summary advice, workshops, and advocacy in family, immigration, refugee, and criminal law
- Court form preparation clinic for drafting supreme court forms for family law proceedings
- Offers counselling, support, information, and other resources

BC Pro Bono Collaborative Roster Society

Website: https://www.bccollaborativerostersociety.com/

- Service for low-income families going through separation/divorce who do not have lawyers
- Collaborative team works with both parties in a divorce to come to a satisfactory settlement

Downtown Eastside Women’s Centre

Telephone 604-681-8480 Website: https://dewc.ca

- Safe space for women and children in the Downtown Eastside
- Advocacy in welfare, tenancy, housing applications, and family law, including providing referrals

Family Services of Greater Vancouver

Telephone: 604-731-4951 Website: https://fsgv.ca

- Family law information, counselling, and support services

Grandparents Raising Grandchildren Support Line

Telephone: 604-558-4740 Toll-free: 1-855-474-9777 Website: https:/ / www. parentsupportbc. ca/ grandparents-raising-grandchildren/

- Phone line staffed by advocates trained in advocacy, social work, family law, and government services related to kinship caregiving

Representative for Children and Youth

Telephone (youth): 1-800-476-3933 Children's Help Line: 310-1234 Website: https://www.rcybc.ca

- Assists children and youth understand their rights and advocates on their behalf

RISE Women's Legal Centre

Telephone: 236-317-9000 Website: https://womenslegalcentre.ca

- Provides legal services to women in family law and immigration applications for permanent residence on humanitarian and compassionate grounds
- Provides summary advice, court preparation, and legal representation

Sources Legal Resource Center

Telephone: 778-565-3638 Website: https://www.sourcesbc.ca/our-services/community-law-clinic/

- Legal information, resources, and advice with family law issues
- Wide variety of counselling and support services

Society for Children and Youth

Telephone: 778-657-5544 Toll-Free: 1-877-462-0037 Website: https://www.scyofbc.org Email: info@scyofbc.org

- Can provide free legal advice to children and youth on family law issues and more

III. Residential Tenancy

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

TRAC Tenant Resource & Advisory Centre

Telephone: 604-255-0546 Toll-Free: 1-800-665-1185 Website: https://tenants.bc.ca/

- TRAC provides legal education and information online, by phone, and by workshop.
- TRAC's website hosts a variety of education materials on tenancy and tenant's rights. If you cannot find the answers you need on their website, you can call their Tenant Infoline.
- For eligible clients, TRAC offers direct advocacy by negotiating resolutions with problem landlords or providing representation at Residential Tenancy Branch dispute resolution hearings. TRAC does not provide a drop-in service to the public.

Residential Tenancy Branch

Telephone: 604-660-1020 Toll-Free: 1-800-665-8779 Website: https:/ / www2. gov. bc. ca/ gov/ content/ housing-tenancy/residential-tenancies

- Provides landlord and tenants with information and dispute resolution services

IV. Human Rights

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

BC Human Rights Clinic

Telephone: 604-622-1100 Toll-Free: 1-855-685-6222 Website: https://www.bchrc.net

- Operated by CLAS
- Short service clinic has 30 minute appointments with a human rights lawyer/advocate.
- Legal services program provides summary advice, legal assistance, or representation to complainants who apply for representation and qualify for assistance.
- You should apply within 30 days of the Tribunal accepting the complaint for filing.

Canadian Human Rights Commission

Toll-Free: 1-888-214-1090 Website: https://www.chrc-ccdp.gc.ca/en

- Administers the *Canadian Human Rights Act*
- Ensures compliance with the *Employment Equity Act*
- Information about how to make a formal complaint regarding a business or organization regulated by the federal government.

BC Human Rights Tribunal

Telephone: 604-775-2000 Toll-Free: 1-888-440-8844 Website: http://www.bchrt.bc.ca/

- Deals with human rights complaints that arise in British Columbia and are covered by the *Human Rights Code*

BC Civil Liberties Association

Telephone: 604-687-2919 Website: http://www.bccla.org/

- Assists the general public complaints against police officers and infringements on freedom of speech
- Provides a Legal Advocate Support Line which can provide legal information, referrals, and consultations for legal advocates working with clients facing civil liberties infringements

V. Wills & Estates

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Access Pro Bono (Wills Clinic Project)

Telephone: 604-424-9600 Website: https://www.accessprobono.ca/our-programs/wills-clinic

- Draft and execute Wills, Representation Agreements, and enduring Power of Attorney for seniors and people with terminal illnesses that have low/modest incomes.

Society of Notaries Public of British Columbia

Telephone: 604-681-4516 Website: https://snpbc.ca/

- Wills, power of attorneys, representation agreements and advance directives

VI. Immigration & Refugee

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Immigration Services Society of BC

Telephone: 604-684-2561 Website: https://issbc.org/

- Support services for immigrants and refugees
- Settlement, education, language and employment services
- Supports refugee claimants throughout the process, including assistance filling out application forms, applying for Legal Aid, using the healthcare system, cultural orientation, and other general settlement services (Settlement Orientation Services: 604-255-1881)

MOSAIC

Website: https://mosaicbc.org

- Offers settlement information and services for immigrants
- Legal advocacy program for low-income immigrants (604-254-9626)
- Interpretation and translation services (Interpretation: 604-254-8022 Translation: 604-254-0469)

Immigration, Refugees, and Citizenship Canada Client Support Centre

Telephone: 1-888-242-2100

- Pre-recorded information about immigration programs, live chat with agents for general questions and specific questions about your case

Vancouver Association for Survivors of Torture

Telephone: 778-372-6593 Toll-Free: 1-866-393-3133 Website: https://www.vastbc.ca/

- Counselling and support services for survivors of torture, trauma and political violence
- Referrals to other agencies and professionals

VII. Disability

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Disability Alliance BC (Advocacy Access Program)

Telephone: 604-872-1278 Toll-Free: 1-800-663-1278 Website: https://disabilityalliancebc.org/

- Free one-to-one assistance with provincial and federal disability benefits
- Advocacy services such as, applying for benefits, appealing the denial of benefits, help with taxes, Canada Pension Plan Disability, and more

VIII. Employment

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Employment Standards Branch

Toll-Free: 1-800-236-3700 Website: https:/ / www2. gov. bc. ca/ gov/ content/ employment-business/ employment-standards-advice/employment-standards

- Administers the *Employment Standards Act* and *Regulation*

IX. Debt

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Credit Counseling Society

Toll-Free: 1-888-527-8999 Website: https://www.nomoredebts.org/

- Free, confidential credit counselling
- Debt consolidation, repayment and settlement
- Money management and budgeting assistance
- Information and referrals

Bankruptcy Canada

Telephone: 1-888-823-8239 Website: https://www.bankruptcy-canada.ca

- Offers free consultation with a licenced bankruptcy trustee

X. Indigenous

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

UBC Indigenous Community Legal Clinic

Telephone: 604-822-1311 Toll-Free: 1-888-684-7874

- Free legal services for Indigenous people in the Downtown Eastside and throughout the Lower Mainland. Advice, assistance and representation for eligible clients who cannot afford a lawyer and who self-identify as Indigenous persons

Native Courtworker and Counselling Association of British Columbia

Telephone: 604-985-5355 Toll-Free: 1-877-811-1190 Website: https://nccabc.ca/

- Legal and health services for Indigenous people. Help with the criminal justice system, assistance with substance abuse and detox issues, discrimination from health providers, family and youth issues, and violence and abuse

XI. Police Complaints

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

Office of the Police Complaint Commissioner

Telephone: 250-356-7458 Toll-Free: 1-877-999-8707 Website: https://opcc.bc.ca/

- Complaints against Municipal Police

Civilian Review and Complaints Commission for the RCMP

Toll-Free: 1-800-665-6878 TTY: 1-866-432-5837 Website: https://www.crcc-ccetp.gc.ca

- Complaints against the RCMP

XII. Chinese Language

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

S.U.C.C.E.S.S.

Telephone: 604-684-1628 Website: https://successbc.ca/

- Service in Mandarin and Cantonese

XIII. Others

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 1, 2023.

The Law Society of British Columbia

Telephone: 604-669-2533 Toll-Free: 1-800-903-5300 Website: https://www.lawsociety.bc.ca/

- Considers all complaints about lawyer conduct or competency

VictimLinkBC

Toll-Free: 1-800-563-0808 Email: VictimLinkBC@bc211.ca

- Provides information and referral services to all victims of crime
- Immediate crisis support to victims of family and sexual violence

The Vancouver Police Department (Victim Services)

Telephone: 604-717-2737

- Provide crime victims, witnesses and their family members with professional, supportive and timely assistance
- Emotional support, information and assistance with Victim Impact Statements and Crime Victim Assistance forms

Crisis Intervention and Suicide Prevention Centre of BC (Crisis Centre)

Crisis Line: 604-872-3311 Toll-Free: 1-866-661-3311 Website: https:/ / crisiscentre. bc. ca/ Suicide Line: 1-800-SUICIDE (784-2433)

- 24/7 free crisis support and suicide prevention service

Vital Statistics Agency

Telephone: 250-952-2681 Website: https:/ / www2. gov. bc. ca/ gov/ content/ family-social-supports/ seniors/ health-safety/health-care-programs-and-services/vital-statistics

- Registers all births, marriages, deaths and changes of name

Alma Mater Society of the University of British Columbia (Advocacy Office)

Telephone: 604-822-9855 Website: https://www.ams.ubc.ca/support-services/ombuds/

- Provides confidential assistance and representation for undergraduate students involved in formal conflict with the University
- Help with academic appeals, student discipline cases and appeals, housing appeals, parking disputes and library fine appeals

Brydges Line

Telephone: 1-866-458-5500

- Telephone line for individuals to speak to lawyer if they are arrested, detained, and under investigation (but not yet charged)

West Coast Prison Justice Society

Telephone: 604-636-0470 (call for a referral) Website: https://prisonjustice.org/

- Protects prisoners' rights
- Assists with issues like solitary confinement, involuntary transfers, parole suspensions, disciplinary hearings, human rights, and health care

Personal Injury Resource Centre

Website: https://www.murphybattista.com/injury-resources/

- Offers a range of services for injured individuals, including no cost consultations

Better Business Bureau

Telephone: 604-682-2711 Website: https://www.bbb.org

- Can file complaints against businesses
- Provides resources for consumer education