
Resolving Family Law Problems out of Court

Family law problems can be resolved in a bunch of different ways. Court is not the only option. Depending on your particular circumstances, you may never need to darken the doorway of a courtroom.

Almost every issue a couple faces when their relationship breaks down can be handled without litigation, as long as both people are able to discuss things and each is flexible enough to find compromise. The only reason why a couple must go to court is to get a divorce.

There are many reasons why it is generally better to resolve matters out of court. Agreements that are made voluntarily by both parties are more likely to be long-lasting and leave both people more satisfied than if someone else (a judge) makes the decision for them. Another main reason is that resolving matters out of court is often, in the long run, cheaper than a court process. That is not to say out of court processes are cheap or free (with the exception of some services which are detailed below). The processes here still require a financial investment. We just think it's better to invest in one of these processes and come out with a more durable "win-win" agreement for both parties and their children, and to avoid court if you are able to.

This chapter discusses how family law problems can be resolved without going to court. It begins with a brief overview of the different out-of-court options and the different ways that settlements and agreements can be recorded. It also reviews what can happen when someone has a change of heart after an agreement has been reached. The other sections of this chapter discuss in more detail the different options for resolving matters: collaborative process, mediation, arbitration, and parenting coordination.

Introduction

The fundamental goal shared by all out-of-court options is to arrive at a settlement of the issues in dispute, particularly those that could have been fought about in court. As you might expect, reaching settlement can require a certain amount of flexibility and maturity. Most importantly, the people involved must understand that neither of them is going to get everything they want. Whatever a person's wish list might be going into negotiations, the end result always represents a compromise and some accommodation of the other person's goals, wishes and expectations.

It's not always possible to avoid court. Sometimes one or both people are so stubborn that they can't or won't compromise their position, and sometimes urgent court action is necessary to stop something bad from happening. But out-of-court options always offer a cheaper, friendlier resolution to the legal problems that come up when a relationship ends. They are far less stressful and disruptive to the people involved and their children.

It is particularly important to negotiate a settlement when a couple has children. Where there are no children, a couple can walk away from their relationship and have nothing more to do with one another for the rest of their lives. However, where there are children, a couple can expect to be involved with each other, whether they like it or not, for the next five, twenty or forty years. Both parents will want to be at their child's high school graduation, both will want to attend parent-teacher meetings, and both will want to go to school concerts and sports days. The child will want both parents to be there too. No matter how tense or awkward the relationship between the parents is, they will both be involved in each other's lives until they die or their child predeceases them. As a result, maintaining a functioning relationship is an absolute necessity, and negotiation gives parents the best chance of doing just that.

For more information about parenting after a relationship has ended and how to put the children first in your dispute with the other parent, see the section on Parenting after Separation in the chapter on Children. For more information about the emotional issues that tend to come with the end of a long-term relationship and how to keep those issues from hopelessly complicating your dispute, see the section on Separating Emotionally in the chapter Separation and Divorce.

The *Family Law Act* and out-of-court options

According to the Ministry of Justice's guide to the *Family Law Act* ^[1], the BC *Family Law Act* was written to encourage people to resolve family law problems without having to go to court:

"Section 4 emphasizes that out-of-court dispute resolution processes and resolution through agreements are not simply add-ons to litigation but are the preferred option, with court as a valued, but last, resort.

"This focus on family dispute resolution signals an important shift from the *Family Relations Act*, which was criticized for being litigation-focused and for assuming that every dispute would end in a trial."

The *Act* supports the resolution of family law disputes outside of court by:

- requiring lawyers to explain the different dispute resolution processes to their clients (ss. 4 and 8),
- requiring the people involved in a family law dispute to make full disclosure of the information necessary to resolve the dispute, even when they're not in court (s. 5),
- providing for the use of parenting coordinators to resolve disputes about parenting once a final order or agreement about parenting arrangements and contact has been reached (ss. 15 to 19),
- including mediation and the collaborative process as dispute resolution processes to which the court can refer people (ss. 1 and 224),
- changing the rules about arbitration to better accommodate the arbitration of family law disputes (ss. 305 to 313), and
- allowing the court to delay a proceeding while the parties attempt to resolve a family law dispute out of court (s. 223).

The *Act* also allows the court to require people involved in a court proceeding to attempt to resolve their dispute out of court, and to attend counselling if the court is of the view counselling would be helpful:

224 (1) A court may make an order to do one or both of the following:

(a) require the parties to participate in family dispute resolution;

(b) require one or more parties or, without the consent of the child's guardian, a child, to attend counselling, specified services or programs.

(2) If the court makes an order under subsection (1), the court may allocate among the parties, or require one party alone to pay, the fees relating to the family dispute resolution, counselling, services or programs.

This is a dramatic change from the old *Family Relations Act*, which didn't deal with out-of-court dispute resolution options except in terms of how agreements could be enforced or set aside.

This change in the *Family Law Act* has laid the groundwork for changing the how families interact with the court system. A pilot project launched in May 2019 at the Victoria Provincial Court Registry encourages parties to resolve matters by agreement. The Victoria Early Resolution & Case Management Model ^[2] provides family case management earlier in the court process, and refers appropriate parties to either mediation or the collaborative process before appearing in court.

Out-of-court options

There really are only two ways to resolve a legal dispute without going to court: you can negotiate a settlement, or you can ask someone other than a judge to arbitrate the dispute and impose a resolution. Mediation and the collaborative process are types of negotiation. Parenting coordination is a hybrid process that uses elements of mediation and elements of arbitration.

Negotiation

Negotiation is a cooperative effort to resolve a dispute through discussion. Simply put, mediation and the collaborative process are structured ways of handling this discussion; they are both processes of negotiation.

Couples can negotiate a dispute between themselves, with the help of a lawyer, or with the help of a judge at a settlement conference if a court proceeding has started. Negotiation boils down to this:

Pat: "I'll give you 60% of the house sale proceeds if you'll let me keep my Porsche Boxster."

Sandy: "Look, 60% is great, but I need some compensation for my interest in the Porsche. Why not give me 65% of the house and half of your hockey card collection."

Pat: "You know how important my hockey card collection is to me. Let me keep my hockey cards; I'll give you 60% of the house, and I'll sell the Porsche and give you half of what I get for it. Plus, I'll let you keep your Ford Pinto."

In a process of negotiation, each person gives a little and takes a little, all in the hope that at the end of the day they'll be able to come to an agreement on all of the issues that have cropped up because of the end of their relationship. If they reach a settlement, the parties almost always put the agreement in some written form; in fact, writing it down is really important. Without some record of the deal that was reached, there's no way to confirm what the deal was if people start remembering things differently.

For a quick introduction on to how to start negotiations, see *How Do I Start Negotiations with My Spouse?* It's located in the *How Do I?* part of this resource, within the section *Alternatives to Court*.

Collaborative process

The collaborative process is a kind of structured negotiation in which the parties and their lawyers sign an agreement not to go to court and to work together as a team to reach a settlement. The team can use counsellors to address the emotional and psychological issues related to the separation and to provide their expertise on parenting plans. Other specialists can be recruited to help with particular subjects, such as issues about the children or complicated financial problems, as the need arises. The goal of the collaborative process is to arrive at a durable settlement that, as much as possible, meets both parties' highest needs and goals. The idea is that by working together as a team, creative options can be explored for the benefit of the family.

There are collaborative practice groups all over British Columbia. More information about collaborative processes is discussed in this chapter's section on Collaborative Process and on the following websites:

- BC Collaborative Roster Society ^[3] (BC-wide Collaborative Roster)
- Collaborative Divorce Vancouver ^[4] (Vancouver and Lower Mainland)
- Victoria's Collaborative Family Separation Professionals ^[5] (Victoria)
- Okanagan Collaborative Family Law Group ^[6] (Okanagan)
- Collaborative Law Group of Nelson ^[7] (Nelson)
- Collaborative Association in Metro Vancouver ^[8] (Surrey/New Westminster/Fraser Valley)

For a quick introduction to how to start the collaborative process, see *How Do I Start a Collaborative Process with My Spouse?* located in the *How Do I?* part of this resource.

Mediation

Mediation is another kind of structured negotiation in which the parties attempt to reach an agreement with the help of a mediator. A mediator is a neutral third party who guides the parties through their negotiations, helps to identify the parties' interests, and helps them to find settlement that will work for both of them. The goal of mediation is to arrive at a settlement of some or all of the issues in dispute which both parties are as happy with as possible.

Mediation may be used by parties who never plan to set foot in a courtroom. It is also useful for parties who have started a court action but still want to try and settle out of court.

If they reach a settlement, the terms of the deal can be set out in a separation agreement, in minutes of settlement, or in a consent order, depending on the circumstances and the preferences of the parties.

Some lawyers also work as mediators. Lawyers who work as mediators are called *family law mediators*. They have to have additional training in mediation, family violence, and power dynamics in dispute resolution processes. Lawyers who are family law mediators will usually advertise that they are both lawyers and mediators. More information about the training requirements of family law mediators is available from the Law Society of British Columbia's page on Family Law Mediators ^[9].

For a quick introduction to how to start mediation, see *How Do I Start Mediation with My Spouse?*. It's located in the *How Do I?* part of this resource, within the section Alternatives to Court. For more detailed information about the mediation process, see the Family Law Mediation section of this chapter.

The general rule is that mediation is a voluntary process. There is one exception to that rule. If you and your spouse are already parties to an action in the Supreme Court, the *Notice to Mediate (Family) Regulation* ^[10] provides a mechanism for requiring the other side to try mediation before getting into the courtroom. To find out how to use this regulation see JP Boyd on Family Law the Blog ^[11] for the procedure involved.

Arbitration

Arbitration is a decision-making process that can be a lot like court. In arbitration, the parties hire an arbitrator to act as their personal judge. They agree that the arbitrator can make decisions about their dispute that they will be bound by, as if the decisions had been made by a judge in court. However, unlike court, arbitration is a completely private process and the people involved can proceed at their own pace.

Arbitration is a lot more formal than mediation, because the arbitration process can be very much like the court process. Each party presents evidence and arguments, and tries to persuade the arbitrator that their position is the right one. Mediation, on the other hand, is often more like a conversation, with no evidence apart from helpful things like financial statements and with no formal rules of procedure.

Arbitration is governed by the provincial *Arbitration Act* ^[12], and is, like mediation and collaborative processes, one of the dispute resolution processes that the court can refer people to under the *Family Law Act*.

Some lawyers also work as arbitrators. Lawyers who work as arbitrators are called "family law arbitrators." They have to have practised as a lawyer for at least ten years and have additional training in arbitration, family violence, and power dynamics in dispute resolution processes. Lawyers who are family law arbitrators will usually advertise that they provide arbitration services. More information about the training requirements of family law arbitrators is set out in the Law Society's Code of Professional Conduct ^[13] in Appendix B, and the Law Society's Rules ^[14] at Part 3, Division 3.

For a quick introduction to how to start arbitration, see *How Do I Start Arbitration with My Spouse?* It's located in the *How Do I?* part of this resource, within the section Alternatives to Court.

Using mediation and arbitration together

Mediation has lots to recommend it. It's cooperative, it's based on discussion and compromise, and its goal is to reach a settlement by consensus. However, without that last ingredient, consensus, mediation will always fail. It sometimes makes sense to include a way of resolving any issues that can't be agreed to, and that might mean giving the mediator the power to resolve a stalemate by imposing a decision like an arbitrator. This hybrid approach to mediation and arbitration is called *mediation-arbitration*, sometimes shortened to *med-arb*.

In a med-arb process, the parties sign an agreement that commits them to the mediation process and describes what will happen if agreement can't be reached. The agreement should say whether the mediator will use information from the mediation phase to make decisions in the arbitration phase, and how other evidence will be presented in the arbitration phase. It's really important to understand what will trigger the end of mediation and the beginning of arbitration, and whether the mediator will have the power to make decisions as an arbitrator on all of the issues or just some of them.

Parenting coordination

Parenting coordination is a hybrid dispute resolution process that relies on both mediation and arbitration, and is only used to deal with problems about the care of children after a parenting plan has been put in place under a court order or a separation agreement. Parenting coordination is a child-focused process in which a neutral third party, a parenting coordinator, helps parents implement the terms of their parenting plan. Parenting coordination is really only useful for parents who always seem to find themselves in conflict about parenting issues, despite their order or agreement.

In the parenting coordination process, the parents hire a parenting coordinator and sign a parenting coordination agreement that outlines their rights and responsibilities to each other and the scope of the parenting coordinator's services and authority. When a problem crops up, one of the parents will contact the parenting coordinator and the parenting coordinator will get to work. First, the parenting coordinator will try to work out a solution by finding consensus, like a mediator. However, if the parents can't be helped to reach an agreement, the parenting coordinator will impose a resolution to the dispute, like an arbitrator.

Parenting coordinators are family law lawyers and mental health professionals who are hired on a long-term basis, usually for six to 24 months. Lawyers who work as parenting coordinators have to have practised as a lawyer for ten years and have additional training in parenting coordination, arbitration, mediation, family violence, and power dynamics in dispute resolution processes. Lawyers who are parenting coordinators will usually advertise that they also provide those services.

More information about the training requirements of parenting coordinators is set out in the Law Society *Rules* ^[15], Part 3, Division 4. More information about parenting coordination is available at the website of the BC Parenting Coordinators Roster Society ^[16].

To find out more about parenting coordinators, see *How Do I Hire a Parenting Coordinator?* It's located in the *How Do I?* part of this resource, within the section *Alternatives to Court*.

Free and lower cost options

Generally, people will have to pay for their mediator, collaborative lawyer, arbitrator or parenting coordinator. Sometimes these specialists charge on a sliding scale, but often those fees will be in the neighbourhood of \$200-\$400 per hour and up. They will usually require significant retainers in advance. This is the challenge with getting access to legal assistance. The reality is that many people do not have the money to pay these fees or have a limited budget in which to work. Here is a list of services to assist:

- some mediation services regarding children and support are provided at no cost by family justice counsellors ^[17]

- pro bono assistance from a collaborative process team through the Pro Bono Collaborative Divorce Project run by the BC Collaborative Roster Society ^[18] if you meet certain eligibility requirements
- pro bono mediation at the Pro Bono Family Mediation Clinic run by the North Shore Pro Bono Society ^[19] if you meet certain eligibility requirements
- a limited amount of mediation paid for in limited circumstances by Legal Aid
- unbundled legal services, or limited scope retainers, include piecemeal assistance from lawyers that focus on the things you need the most help with (see Unbundled Legal Services ^[20] for more information on this)

Dispute resolution processes - thinking outside the box

The end of a relationship can be a messy business at times. In addition to the legal issues that sometimes come up, there are always emotional issues, and the emotional issues can sometimes cloud people's judgment. (This is one of the reasons why hiring a lawyer can be a good idea; the lawyer's job is to help you see the forest when all you can see is the tree in front of you.) Over time, the intensity of the emotional issues changes and, hopefully, mellows. This can have an effect on how the legal issues are managed; things that seemed terribly urgent or incapable of compromise become less urgent and more susceptible to alternatives.

At the same time, the people who used to be a couple are also moving forward with their lives and learning how to live independently and apart. They're setting up separate homes, and establishing separate bank accounts. Temporary parenting arrangements get sorted out, whether by habit, by agreement, or by court order, and temporary arrangements get worked out about how the family's income will be distributed to support two homes. This too has an effect on how the legal issues are managed.

As the circumstances and attitudes of the parties evolve, so should the approach being taken to the resolution of their dispute.

It seems to me that no one dispute resolution process is going to be appropriate throughout the life of a dispute, except perhaps litigation when the conflict between the parties is extreme or there are mental health or violence issues that cannot be addressed otherwise. Except for unhappy situations like that, different dispute resolution processes will be appropriate for different issues at different times over the course of a dispute. Being sensitive to this can really pay off.

Say, for example, mediation has got you to the point where you agree on everything except for a technical issue, like someone's income or the best way to divide a family business. Rather than getting hung up the issue that you're stuck on, why not try something different? Agree that the issue will be dealt with through arbitration. Agree that the issue will be referred to a senior family law lawyer with special expertise in the area, and agree to be bound by the lawyer's recommended solution. Agree to seek the opinion of a non-lawyer expert. Or, if you must, agree to take that one issue to trial or ask a judge to give an opinion on the issue at a settlement conference.

There is a whole spectrum of processes that can be used to resolve some or all aspects of a family law dispute. Litigation, arbitration, mediation, the collaborative process, and negotiation are all important means of resolving disputes, and more than one process can be best suited for any given problem at any point over the course of a dispute. However, being creative can suggest further options like agreeing to be bound by the opinion of a respected lawyer or taking just one issue to a settlement conference. Don't get locked into the idea that only litigation or only mediation will work. Be willing to think outside the box.

If you do see a mediator, arbitrator, parenting coordinator, or a lawyer for basic advice, you should expect to be asked questions about whether family violence may be an issue during your relationship or separation. This is because of a particular concern that, if out-of-court processes are going to be used to resolve issues, both parties are participating freely and are able to make good decisions without fear for themselves or the children. If there has been family violence, it doesn't mean you may not use out-of-court dispute resolution but it is important that the mediator, arbitrator, parenting coordinator, and your lawyer are aware that it is a factor.

Formalizing the settlement

It is always best to write out the terms of a deal when a deal is done. Writing the agreement out gives everyone a written record of their settlement, which they can refer to if there's a dispute about the agreement down the road.

Although it's true that oral agreements are just as binding as written agreements, it can be very difficult to prove the terms of an oral agreement, especially when a lot of time has passed since the agreement was originally made. On the other hand, when an agreement is written down, that written record is usually all the court will need to determine the terms of the agreement. Notes scribbled on a napkin, for example, might be a written agreement that the court will uphold. Letters exchanged in the negotiation process have also been found to record the terms of an agreement.

Lawyers and mediators always make a tremendous effort to record the terms of a settlement as clearly and comprehensively as possible, and will usually put the settlement into a formal document like a separation agreement, a memorandum of understanding, minutes of settlement, or a consent order.

Separation agreements

A separation agreement is a written contract entered into after the breakdown of a relationship. The contract is written to reflect the terms of the settlement reached between the parties, and includes a lot of extra language that describes the parties' relationship, summarizes the background of the settlement discussions, confirms that each party had legal advice about the agreement, and confirms that the parties intend to be bound by the contract.

Separation agreements are the product of negotiation, the collaborative process, or mediation, and may deal with all or just some of the issues between the parties. A separation agreement can be used to record a settlement reached even after litigation has started.

Separation agreements are discussed in more detail in the chapter Family Law Agreements, in the section Separation Agreements.

Minutes of settlement

Minutes of settlement are used to create a quick record of an agreement and are not as comprehensive and detailed as separation agreements. Sometimes minutes are drafted by a mediator when the mediator isn't a lawyer or expects the lawyer for one of the parties to write a proper separation agreement. Sometimes minutes are used when a settlement has been reached on the brink of trial and there isn't enough time, or maybe enough energy, to draft a proper consent order. Typically, minutes of settlement are little more than an outline of the essential points agreed to, on the understanding that the terms will be elaborated and put into proper legal language later.

Minutes of settlement are the product of negotiation or mediation, and they usually deal with all of the issues between the parties. The terms of the minutes are usually used to draft a consent order or a separation agreement. When minutes are used for a consent order, they are usually attached to the back of the order.

Minutes of settlement are signed by the parties and their lawyers. Minutes of settlement can be enforced by the courts as a binding agreement between the parties, even without a judge approving the consent order or without the parties signing a separation agreement.

Memoranda of understanding

A memorandum of understanding describes the terms on which all or part of a dispute has been settled. Memoranda are even less formal than minutes of settlement, and may not even be signed by both parties or both lawyers. A memorandum may even take the form of a letter sent by one of the lawyers:

"I confirm that in our telephone conversation of earlier this afternoon, we agreed that the children would live mostly with Suman and that Harjit would have parenting time with the children on weekends, and that Harjit would pay child support to Suman in the amount of \$326.00 per month."

While memoranda of understanding can be enforced by the courts on their own, they are almost always put into a more formal document later on, either as a consent order or as a separation agreement.

Consent orders

Consent orders are orders that parties have agreed the court should make. The order is meant to reflect the terms of a temporary or a permanent agreement between the parties, on some or all of the issues, after litigation has started.

Sometimes, parties will come to an agreement before an action has started and want to put the agreement in the form of a court order rather than in the form of a separation agreement. This would really only make sense if there was some important legal reason to have the agreement put into an order, or if the court would be asked to make an order anyway, like a divorce order.

When the judge makes the consent order, the order is just as important and is just as binding as if it was an order made after a trial. Consent orders are notoriously difficult to appeal or change without proof of some sort of deception by the other side or a change of circumstances since the order was made.

Wait, I've changed my mind!

Generally speaking, it is *not* okay to change your mind after you've come to a settlement, especially right after you've reached the settlement. What you can do about it, if you can do anything about it, depends on whether the agreement has already been reduced to writing and signed.

After the agreement has been formalized

If you have a change of heart after a separation agreement has been signed, you can attempt to negotiate an amendment to the terms of the agreement. An amendment is another agreement, put into writing and executed just like the original separation agreement, and is usually described as an *amending agreement* or an *addendum agreement*, or something similar. However, if the other side isn't prepared to change the agreement, you'll have little choice except to go to court and ask the judge to make an order different than the terms of the agreement. Be warned: this may be very difficult unless you can show that there was a significant flaw in how the agreement was reached or that there has been a serious and unexpected change in circumstances since the agreement was executed. You can't ask the court to make an order different from the agreement just because you've decided you don't like it. There must be an awfully good reason why the court should do anything different than what you agreed to.

If you have a change of heart after a consent order has been pronounced, you'll face exactly the same problem. You can try to negotiate the terms of a new order varying the consent order, which will be presented to the court also by consent in the same manner as the original consent order. Failing that, you'll have to apply to court to change the original consent order. You will have to prove that there has been a meaningful and unexpected change in circumstances since the order was made or that there was a significant flaw in how the agreement leading to the consent order was reached.

Amending separation agreements and asking the court to set them aside are discussed in more detail in the chapter Family Law Agreements, in the section Changing Family Law Agreements. Varying orders is discussed in more detail in the chapter Resolving Family Law Problems in Court, in the section Changing Final Orders in Family

Matters.

It's important to know that if you disagree with an order or a separation agreement and just decide not to comply with the order or agreement, the other side can go to court to enforce the order or agreement. In the case of a court order, you could also be faced with an application for an order that you be found in contempt of court. Contempt is punishable by jail time, a fine, or both jail time and a fine. Note also that minutes of settlement and memoranda of understanding may be enforceable as binding agreements in the same way that separation agreements are enforceable.

The enforcement of orders is discussed in more detail in the chapter Resolving Family Law Matters in Court, in the section Enforcing Orders in Family Matters. The enforcement of agreements is discussed in the chapter Family Law Agreements, in the section Enforcing Family Law Agreements.

Before the agreement has been formalized

People sometimes have a change of heart between the time the deal is struck and the time the agreement is put into the form of a consent order or a separation agreement. If this happens, you have two options: live with the agreement, or attempt to get the other side to agree to change the agreement. (Unless you are in the collaborative process, which has specific ground rules around when a deal will be a final deal.)

You must really think hard before bringing your complaint to the other side, because any attempt to renegotiate the deal can upset not only the terms that you want to change but also the terms that you're really quite happy with. As well, the agreement that you struck may be enforceable even before it is put into the form of a separation agreement or court order. Here are some things to think about:

- Is the thing you want to change something you can actually live with? Is changing that one thing worth the risk of losing the settlement altogether?
- Is it worth the additional legal fees it will cost to go back into the negotiation process and to draft a new agreement?
- Is it worth the chance of losing other aspects of the settlement that you're happy with but that the other side isn't too keen on?
- Is it worth the risk that the other side will start a court action to enforce the unsigned agreement? Is it worth the legal fees it will cost to defend an action to enforce the agreement?

Remember that the negotiation process is a process of give and take. It is almost a certainty that you are going to be unhappy with some aspects of the agreement, just as the other side is going to be unhappy with other aspects of the agreement. The two of you each gave things up and compromised your positions in reaching settlement. After all of the anxiety of the negotiation process and the pain of giving up on a hard-fought point, it is also almost a certainty that if one side wants to re-open an issue, the other side will want to re-open another issue.

Resources and links

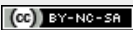
Legislation

- *Family Law Act*
- *Arbitration Act* [12]

Links

- BC Collaborative Roster Society [18]
- BC Parenting Coordinators Roster Society [16]
- Mediate BC website for Family Mediation Services [21]
- Law Society of BC's webpage on Family Law Mediators [9]
- Law Society's Code of Professional Conduct [13], Appendix B
- Law Society Rules [22], Part 3, Division 4

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Catherine Brink, May 25, 2019.

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- [3] <http://www.bccollaborativerostersociety.com>
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