THE LAW FOUNDATION OF BRITISH COLUMBIA

2023 PROVINCIAL ADVOCATES TRAINING CONFERENCE

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Table of Contents

		Page
1.	Activating Allyship: An Introduction to Indigenous Cultural Safety	3
1.1	Presentation	3
1.2	Supporting Documents	15
2.	Additional Rent Increase for Capital Expenditures (ARI-C)	21
2.1	Presentation	21
2.2	Supporting Documents	30
3.	Advanced Fact Patterns in Housing	79
3.1	Supporting Documents	79
4.	Dealing with Debt related to EI and Federal Pandemic Benefits	97
4.1	Presentation	97
5.	Evaluation of Family Law Advocacy Initiative	118
5.1	Presentation	118
6.	Evening Plenary	132
6.1	Presentation	132
6.2	Supporting Documents	137
7.	Family Management Conference/JCC	138
7.1	Presentation	138
8.	Family Property Issues	152
8.1	Presentation	152
9.	Housing Law Update	171

	9.1	Presentation	171
10.	Indian Status Applications		191
	10.1	Presentation	191
	10.2	Supporting Documents	209
11.	The Intersection between Family Law and Child Protection Law		231
	11.1	Presentation	231
12.	Law Foundation Consultation: Scope of Practice		240
	12.1	Supporting Documents	240
13.	Morning Plenary		244
	13.1	Presentation	244
14.	Self-Awareness Practices for Managing Stress		259
	14.1	Supporting Documents	259
15.	Systemic Poverty Law Update		279
	15.1	Presentation	279
	15.2	Supporting Documents	294
16.	Welfare and Assets: Issues for Senior Advocates		308
	16.1	Presentation	308
	16.2	Supporting Documents	333

Activating Allyship

An Indigenous Cultural Safety Course by

Ta7talíya Michelle Nahanee

It's an honour to host you on this leg of your allyship journey. Whether you are just getting familiar with the concepts and actions or have been deep in allyship's personal and systemic activations, this course aims to expand your vocabulary, approaches and goals centred around the lifelong practice of allyship. Even within our Indigenous communities, we can practice allyship with each other. We are all navigating many intersections where awareness of, and activation of, cultural empathy will lead to cultural safety for us all.

Here's what you will learn:

1. what is allyship? what is critical allyship?
2. what is decolonizing, indigenizing, reconciling?
3. etiquette for allies, anti-racist communication
4. how do you want to activate these practices?

Watch for these icons to let you know if there is audio to listen to, text to read or a reflection to write about:



Nahanee Creative for THE LAW FOUNDATION OF BRITISH COLUMBIA

What is Allyship?

Seeing, acting, knowing, and growing; in service of connecting across difference. Not fixing or assuming, empathy over sympathy. Taking, not giving, direction.

NOTES

Reflect & Review #1



Why is it important to have critical awareness when participating in allyship? How can practicing critical allyship contribute to increased cultural safety?



Allyship with Indigenous Peoples

Decolonizing, Indigenizing, Self Actualizing, Reconciling

NOTES

Etiquette #1



Get to know the **colonial myths** you carry so you can actively disprove them.

NOTES

Reflect & Review #2



What colonial myths can you examine and disprove?



Etiquette #2



Decenter Yourself.

NOTES

Reflect & Review #3



Indigenous Cultural Safety (ICS) ensures dignity and respect for Indigenous Peoples by planning for and mitigating harm. It is an ongoing work of uncovering colonial impacts and conditioning, learning new ways to connect across differences, committing to reflexivity, listening through criticism and rejecting the urge to defend. Organizationally, it can mean designing feedback systems, encouraging accountability and practicing cultural safety with as many resources as we allocate to caring for physical safety.

What actions can you take? What words can you say or stop saying? What ideas can you unlearn or learn to advance your allyship and practice Indigenous Cultural Safety?



Terminology

Empathy

is putting yourself in the other person's shoes, listening without judgment, and connecting without fixing. It is holding space for the whole person to *be*, or *say*, what they need.

Microaggressions

Microaggressions are a covert, pervasive form of racism defined as "brief, everyday exchanges that send denigrating messages."

Territorial Acknowledgments

show appreciation for the Nations whose lands you live on and benefit from. It honours the Ancestors who cared for the territory and the People who continue that care.

Reciprocity

is about mutually beneficial exchange, identifying the needs of both sides and aiming for true equality.

Accountability

is taking responsibility for your impact on others.

Decolonizing

is undoing colonial impacts including surfacing our assumptions and beliefs as well as the way we learned them.

Indigenizing

is centering the ways of Indigenous peoples, beyond tokenism and commodification, to connect with the land and be better Ancestors.

Self-Actualizing

is being your best self, carrying your name and Ancestors in a good way, moving towards your highest potential.

Reconciling

is repairing relations, redressing harms and realizing balanced benefit for Indigenous and non-Indigenous peoples.

Redress

as a verb means "to remedy or set right (an undesirable or unfair situation)." As a noun, redress refers to "remedy or compensation for a wrong or grievance."

Terminology

Racialized Violence

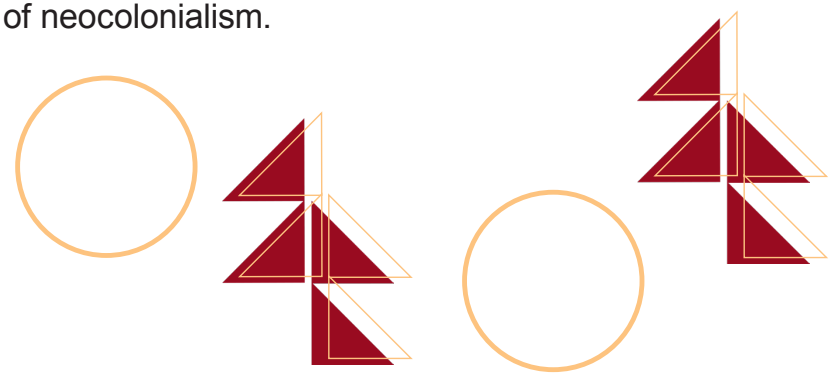
Physical, emotional, spiritual and systemic harm towards a group of people because the race ascribed to them. Exclusion from health care, the economy and/or education are examples of systemic racialized violence.

Reflexivity

A process of continual active reflection that moves beyond comfort, to activate new ways of knowing & doing based on new information.

Neo - Colonialism

While colonialism refers to domination over peoples and dispossession from their territories, neocolonialism refers to ongoing political, cultural and economic oppression. The ongoing financial, educational and health inequities experienced by Indigenous Peoples are systemic examples of neocolonialism.



Reflexive Practices

are everything you do to unlearn conditioned bias and commit to resolving the harms of cultural conditioning including neocolonialism.

Absolution

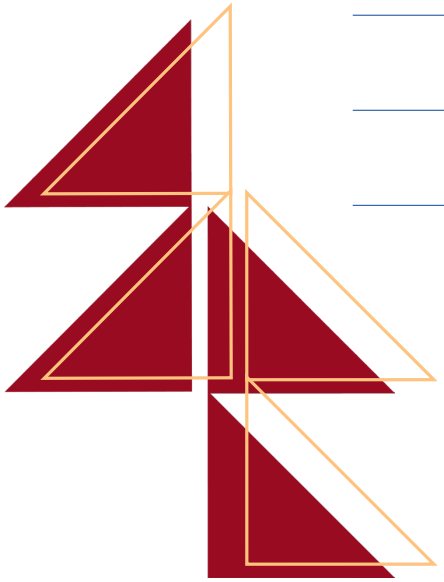
- to be forgiven for wrongdoing.
- to be released from obligation, guilt or consequences.

To be Absolved

to be declared free from guilt, obligation or consequence by a person or organization.

Dominant Narrative

A dominant narrative is an explanation or story that is understood as the truth because it has been told for a long time. It is a way of understanding issues, or people, that a majority of people have normalized. For example, beauty standards are set and reinforced by fashion magazines contributing to a dominant narrative that sets a standard height, weight and look of beauty. A dominant narrative can remain “true” without critical awareness and action.





for



Practicing Indigenous Cultural Safety and Critical Allyship

What actions can you take? What words can you say or stop saying? What ideas can you unlearn or learn to advance your allyship and practice Indigenous Cultural Safety?

Actions: Active listening which includes empathy, asking questions for better understanding, connection and building trust. Building trust involves showing up consistently and being present.

Words to Say: I'm listening. I hear you. I want to understand. I want to be an ally. I'm sorry.

Words to stop saying: Get over it. It's in the past. It's not that bad. Inappropriate jokes.

Ideas to Unlearn: Euro-centrism.

Ideas to Learn: Cultural history of the people in the territories where I live. Some of the local languages. About plants and animals in the region. About the local Indigenous way of life and way of relating and seeing the world."

Learning about Indigenous movements not just on Turtle Island but across the globe (Free Palestine)

Learn about indigenous trauma. Ideally from am indigenous person/author

Decentering myself - put my own feelings aside, practice unlearning

WAIT - Ask myself sometimes ""why am I talking"" and ask if it is more important to listen

Don't assign a specific emotional value to a client's problem, don't assume and judge them or the issue too soon. Hear how it's impacting them versus my response to it.

Empathy vs Sympathy - Learning more ways to empathize over sympathize, learning new phrases and ways to respond

Finding patience to listen to clients

Learning that there are more ways than one to hold space, individualizing it to the client

Find ways to get in touch with different communities

Learning about other resources and how/where to refer clients, knowing where I'm not the expert

Find ways to learn from each other

Myth of colonial time (overly efficient and time-bound) - Take more time to listen to people's stories and introductions, Indigenous ways of being with time. Balance this with navigating structural time systems (funders, court system)

Quantification of trauma-retelling of the day school stories-that never should have happened that way

Practicing Indigenous Cultural Safety and Critical Allyship

What actions can you take? What words can you say or stop saying? What ideas can you unlearn or learn to advance your allyship and practice Indigenous Cultural Safety?

Learning and understanding about Indigenous cultural practices and support clients in accommodating their ritual practices

Listen and learn continually. Active awareness, get comfortable with speaking up and challenging the beliefs. Learn not to say things like "you should..."

Patience

Read the Truth and Reconciliation

Stepping back generally, as a Westerner we feel the need to fill the space. We can step back and listen, pause.

Put money where your mouth is.

To unlearn that indigenous people do not have to pay for post secondary education or they do not have to pay taxes.

Socioeconomic background are the same across the country.

Introduce the territory from which you are living and working reflection of land acknowledgment with thought that it will not ever be remained. "

To have a better understanding, ask more questions. Trust is an extremely important word. We have a lot of work to do. Listening, encouraging and practice cultural safety.

Significant changes to the Indian Act

Learn! Instead of canceling things out, add things in-add the knowledge needed

Learn about the residential schools - triggers going into appointments etc

Learn the history but not from a white washed version-learn from the source

The more you know and learn, the more empathy you can achieve

Believe people's stories - nobody listened for so long

Good practice-oral history, there's no need for proof

Do we really need all the rules

Acknowledge oral history. No need for "proof"

I'm responsible for my own learning- and not at the cost of others

Practice active listening. Stop historicizing. Stop trying to be a fixer. Center the other person and ask what they need. Acknowledging that we work in a colonial system that is inherently repressive, traumatizing, and violent. Accepting that clients may not inherently trust us and that we have to work to earn that trust.

Practicing Indigenous Cultural Safety and Critical Allyship

What actions can you take? What words can you say or stop saying? What ideas can you unlearn or learn to advance your allyship and practice Indigenous Cultural Safety?

Understand that you participate in and benefit from colonialism without feeling as if this is some kind of attack on you personally

Questioning internal narratives as a way to hold yourself accountable for your biases. Fostering individual accountability for change -> relational based change. Lifting people up -> focusing on strength, how far we have come, and centering the possibility for more change.

Vote!!!!!

Accept criticism without defensiveness

Advocating for reconciliation to be trauma informed

Your allyship should not be conditional on your own convenience

Talking less and listening with an open heart and humility

Always be open to learn and listen

Building their trust by listening what they have to say . Only act if they invite us to get involve . Have empathy and take active action in defending their rights not waiting for the government to do it. Active listening without judgement.

Dedicate resources in your organization to decolonization training

Buy art that is done by indigenous people no the mass producing one that goes somewhere else . Disapprove myths like this happen long time ago . Decenter yourself .

Take responsibility for learning

Acknowledge the inequity and disparity resulting from the colonization and genocide that took place on Turtle Island. Acknowledging the advantages I have as a result. Acknowledging the ongoing issues tensions behind government policy and inactions to create a balance in opportunity, power, and self governance.

Understanding and examining your own privilege and continually learning, validating each other, actively resisting the status quo'.

Don't speak in jargon, it alienates you from your clients and also suggests that that is a superior way of speaking

Perpetuating stereotypes

Do not wait for the government to do the right thing: they will not. Assimilation and erasure remains the ongoing policy of the Canadian and Provincial governments

Holding space

Practicing Indigenous Cultural Safety and Critical Allyship

What actions can you take? What words can you say or stop saying? What ideas can you unlearn or learn to advance your allyship and practice Indigenous Cultural Safety?

Working on critical allyship by focusing on words we use. Start listening to people who share their stories. Supporting development of indigenous services and resources rather than non indigenous people trying to fix the problems

Can unlearn that there is one version of history, and think critically on which version we give deference to.

"Actions: take up less space talking. Don't be in a rush to give input to prove I'm an ally. Listen.

Words: stop saying "historically". I'm not sure yet if I should stop saying "settler" when referring to myself. I need to process that longer.

Words to say: thank you.

Ideas you can learn: reconciliation is a goal and reconciliation practices are the journey.

Ideas I can unlearn: that things aren't as bad as they were. "

I would like to learn more about UN declaration and it's impact on our legal system and support the change.

Allow people to be the expert of their own life and experience

Listen not talk

Empathy is not saying "I know how you feel" or "I understand how you feel" - it is feeling and walking with the other person

Listening, amplifying calls for change. Calls for action. Work on critical allyship

Listen. Amplify knowledge and vision shared by Indigenous organizations, groups, people - always with proper credit. Look for opportunities to respond to calls to action put out to the broader community by Indigenous groups. Name the systems that create injustices such as poverty (land and resource theft, generational wealth).

Learn how a person's worldview and knowledge is based on prejudice, internalized racism and stereotypes and practice actively recognising and rejecting these

Integrate cultural practices into your work (e.g. offering smudge kits and Indigenous supports). Asking clients how you can make processes more culturally appropriate. Maintaining reflexively and understanding your own position within society and how that may affect interactions (e.g. often our services and the systems we help clients navigate are inherently colonial, so acknowledging this is important)

Practicing Indigenous Cultural Safety and Critical Allyship

What actions can you take? What words can you say or stop saying? What ideas can you unlearn or learn to advance your allyship and practice Indigenous Cultural Safety?

Punch a Nazi

Creating space for real engagement/ relationship building, not just a seat at the table and not one off activity.

Engage with and commit to trauma informed practises

Stop causing harm

Take a trauma- informed approach to work and personal life. Unlearn fixing-oriented approaches, de-centre myself in my learning process and focus on learning itself rather than myself learning, listen to indigenous voices, perhaps stop using the word "settler", at least in a white-centric self-flagellating manner

Research indigenous art/purchases to directly support indigenous communities.

More community indigenous trainings for non indigenous people.

Loved the medicine wheel, will use at work. "

Move through the world doing as little harm as possible.

Being "neutral" or "apolitical" is the same as doing harm. You are complicit in the harm done by feeling like you can just stay out of it

Don't be silent

Researching who actually crafted the "indigenous goods" and making sure it benefits the indigenous people

Taking the time to learn the customs of the folks whose land you're on

Watch Blood Quantum - a truly excellent indigenous horror film by a great filmmaker who recently passed.

Stop saying "hold down the fort"

By saying nothing we are agreeing

I can engage with more Indigenous art, literature, films etc. to help expand my perspective and unawareness.

I will not know unless I am told I am being culturally unsupportive. I try to be careful when I am around other Nations. Just being aware of my surroundings helps practice indigenous cultural safety.

continue to learn about and practice more of my own culture to ground myself in my own identities so i can more genuinely relate to Indigenous peoples here.

learning more about the physical land i live on and the cultural significance

Shut up and listen

Active listening

Practicing Indigenous Cultural Safety and Critical Allyship

What actions can you take? What words can you say or stop saying? What ideas can you unlearn or learn to advance your allyship and practice Indigenous Cultural Safety?

Not referring to myself as an ally, but always working toward allyship, allowing Indigenous folks to decide whether or not to identify me as an ally.

"I can't pronounce it" is not a good enough excuse not to acknowledge the territory you reside on

"Remind people when they are insensitive by the way they are speaking.

If you see or hear something say something "

Not making stereotypes

Keep learning Indigenous cultures and communities. Don't assume anything based on stereotypical impressions.

Unlearning the idea that new immigrants and/or racialized folks cannot become new settler-colonizers. That we can very much still be a cog in the vast oppressive machine of nouveau colonization and violence against Indigenous Peoples.

Recognize that your organization may represent colonial trauma no matter how progressive you are personally or how much "better" things have gotten

being better about learning and using the indigenous names of places in my community

Redress instead of reconcile

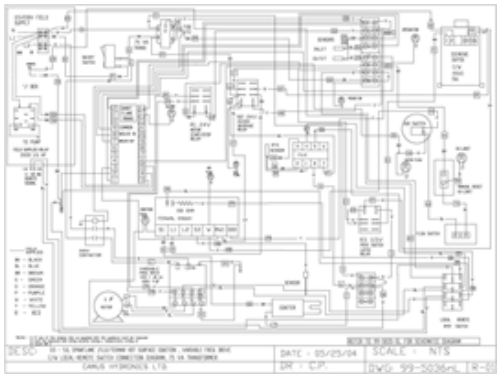
Remembering that - as an ally - not everything is about you

Stop saying "Top of the totem pole"

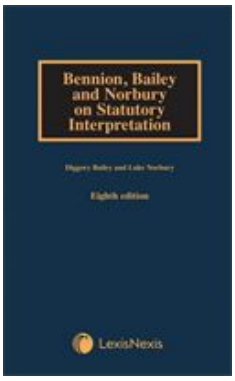
ARI-C











THE BASICS OF ARI-C

- Put into effect in July 2021.
- Allows for a maximum increase of 3% rent increase each year for 3 years.
- The rent increase is not removed or taken back to its prior amount once the cost of the improvements have been paid off.
- The amount claimed for must be spread on every unit and divided by 120 (representing 10 years)
- Requires that the landlord has either improved, repaired, or maintained the property in some way.

Differences between ARI-C and other hearings

- Section 11 of the rules of procedure.
- 30 and 15 day deadlines as opposed to the standard 14 and 7
- Landlords must serve evidence in their possession related to the insurance and maintenance questions.
- Written submissions will be considered regardless of whether or no a respondent (tenant) attends the hearing.
- Usually for more respondents than ordinary and for way larger amounts. (not capped at 35.000 as other RTB hearings are)

Assessing the chance of meaningful success

- What is the type of work the landlord has done?
- How organized are the tenants and are there any long-term tenants?
- What is the impact on the individual tenant?
- What is the landlord claiming for vs the maximum rent increase the tenants can face?

Making the tenants work for you

- Who do you sign on with?
- Are there any tenants with a specialized knowledge?
- What tasks can be outsourced?







What do words mean?

- "The capital expenditures were **incurred** in the 18-month period preceding the date on which the landlord makes the application"
- "**Capital Expenditures**"
- "**Major Systems** or **Major component**"
- "An improvement in the **security** of the residential property"

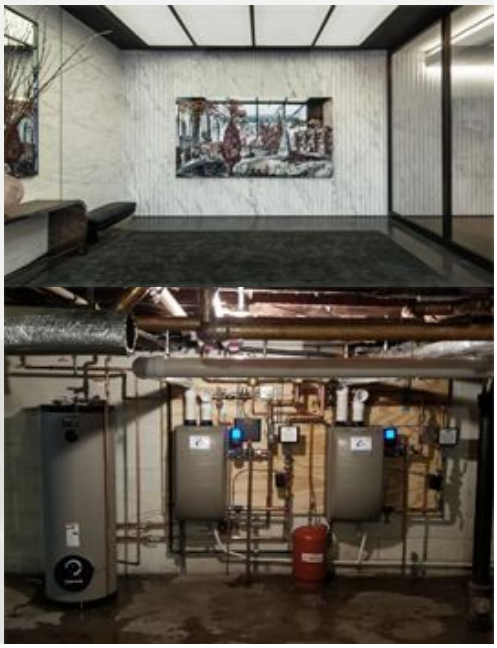
Incurred and the 18-month deadline

- *"As such, the date on which a capital expenditure is considered to be incurred is the date the final payment **related** to the capital expenditure was made"*
- To suffer or bring on oneself (a Liability or expense)
- What is a project and when does it end?



Major system or component

- Very wide definition in the policy guideline 37.
- Individual problems in a tenant's unit not included.
- Cosmetic upgrades not allowed by themselves.
- Essential services vs integral to Major system
- Lot of gray areas, yet to be worked out by the courts.



The worst policy guideline in existence?

- Arbitrators are not bound by policy guideline
- Introduces the concepts of projects
- Interpretation/expansion of the regulation in regard to the wording described heavily favors Landlords.
  - Expands the definition of major system to include a wide variety of systems that are arguably not, such as parking and entry doors.
  - States that there is no requirement that the improved security was needed.
  - States that Policy guideline 40 timelines will be used to determine the expected useful life of capital expenditure, except in cases where the arbitrator determines that documentary evidence is required

Request for evidence

Request for evidence

<Date of letter>

<Landlords address for service>

Dear, <Name of landlord>

My name is <Insert name>, and I am a tenant residing at <rental building address> in relation to the Residential Tenancy Branch matter under file number <Insert file number>, which has a preliminary hearing set <Date of and time of hearing>. I write to you to officially requesting that you submit into the evidence the following documents:

1) The make and model of the heating boiler that was replaced;
2) The date that the previous heating boiler was originally installed;
3) Any and all manuals for maintenance included with the replaced heating boiler;
4) A maintenance record of all repairs and maintenance done on the replaced heating boiler; and,
5) Any and all complaints received from tenants in relation to inadequate heating in the period the replaced heating boiler was in use.

This information is necessary for the tenants because it is relevant to the test under section 23.1 of the *Residential Tenancy Regulation*, as it is relevant to the question of whether or not the landlords have lived up to their repair and maintenance obligations.

This request is made under section 5.3 of the RTB Rules of Procedure.

Best regards,

Lasse Hvitved (he/him)

Landlord's burden of proof

- Landlords have the primary burden of proof for the following things:

- The price of capital expenditures.
- That the repair, maintenance or installation was done.
- That it was a major system or component.
- That the replacement, repair and installation fulfills the necessary requirements.
- That the capital expenditures were incurred within 18 months of the date of which the landlord makes the application.
- That the capital expenditures will not be incurred again for at least 5 years

Landlord's burden of proof continued

- Photographs or video taken before the repair or replacement was done;
- Copies of permits obtained;
- Copies of relevant laws/bylaws/construction standards;
- Expert reports regarding:
  - A)The useful life of the prior system or component,
  - B)The expected lifespan of the installed, repaired or replaced system or component, and
  - C) The reason the installation, repair or replacement was needed;
- Maintenance records for the system being repaired or replaced;
- Documents showing the date the prior system or component was purchased and installed;
- Manufacturer's documents relating to the prior system's or component's useful life expectancy
- Policy guideline 40

Landlord's maintenance

- What are the standards of maintenance?
- Is the lack of maintenance connected to the failure of the system?
- Read the landlord's expert testimony carefully
- Get the manufacturers manual, if possible, don't rely solely on the landlord
- Proactive/preventative maintenance vs. Fixing stuff when it breaks
- Lot of gray areas, yet to be worked out by the courts.

Tenant's burden of proof

- That landlord's inadequate maintenance or repair is the reason that the capital expenditures are required.
- That the landlord has been paid or is entitled to be paid from another source for part or all of the capital expenditures.
- Difficult for tenants to know if there is more evidence than what the landlord submitted.
- Consider if any tenant knows an expert witness.

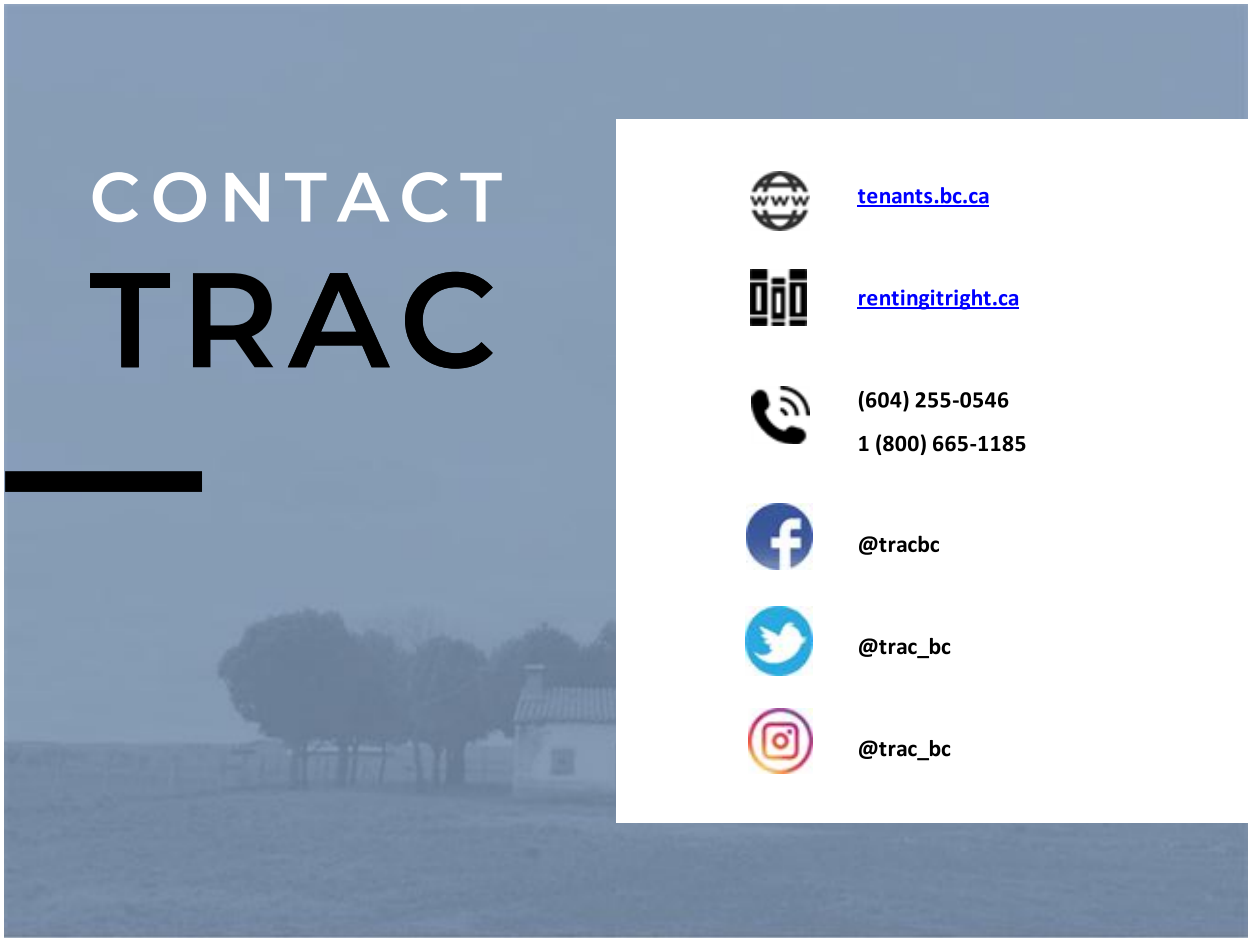


Interesting conclusions from decisions

I should note that I do not doubt that the landlord incurred the costs listed in the ledger. I am asked to refer to Policy Guideline #40 respecting the useful life of building elements. I am not persuaded that I should do so under the circumstances as it would essentially discharge the Landlord from providing any evidence on why the restoration was undertaken, which is a critical component of s. 23.1 of the Regulations. Nor do I believe I could rely upon Policy Guideline #40 to make a finding that the useful life of the parkade has since passed as I have been provided no evidence to indicate when the parkade was last repaired or restored.

[redacted]




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Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Code: ARI-C

Introduction

The landlord made an application in which they seek a rent increase pursuant to sections 43(1)(b) and 43(3) of the *Residential Tenancy Act* ("Act") and section 23.1 of the *Residential Tenancy Regulation,* B.C. Reg. 477/2003 (the "Regulation").

This Decision is in respect of the landlord's application.

History of Application and Proceedings

The application was made on November 19, 2021. A preliminary hearing was held, by telephone conference call, on January 28, 2022. An Interim Decision was issued on January 29, 2022. As noted in the first Interim Decision, this matter was adjourned to June 14, 2022, at which time the landlord's application was to be considered in a written submission-only hearing format (pursuant to section 74(2)(b) of the Act). However, for the reasons set out in the second Interim Decision (which does not appear to have been sent out by the Residential Tenancy Branch until a few months later), the matter was adjourned to November 28, 2022. It is on this date that the parties' written submissions, along with relevant evidence, was considered in respect of the application.

While issues concerning proper service appear to be of some concern for the respondents, I am not satisfied that, at this point in the proceedings (months after the interim decisions have been issued) that either party is prejudiced by service. Both parties have had ample opportunity to make submissions and provide supporting evidence. Further, despite late service by the landlord earlier in these proceedings, this is not a basis by which the landlord's application is to be dismissed. (See also Rule 9.1 of the *Rules of Procedure.)*

Issue

Is the landlord entitled to impose an additional rent increase for capital expenditures?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the issue of this application, and to explain the decision, is reproduced below.

The landlord seeks an additional rent increase based on four categories of capital expenditures incurred within the 18-month period immediately preceding the date of filing the application in regard to the rental property. These expenditures are for the cost of the installation of a secured bicycle storage facility, the cost of repairs to the exterior of the building, the cost of engineering and consultation services required to determine the nature and extent to complete the repairs, and the cost of drainage repair and modifications to the roof.

The landlord has not made a previous application under subsection 23.1(1) of the Act in regard to the property.

The residential property consists of 115 storey building comprising 103 residential rental units, inclusive of a two-unit caretaker suite office. The first level of the building includes a parkade with several underground parking floors. The rental units are located on floors 1 to 15 of the building. For the purposes of this application the building contains 103 specified dwelling units as each rental unit is located within the single building in which all of the subject capital expenditures were incurred.

The building is of concrete construction, believed to have been originally constructed in the 1960s. The landlord is owned the building since July 2005.

The landlord seeks to impose an additional rent increase for capital expenditures (totalling $747,249.52) incurred to pay for work done to the residential property's as follows (referred to individually and collectively as the "Work"):

Description	Date Completed	Amount
Bike room/security repairs	November 30, 2020	$14,473.52
Exterior repairs	September 30, 2021	$681,694.12
Engineering and consultation	September 27, 2021	$50,326.28
Drainage repair	October 14, 2020	$756.00

The landlord submitted copies of invoices supporting these amounts.

The vast majority of the invoices rendered in each of the four categories of expenditures were paid within 18 months prior to the application date. There are a few invoices that were not. However, the level landlord submits but these invoices are still eligible as the final invoice for each project, the capital expenditure chroma was paid within the 18 month eligibility, which catches the earlier invoices rendered. While argues that it would be a wrong approach and contrary to the intention of the regulation and the policy guideline to exclude these invoices.

Regarding the bicycle room security, the landlord submitted that the bicycle room is a new secured storage facility located in Billings garage area, completed in 2020. The facility provides free secured bicycle storage for all tenants. Prior to the bicycle room tenants had no secure location to store their bicycles. Additional detail regarding the bicycle room is set out in the landlords written submission.

The landlord submits that the installation of the bicycle room provides additional security for the residential property and satisfies the requirement of 23.1(4)(a) of the Regulation. the items comprising the bicycle room are expected to last for a period of at least five years. In most cases, much of the components making up the bicycle room will last anywhere between 10 to 25 years.

Regarding the claim for external building repairs and engineering services, these were two capital expenditures associated with conducting exterior repairs to the building. An engineering report was submitted into evidence. The work itself was restoration work to the external concrete of the building, which the landlord submits falls within the definition of a major system that is structural and integral to the residential property. The report from the engineer indicated that the damage observed on the exterior to the building is consistent with ordinary wear and tear for an older concrete building and not due to neglect or failure to maintain the concrete exterior or openings.

During the exterior repair project, it was determined that some modification of the main roof needed to be completed to improve drainage to stop water ingress. The work itself consisted of a channel cut to allow cooling water to freely move to an existing drain. The cost of this work was $756. The landlord submits that the roof is a major system or component and needed modification or repair to provide better drainage. The work is expected to have a useful life of at least five years.

The tenants opposed the claim for exterior work specifically in relation to $160,000.00 in painting. They referenced policy guideline 37 which specifically includes “painting walls” as something that would not be captured by this type of application.

The tenants oppose a sub-claim of $28,800.00 for bird spike epoxy glue. The tenants submitted that "The landlord's evidence again provides no details or even basic information about what this is for. However, if the landlord is found to have lifted their burden of proof for this specific item, it is assumed that it is for the installation of bird spikes."

They further argue that bird spikes would not fall into the meaning of a "major component."

The tenants further submit that the bicycle room is not a major system or component and that it does not improve the security of the rental property. They submit that

> It is not a major system since it is insignificant to the overall security of the building. Additionally, it is not mentioned in any of the examples of major system provided in the RTB's policy, nor are there any mentions of anything similar to a secure bike storage mentioned. It is also not a major system because it provides no additional security to units who does not have bicycles, nor can it even by its design provide it to all tenants since there are only 59 steel placements for bicycles and there are 103 units (which each could have multiple bikes).

Analysis

1. Statutory Framework

Sections 21 and 23.1 of the Regulations sets out the framework for determining if a landlord is entitled to impose an additional rent increase for capital expenditures. I will not reproduce the sections here but to summarize, the landlord must prove the following, on a balance of probabilities:

- the landlord has not made an application for an additional rent increase against these tenants within the last 18 months;
- the number of specified dwelling units on the residential property;
- the amount of the capital expenditure;
- that the Work was an *eligible* capital expenditure, specifically that:
    - the Work was to repair, replace, or install a major system or a component of a major system
    - the Work was undertaken for one of the following reasons:
        - to comply with health, safety, and housing standards;
        - because the system or component was
            - close to the end of its useful life; or

        - because it had failed, was malfunctioning, or was inoperative
      - to achieve a reduction in energy use or greenhouse gas emissions; or
      - to improve the security of the residential property;
    - the capital expenditure was incurred less than 18 months prior to the making of the application
    - the capital expenditure is not expected to be incurred again within five years.

The tenants may defeat an application for an additional rent increase for capital expenditure if they can prove on a balance of probabilities that the capital expenditures were incurred:

- for repairs or replacement required because of inadequate repair or maintenance on the part of the landlord, or
- for which the landlord has been paid, or is entitled to be paid, from another source.

If a landlord discharges their evidentiary burden and the tenant fails to establish that an additional rent increase should not be imposed (for the reasons set out above), the landlord may impose an additional rent increase pursuant to sections 23.2 and 23.3 of the Regulation.

2. Prior Application for Additional Rent Increase

There has been no prior application made by the landlord in respect of this property.

3. Number of Specified Dwelling Units

Section 23.1(1) of the Act contains the following definitions:

> "dwelling unit" means the following:
> (a) living accommodation that is not rented and not intended to be rented;
> (b) a rental unit;
> [...]
> "specified dwelling unit" means

(a) a dwelling unit that is a building, or is located in a building, in which an installation was made, or repairs or a replacement was carried out, for which eligible capital expenditures were incurred, or
(b) a dwelling unit that is affected by an installation made, or repairs or a replacement carried out, in or on a residential property in which the dwelling unit is located, for which eligible capital expenditures were incurred.

There are, for the purpose of this application, 103 specified dwelling units.

4. Amount of Capital Expenditure

The amount claimed by the landlord is $747,249.52.

5. Is the Work an *Eligible* Capital Expenditure?

As stated above, in order for the work to be considered an eligible capital expenditure, the landlord must prove the following:

- the Work was to repair, replace, or install a major system or a component of a major system
- the Work was undertaken for one of the following reasons:
  - to comply with health, safety, and housing standards;
  - because the system or component was
    - close to the end of its useful life; or
    - because it had failed, was malfunctioning, or was inoperative
  - to achieve a reduction in energy use or greenhouse gas emissions; or
  - to improve the security of the residential property;
- the capital expenditure was incurred less than 18 months prior to the making of the application;
- the capital expenditure is not expected to be incurred again within five years.

I will address each of these in turn.

a. Type of Capital Expenditure

The Work included upgrades to the building's exterior, including to the roof. I find that this falls within a major component as contemplated by the policy and the Regulations.

The engineering and consultation services are also, I find, part of the Work.

However, I must agree with the tenants' submissions that the painting of the outside is excluded. Similarly, the claim for bird spike epoxy glue cannot be captured by the claim. Bird spikes are not, I find, something that can be called a major component.

Regarding the secured bicycle storage facility, I must conclude that it does *not* meet the definition of a major system or component. And while the bike room is designed to provide security to the bikes therein, it does not, I find, provide an "improvement in the security of the residential property." It only, as it were, an improvement in the security of tenant property (that is, bikes.) For this reason, I do not accept this claim.

As such, I find that some, but not all, of the Work was undertaken to replace "major components" of a "major system" of the residential property.

b. Reasons for Capital Expenditure

The reasons for the eligible capital expenditures were to repair, replace and install a major system or a component of a major system because the exterior was reaching the end of its useful life. The drainage to the roof was installed to ensure that the roof no longer pools water, which can be said to be malfunctioning.

c. Timing of Capital Expenditures

The landlord made the following submission on the timing:

Timing of Capital Expenditures

9. The following principles apply to determining the eligibility of capital expenditures based on the date they were "incurred":

   (a) a capital expenditure must be incurred within 18 months of the application for an ARI being made: Regulation s.23.1(4)(b); and
   (b) a capital expenditure is "incurred" when payment for it is made (Policy Guideline 37).

10. Unfortunately, neither the Regulation nor the Policy Guideline provide guidance as to when payment of a capital expenditure is made. For the reasons that follow, Hollyburn submits that payment of the capital expenditure is made only upon the payment of the last invoice comprising the underlying project for which the capital expenditure is incurred. It would be contrary to the intent of the Regulation to simply look at the dates

of payment of individual invoices as the dates of payment of the capital expenditure itself.

11. A "capital expenditure" is generally understood to be an expense incurred to acquire fixed (or capital) assets or to repair, replace or improve them. Many capital expenditures will involve several elements comprising multiple contractors or suppliers who are involved at various stages of the project. Each supplier or contractor may issue invoices as various times while the project is being undertaken. Projects may last for more than 18 months.

12. It is submitted that s. 23.1 of the Regulation is project-centric in terms of the incursion of capital expenditures. It contemplates, among other things, capital expenditures to install, repair or replace major systems and major components. Policy Guideline 37 provides some explanation of these items, referring to them as things essential to support or enclose a building, protect its physical integrity or support a critical function of the residential property. Replacing a major system, will generally involve a number of suppliers and contractors who will render invoices at various times. The capital expenditure is the project itself, not the individual invoices that form only part of the capital expenditure.

13. To apply s. 23.1 of the Regulation and the Policy Guideline as requiring each individual invoice rendered in regards to a capital expenditure to fit within the 18 month period immediately preceding the date of the application, would lead to an absurd result. Specifically:

    (a) for longer projects involving a number of aspects or components, it may lead to only part of the capital expenditure for the project being eligible. It makes no sense if, for example, only half of a capital expenditure to replace a building's electrical system was eligible, and the other half was not, as the landlord took additional time to complete the project so as to lessen the inconvenience for tenants, or there was delay beyond the control of the landlord. In such a case, the landlord would have to make a claim for expenditures before the project is complete but would be barred from making a further claim for the balance of the expenditures for 18 months: Regulation s. 23.1(2). Multiple applications involving the same project capital expenditures should not be encouraged.

    (b) eligibility of a landlord's capital expense will be determined by a contractor's timing of the rendering an invoice, which is outside the control of a landlord.

    (c) such a position would discourage prompt payment of invoices by a landlord, solely to extend the time for the invoice to be included in the eligibility period.

(d) It falls to take into account the effect of the *Builder's Lien Act*, which provides for a mandatory holdback for payment for 55 days from substantial completion of the contract or the improvement: s. 8. This 55 day mandatory extension may result in early invoices being excluded from the eligibility period, unless the capital expenditure is seen as a project, rather than as a number of disjointed, individual invoices.

14. As noted, the Policy Guideline provides that the capital expenditure is incurred when "it" is paid. When a capital expenditure is seen as a project to install, repair or replace a major system or a major component (or is related to security of improves energy efficiency), "it" (the capital expenditure) is paid only after the final invoice for the project is paid, generally following the expiration of the Builder's Lien holdback period.

15. For the purposes of this application, the vast majority of the invoices rendered in each of the 4 categories of capital expenditures were paid within 18 months prior to the application date. There are a few invoices that were not. However, Hollyburn submits that these invoices are still eligible as the final invoice for each project (capital expenditure) was paid within the 18 month eligibility period, which catches the earlier invoices rendered. It would be a wrong approach and contrary to the intention of the Regulation and the Policy Guideline to exclude these invoices.

Having carefully considered the landlord's submissions and argument on this point, I am inclined to agree. As such, the entirety of the (allowed) payments made are accepted and considered to fall within the 18-month period.

d. Life expectancy of the Capital Expenditure

As stated above, the useful life for the components replaced all exceed five years. There is nothing in evidence which would suggest that the life expectancy of the components replaced would deviate from the standard useful life expectancy of building elements set out at RTB Policy Guideline 40. For this reason, I find that the life expectancy of the components replaced will exceed five years and that the capital expenditure to replace them cannot reasonably be expected to reoccur within five years.

For the above-stated reasons, I find that the capital expenditure incurred to undertake the Work is an eligible capital expenditure, as defined by the Regulation.

6. Tenants' Rebuttals

As stated above, the Regulation limits the reasons which a tenant may raise to oppose an additional rent increase for capital expenditure. In addition to presenting evidence to contradict the elements the landlord must prove (set out above), the tenant may defeat an application for an additional rent increase if they can prove that:

- the capital expenditures were incurred because the repairs or replacement were required due to inadequate repair or maintenance on the part of the landlord, or
- the landlord has been paid, or is entitled to be paid, from another source.

While there were several submissions made by various tenants, none satisfied the grounds that the capital expenditures were incurred because the repairs or replacement were required due to inadequate repair or maintenance on the part of the landlord, or that the landlord has been paid, or is entitled to be paid, from another source.

7. Outcome

The landlord has been partly successful, minus the above-noted amounts not meeting the eligibility.

Original claim:	$747,249.52
Less bike room/security repairs:	$ 14,473.52
Less bird spike work	$ 28,800.00
Less painting:	$160,000.00

Final amount of eligible capital expenditures: $543,976.00.

Section 23.2 of the Regulation sets out the formula to be applied when calculating the amount of the addition rent increase as the number of specific dwelling units divided by the amount of the eligible capital expenditure divided by 120.

In this case, I have found that there are 103 specified dwelling units and that the amount of the eligible capital expenditure is $543,976.00.

So, the landlord has established the basis for an additional rent increase for capital expenditures of $44.01. (Calculated as follows: $543,976.00 ÷ 103 units ÷ 120).

The parties may refer to RTB Policy Guideline 40, section 23.3 of the Regulation, section 42 of the Act (which requires that a landlord provide a tenant three months' notice of a rent increase), and the additional rent increase calculator on the RTB website for further guidance regarding how this rent increase made be imposed.

Conclusion

The landlord has been successful, in part. I grant the application for an additional rent increase for capital expenditure of $44.01. The landlord must only impose this increase in accordance with the Act and the Regulation.

I order the landlord to serve all tenants with a copy of this decision in accordance with section 88 of the Act.

This decision is made on delegated authority under section 9.1(1) of the Act. A party's right to appeal this decision is limited to grounds provided under section 79 of the Act or by way of judicial review under the *Judicial Review Procedure Act,* RSBC 1996, c. 241.

Dated: November 30, 2022

A. Denegar, Arbitrator
Residential Tenancy Branch

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ARI-C

Introduction

The Landlord applies for an additional rent increase for capital expenditures pursuant to the *Residential Tenancy Act* (the "*Act*") and s. 23.1 of the Regulations.

A.W., L.C., and A.A. appeared as agents for the Landlord. Three of the named respondent tenants were present, J.S., G.G., and F.S.. D.S. identified himself as an occupant for C.T., who he says is a tenant at the building though is not named in the application.

J.S. was represented by L.H. has her advocate. L.H. was joined by A.H. as his assistant.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Landlord's agent L.C. advised having served the notice for the participatory hearing on the respondent tenants in early June 2022. The tenants who were present raised no issue with respect to service of the notice for the participatory hearing. Based on the affirmed testimony of L.C., I find that the respondent tenants were served with the notice for the participatory hearing in accordance with the *Act*. As mentioned in my interim reasons, I found that the Landlord's initial evidence had been served on the respondent tenants, with the Landlord having provided proof of service indicating its service in April 2022.

The advocate advised that J.S.'s response evidence was served on the Landlord, which the Landlord's agents acknowledge receiving without objection. Based on its acknowledged receipt without objection, I find that the Tenant J.S.'s response evidence was served on the Landlord in accordance with the *Act*.

Preliminary Issue – Additional Evidence from the Landlord

The Landlord served an additional evidence package, with the Landlord providing proof of service indicating service occurred in early October 2022. In my interim reasons, I revised the service deadline for the parties, specifically the Landlord's service deadline was altered to 30 days prior to the hearing, rather than the 14-day deadline imposed on applicants by Rule 3.14 of the Rules of Procedure. Similarly, the respondent tenants were asked to serve their evidence 14-days prior to the hearing rather than the 7-day deadline imposed by Rule 3.15 of the Rules of Procedure. As I made clear in my interim reasons, this was done because of the number of respondent tenants and an interest in ensuring everyone, Landlord and tenants alike, had sufficient time to review the documentary evidence.

Despite my directions, the Landlord did not follow the revised service timelines. Similarly, I asked the Landlord to provide written submissions summarizing its position in advance of the participatory hearing. The Landlord failed to do so. I need not make findings on with respect to the written submissions as the Landlord's failure to provide them are largely to its own detriment insofar as the written submissions could have organized its evidence and submissions in support of its position.

Returning to the service of the additional evidence, A.W. advised at the hearing that they followed the 14-day deadline as per the evidence reminder email provided by the Residential Tenancy Branch. I have taken a preliminary view of the additional evidence, all of which appears to have been dated from 2018 to 2020, so the evidence could hardly be considered as coming into existence past the deadline, opening the application of Rule 3.17 of the Rules of Procedure for late evidence.

I wish to make clear that the email respecting the evidence submission deadline was automated and does not supersede the clear directions I provided in the interim reasons. I cannot stress enough that the revision of the service deadlines as set out in the interim reasons was not done capriciously. I did so to ensure everyone had an opportunity to review and respond to evidence in an orderly fashion, including the Landlord. There are 128 named respondents. Had they all responded with written

submissions and evidence in compliance with Rule 3.15, so 7 days prior to the hearing, the Landlord may have found itself pressed to review and organize itself in advance of the hearing given such a volume of documents.

All this is to say that I find that the Landlord has failed to serve its additional evidence in compliance with the 30-day deadline I imposed in my interim reasons. As it was not served in compliance with the time limit imposed, I find that it would be procedurally unfair to include it into the record on the basis that its late service undermined the respondent tenants' ability to review and respond in compliance with the altered 14-day deadline. Accordingly, the second evidence package is not included and shall not be considered by me.

Issues to be Decided

1) Is the Landlord entitled to impose an additional rent increase for capital expenditures?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

A.W. testified that residential property in question has 103 residential units, which includes a caretaker suite, and that the Landlord has not applied for an additional rent increase for a capital expenditure with respect to the property in question. I am further advised that the property was built sometime in the 1960s and was purchased by the Landlord in approximately 2009.

I was further advised by A.W. that the residential property has a parkade which the Landlord undertook restoration work and resurfacing. The Landlord's application breaks the project into the following components:

- Engineering/Architect $54,435.57
- Hazardous Material Removal $6,431.25
- Electrical $5,200.92
- Parkade Restoration $202.238.48

The Landlord's evidence comprises invoices and other documents with respect to the various companies involved in undertaking the work, including engineers and subcontractors. The Landlord's evidence does not contain page numbers nor is there a summary table for the invoices.

A.W. testified that the engineering company named in the invoices conducted regular inspections of the parkade on behalf of the Landlord. I am told that the engineers came to the property in or about November 2018 to conduct an inspection upon reports of water entering the parkade. A.W. testified that the engineers reported that the concrete had delaminated such that repairs were necessary. The Landlord's evidence does not include a copy of the engineering report.

The Landlord's application indicates the project completed on December 6, 2021. However, the Landlord's agents did not advise on the completion date at the hearing and the Landlord's invoices show the most recent invoice is dated to January 29, 2021. A.W. argued that the project was completed within 18 months of the application and that I should base that determination based on the date the last invoice was paid. It was argued that I should view the project as one whole rather view the individual components as such an interpretation would preclude longer, more extensive projects, from falling within the 18-month window imposed by s. 23.1 of the Regulations. Citing s. 23.1(2) of the Rules of Procedure, A.W. argued that multiple applications for the same project ought to be avoided.

I am advised by L.H., the advocate for J.S., that she requested documents from the Landlord in March 2022 with respect to the parkade and received none. L.H. further advised that he asked the Landlord for a series of documents from the Landlord and was provided none. I was directed to a letter in the J.S.'s evidence dated September 9, 2022 in which the request was made, which appears to have been sent to the Landlord on September 12, 2022. I was further directed to the response from the Landlord's agent in the form of an email dated September 15, 2022, also in J.S.'s evidence, in which the document request was denied.

At the outset of the hearing, I enquired whether L.H. would be seeking a summons for the documents. L.H. advised that he was not doing so and was prepared to proceed with the hearing. I was asked by L.H. to draw adverse inferences due to the Landlord's failure to disclose documents he submits are relevant to the present matter.

A.W. argued that the document request amounted to a “fishing expedition” and that if J.S., or her advocate, felt that they were relevant, they could have requested a summons for the documents pursuant to Rule 5.3 of the Rules of Procedure. A.W. argued I ought not draw any adverse inferences.

L.H., the advocate for J.S., advanced three arguments: first, that the parkade is not a major system or component falling within the definitions within s. 21.1 of the Regulations; second, that the Landlord has failed to discharge its evidentiary burden under s. 23.1; and third, the Landlord failed to adequately maintain and repair the parkade.

Both L.H. and A.W. directed me to Policy Guideline #37, which provides guidance with respect to rent increases generally, and the application of s. 23.1 of the Regulations specifically. In it, it provides the following guidance with respect to the type of projects that may be considered eligible capital expenditures, stating the following:

> Major systems and major components are typically things that are essential to support or enclose a building, protect its physical integrity, or support a critical function of the residential property. Examples of major systems or major components include, but are not limited to, the foundation; load bearing elements such as walls, beams and columns; the roof; siding; entry doors; windows; primary flooring in common areas; pavement in parking facilities; electrical wiring; heating systems; plumbing and sanitary systems; security systems, including things like cameras or gates to prevent unauthorized entry; and elevators.

A.W., referring to Policy Guideline #37, submitted that the parkade is an eligible capital expenditure.

L.H., citing *Jozipovic v. British Columbia (Workers’ Compensation Board)*, 2021 BCCA 174, argued that Policy Guideline #37 is inconsistent with the ordinary interpretation of the *Act* and ought not be followed. L.H. further argued that I am not bound by the Policy Guidelines in any event.

L.H. directed me to a copy of the parking agreement in J.S.’s evidence, which was submitted is the standard form the Landlord uses with respect to the parkade. A.W. confirmed that the agreement provided by J.S. is the standard form used by the Landlord. In the parking agreement, L.H. highlighted clause 11, which is reproduced below:

11. The Licensee acknowledges and agrees that the License granted herein does not constitute a service or facility provided to the Licensee pursuant to s. 8 of the Residential Tenancy Act and that any rights granted to the Licensee herein are independent and separate from any rights arising out of the tenancy and are not part of the landlord tenant relationship. The Licensee agrees not to take any arbitration proceedings under the Residential Tenancy Act against the Licensor in regards to any matter, which is the subject of this Agreement. The Licensee agrees that if any such proceedings are taken, he will save harmless and indemnify the Licensor for the cost and exper .e of dealing with any such proceeding, including legal fees.

L.H. submitted that parking is outside the confines of the tenancy by virtue of the parking agreement used by the Landlord and further submitted that the parkade is structurally adjacent to the residential property. A.W. and A.A. contested that the parkade was structurally separate from the building, indicating that the bike locker and boiler room was only accessible through the parkade.

It was further submitted by L.H. that the residential property does not have enough parking stalls for all the occupant tenants. It was argued by L.H. that a rent increase imposed by s. 23.1 of the Regulations is permanent yet parking, as a service or facility, is a non-essential service or facility and can be terminated under s. 27 of the *Act*.

L.H. further argued that the parkade cannot be considered integral to the building as it is an adjacent structure and that a parking lot resurfacing should not be included in Policy Guideline #37 as such an interpretation runs contrary to the *Act*. J.S.'s written submissions argue that it is "contradictory for the Landlord to claim that parking can be said to be so removed from the tenancy that it is not even provided as a service or facility under the RTA, but then argue in this proceeding that it is a major system or component or integral to the tenancy in any way."

I was directed by L.H. to *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator)*, 2007 BCSC 257, who cited it for the proposition that when interpreting the *Act* and Regulations I should resolve any ambiguity in favour of the tenants. It was argued that in this instance ambiguity in s. 23.1 of the Regulations should be interpreted in the tenants' favour.

A.W. argues that L.H. is misconstruing s. 23.1 of the Regulations and that clause 11 of the parking agreement is not relevant to the analysis. He further argued that rent increases for capital expenditures do not consider whether an individual tenant benefits from the project so long as it is considered a major component or system.

As an additional argument, L.H. argued that the Landlord has failed to provide sufficient evidence to discharge its evidentiary burden under s. 23.1 of the Regulations in any event. L.H. argued no permits were provided, no copies of relevant bylaws, no expert reports, nor any evidence indicating that the work was necessary in any way or that it would not reoccur within the next 5 years. L.H. argued that the Landlord's invoices were not clear and lacked critical information. Further, the Landlord's failure to provide the requested disclosure precluded the tenants from obtaining expert evidence themselves.

A.W. directed me to Policy Guideline #40 respecting the useful life of building elements, which indicates parking lot elements are in excess of 5 years. L.H. argued it was illogical to refer to Policy Guideline #40 with respect to this as the building was constructed in the 1960s, which would put the parkade well past its useful life as per Policy Guideline #40. In any event, L.H. argued that no maintenance records were provided nor any records to indicate when the parking lot was last repaired.

L.H. further asked that due to the non-disclosure of relevant documents pertaining to the parkade's maintenance, I should draw an adverse inference against the Landlord. L.H. argued that the present application is not for a chipped faucet, and that the residential property is a multi-million-dollar property in which the Landlord would have likely undertaken some due diligence when it was purchased in the form of building inspections. L.H. argued that if the parkade was in poor condition when the property was purchased, the Landlord could have negotiated a lower price for the property and is now seeking to download the cost of the repairs on the tenants. It was argued that this application amounted to a double dip, in the that the Landlord got a cheaper price on the property and now seeks to recoup the cost of the repairs from the tenants.

Both G.G. and F.S. testified that they are relatively new tenants and that they moved into their respective rental units after the restoration was undertaken. F.S. argued that she would have expected the Landlord to impose the increased rent when her tenancy began in September 2021. G.G. and D.S. argued that Landlord is shifting the capital expense onto the tenants while capturing the capital gain in the increased value of the property following the repairs.

Analysis

The Landlord seeks authorization to impose an additional rent increase for a capital expenditure. Sections 21.1, 23.1, and 23.2 of the Regulation set out the framework for

determining if a landlord is entitled to impose an additional rent increase for capital expenditures.

Landlords seeking an additional rent increase under s. 23.1 of the Regulations must prove, on a balance of probabilities, the following:

- The landlord has not successfully applied for an additional rent increase against the tenants within 18 months of their application.
- The capital expenditure was incurred for the repair, replacement, or installation of a major component or major system for the property.
- The capital expenditure was incurred for one of the following reasons:
    - to comply with the health, safety, and housing standards required by law in accordance with the landlord's obligation to repair the property under s. 32(1) of the *Act*;
    - the major component or system has failed, is malfunctioning or inoperative, or is close to the end of its useful life; or
    - the major component or system achieves one or more of either reducing greenhouse gas emissions and/or improves security at the residential property.
- The capital expenditures were incurred in the 18-month period preceding the date on which the landlord has applied for the increase.
- The capital expenditures are not expected to be incurred again for at least 5 years.

Tenants may defeat a landlord's application for additional rent increases for capital expenditures if they can prove on a balance of probabilities that:

- the repairs or replacements were required because of inadequate repair or maintenance on the part of the landlord; or
- the landlord has been paid, or is entitled to be paid, from another source.

Once the threshold question has been met, the Landlord must also demonstrate how may dwelling units are present in the residential property and the total cost of the capital expenditures are incurred.

Section 21.1(1) of the Act contains the following definitions:

"**dwelling unit**" means the following:

a. living accommodation that is not rented and not intended to be rented;
b. a rental unit;

[…]

"major component", in relation to a residential property, means

a. a component of the residential property that is integral to the residential property, or
b. a significant component of a major system;

"major system", in relation to a residential property, means an electrical system, mechanical system, structural system or similar system that is integral

a. to the residential property, or
b. to providing services to the tenants and occupants of the residential property;

"**specified dwelling unit**" means

a. a dwelling unit that is a building, or is located in a building, in which an installation was made, or repairs or a replacement was carried out, for which eligible capital expenditures were incurred, or
b. a dwelling unit that is affected by an installation made, or repairs or a replacement carried out, in or on a residential property in which the dwelling unit is located, for which eligible capital expenditures were incurred.

I am asked to draw an adverse inference by the advocate due to the Landlord's failure to disclose certain documents upon request. Though I agree with the advocate that much of what they requested was relevant, I do not agree that I should draw an adverse inference under the circumstances.

Rule 5.3 of the Rules of Procedure, which sets out the application process for a summons, states the following:

> **5.3 Application for a summons**
> On the written request of a party or on an arbitrator's own initiative, the arbitrator may issue a summons requiring a person to attend a dispute resolution proceeding or produce evidence. A summons is only issued in cases where the evidence is necessary, appropriate and relevant. A summons will not be issued if a witness agrees to attend or agrees to provide the requested evidence.
>
> A request to issue a summons must be submitted, in writing, to the Residential Tenancy Branch directly or through a Service BC Office, and must:
>
> - state the name and address of the witness;
> - provide the reason the witness is required to attend and give evidence;

- describe efforts made to have the witness attend the hearing;
- describe the documents or other things, if any, which are required for the hearing; and
- provide the reason why such documents or other things are relevant.

In this instance, I enquired whether the advocate, on J.S.'s behalf, wished to make an application to produce the documents at the outset of the hearing. The advocate declined to do so. As mentioned above, I agree that much of what was requested, on its face, is relevant. In an ideal world, the Landlord would have complied with the request voluntarily. However, they were under no obligation to do so. Further, the Rules of Procedure do not impose a positive obligation on participants to list all documents in their possession that are relevant to the dispute in the same way the Supreme Court Civil and Family Rules do. Rule 5.3 of the Rules of Procedure, informed by s. 76 of the *Act*, very much puts the ball in the court of the party seeking the disclosure to make an application for the production of documents by establishing relevance.

J.S., through her advocate, declined to make the request for the documents despite my direct inquiry at the outset of the hearing if they wanted to do so. As no summons for evidence was requested, none was provided. I cannot say the Landlord refused to produce documents contrary to the summons as no summons was ever issued. Accordingly, I do not draw an adverse inference in the present circumstance.

Review of the documentary evidence provided by the Landlord shows a series of invoices, documents that appear to be internal accounting documents, some letters from WorkSafe BC, certificates of payment, and statutory declarations of progress payments. As mentioned in the evidence section above, the Landlord's evidence is not numbered, nor particularly well organized, despite Rule 3.7 requiring parties to do so.

Section 23.1(4)(a) of the Regulations require the capital expenditure be incurred for a specific purpose. In this instance, the relevant portions that could conceivably be relevant are ss. 23.1(4)(a)(i) and 23.1(4)(a)(ii), which I reproduce below:

> (4) Subject to subsection (5), the director must grant an application under this section for that portion of the capital expenditures in respect of which the landlord establishes all of the following:
>
> (a) the capital expenditures were incurred for one of the following:

(i) the installation, repair or replacement of a major system or major component in order to maintain the residential property, of which the major system is a part or the major component is a component, in a state of repair that complies with the health, safety and housing standards required by law in accordance with section 32 (1) (a) *[landlord and tenant obligations to repair and maintain]* of the Act;

(ii) the installation, repair or replacement of a major system or major component that has failed or is malfunctioning or inoperative or that is close to the end of its useful life;

I have been provided with no documentary evidence by the Landlord that would enable me to make a finding that the restoration was necessary as defined by s. 23.1(4)(a) of the Regulations. The Landlord's agent advises that they were told that the concrete had delaminated and that there was water ingress, though no documents were provided evidencing these findings by the engineers.

I have no opinion letter from the engineers. Nor do I have a report from the engineer inspectors pertaining to the state of the parkade in November 2018, nor do I have their recommendations. I have no inspection records with respect to the parkade despite the Landlord's agent advising the engineering firm conducted inspections of the building on behalf of the Landlord. I have not been referred to any law or code that the restoration was intended to comply. I have not been provided with evidence on the age of the parkade nor when it was last maintained other than the testimony that the building itself was constructed sometime in the 1960s.

I am asked to refer to Policy Guideline #40 respecting the useful life of building elements. I am not persuaded that I should do so under the circumstances as it would essentially discharge the Landlord from providing any evidence on why the restoration was undertaken, which is a critical component of s. 23.1 of the Regulations. Nor do I believe I could rely upon Policy Guideline #40 to make a finding that the useful life of the parkade has since passed as I have been provided no evidence to indicate when the parkade was last repaired or restored.

All I have are invoices and internal accounting documents, which only demonstrate that work was done, it was done between certain dates, and that it cost a certain amount. I am asked to infer from that and the submission without documentary evidence that the concrete had delaminated and there was water ingress that the work was incurred for

an approved purpose. That is wholly insufficient to discharge their burden of proving each element under s. 23.1 of the Regulations, particularly with respect to the necessity of the work as defined under s. 23.1(4)(a).

I find that the Landlord has failed to adduce sufficient evidence to demonstrate that the parkade restoration was required to comply with the health, safety and housing standards required by law or that the parkade had failed, malfunctioned, was inoperative, or was close to the end of its useful life.

As the Landlord has failed to discharge their evidentiary burden with respect to this aspect, I dismiss the Landlord's application for an additional rent increase for the parkade without leave to reapply. Given this, I need not consider the other arguments raised by the advocate pertaining to whether the parkade is a major component or system of the building.

Conclusion

The Landlord's application for an additional rent increase for the capital expenditure related to the parkade is dismissed without leave to reapply.

I order the Landlord to serve the respondent tenants with a copy of this decision in accordance with section 88 of the *Act*.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

[redacted]

[redacted]

Residential Tenancy Branch

Request to comply with section 11.4 of the residential tenancy rules of procedure.

Hello, my name xxxx, I am a tenant of xxxxx and responding in relation to dispute # xxxxx, with a hearing set for xxxx. In accordance with section 11.4 of the rules of procedure at the RTB, which I have attached to this email, the applicant (you) must submit documentation relevant to the ineligibility criteria. We believe the following documents related to the ineligibility criteria have not yet been submitted by the landlord:

1) Any and all advice, reports or manuals received prior or during the building's lifetime in regard to the maintenance requirements of the building.
2) A maintenance record of all repairs and maintenance done to any of the building envelope components of the tower. Including any documents related to the repairs and maintenance done on the building envelop components.
3) Any and all Maintenance Service Agreements with contractors that has been active during the buildings lifetime
4) Any and all documents, emails and communication related to the Sealant and Painting project of the exterior walls that was completed in 2015.
5) Any and all complaints from tenants in regards to interior wall cracks and water ingress.
6) The building insurance(s) applicable to the building from 2014-Present.
7) Confirmation whether or not any claims were made against the building insurance for the repairs subject to the additional rent increase for capital expenditures.
8) The depreciation report for the building

I request this information be submitted to the RTB and sent to me at xxx Should this request not be honored in line with your evidence deadline on xxxx, the tenant will attempt to obtain a summons from the arbitrator for you to submit the above-mentioned documents into evidence. This may ultimately lead to delays in the proceedings or to the tenants requesting that the adverse inference be drawn against the landlord for their failure to provide these documents.

Best regards,

Tenant's Written Submission

In the matter of a dispute resolution hearing under Part 5, Division 1 of the Residential Tenancy Act, [SBC 2002] c. 78 (as amended)

Between:

("the Landlord"- Applicants)

And:

("the tenant"- Respondent)

Regarding an application for capital expenditure increases

Decision sought

1. The tenant is opposing that the landlord's application for an additional rent increase due to capital expenditures be granted
2. In the alternative, the tenant seeks an order that the landlord's application be dismissed for failure to lift their burden of proof under section 23.1 of the residential tenancy regulation.

Material facts

3. The property was inspected and found in need of repair by RJC.
4. From xxxx the landlord conducted various repairs and upgrades to the building. Including installation of a bike storage unit, Repairs to the façade of the building, painting of the façade of the building and repairs to the roof. \
5. The landlord applied for a rent increase for capital expenditures on the xxx and the preliminary hearing happened on xxxx.
6. On xxxx, the landlord was sent a physical letter followed by an email on the xxxx by the tenant requesting they included various documents relevant to the case in their evidence.
7. The letter was delivered to the landlord by mail on xxxx.
8. The landlord acknowledges receipt of xxxx by xxxx and in follow-up emails, stated that the landlord would only submit the documents upon payment by the tenant
9. The tenant did not receive the dispute resolution document or the interim decision until they received the full package with submissions from the landlord which happened xxxx

Relevant Law

10. The tenant arguments will rely on the following sources:

11. The supreme court case of Berry and Kloet v. British Columbia (residential Tenancy Act, Arbitrator), 2007 BCSC 257. (page 28) The crucial part of this decision is paragraph 11 which states:

" [11] I start from the accepted rules of statutory interpretation. I conclude that the Act is a statute which seeks to confer a benefit or protection upon tenants. Were it not for the Act, tenants would have only the benefit of notice of termination provided by the common law. In other words, while the Act seeks to balance the rights of landlords and tenants, it provides a benefit to tenants which would not otherwise exist. In these circumstances, ambiguity in language should be resolved in favour of the persons in that benefited group: See (Canada Attorney General) v. Abrahams, [1983] 1 S.C.R. 2: Henricks v. Hebert, [1998] B.C.J. No. 2745 (QL)(SC) at para. 55:

I think it is accepted that one of the overriding purposes of prescribing statutory terms of tenancy, over and above specifically empowering residential tenants against the perceived superior strength of landlords, was to introduce order and consistency to an area where agreements were often vague, uncertain or non-existent on important matters, and remedies were relatively difficult to obtain.

12. RTB policy guideline 37, the essential quotes being:

a. ***"The following is a non-exhaustive list of expenditures that would not be considered an installation, repair, or replacement of a major system or major component*** *that has failed, malfunctioned, is inoperative or is close to the end of its useful life:*

- *repairing a leaky faucet or pipe under a sink*
- ***painting walls***
- *patching dents or holes in drywall*
- *fixing a broken window"*

b. *"Regarding the need to install, repair or replace a major system or major component, landlords may consider providing:*

- *Photographs or video taken before the repair or replacement was done;*
- *Copies of permits obtained;*
- *Copies of relevant laws/bylaws/construction standards;*
- ***Expert reports regarding the useful life of the prior system or component, the expected lifespan of the installed, repaired or replaced system or component, and the reason the installation, repair or replacement was needed;***

- ***Maintenance records for the system being repaired or replaced;***
- *Documents showing the date the prior system or component was purchased and installed;*
- *Manufacturer's documents relating to the prior system's or component's useful life expectancy."*

c. *If there are certain documents a tenant requires that are in the possession of the landlord or someone else (like a tradesperson), such as maintenance records or grant applications, tenants should request these from the relevant person in advance of the hearing. If the landlord or other person fails to provide the requested documents, tenants may, as soon as possible before the hearing, apply for the production of these documents pursuant to Rules 5.3 and 5.4 of the Rules of Procedure.*

d. *"Generally, in order to qualify, the repairs should be substantive rather than minor.* ***Cosmetic changes are also not considered a capital expenditure****…."*

13. Section 23.1 of the residential tenancy regulation:

"Additional rent increase for eligible capital expenditures

23.1 (1)Subject to subsection (2), a landlord may apply under section 43 (3) [additional rent increase] of the Act for an additional rent increase in respect of a rental unit that is a specified dwelling unit for eligible capital expenditures incurred in the 18-month period preceding the date on which the landlord makes the application.

(2)If the landlord made a previous application for an additional rent increase under subsection (1) and the application was granted, whether in whole or in part, the landlord must not make a subsequent application in respect of the same rental unit for an additional rent increase for eligible capital expenditures until at least 18 months after the month in which the last application was made.

(3)If the landlord applies for an additional rent increase under this section, the landlord must make a single application to increase the rent for all rental units on which the landlord intends to impose the additional rent increase if approved.

(4)Subject to subsection (5), the director must grant an application under this section for that portion of the capital expenditures in respect of which the landlord establishes all of the following:

(a)the capital expenditures were incurred for one of the following:

(i)the installation, repair or replacement of a major system or major component in order to maintain the residential property, of which the major system is a part or the major component is a component, in a state of repair that complies with the health, safety and housing standards required by law in accordance with section 32 (1) (a) [landlord and tenant obligations to repair and maintain] of the Act;

(ii)the installation, repair or replacement of a major system or major component that has failed or is malfunctioning or inoperative or that is close to the end of its useful life;

(iii)the installation, repair or replacement of a major system or major component that achieves one or more of the following:

(A)a reduction in energy use or greenhouse gas emissions;

(B)an improvement in the security of the residential property;

(b)the capital expenditures were incurred in the 18-month period preceding the date on which the landlord makes the application;

(c)the capital expenditures are not expected to be incurred again for at least 5 years.

(5)The director must not grant an application under this section for that portion of capital expenditures in respect of which a tenant establishes that the capital expenditures were incurred

(a)for repairs or replacement required because of inadequate repair or maintenance on the part of the landlord, or

(b)for which the landlord has been paid, or is entitled to be paid, from another source."

14. Residential tenancy act section 32:

*"**32** (1)A landlord must provide and maintain residential property in a state of decoration and repair that*

(a)complies with the health, safety and housing standards required by law, and

(b)having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

(2)A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

(3)A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(4)A tenant is not required to make repairs for reasonable wear and tear.

(5)A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement."

Arguments:

The tenant argues the following:

1) The landlord has failed to lift their burden of proof that the repairs were necessary to maintain the property, replace a system that has failed or achieves an increase in security of the residential property.

2) The landlord has failed to provide the maintenance records of the façade to the tenant, despite being requested, and therefore an adverse inference should be drawn that the landlord is not providing them because they failed to do proper maintenance; therefore their claim should be dismissed.

3) That even if the landlord were to be granted some of the application, they should not be granted for exterior painting, grinding epoxy glue holding bird spikes, sealant replacement for recessed windows and doors and the new “secure” bike storage.

In regards to 2)

15. The landlord bears the burden of proof that the capital expenditures meet the requirements to be eligible for an addition rent increase

16. As quoted above under 12. There is a list of documents that is suggested the landlord should consider proving to establish the need to install, repair or replace a major system or major component. The list contains 7 items and of the 7 the landlord has only provided a limited version of 1 of those documents. The only thing they have provided are some pictures of the building prior to the project.

17. They have provided no copies of permits obtained; no copies of relevant laws/bylaws/construction standards; no expert reports regarding any part of the useful life of the prior system, the expected lifespan or the reason the work was needed; no maintenance records for the system or component being repaired or replaced; no documents showing the date the prior system or component was purchased and or installed; no documents from a manufacturer’s documents relating to the prior system’s or components useful life expectancy; and no pictures of the current look of the building.

18. They have not provided these documents despite both being encouraged to in the guidelines that they quote in their own submissions and a specific request from the tenant that they provided such documentation related to the project.

19. The only thing they have provided outside of pictures and bills is a 2-page document by an engineer. This note from the engineer lacks any detail or any description of the many different parts of the project, or any evidence that the projects were needed. The only thing the letter contains is a matter of fact description of the building in xxx, that xxxx was recommended they repair it, and that the damage observed where consistent with ordinary wear and tear. We would also note that this engineer has received money that the landlord is now requesting the tenants pay.

20. It is important to note here that as stated in *Berry and Kloet v. British Columbia*, the *Residential Tenancy Act* and by extension the tenancy regulation is legislation whose main goal is to confer

rights upon tenants, and that any ambiguity in the wording of those legislations must therefore be resolved in favor of the tenants.

21. In cases like capital expenditures for major repairs to the building, the landlord has in their sole possession almost all documents relevant to the case. This presumably includes documents related to the project from engineers and other tradespeople, documents related to the maintenance of the system and/or component being replaced, information related to the component being installed, and information regarding what work was actually done.

22. The very large amount of compensation being requested by the landlord, in this case more than xxxxx dollars, gives rise to a duty for the landlord to include such documents in their application if they which to lift their burden of proof.

23. Landlords should not be able, as they have done in this case, to shroud the project in darkness by refusing to disclose the important information available to them, and only providing one- or two-pages documents devoid of any detail or reason explanation. This makes it practically impossible for the tenants and the Residential Tenancy Branch to apply any sort of scrutiny to the landlord's claims. Given the lack of information provided to the tenant, they are unable to procure their own experts to review the landlord's claims, as those experts would have no documentation which they could review to give any sort of report on the need of the project.

24. As the landlord has in this case not just failed to lift their burden of proof, but failed to provide any meaningful evidence at all outside of bills paid, despite both being encouraged in the guideline and explicitly requested by the tenant, their application must be dismissed.

In regards to 3)

25. For the same reasons as above, while the tenant bears the burden of proof that the landlord has failed to do proper maintenance of the major component, the tenant submits that the arbitrator should draw an adverse inference from the landlord's refusal to provide the maintenance records.

26. In order words, the landlord's refusal to provide the maintenance records, despite being encouraged by policy and requested by the tenant directly to do so means, should lead the arbitrator to draw the conclusion that the maintenance records contains information damaging to the landlords case and that they therefore have not lived up to their maintenance requirements, and are therefore ineligible to claim the cost for repairs under section 23.1 of the tenancy regulation.

In regards to 4)

27. Even if the landlord is found to have lifted the burden of proof, several of the items that they are claiming for are not eligible under section 23.1 of the residential tenancy regulation. Those items are A) exterior painting, B) grinding epoxy glue holding bird spikes, C) sealant replacement for recessed windows and doors and D) the new bike storage.

28. As above, per the BC Supreme Court's reasoning in *Berry and Kloet v. British Columbia*, any ambiguity in regard to what is include in capital expenditures must be interpreted in the favor of the tenants. This means that what is included under capital expenditures must be interpreted narrowly, and exemptions interpreted broadly.

29. This is especially important because there is a risk that section 23.1 of the regulation could override the landlords' responsibilities to maintain the property under section 32 if section 23.1 of the regulation is not given a careful and limited interpretation. It does not accord with the purpose of the Residential Tenancy Act to permit a landlord to benefit financially from their own failure to repair and maintain the rental property.

30. With that in mind each element will now be addressed separately.

In regard to 4A)

31. According to the landlord the cost for the painting amounts to xxxx.

32. According to policy guideline 37, cosmetic changes are not included in capital expenditure, and even more explicitly the painting of walls is not included in the category of valid capital expenditures.

33. As seen on page 24-26, the building was not painted before, so it being painted now cannot be considered part of the repairs of the concrete. Instead, it can only be considered a cosmetic change that the landlord opted for and therefore not be included in the capital expenditures.

34. The fact that it happened at the same time as the repairs is not relevant and does not justify its inclusion in the landlord's claim. If the landlord would not be able to have the cost reimbursed if he had done it at a later date, it should not matter that it happened at the same time as the repairs to the façade.

35. Lastly, as alluded to under the section for the lack of evidence, the landlord evidence mentions nothing about the necessity or even reasoning behind the painting of the building and they have not lifted their burden of proof in this regard.

36. As the landlord is both excluded due to the ineligibility of the expense due to it being a cosmetic change and their lack of any evidence of the necessity of the painting, this part of their claim should be dismissed.

In regard to 4B)

37. The grinding epoxy glue holding bird spikes is set at xxxx dollars in the landlords

38. The landlords evidence again provides no details or even basic information about what this is for. However, if the landlord is found to have lifted their burden of proof for this specific item, it is assumed that it is for the installation of bird spikes.

39. Bird spikes are not a sufficient important part of a building to rise to the meaning of Major component in the wording of policy guideline 37 *"Major systems and major components are typically things that are essential to support or enclose a building, protect its physical integrity, or support a critical function of the residential property"* it then goes on to list such things as load bearing walls, heating systems, electrical wiring and primary flooring in common areas. Clearly bird spikes do not belong in the same category as those items.

40. These things are not comparable to bird spikes which are not essential to any function of the building, nor constitutes an essential function in and off itself. The reduction of the at times mild annoyances from bird life is entirely optional and many buildings do not have them.

41. For all of these reasons this part of the landlords application should fail.

In regard to 4C)

42. The sealant replacement for recessed windows and doors is set at xxxx.

43. The landlord's evidence does not make it possible to know which of the doors or windows have had sealant replacement and as such it is not possible to know whether or not it is the windows and doors of tenants or those of common areas. Since the majority of windows and doors would be those of the tenant's units and not common areas, the most reasonable assumption is that it is the doors and windows of tenants units.

44. The doors and windows of a tenants units, including the fact that they effectively seal the unit from the elements is part of the landlords ordinary responsibilities for the unit under section 32 of the RTA.

45. It would be absurd if the landlord could somehow avoid this responsibility by replacing the sealant for several windows/doors at the same time. If this were to be true, landlords managing apartment building would simply ignore repair requests of windows and doors, until several tenants had similar issues and then fix them at the same time and then apply for a rent increase due to capital expenditures as a result of having the doors or windows changed. Essentially completely avoiding their responsibilities under the Act and pushing the financial burden of basic maintenance over onto the tenants.

46. As such the landlord's application must be denied for this part, as nothing in section 23.1 of the regulation, mentions that the landlord no longer has their normal obligations under section 32 and as stated several times, *berry and kloet v. British Columbia,* require ambiguity to be resolved in the tenants in the tenants' favor. The most reasonable interpretation is that section 23.1 cannot be used by the landlord to shift the cost of their routine maintenance over to the tenants.

47. This interpretation is further reinforced by the fact that lack of proper maintenance is a ground for making expenditures ineligible. Unfortunately, the landlords failure/refusal to enter into evidence any maintenance records make it impossible to know if they have actually done proper maintenance on the windows or doors.

In regard to 4D)

48. To be granted a rent increase for capital expenditures for improving the security of the property 2 things must be true:

- **a.** the capital expenditures must relate to a major system and
- **b.** that major system must improve the security of the rental property.

49. The tenant submits both that the bicycle room is not a major system or component and that it does not improve the security of the rental property.

50. It is not a major system since it is insignificant to the overall security of the building. Additionally, it is not mentioned in any of the examples of major system provided in the RTB's policy, nor are there any mentions of anything similar to a secure bike storage mentioned. It is

also not a major system because it provides no additional security to units who does not have bicycles, nor can it even by its design provide it to all tenants since there are only 59 steel placements for bicycles and there are 103 units (which each could have multiple bikes).

51. Additionally, the landlord has provided no proof that thieves are entering the units specifically targeting bicycles. Neither have they shown, through evidence or through reason, that those bicycles would be more secure a separate bike storage area than in an apartment unit. In fact, the tenant submits that the opposite is true: it is easier for a thief to gain access to a separate outdoor fenced in bike storage area, than it is to gain entry into the building and then separately gain entry into an apartment. As such, the tenants parking their bikes in the secure bike storage is just as likely to instead attract bicycle thieves to the property, since they now have 1) all the bikes conveniently stored in once place and 2) easier access to stealing the bikes since they no longer have to enter the building.

52. The tenant suggests the true motivation for the landlord to install the bike storage is reveled in their own submissions stating that *"… but also to discourage tenants from bringing bicycles into the building lobby, elevators and rental units, which damages the residential property…".* This is not a security concern, but an aesthetic concern of the landlord.

53. For these reasons the landlord's application in regard to the bicycle storage should fail

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ARI-C

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "**Act**") and the *Residential Tenancy Regulation* (the "**Regulation**") for an additional rent increase for capital expenditure pursuant to section 23.1 of the Regulation.

The landlord was represented at the hearing by its property manager ("**DL**") and its building manager, who is also a tenant in the residential property ("**AB**"). Eight tenants were present at the hearing: AS (unit 102), FL (unit 304), DP (unit 311), JG (unit 505), AW (unit 601), LL (unit 601), AD (unit 612), and DW (unit 701). AD and DW were represented by an advocate ("**LH**").

This hearing was reconvened from a hearing on February 25, 2022 presided over by a different arbitrator, which itself was reconvened from a preliminary hearing held January 25, 2022. Interim decisions were issued following both hearings.

DL testified that the landlord served the tenants with the notice of dispute resolution proceeding form, supporting documentary evidence, and interim decisions by registered mail on March 13, 2022. All tenants in attendance confirmed receiving the required material in this manner. Accordingly, based on DL's testimony, corroborated by the tenants evidence, I find that the landlord has served the tenants in accordance with the Act.

I neglected to ask the tenants if they serve their documentary evidence on the landlord. However, I did advise the parties that I had reviewed the tenants' evidence prior to the hearing, and the landlord did not raise any objection regarding the evidence is admissibility at that point, or at any point during the hearing. Additionally, for the majority of the hearing, the parties referred to documents contained in the tenants' evidence packages. As such, I find that the landlord has been served with the tenants' evidence in accordance with the Act.

Preliminary Issue – Additional Evidence

As part of its evidence, the landlord submitted ledger entries of expenses incurred in the course of maintaining the residential property. During the hearing, DL testified that some of these entries related to the preventative maintenance of one of the major

components which was replaced (the boiler). At the hearing, out of a consideration of time, I ordered the landlord to provide me with a list of the charges contained in these ledgers which were incurred for the purpose of preventative maintenance by June 27, 2022.

LH requested that the tenants be permitted to provide a written response to this list of ledger entries, given that this list would be a substitution for the landlord's verbal submissions. I agreed and granted this request. I ordered that the tenant may submit a written response to the RTB and the landlord no later than July 4, 2022.

The landlord provided its documents to the RTB and the tenants within the required time frame, and LS provided written submissions within the time frame set out. I have reviewed these documents prior to writing this decision.

Issues to be Decided

Is the landlord entitled to impose an additional rent increase for capital expenditures?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The residential property is an 8-storey apartment building containing 91 dwelling units (the "**Building**").

The parties agreed that the landlord has not imposed an additional rent increase pursuant to sections 23 or 23.1 of the Regulations on any of the tenants within the last 18 months.

The landlord seeks to impose an additional rent increase for a capital expenditure incurred to pay for the replacement of the Building's boiler (the "**Work**"). DL testified that in November 2020, the old boiler started "having issues". The landlord engaged a plumbing company ("**KC**") to try to fix it, but they were unsuccessful. KC recommended that the landlord replace the boiler, because there was nothing it could do to fix the issue.

The new boiler system is comprised of three separate boilers, all of which are "high efficiency". DL stated that the landlord selected this system, as it had the ability to be expanded (adding a fourth unit) in the future, if needed. She testified that the landlord had to re-pipe the boiler room to accommodate a different exhaust system. She testified that the new boiler system is made locally, so there would be a minimal wait time to get replacement parts, if needed and that the life expectancy of the new boiler is up to 20 years.

KC started to install the new boiler at the end of January 2021. She testified it took until the end of March 2021 to completely the install of the new boiler. She testified that the landlord was forced to bring in a temporary boiler (located in the Building's parking lot) to provide heat to the Building during the installation process.

DL testified that the landlord incurred a cost of $196,209.57 to do the Work. The landlord provided four cheques and two invoices supporting this amount. However, on its application, the landlord stated that the amount of the capital expenditure was $184,450.53. DL stated that the after making its application, it received another invoice related to the Work from an electrical company who assisted KC in completing the Work. Additionally, she testified that the landlord subsequently received a final invoice from KC, which showed total cost of the Work as $192,952.89.

The differences between the amounts listed on the landlord's application and those on the cheques and invoices submitted into evidence are as follows:

Description	Amount on application	Amount on cheque/invoice
KC - Payment 1 of 4	$ 105,000.00	$ 105,000.00
Electrical Payment	$ -	$ 3,256.68
KC - Payment 2 of 4	$ 25,000.00	$ 25,000.00
KC - Payment 3 of 4	$ 36,005.47	$ 44,507.83
KC - Payment 4 of 4	$ 18,445.06	$ 18,445.06
Total	**$ 184,450.53**	**$ 196,209.57**

DL did not provide evidence as to the reason for the discrepancy between the amount listed for KC's third installment payment.

The landlord called a witness in support of its application.

HK is a "senior heating technician" with KC. He testified that in mid-winter 2020 the old boiler had "basically broken down" and that there was nothing he could do to fix it. He testified that the boiler had "a catastrophic failure" and that it could not be fixed. He testified it was approximately 17 years old and was well-maintained.

HK testified that KC had been inspecting the old boiler on a quarterly basis (every three months). He testified that KC did a "forensic audit" annually since 2010, which entails cleaning the heat exchanger, removing and cleaning the fans, flushing the system, flushing the pumps, inspecting the system for leaks, and replace any parts as needed.

HK testified that the model of the old boiler did not have a good reputation in the industry, and that this model of boiler was no longer on the market, but an updated version of it continues to be sold. He estimated the old boiler's life span as 20 years and

agreed that the heat exchanger had a warranty for 20 years against thermal shock. However, he testified a well-maintained boiler could last for much longer.

HK testified that he was unsure why the old boiler failed. He testified that he did not know if thermal shock caused the failure. He testified that multiple items on the boiler failed (which could have been caused by thermal shock), and that the heat exchanger failed “possibly” because of thermal shock. He testified that while it was “very possible” thermal shock to the boiler caused the failure, he “couldn’t prove it”.

HK testified that the new boiler brand is widely adopted in British Columbia. He estimated 90% of apartment buildings use this brand. He testified the life expectancy is 25 years.

On cross-examination, HK testified that sometimes companies other than KC undertook maintenance on the old boiler when KC was unavailable. He testified that he does not have access to their maintenance records, so he does not have a full view of what they did. However, he testified that he could see the work these companies did whenever he inspected the old boiler.

Advocate LH stated the old boiler’s manual specified that certain work needed to be done on the old boiler every 6 months. HK stated that the old boiler was inspected quarterly and that the igniter and relief valve gets replaced annually.

LH then referred HK to an invoice dated May 4, 2018 from KC. It listed a description of the work done by KC, which included:

> Relief valve [-] installed in 1997, and is too old the valve should be replaced
> Relief valve [-] also installed in 1997, and is too old. The unit requires replacement
> Backflow device [-] last tested in 1986 this unit needs to be tested - hasn't been tested in over 20 years needs testing ASAP - not OK

HK testified that a backflow device is required by the municipality and has nothing to do with the boiler’s functionality. He testified that the relief valves in question were not part of the boiler, but were part of the domestic hot water system. He testified that the domestic hot water and the boiler system are not interconnected systems.

Other tenants cross-examined HK, but, for the purposes of this application, I do not find that the questions or HK’s answers are relevant.

Tenant DW testified that he has lived in the Building since 2006. He testified that it is his belief that the landlord has not met its obligations under the Act to maintain the Building since 2010, when the landlord restructured, created the property manager position, and hired DL. He noted that DL is the property manager for more than 15 buildings.

DW testified that the since 2010 the landlord does not do preventative maintenance in the Building. Prior to this time, preventative maintenance notices were regularly posted around the Building. After this date, they became a rare occurrence, and the Building is only repaired when problems arise. He cited the Building's water system as an example of this. He testified that there are ongoing leaks in the hallways and lobby since 2006 and have been getting worse since 2019 and that two washing machines cannot be started at the same time (lest they flood). Additionally, he testified that he has had leaks in his rental unit, and that his water had to be shut off to address them.

DW also testified that the Building has had heating issues since 2018. He testified that since the new boiler was installed many of these issues were resolved, but that during the past 15 months, heating shutdowns have continued in the Building.

LH stated that he did not dispute that the fact that the old boiler failed, that the new boiler has a lifespan of more than five years, that the cost of the new boiler is what the landlord listed on the application, or that the boiler is a major system or a major component thereof. He stated that his entire argument was that the cause of the failure was due to inadequate maintenance.

LH stated that the manual for the old boiler contained a number of requirements for maintenance, in particular:

- Heat exchanger services and vent piping should be checked every six months for deterioration and carbon deposits.
- [The relief valve] should be checked for proper operation at least once a year by a qualified service technician.
- Check the main burner every 6 months for proper flame characteristics.
- In order to maintain peak efficiency, it is recommended that the hot surface igniter be replaced after 4,000 hours of operation [roughly 6 months].

LH then referred to the landlord's records relating to the repair and maintenance of the old boiler (which were from a former service provide ("**LA**") and which the landlord had provided in advance of the hearing). They show that the old boiler was installed October 28, 2005 and that the first preventative maintenance was performed on the boiler November 11, 2007. The next visits occurred on the following dates July 31, 2008, November 28, 2008, May 22, 2009, June 26, 2009, June 30, 2009, September 28, 2009, September 30, 2009, April 30, 2010, May 28, 2010, September 30, 2010, November 12, 2010, February 18, 2011, and February 25, 2011.

LH noted that none of the descriptions of the work done on these subsequent visits referenced "preventative maintenance". Rather he stated that the work done on these visits amounted to repairing of problems that had already arisen. He stated that these records did not show that the flame ignitor was ever replace during this time (which was supposed to have been replaced every 4000 hours). I note that the records referred to seem to indicate that it was replaced on November 11, 2007.

LH stated that the landlord apparently switched maintenance and repair providers to company KT. The first record of work done by KT is an invoice dated December 27, 2013 for work done to repair a noisy pump motor. The landlord provided additional invoices from this provider dated as follows:

- March 31, 2014 for “preventative maintenance”
- October 15, 2014 to “repair heating” in one of the units
- October 29, 2014 to address pipes banging against a wall
- November 19, 2014 to repair heat in one of the units and to “check the boiler room”
- November 16, 2015 for “preventative maintenance”
- November 30, 2015 to “check all pumps and boiler”
- May 30, 2016 for “preventative maintenance”

LH argued that these invoices showed that the landlord only conducted preventative maintenance once a year, and not quarterly (as HK testified) or even bi-annually as required by the old boiler’s manufacturer.

LH stated that the landlord then hired KC to supplement KT. The landlord provided invoices for work that was done between 2017 and 2020, as follows:

Date	Provider	Reason for visit	Cost
28-Feb-17	KC	due to “loud banging noise heard from the heating system	$ 199.50
22-Apr-17	KC	due to “boiler not firing”. This invoice stated “the boiler requires cleaning/service as soon as possible”	$ 294.00
28-Apr-17	KC	due to “pump on right hand side of boiler leaking” The invoice indicated that “flame rod is failing and circ pump motor needs to be replaced and that the boiler filter on air intake was replaced	$2,113.74
19-Jun-17	KC	to “check boiler operation”. The invoice noted that “the burners need to be cleaned and serviced	$ 196.82
30-Jun-17	KC	for “boiler servicing”. The invoice noted that the technician “found boiler in poor condition” and that the technician “clean heat exchanger, vacuumed out inside of boiler, and the outside. Remove and replace burner gaskets and burner.	$1,981.06
27-Jun-17	KT	where the technician had to turn off heat in the boiler room in order to unclog a drain in a rental unit.	$ 154.88

04-Jul-17	KT	to address the issue of no heat in one of the units. The invoice stated that technician “went down to the boiler room, found the boiler off and flame failure"	$ 89.25
07-Jul-17	KC	due to “a strong smell” in the boiler room. Invoice indicated that there was a “small leak” on the “blower meter of the boiler”. The technician replaced the igniter	$ 596.03
13-Jul-17	KC	due to a “shut down heating boiler”	$ 157.50
22-Sep-17	KT	due to “heat not working properly”	$ 139.13
30-Sep-17	KT	due to the heat not working in one of the units	$1,074.08
30-Sep-17	KT	due to a leak in the boiler room	$ 497.03
10-Nov-17	KT	to “perform maintenance agreement"	$ 222.60
31-Jan-18	KT	to replace copper pipe	$ 938.77
27-Apr-18	KC	to address excessive temperature in building	$ 152.25
04-May-18	KC	to perform maintenance testing	incomplete invoice provided
14-May-18	KC	to “repair the leaking expansion joint on the radiator”	$1,184.45
29-May-18	KT	to install a “storage tank”	$4,410.00
05-Jun-18	KT	to repair leak on boiler relief valve	$ 222.60
07-Jul-18	KC	to replace heating lines	incomplete invoice provided
07-Jul-18	KC	to "refill system and test"	$4,404.72
13-Jul-18	KT	to repair leak on boiler relief valve	$ 183.75
01-Oct-18	UP	for a “service call as the heating is not working”	$3,233.42
15-Nov-18	KC	for a service call due to “no heat"	$ 215.25
27-Dec-18	KC	to “replace faulty zone valve”.	$ 545.75
07-Jan-19	KC	due to "too much heat"	$ 181.13
29-Jan-19	KC	due to "problem with heat"	$ 490.62
04-Mar-19	KC	due to "zone valve" leaking	$ 181.13
06-Mar-19	KC	to "drain heating system and replace leaking inverted flares for zone valve"	$ 313.15
13-Mar-19	KC	due to "not enough heat" in unit	$ 181.13
18-Mar-19	KC	due to heat not turning off	$ 380.37
05-Apr-19	KC	due to heat not turning off	$ 404.00
07-May-19	KC	due to grey water backing up in sink of unit	$ 354.38

13-May-19	KC	due to heat not turning off and to replace zone valve	$1,223.00
09-Oct-19	KC	no heat in unit	$ 201.73
30-Oct-19	KC	thermostat not functioning	$ 188.20
20-Nov-19	KC	due to heat not turning off	$ 380.37
05-Dec-19	KC	to "bleed the air from the radiator"	$ 181.13
19-Dec-19	KC	no heat in unit	$ 563.87
10-Jan-20	KC	no heat in unit	$ 346.50
21-Feb-20	KC	no heat in unit	$ 713.45
05-May-20	KC	constant heat on one side of unit	$1,020.12
26-May-20	KC	to turn temperature down in lobby	$ 280.72
23-Oct-20	KC	no heat in unit	$ 191.63
28-Oct-20	KC	no heat in unit	$ 556.25
04-Nov-20	KC	not enough heat in unit	$ 246.75
10-Nov-20	KC	not enough heat in unit	$ 501.12
24-Nov-20	KC	no heat in building and water on floor of boiler room (visit at which KC determined old boiler needed to be replaced)	$2,270.94

LH argued that this showed that the landlord did perform adequate maintenance of the boiler system. He argued that the landlord did not live up to the requirements set out in the manual. He argued that, had the landlord properly maintained the old boiler according to the standards set out in the manual, the old boiler would not have failed catastrophically, and the purchase of the new boiler would not have been required.

DL testified that the invoices provided did not show all of the maintenance done on the boiler. She testified that the landlord had a maintenance contract in place since 2006. She testified that the landlord's ledger submitted into evidence showed all of the payments the landlord made for maintenance of the boiler. She testified that different accountants the landlord employed over the years labeled preventative maintenance differently in the ledgers.

DL stated that the due to the effluxion of time, the landlord did not have full records for all the maintenance done to the old boiler, as the landlord only retains records for seven years. She asked to call tenant FL as a witness, as FL and her now-deceased husband were the on-site managers for the Building from 2001 to 2009.

FL testified that she and her husband kept records of maintenance. She testified that "whatever the needs of the boiler were, they were addressed". She testified that during her tenure, she or her husband checked the boiler every morning and evening and that, to the to the best of her ability everything that was needed to be done was done for the boiler.

FL testified that if there were any issues with the boiler, they would call technicians. To the best of her recollection, she “believed there was a contract” with LA to do either annual, bi-annual, or quarterly preventative maintenance of the old boiler. She stated that her husband was “meticulous” and the building was well taken care of and that she cannot recall time when there was an issue that was not addressed.

FL testified that she and her husband kept daily journals of the work done. Copies of these journals were not entered into evidence. She conceded that her husband was more involved with the Building maintenance than she was (whereas she dealt with the rent rolls). On cross-examination, FL stated that neither she nor her husband had any special expertise in maintaining boiler systems.

As stated above, the landlord was permitted to upload a list of the line items in its ledger which it claims were incurred for preventative maintenance. The landlord uploaded a spreadsheet and a copy of its ledger with underlined items. I have compiled these two documents into a single chart as follows:

Date	Invoice Issuer	Amount	Memo line
October 15, 2010	LA	$ 465.43	-
November 22, 2010	LA	$ 155.68	-
February 15, 2011	KC	$ 6,707.00	KC
October 3, 2011	LA	$ 2,621.98	LA
December 10, 2011	KC	$ 1,405.60	Boiler
August 11, 2011	KC	$ 772.64	Boiler
February 3, 2012	KC	$ 2,866.86	KC
May 1, 2012	KC	$ 614.32	boiler
June 4, 2012	KC	$ 694.74	boiler
October 15, 2012	KC	$ 378.00	KC [invoice #]
April 18, 2013	KT	$ 969.92	boiler #2
December 17, 2013	KT	$ 582.38	new pump
January 15, 2014	KT	$ 932.17	boiler
May 14, 2014	KT	$ 223.13	PPM
January 15, 2015	KT	$ 223.13	preventative maintenance
April 8, 2015	KC	$ 756.35	no heat - igniter
June 11, 2015	KT	$ 223.13	preventative maintenance
September 18, 2015	KC	$ 11,443.64	boilers 2
April 8, 2016	KT	$ 496.13	boiler
May 30, 2016	KC	$ 152.25	boiler
June 20, 2016	KC	$ 2,061.36	boiler
April 7, 2017	KC	$ 831.39	annual PM
May 30, 2017	KC	$ 2,113.74	boiler pump is leaking

June 21, 2017	KC	$ 294.00	boiler
August 31, 2017	KC	$ 2,773.71	boiler
January 30, 2018	KC	$ 1,428.35	boiler
July 11, 2018	KC	$ 2,300.16	boiler, roof top
September 18, 2018	KC	$ 2,656.88	3/4" heating line / pipe in lobby / boiler
December 14, 2018	KC	$ 511.88	boiler
April 3, 2019	KC	$ 927.97	annual PM
July 5, 2019	KC	$ 1,505.65	AC
October 30, 2019	KC	$ 393.00	boiler
November 19, 2019	KC	$ 1,486.57	boiler room
May 6, 2020	KC	$ 701.82	boiler Jan 2
June 10, 2020	KC	$ 2,952.67	Replaced leaking pipe Boiler room
August 17, 2020	KC	$ 1,987.75	No heat - boiler pump
November 22, 2017	?	$ 222.60	maintenance agreement
July 27, 2018	?	$ 183.75	boiler
December 16, 2019	?	$ 246.75	PM

LH provided written submissions in response to the landlord's claim that each of these line items represent preventative maintenance as follows:

> The landlord's argument that the different naming on the Ledger is merely due to clerical differences between different accountants and that all the things they underlined [in the ledger] is actually preventive maintenance is on its face illogical. The things are not just named something slightly different than maintenance they have entirely different names.
>
> Additionally, the different naming convention only takes place in a relatively narrow window of time between May 2014-December 2019 (page 5 of the ledger submitted by the landlord), which happens to be closely around the period where some preventative maintenance is also shown to be happening in the full maintenance record as presented by the tenants doing the hearing. The fact that the times preventative maintenance happening in the ledger overlaps with the time it happens in the fuller maintenance records show that it is most likely not due to a clerical difference but because preventative maintenance only actually took place in this period.
>
> Furthermore, all of the visit actually marked by the label preventative maintenance on the ledger all have a very similar price of around 220 dollars (see page 5 of the ledger). Whereas some of the items marked by the landlord as preventative maintenance go as high as 11,443.64 dollars (See September 18th, 2015 entry on page 2 of the landlords ledger) and many of them are in the number of several 1000s, which again indicates that they are not merely named different but is substantively different from the preventative maintenance marked as such.

The tenant has not been able to find a corresponding match for the majority of the landlords listing in the ledger but have been able to find corresponding matches for the following:

a. 11/22/2010 page 1 of the landlord's ledger have a corresponding entry in the maintenance records located at page 27 of the tenant evidence. They are both for the amount of 155.68. The description for the entry is: *"to supply necessary labour and material to troubleshoot and repair excessive heat in the building. Arrived on site and gained access to the building, set internal switch to remove and reset tekmar control settings back to. Tested operation and found okay as per attached service report"* This is clearly not preventative maintenance; they were called to the building as a response to excessive heat and fixed a specific

b. 1/15/2014, for 932.17 there are two maintenance invoices (page 3-4 of this document) that adds up to exactly 932.17 in the month preceding this invoice. The description for those two are "called in to replace a noisy pump motor and a leaking bearing assy" and "called in to check in noisy pump in the boiler room seems fine, unit 402 tighten a loose compression joint in the base heater". Again none of this is preventative maintenance, they were called to fix an issue of a noisy pump and fixed it by replacing a pump, this is exactly the sort of thing the tenant described at the hearing that the landlord will only do repairs or maintenance when something breaks.

To sum up the landlords claim that all of these points on the Ledger are illogical, because it does not make sense that they would name the same things differently in such a short time period and that also being the only. In which regular maintenance happen in the full maintenance records, the monetary amounts between what they say vary wildly with the most expensive one being more than 50 times as expensive as the things actually named preventative maintenance and in the instances where the tenant have been able to cross reference the Ledger with the maintenance records those full records revealed that it was not preventative maintenance.

Analysis

1. Statutory Framework

Sections 21.1, 23.1, and 23.2 of the Regulation set out the framework for determining if a landlord is entitled to impose an additional rent increase for capital expenditures. I will not reproduce the sections here but to summarize, the landlord must prove the following, on a balance of probabilities:

- the landlord has not successfully applied for an additional rent increase against these tenants within the last 18 months (s. 23.1(2));
- the number of specified dwelling units on the residential property (s. 23.2(2));
- the amount of the capital expenditure (s. 23.2(2));
- that the Work was an *eligible* capital expenditure, specifically that:
    - the Work was to repair, replace, or install a major system or a component of a major system (S. 23.1(4));
    - the Work was undertaken for one of the following reasons:
        - to comply with health, safety, and housing standards (s. 23.1(4)(a)(i));
        - because the system or component:
            - was close to the end of its useful life (s. 23.1(4)(a)(ii)); or
            - had failed, was malfunctioning, or was inoperative (s. 23.1(4)(a)(ii));
        - to achieve a reduction in energy use or greenhouse gas emissions (s. 23.1(4)(a)(iii)(A)); or
        - to improve the security of the residential property (s. 23.1(4)(a)(iii)(B));
    - the capital expenditure was incurred less than 18 months prior to the making of the application (s. 23.1(4)(b)); and
    - the capital expenditure is not expected to be incurred again within five years (s. 23.1(4)(c)).

The tenants may defeat an application for an additional rent increase for capital expenditure if they can prove on a balance of probabilities that the capital expenditures were incurred:

- for repairs or replacement required because of inadequate repair or maintenance on the part of the landlord (s. 23.1(5)(a)); or
- for which the landlord has been paid, or is entitled to be paid, from another source (s. 23.1(5)(a)).

If a landlord discharges their evidentiary burden and the tenant fails to establish that an additional rent increase should not be imposed (for the reasons set out above), the landlord may impose an additional rent increase pursuant to sections 23.2 and 23.3 of the Regulation.

2. Tenants' Rebuttals

As the bulk of the submissions related to the maintenance regime of the old boiler system, I will address this issue first.

As stated above, the tenants may defeat an application for an additional rent increase if they can prove that the capital expenditures were incurred because the repairs or replacement were required due to inadequate repair or maintenance on the part of the landlord.

Based on the submissions of the parties, the testimony of the witnesses, and the documentary evidence provided, I find that the tenants have established that it is more likely than not that the landlord failed to adequately maintain the old boiler, and that this failure caused or contributed to the old boiler to malfunction or break down.

Based on the manual for the old boiler submitted into evidence, I find that the manufacturer recommended that the following maintenance:

- Check the heat exchanger services and vent piping every six months for deterioration and carbon deposits.
- Check the relief valve for proper operation at least once a year by a qualified service technician.
- Check the main burner every 6 months for proper flame characteristics.

I find that this maintenance is the minimum level which could be considered “adequate”. As such, I would expect that the landlord arrange for an inspection of the old boiler to occur every six months, at a minimum.

I do not find it necessary for the “hot surface igniter” to be replaced after 4,000 of operation, as the manual states that this is necessary “in order to maintain peak efficiency”. I do not find it necessary for the landlord to have maintained the old boiler at “peak efficiency” in order to be considered to have adequately maintained it.

FL testified that there was a preventative maintenance contract with LA when she was the onsite manager. The landlord obtained LA’s maintenance records which include entries from 2005 to 2011. Of the entries listed, only one is for “preventative maintenance”, which occurred 13 months after the old boiler was installed. The other entries relate to call outs LA received to address specific issues that arose.

The landlord has not suggested that any other service provider undertook preventative maintenance during this time frame. As such, I do not find that the landlord had a preventative maintenance contract in place with LA or any other service provider between 2005 and 2011. Rather, I find it more likely than not that the landlord had a service contract with LA, and would contact them whenever issues arose with the boiler. DL and FL’s testimony about preventative maintenance being undertaken by LA is not supported by the documentary evidence.

The landlord submitted a ledger and spreadsheet into evidence which purportedly shows all preventative maintenance undertaken by the landlord on the boiler from October 2010 to December 2019. Based on review of these documents evidence, I do not find that this is the case.

The memo lines for some of these ledger entries suggests that the nature of the expenses are reparative, rather than preventative:

Date	Issuer	Amount	Memo line
December 17, 2013	KO	$ 582.38	new pump
April 8, 2015	KC	$ 756.35	no heat - igniter
May 30, 2017	KC	$ 2,113.74	boiler pump is leaking
June 10, 2020	KC	$ 2,952.67	Replaced leaking pipe Boiler room
August 17, 2020	KC	$ 1,987.75	No heat - boiler pump

I do not think it reasonable to conclude that the landlord's bookkeepers would have labelled these expresses as they did, if the expenses were for preventative maintenance.

Additionally, the memo lines in the landlord's ledgers which indicate an expense was incurred was for preventative maintenance all have a similar cost (roughly $220 fror preventative maintenance and between $800 and $900 for annual maintenance):

Date	Issuer	Amount	Memo line
May 14, 2014	KO	$ 223.13	PPM
January 15, 2015	KO	$ 223.13	preventative maintenance
June 11, 2015	KO	$ 223.13	preventative maintenance
April 7, 2017	KC	$ 831.39	annual PM
November 22, 2017	?	$ 222.60	maintenance agreement
April 3, 2019	KC	$ 927.97	annual PM
December 16, 2019	?	$ 246.75	PM

However, many of the other items listed on the ledger which the landlord asserts are for preventative maintenance are well in excess of these amounts (some wildly so):

Date	Issuer	Amount	Memo line
February 15, 2011	KC	$ 6,707.00	KC
October 3, 2011	LA	$ 2,621.98	LA
December 10, 2011	KC	$ 1,405.60	boiler
February 3, 2012	KC	$ 2,866.86	KC
September 18, 2015	KC	$ 11,443.64	boilers 2
June 20, 2016	KC	$ 2,061.36	boiler
May 30, 2017	KC	$ 2,113.74	boiler pump is leaking
August 31, 2017	KC	$ 2,773.71	boiler
January 30, 2018	KC	$ 1,428.35	boiler
July 11, 2018	KC	$ 2,300.16	boiler, roof top
September 18, 2018	KC	$ 2,656.88	3/4" heating line / pipe in lobby / boiler
July 5, 2019	KC	$ 1,505.65	AC
November 19, 2019	KC	$ 1,486.57	boiler room
June 10, 2020	KC	$ 2,952.67	Replaced leaking pipe Boiler room

August 17, 2020	KC	$ 1,987.75	No heat - boiler pump

The foregoing discrepancies in cost cause me to have little confidence in DL's testimony (and the landlord's representations) that all of the items listed on the spreadsheet and underlined in the ledger provided after the hearing represent costs incurred by the landlord for *preventative* maintenance. As such, I assign the DL's testimony that entries in the ledger labelled "boiler" or other similarly vague descriptions are for costs incurred to perform *preventative* maintenance.

I should note that I do not doubt that the landlord incurred the costs listed in the ledger. However, I find it more likely than not that most of them were incurred as a result of the landlord engaging a service provider to repair an existing issue, rather than as a result of the landlord being proactive and following the manufacture's preventative maintenance regime. It may also be that the landlord engaged in a more rigorous preventative maintenance routine since KC became the primary service provider in 2017 (which may accord with HK's testimony). However, I do not find that a recently enacted preventative maintenance routine is a substitute for keeping the old boiler adequately maintained throughout its life.

Accordingly, I find that the landlord failed to adequately maintain the old boiler over the course of the old boiler's life. Due to this failure, which was most pronounced from November 11, 2007 to March 31, 2014, when *no* preventive maintenance was undertaken, I find that it is more likely than not that that the old boiler malfunctioned and needed to be replaced.

The neglect of the boiler for over six years, coupled with the sporadic maintenance thereafter likely amplified any defects or deficiencies in the old boiler (which HK testified was not a model of especially high quality) and was more likely than not contributed to the old boiler having a "catastrophic failure".

I find that the tenants have discharged their evidentiary burden to prove the replacement of the old boiler was due to the landlord's inadequate maintenance.

As such, I dismiss the landlord's application without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: August 5, 2022

46. Transitional Housing, Supportive Housing, Health Facilities, and Rehabilitative and Therapeutic Housing

This Policy Guideline is intended help the parties to an application understand issues that are likely to be relevant. It may also help parties know what information or evidence is likely to assist them in supporting their position. This Guideline may be revised, and new Guidelines issued from time to time.

This policy guideline addresses the Director's interpretation of and the differences between transitional housing, housing based health facilities that provide hospitality services and personal health care, living accommodations that are made available in the course of providing rehabilitative or therapeutic treatment or services, and supportive housing. Of these forms of housing, the *Residential Tenancy Act* (RTA) applies only to supportive housing.

A. LEGISLATIVE FRAMEWORK

Section 4(f) of the RTA states that the RTA does not apply to living accommodation provided for emergency shelter or transitional housing.

Under section 1 of the Residential Tenancy Regulation (Regulation), "transitional housing" means living accommodation that is provided:

(a) on a temporary basis,

(b) by a person or organization that receives funding from a local government or the government of British Columbia or Canada for the purpose of providing that accommodation, and

(c) together with programs intended to assist tenants to become better able to live independently.

Section 1.1(2) of the Regulation defines "emergency shelter" as including living accommodation that is provided in relation to the COVID-19 emergency [as defined in section 1.1(1)]

(a) on a temporary basis,

(b) free of charge to the occupant, and

(c) by a person or organization that receives funding from the government for the purpose of providing that accommodation.

Section 4(g)(v) and (vi) of the RTA also states that the RTA does not apply to living accommodation in a housing based health facility that provides hospitality support services and personal health care or to living accommodation that is made available in the course of providing rehabilitative or therapeutic treatment or services.

B. LEGISLATIVE PURPOSE

Underlying the Director's interpretation of the provisions specified in Section A is that one of the primary purposes of the RTA is to provide protections to tenants beyond what exists at common law and what most tenants would be able to negotiate on their own. If an accommodation is exempt from the RTA, the resident receives none of the protections under the RTA.

In general, if there is ambiguity in the language of a provision that provides a complete exemption from the RTA, a narrow interpretation best ensures that those who are often vulnerable have protections, which achieves one of the primary purposes of the legislation.

C. EMERGENCY SHELTER

As the definition in the Regulation relating to the COVID-19 emergency uses “includes”, the term “emergency shelter” is not limited to this definition.

The term “emergency shelter” also encompasses circumstances where a facility provides an individual with temporary overnight shelter.

Residents in emergency shelters may have an immediate need for support services, including help with meeting basic needs for nutrition, hygiene, and health services. Residents may be required to abide by house rules as a condition of their stay.

D. TRANSITIONAL HOUSING

Transitional housing is often a next step toward independent living. An individual in transitional housing may be moving from homelessness, an emergency shelter, a health or correctional facility, or an unsafe housing situation. Transitional housing is intended to include at least a general plan as to how the person residing in this type of housing will transition to more permanent accommodation in the future. Individuals in transitional housing may transition to independent living or, if they have a moderate need for ongoing support services, they may transition to supportive housing.

Living accommodation must meet all of the criteria in the definition of “transitional housing” under section 1 of the Regulation to be excluded from the RTA. Requiring residents to sign a “transitional housing agreement” does not determine whether housing is exempt from the RTA.

E. HOUSING BASED HEALTH FACILITIES THAT PROVIDE HOSPITALITY SUPPORT SERVICES AND PERSONAL HEALTH CARE

There are three requirements for living accommodation to be exempt from the RTA under section 4(g)(v):

1. the housing is in a health facility,
2. hospitality support services are provided, and
3. personal health care is provided.

Based on principles of statutory interpretation, each of these three requirements must mean something different. For instance, a “health facility” means something other than providing hospitality support services and personal health care.

To be a “health facility,” general health services should be a primary focus or the feature service of the location. Having a private nurse attend or other employees to conduct safety checks at a rental unit would not qualify it as a “health facility.” The Director will consider whether the facility is licensed or regulated to provide health services or is otherwise operating as a health institution.

Hospitality support services could include providing meals, housekeeping, laundry, social and recreational opportunities, or a 24-hour emergency response system.

Personal health care is considered assistance with aspects of essential everyday activities that are tied to a person's health or otherwise managing daily aspects of health but are not otherwise a hospitality support service. This could include assistance with bathing, managing medication and diets, behaviour management, or psychosocial supports. Providing personal health care means the facility takes an active role in that care through its staff or contractors.

A residence that offers minimal services will not meet the requirements for an exemption under section 4(g)(v). For example, providing housekeeping for the units and bringing in a flu vaccine service once a year will not meet the requirements. Similarly, offering a 24-hour emergency response system and agreeing to wait with a tenant until medical assistance arrives would not be sufficient.

F. PROVIDING REHABILITATIVE OR THERAPEUTIC TREATMENT OR SERVICES

Under section 4(g)(vi) of the RTA, a living accommodation is exempt from the RTA if the living accommodation is made available in the course of providing rehabilitative or therapeutic treatment or services.

There are two characteristics generally determinant of this type of living accommodation:

1. Residency is dependent on the occupant actively receiving rehabilitative or therapeutic treatment or services provided by the housing provider at the housing location. If a resident stops actively receiving treatment or service, their occupancy is terminated. Conversely, residency is not permitted for an individual if they do not require or choose not to receive rehabilitative or therapeutic treatment and services.
2. Residency is time-limited, meaning that the occupant and housing provider agree that the period of occupancy will be for a specified duration and/or will terminate once the objectives of services and treatments provided have been met.

Rehabilitative treatments or services aim to restore the individual to their greatest physical, mental, social, or vocational potential.[1] It can also be designed to improve the skills and behaviour of a person through things like training, counselling, or education to allow for better integration into society. Therapeutic treatments or services aim to respond to an individual's needs in the treatment of a disease or disorder.

In general, the treatments and services provided are the primary focus, and the housing is made available in the course of providing the treatment and services.

G. SUPPORTIVE HOUSING AND INDEPENDENT LIVING

In general, where persons are living independently, they will be tenants under the RTA unless another provision in section 4 of the RTA applies (for instance, they share a bathroom or kitchen facilities with the owner of the accommodation).

[1] *Keith Whitney Homes Society v. Payne* (1992), 9 O.R. (3d) 186 (Ont. Gen. Div.) (https://canlii.ca/t/g150w).

46. Transitional Housing, Supportive Housing, Health Facilities, and Rehabilitative and Therapeutic Housing

Supportive housing is long-term or permanent living accommodation for individuals who need some support services to live independently. In the context of seniors' housing, supportive housing is often referred to as "independent living." Supports offered on-site by supportive housing providers are non-clinical, and residents are not required to receive supports to maintain their housing. These supports include meal services, life skills training, and access to health supports. The RTA applies to supportive housing.

Under section 5 of the RTA, landlords and tenants cannot avoid or contract out of the RTA or regulations, so any policies put in place by supportive housing providers must be consistent with the RTA and regulations.

H. CHANGES TO POLICY GUIDELINE

Section	Change	Notes	Effective Date
All	new		05-Dec-2016
B	am	Update to reflect the addition to the regulation of a definition of emergency shelter	02-June-2020
B	new	Added section on legislative purpose	03-Feb-2023
E and F	new	Added director's interpretation of sections 4(g)(v) and (vi) of the RTA.	03-Feb-2023
A	am	Updated to include legislative framework for sections C and D	03-Feb-2023
C	new	Added section on emergency shelters based on previous version of the PG.	17-Feb-2023

Change notations

am = text amended or changed

del = text deleted

new = new section added

Fact Pattern 1 - Jurisdiction

- Your client lives in a subsidized housing unit, with a non-profit landlord.
- The client's tenancy agreement is titled "Program Agreement" and explicitly states at the outset that the RTA does not apply. The client's "Program Agreement" states that the following services are available to the residents of the property:
    - Daily breakfast
    - Dinner 3 times per week
    - Harm reduction supplies
    - Assistance with cleaning rental units, if required
    - Access to flu and COVID vaccines on-site on a date specified by the landlord
    - Assistance with managing prescription medication, if requested by the client

- The landlord has imposed the following policies:
    - Wellness checks:
        - If a tenant is not seen by staff in a 24 hour period, a staff member will knock on the tenant's door, and, if the tenant does not answer, the staff member will enter the unit without notice.
    - Guest policy:
        - Tenants are not permitted any guests after 10:00pm.
        - All guests must check in with staff upon entry and present identification.
        - Tenants must accompany their guests at all times in common areas including when the guest enters and leaves.
    - Building access:
        - Tenants do not have keys or fobs for the building; they must be buzzed into the building by staff.
        - In practice, staff are almost always very prompt in buzzing tenants in, but occasionally a tenant may have to wait 2-5 minutes if front desk staff are busy in another part of the building.

- Your client has already filed for dispute resolution at the RTB seeking an order that the landlord comply with the RTA. She takes issue with all of the policies outlined above. The landlord has responded by sending the tenant a letter, explaining that the RTA does not apply because the landlord is excluded from the RTA by either s. 4(g)(v) or s.4(g)(vi) of the RTA.
    - 4(g)(v): living accommodation in a housing based health facility that provides hospitality support services and personal health care
    - 4(g)(vi): living accommodation that is made available in the course of providing rehabilitative or therapeutic treatment or services

- The client tells you that of the available services, she accesses only the following:
    - Breakfast, daily
    - Dinner, only once or twice a month
    - Harm reduction supplies, occasionally

Questions:

1. What kinds of evidence could you look for to support your client's position that the RTA applies to this tenancy?

2. What arguments would you make regarding section 4(g)(v)?

3. What arguments would you make regarding section 4(g)(vi)?

4. If the client wins on jurisdiction:
    a. What arguments would you make about wellness checks?

    b. What arguments would you make about the guest policy?

    c. What arguments would you make about the building access policy?

    d. Do you think any of the policies, or aspects of the policies, would be permitted even if the RTA applied? Why?

Fact Pattern 2 - multiple 2 month NTEs

- Your client rents a basement suite from their landlord who lives upstairs in the main part of a single family house.
- The basement suite is entirely self-contained, and your client shares no common space with the landlord or their family.
- The landlord asked your client six months ago to agree to pay a 50% rent increase and your client refused.
- Five months ago, the landlord served a Two Month Notice to End Tenancy for Landlord's Use on your client that stated that the tenancy would end because the landlord intends to occupy the rental unit. In correspondence with your client, the landlord stated that they wanted to use the basement suite to hold group piano lessons, as their living room upstairs was too small to give lessons to more than one child at a time.
- Your client disputed the Two Month Notice and won. The Arbitrator rendered a decision last week.
- In that decision, the Arbitrator wrote that they believed your client that the landlord had demanded higher rent from them, and found that the landlord had an ulterior motive that undermined their claim to be acting in good faith.
- The day after your client received the decision, the landlord issued a new Two Month Notice that is identical to the first except for the date it was served and the effective notice.

Questions:

1) Does your client need to challenge the newest Two Month Notice? If so, what arguments can they raise in the hearing?
2) Assume that your client sets aside the second Two Month Notice, and the landlord waits six months and issues a third Two Month Notice, identical to the first two, along with a letter that says they still want the basement suite to hold piano lessons. What arguments could your client raise about this Notice?
3) Assume instead that the landlord waits two months, and issues a third Two Month Notice that states that the parent of the landlord or the landlord's spouse intends to occupy the rental unit. What arguments could your client raise about this Notice?

Fact Pattern 3 - month 2 NTE, not in RTB form

- Your client is a long-term tenant who rents a single family home from an individual landlord who lives one city away.
- Your client received a “Tenancy End Notice” (see attached). They see that it lists the reason why the landlord wants to end the tenancy and has the correct information for them and their landlord. They believe it is a valid eviction notice, and they did not know that a landlord is required to use the proper form from the RTB. They accept the end of the tenancy and move out.
- Once they move out, the landlord immediately demolishes the building and sells the lot to a developer.

Question:

1) Is your client entitled to compensation under *RTA* s.51(2)? If not, are they entitled to any other compensation under the *RTA*?

Tenancy End Notice

Reason for end tenancy: The rental unit will be occupied by the landlord.

To the tenants:

David Tenant

Tenant Address:

Street	City/Province	Postal code
123 Real St.	Placeville/BC	V1V 1V1

From the landlord:

First name	Last name
Land	Lord

Landlord Address:

Street	City/Province	Postal code
321 Fake St.	Spaceville/BC	V2V 2V2

I, the landlord, give you the notice to move out of the rental unit located at:

Street	City/Province	Postal code
123 Real St.	Placeville/BC	V1V 1V1

You must move out of the rental unit by: July 15, 2022

Name of the landlord	signature of landlord	date signed
Land Lord		May 29, 2022

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20190513
Docket: S191818
Registry: Vancouver

Between:

Gordon Zeilstra

Petitioner

And

Amrik Samra

Respondent

Before: The Honourable Mr. Justice Davies

On judicial review from: an order of the Residential Tenancy Branch, dated February 9, 2019

Oral Reasons for Judgment

In Chambers

Counsel for Petitioner:	D. Sabelli
Counsel for Respondent:	G. Santos, Articled Student
Place and Date of Trial/Hearing:	Vancouver, B.C. May 13, 2019
Place and Date of Judgment:	Vancouver, B.C. May 13, 2019

[1] **THE COURT:** This is an application by the petitioner to set aside the decision of an arbitrator under the *Residential Tenancy Act*, 2002 S.B.C. c. 78, in respect of the Arbitrator's determination that the respondent landlord had appropriately given notice under s. 49(3) of the *Residential Tenancy Act* of his intention to have the subject property occupied by his son.

[2] Section 49(3) of the *Act* provides that:

> [49] (3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

[3] The history of this matter is somewhat complicated.

[4] On October 5, 2018, the landlord provided the tenant with a two-month notice to end tenancy for the landlord's use of the property pursuant to s. 49(3) of the *Act* on the basis that his son, who is 26 years old, and who lived with him at the time, planned to move into the petitioner's rental unit.

[5] The petitioner applied for dispute resolution arguing that that the notice should be cancelled because the landlord did not have an honest intention to move his son into the rental unit and based also upon a submission that he and the landlord had an oral agreement that the petitioner would be a long-term tenant.

[6] The hearing of that first notice before the Residential Tenancy Branch occurred on November 23, 2018.

[7] The arbitrator, Arbitrator Wellman, issued a decision granting the tenant's application to cancel the first notice on the basis that the respondent failed to prove that he had a good faith intention to move his son into the rental unit.

[8] The decision read:

> As the landlord's "good faith" was questioned regarding the issuance of the Notice, I considered that the only submission that the Landlord provided was his own testimony that his son was going to move in. I find that the Landlord could have provided further evidence to prove beyond a balance of

> probabilities that, his son in, good faith, was intending to move into the rental unit in accordance with s. 49 and 51 of the *Act*.
>
> As such, I find that the Landlord has failed to provide sufficient evidence that the reasons for the issuance of the Notice were valid. As a result, I cancel the Notice and order the tenancy to continue until it is ended in accordance with the *Act*.

[9] The respondent landlord was unsatisfied with that decision and applied to have it reviewed. On December 6, 2018, Arbitrator Holloway issued a reconsideration decision dismissing the respondent landlord's application for reconsideration. In dismissing that application the Arbitrator stated:

> I find the new evidence submitted on this application for review is more in the nature of an attempt to reargue the same matters that were before the arbitrator at the original hearing. The review process is not intended to provide a party with an opportunity to present additional evidence that was available but not presented at the original hearing in order to strengthen arguments that were considered but rejected by the arbitrator at the original hearing. In this case the arbitrator rejected the good faith intention of the landlord.

[10] Eleven days after the issuance of that review consideration decision, the respondent landlord issued a second two-month notice to end the tenancy for the landlord's use of property. He again did so under s. 49(3) of the *Act* again stating that he intended to move his son into the rental unit.

[11] The petitioner again applied for dispute resolution with the Residential Tenancy Board seeking to cancel the second notice.

[12] On February 5, 2019, a second dispute resolution hearing concerning the petitioner's application to cancel the second notice was heard.

[13] During that second hearing the respondent's son attended as a witness and testified that he intended to move into the rental unit. The respondent provided no other additional evidence.

[14] That hearing resulted in the decision, which is now the subject of this application.

[15] The second Arbitrator, Arbitrator Selbee acknowledged the first decision as well as the review consideration as being final and found that the landlord's position had not changed since the issuance of the first notice.

[16] Arbitrator Selbee then stated:

> The original decision and review decision relate solely to the notice to end tenancy dated October 5th, 2018. It is correct that the Landlord could not have sought an order of possession based on the October 5th notice given the original decision and review decision. It is also correct that the Landlord was not granted a review hearing, which would have been a second consideration of the October 5th notice.
>
> However, neither the original decision nor the review consideration decision prevented the Landlord from issuing a new notice to end tenancy under s. 49 of the Act. The Landlord is not precluded from ever issuing a notice to end tenancy under s. 49 of the *Act* because the October 5th notice was cancelled. It was open to the Landlord to issue a new notice under s. 49 of the Act and I do not accept the submissions of the tenant arguing otherwise.
>
> Further, it is appropriate for me to hear this matter and determine the validity of the Notice as this issue has not been addressed before. This is not a reconsideration of the October 5th notice. It is a reconsideration of an entirely different notice to end tenancy subsequently served on the tenant.

The Arbitrator went on to say:

> I acknowledge there has been a history with this matter. However, I do not find this affects my assessment of the credibility of the Landlord and witness. The position of the Landlord has not changed since the October 5th notice was issued.

[17] The issue now before the court on judicial review is whether the second decision was patently unreasonable.

[18] I am satisfied that it was.

[19] I say that for the following reasons:

1) The second notice to terminate was issued for exactly the same reasons as the first notice.

2) The validity of the first notice had been determined against the position of the landlord.

3) There was a determination of a lack of good faith.

4) That first decision resulted in a reconsideration which was also resolved against the landlord.

5) The facts had not changed in any way when the second notice was issued.

6) In my view, the second notice to end the tenancy was an abuse of the process of the Residential Tenancy Branch in an attempt to do an end run on the first decision.

[20] The circumstances here are not like they were in the decision in *Khan v. Shore*, 2015 BCSC 830, which is relied upon by the landlord.

[21] In *Khan* a second notice was upheld by the court on judicial review, but that second notice did not deal with the same facts with which the first notice had dealt. The second notice dealt with some of those facts, but also new facts and new alleged breaches. It was not a situation where exactly the same facts were before the second arbitrator or the court.

[22] In my view, issue estoppel applied in this case to prevent the second arbitrator from hearing the identical application a second time.

[23] Issue estoppel as a doctrine of *res judicata* applies to avoid re-litigation. It is applied to ensure that the parties bring forward their best case to be decided by the decision maker and that they are therefore at the end of the day precluded from bringing another application on the same facts to try to attempt a different result.

[24] In its decision in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the Supreme Court of Canada stated:

> 18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated

> to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> 19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice….

[25] For issue estoppel to apply it is required 1) that the same question has previously been decided; 2) that the judicial decision which is said to create the estoppel was final; and, 3) that the parties to the decision or their privies were the same as the parties to the proceedings in which the estoppel is raised.

[26] All three of those preconditions to estoppel were satisfied in this case.

[27] The same question was decided by the first arbitrator, that being whether the first notice to terminate was made in good faith.

[28] That decision was final, having been determined by the arbitrator in first instance as well as on reconsideration.

[29] The parties to the decision were the same as those on the second application.

[30] In my view, application of these principles precluded the second hearing.

[31] In those circumstances, the ruling made by the second arbitrator, who stated simply that the creation of a second notice had the effect of removing any effect of the first notice, is patently unreasonable.

[32] To allow it to stand would amount to an abuse of the process and constitute oppressive conduct against the interests of this petitioner.

[33] The petitioner’s petition is allowed with costs.

“Davies J. “

How a tenancy ends

44 (1)A tenancy ends only if one or more of the following applies:

(a)the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

(i)section 45 [tenant's notice];

(i.1)section 45.1 [tenant's notice: family violence or long-term care];

(ii)section 46 [landlord's notice: non-payment of rent];

(iii)section 47 [landlord's notice: cause];

(iv)section 48 [landlord's notice: end of employment];

(v)section 49 [landlord's notice: landlord's use of property];

(vi)section 49.1 [landlord's notice: tenant ceases to qualify];

(vii)section 50 [tenant may end tenancy early];

(b)the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;

(c)the landlord and tenant agree in writing to end the tenancy;

(d)the tenant vacates or abandons the rental unit;

(e)the tenancy agreement is frustrated;

(f)the director orders that the tenancy is ended;

(g)the tenancy agreement is a sublease agreement.

(2)[Repealed 2003-81-37.]

(3)If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Landlord's notice: landlord's use of property

49 (1)In this section:

"close family member" means, in relation to an individual,

(a)the individual's parent, spouse or child, or

(b)the parent or child of that individual's spouse;

"family corporation" means a corporation in which all the voting shares are owned by

(a)one individual, or

(b)one individual plus one or more of that individual's brother, sister or close family members;

"landlord" means

(a)for the purposes of subsection (3), an individual who

(i)at the time of giving the notice, has a reversionary interest in the rental unit exceeding 3 years, and

(ii)holds not less than 1/2 of the full reversionary interest, and

(b)for the purposes of subsection (4), a family corporation that

(i)at the time of giving the notice, has a reversionary interest in the rental unit exceeding 3 years, and

(ii)holds not less than 1/2 of the full reversionary interest;

"purchaser", for the purposes of subsection (5), means a purchaser that has agreed to purchase at least 1/2 of the full reversionary interest in the rental unit.

(2)Subject to section 51 [tenant's compensation: section 49 notice], a landlord may end a tenancy

(a)for a purpose referred to in subsection (3), (4) or (5) by giving notice to end the tenancy effective on a date that must be

(i)not earlier than 2 months after the date the tenant receives the notice,

(ii)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, and

(iii)if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy, or

(b)for a purpose referred to in subsection (6) by giving notice to end the tenancy effective on a date that must be

(i)not earlier than 4 months after the date the tenant receives the notice,

(ii)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, and

(iii)if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy.

[...]

(3)A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

[…]

(7)A notice under this section must comply with section 52 *[form and content of notice to end tenancy]* and, in the case of a notice under subsection (5), must contain the name and address of the purchaser who asked the landlord to give the notice.

Tenant's compensation: section 49 notice

51 (1)A tenant who receives a notice to end a tenancy under section 49 [landlord's use of property] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

(1.1)A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

(1.2)If a tenant referred to in subsection (1) paid rent before giving a notice under section 50, the landlord must refund the amount paid.

(2)Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if the landlord or purchaser, as applicable, does not establish that

(a)the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice, and

(b)the rental unit, except in respect of the purpose specified in section 49 (6) (a), has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

(3)The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as applicable, from

(a)accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, and

(b)using the rental unit, except in respect of the purpose specified in section 49 (6) (a), for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Form and content of notice to end tenancy

52 In order to be effective, a notice to end a tenancy must be in writing and must

(a)be signed and dated by the landlord or tenant giving the notice,

(b)give the address of the rental unit,

(c)state the effective date of the notice,

(d)except for a notice under section 45 (1) or (2) [tenant's notice], state the grounds for ending the tenancy,

(d.1)for a notice under section 45.1 [tenant's notice: family violence or long-term care], be accompanied by a statement made in accordance with section 45.2 [confirmation of eligibility], and

(e)when given by a landlord, be in the approved form.

DEALING WITH DEBT RELATED TO EI AND THE FEDERAL PANDEMIC BENEFITS



Kevin Love, Lawyer
Manjeet Chana, Lawyer
Community Legal Assistance Society
October 25, 2023

CLAS Community Legal Assistance Society

What we will cover

In our session today, we will cover:

- a recap of the main federal pandemic benefits
- what caused overpayments
- how to approach overpayments
- when and how you can challenge overpayments
- how you can manage overpayments if there is no way to fight them



The Federal pandemic benefits

- Because of Covid-19, Canadians had to isolate and many employers could not provide in-person services. As a result, many people lost their jobs, were laid off, or had fewer working hours and experienced a loss in income.



- In response, the federal government created various benefits to get financial help to people and employers affected by Covid-19.

So Many Different Benefits!

Here is a list of short-forms:

- Canada Emergency Response Benefit (CERB)
- Canada Recovery Benefit (CRB)
- Canada Recovery Sickness Benefit (CRSB)
- Canada Recovery Caregiving Benefit (CRCB)
- Canada Worker Lockdown Benefit (CWLB)
- Canada Emergency Student Benefit (CESB)
- Employment Insurance (EI)
- Employment Insurance Emergency Response Benefit (EI ERB)

Canada Emergency Response Benefit (CERB)

- CERB provided financial support to employed and self-employed Canadians who were directly affected by COVID-19
- CERB eligibility was from March 15, 2020 to September 26, 2020
- applicants received $2,000 for a 4-week period (the same as $500 a week)
- application requirements generally (see full list here and Q&As here):
  - resides in Canada, at least 15 years old, and have a valid SIN
  - earned a minimum of $5,000 (before taxes) in the last 12 months, or in 2019, prior to the application date, from employment income, self-employment income, and/or provincial benefit payments related to maternity or parental leave
  - stopped working or was unable to work because of Covid-19 OR work hours were reduced because of Covid-19 and did not earn more than $1,000 in employment or self-employment income (before deductions) for at least 14 days in a row during the 4-week period
  - did not quit their job voluntarily
  - exhausted their EI regular benefits or EI fishing benefits between December 29, 2019 and October 3, 2020
  - filed a 2019 or 2020 tax return

Canada Recovery Benefit (CRB)

- CERB ended September 26, 2020. Employed and self-employed people who weren't entitled to EI benefits could apply for the Canada Recovery Benefit (CRB)
- Applicants received either $1,000 ($900 after taxes) or $600 ($540 after taxes) for a 2-week period, between September 27, 2020 and October 23, 2021
- Application requirements generally (see full list here):
  - did not quit their job or reduce hours voluntarily unless reasonable to do so
  - resides in Canada (lived and had a home in Canada), at least 15 years old, and has a valid SIN
  - had **gross** employment and/or **net** self-employment income of at least $5,000 in 2019, 2020 or in the 12 months before the date of their application. The $5,000 **should not** have included pension income, OAS payments, social assistance, disability benefits, family support, student loans, or any Covid-19 emergency or recovery benefits in the calculation
  - was not employed/self-employed **OR** had a 50% reduction in their average weekly income compared to previous year, due to Covid-19
  - available and looking for work and did not turn down reasonable work
  - filed a 2019 or 2020 tax return

Other pandemic benefits

- **Canada Recovery Caregiving Benefit (CRCB)**
  - for employed and self-employed individuals who were unable to work because they had to care for their child under 12 years old or a family member who needed supervised care
  - eligible applicants could have received $500 ($450 after taxes withheld) for each 1-week period, for up to a total of 44 weeks, between September 27, 2020 and May 7, 2022
  - see eligibility criteria here

- **Canada Recovery Sickness Benefit (CRSB)**
  - for employed and self-employed individuals who were unable to work because they were sick or needed to self-isolate due to COVID-19, or had an underlying health condition that had put them at greater risk of getting COVID-19
  - eligible applicants could have received $500 ($450 after taxes withheld) for each 1-week period, for up to a total of 6 weeks, between September 27, 2020 and May 7, 2022
  - see eligibility criteria here

- **Canada Emergency Student Benefit (CESB)**
  - financial support for post-secondary students, and recent post-secondary and high school graduates, who were unable to find work due to COVID-19
  - eligible applicants could have received $1,250 for a 4-week period for a maximum of 16 weeks, between May 10 and August 29, 2020. An extra $750 (total benefit amount of $2,000) for each 4-week period was available, if you had a disability or dependants
  - see eligibility criteria here

What caused overpayments?

A 2022 audit by the Auditor General of Canada found that a total of $210.7 billion in federal benefits had been paid out between March 15, 2020 to September 30, 2022. Of that, overpayments to ineligible recipients totaled $4.6 billion and an estimated $27.4 billion in payments required further investigation.

Some fraud may have caused pandemic benefit overpayments, but other reasons were more common, including:

- eligibility rules were vague and unclear
- information people got when applying was often wrong and inconsistent
- very little front-end verification - reliance on information provided verbally by applicants themselves
- many people ended up getting the wrong benefit



Common reasons for alleged CERB/CRB overpayments

- applying for CERB from both Service Canada and CRA
- problems with tax returns (or not filing one)
- not meeting the $5,000 income threshold
- misunderstanding what should count towards the required $5,000 income threshold
- reduction or loss of income not related to Covid-19, no 50% reduction in income, or not meeting other eligibility requirements
- having an existing EI benefit period when applying for CRB

Common problems leading to EI overpayments

For clients who were eligible for EI benefits from March 15 to September 26, 2020, their EI claim became a CERB payment through Service Canada. When CERB ended, people were automatically rolled onto EI when they weren't entitled (they were unavailable for work).

Other reasons for EI overpayments included:

- a claim review that imposed a disqualification for quitting or misconduct
- a review changing the claimant's hours or earnings, or whether the claimant is covered by EI at all
- undeclared earnings while on claim

How to approach overpayments

If you have a client who comes to see you about an alleged overpayment, how can you help them? Here's the plan:

1. identify the benefit

2. figure out time limits:
   - has the time limit to **declare** an overpayment passed?
   - has the time limit to **collect** the overpayment passed?
   - what is the time limit (and process) for your client to seek a CRA second review or judicial review, or an EI reconsideration, or appeal to the SST?

3. determine if there is a basis to challenge the overpayments (ie. what are the eligibility criteria for the benefit and has the client met them?)

4. consider seeking a second review/judicial review of a CRA decision, or reconsideration or appeal of an EI decision, if the client **meets** the eligibility criteria

5. consider debt management options if the client **doesn't meet** the eligibility criteria

#1: Identifying the benefit

First thing's first: what benefit are you dealing with?



- to figure out how to approach a client's alleged overpayment, confirm the client applied for and received a benefit and figure out what benefit(s) the client received

- CERB is sometimes used as a catch-all term. If the client really received CERB, was it through Service Canada or CRA?

- you should also figure out if the client got more than one type of benefit

Luca

Luca comes to your office. He says the government is making him pay back his CERB.

How would you go about confirming what benefit Luca actually received?

#1: Identifying the benefit

How to find out what benefit the client got

- ask why the client applied for benefits - was it because they were out of work, sick, providing care?
- ask to see letters the client has received from CRA, Service Canada
- ask the client to log into their MyCRA and/or Service Canada account for information
- call CRA or Service Canada (but client needs to be with you)
- figure out **when** the benefits were paid
  - CERB and EI-ERB (mostly) ended in September 2020
  - many people automatically transitioned from CERB to EI at the end of September 2020
  - very few regular EI claims made between April and September 2020

#2: Time limits – declaration of overpayment

Next you need to figure out time limits. Has the time limit to **declare** an overpayment passed?

Legally, the federal government has **36 months** from the time EI and CRB benefits were paid to verify the payment was appropriate.

Note: the time frame can be extended to **72 months** if the CRA suspects recipients provided false information when applying for the benefits.

There is no specific deadline for CERB.

#2: Time limits – collection of overpayment

Has the time limit to **collect** the overpayment passed?

The federal government has **72 months** from when an EI overpayment was declared to sue on it.

For CERB/CRB, the federal government has **6 years** from when the debt became due and payable to start an action. There are exceptions and extensions. For example,

- claimant acknowledges debt or makes partial payment (restarts limitation period). Also, acknowledgement after expiry can restart limitation period
- doesn't apply to government enforcement of a judgement against claimant
- CRA may still be able to deduct the debt from other benefits after this deadline (wording in s. 33(3) of the *CRB Act* – "money owing under this Act may be recovered **at any time**…")

Note: deadlines paused when a review is pending (s. 33(6) of the *CRB Act*) or during a formal reconsideration/appeal.

#2: Time limits – second review or judicial review

Figure out deadlines for a second review and/or judicial review of a decision relating to eligibility for CERB and CRB benefits:

CERB or CRBs:



Second review by CRA within 30 days of being notified about ineligibility

Judicial review application in Federal Court within 30 days of the date the second review decision was communicated to the client

Note: check CRA letters and/or call the CRA to confirm timelines. It is possible to request extensions of deadlines if more time is needed.

#2: Time limits – EI reconsideration or appeal

Figure out deadlines relating to review of eligibility for Employment Insurance

EI (including EI ERB):

Reconsideration within 30 days of decision being communicated to client

Appeal to SST within 30 days of decision being communicated to client

EI application deadline: usually four weeks after interruption of earnings

Note: check Service Canada letters and/or call Service Canada to confirm timelines.

Time limits - Overview

Benefit	CRA Recon	CRA Recon (False info)	Collect debt	Claimant review/recon	SST appeals - General or Appeal Div.	Judicial Review
CERB (CRA)	No set limit	No set limit	6 yrs.	30 days (informal)	N/A	30 days
CRB	36 months	72 months	6 yrs.	30 days	N/A	30 days
EI incl. EI ERB	36 months	72 months	6 yrs.	30 days	30 days	30 days

#3: Is there a basis to challenge the overpayment?

Some tips to help figure this out:

- look at the eligibility criteria for the particular benefit. Does the client meet them? Note: CRA has no discretion to waive eligibility requirements
- ask for **all** letters from the CRA, including the decision that **created** the overpayment. Did the letters say the client was eligible? Are the current letters asking for verification? Has CRA issued a decision letter or a Notice of Debt?
- can be challenging because decision letters may not have very much information
- identify the remedy the client wants to pursue (ie. a review vs. debt management). Don't jump to debt management options (eg. a write-off or repayment plan) if there shouldn't be an overpayment in the first place!

Luca

Luca shows you a letter he received from the CRA a week ago. It says he is ineligible for the benefits he received from January 23 to March 24, 2021 and asks him to call the CRA to set up a repayment plan.

Luca tells you that he applied for federal benefits in January 2021 as he barely worked in 2020.

What additional information do you need?

What questions would you ask Luca?

Luca

- Luca can apply for a CRA second review
- deadline is 30 days (note: a week has already passed)
- information you need and some example questions:
  - identify the benefit (eg. does the CRA letter specify it's CRB)?
  - what was Luca's employment situation in 2019, 2020 and why did he "barely work" in 2020?
  - did Luca have gross employment and/or net self-employment income of at least $5,000 in 2020? (Doublecheck the sources of income)
  - did he file his tax returns for 2019, 2020? Ask for copies
  - ask for copies of all letters from CRA, including original decision letter

#4: If client meets eligibility criteria

Moving on…if the client seems to meet the benefit eligibility criteria and was entitled to receive the benefit(s), the client can:

1. seek a second review through the CRA or apply for a judicial review of a negative second review decision through Federal Court if **CERB/CRB**
2. seek a reconsideration or appeal through the SST if **EI**

#4: If client meets eligibility criteria - CRA

CRA second review: when it happens

- CRA may have asked client to verify their eligibility (that is, justify their eligibility after the fact). After considering the client's information and documents, CRA may have found the client ineligible. (CRA validation process can take up to 8 weeks.)

OR

- CRA may have decided the client was ineligible (eg. clearly didn't meet income threshold) and asked for debt repayment

In either case, if the client disagrees with CRA's decision about eligibility, and it appears they meet the benefit eligibility criteria, they can challenge the decision and ask for **a second review**

#4: If client meets eligibility criteria - CRA

CRA second review: process

- generally, requests for a second review can be submitted online (through MyCRA online account), by mail, or by fax
- must include the following:
  - reasons why the client disagrees with the decision (ie. CRA did not consider all of the information provided, certain facts or details were missing or misinterpreted)
  - any relevant new documents, new facts, or correspondence



#4: If client meets eligibility criteria - CRA

CRA reviews: general strategies

- provide a detailed letter with information organized in chronological order (eg. date of person's employment, date of lay-off and why; when they applied for CERB/CRB; date notified of ineligibility, etc.)
- tell the client's personal story
- Notice of Assessment insufficient to prove income. Need to provide underlying documents and evidence proving eligibility, including:
  - employment information, including pay stubs, termination letter, Record of Employment, bank statements
  - self-employment information, including copies of contracts, invoices, receipts, e-transfer emails
  - letters from clients, text messages, emails

#4: If client meets eligibility criteria - CRA

Applying for judicial review

- client may file for a judicial review with Federal Court within 30 days of communication of a negative second review decision
- key: refer the client to get legal advice
- generally, where the client clearly meets the eligibility criteria and their case has merit, CRA typically offers to settle (usually involves referring the file back to CRA for redetermination)
- some clients have had success on judicial review when basis for decision is unclear
- resources on the Federal Court website: How to file an application for judicial review and Representing yourself. Client must tell their story clearly and get all docs supporting eligibility

#4: If client meets eligibility criteria - EI

EI reconsideration: general strategies

If the client seems to meet the benefit eligibility criteria and was entitled to receive the benefit, client can seek a reconsideration. Keep in mind:

- very important to identify the issue
- respond to the actual issue and why client is being asked to repay benefits
- you will usually get a phone call from reconsideration officer, but still helpful to send info in writing
- unlike CERB and CRB, you can appeal to SST if reconsideration denied

#5: If the client does not meet eligibility criteria – remedies for CRA debt (CERB, CRB, etc.)

What happens if the client owes the debt?

Options include:

- paying the full amount if they can
- applying for relief for certain students and self-employed people
- applying to stop collection based on extreme financial hardship
- negotiating a repayment plan if they have some ability to pay
- doing nothing



#5: If the client does not meet eligibility criteria – relief for certain claimants

CRA will allow certain claimants to keep benefits they were not entitled to:

- students who got CERB when they should have gotten the CESB
- self-employed people who applied with $5,000 gross instead of $5,000 net
- CRA may even reimburse amounts recollected!



#5: If the client does not meet eligibility criteria – financial hardship application

If the client doesn't have the ability to repay the debt, they can apply for **financial hardship** **relief:**

- generally, hardship is determined on the basis of whether a payment will affect the person's ability to pay for necessities and on the basis of the claimant's ability to pay the debt in the foreseeable future
- be prepared to provide financial information in support of a hardship application
- possible outcomes: renegotiation of payment arrangement, suspension of collection activity, and/or other suitable measures

#5: If the client does not meet eligibility criteria – repayment plan

Another option is for the client to enter into a **repayment plan**. Call 1-833-253-7615 for CRA-issued benefits to discuss. Client must be present during the call.

But before calling, consider whether a repayment plan is a good option in the client's case:

- apparently, CRA may take really low payments (eg. $5/month) and doesn't charge interest on COVID-19 benefit debts
- but a repayment plan does not stop CRA from setoffs against other benefits or credits (including income tax refunds, GST credits, etc.)
- repayments also keep limitation period going

#5: If client does not meet eligibility criteria – doing nothing

Another option for the client to consider is **doing nothing.**

- 6 year time limit for the government to sue on CERB and CRB debt
- if the client doesn't acknowledge the debt verbally or in writing, doesn't make any payments or enter into a payment plan and make payments, and the government doesn't start an action, the debt expires.
  - note, however, an acknowledgement ***after*** the expiry of the 6 year time limit appears to restart the limitation period (s. 33(4) of the *CRB Act*)!
- but within the 6 year time limit, CRA may still start legal action, garnish income or bank accounts, obtain a certificate from the Federal Court and register a lien against their property, seize and sell their assets, or use other means to collect the amount they owe.
  - also, even if the 6 year time limit has passed, CRA may still be able to deduct the debt from other benefits

#5: If the client does not meet eligibility criteria: EI remedies

- applies to both EI benefits and EI ERB (CERB through Service Canada)
- options include:
  - apply for write-off
  - negotiate payment plan
  - do nothing



#5: If the client does not meet eligibility criteria: writing-off EI overpayment

Writing-off EI debt

- general EI overpayments:
  - Section 56 of the *Employment Insurance* ***Regulation***

- EI ERB overpayments:
  - Section 153.1306(1) Of the *Employment Insurance* ***Act.*** Can be written off in certain circumstances.

#5: If the client does not meet eligibility criteria - writing-off EI overpayments

- undue hardship
- later decision from CRA impacting insurable hours and earnings if no misrepresentation by claimant
- bankruptcy
- death
- very small (under $100) or uncollectable debts

Note: always discretionary! These do not automatically get a write-off.

#5: If the client does not meet eligibility criteria - writing-off EI overpayments

- some reasons for write-off apply only if overpayment is declared more than a year after the week for which benefits were paid:
  - Commission delay or error
  - employer error on RoE or about hours or earnings
- must not be due to false or misleading information from claimant (accidental or deliberate)
- generally requires that claimant could not have reasonably known benefits were being wrongly paid

#5: If the client <u>does not</u> meet eligibility criteria - writing-off EI overpayments: process

- lots of confusion and very little information
- for undue hardship applications, call Service Canada at 1(800)206-7218
  - say you want to apply for a write-off, which needs a "level two decision-maker"
- CRA apparently makes "recommendations" to Service Canada about undue hardship
- often get bounced back and forth
- will mail out an application package for client will have to report income, assets, debts, expenses etc.
- no right to reconsider or appeal write-off decisions

Luca

Luca comes back to see you and tells you the second review was denied. It turns out Luca thought his disability benefits counted as income, but they don't. He clearly has not earned the necessary $5,000.

- What options could Luca still consider?
- What questions would you ask Luca to figure out what option(s) might be best?

QUESTIONS?





Kevin Love, Lawyer
Manjeet Chana, Lawyer
Community Legal Assistance Society
October 25, 2023

Law Foundation of British Columbia: Family Law Advocacy Initiative

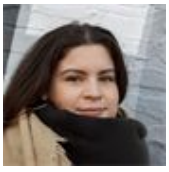
Reciprocal Consulting Incorporated.

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About the Project

Unique to BC, the FLA initiative is a network aimed at supporting litigants experiencing barriers to accessing family court, particularly litigants with marginalized identities.

Supports a network of trained community-based lay advocates who are supervised and supported by a supervising lawyer

Role of community advocates:

Interview clients and identify client's legal issues

Provide clients with clarification on processes Identification and collection of relevant evidence

Support clients to stay organized

Help complete court documents

Accompanying clients to court in a support role

Evaluation Approach

- Culturally relevant & responsive
- An Indigenous worldview
- Developmental
- Strengths-based
- Social Justice
- Participatory methods

Evaluation Questions







- Is the design of the program effective?
- What are the resource and capacity needs of the program?
- What is the reach of the program?
- What are lessons learned for program improvement?

Data Collection

Target group	n	Focus of data collected and reviewed
Host agency staff / community advocates interviews	30	Design Resources & Capacity Reach Lessons learned
Lawyer Interviews	9	Resources & Capacity Lessons learned
LFBC Staff Sharing Circle	6	Design Resources & Capacity Lessons learned
	45	Total interviews
Secondary data	28	Design Reach
Total	28	Total documents reviewed

Disaggregated Data Sources

Disaggregated Data	n	Focus of data disaggregation
Secondary data analysis	Number of documents reviewed	A total of 28 documents reviewed, which included reporting documents from host organizations from a total of 26 organizations (2 organizations had 2 reporting documents included).
Role of speaker	Number of urban vs rural transcripts	Of the 13 host organization interviews collected - roles included family law advocates (n = 10); and roles noted as other (n = 13).
Location	Number of urban vs rural transcripts	A total of 11 sites were interviewed, of those, 4 were categorized as "rural/remote", while the remaining 7 were grouped as "urban". This was based on a combination of population size of location and proximity to urban centers and services.

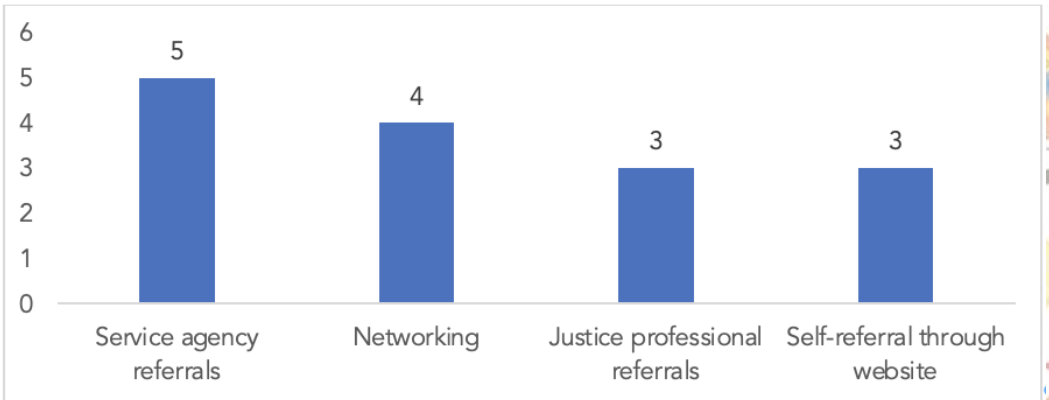
Supervision Style

Supervision style	Description of supervision style	Number of transcripts with model
Traditional model	The supervising lawyer is a private bar lawyer (usually within the community) who provides supervision under a contract with the agency. They meet at least once a month and are available by phone/email as needed. When they are not available, which happens often, or if there is a conflict, [program name] FASL lawyer steps in Roughly half the programs are working under this model.,	7
Embedded in the clinic	The SL works at the clinic, so the lawyer is more integrated	4
Centralized legal supervision	[program name] hosts this program funded by the Law Foundation. There is a central supervising lawyer whose job is to provide legal supervision to several groups – we wanted to test this model which provides more availability/timeliness and closer mentorship (weekly- meetings), consistency between the programs supervised by the same lawyer and ongoing training	1
Hired a lawyer	There is one program that does not have supervision as it hired a lawyer	0

Reach

- How are clients being referred to the program?
- Is the eligibility criteria a barrier to accessing services to those who could benefit from the services?
- Are you serving and reaching Indigenous and racialized/ equity seeking people
- Are clients enabled to access relevant services (i.e. bridging to relevant services such as Legal aid, private bar, or various pro bono stop gaps)

Referrals



Effectiveness of Reaching Clients

- Host agencies have responded that the services seem to be reaching those who need it
- Some host agencies shared that reaching clients is not always an effective process highlighting the challenges and gaps

  We're trying to fill the gaps while people are waiting for a lawyer to be given to them or assigned to their file, which is so unsustainable, and a huge problem. Legal Aid, we have a really close relationship with access pro bono all of their programs.

- Participants responded that there is a gap in outreach activities and access to the service further describing some challenges



Program Design and Delivery

- In general, host agencies found the program design to be effective with opportunities for improvement
- Staff respondents noted that the program is responsive to meeting needs
- The role of host agency in this program is to support advocates in their role by accommodating their needs, providing regular training, and providing supervision.

Modes of Delivery

- Other host agencies mentioned that delivery by phone and virtual is effective (n = 7).
- Some host agencies shared that in-person delivery is most effective (n = 6).
- Few other host agency participants noted challenges with methods of delivery (n = 3).
- Urban respondents echoed this, describing children overhearing sensitive conversations in-person and technical challenges in audio-visual communications (n = 3).



Accessibility of Services

- Provide language and translation services
- Ensure the location can accommodate mobility needs
- Ensure the location is near other service providers
- Ensure the host agencies and advocates understand the role of the advocate
- Provide access to wraparound supports to clients



Resources and capacity needs of the FLA initiative

Do the resources and capacities meet the demand for services?

Do you have the resources and knowledge to serve Indigenous and racialized/ equity seeking groups in a culturally safe way?

What are the challenges with recruitment and retention?

What training and professional development needs would benefit community advocates?

From your perspective, is the model for supervision meeting current needs in the network?

How can LFBC better support supervising lawyers?

Resource and Capacity Needs

- Staff spoke about assuring that the needs of employees and clients are being met.
- A couple of staff shared concerns regarding advocates' capacity.
- Host agencies were gave high ratings when asked if they felt they had the resources needed to need the demand for services.
- Lawyers indicated that they did not feel the program has adequate resources or capacities.
- Demand for services may fluctuate seasonally.



Retention and Recruitment

Participants recognized low staff retention and recruitment as a challenge

- *It's a lot of responsibility, there is a learning curve. If people are leaving every six months, we're getting nowhere. If organizations are paying $18 an hour it is hard to keep people.*

Similar themes emerged in secondary data, describing staff turnover and retention problems as for example:

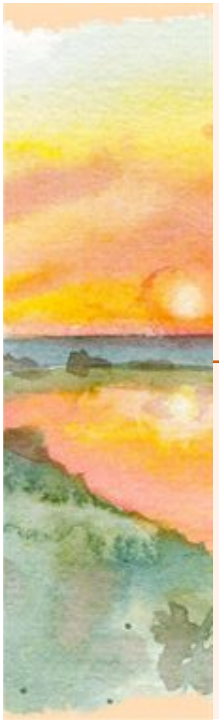
- Several staff changes in a year
- Increased need for more staff with the high volume of clients

A staff member commented on some challenges with recruitment since there are not many legally trained advocates suitable for the role.



Beneficial Training and Professional Development Opportunities

- Participants have most frequently shared positive feedback on existing training and professional development (host agencies = 10; staff = 2).
  - *Participants commented that LFBC provides good ongoing and proactive trainings*
  - *Micro trainings have been useful [in] retaining information. [I'm] obtaining a lot of knowledge from current trainings.*
- Host agencies and supervising lawyers had suggestions for additional training and professional development opportunities.



Model for Supervision

Advocates can reach out whenever they need it, we are in very frequent contact, once or twice a week, sometimes more. I do not keep track of the hours or time I spend with them. There are backup supervising lawyers for advocates to contact if they cannot reach me.

Disaggregation of responses on satisfaction with supervision model by supervision style demonstrated that the host organization respondents broadly find the supervision model effective, with some areas identified for improvement.

Strengths of the FLA Initiative

- The program is filling an important need by serving individuals who would not otherwise have access to services.
- The collaborative and supportive environment that is fostered through this program model is an asset.
- The mentorship model, whereby lawyers provide supervision and mentorship to advocates was found to be a program strength.

> *It's so important for… women and children the security that they can we can provide them after seeing and speaking with [the advocate] and she determines the needs that they have. A we can assist with rent, we can give them food we can provide all sorts of services, medical, dental, etc. We can help maintain a family until they have stable secure places to live… I think it's very much required for the community… And it's been amazing what [service provider] have able to do to get these people back on their pensions, disability pensions because they were stopped and to provide them with food security and housing at the moment, working with them to find employment and so it's a real holistic delivery of programs and services to these people that that improves their life.*

Opportunity for Improvement

Increased support for advocates was identified by staff and host agency participants as an opportunity for improvement.

There's so much focus, and rightfully so about client services, like how are we providing the services? How are the clients receiving the services, but there's very little focus on us… how are we dealing with clients, giving them, you know, putting a lot of stress on us, how were we dealing with the outside world putting a lot of stress on us.

Opportunity for Improvement

Staff recruitment and retention was identified as an opportunity for improvement.

…We share practices, we give them different opinions, but then again, we are not at the ground level. So how can we help that, and advocates feel that they want to stick along in this organization, they want to grow further. And being senior advocates, we surely do have some great advocates out there. But then there also are certain cases where there's a high turnover rate.

It's a lot of responsibility, there is a learning curve. If people are leaving every six months, we're getting nowhere. If organizations are paying low wage *it is hard to keep people.*



Opportunity for Improvement

Participants, particularly lawyer participants, identified increased opportunity and need for training and professional development.

There could be way more support in initial stages of a family law advocate being hired… I could've had way more training one-on-one. Developing client interview skills, that something you could talk about but until you do, and someone gives you guidance , that I would emphasize in the initial stages and that might lead to longevity in family law advocates. Try to alleviate the stress in the early days, might be file management, note taking, how to document things, how to keep client files understandable, articulate, and to meet legal requirements. So that if theirs is ever issues down the road and letting them know that we are not lawyers and need to be emphasized over the first 3-6 months.

Opportunity for Improvement

- Participants identified a need for clear roles and responsibilities, as well as reporting lines.
  - *If you were to work really diligently, would go far beyond the allotted time you are compensated for, if you work in a more reduced way that is more consistent with the rough time expectation you are compensated for. Maybe tracking the amount of time different lawyers are putting in to get an idea of where adjustments are needed.*
- Staff identified an opportunity for increased communication to support collaboration. This was support through feedback from other target groups who appreciated feedback loops with LFBC.

Recommendations

- Continue to focus on those who are underserved
- Continue to improve outreach efforts
- Work to address barriers to access



Recommendations

- Clear roles and responsibilities
- Professional development
- Model that supports mentorship
- Community of practice
- Communication



Recommendations

- Recruitment and retention
- Reduce advocate workloads
- Support for advocates
- Increase program capacity



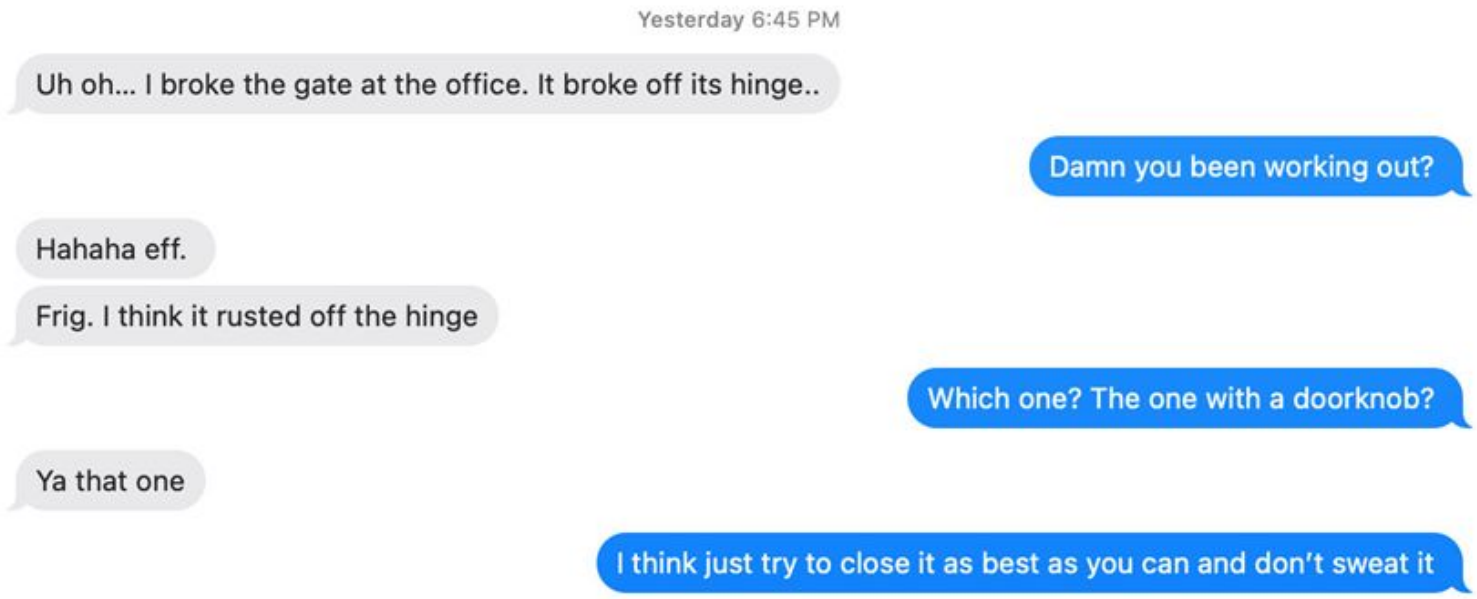
Thank you

Q and A

In Defence of Difficult Clients

Douglas King, *Executive Director*,
Together Against Poverty Society

Boundaries – “violence in the workplace policy”




MIMA



CanLII Home › British Columbia › Supreme Court of British Columbia › 2011 BCSC 1244 (CanLII)

British Columbia (Public Safety and Solicitor General) v. Stelmack, 2011 BCSC 1244 (CanLII)

Document | History (0) | Cited documents (51) | **Treatment (17)** | CanLII Connects (0)

Citations (17) | Discussions (1)

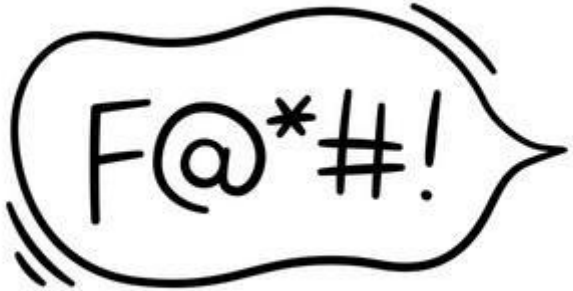
Search for all citing documents

1. Public Safety and Emergency Services (Re), 2023 CanLII 44297 (AB OIPC)
Office of the Information and Privacy Commissioner — Alberta
2023-05-11 | 26 pages
video — camera — footage — blind spots — inmates

[...] Cases Cited: Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31 ; British Columbia (Public Safety and Solicitor General) v. Stelmack, **2011 BCSC 1244 (CanLII)** . [...] [para 35] The foregoing decision was upheld at the Supreme Court of British Columbia by Russell J. **in British Columbia (Public Safety and Solicitor General) v. Stelmack , 2011 BCSC 1244 (CanLII)** . [...]

Goals Over Facts

- 1. Keep coming back to them
- 2. Set your own
- 3. Recognize it’s not your place to dictate the goals of others, and do your best not to judge them





West Coast LEAF

Kids Are Only Kids Once Film – Information and Resources

About the film

Kids Are Only Kids Once is a short documentary about the harms of the family policing system (often called the child welfare system). It was created by impacted parents, other advocates, 3 Crows Productions, and West Coast LEAF. We hope you will share the film to amplify the knowledge and vision generously shared by interviewees. Questions? Please email Alana at aprochuk@westcoastleaf.org.

Content note: *Kids Are Only Kids Once* discusses child apprehensions, residential schools, trauma, colonialism, and discrimination against people who use substances.

Support resources in BC – Current as of September 2023

KUU-US Crisis Line
Toll-free phone: 1-800-588-8717
24/7 crisis support and listening for Indigenous peoples in BC.
kuu-uscrisisline.com

Crisis Centre of BC
Toll-free phone: 1-800-SUICIDE (1-800-784-2433)
24/7 crisis support for people anywhere in BC, with interpretation available in more than 140 languages.
crisiscentre.bc.ca

Parents Legal Centres (Legal Aid BC)
Toll-free phone: 1-888-522-2752 (1-888-LABC-PLC)
If the child welfare system has made contact with your family, you can call Parents Legal Centres to find out if you qualify for a free lawyer and advocate.
legalaid.bc.ca/legal_aid/parents-legal-centres

Indigenous Justice Centres (BC First Nations Justice Council)
Legal services for Indigenous people who could not otherwise access them, focused on criminal law and child protection. In-person services in Chilliwack, Merritt, Prince Rupert, and Prince George. Virtual services for the rest of BC.
bcfnjc.com/indigenous-justice-centres-in-british-columbia/

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Charitable Registration

FMC and JCC Presentation

By Samantha Davis

January 10, 2024

DISCLAIMER:

This presentation does not include legal advice.

If you, your client or someone you care about requires legal advice, please consult with a lawyer.

January 10, 2024

Outline

The legal stuff:

- Family Management Conference (FMC)
  i. PCFR: Provincial Court Family Rules
- Judicial Case Conference (JCC)
  i. SCFR: Supreme Court Family Rules
- BREAK 10 Minutes
- Review of FMC/JCC Brief

The human stuff:

- Before conference
- During conference
- After conference

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Family Management Conference

- Replaces first appearance (in new rules)
- only 30 minutes
- PCFR 36 to 57
- Advocates should ask the Court and opposing counsel/party for permission to attend FMC with clients

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What can judges do? PCFR 36(1)

a) Assist parties to identify issues
b) Explore options to resolve issues
c) Make orders for Case Management Orders (procedural)

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What can judges do? PCFR 36(1)

d) Make interim orders under rule 50 (either with or without consent)
e) Make orders if:
   i. No reply is filed (PCFR 31)
   ii. By consent (PCFR 52)
   iii. A party is absent (PCFR 54)

PCFR 36(2) – allows judges to make any other orders or directions if appropriate

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What is required to schedule a FMC?

- FMC can be scheduled if registry requirements are met
  i. PCFR 39 – Family Justice Registry
  ii. PCFR 40 – Parenting Education Registry
- If application about a family law matter and reply have been filed, FMC will be scheduled (PCFR 37)
- If application about a family law matter has been filed, and no reply has been filed and 30 days has passed since service, FMC will be scheduled (PCFR 38)

Depends on Registry…

Information presented at FMC (PCFR 46)

Judges may require a party to provide the following:

- Information in application, reply or counter application
- Evidence in financial statement
- Oral evidence
- Affidavit evidence
- Submissions

After FMC (PCFR 56)

At the end of FMC, judge may order or direct a party:

a) Participate in consensual dispute resolution
b) Return for another FMC
c) Attend family settlement conference
d) Attend trial preparation conference, or
e) Attend a hearing or trial.

Resources

What can I expect at a Family Management Conference? (BCPC website)

Family management conferences in Provincial Court (LABC website)

Checklist for a family management conference (LABC publication)

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Judicial Case Conferences (SCFR 7-1)

- $80 per JCC, paid by requesting party
- Usually JCC must be conducted before Notice of Application can be served (SCFR 7-1 (2))
    i. There are exceptions outlined in SCFR 7-1 (3) and (4)
- 90 minutes
- Advocates should ask permission to attend JCC with clients

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What can Judges or Masters do? SCFR 7-1 (15)

a) Identify issues
b) Make consent orders
c) Mediate issues
d) Refer parties to family dispute resolution professionals
e) Refer parties to family justice counsellor

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What can Judges or Masters do? SCFR 7-1 (15)

h) Make orders requiring particulars be provided in relation to matter raised in pleading

o) Without hearing witnesses, give a non-binding opinion on the probable outcome of a hearing or trial

s) Make procedural orders

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How to request a JCC? (SCFR 7-1 (7) & (8))

- File a notice of judicial case conference in Form F19 (SCFR 7-1 (7))
- File and serve:
  i. Form F19 *at least* 30 days before JCC
  ii. Financial statement in Form F8 at least 7 days before JCC (SCFR 7-1(8) & (10))
- "at least" means "clear" days – do not count the day of service and the day of JCC

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Non-attendance at JCC SCFR 7-1 (16)

If a party fails to appear at JCC, the court may:

a) Proceed in the party's absence

b) Exercise powers of the court under subrule 15 (previous slide), and

c) Order party who failed to appear pay costs to the other party

What happens after a JCC? SCFR 7-1 (15)

a) Reserve trial dates

b) Set trial management conferences

c) Adjourn JCC

d) Direct parties to attend another JCC

Resources for Advocates & Clients

Litigants' Guide to Judicial Case Conferences (BCSC website)

Judicial Case Conferences in Supreme Court (LABC website)

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FMC/JCC brief

- Optional
- Without prejudice
- Sets out history and issues
    i. *positions of party*
- Can be provided to the opposing party/counsel and the Court

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Can we attend as advocates?

It depends…

You will have to ask for the judges consent to be present. If there is a lawyer for your client, they can ask for permission on your behalf.

The judge will likely consult the OP/OC for their position on the presence of a support person.

Preparing our clients for conferences

Some things client may struggle with:

- Preparing their conference brief
- Fear/anxiety/etc.
- Cost of travel
- Computer/internet/phone access
- Getting sleep the night before
- Childcare
- Finding parking
- Seeing the OP (before/during/after the conference)
- Triggers from the OP
- Entrance and exit plans for the courthouse

Reminders for our clients:

- Clients **do not have to agree to anything** in these conferences
  - Determine their boundaries before the conference

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Reminders for our clients:

- Bring water and snacks
- Wear something comfortable
- Childcare for after the conference
- Plan for afterwards



During the FMC/JCC

- Taking detailed notes of what was said/ordered (if applicable)
- Being alive to dynamics between OP and CL
- Be prepared to ask for breaks



After the FMC/JCC

- Debrief (whenever the client is ready)
- Set reminders for next steps
- More legal advice



Q & A



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Agenda

→ Property Basics
→ Complex Areas
→ Pensions
→ Supporting Clients
→ Preservation & Use of Property
→ Questions!

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Property Law Basics

- *Family Law Act*, *Supreme Court Family Rules*, other legislation that governs tax, businesses, property
- The *Family Law Act* property and pension division sections apply to both married and unmarried (common-law) spouses
- **Paths**: Supreme Court, Negotiation, Mediation, Arbitration, Waiting
- **Results**: Court Order, Written Agreement, Status Quo

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Limitation Periods

→ Court proceedings for the division of property and debt must be started within two years of the date of separation for non-married spouses, and two years after the date of divorce or annulment for married spouses.

→ Client should get legal advice on limitation periods and the impact of delay on their case.

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Property Law Basics

What does the *Family Law Act* do?

1. Financial disclosure
2. Ensure that property and debt can be preserved/fairly used until a division occurs
3. Divide family property and debt through an order or agreement

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Defining Family Property

Family Property

→ Property acquired during relationship and any increase in equity in previously acquired property /excluded property

→ Family property does not need to be held in both parties' names

Family Debt

→ Debt acquired in either party's name (or joint) during the relationship, or after the relationship if incurred to maintain family property. [*FLA* s. 86]

Excluded Property

→ Property not typically subject to division as it is not family property.

→ Includes property acquired before the relationship, inheritances, gifts, see *FLA* s 85 for full list

→ Increase in value of excluded property during the relationship is family property

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Property Law Basics
Valuing Property

- **Valuing Property:** A property's value is "fair market value" on the date of either an agreement or final order dividing the property [*FLA* s 87]
    i. Some exceptions like chequing accounts which can be valued at date of separation and are not subject to market forces

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Details of Division

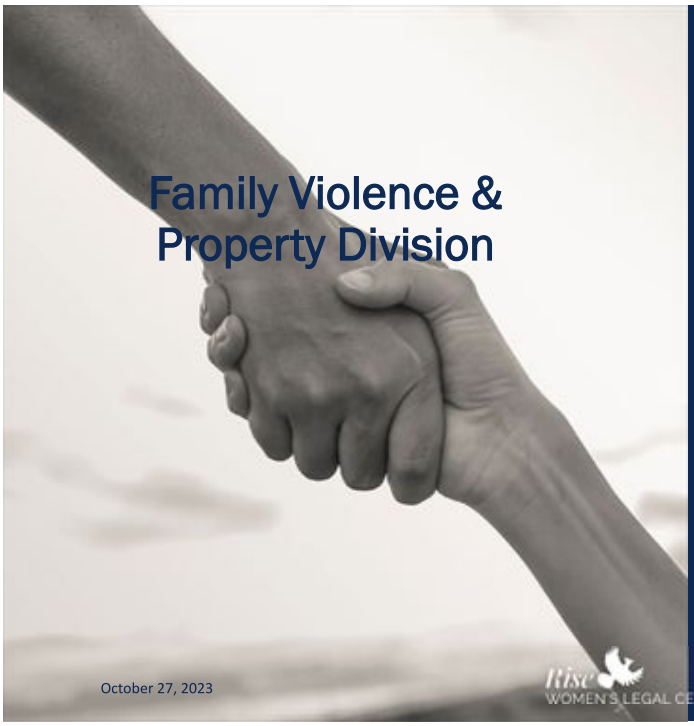
- Starting point in the *Family Law Act* is that upon separation, each party is **equally entitled to family property and equally responsible for family debt regardless of their use or contribution** [*FLA* s 81]
  i. Presumption for equal division of family property and debt

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Unequal Division

- Unequal division is possible but the party asking for unequal division must show that equal division would be "**substantially unfair**"*[FLA* s 95*]*
- High threshold to meet the legal test for unequal division in court
- Some considerations of the court:
  i. Length of the relationship;
  ii. Terms or agreement between the spouses;
  iii. Contributions to career and career potential;
  iv. Reasons for the incurring of debts;
  v. If amount of debt exceeds value of family assets, the ability of each spouse tp pay a share of the family debt;
  vi. After separation, whether a spouse caused a significant increase or decrease in the value of family property or family debt beyond market trends;
  vii. If a spouse, other than if they were acting in good faith:
    - Substantially reduced the value of the family property;
    - Disposed of/transferred property that is or would have been family property.

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Family Violence & Property Division

- Existence of family violence not usually enough in most cases to meet the legal test for unequal division but depends on circumstances.
- *Petrie v. Lindsay*, 2019 BCSC 371 – example of finding by the court that family violence justified unequal division.

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"Unequal" financial contributions

→ Not typically a justification on its own for unequal division of family property

→ Different financial contributions by the spouses in a relationship is more the norm than the exception

→For example, one party paying the mortgage throughout the relationship not likely a reason on its own for unequal division

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Division may be completed through:

1. Declare/transfer ownership/responsibility of specific assets or debts
2. An equalization payment is made between parties
3. Require an asset is sold and divide the proceeds of sale amongst the parties

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Property Law Basics

Supreme Court Family Procedure

You must look at the rules as there are **many more** steps and potential paths. For example, if there is already a written agreement you would take a different approach.

Supreme Court Family Rules are generally much more party-driven, have more deadlines, and more paperwork a Provincial Court Family Rules.

Agreements can be made at any point and mediation can be accessed at any point.

Typical Procedure Overview:

1. Initiating documents
   - P1 Files and Serves a Notice of Family Claim P2 Files and Serves a Counterclaim, Response,
   - P1 may file a response to Counterclaim
2. Disclosure & Interim/Procedural issues
   - Financial Statements
   - List of Documents
   - Attend a JCC
   - Notice of Applications
   - Judicial Settlement Conference (not required, but a useful tool in some cases)
3. Trial and a decision
4. Enforcing the decision

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Financial Disclosure

Financial disclosure can happen without court intervention, but the court process creates rules about disclosure.

Key tools

→Financial Statement

→List of Documents

→Requests for Disclosure

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Complex Areas to Look Out For

- Exclusions, especially where both parties have contributed excluded funds to the same asset
- Self-employed persons/corporations
- More than two parties
- Significant financial imbalance between spouses
- Property in multiple jurisdictions (outside of BC and/or Canada)
- Property on reserve
- Substantial debt with few assets/bankruptcy & consumer proposals
- Interaction between spousal support and property division
- Pensions

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Pensions

- Can be complicated – many types of pension and different rules about how they can or can't be divided.
- Without legal advice, client may be unaware they are giving up a valuable claim and lose out on a significant source of income in retirement.
- Value of pension not always obvious.
- Pension plan administrator often carries out the division. It is crucial the separation agreement or court order is drafted properly to avoid issues.

Canada Pension Plan

→ Equalizing/credit-splitting.

→ CPP is distinct from other types of pensions. The default is that either spouse can apply to equalize unless there is a written agreement or court order otherwise.

→ Still important for client to get legal advice and deal with CPP through agreement or court order.

→ CPP has its own time limits for submitting paperwork to complete the equalizing/credit-splitting.

→Please see CPP webpage for further info: Divorced or separated: Splitting Canada Pension Plan credits - Canada.ca

Other Pensions

- Main types are “defined benefit” and “defined contribution”
- Options for division depend on specific plan and other factors such as whether the pension is matured/in-pay (i.e., the pension-holder has received or is receiving benefits)
- The spouse becoming a limited member of the pension plan is a common option – their share of benefits are paid directly to them once they are eligible to receive them
- Some pension plans allow for direct payment of a lump sum from the plan to the spouse
- Some parties will choose to pay out another asset/share of an asset in lieu of pension division
    i. Requires an actuary, difficult to value accurately, expensive

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Form P1

→ Does not divide the pension

→ Puts pension administrator on notice that the client has a claim to the pension

→ Requires pension administrator to provide client with certain info within 60 days including:

→Most recent annual statement

→ Whether client is designated as beneficiary

→ Member spouse will be informed that the client has submitted a P1 form

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Survivor Benefits

- Beneficiary designation is not the same thing as pension division
- Usually refers to what happens to the member spouse's portion of the pension if they pass away first

Fact Pattern Exercise

- John (45) and Sarah (43) have been married for 21 years and separated about one year ago. They have two children, ages 8 and 10. John has been employed as a paramedic for 15 years and has been accumulating benefits with the BC Public Service Pension Plan during his employment. He earns about $80,000 annually. Sarah is a self-employed artist and her income averages around $20,000 a year.
- Since separation, Sarah has remained living in the family home with the children. John lives in an apartment and has recently began cohabiting with his new partner.
- There is a history of verbal and emotional abuse by John towards Sarah.
- John and Sarah tried mediation recently to see if they could reach a settlement about the division of their assets and debts. This was unsuccessful, as John steadfastly refuses to divide his pension.
- Sarah is frustrated and is considering a settlement with no pension division, since she is not planning to retire for many years. She also wonders about accepting a $30,000 payment in lieu of division.
- No court case has been started yet.
- **What potential concerns/issues do you see here regarding pensions?**

How Can We Support Clients with Property Issues?

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Support From Advocates

- Fill out court forms and applications
- Court registry advocacy
- Support clients through mediation
- Refer clients to other supports and organizations
- Assist clients with preparing for and participating in summary advice appointments
- Support clients with implementing legal advice
- Supporting clients working with Legal Aid lawyers
- Legal aid applications, change of counsel forms, and eligibility reviews
- Supporting clients in court appearances and hearings

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Support from Advocates

Collecting documents relating to property division:

- Make a list or table of all the assets/debts client knows of
- Bank accounts: joint and personal
- Debts: joint and personal
- Addresses and PID numbers for properties
- Estimates of market values of property (vehicles, homes)
- Any potential excluded property and evidence for the exclusion
- Assets and debts at the time of cohabitation and separation

Providing Support in Court

Supporting your client in court for property:

→Help with preparing a script/brief that makes it clear what the client is asking for and highlights important dates and numbers as well as explanations

→Important to have always have these reviewed by a lawyer

Property Law Referrals

Rise Women's Legal Centre	Access Pro Bono	Legal Aid	Unbundled Services
Virtual Legal Clinic Advocate and Summary Advice Services	Virtual Family Mediation Project, Lawyer Referral Service, Roster Program, Summary Advice Program	Lawyers, LawLINE, Online resources	Unbundling.ca

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Other Professionals

- Financial advisors, accountants
- Banks, mortgage brokers
- Bankruptcy trustees
- Business appraisers, property appraisers
- Pension plan administrators

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Preservation & Use of Property

- Interim Distributions
- Exclusive Occupancy
- Forcing Sale of the Home
- Property Restraining Orders
- Certificate of Pending Litigation
- *Land (Spouse Protection) Act* Entries

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Interim Distribution (Section 89) Orders

- Section 89 of the *Family Law Act*
- Interim Distribution of Property is an advance on family property to:
  i. hire a family lawyer,
  ii. participate in family dispute resolution,
  iii. to obtain information and evidence required for family dispute resolution or court
- This purpose of these orders is to level the playing field when one spouse controls the majority of the wealth/assets.
- Test: Must show that the advance is required to challenge the other spouse's position and that the advance will not jeopardize the other spouse's position at trial.

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Exclusive Occupancy (Section 90) Orders

- Court can order one spouse gets sole use and occupancy of the home on an interim basis.
- Must be able to show the court that:
  i. It is a practical impossibility for you and your spouse to live in the same home; and
  ii. You are the preferred occupant of the home as compared to your spouse.
- This does not equal a finding that one spouse has more entitlement to keep the home in the division of assets.

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Orders for Sale of the Home

- Sale of the family home can be ordered on an interim basis, i.e., before the asset division is settled.
- The court may order a sale of property on an interim application if it appears "necessary and expedient". SCFR Rule 15-8(1).
- Factors to be considered include the following (*Kertcher v. Kertcher*, 2016 BCSC 1718):
  a. Children's need for stability;
  b. The availability (including affordability) of alternative accommodation for each spouse and their dependents;
  c. The emotional condition of the spouses, especially the parenting spouse;
  d. External economic factors (for example, a declining market);
  e. Wasting of the asset; and
  f. The capacity of the parties to maintain the asset.
- Other factors which the court has found supported an order for the sale of a property include (*Sawka v. Sawka*, 2019 BCSC 1833):
  a. A spouse's inability to purchase another residence without the release of equity from the family home;
  b. The home would inevitably be sold to give effect to the division of family property.

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Property Restraining (Section 91) Orders

- Section 91 orders are financial restraining orders which
  i. Can apply to any property the applicant claims an interest in;
  ii. Can prohibit the other party from disposing of, transferring, converting, or exchanging the property into another form;
  iii. Can be made without notice.

Certificate of Pending Litigation

→Used to protect real property by giving notice to any prospective buyer or lending institution that the property is subject to a family law claim

→Can only be used if the party has filed a Notice of Family Claim claiming an interest in the property and pleading a certificate of pending litigation

→Must file a Form 33 with the Supreme Court and additional forms with the Land Title Office

→Those on title will be notified of the CPL

Land (Spouse Protection) Act

→An entry filed against a home that prevents the sale or transfer without the written consent of the other spouse.

→An LSPA entry can only be entered against a "homestead"

→Defined in *Land (Spouse Protection) Act* as:

- Property must only be registered in one spouse's name;
- Spouses must have lived in the property as their residence within one year immediately preceding the application for an entry.

→Unlike a CPL, an LSPA entry can be made before the parties have separated and before a Notice of Family Claim has been filed.

→Notice of the entry is not automatically provided to the owner spouse, but if they searched the title, they would see the entry.

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Fact Pattern Exercise

- Samuel and Isabella have been living in a marriage-like relationship for 12 years. They separated six months ago. They have a 7-year-old child together, who they have been sharing time with 50/50 since separation.
- The family home, purchased during the relationship, is registered in joint names. Isabella continues to live in the family home and Samuel resides in a basement suite that he rents. Isabella is not able to buy out Samuel's interest in the family home. He is not interested in keeping the family home himself but does not want to list it for sale.
- There is also a rental home, which is registered solely in Samuel's name and which he purchased about 5 years prior to the relationship. He manages this rental property and earns rental income from it. Besides the two properties, other assets include two vehicles and several bank accounts, with the largest account being an RRSP in Samuel's name worth about $120,000.
- Samuel works in sales. Between his salary and rental income, he has an income of about $110,000. Isabella works as an administrative assistant and earns $40,000 a year. Recently, Samuel has complained of financial difficulties and on one occasion threatened to declare bankruptcy if Isabella pursues spousal support.
- Isabella is becoming more concerned and is not sure what to do next. Other than the income she has to cover day-to-day expenses, she only has access to savings in her name of about $3,000 so is worried she will not be able to get a lawyer to help with her case.
- **What are some options for interim preservation/use of assets? What are your reasons for selecting those options?**

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THANK YOU!

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Housing Law Update 2023

Recent Developments in Residential Tenancy Law

Robert Patterson & Zuzana Modrovic, TRAC

Changes to the *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act*

New Review Consideration Grounds

Application for review of director's decision or order

79 (1) A party to a dispute resolution proceeding may apply to the director for a review of the director's decision or order.

(2) A decision or an order of the director may be reviewed only on one or more of the following grounds:

(a) a party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control;

(b) a party has new and relevant evidence that was not available at the time of the original hearing;

(c) a party has evidence that the director's decision or order was obtained by fraud.

24 Section 79 is amended

(a) by adding the following subsection:

(1.1) The director may, on the director's own initiative, review the director's decisions or orders. ,

(b) in subsection (2) (a) by striking out "the original hearing" ***and substituting*** "the original hearing or part of the original hearing",

(c) in subsection (2) (b) by striking out "original hearing" ***and substituting*** "original hearing and that materially affects the decision", ***and***

(d) in subsection (2) by adding the following paragraphs:

(b.1) a party, because of circumstances that could not be anticipated and were beyond the party's control, submitted material evidence after the applicable time period expired but before the original hearing, and that evidence was not before the director at the original hearing;

(b.2) a person who performed administrative tasks for the director made a procedural error that materially affected the result of the original hearing;

(b.3) a technical irregularity or error occurred that materially affected the result of the original hearing;

(d) in the original hearing, the director did not determine an issue that the director was required to determine;

(e) in the original hearing, the director determined an issue that the director did not have jurisdiction to determine.

Admin Penalty Review Consideration

Review of administrative penalty

87.8 (1) A person who receives a notice under section 87.5 may apply to the director for a review of the matters set out in the notice.

(2) Division 2 *[Reviews of Decisions and Orders]* of Part 5 applies to a review referred to in subsection (1).

27 Section 87.8 is repealed and the following substituted:

Review of administrative penalty

87.8 (1) A person who receives a notice under section 87.5 may apply to the director for a review of the matters set out in the notice.

(2) The director may, on the director's own initiative, review the matters set out in the notice.

(3) Subject to subsection (4), Division 2 *[Review of Decisions and Orders]* of Part 5 applies to a review under this section.

(4) For the purposes of this section, section 79 (2) is to be read as if it provided that a decision or order of the director may be reviewed only on one or more of the following grounds:

(a) the person was unable to be heard because of circumstances that could not be anticipated and were beyond the person's control;

(b) the person has new and relevant evidence that was not available before the director imposed the administrative penalty and that materially affects the decision to impose the administrative penalty;

(c) a person who performed administrative tasks for the director made a procedural error that materially affected the decision to impose the administrative penalty or the amount of the administrative penalty;

(d) a technical irregularity or error occurred that materially affected the decision to impose an administrative penalty or the amount of the administrative penalty;

(e) the director did not determine an issue that the director was required to determine.

Analogous changes have been made to the relevant sections of the MHPTA

Annual rent Increase in 2024

Tenancies under the RTA: 3.5%

Tenancies under the MHPTA: 3.5 + proportional amount (increases in gov’t levies and regulated utility fees)

Changes to RTB Policy Guidelines

PG 24 - Review of a Decision or Order (guideline rewritten)

Section E - Stages of the Review Process

- Stage 1 - "At the first stage, only the applicant's submissions and evidence are considered. The delegate essentially determines whether the submissions and evidence are sufficient for the application to continue to the next stage of the review process. No final decision is made that a ground of review has been established. The decision will set out: (1) which ground(s) of review will be proceeding to the next stage and why, (2) in what format the review will be conducted (if one is being conducted), and (3) if any ground(s) of review is not proceeding, why it has been dismissed or refused."

- Stage 2 - "both parties are given notice. After receiving submissions from the parties, either orally or in writing, a final determination will be made on whether a ground that permits a review of the decision is established. If no ground of review is established, the original decision or order will be confirmed.

  If a ground of review is established, the review will proceed to a determination of whether the original decision or order should be confirmed, varied, or set aside. This is a determination on the merits of matters in the dispute resolution application put in issue by the ground(s) of review."

PG 24 - Review of a Decision or Order ctd.

Section F(1) - Unable to attend:

- This section was updated to add the bit about not being able to attend a part of a hearing to reflect the legislative change
- "This ground is not met if a party could have attended the hearing or had someone attend in their place with reasonable care and planning."
    - Examples where the ground would not be met:
        - A party did not pick up or read a notice of hearing
        - A party did not arrange to have someone attend the hearing either as a representative or to ask for an adjournment
        - A party forgot to charge their cell phone
        - A party was caring for a sick child, unless they can show that this prevented them from being able to call in to the hearing and ask for an adjournment
        - A party hung up on purpose
        - A party put the wrong date or time for the hearing in their calendar
        - The party forgot to attend the hearing
- The Policy Guideline clarifies that the intent is for this ground to be used where a party has not been properly served, and if a party has been deemed to have been served, that party has to establish that service was ineffective due to no fault of their own (eg. they cannot avoid service by not picking up registered mail)
- Note: This Policy Guideline does not incorporate or account for *M.B.B. v. Affordable Housing Charitable Association*, 2018 BCSC 2418
    - In M.B.B., a tenant did not phone into the hearing because she misunderstood the instructions and thought the RTB was supposed to call her. On review consideration, Arbitrator Takayanagi found that the tenant had sufficient time to clarify the hearing instructions to the extent that she was uncertain about them, and therefore dismissed her application. On judicial review, Justice Milman found this to be patently unreasonable, because the tenant thought she knew what to do, and only realized when it was too late that she had made a mistake. She therefore had no reason to seek clarification prior to the hearing.

PG 24 - Review of a Decision or Order ctd.

Section F(3) - Material evidence submitted late and not before the arbitrator

- "A review on this ground may proceed if the applicant provides sufficient evidence of each of the following:
    - they submitted evidence late, but before the original hearing;
    - they submitted the evidence late because of circumstances they could not anticipate and that were beyond their control;
    - the evidence was not before the arbitrator at the original hearing; and
    - the evidence was material to the determination of an issue in dispute.

  [...]

  When applying for a review in these circumstances, a party must provide evidence demonstrating that they were unable to submit their evidence within the applicable time period due to unanticipated circumstances beyond their control. For example, a party may not have provided evidence until the day before their hearing because they were hospitalized due to an accident prior to the deadline for submitting their evidence.

  In determining whether unanticipated circumstances prevented a party from submitting evidence by the relevant deadline, arbitrators will consider when the unanticipated circumstances began, when the party was in possession of the evidence and, if there is a gap in time between the party being in possession of the evidence and the unanticipated circumstances arising, the reasons the party waited to submit the evidence.

  When something unanticipated arises that will prevent a party from submitting evidence by the time limit established in the Rules of Procedure, it is expected that they will make all reasonable efforts to have someone else submit that evidence on their behalf. [...]"
- Parties are expected to raise the issue during the hearing when they realize that some or all of their evidence is not before the arbitrator, and request an adjournment or permission to re-submit the evidence after the hearing has concluded
- Material evidence is evidence that could have impacted the outcome of the decision if it was in front of the arbitrator

PG 24 - Review of a Decision or Order ctd.

Section F(4) - Administrative procedural error

- "A review on this ground may proceed if the applicant provides sufficient evidence that:
    - RTB staff performing an administrative task made a procedural error on the dispute resolution application file in issue; and
    - the procedural error materially affected the result of the original hearing."
- Example of a procedural error: RTB staff misfile material under the wrong dispute resolution file
- "If the applicant provides sufficient evidence to show an administrative error likely occurred, it is anticipated that an arbitrator will review any internal documents that may provide further information about whether an error occurred."
- "Materially affected the result" means that the result of the hearing may have been different if the mistake had not happened
- The Policy Guideline explicitly excludes cases where an arbitrator made a decision to exclude materials

PG 24 - Review of a Decision or Order ctd.

Section F(5) - Technical irregularity or error

- A review on this ground may proceed if the applicant provides sufficient evidence that:
    - a technical irregularity or error occurred; and
    - the irregularity or error materially affected the result of the original hearing.
- Examples of a technical irregularity or error:
    - a party receives a confirmation that their evidence was uploaded to the system but the evidence file was corrupted and the arbitrator could not view it as a result
    - Connection issues that cause the conference call to cut in and out
- "If a party becomes aware of technical issues before or during the hearing, then where possible, they should bring this to the arbitrator's attention and request an adjournment or some other modification to address the issue."
- "If the applicant provides sufficient evidence to show a technical irregularity or error likely occurred with RTB's technology, it is anticipated an arbitrator will review any internal RTB material that may provide further information about whether an irregularity or error occurred. If the technical irregularity or error was not with RTB's technology, only the evidence submitted by the applicant will be considered in determining whether the applicant has established this ground on a balance of probabilities."
- An application may be dismissed if
    - the error occurs because the party failed to follow the instructions provided with respect to using the technology rather than there being a problem with RTB's technology
    - If the problem was with an individual's device that could have been anticipated or avoided
- "Materially affected the result" means the result of the hearing could have been different if the irregularity or error had not occurred

PG 24 - Review of a Decision or Order ctd.

Section F(7) - the director did not determine an issue they were required to determine

- "There are two general circumstances in which this ground may arise:
  - (1) the director completely missed determining an issue or
  - (2) the director decided they had no authority or ability to determine an issue before them on its merits but their decision is fundamentally defective."

- "An arbitrator is not required to address every detail raised by the parties during the original hearing in their decision. They also do not have to respond to every argument or make an explicit finding on each element leading to their final conclusion on an issue. In some instances, an arbitrator may have made an implicit determination."

- Examples of completely missing an issue:
  - A tenant seeks an order for repairs of a shower leak and a broken heater, and the decision only deals with one of them
  - A tenant disputes a notice for a breach of material term and the arbitrator fails to determine whether the tenant corrected the breach within a reasonable period of receiving written notice to do so

- Examples of determining they had no authority to determine an issue when this decision is "fundamentally defective" (which we think means deciding they did not have authority when they actually did)
  - Deciding not to hear a section 51(2) (12 month rent) claim because it exceeds the small claims limit
  - Dismissing an application for being out of time when it was not

- This ground does not appear to apply where the parties argued about jurisdiction in the hearing (eg the landlord claimed the housing was transitional), and the arbitrator found no jurisdiction based on the evidence and arguments submitted by the parties
  - In our view, the language of the policy guideline is equivocal enough to say that if a tenant is considering judicial review of a decision like this, it may be that they need to try a review consideration first

PG 24 - Review of a Decision or Order ctd.

Section F(8) - the director did not have jurisdiction to determine an issue

- A review on this ground will proceed if the applicant can establish that the arbitrator made a decision or order that was outside of the legal authority granted to them by the RTA and MHPTA

- One example provided by the policy:

  - "if the original arbitrator found as a fact that the parties shared a bathroom (and this was not merely a temporary arrangement) but then went on to conclude the RTA applied, the review on this ground could be successful because section 4(c) of the RTA excludes these accommodations from the RTA."

- Other examples might be if the RTB applies legislation that id does not have the authority to apply, such as the Human Rights Code, or determines a dispute that was filed beyond the ultimate time limit

- Not an opportunity to reargue issues that were argued at the original hearing

- You can use this ground even if the issue of jurisdiction was not raised at the hearing, with some exceptions

  - Example of an exception: where there is evidence of exclusive possession and a fixed amount of rent there is a presumption of a tenancy agreement under the RTA or MHPTA, and a party then has to raise jurisdiction if they want to argue there was no tenancy agreement under one of the Acts

PG 24 - Review of a Decision or Order ctd.

Other changes:

- Some content on reviews initiated by the director (ie where a party does not apply for review consideration but the director decides to conduct one.)
- Some new content on time limits:
    - "If a decision or order attracts two different time limits, the shorter time limit will typically be applied. For example, according to the legislation, a decision or order related to a notice to end tenancy for cause attracts a 5-day time limit to apply for review. However, if the decision dismissed an application disputing a notice to end tenancy for cause, the director must grant an order of possession to the landlord. In that case, the decision also relates to an order of possession which attracts a 2-day time limit. The director would apply the 2-day time limit."
        - This, at least arguably, contradicts a BCSC decision from last year. For those interested, the citation is: *Connors v. Maclean*, 2022 BCSC 1460
- Director may suspend decisions or orders until review is complete
    - Presumably this is to give effect to the new 2 step process
    - "A decision or order of the director may not be filed in court until the review has been concluded. Even if an order was already filed in court because the application for review was made after the time limit expired, the director can order the original decision or order be suspended."
- Content on how they can proceed if a review is successful on steps one and two:
    - Reconvening with the original arbitrator
    - Based solely original record and written submissions
    - A new hearing with a new arbitrator

PG 27 - Jurisdiction

Section B(2) - Small Claims Limit:

- *Monetary Orders for Unpaid Rent*
    - Where a tenant applies to cancel a NTE for unpaid rent and the application is dismissed, the small claims limit does not apply to the associated monetary order granted to the landlord for the unpaid rent
    - Where a tenant does not apply to dispute a NTE for upaid rent, the landlord applies to enforce the NTE, and the application is successful, the small claims limit does apply to the associated monetary order that may be granted to the landlord for the unpaid rent
- *Dividing Claims*
    - Essentially if a tenant has a claim arising from a single cause that exceeds the small claims limit they cannot avoid the limit by splitting the claim up between multiple applications
        - Eg: "[A] tenant makes an application for dispute resolution seeking compensation for emergency repairs due to a leak in the roof and submits a second application seeking damages for property that was ruined because of the leak and compensation for loss of enjoyment of the property while there was a leak. In a situation like this, the total of the monetary compensation sought cannot exceed $35,000 because both applications concern claims arising from the same series of events: the roof leak .
    - Claims not arising from the same cause of action can be brought separately whether or not they exceed the small claims limit
        - Eg: a tenant could make an application for dispute resolution seeking monetary damages of $35,000 or less for loss of quiet enjoyment because the landlord unlawfully entered the rental unit, and a second application for dispute resolution seeking monetary damages of $35,000 or less because the landlord terminated access to utilities. Even if the total of the damages being sought between the two applications exceeds $35,000, the director has jurisdiction over both applications because the claims do not stem from the same series of events. They also are not integrally interwoven. In this situation, both applications would rely on different evidence and findings of fact.

PG 27 - Jurisdiction ctd.

Section 9 - Strata Evictions

- "Section 138 of the Strata Property Act allows a strata corporation to evict a tenant of a residential strata lot 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 common assets. This provision allows the strata corporation to issue a Notice to End Tenancy under section 47 (landlord's notice: cause) of the RTA."

- The Policy Guideline purports to do this by saying the definition of "landlord" in the RTA can include a strata corporation, but only for the purposes of section 47.

    - *But can the RTB actually do this through "policy"*?

- "Once a strata corporation issues a Notice to End Tenancy under section 138 of the Strata Property Act, the director has statutory authority to cancel the notice or uphold the notice and grant an order of possession. If a tenant disputes the Notice to End Tenancy, the director will determine whether:

  1. The tenant repeatedly or continuously contravened a bylaw or rule; and
  2. 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."

    - *What happened to the Strata Property Act requirement that the bylaw be reasonable and significant? Is it left out of this "test" because the RTB does not have jurisdiction to determine whether a strata bylaw is reasonable and significant? Can they just leave that requirement out like this where doing so broadens the intended scope of the statutory provision they are purporting to give effect to?*

Have you seen any cases where a strata corporation has served an eviction notice in place of a landlord? We would like to hear from you.

PG 37 - Rent Increases

- Is now actually split into 5 policy guidelines:

    - 37 - Permitted Rent Increases
        - Sets out notice and timing requirements

    - 37A - Annual Rent Increase
        - Deals with how annual rent increase maximus are usually calculated for RTA and MHPTA tenancies, and with the specific amounts set for 2023 and 2024

    - 37B - Agreed Rent Increase
        - Deals with requirements for agreed rent increases above the maximum allowable annual amount

    - 37C - Additional Rent Increase for Capital Expenditures (ARI-Cs)
        - Deals with landlord applications under sections 23.1 - 23.4 of the Residential Tenancy Regulation

    - 37D - Additional Rent Increase for Expenditures
        - Deals with:
            - landlord applications for additional rent increase for significant repairs or renovations (MHPTA only)
            - Financial loss from extraordinary increase in operating expenses (RTA and MHPTA)
            - Financial loss for financing cost of purchasing property or part (RTA and MHPTA)
            - Where a tenant who is a landlord receives an additional rent increase (RTA and MHPTA) - this is about sublets

PG 39 - Landlord's Direct Requests

New direct request for landlord Orders of Possession

- The direct request process is now expanded beyond 10 day notices for non-payment, to include
    - One month notice for cause or end of employment
    - 2 month notice where a tenant does not qualify for a subsidized rental unit
    - 4 month notice for demolition or conversion of a rental unit

- This will clearly lead to more direct requests, and more tenants who will need help applying for review where they have suddenly received an OP but never got the notice to end tenancy the OP is based on
    - While that landlord is required to submit evidence of service, this can be accomplished by filling out a form with a witness statement

Other PG Changes

PG 12 - Service Provisions
- Section 12.1 - new content on arbitrator discretion to extend deadline to serve a notice of proceeding
- Section 13 & Table 1 - Updated to specifically deal with a standing order on service of ARI-C applications

PG 23 - Amending an Application for Dispute Resolution
- Section G - Added info on amending an application at hearing, new subheading on small claims limit

PG 42 - Digital Evidence
- Sections A & D - minor revisions to reflect the rules of procedure, and to provide some guidance on security settings when sharing files via a file hosting service

PG 44 - Format of Hearings
- Section E - Content added to reflect Rule 6.4 in the Rules of Procedure about how to request an alternate format for a hearing
- Section F - edits for clarity

PG 46 - Transitional Housing, Supportive Housing, Health Facilities, and Rehabilitative and Therapeutic Housing
- Section B - new section on legislative purpose, echoing *Berry and Kloet*
- Section C - new section on Emergency Shelter
- Section E - guidance on interpreting section RTA 4(g)(v) - exclusion for living accommodation in a housing based health facility that provides hospitality support services and personal health care
- Section F - guidance on interpreting section RTA 4(g)(vi) - exclusion for living accommodation that is made available in the course of providing rehabilitative or therapeutic treatment or services

Caselaw Update

Jadavji v Yin, 2022 BCSC 2260

Facts:

- Tenant J paid $5,700/month for his rental unit which included a wine cooler and blinds.
- J applied for and won a repair order which required the Landlord Y to replace the non-functional wine cooler and clean the blinds, and an order that permitted him to deduct $500/mth until the cooler was replaced and $100/mth until the blinds were cleaned.
- Y replaced the cooler and cleaned the blinds, but there was a dispute about whether the new cooler was of "comparable quality" and four blinds were not cleaned.
- J continued to deduct from his rent, Y served a 10 Day NTE for Non-Payment.
- At the hearing, the Arbitrator upheld the eviction.

On judicial review, J argued that the Arbitrator failed to consider s.66(2)(b):

Director's orders: changing time limits

66 (1) The director may extend a time limit established by this Act only in exceptional circumstances, other than as provided by section 59 (3) *[starting proceedings]* or 81 (4) *[decision on application for review]*.

(2) Despite subsection (1), the director may extend the time limit established by section 46 (4) (a) *[landlord's notice: non-payment of rent]* for a tenant to pay overdue rent only in one of the following circumstances:

(a) the extension is agreed to by the landlord;

(b) the tenant has deducted the unpaid amount because the tenant believed that the deduction was allowed for emergency repairs or under an order of the director.

Jadavji v Yin, 2022 BCSC 2260

The Court rejected this argument because J had failed to raise s.66(2)(b) in the hearing:

[40] The petitioner did not seek relief under s. 66(2)(b) at the hearing. Had the petitioner done so, the respondent would have been given the opportunity to provide arguments on the issue and the Arbitrator may have been required to provide some indication as to why he did or did not exercise that discretion: *Morgan-Hung v. British Columbia (Human Rights Tribunal),* 2011 BCCA 122 at para. 46.

[41] In my view, in this case, the Arbitrator was not statutorily required to consider s. 66(2)(b). I accept that the failure of the Arbitrator to consider this discretionary power did not render his Decision patently unreasonable as outlined in s. 58(3) of the *ATA*.

So what does this mean?

- If an Arbitrator has a discretionary power and you want them to exercise it in your client's favour, make sure you raise that during the hearing!
  - Examples of discretionary powers: ss. **55(3)**, 62(4)(c), 64(4)&(5), 66(2), **68**

Del Puppo v Austeville Properties Ltd., 2023 BCSC 1282

Facts:

- Tenant D rented a single-family home from Landlord A, which also owned some nearby apartment buildings.
- A served D with a 4 Month NTE for Conversion to a caretaker's suite. D disputed the eviction, but it was upheld. A stated, and the Arbitrator accepted, that the caretaker would oversee A's nearby properties.
- D argued that a landlord cannot move a caretaker into a rental unit on one residential property to oversee units at different residential properties. The Arbitrator disagreed and upheld the eviction.

Court: That's fine.

So what does it mean?

- Tenants can be evicted for caretaker use even if the supposed caretaker will not be tasked with caretaking the same rental property :(

Ali v British Columbia (Residential Tenancy Branch), 2023 BCSC 1336

Facts:

- Tenant A rented from Landlord S, a non-profit.
- S accused A of having her nephew and his girlfriend living with her, in breach of her tenancy agreement, which they discovered on June 8, 2022.
- A sent S a notice on August 26, 2022, stating that she must provide 3 different kinds of proof that her nephew and his girlfriend did not live with her by September 9
- S sent proof to A on October 28 that they did not live with her and were helping her with babysitting, were having some mail sent to her unit while they were out of the country, and were renting a different unit.
- On October 31, S sent a 1 Month NTE for Cause for breach of material term to A, writing:
  > "[w]hile you have provided documents showing alternate addresses, we do believe that [PB and AR] have been residing in your unit" and "We are not satisfied that all of these people reside elsewhere as there is adequate proof they are using your address at Newton Green."
- A disputed the NTE, and at the hearing, the Arbitrator found in favour of the Landlord S.
- The Arbitrator found that S had breached a material term of her agreement by having additional occupants in the unit. However, the Arbitrator made no finding as to whether S had corrected the breach within a reasonable time of receiving written warning on August 26.

Ali v British Columbia (Residential Tenancy Branch), 2023 BCSC 1336

The Court:

- The Decision was patently unreasonable "because it upheld the termination without finding that it satisfied one of the two necessary conditions to a valid termination under RTA, s. 47(1)(h). That is, it upheld SPAHS' termination as valid without addressing whether Ms. Ali corrected PB and AR being occupants of unit #4 within a reasonable time after SPAHS gave her written notice to do so."
- The Arbitrator did not make any findings about when the other occupants actually lived in A's suite, and therefore also did not (and could not) make any findings about whether she complied with the material term within a reasonable time.
- The Court also commented that the S failed to give proper written warning because they did not state that A would be evicted unless the occupants moved out by the deadline

So what does this mean?

- Always make sure you are arguing each constituent ground when challenging an eviction notice, *especially* one issued for breach of a material term (which has arguably 4 distinct requirements: that the term be material; that the tenant have breached it; that the landlord have given warning of the breach which includes both a demand for compliance and a threat to evict; and that the tenant not have corrected the breach within a reasonable period of time)

Shuster v Prompton Real Estate Services Inc., 2023 BCSC 1605

Facts:

- Tenant S signed a 2 year fixed term tenancy agreement with Landlord P that stated that rent during the first year would be $5,500/month for the first year, and $6,500/month for the second.
- Tenant S applied to recover overpayments of rent on the basis that the $1000 increase was an illegal rent increase contrary to section 42 of the *RTA*
- The Arbitrator dismissed S's claim:

> "In this case, I find that the amount of rent due during the fixed term was confirmed in an email from [Ms. Buchanan] to [Mr. Shuster] dated December 17, 2020, and that the parties signed the written tenancy agreement on December 21, 2020. I accept that the tenancy agreement reflects the parties' understanding with respect to the amount of rent due during the fixed term. I also accept that the lower rate in effect from January 1 to December 31, 2021 reflected a concession for the first year of the tenancy. I find that the rent increase was not an attempt to avoid the rent increase provisions of the [*RTA*].
>
> Further, as the parties agreed to the rent increase in writing, I find that the timing and notice requirements of section 42 of the [*RTA*] are not engaged." (para 16)

- The Arbitrator also applied estoppel, even though they did not hear from the parties on that issue:

> "In this case, by paying the agreed-upon rent throughout the tenancy and by failing to make an application for dispute resolution within a reasonable time, I would have found that the tenants are estopped from disputing the rent increase." (para 17)

Shuster v Prompton Real Estate Services Inc., 2023 BCSC 1605

The Court:

- This was not patently unreasonable: the Court determined that section 14 permitted the parties to agree to the "temporary rent rebate", and because it was agreed to in writing and the tenants knew about it more than 12 months ahead of time, the rent control provisions of the *RTA* were not violated.
- The Court also did not believe this was contracting out of the rent increase provisions:

> "The Arbitrator concluded that the lower rent during the first year of the fixed term tenancy reflected a concession on the part of the landlord, which Ms. Buchanan testified was given on account of the uncertainty in the rental market occasioned by COVID-19. As such, the Arbitrator concluded that the rent increase in the second year of the fixed term Tenancy Agreement was not an attempt to avoid the rent increase provisions of the *RTA*: Decision at p. 3. This conclusion is not openly, evidently, and clearly irrational, or unreasonable on its face, nor is it unsupported by evidence, or vitiated by failure to consider the proper factors."

So what does this mean?

- If properly structured, these "rent rebates" on longer fixed term tenancies may be enforceable :(
- But it also depends a lot on how they're worded in the tenancy agreement: if you're going to help a client challenge the legality of an arrangement like this, read this decision to make sure you can distinguish that situation from this one!

Ball v Bedwell Bay Construction Ltd., 2023 BCSC 1470

Facts:

- The Tenant had lived in a motorhome campground since 2015. She lived at different lots until either 2017 or 2019 (Tenant and Landlord disagreed), after which she lived at one site.
- Landlord took the position that the *MHPTA* did not apply, and demanded that she move out; Tenant filed a dispute with the RTB to seek a finding that the *MHPTA* applied to her tenancy
- The Arbitrator agreed with the Landlord; the Tenant applied for judicial review

The Court:

- The decision was upheld; the Court found the Arbitrator had weighed all the different factors in Policy Guideline 9 together, and it was open to them to conclude that the Tenant's long-term residence in one site was not enough to prove that the *MHPTA* applied

So what does it mean?

- For the Policy Guideline 9 test (and any test set out in Policy that features lists of relevant factors, e.g. Guideline 54), make sure you make arguments on every relevant factor, as any of them on their own or any constellation of them could undermine a tenant's case, even one that is strong on the surface.

Smart v 336688 Holdings Ltd., 2023 BCSC 1271

Facts:

- Tenant S was evicted with a 1 Month NTE for Breach of a Material Term due to having pets
- However, the Arbitrator did not consider whether any of the terms of the tenancy agreement were material, *and* found that there was no term in the agreement requiring S to get the Landlord's permission to have a pet, even though they evicted the tenant for breach of this (non-existent) term.

The Court:

- Both of these errors were patently unreasonable
- The contradictory finding about the lack of pet term was illuminated by S's application for clarification, which made it obvious that the Arbitrator had made conflicting findings

So what does it mean?

- Arbitrators must apply the proper approach to contract interpretation - always keep *Belmont v. Swan,* 2021 BCCA 265 in your back pocket when arguing about how to interpret a tenancy agreement or its terms!
- Applications for clarification or correction can be very helpful to your client if they intend to apply for judicial review, but exercise caution!

Shaikh v Brar, 2023 BCSC 1285

Facts:

- Tenant S applied to the RTB for monetary compensation for breach of quiet enjoyment against Landlord B. Before the hearing, B issued a 1 Month NTE for Cause to S. S amended their application to also dispute the NTE.
- At the hearing, the Arbitrator engaged in "med-arb" - mediation-arbitration - where they tried to help the parties settle the disputes before them
- During the med-arb, S agreed that they would move out on a date in the future, but when it came time to discuss the monetary portion of the claim, they would not agree to the reduced amount that B was offering to pay.
- The Arbitrator then stated during the med-arb that they were severing the monetary claim, and asked S if they were "backing out" of the deal that they had made "under oath". The Arbitrator also frequently asked S if they were prepared to move out "on two day's notice", a reference to the default (minimum) two day order of possession
- S ultimately agreed to the settlement of the eviction issue only, but applied for judicial review on the grounds that the Arbitrator had conducted the hearing unfairly, specifically by telling them partway through that portions of the claim would be dismissed with leave to reapply, and pressuring them to move ahead with a partial settlement of the eviction issue alone.

Shaikh v Brar, 2023 BCSC 1285

ARB	... Tenants, you've filed a monetary application, what are you planning to do with that? Is this a full settlement of that as well?
FS	Yes, full settlement for the monetary compensation.
ARB	Okay, so you are not asking for anything else, correct?
FS	No, just what I filed for.
ARB	Sorry, what do you mean?
FS	For the amount of $6,600 ... I believe it was ... in full compensation ...
ARB	Okay, well, you can talk about a settlement with the landlord. If you don't settle you have to reapply for that, we are not going to be dealing with it today. It's up to you how you want to proceed.

GC	... I do have an offer for $500, is my maximum. But it's non-negotiable.
CG	No.
ARB	Ok, tenants?
FS	No, then we will conclude this mediation.
ARB	Well, I am going to conclude the mediation not you. Do you want to settle the monetary claim or not?
FS	No, not for 500 dollars, no.
ARB	Okay, so you are going to have to reapply for that other claim in the future. You are probably going to be waiting eight or nine months for a hearing. You have to prove your full claim and if you are successful, you will get it but if not, you will get zero. So, it's up to you.
FS	Well, I thought this hearing was for that. Why do I have to reapply? It's all included in this application.
ARB	Okay, so you applied for four claims, the landlord applied for two claims. There are six claims total. We have a maximum hearing time today and the priority issue of why you got a priority hearing date is because you applied related to a one-month notice. That's actually whey we are here.
FS	Actually ...
ARB	That's the main issue, the urgent issue for the end of the tenancy. So, that's the only thing we are dealing with today. And pursuant to rules 2.3 and 6.2 I can sever any monetary claims, which are not considered priority issues. That's not why you got a priority date, for the monetary order, it's because of the one month notice.
FS	Actually, I got the one-month notice way after this hearing date was set. This wasn't applied at the time.
ARB	It doesn't matter. The landlord applied for an order of possession for cause as well, that's the main issue. I'm not going to argue or debate the issue with you, I'm not dealing with your monetary claim. My decision is not going to change if you argue with me.

Shaikh v Brar, 2023 BCSC 1285

[42] There followed a brief discussion of some of the Tenants' practical concerns, given they would not be financially able to pay a damage deposit for a new home unless their damage deposit for the current home was first refunded. The Arbitrator interrupted Ms. Shaikh as she was explaining this issue to state:

> ARB You didn't file an application for damage deposit. I don't know what you are talking about. That cannot be dealt with before the tenancy has ended according to the Act. It's not even in your application, so what are you talking about?
>
> FS Well I, I ...
>
> ARB You haven't asked for the return of your damage deposit. It's nowhere in your application ...
>
> FS In my monetary claim. Yes, in my monetary claim.

Of course, as noted above, the Tenants had included a claim for damage deposits in their monetary claims.

Shaikh v Brar, 2023 BCSC 1285

ARB So are you now revoking the settlement that you've already agreed to under oath?

FS Yes. I'll go back and go ahead ...

ARB Ok, are you prepared to move out in two days then?

FS No, can I just move forward with the hearing and not ...

ARB Yes, are you prepared to move out in two days?

FS No.

ARB Because that's what could happen if you move forward with the hearing.

FS No.

ARB Okay, well, if you are not then you will need to decide Ma'am. Because if I go ahead with the hearing, you might have to move out in two days. If you are not prepared for that risk, then you can settle. You need to decide which way you want to go. We have now spent 26 minutes of the hearing discussing a settlement because you said you wanted to.

FS Yes, because I thought the landlord would compensate us more than $500 dollars and that's why I should ...

ARB The landlord doesn't have to compensate you for anything. They made an offer, you rejected it, that's your right to do so. We are not here for the monetary claim, we are here for the one-month notice. There's everyone waiting in line as well, not just you. And the reason that we have priority hearing dates are to deal with end of tenancy issues, which are considered urgent claims. The landlord made a claim for it, you made a claim for it. That's the only thing we can deal with today. I'm still not dealing with your monetary claim even if we go ahead with the hearing. So, regardless you are going to have to reapply for that. If you are upset about that, that's fine. If we go ahead with the hearing, you are still not getting your monetary claim, but you will face the risk of moving in two days. So, if you would like to do that and you are prepared for that, I'm happy to make a decision and go ahead with the hearing.

FS We will move out as discussed, I don't know if the landlord is still in agreement on March 31st.

ARB Okay, you keep changing your mind so I don't know what you are looking for today. You said you were gonna move out ...

FS I am changing my mind ...

ARB And then you don't want to move out and now you do want to move out.

FS Well, because ... this is kind of ... I made an application and this is turned out, we're getting evicted and we haven't even had our application heard.

ARB Yes, and I gave you the choice at the beginning of the hearing and I said we can do a hearing, these are the risks, or you can settle. You chose to settle, I didn't force you, I'm not there with you, I can't make you do anything. You said you wanted to settle. If you don't want to settle, I'll make a decision. If you do want to settle, then you need to let me know. You've told me three different things now.

FS [inaudible]

CG So all that evidence is no good?

ARB That's not what I said. And you guys are wasting additional time by fighting and arguing with me. I have already explained the options to you. I just need to know how do you want to proceed. We have now used half the hearing time with you two arguing with me.

FS Okay, I'll let you go ahead and make a decision.

ARB Okay, are you prepared to move out in two days?

FS No.

ARB Well then, you'll need to decide what you want to do. ← This was 27 minutes into the hearing.

Shaikh v Brar, 2023 BCSC 1285

The Court:

- The Arbitrator conducted the hearing in a procedurally unfair manner, and the settlement was overturned.
- First, the Arbitrator decided to sever the monetary claim from the eviction issue either before or very early in the hearing and refused to hear from the parties on the question. That alone was procedurally unfair:

> [92] It is clear on the record that the Arbitrator embarked on the hearing with an unshakeable understanding that the parties had been given a priority hearing date for purposes of the Landlords' notice of terminiation. When Ms. Shaikh tried to explain that was simply not accurate, the Arbitrator interrupted Ms. Shaikh and talked over her. Despite having been advised of this incorrect factual assumption, the Arbitrator did not review the file to ascertain what had actually happened, but repeated the factually incorrect information in the written Decision.

- The Arbitrator merely assumed the issues underlying each claim were unrelated, but did not indicate anywhere in the Decision or in the hearing why they did. They actually were very closely related!

> [99] At the root of the issues in this case was the Arbitrator's assumption, going into the mediation phase, that the issues were unrelated and the claims could be easily separated for negotiation purposes. This assumption was not communicated to the Tenants until the stark difference between their position and the Landlords' position on compensation became apparent. The Tenants clearly understood they were there to negotiate with respect to the claims as a whole, and while they were willing to start with discussion of a move-out date, they had no expectation that, in essence, the rug would be pulled out from under them by the Arbitrator's decision, mid-mediation, to exercise their decision-making powers in order to sever and dismiss the Tenants' claims.

Shaikh v Brar, 2023 BCSC 1285

The Court:

- The Court also found that it was inappropriate to imply that, by wanting to scuttle the settlement, they were "revoking the settlement that [they had] already agreed to under oath".

> [103] In my view, if a party is asked to give an affirmation to tell the truth prior to a mediation, and then a dispute arises as to whether there has been a settlement, or a partial settlement, that is a matter of submissions and not of evidence. The spectre of breach of the affirmation (and, implicitly, the moral consequence of breach of an oath and the possibility of criminal charges for perjury) should not be brought to bear upon the party who disputes whether a full settlement has been reached.

- The fast pace of the "med-arb" process in the hearing was also a problem:

> [109] The Arbitrator also stated in the same excerpt from the Decision that the parties "were given ample and additional time during this hearing, to think about, review, discuss and negotiate the terms of this settlement". This is, to some degree, a question of impression. Clearly, the Arbitrator is accustomed to dealing with significant issues of the sort arising in this matter in one-hour chunks of time. I have noted in my summary of the hearing the timing of the various stages. A party not accustomed to the pace of such hearings may well have felt that what occurred between the 14-minute mark and the 27-minute mark of the hearing was a whirlwind. There is no point in the recording at which there was any break in the discussion to allow the Tenants time to "think about" what was happening, or to discuss matters amongst themselves.

Shaikh v Brar, 2023 BCSC 1285

The Court:

- Perhaps most importantly, the Court found that it was improper for the Arbitrator to raise the threat of a two-day Order of Possession to pressure the Tenant into settlement:

> [111] The Arbitrator's frequent use of the spectre of a two-day order for possession is also of concern. As can be seen from the transcript excerpts above, the Arbitrator on at least one occasion said that a two-day order "will" be granted if the One Month Notice is upheld, and on other occasions said that a two-day order "could" be granted. The repeated references to the spectre of a two-day order for possession were clearly of significance – and intended to be of significance – to the Tenants. The spectre of being suddenly unhoused would be of concern to anyone participating in such a hearing. The repeated references to this point by the person who would be deciding the issue, if the matter was to proceed to a hearing, would similarly be of concern to anyone participating in such a process, as would the inconsistency as to whether such an order was a predetermined result or simply a possible outcome.
>
> [112] By my count, in the excerpt quoted at para. 43 above, the arbitrator raised the question of whether the Tenants were "prepared to move out in two days" on five occasions between the 23- and 27-minute marks of the hearing. This is in the context of the Tenants on at least two occasions asking to bring the mediation to a close and move into the arbitration phase and have the Arbitrator decide the issues.

- In conclusion, it was inappropriate for the Arbitrator to pressure the Tenants into making a settlement when they had clearly indicated they did not want to settle and wanted to proceed with the hearing: "It is only as a result of intensive interventions by the Arbitrator that the Tenants ultimately felt that they had to agree to the partial settlement."

Shaikh v Brar, 2023 BCSC 1285

The Court:

[115] In my view, the med-arb process in this case was fundamentally flawed. The Arbitrator used decision-making powers that should be reserved to the arbitration phase in order to pressure the parties within the mediation. The Arbitrator used the spectre of an adverse decision in the arbitration phase in a manner that went beyond the scope of appropriate exhortation within the med-arb context. The pressure put on the Tenants to proceed with the partial settlement was intense. In all of these circumstances, had I been required to decide this issue, I would have concluded that the Arbitrator's decision to record the settlement in this case was patently unreasonable.

Shaikh v Brar, 2023 BCSC 1285

So what does this mean?

- Advocates should *always* have this case on hand in case an Arbitrator begins to pressure their tenants into settlement

- In particular, it is essential for helping to push back against the common threat Arbitrators make about making a two-day order of possession

APPLYING FOR STATUS

STEP 1:

Get the Application Forms

Online, in person (ISC Regional Office), or request by mail

STEP 2:

Do you need a Guarantor?

- Are you applying by mail?
- Are you using a photo ID that doesn't meet all the requirements?
- Are you submitting on behalf of an applicant?

Your Guarantor MUST:

- Be 18 years or older
- Reside in Canada or the U.S.
- Have known you personally for at least 2 years
- Be reachable to verify information
- Have a Secure Status Card that they applied for when they were 16+ OR
- is one of the listed qualified professions

STEP 3:

Gather Your Supporting Documents

If you are applying for a Secure Certificate of Indian Status (SCIS), you must include **2 copies** of a **Canadian passport-style photo** in your application.

*** You are not required to apply for an SCIS if you are applying for status

If **anyone** listed on the application has a different name from the one on the required documents, you must provide **EITHER**:

- An original document linking the previous name to the current name

OR

- a photocopy of the above document with valid ID that has the current name as it appears on the application

ADULT APPLICATION

IN PERSON:

1. Original Birth Certificate with the parents' names
2. Original acceptable valid ID

BY MAIL:

1. Original birth certificate with the parents' names
2. Photocopies of ID, signed by a guarantor
3. A Guarantor Declaration

CHILD / DEPENDENT APPLICATION

IN PERSON:

1. Original Birth Certificate with the applicant's parents' names
2. Original acceptable valid ID of parent/legal guardian

BY MAIL:

1. Original birth certificate with applicant's parents' names
2. Photocopies of ID for each of the applicant's guardians, both signed by a guarantor
3. A Guarantor Declaration

APPLYING FOR STATUS

STEP 4:

Fill out the application forms:

Try to have as much information as you can about your parents and grandparents. If you don't know it all, you can still apply!

Information Requested Includes:

Legal names, dates of birth, band names or First Nations, registration numbers, contact information, and adoption information (if applicable)

STEP 5:

Sign and Date your Application

***NOTE:
A parent/guardian will need to sign the application for a dependant

Keep in mind: it can take at least 6 months to receive a decision on your application

A status application can be **expedited** for elders or in cases of serious illness

STEP 6:

Submit your Application

In person or by mail:

IN PERSON:

At any ISC Regional Office or First Nation or Band Office (if applicable)

BY MAIL: General Applicants

Mail to:

National Processing Unit
Indigenous Services Canada
10 Rue Wellington
Gatineau QC, K1A 0H4

Use this address if you're applying based on previously denied or revoked status that was **discriminatory**

BY MAIL: Bill S-3 Applicants

Mail to:

Application Processing Unit
Indigenous Services Canada
Box 6700
Winnipeg MB, R3C 5R5

Entitlement for Registration of Indian Status



Chris C. Bolton/IRA
Gitga'at First Nation
Hartley Bay, B.C.

Entitlement of Registration

1. Entitlement
2. Determine Entitlement
3. Research – First Nation Genealogy
4. Parent not listed on Birth Certificate
5. Difference of Surname
6. Application form
7. Control of Membership
8. Benefits of First Nations
9. Indigenous Services Canada

Entitlement

- Are you entitled to be registered under the Indian Act.
- Are your parents/grandparents registered or entitled to be registered? You might be entitled to Subsection 6(1) or 6(2) of the Indian Act.
- Are any of your immediate/extended family registered or entitled to be registered?
- Bill C31 restored entitlement to women who lost their status due to marriage of a non-entitled man, entitling their children to register as well. (Attachment for Bill C31 & Bill C3)





WHAT IS BILL C-31 AND BILL C-3?

- Under Section 11, the Indian Register maintains the band lists for those bands that do not control their membership (bills under Section 10).
- The introduction of two membership systems has created a new relationship between Indian registration and band membership. There are situations which can be present when an individual doesn't have Indian status, but that individual is on Section 10 band membership list and is recognized as a Band member. The opposite situations can occur when an individual has a historic Indian status but does not appear on a band's Section 10 list.

Funding

Bill C-31 allowed more than 174,000 people to become eligible for registration. The federal government did not provide enough funds to cover this great number of people. As a result, band Councils faced funding issues and could not provide adequate services to the new Band members who received Indian Status. For example, not all new registrants could get housing or reserve or receive post-secondary funding.

Bill C-31

Soon after Bill C-31 was passed, Women took to challenge the registration provisions of the Indian Act under the Canadian Charter of Rights and Freedoms. They argued that sex-based discriminations continued to exist. They also thought that the certain registration rules in the Indian Act were still unfair. The first challenge was initiated by Sharon McIvor in 1987. Sharon McIvor lost her Indian Status when she married a non-Indian man. After the 1985 amendments to the Indian Act were introduced, her right to Indian registration was returned to her using section 6(1)(c). Her son, Jacob Grismer, had only one Indian parent, and he had the right to have Indian registration under section 6(2). Yet, he couldn't transfer his Indian status to his children because he parented with a non-Indian woman. On the other hand, Jacob's cousins in the male line, who were born to a man who married a non-Indian woman before 1985, could pass their Indian status on to their children. The status of the other parent did not matter there.

The McIvor case was decided by the British Columbia Court of Appeal (BCCA) in 2009. In its decision, the BCCA widened the definition of who an "Indian" was. It was done through the Gender Equity in Indian Registration Act (Bill C-3). Bill C-3 resulted in the following changes: individuals registered under section 6(2), such as Mr. Jacob Grismer, were entitled to register under section 6(1)(c.1) provided they met all of the following conditions:

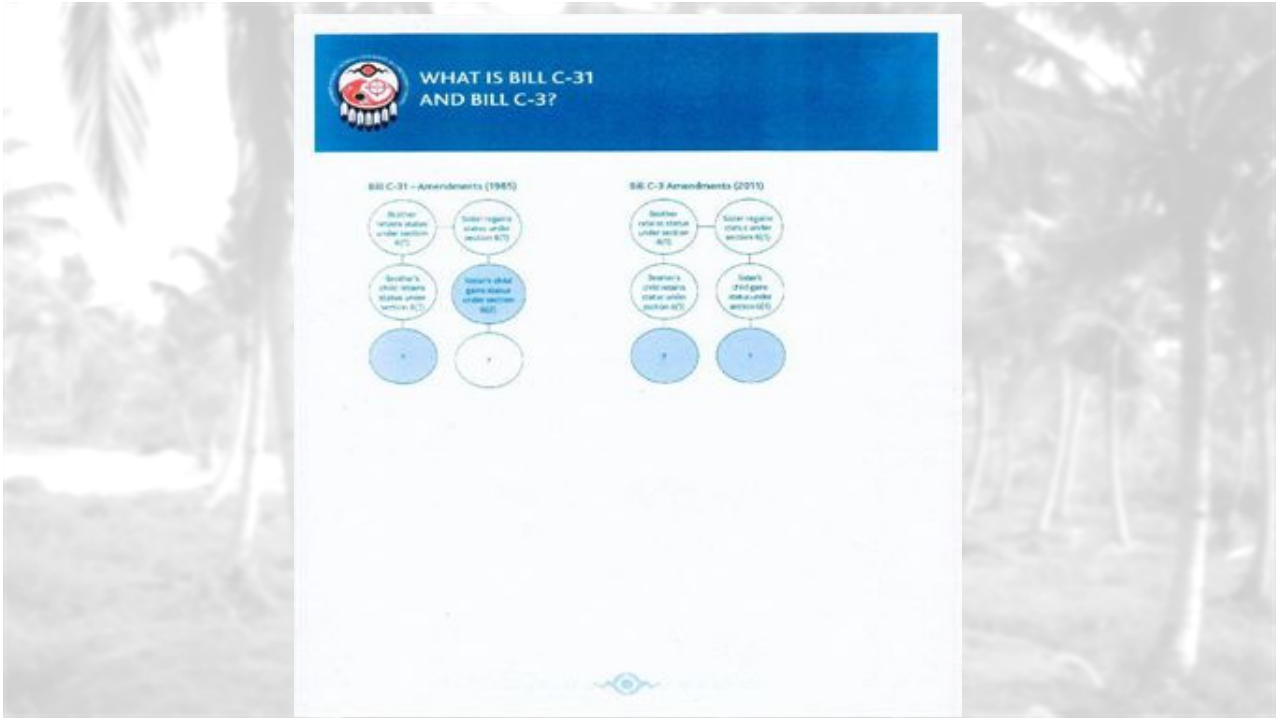
- have a mother who had lost her right to registration because she married a non-Indian man before April 17, 1985;
- have a father who does not have a right to be registered, or, if he is no longer alive, did not at the time of death have the right to Indian registration;
- were born after the date of his/her mother's marriage that led to that mother losing her right to Indian status, and prior to April 17, 1985 (unless his/her parents were married before that date); and
- were a child on or after September 4, 1951 of a person who did not have the right to Indian registration on the day when that child was born or adopted.

Since amendments changed registration rules for these people under section 6(1)(a.1), their children were then allowed to register under section 6(2) of the Indian Act. For them, they have to meet certain requirements. For example, they need to have:

- a grandmother who lost her entitlement because she married a non-Indian man;
- a parent entitled to be registered under section 6(2); and
- a brother or they had a sibling who was born on or after September 4, 1951.

As a result, in the period from 2011 to 2017, Bill C-3 allowed more than 37,000 people to get registered as a Status Indian.

The charts below show the difference in the rights of siblings to Indian status – siblings are inconsistent by a brother and a sister. These differences took place when the sister got her right to Indian registration back after she married a non-Indian man before April 17, 1985. This was under Bill C-31. Then, the chart shows the same situation after Bill C-3 was passed – the Gender Equity in Indian Registration Act. Now, section 6(1) allows children of both brother and sister to have registration. Their grandchildren are also entitled to registration under section 6(2).



WHAT IS BILL C-31 AND BILL C-3?

Bill C-31 – Amendments (1985)

Bill C-3 Amendments (2011)

Determine entitlement

To Help determine entitlement to registration, provide:

- **The names of any other family/relatives (brothers, sisters, aunts, uncles or cousins who are registered/entitled to be registered.**
- **Any relevant information that may help identify them in records at Indigenous Services Canada (ISC) and link them to you, the child or dependent adult.**
- **As much relevant information as possible about your First Nations ancestors. ISC will research its records to determine entitlement to register.**



Between 1985 and 2019, the *Indian Act* was amended to address sex-based inequities and comply with the *Canadian Charter of Rights and Freedoms*:

- Bill C-31 restored entitlement to women who had lost entitlement due to marriage to a non-entitled man, entitling their children to registration as well
- Bill C-3 granted entitlement to grandchildren of certain women who regained entitlement under Bill C-31
- Bill S-3 eliminated all known sex-based inequities not addressed by Bill C-31 or Bill C-3, entitling all descendants born before April 17, 1985, or from a marriage that occurred before that date, of women who had lost their entitlement due to marriage to a non-entitled man

If your entitlement to registration has been affected by known sex-based inequities in the *Indian Act*, you may now have the right to be registered if:

- your mother, grandmother or great-grandmother lost her entitlement through marriage to a non-entitled man before April 17, 1985

or

- your mother, grandmother or great-grandmother was born outside of marriage to an entitled father and a non-entitled mother between September 4, 1951, and April 16, 1985

or

- your parent, grandparent or great-grandparent lost their entitlement because of their mother's marriage to a non-entitled man before April 17, 1985

or

- your parent's, grandparent's or great-grandparent's name was omitted or deleted from the Indian Register or from a First Nation membership list because of their non-entitled father

As of August 15, 2019, Bill S-3 amendments addressed all known sex-based inequities in the registration provisions of the Indian Act. On December 11, 2020, the third and final report to Parliament on the review of Bill S-3 was tabled.

To find out more, visit:

- Bill S-3: Eliminating known-sex based inequities in registration
- Removal of the 1951 cut-off
- How do you apply for registration

or call:

- 1-844-280-5011

Enfranchisement of unmarried women

On July 31, 2020, the Quebec Superior Court issued its decision in the case of *Hele c. Attorney General of Canada* (Hele decision), ruling that unmarried women could not be enfranchised under the 1951 *Indian Act*.

If you, your mother or grandmother were unmarried and enfranchised by application as an adult between September 4, 1951, and April 17, 1985, you may be affected by that decision.

To find out more about enfranchisement and the steps the Government of Canada is taking to address the Quebec Superior Court's decision, visit Addressing enfranchisement of unmarried women in registration.

Research

- **To research family genealogy, visit First Nations genealogy (attachment)**
- **Talk to Elders and other band members to see if they remember your parents, grandparents, did they lose their status by enfranchisement.**
- **Check at the band office to see if your parents or grandparents are or were previously registered.**



Government of Canada / Gouvernement du Canada

Canada.ca > Library and Archives Canada > Collection > Help with your research > Indigenous history

First Nations genealogy

We have many resources for researching the family history and genealogy of First Nations peoples, particularly those who have status.

The departments responsible for Indigenous affairs changed frequently over time. For the sake of clarity, when referring to records held currently, we will refer to the two departments that presently manage Indigenous affairs: Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) and Indigenous Services Canada (ISC).

Indian Status

Under the *Indian Act*, an Indian is "a person who, pursuant to this Act, is registered as an Indian or is entitled to be registered as an Indian." The rules for eligibility for registration have changed over time.

Most information on **Indian Status** is in the archival records of the Department of Indian Affairs and Northern Development fonds, which includes the Indian and Inuit Affairs Program sous fonds or Record Group (RG) 10.

"Non-Status Indians" commonly refers to people who identify themselves as First Nations, but who are not entitled to registration on the Indian Register pursuant to the Indian Act. Some may however be members of a First Nation band.

On this page

- Before you start

- Places to look
- Access the records
- Related resources

Before you start

Gather information such as:

- name(s)
- approximate year of birth
- birth place
- place of residence in Canada
- First Nation band name

Please note that when you search for place names or band names, some names have changed. For example, Mud Lake has become Curve Lake. There may also be spelling errors, so you should try variations of spelling.

Places to look

- ▸ 1. Census records
- ▸ 2. Birth, marriage, and death records
- ▸ 3. The Indian Registers, 1951-1984
- ▸ 4. Membership records
- ▸ 5. Annuity pay lists
- ▸ 6. Estates and wills
- ▸ 7. Military records

Related resources

- The Indian and Northern Affairs Canada's publication *Schedule of Indian Bands, Reserves and Settlements* gives the names of the reserves in each province and territory and the names of the bands in each reserve.
- The *Atlas of Indian Reserves and Settlements of Canada* contains similar information, but with slightly more detailed maps.
- Crown-Indigenous Relations and Northern Affairs Canada: First Nation Profiles Interactive Map
- Many provincial and territorial archives have research guides and records relating to First Nations.
- Some public libraries and municipal archives also have guides and local resources.
- If you are looking for records that are too recent for our collection or information about your Indian Status, please contact Indigenous Services Canada (ISC).

Did you find what you were looking for?

What was wrong?

- ○ I can't **find** the information
- ○ The information is hard to **understand**
- ○ There was an error or something **didn't work**
- ○ Other reason

Please provide more details

You will not receive a reply. Telephone numbers and email addresses will be removed.

Maximum 300 characters

Entitled to be registered

If one of the biological parents isn't listed on the birth certificate but is registered, you can submit:

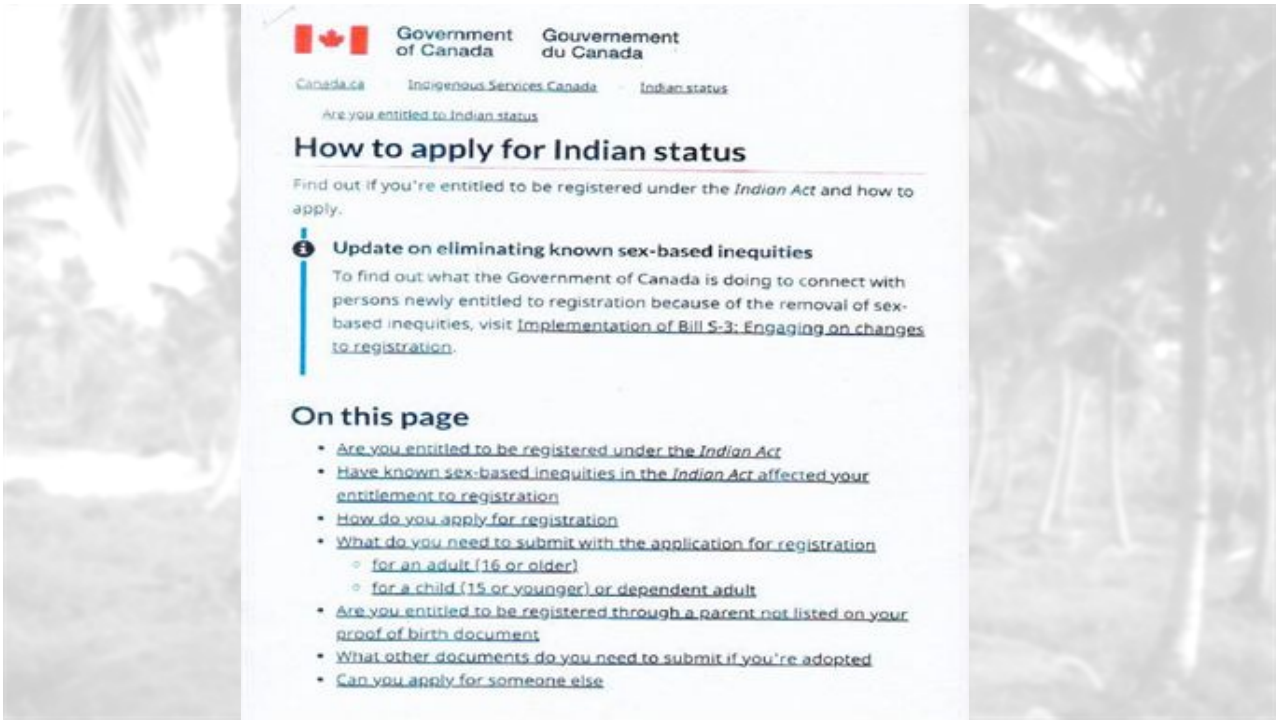
- **An original amended birth certificate listing the unstated parent's name.**
- **Statutory declaration from the parent listed on the birth certificate and from the unstated parent acknowledging parentage**
- **A court order declaring parentage**

Entitled to be registered

- **Original DNA testing results that demonstrate a conclusive 99% probability or higher of a parent-child relationship from an accredited by the Standards Council of Canada**
- **If you can't submit any of these documents, you may submit a statutory declaration from family members, close relative, Elders or community members with knowledge of parentage.**
- **If entitled to be registered, you will receive a letter confirming registration in 6 – 8 months. You will receive a 10-digit registration number. The first 3 numbers identifies the First Nation you are affiliated with.**

Application form

- **Get the Registration application from your IRA, go on-line or drop into the DIAND regional office, for a copy.**
- **Fill out all relevant sections, you must provide information about yourself or the child or dependent adult.**
  Attach all necessary documents as requested.
- **Sign and date the application form.**
- **If either of your parents are entitled to be a member or citizen of a different First Nation, you may have a choice of which First Nation you want to be affiliated with.**



Government of Canada / Gouvernement du Canada

Canada.ca > Indigenous Services Canada > Indian status > Are you entitled to Indian status

How to apply for Indian status

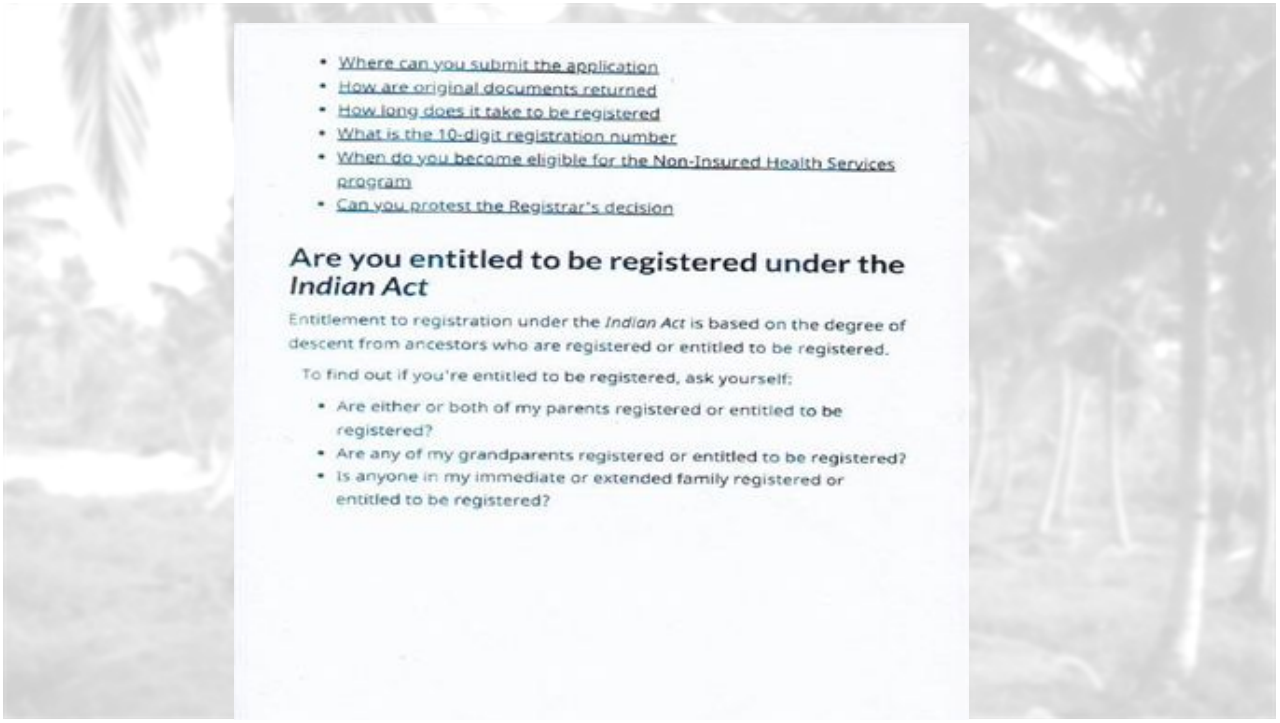
Find out if you're entitled to be registered under the *Indian Act* and how to apply.

Update on eliminating known sex-based inequities

To find out what the Government of Canada is doing to connect with persons newly entitled to registration because of the removal of sex-based inequities, visit Implementation of Bill S-3: Engaging on changes to registration.

On this page

- Are you entitled to be registered under the *Indian Act*
- Have known sex-based inequities in the *Indian Act* affected your entitlement to registration
- How do you apply for registration
- What do you need to submit with the application for registration
  - for an adult (16 or older)
  - for a child (15 or younger) or dependent adult
- Are you entitled to be registered through a parent not listed on your proof of birth document
- What other documents do you need to submit if you're adopted
- Can you apply for someone else



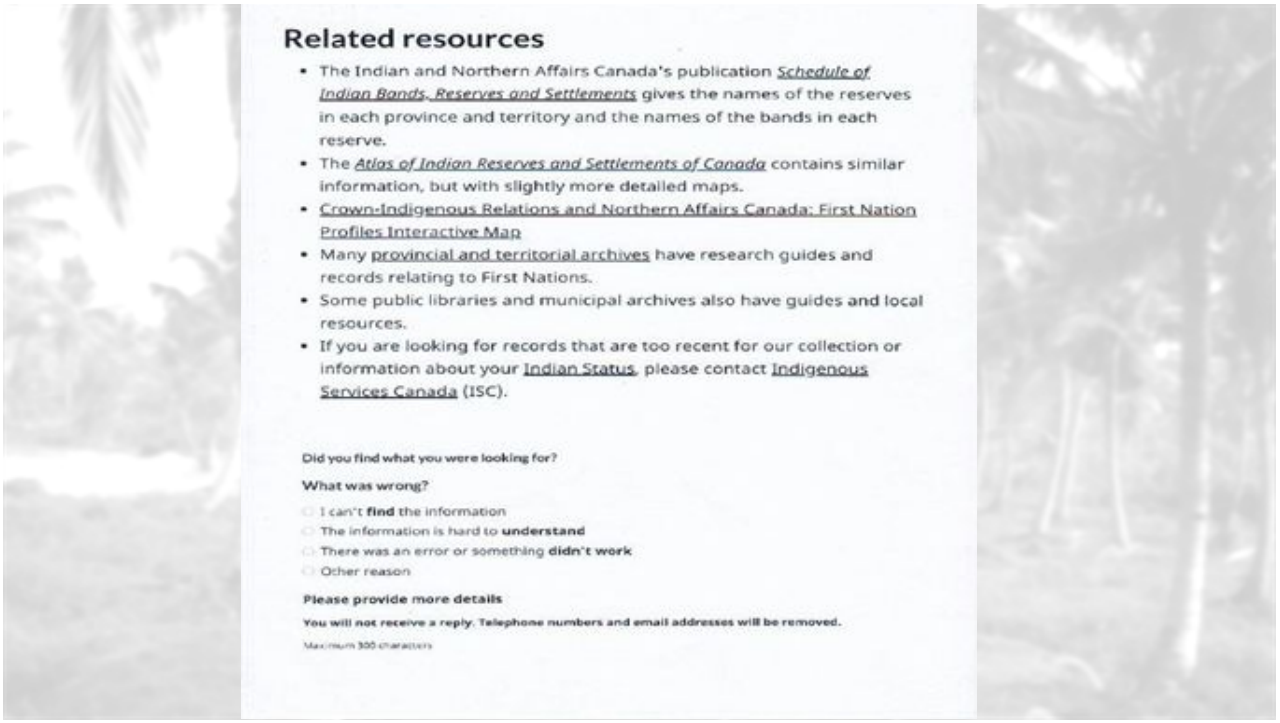
- Where can you submit the application
- How are original documents returned
- How long does it take to be registered
- What is the 10-digit registration number
- When do you become eligible for the Non-Insured Health Services program
- Can you protest the Registrar's decision

Are you entitled to be registered under the *Indian Act*

Entitlement to registration under the *Indian Act* is based on the degree of descent from ancestors who are registered or entitled to be registered.

To find out if you're entitled to be registered, ask yourself:

- Are either or both of my parents registered or entitled to be registered?
- Are any of my grandparents registered or entitled to be registered?
- Is anyone in my immediate or extended family registered or entitled to be registered?



Related resources

- The Indian and Northern Affairs Canada's publication *Schedule of Indian Bands, Reserves and Settlements* gives the names of the reserves in each province and territory and the names of the bands in each reserve.
- The *Atlas of Indian Reserves and Settlements of Canada* contains similar information, but with slightly more detailed maps.
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Did you find what you were looking for?

What was wrong?

- I can't **find** the information
- The information is hard to **understand**
- There was an error or something **didn't work**
- Other reason

Please provide more details

You will not receive a reply. Telephone numbers and email addresses will be removed.

Maximum 300 characters

To be Submitted

You must submit:

- **A completed application for registration of adults (16 & over).**
- **Original birth certificate with parental information.**
- **Valid acceptable identification**
- **If necessary, a Guarantors Declaration**
- **If applying for a SCIS, 2 passport photos**

Difference of name

- **If the name on the application is different from the name on the identification cards you must submit:**
  An original legal name-linking document, such as a change of name certificate, a marriage certificate or a divorce order, that links the previous name with the current name.
- **Or a copy of a legal name-linking document and a copy of a valid acceptable identification with the name that is on the application form.**

Control of membership

- If the First Nation is a Section-10 band, they control their own membership and will have their own membership code in place.
- If you want to become a member of that First Nation, you need to apply in writing requesting to become a member (either by registration or transfer).
- When reviewing an application requesting to become a band member, the Council will abide by their code.
- If necessary, attach a Guarantor Declaration.

Benefits for registered First Nations

- Tax exemption: Income Tax (working on reserve). For vendors and service providers; a valid status card is required to present to them. (Attachment > Indian Act – Section 87)
- Non-Insured Health Benefits: Prescription drugs, dental care, vision care, medical supplies and equipment, mental health counselling , transportation to access health services not available in your community, (Attachment)
- You need to be a registered First Nation or Inuk with a valid status card to be eligible for the Non-Insured Health Benefits (NIHB) Program.
- Social Programs: Income Assistance, child & family services, assisted living,
- Housing, Education (Post Secondary Education > off reserve band members).
- Other Benefits: Canada Child benefit, child disability benefit, goods and services tax/harmonized sales tax credit, disability tax credit, Northern resident's deduction, Canada workers benefit, income is tax exempt, Canada training credit (you need to file your income tax & benefits every year, even if you have no income. Your child must be registered for the Canada child benefit.



Government of Canada | Gouvernement du Canada

Canada.ca > Indigenous Services Canada > Indigenous health > Non-insured health benefits for First Nations and Inuit

Benefits and services under the Non-Insured Health Benefits program

Learn about coverage for drugs, dental and vision care, medical supplies and equipment, mental health counselling and medical transportation. Coverage is available for registered First Nations and recognized Inuit for eligible goods and services obtained in Canada.

Emergency evacuations

For evacuees:

- Accessing Non-Insured Health Benefits
- Accessing a Temporary Confirmation of Registration Document

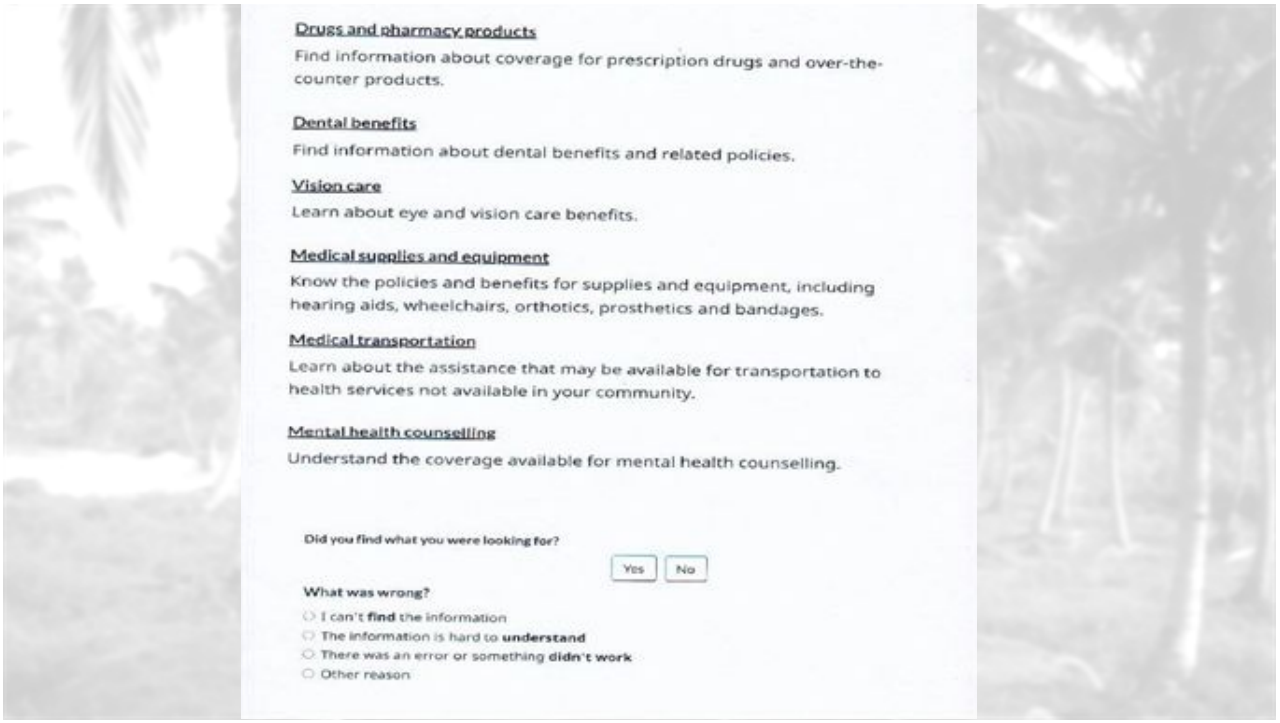
Most requested

- Contact the Non-Insured Health Benefits program

Services and information

Program and benefit updates

Access updates to coverage, policies and benefits.



Drugs and pharmacy products

Find information about coverage for prescription drugs and over-the-counter products.

Dental benefits

Find information about dental benefits and related policies.

Vision care

Learn about eye and vision care benefits.

Medical supplies and equipment

Know the policies and benefits for supplies and equipment, including hearing aids, wheelchairs, orthotics, prosthetics and bandages.

Medical transportation

Learn about the assistance that may be available for transportation to health services not available in your community.

Mental health counselling

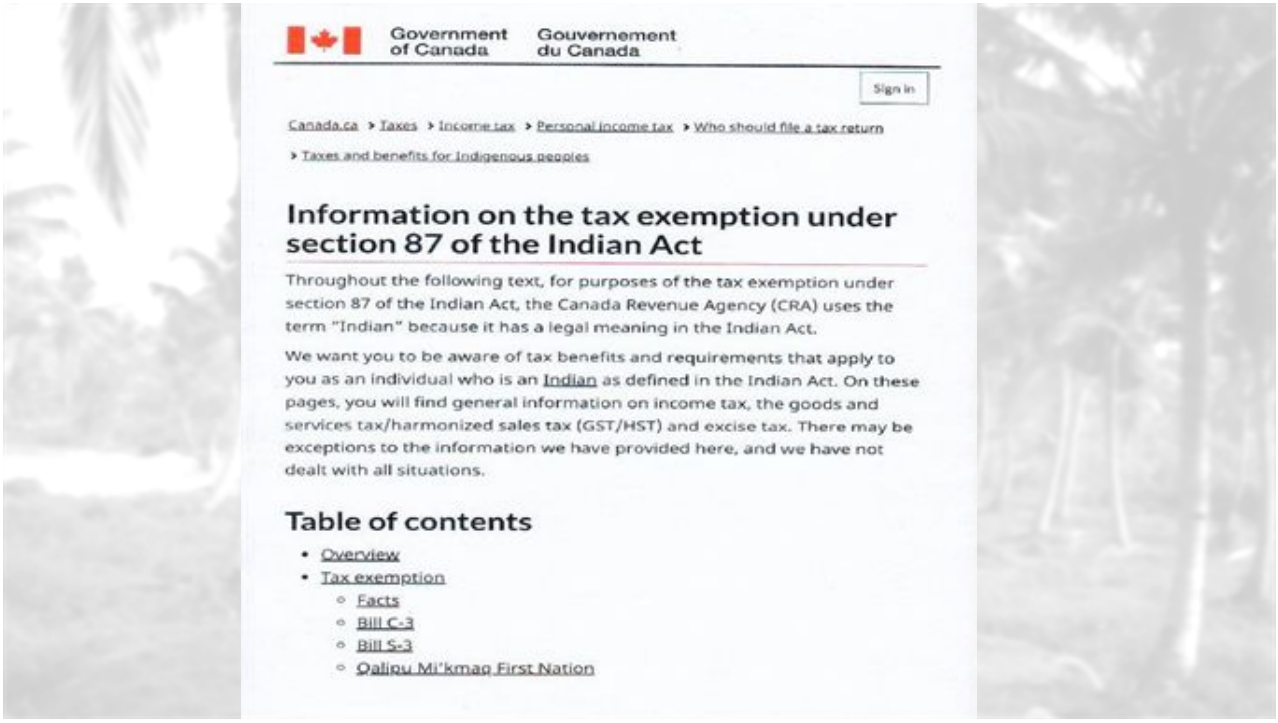
Understand the coverage available for mental health counselling.

Did you find what you were looking for?

Yes | No

What was wrong?

- I can't **find** the information
- The information is hard to **understand**
- There was an error or something **didn't work**
- Other reason



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Sign in

Canada.ca > Taxes > Income tax > Personal income tax > Who should file a tax return > Taxes and benefits for Indigenous peoples

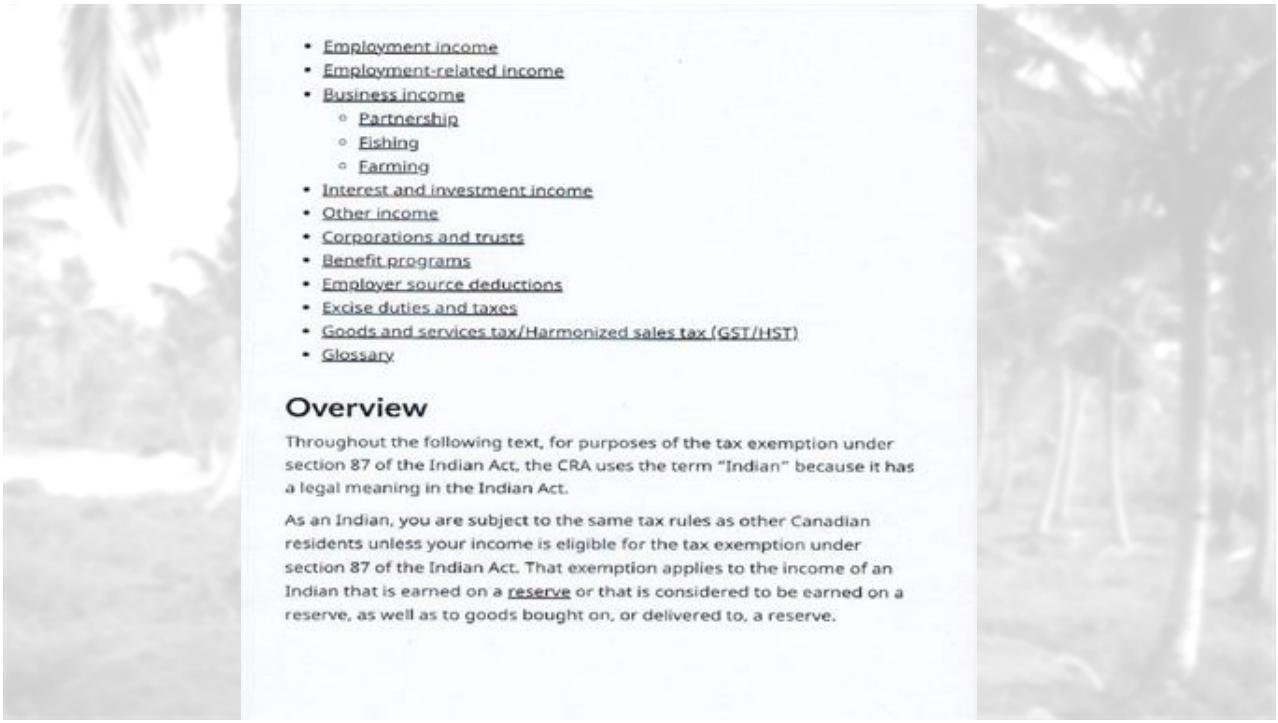
Information on the tax exemption under section 87 of the Indian Act

Throughout the following text, for purposes of the tax exemption under section 87 of the Indian Act, the Canada Revenue Agency (CRA) uses the term "Indian" because it has a legal meaning in the Indian Act.

We want you to be aware of tax benefits and requirements that apply to you as an individual who is an Indian as defined in the Indian Act. On these pages, you will find general information on income tax, the goods and services tax/harmonized sales tax (GST/HST) and excise tax. There may be exceptions to the information we have provided here, and we have not dealt with all situations.

Table of contents

- Overview
- Tax exemption
  - Facts
  - Bill C-3
  - Bill S-3
  - Qalipu Mi'kmaq First Nation



- Employment income
- Employment-related income
- Business income
  - Partnership
  - Fishing
  - Farming
- Interest and investment income
- Other income
- Corporations and trusts
- Benefit programs
- Employer source deductions
- Excise duties and taxes
- Goods and services tax/Harmonized sales tax (GST/HST)
- Glossary

Overview

Throughout the following text, for purposes of the tax exemption under section 87 of the Indian Act, the CRA uses the term "Indian" because it has a legal meaning in the Indian Act.

As an Indian, you are subject to the same tax rules as other Canadian residents unless your income is eligible for the tax exemption under section 87 of the Indian Act. That exemption applies to the income of an Indian that is earned on a reserve or that is considered to be earned on a reserve, as well as to goods bought on, or delivered to, a reserve.

Government of Canada

- How to apply for Indian Status – go to their website (I use INAC)
- Indigenous Services Canada – department deals with First Nations
- Indian Status > How to apply for Indian Status (copy attached).
- FYI - DIAND has more information about:
  Bill C-31: restore entitlement to women who lost it due to marriage. Entitling their children to registration
  Bill C-3: grant entitlement to grandchildren of certain women who regained entitlement under Bill C-3.
  Bill S-3: Eliminate all known sex-based inequities, not addressed by Bill C-31 or Bill C-3 entitling all descendants born before April 17/1985 to register.
- Benefits and Rights for Indigenous People (check Canada.ca)

Concludes my briefing on Registration

- I hope the information is helpful to you.
- Thank you for giving me the opportunity to present a couple of topics to the group ☺

Name: Christopher Cecil Bolton
Positions held: Previous > Band CEO (Manager) 32 years
Monitoring – Site of the Queen of the North
Current > Indian Registry Administrator & Training Manager

Various Boards:

- **North Coast Tribal Council – President**

> Tsimshian Tribal Council – Board of Director

> Aboriginal Financial Officers Association BC – Board of Director

> Aboriginal Financial Officers Association Canada – Board of Director

> First Nation & DIAND Committee – Board of Director

- **Monitor > site of the Queen of the North**

- **United Church of Canada – Board Member of two Committees**

445 Hayimiisaxaa Way
HARTLEY BAY, BC V0V 1A0
Tel: **250-841-2500/2525**
Toll Free: **800-804-5674**
Fax: 855-259-7085

Briefing Notes

Indian Registry Administrator: records the following:

- ***births*** - *original birth certificate is required, both parents listed on it.*
  - *Mother & Fathers address, phone number & email address*
  - *DOB, Registration #, FN affiliated with,*
  - *Applying parent's identification card (photocopy front & back)*

- ***marriages*** (*require photocopy of marriage certificate)*
  - *Complete an Indian Registry Data Entry (marriage)*
  - *Declaration of Surname on Marriage*

- ***deaths*** (*require photocopy of death certificate*)
  - *Complete an Indian Registry Data Entry form (death)*

- ***transfers*** (*letter of request)*
  – Stating full name, DOB & current registration number.
  - Once received I will complete a Band Council Resolution for acceptance of applicant.
  - Council will sign the BCR.
  - Once completed I will mail the transfer request to DIAND.

- *Events Reporting Summary*
  - Done on monthly basis and submitted to DIAND.
    FYI DIAND states it takes up to 6 months to 2 years for their approval on some documents (i.e. Transfers)
  - Note: Registration of a child, type this on the envelope (DIAND will get to it quicker)

- **Membership list** – update on regular basis
  - ***Total 850****: 402 males; 448 females; HB – 169; Off – 708)*
  - Notify me of any changes to your address or phone number.
  - Need email address.

- **Status cards** – requires two identification cards (*photocopy the front & back*)
  If you have a *passport/BCDL-Health that would be the only id you would need.*
    - Recent photo is required (1" x 1 ¼")
    - Signature on CIS application & status card (must be done in the *presence of IRA*)
    - Laminate card (photocopy then pass it on)

Secure Certification of Indian Status (SCIS) is good for **10 years**.
– there are two options to apply for this status card.

1. **INAC** – select *Indigenous Services Canada*
- Select Status
- Then select application (has instructions available)
- Must provide two passport photos.

2. **One Feather** – click on Status card,
    - It will direct you to the form & how to complete it.
    - They have an app to take the photo's required.

Training:
Gitga'at Application for Training Sponsorship

- Need applicants address, phone number & email address.
- Applicant to provide *brochure* – for the training course.
- Require *name* of the course, *tuition cost* (& other costs).
- Require the *start & end date* and location of the course.
- What Certificate will be awarded for the completion of the course?
- Will another sponsor provide funding for the course?

Once a Gitga'at Band Member phones or emails me to let me know what training course they are interested in taking, I will complete the Application for Gitga'at Training Sponsorship for him/her. Once I have all the information required, I will email the application to them for their signature.
Once we both signed the application form, I will hand deliver it to our Finance Dept.

Cell #: **778-884-2468**
Email: **chrisbolton@gitgaat.ca**

(RE)CLAIMING INDIAN STATUS



BEAR PAW
MEDIA AND EDUCATION

These citations are referenced throughout the publication text.

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9. Métis Settlements Act, RSA 2000, c M-14, Section 75.
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12. Wallace, R. 2019. Alberta Archives. Personal communication. All information in the family resource section is adapted from R. Wallace interview for "(Re)claiming Indian Status" (2020) by BearPaw Legal Education and Media.



WHAT IS INDIAN STATUS?



"Indian Status" is a specific legal identity of an Indigenous person who is registered as an "Indian" under Section 6 of Canada's Indian Act.

If you are registered, your name is added to the Indian Register – a central registry maintained by Indigenous Services Canada (formerly Indian and Northern Affairs Canada).

Indigenous people with Status *may* be eligible for a range of rights, benefits, and access to programs and services from the federal and provincial or territorial governments such as Treaty payments, education funding, non-insured health benefits programs and potential tax benefits.[1]

Indian Status is widely acknowledged as a race and sex-based legal definition rather than a true representation of Indigenous ancestry and cultures.

Some Indigenous people consider Status to be an affirmation of our ancestry. In urban areas, Indian Status can help provide some of us with a sense of belonging to our communities when we are far from our ancestral homelands.

For those who are not eligible for Status, it can cause some of us to question our own claim to an Indian identity and our legitimacy and authenticity as an Indigenous person.[2]

We hope this booklet provides you with a starting point to help you figure out if you are eligible to apply for Status. We provide the steps to the application process, the documents required for your Status registration application and some resources to help you in your application.

TAKE GOOD CARE OF YOURSELF AND ASK SOMEONE YOU TRUST TO SUPPORT YOU THROUGH THE STATUS APPLICATION PROCESS. IF YOU REQUIRE ASSISTANCE, CONTACT NATIVE COUNSELLING SERVICES OF ALBERTA, RESIDENTIAL SCHOOL HEALTH SUPPORT PROGRAM AT 780-482-7894





TIMELINE DEFINITIONS

WHAT DOES "ENFRANCHISEMENT" MEAN?

Historically, Indigenous people could lose their Indian Status in a variety of ways in order to become a full Canadian citizen. The government process of removing Status to get citizenship rights was called "enfranchisement."

For example: If a Status Indian obtained a university degree and/or became a doctor or lawyer, they would automatically lose their Status.[4]

WHAT IS THE "1951 CUT-OFF"?

In 2011, Bill C-3 amendments to the *Indian Act*, individuals were entitled to obtain Status if (a) their grandmother had lost her Indian Status because she married a non-Status man; and (b) their mother had at least one child or adopted one child on or after September 4, 1951.

If an individual had a grandmother who lost their Indian Status because she married a non-Status man but their mother had all of their children before September 4, 1951, the grandchild could not obtain Indian Status.

REMOVAL OF THE "1951 CUT-OFF"

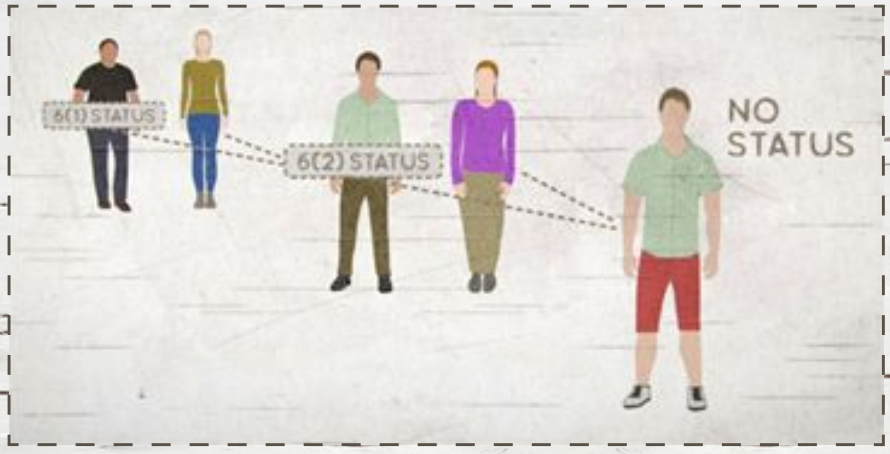
As of August 15, 2019, all descendants born prior to April 17, 1985 to women who lost Indian Status or were removed from band lists because of their marriage to a man without Status dating back to 1869 will be entitled to registration. This means these descendants would be in line with the descendants of women who lost Indian Status because of their marriage to a non-Status man who had children after September 4, 1951.

For more information about the 1951 cut-off, go to:
www.rcaanc-cirnac.gc.ca/eng/1540403451139/1568898699984

WHAT IS THE "SECOND GENERATION CUT-OFF"? DOES IT STILL APPLY?

Yes, the second generation cut-off still continues to apply after 1985. Introduced in 1985 as part of the Bill C-31, it means that after two consecutive generations of parenting with a person who is not entitled to registration (a non-Indian), the third generation is no longer entitled to (cut-off from) registration. If you only have one grandparent and one parent who is not entitled to registration, you would not be entitled to register as a Status Indian.

The following diagram illustrates how the second-generation cut-off works:



TO REQUEST A CATEGORY AMENDMENT FROM SECTION 6(2) TO 6(1):

If you have been affected by known sex-based inequalities in the *Indian Act* and already have Status, the Indian Registrar can review your registration category (under Section 6) and it could be amended.

To request a category amendment (From Section 6(2) to 6(1)):

1. Submit a photocopy of valid federal, provincial or territorial government I.D. that includes your name, date of birth, photo and signature.

2. You must also send a signed and dated written request with your name, registration number and mailing address:

- In person to any Indigenous Services Canada regional office. Resources on page #19 for Alberta regional offices.
- In person at any First Nation or band office (if applicable), or
- By mail to: Application Processing Unit
  Indigenous Services Canada
  Box 6700
  Winnipeg MB, R3C 5R5

AM I ELIGIBLE FOR INDIAN STATUS?

Eligibility for Indian Status under the *Indian Act* is based on how close you are (generational degree) from your ancestors who were registered or were entitled to be registered.[5]

You may obtain Indian Status if your parent, grandparent or great-grandparent had Status or was eligible for Status on your mother or father's side.

ASK YOURSELF:

- Does one of my relatives have Status already?
- Did my mother, grandmother or great-grandmother lose their Status at some point in our family history?

If you answered "yes" to either of these questions, you may be eligible for Indian Status.

IN GENERAL, YOU MAY BE ELIGIBLE FOR INDIAN STATUS IF:

- At least one of your parents is or was registered or entitled to be registered under Section 6(1) of the *Indian Act*, or
- Both of your parents are registered under Section 6(2) of the *Indian Act*.
- Your mother, grandmother or great-grandmother was born out of wedlock of an Indian father and a non-Indian mother between September 4, 1951, and April 16, 1985.

For more on Section 6 of the *Indian Act*, go to:
laws-lois.justice.gc.ca/eng/acts/i-5/section-6.html#s-6ss-(2)IDQEBDA

YOU AND YOUR FAMILY MAY ALSO BE ELIGIBLE FOR STATUS IF...

Your mother, grandmother or great-grandmother was born out of wedlock of an Indian father and a non-Indian mother between September 4, 1951, and April 16, 1985 and became eligible under section 6(1)(c.3) (Descheneaux c. Canada).

You, your mother, or grandmother were unmarried and voluntarily enfranchised as an adult between Sept 4, 1951 and April 16, 1985, you may be eligible for a category amendment (Hele c. Attorney General of Canada). Note: The Hele decision does not affect all women or their descendants that were enfranchised prior to 1985.

Due to the Hele decision, Indigenous Services Canada is processing all active applications – there is no need to reapply.

If you applied and were denied, you will need to reapply for assessment of a category amendment as a result of the Hele decision.

For more information on the Hele decision and changes – go to:
www.sac-isc.gc.ca/eng/1619464827538/1619464857840

HOW DO I APPLY FOR STATUS?

The following information is for adult applicants (16+ years old). For information on child (15 years or younger) and dependent adult applications go to: www.sac-isc.gc.ca/eng/1462808207464/1572460627149

Since the enactment of Bill S-3 (2019), there is only one application form for all Status applications. The application includes the registration (Application for Registration on the Indian Register) and card application (Secure Certificate of Indian Status). **It can take between 6 months to 2 years to process your application.**

1. GET APPLICATION FORM

Do you need help finding the right form? Go to:
www.sac-isc.gc.ca/eng/1584384814016/1584385025986

If you are applying for Status for the first time, there is 1 application for your registration and your status card called "Application for Registration on the Indian Register and for the Secure Certificate of Indian Status."

ONLINE: To get a printable copy – or saveable copy, go to:
www.sac-isc.gc.ca/eng/1462806841047/1572461062751#frm-83-168

BY MAIL: Call Public Enquiries, toll-free: 1-800-567-9604

IN PERSON: Go to an Indigenous Services Canada, Regional Office:
www.sac-isc.gc.ca/eng/1100100016936/1534342668402

You can now:

- **Use your traditional name on your Status card.**
- **Select a non-binary gender marker on your application or status card. Gender options include: X (another gender), F (Female), M (Male). Your gender marker does not need to match the gender listed on other documents you submit with your application.**

2. FIND A GUARANTOR

A guarantor is a person (18+ years old) who can confirm your identity for your application for Indian Status or a Status card.

YOU NEED A GUARANTOR IF:

- You are applying by mail
- You are providing valid identification that does not meet all the requirements (name, date of birth, photo and signature)

A GUARANTOR MUST:

- Be 18 years of age or older
- Live in Canada or the United States
- Be able to be contacted by phone by Indigenous Services Canada to confirm information about you
- Have known you personally for **at least 2 years**. They have to be able to confirm: your name, age, place of birth, physical description, and some personal history (for example, where you live currently)
- Be a person with a valid Status card (and applied for it when they were 16 years old or older) OR be a person working in any of the following professions:
    - Elected or appointed official (including Band Chief or Council)
    - Judge, some justice personnel, police
    - Lawyers
    - Medical professionals
    - Minister of a religion
    - Social worker
    - Educator
    - Professional accountants or engineers
    - Military personnel

TO FIND THE GUARANTOR DECLARATION FORM GO TO:

www.sac-isc.gc.ca/eng/1584384814016/1584385025986

3. FILL OUT YOUR APPLICATION FORM

You can fill out the application form electronically (with the fillable/saveable form on page #) or you can print the form and fill it out with **blue or black ink**.

For detailed instructions on how to fill out the form, go to:
www.sac-isc.gc.ca/eng/1100100032421/1572461539061#How_do_you_apply

You will need the following information about yourself and your parents and grandparents for your application (with supporting documents):

- Legal name
- Date of birth
- First Nation or Band name
- Registration number
- Contact information
- Adoption information

You have to indicate which First Nation or Band you, or your parents or grandparents belonged. If there are multiple First Nations or Bands, you can state which band you prefer to belong.

To help establish your entitlement to registration, it can be helpful to provide:

- The names of any relatives (brothers, sisters, cousins, aunts, uncles) who are or were registered with Status.
- Information about ancestors including their names, band numbers, their family members with registration.

This information will help provide evidence that connects you to your family and help show that you are also entitled to Status. The more information you can provide the better. Indigenous Services Canada can conduct research in its own records to determine your registration eligibility.

MORE COMPLEX APPLICATIONS

Your application for Status may be more complex and may take more time to process and require more documentation, if you cannot provide a Status number of a relative on your application for any of the following circumstances:

1. Your grandmother or great grandmother lost Status
2. You cannot prove paternity (father is missing from birth certificate)
3. You were adopted, or
4. You have difficulty accessing familial records or records are missing

Indigenous Services Canada has the option (discretion) to grant Status based on the probability (the likelihood) that your relative had Status or was eligible for Status at some point.

If your application is more complex, Indigenous Services Canada will contact you if they require more documentation.

4. SIGN AND DATE YOUR APPLICATION FORM

Before you submit or send in your application, make sure you:

1. Filled out all of the relevant sections on the form – including the checklist of documents.
2. Signed and dated the form.
3. Included all required documents (originals will be returned to you by mail).

When you submit your application, the Indian Registrar will send you a receipt of the application by mail. Be sure to keep this for your records – it has your file number on it.

If your application is missing information, it could delay the process or Indigenous Services Canada could determine it is incomplete and return it to you.

5. SUBMIT YOUR APPLICATION

You can submit your application in the following ways:

1) You can mail the secure status card application and necessary documents to:

National Processing Unit
Indigenous Services Canada
10 rue Wellington
Gatineau QC, K1A0H4

2) Indigenous Services Canada Alberta Regional Office in Edmonton

3) Indigenous Services Canada Alberta Field Office in Calgary

4) Treaty 7 First Nations Offices

If you have questions about where to send your application, contact Public Enquiries.





FREQUENTLY ASKED QUESTIONS

1. WHAT IF I ONLY HAVE A SINGLE PARENT LISTED ON MY BIRTH CERTIFICATE?

Your birth certificate can help determine if you are entitled to registration based on your parents' entitlement. It is evidence of your parentage (ancestry).

If one of your biological parents is not listed on your birth certificate, the Indian Registrar may ask that you change your birth certificate to include both parents.

If it is not possible to change the birth certificate, the Indian Registrar may accept a statutory declaration signed by one or both of the biological parents, by a member of the unstated parent's immediate family, or by a close relative or Elder, that confirms the identity of the unstated parent.

Following the *Gehl Decision* and *Bill S-3*, you can include other evidence to establish your Indian parentage such as:

- Amended long-form birth certificate
- Statutory declaration
- Census records
- Court documents
- Church, school, or hospital records
- Band council resolutions

The Indian Registrar must consider all relevant evidence and assess it based on the known challenges to getting certain pieces of evidence, like historical records, and take into account a person's circumstance that can justify the inability to produce information about relatives.

The Indian Registrar decides Indian parentage on the standard of balance of probabilities (the likelihood of eligibility). The decision must answer this question: Has the applicant established that it is more probable than not that the parent, grandparent or ancestor is, was or would have been entitled to be registered? [7]

For more information, go to:
www.sac-isc.gc.ca/eng/1516895024877/1572460772889

2. HOW DO I APPLY FOR STATUS IF I WAS ADOPTED?

If you were adopted, you will need to provide:

1. Your completed application form.
2. Original post-adoption birth certificate listing adoptive parents names. You can also provide the pre-adoption birth certificate listing birth parents' names (if available).
3. Photocopy of adoption order or photocopy of letter from social services confirming the details of the adoption.
4. Letter outlining any information about biological family members who have or had Indian Status (if possible).

If you have questions, contact the Adoption Unit by email at:
aadnc.infopubs.aandc@canada.ca [8]

LEGAL VS. CUSTOM ADOPTION

A legal adoption is a court process that includes legal documents and an adoption order. A custom adoption follows Indigenous cultural traditions.

If you were adopted as a minor (17 years of age, or less in Alberta) by Indian parents through legal or custom adoption can register for Indian Status.

For more information, go to:
www.sac-isc.gc.ca/eng/1462808207464/1572460627149

3. CAN I HAVE MÉTIS STATUS AND INDIAN STATUS AT THE SAME TIME IN ALBERTA?

The Métis Settlements Act (provincial legislation), with some limited exceptions, does not allow adults who register as Status Indians to also be a member of a Métis Settlement.[9]

The Bylaws of the Métis Nation of Alberta do not allow registered Status Indians and those on a Band list from being members of the Métis Nation of Alberta.[10]

4. WHAT IF I DO NOT AGREE WITH THE INDIAN REGISTRAR'S DECISION ON MY APPLICATION?

If you do not agree with the Indian Registrar's decision on your application, you can appeal it by submitting "a protest" under Section 14.2 of the *Indian Act*.

A PROTEST MUST:

- Briefly state the reason by describing how the Indian Act may have been misinterpreted or by indicating what evidence may have been overlooked in the decision.
- Be submitted **in writing** to the Indian registrar within **3 years from the decision** by the person directly impacted by the decision or their **authorized representative (such as a lawyer), band council or band member.**[11]

For more information, go to:
https://www.sac-isc.gc.ca/eng/1462808710500/1572460546047

HOW TO BEGIN YOUR FAMILY RESEARCH

Your family's stories (oral history) can provide information about your family history and help you in your research to prove you are eligible for Status.[12]

Researching your family history can take a lot of time and resources. Here are some starting points to help begin your search:

1. **Talk to your family and/or reach out to your family's home community and Elders to learn information about your relative's:**

- Birth date,
- Where your family lived and the time period,
- The age of the relative at the time you are researching,
- Any potential religious connection to a Church, or
- Name and location of residential school.

2. **Go to the Alberta Archives – Set up an appointment to meet an Archivist**

   The Alberta Archives has Government of Alberta records from Vital Statistics (birth, marriage and death records) and Church records (marriages, births, baptism lists). **There are no fees to access the archives. It is a public space.**

BEFORE YOU GO TO THE ALBERTA ARCHIVES, KNOW THAT:

- Research takes time.
- It may be triggering to find records related to residential schools and churches.
- You may feel confused or frustrated as some of the archive searching is not intuitive and some records may not exist.
- Consider taking someone you trust with you to the Archives.

Call ahead to set up an appointment with a trained Alberta archivist (a researcher). They can help you get some records ahead of time so they are there for you when you arrive.

If you walk-in, go to the reference desk. Tell the person at the desk that you need help to do genealogical research for your Status application.

MEET WITH AN ARCHIVIST

When you meet with an archivist, they will have you fill out a registration form to use the archives.

Be prepared to share your family information with the archivist. By listening to your story, they can help you with your family research. If you have any of the following information, it can greatly help your research:

- Where your family lived (location) and the approximate years that they lived in that location,
- Name and ages of relatives during the time period of your search, or
- Any religious connection – name of a Church or Mission.

The archivist may take notes to help you decide how and why to look into certain records.

GETTING THE ARCHIVES

Unlike a regular library, the archives are not on shelves. You have to submit request slips to get documents from temperature controlled vaults.

All records in the archives are one-of-a-kind. You will have to:

- Get photocopies made (fees apply),
- Take a photo of the archive with no flash (no fees apply), or
- Get scans of archives (fees apply).

There is a chance that there will be gaps in records (missing information) due to fires, floods, and mold that may have damaged or erased records completely. There are a number of resources to refer to in order to establish ancestry including, but not limited to:

- First Nation Band records
- Church, hospital and school records
- Library and Archives Canada
- Provincial and/or Territorial Vital Statistics
- Band Council Resolutions
- Court Documents
- Statutory Declarations
- Ancestry websites



RESOURCES

Application Process

If you have other questions, contact **Public Enquiries** at:
Email: aadnc.infopubs.aandc@canada.ca
Phone (toll-free): 1-800-567-9604
TTY (toll-free): 1-866-553-0554

To find all application forms for Indian Status, Status cards, and updates to the Indian Registrar, go to: www.sac-isc.gc.ca/eng/1462806841047/1572461062751

Indigenous Services Canada, Alberta Regional Offices

AANDC Alberta Region Head Office
630 Canada Place
9700 Jasper Avenue
Edmonton, AB T5J 4G2
Phone: (780) 495-2773
Fax: (780) 495-4088

AANDC Southern Alberta Field Services Office
Suite 300
9911 Chiila Boulevard
TSUU T'INA, AB T2W 6H6
Phone: (403) 292-5901
Fax: (403) 292-6903

Family Research Resources

Alberta Archives
(for historic records)
Phone: 780-427-1750
Email: paa@gov.ab.ca

Library and Archives Canada
(National Archives)
Phone: 1-866-578-7777

Vital statistics (Birth, Death, and Marriage Records)

Hours: 8:15 am to 4:30 pm
(open Monday to Friday, closed statutory holidays)
Phone: 780-427-7013 (Edmonton and area)
Toll free: 310-0000 before the phone number (in Alberta)
Email: vs@gov.ab.ca

BEAR PAW MEDIA AND EDUCATION

NCSA Native Counselling Services of Alberta EST. 1970

Find us @BearPawLegal

BearPawLegalResources.ca
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CHILD PROTECTION MEETS FAMILY LAW

FEENIE MACDONALD 2023

WHAT IS CHILD PROTECTION LAW?

- Children are protected under the *Child, Family and Community Service Act*
- Administered by the Ministry of Children and Family Development
- Parents must
  - Keep their children safe
  - Take care of their physical and emotional needs
  - Get them medical care
  - Protect them from abuse
  - Not neglect their children

WHAT IS FAMILY LAW?

- Governs relationships between spouses and between parents and their children
- If parties cannot agree, they can file an application under the Family Law Act and the courts will determine the outcome.
- Best interests of the child is the deciding factor

WHEN DO THESE 2 SYSTEMS INTERACT

- Removals and the parent entitled to custody
- Obtaining temporary custody orders under the CFCSA
- Obtaining permanent custody orders under the CFCSA
- Family Law Act Applications to become a Guardian
- Priority parenting applications under the Family Law Act

WHO IS THE PARENT ENTITLED TO CUSTODY?

- Under the CFCSA, the Director or the courts can return to the parents who are entitled to custody
- FLA brought in new definitions and now, the Director can return to "guardians"
- Under the Family Law Act, biological parents who reside with the child or regularly care for the child are guardians
- If the Director assess that a guardian of the child is protective, the child will be returned to that person.

TEMPORARY CUSTODY ORDERS UNDER THE CFCSA

- S. 35(2)(d) and 41(1)(b) of the CFCSA
- Approval process – may include criminal record check, prior records check, collatorals and home visit
- Director will supervise the placement, including terms for access & reunification for parents and family
- Caregivers are paid by the Ministry to care for the children

PERMANENT CUSTODY ORDERS UNDER THE CFCSA

- Caregivers become permanent custodians of the child under s. 54.01 (pre-CCO) and s. 54.1 (post-CCO) orders
- Approval process – includes criminal record check, prior records check, collatorals and home visit
- Parents are no longer guardians of the child. Parents could subsequently apply under FLA to become guardians again
- Access orders granted under s. 57.01 and 57 of the CFCSA are administered under FLA
- Caregivers are paid by the Ministry to care for the children

BECOMING A GUARDIAN UNDER THE FAMILY LAW ACT

- Biological Parents who are not guardians can apply under the Family Law Act to become guardians
- Extended family and friends can apply under the Family Law Act to become guardians
- Applications under the Family Law Act are served on the parents
- Persons complete a criminal records check, a protection order registry check and a check for prior Ministry involvement
- Judge grants the order on being satisfied it is in child's best interest

PRIORITY PARENTING APPLICATIONS UNDER THE FAMILY LAW ACT

- New procedure under the Family Law Act, supposed to result in applications being prioritized
- To prevent a child going into the care of the Director
- Or to have a child come out of care
- Application process is started by person applying
- Director fills out one section of the application form to confirm that an order will prevent a child going into care or result in a child coming out of care

WORKING WITH THE MINISTRY

- Alternatives to court or in conjunction with court
- Advocates can help parents navigate the system
- Develop a Safety Plan or come to a written agreement

SAFETY PLANS

- This is a plan that the parent and social worker develop to take better care of the child
  - What the problem is
  - What parent can do
  - How long it will take
  - What help parent needs
  - What child wants (if older child)

WORKING WITH THE MINISTRY- AGREEMENTS

- Social worker works with parents rather than take case to court, develop a plan that outlines support services the Director can provide
- Family or friends take care of child with consent of the parent and support of the Director (s. 8 agreement)
- Parents sign a voluntary care agreement
- Youth Agreements
- Special Needs Agreements

WAYS TO GET AGREEMENT

- Mediation
- Family group conference
- Traditional decision making
- Family case conferences

TIPS FOR AGREEMENTS

- Get help from a lawyer and an advocate
- Parent should be part of decision
- Be realistic of what parent can do
- Check time limits
- Take notes

WHAT THE DIRECTOR CANNOT DO

- The Director is not a parenting coordinator
- They do not provide supervised access for children that are not in care. There are rare exceptions – there must be a child protection concern
- Find housing

HIGH CONFLICT FAMILY LAW CASES

- When high conflict becomes a protection issue
- Malicious reports
- Disclosure of Ministry file

WHAT CAN ADVOCATES DO

- Support client to obtain information for services
- Go to mediations, family group decisions, traditional decision making and family conferences
- Provide information about process
- Assist with obtaining legal aid
- Assist lawyer to support client

SIGNIFICANT DEVELOPMENTS IN THE LAW

- Canada removed its objector status to the UN Declaration on the Rights of Indigenous Peoples in 2016
- BC enacted the Declaration on the Rights of Indigenous Peoples act in 2019
- An Act Respecting First Nations, Inuit and Metis Children, Youth and Families became law in 2020
- Several amendments made to the CFCSA over the years that are in line with the Federal Act

Poverty Law Advocacy Program Scope of Service

2019

Overall Objective: The advocate will provide free legal information, advocacy, and representation to low-income people in the community.

Poverty Law Matters Covered:

- Income security, income assistance;
- Persons with Disability (PWD) and CPP-Disability (CPP-D)
- Tenancy issues: RTA and non-RTA issues including mobile homes, Co-ops, shared accommodation, and room rentals;
- Employment law: EI, ESB;
- Old Age Security;
- Debt and consumer law;
- Workers' rights;
- Civil Resolution Tribunal (CRT) assistance on co-op, non-RTA housing, and small claims.
    - advocates ***should not*** cover strata, ICBC/motor vehicle, and personal injury matters.
- Aboriginal law issues including Indian status applications, health benefits, band membership applications, housing, and income security;
- Family Law – information and referral only; and
- Other areas of law will be considered when those issues are connected with poverty law matters and when not covered by legal aid.

1. Information and Referral:

- Being available to clients in their communities;
- Reviewing information provided by clients;
- Explaining information and process for clients;
- Making legal information available; and
- Providing appropriate referrals as needed.

2. Advocacy:

- Identifying clients' legal issues; i.e. identifying why a client does not have disability benefits;
- Providing information about benefits;
- Advocating with decision-makers on behalf of clients;
- Prioritizing clients legal needs and helping them choose realistic solutions; and
- Representing clients at tribunals and other hearings.

3. Systemic Advocacy:

- Sometimes it is necessary to address systemic, substantive and procedural issues that affect more than one client with the relevant department or decisionmaker. This should involve specific concerns with specific recommendations for change.

4. Becoming a Commissioner for Taking Affidavits:

- The advocate, their organization, and their supervising lawyer have discretion as to:
  - whether to seek the appointment order; and
  - deciding who can access the service.

- This discretion is subject to the following limitations:
  - the supervising lawyer must be in agreement with the advocate obtaining the appointment as commissioner;
  - advocates must limit their commissioning services to clients of the organization;
  - advocates must not commission affidavits or statutory declarations on any matter that relates to real property or any other property or matters with a value in excess of $20,000;
  - advocates must take regular Law Foundation training on the correct procedure for commissioning affidavits and statutory declarations; and
  - advocates must complete a checklist confirming the procedure they followed when confirming the identity of the client; the fact sheet must remain on the file after closing.

5. Public Legal Education (PLE):

- While PLE is not a core service or required, most advocacy programs will likely provide some limited PLE workshops and take initiative in doing so; and
- Connect with the Law Matters Program at their local public library.

The advocate will:

- Interview clients to help identify legal issues, prioritize their legal needs, and help them choose realistic and fair legal solutions by providing legal information, advocacy, and appropriate referrals to other specialized advocacy programs, lawyers and other resources;
- Provide clients with options and assist them with decision-making - keeping in mind their specific needs due to disability, cultural or language barriers, literacy issues, transportation and childcare issues; and
- Meet regularly with a supervising lawyer for advice and file review.

Civil Resolution Tribunal (CRT):

The advocate should consider a means test or assessment prior to assisting a client with the CRT.

Advocates can be either be a “helper” or a “representative”. A helper cannot talk to the CRT on a clients’ behalf but can provide support to the client such as helping them stay organized, taking notes, provide emotional support, and helping them fill out forms. A representative can speak to the CRT on the clients’ behalf and make agreements on their behalf (recognizing that the client will then have to follow through on what is agreed to), act as the contact person for communication with the CRT, file documents on behalf of the client, discuss the dispute with CRT staff, and speak during the tribunal or oral hearing. If a client requests that an advocate act as a representative with the CRT the client must ask permission of the CRT to do so.

Other functions:

- Identifying gaps in services and systemic issues and collaborating with others to identify solutions where appropriate;
- Developing legal resources and hand-outs;
- Organizing pro bono legal clinics;
- Acting as a liaison to the justice system; and
- Staying apprised of new legal developments and resources.

Conflicts Policy:

All organizations should develop a Conflict Policy. Conflicts can arise where the agency has already represented another party, even outside the poverty law program. Each program will develop a conflicts policy. Advocacy offices should be designed to represent the interests of only one party to a dispute and therefore must keep a robust and up-to-date system of checking for conflicts. Services will be provided to the clients on a first come first served basis.

If a Poverty Law Advocacy program and a Family Law Advocacy program are housed in the same organization, the programs will share client lists. Accessing one program will disqualify the opposing separating spouse from accessing the other program. First come, first served means that if client A is using poverty law services, their separating spouse B cannot access the family law advocate. But client B can access other services at the agency. Clients who are “conflicted out” should be referred to another poverty law advocacy program in the closest community.

Law Foundation Training:

Law Foundation Advocates are expected:

- To attend the Legal Advocate Training Course;
- To attend the Provincial Training Conference every year; and

- To avail themselves of the Law Foundation Education and Training Fund where appropriate. Legal advocates funded by the Law Foundation working at least .5 FTE may apply to the fund for financial support for the costs of:
    - training for professional development, or
    - counselling to support advocates dealing with trauma related to their work.

Suggested Percentages as Guidelines:

- Advocacy 80% (75% if working in a focused area with 5% for Law Reform)
- PLE – 10%
- Community Involvement – 2.5%
- Systemic Advocacy - 2.5%
- Legal Supervision, Administration, and Training – 5%

If there is ambiguity or uncertainty as to the meaning of terms within this document, then the advocacy program will contact the law foundation program director to resolve the ambiguity or uncertainty.

Mental Health Supports Program

THE LAW FOUNDATION OF BRITISH COLUMBIA

OVERVIEW OF PROGRAM

- Available to all Foundation funded individuals at grantee organizations who are engaged in providing direct client-facing legal and advocacy services. This includes part-time and full-time advocates, clinical services staff lawyers, articling students, court workers, Indigenous Elder and court coordinators, and legal assistants and other support staff.
- All eligible individuals can access up to $2,500 per calendar year.
- Intended to support access to services that engage a support provider specializing in mental, emotional, and spiritual well-being.

ACCESSING SUPPORT

- To submit a request for funds or ask a question, send an email to counselling@lawfoundationbc.org
- We will ask for information to confirm the eligibility of your request (e.g., your role/title and work email) and for receipt(s) for services.
- Once eligibility has been confirmed, individuals will be reimbursed directly by email transfer.
- Funding is typically provided on a reimbursement basis, but we can consider alternative arrangements as needed.

CONFIDENTIALITY AND PRIVACY

- The counselling@lawfoundationbc.org email is only accessed by designated Foundation staff who hold all requests and communications in strict confidence.
- Foundation staff only assess the eligibility of expenses, not an individual's need for the requested supports.
- Individuals do not need to inform their employer or Grants Manager that they are accessing support through the program.
- Any correspondence sent in error will be deleted.

EDUCATION AND TRAINING

- Professional Development – Advocates and Direct Legal Service Providers stream of funding is available to Foundation funded individuals at ongoing grantees who are engaged in providing direct client-facing legal and advocacy services.
- Eligible individuals working full-time or 0.5 FTE and above can access up to $1,000 per year. Eligible individuals working part-time below 0.5 FTE can access up to $500 per year.
- To learn more or initiate the application process, reach out to your Grants Manager at the Foundation.



GENERAL SUPPORT

Clio Support
Available 24/5
Access from your Clio portal or via phone 1-888-858-2546

LFBC-Clio Info Page & Handbook
www.lawfoundationbc.org/clio
Password: LFBCclio

Weekly Thursday Office Hours with Clio Trainer (November)
Email Tara Cain for the week's link: tara.cain@clio.com

PRE/POST-MIGRATION / OTHER SPECIFIC SUPPORT

Law Foundation Clio Team
Kayla Black, Arnold Bundotich, Veenu Saini
techdevelopment@lawfoundationbc.org

Susan Atkins, Third-Party Consultant at SEA EDiscovery
atkins@seaediscovery.com

Andrea Bryson, Family Advocate Educator
Family Law Advocates: www.bit.ly/RiseFAE
Poverty Law Advocates: https://bit.ly/RiseFAEpov
(please wait until after Nov. 1st to schedule)

WHAT'S NEXT

01

November 2023
All groups migrated to Clio

02

January 2024
Automatic monthly statistic reporting set-up

03

Spring 2024
Grantee access to their reports in the granting software

WHAT'S NEXT

surveymonkey.com/r/ClioFeedback

04

Ongoing Training
Please complete our feedback survey!

THANK YOU!

The Law Foundation of British Columbia

2023 Provincial Advocates Training Conference
October 25, 2023

David Paradiso
Deputy Ombudsperson, Investigations, Intake and Early Resolution

OMBUDSPERSON
BRITISH COLUMBIA

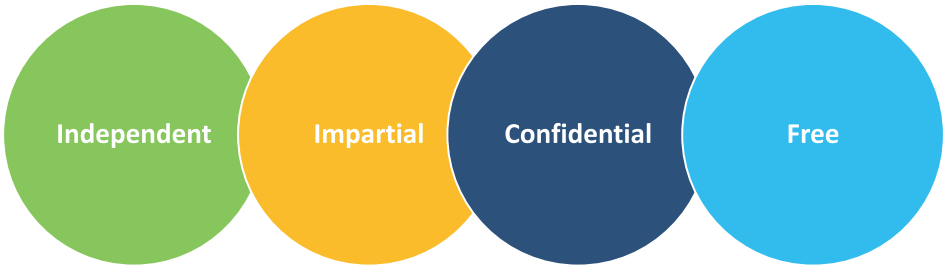
What is an Ombudsperson?

OMBUDS-PERSON – Strange word, but an important service

- We make sure provincial and local organizations that provide public services are following the rules and treating people fairly
- When they don't and we find there's something wrong, we help make it right

The Ombudsperson "*can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds.*" (1970) Re: *Ombudsman Act*, Alberta Supreme Court

We promote and foster fairness



Our role

- Two statutes that govern our work:
  1. *Ombudsperson Act*
  2. *Public Interest Disclosure Act*
- We deliver our mandate by:



Receiving complaints



Conducting in-depth, impartial investigations

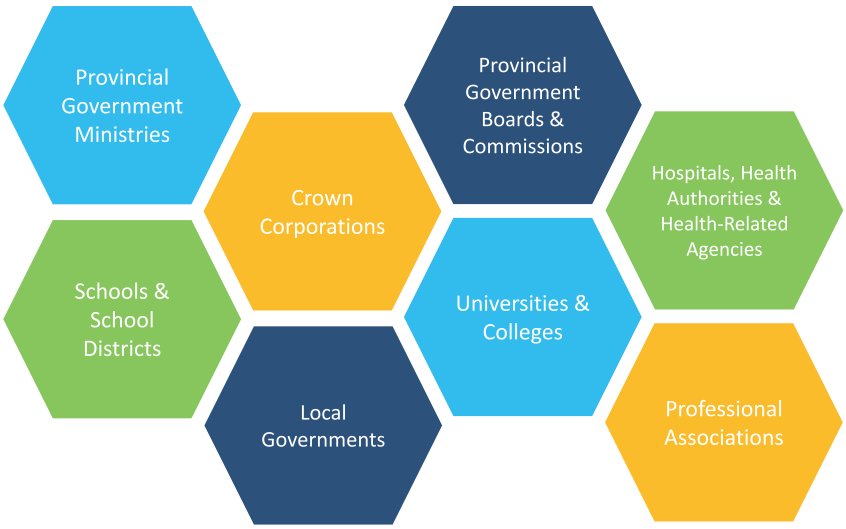


Making recommendations & reporting publicly

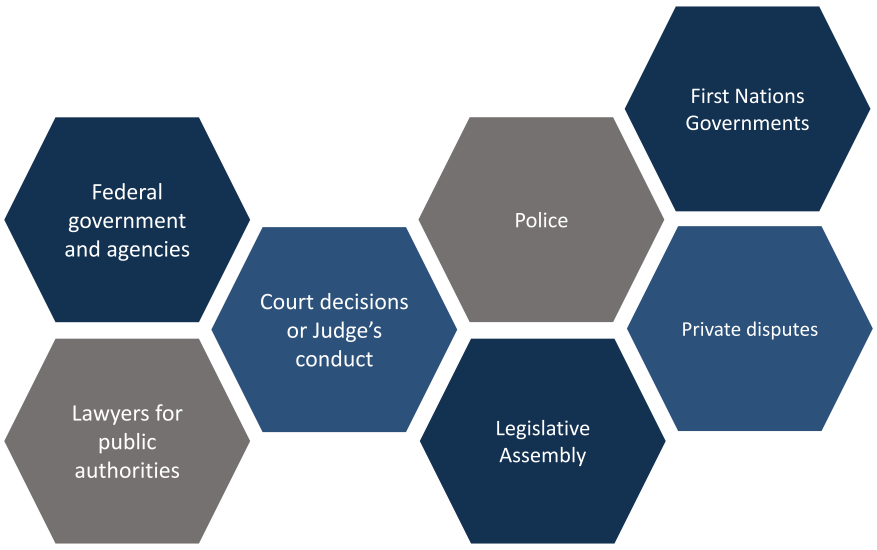
45 years of experience

4

Who we can investigate



Who we don't investigate



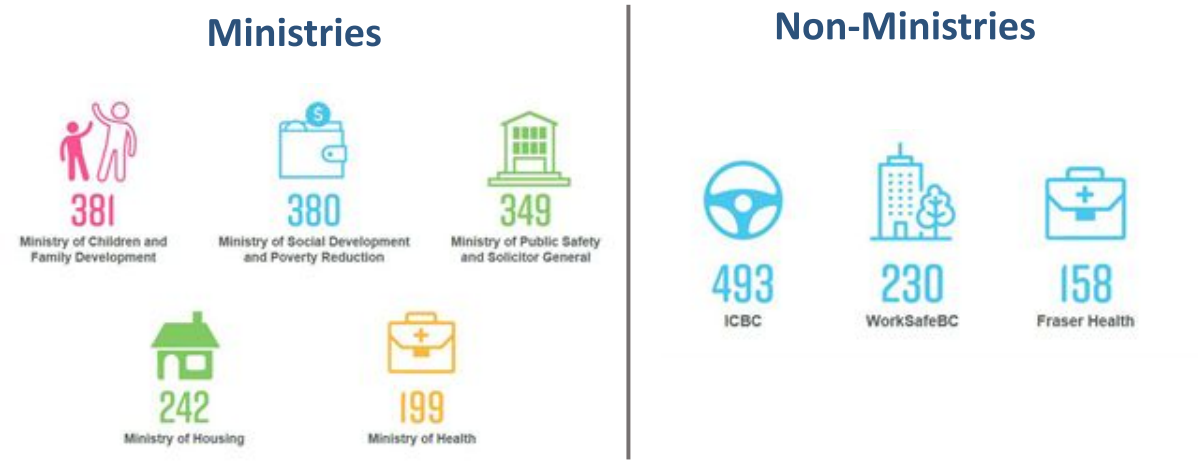
Common complaints we receive



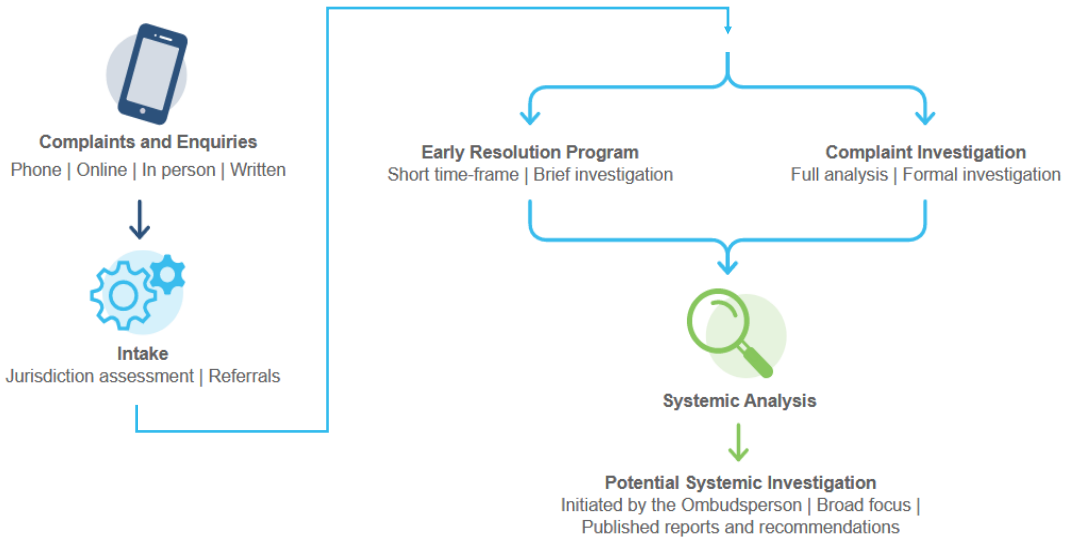
Complaints and enquiries received: 2022/23



Highest volume public authorities in 2022/23



Our process



Investigative Powers

- to obtain information from public body or any other relevant source
- to examine a person under oath
- to make findings of unfairness
- to make recommendations
- to report publicly on an investigation
- to monitor and report publicly on the implementation of recommendations

Investigations are confidential and impartial. Our services are free.

11

Administrative fairness is…

Consistent and transparent decision making

Fair and respectful treatment of all people

Even-handed and reasonable application of the rules

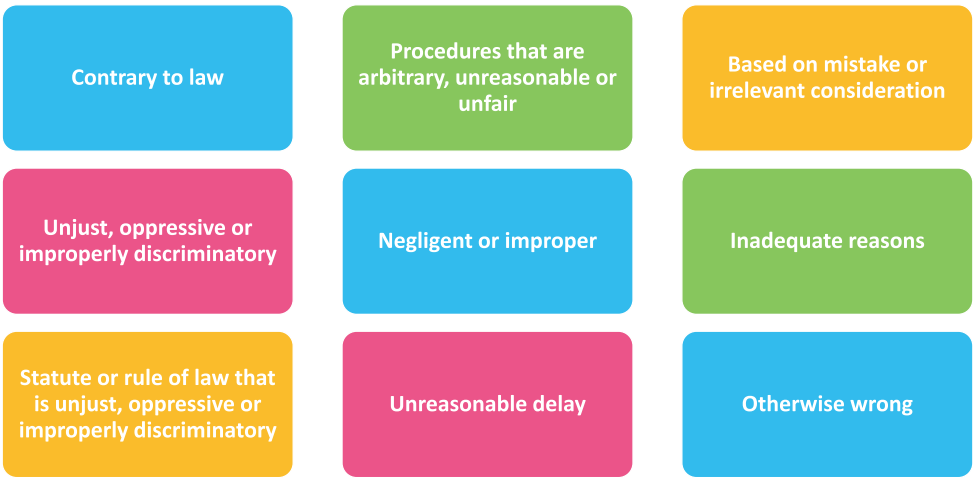
Policies and practices are supportive of the program goals

People impacted by decisions have an opportunity to be heard

Providing understandable reasons for decisions

Following regulations, policies and procedures

How does the *Ombudsperson Act* describe administrative unfairness?



Possible investigative outcomes



A single complaint can often lead to changes that benefit many

The power to propose rather than impose

"The inability to force change may be the central strength of the office. It requires that its recommendations be based on a thorough investigation of all facts, scrupulous consideration of all perspectives and vigorous analysis of all issues. This application of reason produces results that are more powerful than could be achieved through coercion. A coercive process may produce reluctant change in a particular instance, but it creates a "loser" who will be unlikely to embrace change in the future. By contrast, change that results from a reasoning process changes a way of thinking and the result endures, to the benefit of future users."

- Stephen Owen, Former B.C. Ombudsman

Public Reports

- Ombudsperson-initiated or as a result of a complaint
- Broad consideration of policies and procedures
- Generally wider impact



Monitoring

- Follow up on recommendations accepted for implementation
- Typically monitor until all recommendations implemented, or 5 years







Questions?

CONTACT US:
1-800-567-FAIR (3247)

www.bcombudsperson.ca

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PO Box 9039 Stn Prov Govt
Victoria BC V8W 9A5

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STRESS MANAGEMENT THROUGH SELF AWARENESS

With Yogacharini Maitreyi

Arkaya.net

Law Foundation of British Columbia:
Provincial Advocates Training Conference 2023



What is Stress and the Stress Response?

Stress is a natural inbuilt response that helps us address internal or external threats to our systems. These systems can be our body, emotions, mind, and/or family systems. It can also be work systems, living systems or anything we are attached to or identify as an extension of ourselves.

The stress response can also be looked at as the fear or survival response. It activates core fears of our basic needs not being met. The fear response elicits four major survival reactions. This is what helped our forefathers survive in the jungle. Both adrenaline (also called epinephrine) and, later, cortisol are released in the body during the stress response. It is used in one of the activities below.

1) Fight - Think of our forefathers fighting a predator or other tribes that invade, for survival.
2) Flight - Sometimes an escape route is best.
3) Freeze - Lets pretend to be dead and non-threatening and pretend to give them what they want.
4) Fawn - Let's actively butter up or fan the ego of the chief so we get the best corn, best catch, best gigs and opportunities.

As useful as this is in the jungle where we have to survive tigers and other predators it is also useful now, in the concrete jungles.

However, unlike in the past where our forefathers were dealing with actual tigers, we are dealing with *virtual tigers* like the “expectation tiger,” the “future tiger,” the “worst scenario imagined tiger,” etc. We go to bed with these tigers and wake up with them leaving ourselves no rest or respite.

Let us see if these looming tigers are actual tigers or just house cats. Sometimes, depending on each situation, we may need an animal specialist to support us in dealing with these cats. Or maybe we just have to step back and get the perspective to see that it’s not a tiger - it’s just a scared, hissing cat. Or because we are far enough we actually enjoy seeing the tiger like when we are on a safari.

When we are stressed we are in the **sympathetic nervous system dominance** which is where the fight / flight and other survival responses are activated. Ideally most of the day we want to be in **parasympathetic dominance** which is the rest and digest mode. The rest, assimilation and healing will not happen optimally if we are in sympathetic dominance.

List Your Tigers for Your Awareness

1. What are the general repetitive tigers in your life? A repetitive tiger could be when you get stuck in traffic everyday. Or work stress. Or family stress. Be specific when you describe the situations.
2. At present what is the looming tiger for you, feeling like it is hanging over you?
3. How do you react when these tigers or cats are around?

PLEASE LIST YOUR RESPONSES HERE

Taming the Tigers

In yoga psychology we learn **discernment** to see if the tiger can be tamed or if it's a dangerous situation that can damage us. In such cases we need to move away & communicate. We need to keep emotional and physical distance from situations and learn tools not to get enmeshed.

Basics of Yoga Psychology to Address Stress

Yoga psychology tells us that the stress response is not conscious. It is unconsciously wired into our system as a means of survival. Therefore yoga aims at bringing into awareness what lies buried. Else these buried impulses and driving forces may dictate our direction and we will think it is a choice we made. It is actually a choice that we were conditioned or programmed to make. We may falsely interpret it as fate or “it's meant to be” as well.

Karma is the sanskrit work that denotes the fruits of our actions. In a very simplified way the more cakes, made from white flour and white sugar, we eat, the more weight we put on. This is a direct consequence for that choice and action. Of course there may be other karmic impacts like getting addicted to sugar, the blood sugar spike over the long term leading to diabetes and the gut bacteria going off balance. This is our negative karma. Karma can be positive too.

Karma is the sum total of our thoughts, words and actions. Hence we become more aware of the choices we make and think about their consequences beforehand. The first step is to become conscious of all the unconscious and conditioned fears and motivations that lie beneath. This takes self observation and most importantly *compassionate self observation*. In sanskrit, compassionate witnessing is **karuna sakshi bhava**. So we start with the foundation of karuna (action-oriented compassion) to change our karma for the better. Both *karma* and *karuna* have in them the root word “Kar”. *Kara* means “hands” in Sanskrit. Both are action words. Also note that our *kara* are connected to the heart. That is why a heart-oriented action has more impact. Or, if we do good, we activate the heart.

What Impacts Stress?

There are many factors that impact stress right from our physical and lifestyle habits to emotional management to thought patterns, ideologies and self talk. All the ways in which we live our lives add up. This is *cumulative stress* or *chronic stress*.

Sudden traumatic events like death of a loved one or one close to you, loss of a job, war, an accident, divorce or any major change can cause stress too. This is called *acute stress* and occurs short term. Of course in divorce the disconnection and strife over years can cause chronic stress. Similarly if a loved one’s health was failing and you were their caretaker there is chronic stress *and* the acute stress caused due to the passing and loss.

Yogic Perspective on Stress

A yoga life is a life lived consciously. We contemplate and shift for the better everything from what we drink to what we think.
- Yogacharini Maitreyi

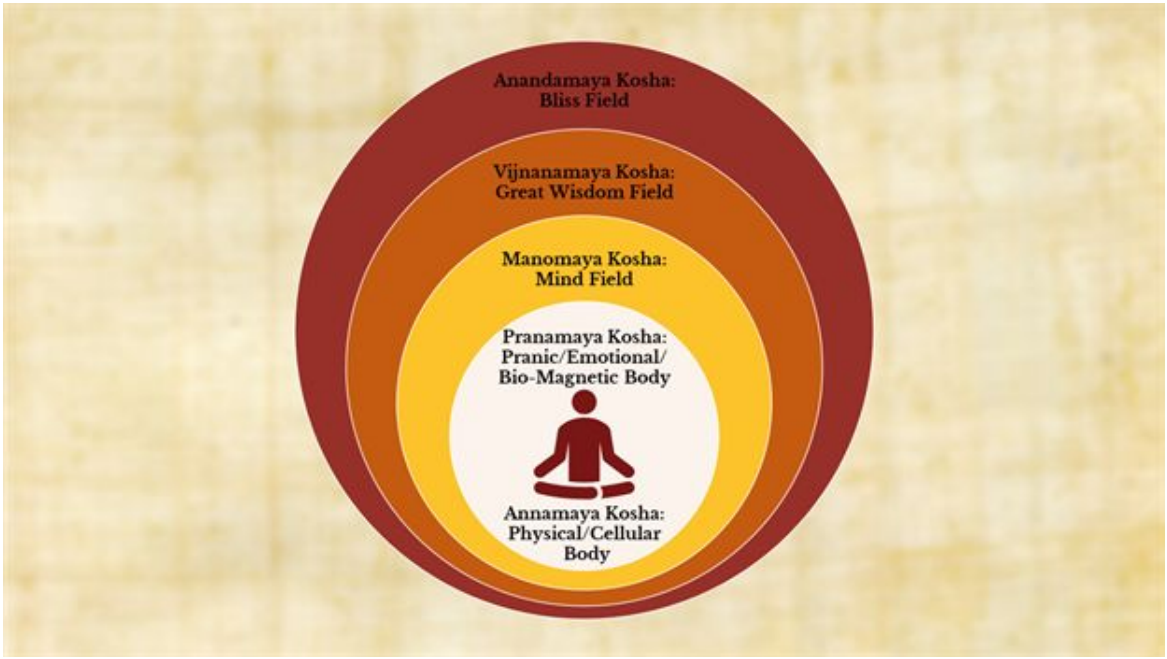
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The yogic life does not give us just symptomatic remedies. This means it does not suppress the symptoms but enables and empowers us to fully feel them as opposed to escaping them or numbing ourselves. The symptoms and pain are a messenger to inform us that we need to change. The change can be using non-toxic products, working on our posture, processing our emotions better, doing a parasite cleanse, or eating cleaner.

Painkillers disconnect the brain from feeling the pain. It helps one cope in the moment and is thereful useful momentarily to find relief. However in the long term the dysfunction or dis - ease in the system grows as one does not feel the imbalance. So without pain to inform or move us, there is even less motivation to change and the disease takes a stronger hold. Many do not have the time to sit with the pain nor do they see the value of it. They do not realize how the imbalance can be caused. That is why the yogic healing system is invaluable in going to the root of the issue.

For example, back pain could be due to long hours of sitting on a chair that is not ergonomic.
Or even if the chair is good, the body is not meant to be static in an unconscious task oriented setting for long periods and hence stiffens up. Or there is fear of failure as one is dealing with the to do list and that impacts the back. Or the emails or meetings can be conflict oriented and push us into victim / victimiser mode, causing a backache. Or we are simply shouldering the weight of the world, emotionally, and the shoulders and upper back stiffen up.

In yoga we see there can be many physiological, emotional, mental, energetic and spiritual reasons for stress and pain to get lodged in the system. That is why the human being is not looked at as only a physical being but as a multidimensional being. You can see below the diagram of the yogic model of the human being.



This is the full spectrum, decolonized yoga and tantra taught at Arkaya. Here, every aspect of the individual is healed and integrated. This returning to wholeness, is what yoga supports. The word *yoga* itself comes from the Sanskrit word *yuj* which means “to yoke, bind and bring together.” Yoga's principles and practices yoke the individual with the universal.

Tantra is one of the most misinterpreted and wrongly taught subjects. *Tan* means “body” and *tra* means “a tool to hone and transcend.” Just as *mantra* helps one to become aware of, hone and rise above the limitations of the conditioned mind, tantra helps us to embody harmony and ease in the body, so we live these principles, not just understand them intellectually. However we see the hypersexualisation of tantra in the west. Tantra teaches us energetic awareness and most importantly energetic boundaries and feeling expansiveness in the body.

In Tantra we spiritualise all of life including sexuality, not sexualise spirituality.
- Yogacharini Maitreyi

Introduction to Arkaya

Arkaya is one of the names of the sun that means light, healing, inspiration and awesomeness in Sanskrit.

Arkaya Foundation is the not-for-profit organization I started over two decades ago in India to educate people on the paradigm shifts required to practice real yoga. This enables us to find our way back to ease and effortless effort. As I was teaching yoga in India, Sweden, Hong Kong and many other countries I found this foundation was not being taught. For over 25 years I have shared a full-spectrum, decolonised yoga. Full-spectrum is to indicate that breath work and pranayama are part of yoga. Meditation is part of yoga. Affirmations and contemplation are part of yoga. Dyads and healthy dialogue are part of yoga. Mantra and sound vibrations that dissolve destructive energy and mental constructs are part of yoga. Healing using chi, prana or energy is part of yoga.

Without a full-spectrum perspective, we are stuck in an industrial paradigm that prevents us from savoring our bodies, breath and our being. We are conditioned to believe that we are only worth as much as we possess or produce. **The indigenous or yogic paradigm states that we have intrinsic worth**. Just this one paradigm shift alone can reduce stress tremendously in our systems and leave room for self reflection, feeling less triggered and unfolding into harmony.

There are many such transformations into peace and well being that occur as a result of practicing yoga with its paradigm shifts as with Arkaya yoga.

Our relationship to ourselves, including pain, is dramatically different, subtle and elevating. We find that we become more integrated rather than fragmented.

Through the simple practice of applying *karuna sakshi bhava* to the body, emotions, energy system and mind, we cultivate greater self awareness. We start with the compassionate observation of the body to identify pain spots that we push out of our awareness in our busyness. Then, the process gets more and more subtle.

The body is like a child asking for attention. The mind (the parent) is used to ignoring it or overindulging it which causes further stress and schisms. The practice is essentially learning to reparent ourselves into joy and peace. In Arkaya we learn to create healthy communication channels with the inner child as well as create spaciousness in the body.

Eustress, Stress and Distress

Eustress is a healthy amount of stress to move us forward. *Stress* and especially *distress* block our capacity to reset into rest and regenerate mode, if endured for long periods.

Stress in the right amounts is regenerative. Think of how intermittent fasting impacts the body. In the beginning we might find it difficult to go without food for 16 hours. However we are anyway fasting when we sleep and are just extending that by a few more hours. The body starts to regenerate with intermittent fasting. Fasting has been recommended in many religions and spiritual traditions for this purpose. Similarly, intermittent breathing, or pausing the breath gently, also increases our CO2 tolerance and supports a higher threshold of emotional stress. Breath is intimately connected to our emotional states. The right amount of asana, or physical practice, creates optimal stress on the muscles and builds them causing you to have stronger muscles. Push it beyond its limit and you tear a muscle. So finding this sweet spot or informed edge is important. Also knowing that **less is more in some cases** is good so we do not overdo things.

Unlike exercise, where you push yourself to compete with others or a class, in real yoga you build self awareness and pace yourself. Unfortunately I see many yoga classes also being taught like boot camp. If you follow this principle and don't give in to your conditioned impulse to push, then you activate eustress. Finding that intelligent edge is what real yoga, which builds a higher stress tolerance, is about.

When one does too much exercise or deprives oneself of nutrients then the opposite of eustress happens and this distresses the body. Think of a rubber band that is kept stretched for a long time. Or imagine it is kept in soggy circumstances where it simply loses its elasticity. It is so over stretched and distressed, it snaps. The "kill yourself working out or working" approach does not support healing and growth. In fact we may think we have speed but, like a car with wobbly wheels, or wheels that are not aligned, we will wobble off the path and can even hurt ourselves or another tremendously if we do not build stability.

Stability first, speed next is the Yogic ethos.
- Yogacharini Maitreyi

The yogic practices help maintain the elasticity of the rubber bands in us as well as cultivate self awareness to know how not to distress or over stretch ourselves. Lack of self awareness is common in a world where we are externally focused and not internally focused. We are emulating role models that may be commercially successful but either falling apart inside or are narcissistic / self absorbed. These manufactured images of success, be it as humans or items, only serve to take us further away from our capacity for self awareness.
When we focus internally to cultivate self awareness then we **cultivate inner sight or insight.** This insight is important for self awareness so we can pace ourselves rather than push. That is a key difference between real, decolonized Arkaya yoga and exercise. Unfortunately many yoga classes do not understand this core paradigm shift needed for yoga practice and instead juxtapose the same exercise paradigm onto yoga practice.

Trauma

When there is distress to the system there is trauma. This can be sudden, like a home invasion or long term, like emotional abuse. Trauma can be both physical and emotional.

1. *Acute trauma* is the body's response after a single distressing incident.
2. *Chronic trauma* is continuous trauma, like being enmeshed with an abusive client, boss or one's own ideas that do not serve their wellbeing.
3. *Complex trauma* is the response to various stressors that may or may not be related. However they all contribute to the weakening or overstretching of the nervous system and other systems in us.

Relationship Between Breath and Emotions

When you watch a horror film your body is tense, you are at the edge of the seat and you forget to breathe. This is what happens to the breath when we are in shock or in anticipation of something terrible happening. The virtual tigers and horror films that run in our heads wire the old brain into a state of danger. When there is danger there is change in breath rate. When we are angry or anxious the breathing is short. When we are calm and relaxed the breathing is gentle.

When you breathe deeply then the nervous system and the entire body gets very nourished.
We humans take about 15 breaths a minute. Monkeys take about 30 breaths a minute. That is why *rishis* (sages or ancient researchers) asked us not to become monkey minds. When we are anxious or stressed our breath rate increases and we think we are doing things fast when in actuality we are scattered. The capacity for stillness is cultivated so that we can calm the mind and nervous system to dive deeper into the unconscious and allow for transformation of the buried unresolved trauma / energy / emotions.

Most of us are in the sympathetic nervous system dominance and deep breathing and other pranayama tools bring in parasympathetic balance. *Pranayama* is the yogic term for breathing practice. “Breath work” is a very shallow translation of pranayama as *prana* means “energy, life force, chi” and *ayama* means “expansion.” So the correct translation of pranayama is “the

conscious expansion of energy." One of the important means by which this is done is through breathing correctly and efficiently. That is why correct pranayama will keep us healthy and energized as opposed to stressed and fatigued.

Transforming stress

All Yogic practices teach us to transform stress. Normally we suppress it causing psychosomatic illness. Or we misplace it or project it onto an unsuspecting soul who may have no role in causing the stress. Hence learning tools to transform is invaluable so we do not hurt others or ourselves

A Few Yogic Stress Markers

1. **Physical Body**:

   Contraction, tightness, pain, stiffness. When the stress response is activated, the body tenses to get ready for a fight or flight response. If the adrenaline produced from the adrenal glands is not released from the body, then the contraction remains. With time the layers of tightness keep adding on and due to lack of pranic / energy flow pain sets in.

   Also think of trying to fit into a box - claustrophobic…right? Or trying to fit into a dress or outfit three sizes too small. How much ever we suck in our tummies we are going to feel compacted in that space. So the main thing to address is finding a box that fits with us. The second is to also have enough self awareness where we know we have to let go of excess weight or old contraction patterns so that we can have a body that feels relaxed, restful and safe.

2. **Breathing / Emotional Body:**

   a) Compacted or shallow breathing as well as tension in solar plexus and different areas.
   b) Very low CO2 tolerance. This means not being able to hold your breath for more than 20 seconds. Moderate is 40 seconds.

   The yogic traditions have thousands of breath techniques and my guru himself taught over a hundred breath techniques more accurately described as pranayama. The aim is not to master many techniques but learn a few that will support the nervous system and our being to heal.

3. **Mental Body:**

   a) A racing mind. One that engages in overanalysis most of the timeAgitation of the mind can also reflect as restlessness of the body. This is also a clear marker of stress.

b) A dull mind or brain fog. Constantly needing stimulants like coffee to be alert. A mind that is easily confused or overwhelmed.

In addition to the list above, the questionnaire at the end of this booklet will make you aware of all the lifestyle and emotional/mental related factors that add to cumulative stress

Right Attitude To Observe And Identify Stress Markers In Us

In yoga this capacity to see ourselves is cultivated. We learn to see ourselves with karuna sakshi bhava (compassionate witnessing) as that creates a safe, stress free space for insight and self observation. We become the experiment and the experimenter.

Karuna = action oriented compassion
Sakshi = witness
Bhava = the feeling or emotion

Think of a scientist screaming his guts out because he disliked crows and wanted to prove them to be dumb but in the experiment the superior problem solving skills of the crow shone through. This is how a preconceived notion or mental construct can mess up our minds. It makes it subjective rather than objective.That is why the foundations of a yogic life are compassionate observation without:

1. Condemning or judging
2. Justifying or
3. Identifying

Once we are established in being the compassionate observer, experimenter and the experiment then we start to see a lot of things in our system that are out of balance that we previously missed. No energy is lost in reacting to what is observed. Instead it is invested in communication and change for the better. The mind gets rewired into shifting things for the better gently and finding solutions rather than flogging the inner child.

The Nervous System And The Vagus Nerve

The nervous system consists of a set of neurons that are communication mediums. They send and receive information.

There are two main branches:

1. Central nervous system - brain and spinal cord
2. Peripheral nervous system

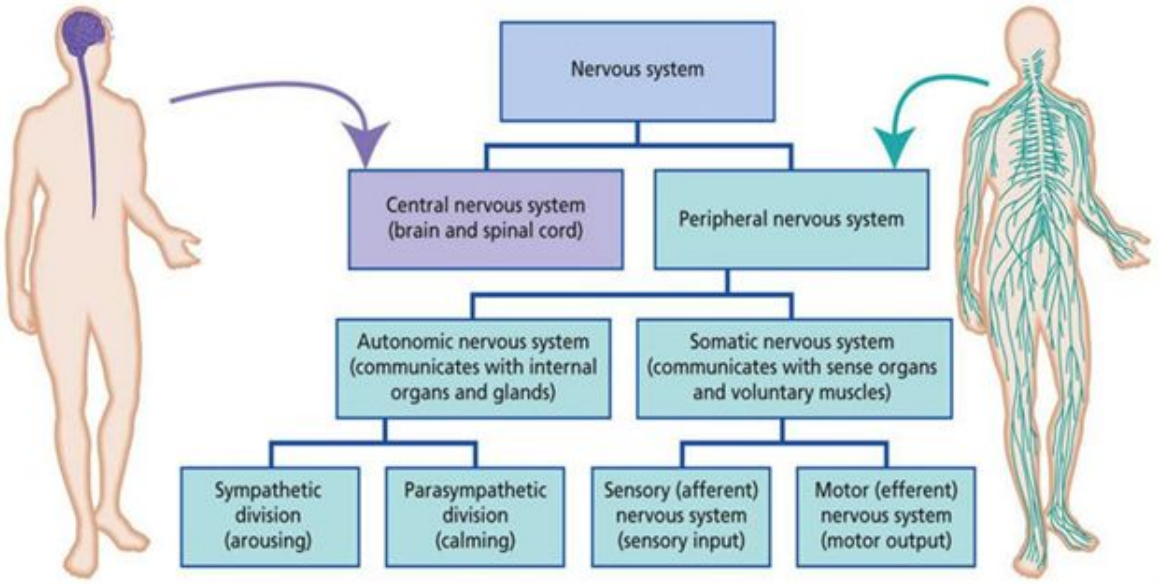


Image Credit: bing.com/images

The peripheral nervous system is further divided into two:

1. Somatic nervous system - communicates with sense organs voluntary and involuntary muscle control. It is further divided into sensory and motor nervous system.
2. Autonomic nervous system - communicates with internal organs and glands.

The autonomic nervous system is further divided into two:

1. Sympathetic - This is in dominance when the stress response is activated. Fight, flight, freeze and fawn. Release of adrenaline and cortisol.
2. Parasympathetic - Rest and digest.

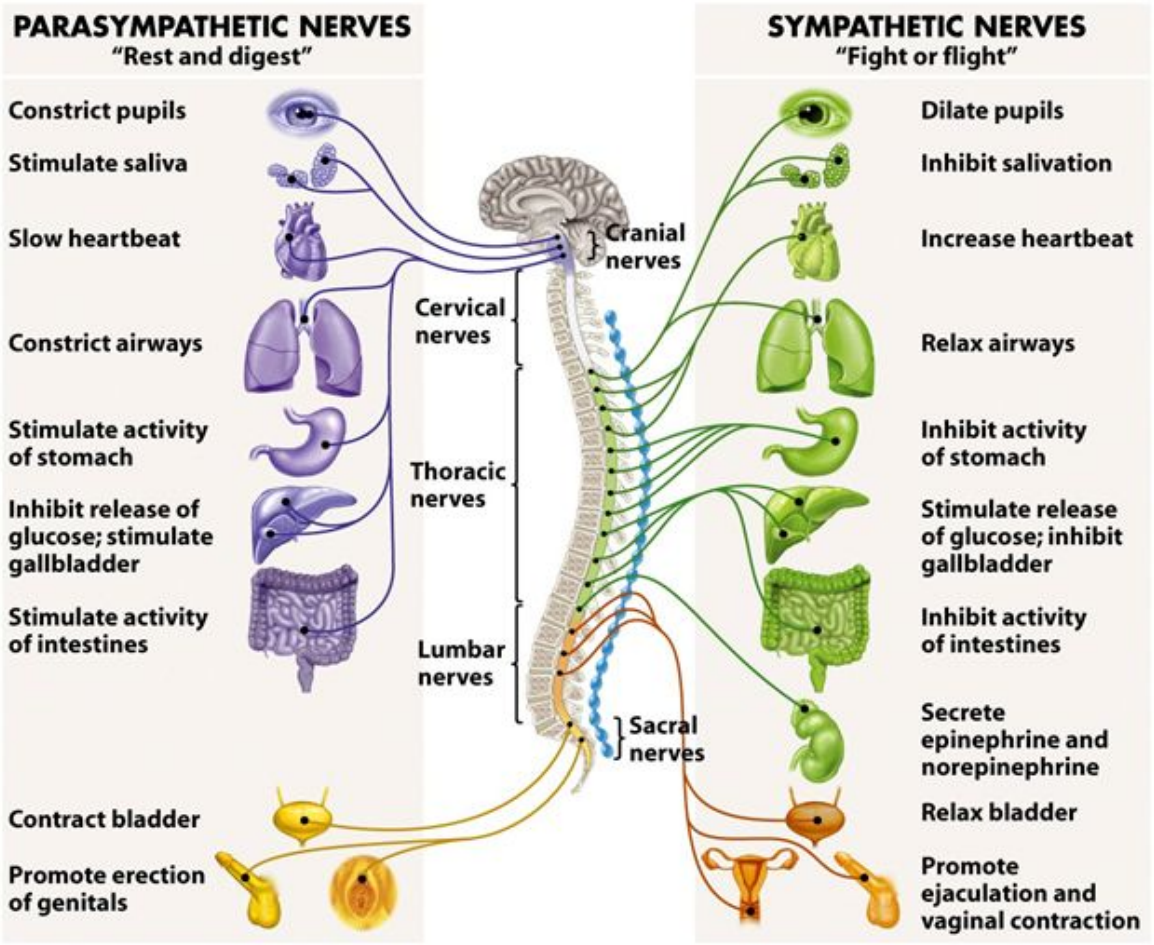
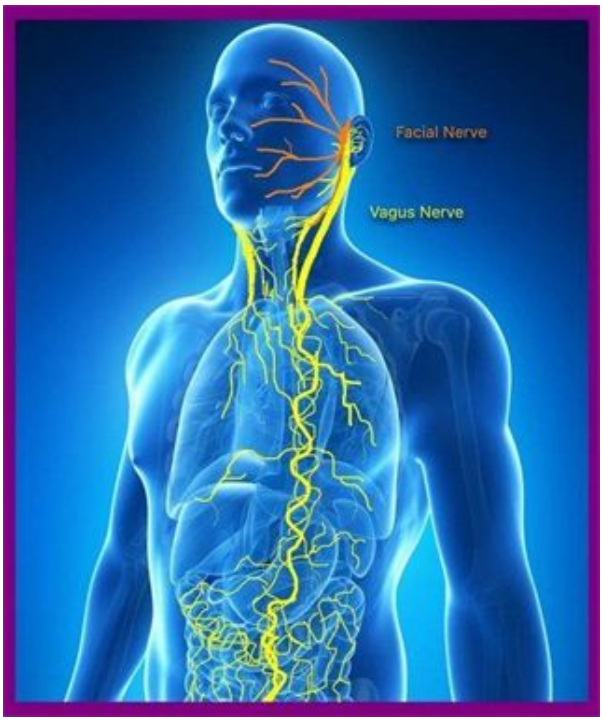


Figure 45-20 Biological Science, 2/e
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Image Credit: bing.com/images

The **vagus nerve** is part of the autonomic nervous system and the longest nerve in the body. Its functions are mostly parasympathetic and some sympathetic functions as well. When this nerve is in balance we feel relaxed and at ease. Else we feel jumpy and agitated or extremely ill at ease. This goes all the way down to the abdomen along the way, having branches to communicate to the heart, lungs, liver and other organs. The yogis developed many practices to soothe this nerve as they discovered that long term stress, exposure or PTSD (post traumatic stress disorder) impacted this nerve. They saw that this nerve impacts almost every organ including the liver, heart, pancreas, kidney, intestines etc. You can see its pathway in the diagram below.



Benefits Of A Toned And Balanced Vagus Nerve

1. Manifest your highest in an embodied way
2. Become more compassionate and build energy to support yourself and others
3. Go easily into rest, relax and receive mode
4. Good digestion
5. Emotional regulation
6. Become less prone to depression and anxiety
7. Less mood swings and consistent, balanced moods
8. Optimal deep sleep
9. Better moon cycles and menopausal symptoms
10. Stronger immunity
11. Health and longevity
12. Feel fulfilled
13. Wake up feeling happy
14. Increase your capacity to process and release trauma stored in the body
15. Heal at the nervous system level
16. Increase your capacity for stability and commitment
17. Value your own time as well as others

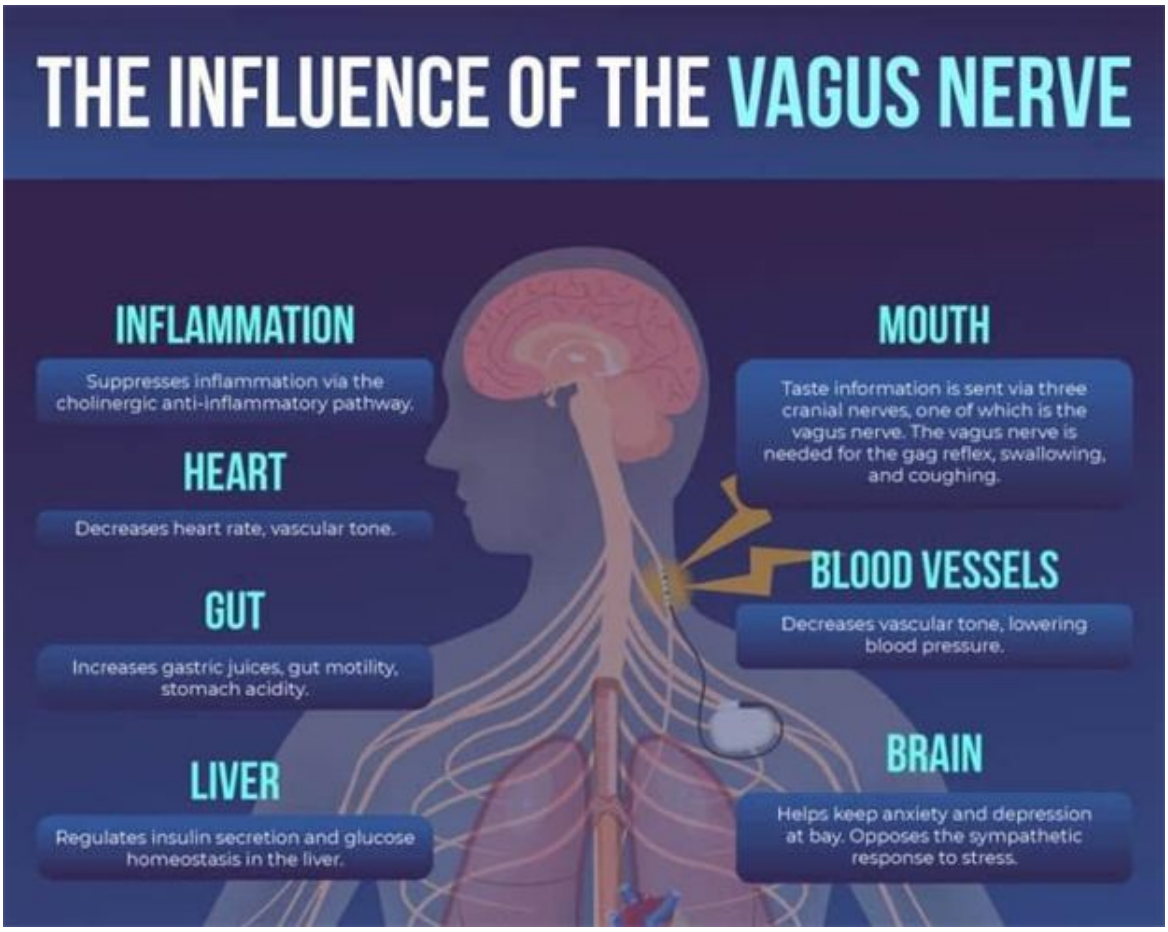
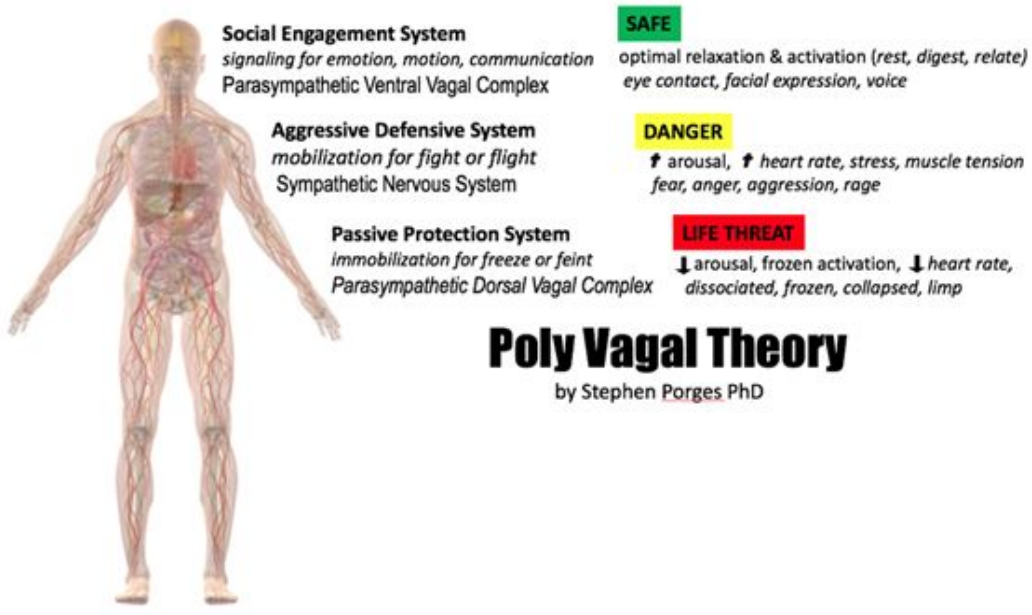


Image Credit: *Better Brain on Facebook - www.facebook.com/betterbrain77*

What A Weak Or Overstimulated Vagus Nerve Leads To

1. ADHD
2. Candida and mold in the system
3. Irregular sleep patterns, trouble sleeping and/or lack of deep restful sleep
4. Emotional disregulation
5. Hyper-reactivity
6. Irregular breathing patterns
7. Fibromyalgia
8. Crohn's Disease
9. Fatigue
10. Inflammation
11. Heart palpitations
12. Seizures
13. Irritable bowel syndrome

14. B-12 deficiency
15. Autoimmune diseases
16. Rheumatoid arthritis
17. Psoriasis
18. Energy invasions or feeling heavy after meeting others
19. Lupus
20. Gallbladder, liver and kidney issues
21. Digestive issues and mood swings



What An Imbalanced Vagus Nerve Does On An Emotional & Behavioral Level

1. Tendency to forget
2. Feel overwhelmed
3. Too much self pity
4. Emotional instability
5. Acting out
6. Aggressive or passive aggressive
7. Venting without being solution oriented
8. Feel entitled to another's energy and time due to past trauma
9. Lack of healthy boundaries
10. Feel unloved and depleted
11. Feel not enough or not good enough

12. Constantly compare yourself with others
13. Need to dominate and control
14. Overwork to please others
15. Fatigue and exhaustion
16. Feel dissatisfied and hopeless for no apparent reason

Arkaya Practices For Healing Stress, Balancing The Vagus Nerve And Living A Life Aligned With Harmony

Please note that all these practices can be done in 1 to 3 minutes. You can go deeper into one practice or play with a few if you can extend your time commitment to 7 to 8 minutes each day. All these practices help in self soothing, self regulation and seeing situations with better clarity and maturity.

1. Karuna Sakshi Bhava: compassionate witnessing
2. Applying the yogic/ indigenous approach to life to get off the hamster wheel
3. Sankalpa = intention aligned with the highest truth
4. Body, Breath, emotions, energy and mind awareness practices applying karuna sakshi bhava. Body scan to find stress points.
5. Pranayama: conscious expansion of energy using breath
    a. Mahath Yoga Pranayama: great yogic breath
    b. Sukha Bhasthrika: comfortable bellows breath
    c. Bujangini Pranayama: female cobra / hissing breath
    d. Sighing breath
    e. Kumbhaka and Shunyaka: pausing the breath after breathing in and pausing breath after breathing out
    f. Haakaras: using the diaphragm to make a cathartic “Haa” sound
6. Jathi: conscious, playful, rhythmic movements to release uptightness. Builds circulation and pranic flow.
    a. Physical shaking to release
    b. Eye movements to release stress
    c. Tongue movements to activate and reset the vagus nerve
    d. Finding tension spots in the body and moving them
7. Kriya: action for purification
    a. Simha kriya: lion
    b. Meru Danda Kriya: realigning the spinal column
    c. Jyothi Kriya: inner illumination practice for purification
8. Asana: state of being
    a. Veerya asana to build strength and courage. When I was speaking at a conference years ago, one of the self help people demonstrated the Wonder Woman or Superman pose. The rishis (sages or ancient researchers) discovered hundreds of thousands of postures that change not just the physiology but the neurology of the person.

9. Mudra: mystic / energetic seal
    a. Jyothi mudra: gently touching the tips of all five fingers
10. Mantra: A tool to hone and transcend the mind; positive affirmation + sound vibration
    a. Chant the brahmari: buzzing bee - excellent for vagus nerve toning
    b. Chant the peace chant: “Shanthi, Shanthi, Shanthi” - excellent for self soothing and vagal nerve toning
11. Shava asana: conscious relaxation and rebirthing for embodiment
12. Lifestyle habits
    a. Drink good quality water and remain hydrated. Eat sattvic food. Sattvic foods are foods that give us energy and cause the least stress to the body. They are fresh organic fruits and vegetables, whole grains, and bio available foods.
    b. *Rajasic* foods are stimulants like coffee, white sugar and too much chillies.
    c. *Tamasic* foods are foods that are heavy or lack prana. So all packaged foods with preservatives, red meats, heavy, oily, fried foods, modified oils and reheated oils.
    d. There is a lot more detail with which we can look into our lifestyle. However this is a good starting point.
13. Emotional habits
    a. The deep breathing practices support emotional regulation. Practice them regularly during the day as and when you remember or set a timer, each hour for a minute to 3 minutes of conscious breathing
    b. Stress or fear response is an emotional reaction to a situation. Arkaya Tantra Yoga teaches us how to not let the series of fear responses accumulate in the system. We learn to consciously feel to heal. Please note that the practice might bring to the surface suppressed and buried emotions
14. Mental habits
    a. Cultivate discernment and space in the practice. Benefits include elements like catching yourself when you are quick to come to conclusions and have rigid ideas.
    a) As you practice real yoga your thoughts move from divisive to unitive.
15. Spiritual alignment
    a) You become solution oriented
    b) Your capacity to see and create win-win-win outcomes increases. Most people have heard of win-win in management. The yogic win-win-win implies that not just the two parties involved are benefited but also the greater good. For example: it is not just two corrupt people making each other a good deal but the environment and communities also also being benefited in the process. This awareness is created with the Arkaya integration practices. We not only intellectually understand values, or speak of idealistic things but feel and integrate them in our choices and decision making.

17

AWARENESS ORIENTED STRESS QUESTIONNAIRE

Please write down your answers in your journal or your computer. This questionnaire is designed to build your self awareness about possible stressors.

Please note that this is a self awareness exercise not a self condemning or self sentencing exercise. However it is meant to point you in the direction of positive change and solutions to reduced cumulative stress in the system and to lead a life filled with *sthiram* and *sukham*.

Sthiram = stability, healthy foundation.

Sukham = pleasant , ease filled, content not complacent.

NOTE: Please share as openly and honestly as possible so that you can understand yourself better. Since this is a self-awareness exercise, the quality of your reflection will set the foundation for your own self-understanding and evolution.

Food Questions

1. When you are feeling stressed do you make unhealthy food and eating choices or do you fall back on healthy eating habits?
2. Do you eat mostly organic or pesticide free?
3. Do you eat fast or slow? Do you take the time to savour and properly chew your food?

Lifestyle Questions

1. How many hours of sleep do you get on average? How deep is your sleep?
2. Do you have a consistent self-care routine?
3. Do you participate in activities that give you joy and allow you to be playful?
4. Do you read the labels of your personal health and hygiene products to determine their toxic load?
5. Do you read the labels of your cleaning products to determine their toxic load?

Social Support/Family

1. Do you have a trusted friend or friends that you can speak with regularly to feel supported?
2. Is your relationship with your partner / family harmonious or drama-filled?
3. Do you feel at ease in your own home?

Work Environment

1. Do you feel you have a comfortable ergonomic setup in your work environment?
2. How much time do you spend looking at the computer screen or phone each day?
3. What time do you start and end your work day?

4. How stressful is your work environment on a scale of 1 to 10 (10 being the most stressful)?
5. How supportive is your work environment?

Mental-Emotional Questions

1. Do you wake up feeling happy, sad, angry, or afraid? The predominant emotion gives you a glimpse into what you need to work on.
2. How long is your attention span? Are you easily distracted? Do you feel scattered?
3. Despite the stress, are you usually able to communicate in challenging situations and find solutions?
4. Have you experienced any traumatic/highly stressful events in your life that may not have not been fully processed? You know they have not been fully processed if you get triggered by similar circumstances or you find yourself repeatedly getting into similar circumstances.

Ongoing Support to Implement the Arkaya Practices

It has been delightful to spend time with you and share the wisdom of my ancestors and spiritual lineage with you. Thank you for attending and wanting to reparent yourself into joy and ease. I am very grateful for the wisdom passed down to me and to be able to share it.

To move from stress to celebration might take time, patience and right practices, though instant positive shifts can also be seen.

Each participant is offered a FREE monthly membership to the ONLINE Arkaya Community Classes on zoom. This happens every Saturday from 9 to 11 AM PST. So you get four, 2-hour sessions to further deepen your commitment to yourself.

To receive your free month's membership, please email us to connect at infoarkaya@gmail.com and we will get you set up!

The community classes include:
1. A meditative session guided by me. Integration of body, emotions, energy, mind with the universal.
2. A full spectrum, decolonised tantra yoga practice on the mat led by one of the Arkaya teachers. This awareness is taken off the mat as well and applied in life
3. A topic chosen for contemplation and deeper exploration. Community connection + kirtan (soul song)
4. Some Saturdays we have invited speakers for the last 30 minutes.

Yogacharini Maitreyi’s profile

Maitreyi's heart sings to see lives blossom into consciousness. Yogacharini Maitreyi is an international master teacher, practical mystic and founder of Arkaya Awareness Center and Arkaya Foundation. For the last 26 years she has been dedicated to sharing and teaching full spectrum heart centered yoga, traditional tantra and expansive life principles. Her grandfather was her first guru and then she studied and served in the Shivananda and Ananda ashrams for many years.

Since 1997 in India, Maitreyi has been given titles: Yoga Chemmal (expert), Yoga Shiromani (gem), and Yoga Acharini (guide). In 2007 she was one of the youngest to be invited to the Advisory Board of the World Yoga Council, in Europe. She has shared the deeper dimensions of yoga, self management and sattvic tantra worldwide. This includes seeing and shifting within ourselves, deep rooted conditioning that is divisive, exploitative, colonial or disrespectful.

She has trained over 60 corporations in enlightened leadership, stress, emotional and self management. She has spoken at many conferences and events in India, Hong Kong, Sweden, Dubai, Srilanka, U.S.A., and Canada. She has also facilitated many self empowerment workshops invoking and evoking the divine feminine for women’s groups. She runs a foundation in India for children living in the slums.

Maitreyi has over 100 published articles and writes a blog as well to share the deeper dimensions of yoga and tantra. She was a columnist for “The Hindu” , South India’s largest news daily, “The Economic Times” and “ Heritage Healing” in India. She has written for various magazines as well like “Asana Journal” in Hong Kong and “Common Ground” and “Agora” in BC, Canada

The Arkaya school offers many online programs, and some in-person workshops and retreats, to share the transformational power of Yogic Healing. Maitreyi facilitates an online 500-hour, 2-year self awareness (Yoga and sattvic Tantra) teacher training. This helps teachers know the difference in their body and minds between the industrial and indigenous paradigms and share decolonized yoga.
Maitreyi facilitates individual healing and guidance sessions as well. These sessions are in person at her clinic in Kitsilano/ Vancouver or online.

She enjoys ayurvedic food, being close to nature and making documentaries on subjects close to her heart. She lives in Vancouver now.

Read Maitreyi’s blog and find details about the March 2024 course and all Arkaya programs by visiting: www.arkaya.net

CPP Disability Benefits

The goal of this presentation is to give:

- an understanding of what CPP-Disability (CPP-D) is and the program's eligibility requirements.
- a description of some of the major changes created by the introduction of new *Rules of Procedure* with the Social Security Tribunal

Minimum Qualifying Period (MQP)

An person can only get the CPP-D designation if they have made enough contributions to the CPP-D program.

For most people who stopped working after 1998 that means they must have worked and paid into the plan for at least 4 out of 6 years.

In 2008 the program also added a 3 out of 6 year MQP for people who had worked for 25 years or more.

To assess a person's MQP you may need to have a look at their "Statement of Contributions"

People can access one of these online if they have a registered MyServiceCanada account, by calling Service Canada 1-800-277-9914, or in person at a Service Canada office.

Late Applicant Provision

Many people apply for CPP-D benefits years after their MQP has ended. For people in this position they can still apply for CPP-Disability benefits and have a possible chance of success.

To succeed and obtain the pension will require providing medical evidence that they met the definition of disability **before** the end of their MQP. However, in most cases retroactive benefits will be calculated based on the date of application and not date of disability.

Incapacity Provision

This provision is rarely applied to CPP-D files and the threshold is extremely high.

This provision is only applied if a person can prove

- that they had been physically or mentally incapable forming or communicating the intent to apply for CPP Disability benefits and,
- that they had been continuously disabled from the date the MQP ended up to present and,
- that it has been less than 1 year since they have regained capacity

For example: A person who had been in a coma for a number of years.

Collecting other forms of CPP

The program is set up in a way where you can only collect one form of CPP at a time. This can create issues if people have taken CPP Early Retirement (CPP-ER). Once on CPP ER there is a 15 month window to switch from CPP-ER to CPP-D **and** that can only happen for conditions that started **before** the applicant began receiving ER.

For people who are on ER who have collected benefits for more than 15 months or who have conditions that began after they started collecting their ER benefits there is now a Post Retirement Disability Benefit that can be paid up to the age of 65. It uses the same application and appeals process as Disability but the payment rates are different.

CPP-D's definition of disability

Section 42(2) of the Canada Pension Plan defines disability. It says that:

a person ~~shall be considered to be disabled only if he is determined in prescribed manner~~ to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

- a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
- a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and

a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in prescribed manner to be the time when he became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of making any application in respect of which the determination is made.

~~(R.S.C. 1985, c.30 (2nd Supp.), s. 2(2)~~

Application Processing Times

Terminal Illness Application – 7 days approx.

Grave Medical Conditions – 30 days approx.

CPP-D Application 3-6 months approx.

This is from the date that EDSC receives a complete application. In some cases it can take much longer. If the adjudicator is waiting for results from tests that haven't been done yet or for contributions from outside of Canada for example.

It is in the applicant's best interests to allow them the additional time.

Decision letters

At the end of the processing time once the information has been reviewed a decision letter will be sent to the applicant in the mail.

If an application is approved it will be sent to processing and your client can expect CPP-D payments going forward.

If the application is denied there is the option of requesting a reconsideration. People are given 90 days to make such a request. This is best done using a Reconsideration Request form

https://catalogue.servicecanada.gc.ca/content/EForms/en/Detail.html?Form=ISP1145

CPP-D Reconsiderations

If the 90 days has expired and the person has not applied for Reconsideration they can try submitting the form and ask for an extension.

These extension are not automatically awarded. To increase the chances of getting one approved you must provide an explanation for why the Reconsideration request was submitted late.

The benefit of doing this is any potential retroactive may go back to the date of application

Time Lines

Depending on the file CPP Reconsiderations can take between 3-12 months.

Occasionally it may take them longer to make a decision. Typically that happens in cases where the decision maker is putting off making the decision until after medical information develops and specific treatments have been tried or appointments have been had.

It is often in your best interests to give the decision maker this time. Frequently when rushed the decision maker will just deny based on what they have on file rather than delay and consider making a different decision.

Social Security Tribunal Income Security Division

The Social Security Tribunal is an independent Tribunal established by the federal government to oversee and give an impartial judgment on Canada Pension Plan Disability appeals that have been denied at the Reconsideration stage (General Division) and by the SST General Division (Appeals Division).

They were previously only governed by an Act and Regulations. These were developed in consultation with a variety of different groups.

Regulatory change was enabled by the ***Budget Implementation Act, 2021, No. 1*** and much of what previously was covered in the old Regulations is now found under the Rules of Procedure. These were registered and came into force December 5, 2022

Constitutional Questions

Filing of notice

1 (1) A party who wants to challenge the constitutional validity, applicability or operability of a provision of the *Canada Pension Plan*, the *Old Age Security Act*, the *Employment Insurance Act*, Part 5 of the *Department of Employment and Social Development Act* or the rules or regulations made under any of those Acts must file a notice with the Tribunal that sets out

- **(a)** the provision that will be challenged;
- **(b)** the material facts relied on to support the constitutional challenge; and
- **(c)** a summary of the legal argument to be made in support of the constitutional challenge.

Service of notice

(2) At least 10 days before the date set for the hearing of the appeal or application, the party must serve notice of the challenge on the persons referred to in subsection 57(1) of the *Federal Courts Act* and file a copy of the notice and proof of service with the Tribunal.

Failure to file proof of service

(3) If proof of service has not been filed in accordance with subsection (2), the Tribunal may, on its own initiative or on the request of a party, postpone or adjourn the hearing.

Format of Hearing General Division

Format of hearing

2 (1) A Tribunal hearing must be held in one of the following formats, as requested by the appellant:

- **(a)** in writing;
- **(b)** by teleconference, videoconference or other means of telecommunication;
- **(c)** in person.

Exception — other parties

(2) Despite subsection (1), the Tribunal may allow any other party to participate in a hearing by a means other than the format requested by the appellant if the Tribunal determines that it is warranted based on the needs and circumstances of that party.

Exception — circumstances

(3) Despite subsection (1), the Tribunal may hold a hearing, in whole or in part, in a format other than that requested by the appellant if the Tribunal determines that the requested format

- **(a)** would not allow for a full and fair hearing;
- **(b)** would raise security or health concerns that cannot be mitigated to the Tribunal's satisfaction; or
- **(c)** would be impractical in extraordinary circumstances such as fire, flood, epidemic, natural disaster, political turmoil, act of terrorism or major accident.

Confidentiality of Proceeding

Private hearing and restricted access

3 The Tribunal may, on request or on its own initiative, hold a hearing, in whole or in part, in private and restrict public access to all or part of the appeal record if it determines that reasonable alternative measures cannot adequately mitigate any of the following serious risks that could result from a public hearing and public access:

(a) a serious risk that the disclosure of personal information, such as medical information, would cause undue hardship to a person that outweighs the societal interest that the hearing and appeal record be public;

(b) a serious risk to the life, liberty or security of a person;

(c) a serious risk to the fairness of the proceeding that outweighs the societal interest that the hearing and appeal record be public;

(d) a serious risk to public security.

SST Rules of procedure

Most of what was previously covered by the Regulations can now be found within the *Rules of Procedure*. These also came into effect December 5, 2022.

This Rules in this presentation are not exhaustive. However, we will touch on some off the major changes that have been made.

Adding Representatives to a file

There is no longer a form that appellants submit to add a representative to the file

Conferences

The SST may schedule conferences for the parties to discuss:

- Where the appeal is at and the next steps
- Issues contained within the appeal
- Tribunal's authority to do or decide something
- Deadlines
- Settlements

Conferences will be scheduled over:

- phone
- videoconference or other form of telecommunication
- in person

Settlement Conferences

Documents and discussions will not be a part of the appeal records and will not be disclosed unless all parties agree to their inclusion.

Note: Decisions can still be made based on filed agreements made by both parties with or without a Conference these documents must be signed and filed with the SST.

Filing deadlines

The Tribunal will set filing deadlines for information to be submitted in the appeal. They are not able to set these deadlines beyond two years after the date the appellant filed their notice of appeal except for under exceptional circumstances.

Under the old regulations this was limited to 1 year.

Income Security Appeals at the Appeal Division

Marginal note:Asking for more information — permission to appeal

48 (1) The Tribunal may ask an appellant for more information before it decides whether to grant permission to appeal a General Division decision.

Deciding without arguments from other parties

(2) The Tribunal decides whether to grant permission to appeal without asking the other parties for arguments.

Sending filing deadlines

49 (1) If it grants permission to appeal, the Tribunal must send the parties the deadlines for filing evidence, arguments or any other documents.

If a party is filing evidence, arguments or other documents

(2) Parties must file any evidence, arguments or other documents by the filing deadlines.

Changing the filing deadlines

(3) The Tribunal may change the filing deadlines if it considers the change necessary. The Tribunal must then send the parties the new deadlines.

The Biggest Change In My Opinion

Appeals to the Appeals Division are now able to include information that was not before the General Division at the time of making their decision.

This will reduce the number of files that following their hearing get referred back to the General Division for a second “de novo” hearing.

For more information

Social Security Tribunal Website:

https://www.sst-tss.gc.ca/en

Disability Alliance BC

#1450-605 Robson Street, Vancouver, BC V6B 5J3

(604) 872-1278

advocacy@disabilityalliancebc.org

For advocates only:

To reach Ashley directly press 111 **or** email ashley@disabilityalliancebc.org



Disability Alliance BC

Recommendations to Update TogetherBC:
BC's Poverty Reduction Strategy
April 2023

April 28, 2023

Dear Honourable Minister Sheila Malcolmson,

Since 1977, Disability Alliance BC (DABC) has been a provincial cross-disability voice that advocates for the rights of people with disabilities. As a non-profit organization, we work to support people with all disabilities to live with dignity, independence, and as equal and full participants in the community. We are submitting our written recommendations to the Ministry of Social Development and Poverty Reduction (SDPR) for consideration in updating TogetherBC: BC's Poverty Reduction Strategy.

In conjunction with this recommendations document, DABC has recently engaged with SDPR as they seek feedback from community organizations on TogetherBC, including a meeting held in February 2023 between DABC and SDPR staff whereby we outlined many of the recommendations written here. DABC also hosted a small-group discussion between clients and members of our network, and SDPR in March 2023.

In addition to the recommendations included here, DABC, as a member of the BC Poverty Reduction Coalition (BCPRC), supports the BCPRC's submission to the TogetherBC review.

Our recommendations are based on direct feedback from our clients and our membership – most of whom are people with disabilities living on low income. We have witnessed how our clients and our community are affected by poverty. 24.7% of BC's population are people with disabilities,[1] and for many of them, they face two times higher poverty rates, worse housing outcomes and incur higher and additional expenses for basic needs of daily living than persons without disability.[2] A large majority (71%) of people accessing social assistance in BC are those who receive Disability Assistance (colloquially known as PWD). PWD also accounts for 88% of new clients under social assistance.[3] DABC recognizes that Indigenous people with disabilities also face further compounding barriers to poverty reduction. DABC wishes to echo West Coast LEAF's recommendation in prioritizing Indigenous Poverty Reduction Measures, and in particular, wishes to highlight the recent report titled, *INCOME SUPPORTS AND INDIGENOUS PEOPLES IN B.C.: An Analysis of Gaps and Barriers* produced by the First Nations Leadership Council.

We recognize that none of these recommendations would be as compelling without the stories and lived experience of those who are living in poverty. With this in mind, we recommend that SDPR read this submission in conjunction with publicly shared experiences. For instance, we are inspired by the interviews collected in this document, published by the Insufficient Art Project, among many others shared online, in the media, and in publications that place the lived experiences of people with disabilities at the centre.

Recommendations

1) **Establish PWD as a separate program from Income Assistance**
2) **Broaden criteria in the PWD application to reflect the wider implications of disability.**
3) **Expand qualification for designated medical professionals to complete the PWD application**
4) **Expand qualification to apply for PWD as a prescribed class.**
5) **Increase the social assistance rates indexed to inflation as guaranteed in legislation**
6) **Expand eligibility criteria of assistive devices coverage beyond PWD clients**
7) **Expand Plan C extended healthcare coverage**
8) **Reduce income-testing requirements for people on PWD**
9) **Ease clawbacks on unearned income for people on PWD**

Rationale

1. **Establish PWD as a separate program from Income Assistance**

DABC believes that placing PWD within the social assistance system serves to reinforce discrimination and stigmatization towards people with disabilities.

Income Assistance (IA) is designed to provide short term assistance as a measure of “last resort” for those facing temporary problems. By having the PWD system nested within the IA system, it transfers that intention of

“temporary” assistance to those on PWD and fails to acknowledge the life-altering, often long-term nature of many disabilities that requires sustained and committed financial support that is needed in order to ensure meaningful participation of people with disabilities within the wider society and economy as a whole. This is especially evident in the routine monthly reporting that PWD recipients must provide in order to demonstrate that they are still within the financial eligibility requirements to receive assistance. This level of reporting and investigative nature by SDPR removes the agency of PWD recipients in obtaining financial freedom.

Having PWD as a separate system would enable people with disabilities to achieve an adequate basic income, with enhanced supplements, that would fully appreciate the long term financial and extended support required by many low income people with disabilities. This separate system would also positively acknowledge the rights and dignities of people with disabilities, and the responsibility of the BC Government to actively support their inclusion in our society.

DABC recommends that SDPR create a separate financial assistance and supports system which would provide a guaranteed income for all low income people with disabilities.

2. **Broaden criteria in the PWD application to reflect the wider implications of disability.**

The current PWD application process discourages people from accessing much needed support. Many PWD applicants have met with great difficulty and have often had to go through lengthy appeals before having their application approved.

The application process in and of itself can be a degrading experience for an individual, who may already feel demoralized due to public perception that income assistance is a “hand out”. To further go through the PWD application process where one needs to “prove” their disability in great detail in order to receive income, is an insult to many. Further, stigmatization towards people with disabilities, especially those with

"invisible" disabilities, is still very much prevalent in the healthcare sector, as evidenced by experiences shared from DABC clients.

In 2021, The Union of BC Indian Chiefs passed a resolution calling for the decolonization of the PWD application process, as the current application "does not adequately support, respect, and respond to the cultural, mental, and physical needs of Indigenous applicants, and instead reinforces cultural divisions and inequities between Indigenous peoples and non-Indigenous peoples."[4] DABC fully supports this resolution.

DABC recommends that SDPR expand the PWD application eligibility criteria that recognizes a more inclusive process for individuals to declare their disability.

3. **Expand qualification for designated medical professionals to complete the PWD application**

DABC has heard from many clients the difficulties in accessing a doctor or nurse practitioner available in their community to provide the assessment needed for section 2 of the PWD application. DABC has also heard from PWD applicants who either have recently moved to BC or, due to the nature of their disability are better placed to be treated by a specialist from outside the province, would benefit greatly by having their medical professional from outside of BC complete section 2 of the PWD application. It is in the best interest of PWD applicants to have a medical professional who knows their medical history well enough to adequately fill out the PWD application.

DABC recommends that SDPR include other classes of medical professionals and those practicing medicine or nursing in other provinces to support the PWD application.

4. **Expand qualification to apply for PWD as a prescribed class.**

DABC recommends that SDPR streamline the PWD application process by recognizing those who have already gone through a similar application, such as:

- Individuals who have been approved for disability assistance in another province and who have then moved to BC

- Recipients of the Disability Tax Credit

DABC argues that the above situations are similar to the current process for Canada Pension Plan – Disability (CPP-D) applicants, who may submit a streamlined application. As CPP-D and DTC applicants, as well individuals who have applied for disability assistance in other provinces, have already undertaken an assessment of disability with a medical professional through these application processes, a full PWD application is not needed.

DABC reiterates the need for SDPR to consider that the level of stress and pressure on individuals to "prove" their disability can be mitigated against through finding ways to streamline the process. Examining instances where individuals who have already gone through an application process for a different disability benefit should not need to go through the same validation process again.

5. **Increase social assistance rates indexed to inflation as guaranteed in legislation**

In our official review of the 2023 Budget, DABC stated our relief to see an increase in the shelter rate for people on social assistance; an increase that has been long overdue. The shelter rate, which hasn't changed since 2007, will increase from $375 per month to $500 per month for single individuals in July 2023. For a single person on PWD, this means their rate will go from $1,358 to $1,483 per month.

Undoubtedly, rent prices have increased by much more than $125 since 2007, so while we recognize that this shelter rate increase is a step in the right direction, it fails to meaningfully address systemic poverty in our province. DABC has heard from clients on PWD who continue to have to make impossible decisions between essentials like food, medication, rent, and utilities. Therefore, the current rate of PWD will continue to impact the quality of life, health and well being of low-income people with disabilities.

The poverty line for the majority of the province is roughly $2100 per month for a single individual,[5] and so this recent rate increase still will not meet the poverty line. While the BC Basic Income Panel report recommends that PWD be increased to match the poverty line,[6] DABC further argues that people with disabilities will most certainly have additional disability-related

costs to incur on a regular basis, which goes beyond what a person without a disability would incur. Therefore, the current poverty line does not reflect the higher cost of living for people with disabilities. DABC highlights the BCPRC statement in their Blueprint for Justice: “we must not mistake Canada’s Market Basket Measure poverty line for a finish line. Shifting people marginally past a low threshold may achieve a statistical benchmark, but it does not signal that their fundamental human rights have been met. The poverty line is not a benchmark by which to measure the achievement of secure, full-time, unionized work with all the benefits workers and families deserve.”[7]

DABC recommends that SDPR increase the PWD rate, including indexed year on year for inflation and guaranteed within legislation. This will ensure PWD recipients peace of mind with their financial security rather than depend on the whim of whichever political party is in government at any time.

6. **Expand eligibility criteria of assistive devices coverage beyond PWD clients**

As noted above, there is an inherent cost in having a disability. Many people with disabilities have higher daily living expenses, such as extra healthcare costs including medical equipment, caregiving and home support, education and employment costs including assistive technology.

In the context of assistive devices, most provinces (except BC) have broad programs for access to assistive devices that are not tied to income, but focus instead on ability. Ontario’s Assistive Devices Program is not income tested; rather, it is available to any resident with a valid health card that has a long-term physical disability.[8] In Quebec, assistive devices are available free of charge to anyone with a physical or intellectual disability or autism spectrum disorder that is covered by the provincial health plan.[9] Alberta’s Aids to Daily Living Program provides a broad range of assistive devices to anyone with a long-term disability, chronic illness or terminal illness that has an Alberta health care card; it is a cost share program, but low income people do not pay the cost-sharing portion.[10]

In BC, most financial coverage available for adults for these devices is available for people on PWD only. Those that do not qualify for PWD can

apply for certain types of medical equipment and assistive devices only if they can establish that it is needed to meet a “direct and imminent life-threatening need”, and they have an extremely low income.[11] Many applicants fail to meet this strict criteria. People with disabilities who do not qualify for PWD are left to purchase expensive medical equipment and assistive devices on their own or to seek out help from non-profits and charities. In addition, many people who acquire a disability after retirement age are shocked to find there is no government financial assistance for assistive devices. This is not a minor issue. As noted by ARCH Disability Law Centre, assistive devices “can be the difference between independence, inclusion and participation in daily activities.”[12]

DABC recommends that SDPR expand eligibility beyond PWD clients to include other people with disabilities, including seniors and people who receive CPP-D.

7. Expand Plan C extended healthcare coverage

The BC Expert Panel on Basic Income recommends an approach of reducing “extended benefits coverage as income rises, using an approach similar to Fair Pharmacare”[13]. DABC further argues that in order for this approach to be successful, Pharmacare and MSP should be improved to expand coverage of prescriptions and treatments that are not currently covered under this system. In particular, DABC acknowledges that people living with mental health disabilities have felt ostracized from the PWD system as treatments such as counselling and psychiatric care are in large part not covered within the healthcare system.

Further, the current $23 supplement for extended therapies[1] provided to PWD recipients is not effective in providing any financial relief as DABC has heard from clients that many practitioners often refuse to provide treatments to PWD clients as the administrative cost alone to apply for reimbursement from either MSP or the Ministry is more than $23.

DABC recommends that SDPR collaborate with the Ministry of Health to increase and expand Plan C coverage, especially within the context of low income people with disabilities who are not on PWD, and who are often the

[1] Extended therapies includes: acupuncture, chiropractic, massage therapy, naturopathy, podiatry and physical therapy. It does not include any mental-health related therapies

most affected by this lack of coverage due to additional prescription and treatment costs.

8. **Reduce income-testing requirements for people on PWD**

The current PWD system disincentivizes recipients from actively seeking out opportunities that would improve their life situation (such as a full-time job, living with a partner/spouse, joining a rehabilitation facility for treatment, or travelling outside of the province) because of fear that their PWD income would be clawed back or revoked altogether. The level of restrictions currently imposed on PWD recipients in order to continue receiving assistance negatively affects the life choices of these recipients to such a degree that the Ministry has inadvertently established a class system in BC whereby low income people with disabilities are not afforded the same freedoms as everyone else.

DABC recommends that SDPR simplify the income testing process for PWD applicants, and that ongoing income testing to prove continued eligibility for assistance be structurally overhauled to heavily reduce the amount of reporting that currently PWD recipients are obligated to provide.

9. **Ease clawbacks on unearned income for people on PWD**

Currently, unearned, unexempted income received by PWD recipients are clawed back dollar for dollar from their monthly PWD income. The IA application process and the ongoing PWD monthly reporting process, has been given the term “welfare wall” which disincentivizes PWD recipients from earning too much, or accessing other benefits like CPP-D, lest they have their PWD pay clawed back or removed entirely. The BC Expert Panel on Basic Income suggests that clawbacks should be changed from 100% to 70%. DABC agrees that this would be a large improvement on the current treatment of unearned, unexempted income, however, we argue that CPP-D payments should not be clawed back at all.

For those who are no longer able to work, DABC is aware of the practice that SDPR takes in requiring PWD recipients to apply for CPP-D. Since CPP-D is taxable income and PWD income is not, the PWD client is worse

off financially when their PWD income is clawed back as they ultimately would need to pay taxes on the CPP-D income. This is discriminatory.

For those on PWD who are able to work, DABC believes that income replacement systems like employment insurance (EI) should be treated as earned income, not unearned income because workers contribute their employment earnings to EI through a deduction in their pay cheque. Everyone who pays EI premiums can rely on EI benefits being there when they need them, including PWD clients, however the difference is that PWD clients "are required to pursue and accept the other income or means of support,"[14] meaning that they must accept EI benefits if they are eligible for them, but have no recourse to stop their PWD income from being clawed back. DABC believes this clawback of EI benefits is discriminatory against PWD clients, which hinders them from escaping the cycle of poverty. This argument was reflected in our letter to the Ministry in March 2022.

DABC recommends that SDPR exempt all unearned income.

Conclusion

DABC acknowledges the policy changes that SDPR has enacted over the years which have resulted in improved quality of life for low income people with disabilities in our province.[15] Ultimately, we believe that further action is needed to provide stronger, more robust supports for people with disabilities living in poverty.

DABC welcomes open, sincere dialogue with SDPR and the Province in working towards meaningful poverty reduction measures for low income British Columbians with disabilities.

Sincerely,



Helaine Boyd
Executive Director
Disability Alliance BC

[1] Canadian Survey on Disability (2018). Persons with and without disabilities aged 15 years and over, by age group and sex, Canada, provinces and territories (Table 13-10-0374-0). Statistics Canada. https://doi.org/10.25318/1310037401-eng

[2] Scott, C.W.M., Berrigan, P., Kneebone, R.D. et al. Disability Considerations for Measuring Poverty in Canada Using the Market Basket Measure. Soc Indic Res (2022). https://doi.org/10.1007/s11205-022-02900-1

[3] https://maytree.com/social-assistance-summaries/british-columbia/

[4] Page 42 of https://d3n8a8pro7vhmx.cloudfront.net/ubcic/pages/132/attachments/original/1615323503/2021FebCC_FinalResolutions_Combined.pdf?1615323503

[5] https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110006601

[6] Page 39 of https://bcbasicincomepanel.ca/wp-content/uploads/2021/01/Final_Report_BC_Basic_Income_Panel.pdf

[7] https://www.bcpovertyreduction.ca/full-blueprint/economic-security

[8] https://www.ontario.ca/page/assistive-devices-program

[9] https://www.quebec.ca/en/health/health-system-and-services/assistive-devices-disabilities-andhandicaps/assistive-devices-programs-for-persons-with-a-physical-or-intellectual-disability-or-an-autismspectrum-disorder-asd/

[10] https://www.alberta.ca/alberta-aids-to-daily-living.aspx

[11] Employment and Assistance Regulation, BC Reg 263/2002, s. 76; Employment and Assistance for Persons with Disabilities Regulation, BC Reg 265/2002, s. 69.

[12] https://archdisabilitylaw.ca/resource/arch-bulletin-on-covid-19-ontario-assistive-devices-program/

[13] BC Expert Panel on Basic Income. (2020). *Covering All the Basics: Reforms for a More Just Society.* Page 501. https://bcbasicincomepanel.ca/wp-content/uploads/2021/01/Final_Report_BC_Basic_Income_Panel.pdf

[14] https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/eligibility/pursuing-income

[15] https://engage.gov.bc.ca/povertyreduction/actions-to-date/ and https://disabilityalliancebc.org/community-update-province-announces-policy-changes-aimed-at-reducing-poverty/

MINISTRY OF SOCIAL DEVELOPMENT AND POVERTY REDUCTION/ ADVOCATE CONSULTATION PROCESS

There is an ongoing consultation process between MSDPR and advocates in BC; it has three parts.

If you are interested in joining any part of the consultation process, or want more information, contact the relevant advocate representative, or (for regional calls) the Ministry's CRSQ on the attached list.

1. MOVING FORWARD STEERING COMMITTEE:

This is the umbrella group for the consultation process. Committee members meet quarterly to discuss policy, procedural, or other issues, and share information.

Anita LaHue, Ministry Co-Chair Anita.LaHue@gov.bc.ca;

Tish Lakes, Advocate Co-Chair tishlakes@okadvocate.ca

2. SUBCOMMITTEES of the Moving Forward Steering Committee

Sub-committees focus on issues the Steering Committee identifies as needing more work.

a) CPPD (Canada Penson Plan Disability):

Mira Cullen, Ministry Co-Chair Mira.Culen@gov.bc.ca

Paul Lagace, Advocate Co-Chair advocate.pruac@citywest.ca

b) Health Benefits:

Peta Poulton, Ministry Co-Chair Peta.Poulton@gov.bc.ca

Caitlin Wright, Advocate Co-Chair CWright@taps.bc.ca

c) Prevention Loss Management Services (PLMS)

Kellie Vachon, Ministry Co Chair: Kellie.Vachon@gov.bc.ca

Advocate Co-Chair: position currently vacant (in the interim, please contact advocate Tish Lakes with questions about or interest in the PLMS committee: tishlakes@okadvocate.ca)

3. REGIONAL CONSULTATION CALLS

Each Ministry region has a regular quarterly call with advocates working in that region, where information is shared, and advocates can raise problems they've encountered with Ministry services or policies. All advocates are encouraged to attend the consultation call for their Ministry region.

Regionals calls are hosted by the Ministry's Community Relations and Service Quality (CRSQ) Manager for a particular region. If you do not yet receive email invitations for your regional call, please contact the CRSQ for your region and ask to be added to the invitation list. There is a current list of CRSQs, with their contact information, attached.

(last updated October 20, 2023)

Service Delivery Division

COMMUNITY RELATIONS AND SERVICE QUALITY (CRSQ) MANAGER CONTACT LIST

Work Unit (All Provincial Issues)	Community Relations and Service Quality Manager (CRSQ)	PHONE	GEOGRAPHIC AREA (Includes Ombudsperson Investigations)
INTAKE (Applications general & MySS Apps)	Michele Lauzon Michele.Lauzon@gov.bc.ca	Mobile: 604 760-4471	Lower Mainland Fraser and Van Coastal Lowermainland.MCRSQ@gov.bc.ca
	John Bethell John.Bethell@gov.bc.ca	Mobile: 604 512-5487	Lower Mainland Fraser and Van Coastal Lowermainland.MCRSQ@gov.bc.ca
CRSQ ISSUES SUPPORT SDSI.IssuesSupport.CommunityRelationsandServiceQuality@gov.bc.ca	Steven Clayton Steven.Clayton@gov.bc.ca	Mobile: 604-785-2506	Lower Mainland Fraser and Van Coastal Lowermainland.MCRSQ@gov.bc.ca
	Kellie Vachon Kellie.Vachon@gov.bc.ca ***(PLMS: Section 10 liaison)***	Mobile: 604 999-6476	Interior
	Mira Culen Mira.Culen@gov.bc.ca ***(CPPD Liaison)***	778 698-5993	Vancouver Island
Health Assistance, Health Supplements, Medical Transportation CONTACT CENTRE (Includes ACE & Bus Pass) Specialized Services*: ***EPs & Reconsiderations**	Peta Poulton Peta.Poulton@gov.bc.ca ***(CLBC Liaison)***	Mobile: 250-203-6311	Vancouver Island
SPECIALIZED SERVICES: Funeral Assistance, Special Care Facilities, OAS/GIS, Seniors Supplement, etc.	Pennie Smith Pennie.Smith@gov.bc.ca	250 734-4867	Northern

Approved by: Ann Evans Locker, Strategic Services Updated: April 28, 2023

Please contact approver for any updates required to this document.

	Ann Evans Locker Senior Manager, Stakeholder Relations	Mobile: 250 896-3323	

Please note: To streamline responsiveness, Lower Mainland, Fraser and Vancouver Coastal geographic issues are managed collectively through one mailbox: **Lower Mainland MCRSQ mailbox** (Lowermainland.MCRSQ@gov.bc.ca) to be used by Lower Mainland stakeholders and ministry staff only, as the preferred method of contact. Stakeholder queries sent to the mailbox will be responded to by the first available MCRSQ as soon as possible. Please continue to use the complaint resolution process: **Staff → Supervisor → MCRSQ**

WELFARE and ASSETS

October 25, 2023

Alison Ward, lawyer
Community Advocate Support Line, CLAS

Caitlin Wright
Advocate, Together Against Poverty Society (TAPS)

Welfare and Assets:

Outline

1. Options for clients who receive a lump sum of money while on welfare;

2. The Ministry says someone is not eligible for welfare for a time as they have "disposed of assets"; and

3. When is a thing not an "asset"?

- Jointly owned assets
- Assets that can't be sold
- Where a client is legal owner, but not beneficial owner

Section 1:

Receipt of lump sums on welfare



Receipt of lump sums on welfare

Clients may receive lump sums from many different sources. For example:

- An inheritance;
- A gift from a friend or family member;
- A residential school settlement or other Indigenous financial settlement;
- A family law settlement or court order for property division;
- An ICBC settlement;
- Retroactive child support arrears.

Duty to report income to the Ministry

ALL CLIENTS OF THE MINISTRY MUST REPORT THEIR RECEIPT OF ALL INCOME TO THE MINISTRY, BY THE 5 DAY OF THE MONTH AFTER THEY RECEIVE IT. IF THEY DON'T, THEY RISK:

- ASSESSED OVERPAYMENT

- BEING ASSESSED SANCTIONS FOR NON-REPORTING;

- THE POSSIBILITY OF CRIMINAL CHARGES FOR FRAUD IN RELATION TO WELFARE BENEFITS; AND

- LOSING THE CHANCE TO STRUCTURE THEIR SITUATION TO SO THAT THEIR ONGOING WELFARE BENEFITS ARE AFFECTED AS LITTLE AS POSSIBLE

When someone receives a lump sum: Four key questions

1. Does the welfare legislation exempt the lump sum as income in the month it was received?

2. Does the welfare legislation exempt lump sum as an asset in the months after its receipt?

3. If the lump sum is not an exempt asset, will it put the client over their asset exemption level?

4. If it will, what options does the client have for managing the excess asset under the welfare legislation?

First question: is the lump sum exempt income?

The answer to this depends on

1. The **source** the money came from; and
2. the kind of welfare benefits your client receives.

Disability assistance income exemptions are different than income exemptions for income assistance and PPMB benefits.

Hardship assistance income exemptions are different too.

Income exemption and types of benefits

Disability Assistance (PWD)

- Inheritances are exempt income
- Gifts **(including recurring gifts)** are exempt income

IA and PPMB benefits

- Inheritances are NOT exempt income
- Recurring gifts are NOT exempt income
- One time gifts are an asset (not income) at the time of receipt, and exempt up to the client's asset exemption level

(source: SCBC *Morris* decision and Ministry policy)

Income exemptions - legislation

Check the applicable legislation carefully for each client!

For a full list of income exemptions, you need to look in three places:

1. Schedule B of the *Employment and Assistance (EA) Regulation* (for IA and PPMB benefits);

2. Schedule B of the *Employment and Assistance Regulation for Persons with Disabilities (EAPD) Regulation*, Schedule B (or disability assistance); and

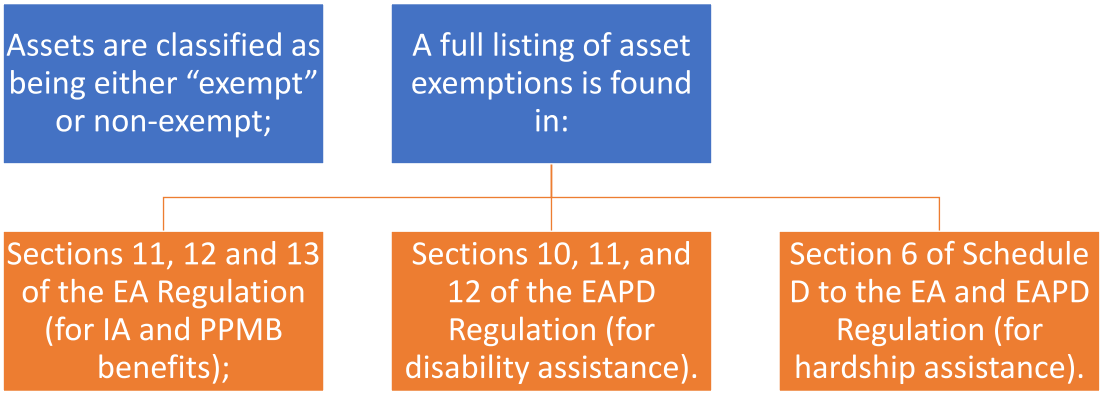
3. Schedule D of the EA and EAPD Regulations (for hardship assistance).

Fact pattern: Rosa

Rosa comes to your office this afternoon – she is a single mother on income assistance. She has two kids, 2 and 4. Her oldest child was diagnosed with autism last year. Rosa is excited because MCFD recently approved them for Autism Funding. She hasn't received any money yet but MCFD told her it could be as much as $22 000 per year.

She is worried that receiving that money might make her lose her income assistance benefits and wants your advice about that.

Second question: after receipt, is it an exempted asset?



Spending exempt assets

Let’s say the lump sum your client received is an exempt asset (e.g. retroactive child support);
If the exempt lump sum is used to buy other assets that are not otherwise exempt (e.g. a 2nd car), the other asset (e.g. 2nd car) becomes exempt
The exemption passes from the lump sum to the asset bought with it
Record keeping is very important! Client must be able to show exempt funds used to purchase the second car, in this example
Consider putting an exempt lump sum in a separate bank account to create a clear record of what that exempt money is used for.

Fact pattern: Janice

- Janice is survivor of an Indian Day School: she receives PPMB benefits as a single person. She recently received compensation of $50,000 from the Day School Class Action. She reported the monies to the Ministry.
- She would like to use some of the settlement money to buy a boat, so she can take her younger family members out on the water in the summer, but she is worried that might get her in trouble with MSDPR. She isn't sure what exact boat yet but has her eye on one that costs $30,000.

What guidance would you give to Janice?

Third question: If the lump sum isn't exempt, will it put the client over their asset exemption level?

Asset exemption levels

- $5000 for a single person on IA or PPMB benefits;
- $10,000 for a family unit of 2 or more on IA or PPMB benefits;
- $100,000 for a family unit on disability assistance where one adult has the PWD designation;
- $200,000 for a family unit on PWD where two adults have the PWD designation

Additional asset exemptions for PWD benefits

- Funds in a disability trust, RDSP or structured settlement annuity are also an exempt asset for PWD clients;

- Funds that a person on PWD benefits *intends* to put into a disability trust or RDSP are also exempted as an asset (see EAPD Regulation, s. 12.1(2));

- If a person has not yet received the PWD designation, but they have a genuine intention to apply, they can receive income assistance with assets at the higher, disability assistance levels while they apply for PWD designation (see EA Regulation, s. 11(2.1)).

Fact pattern: Jason

This morning you had an interview with a new client called Jason. Jason is 48 and receives income assistance benefits as a single person. He says he came to see you because his mother recently passed away and she left Jason $100,000 in her Will. Jason's sister is the executor of the mother's Estate, and the sister recently told Jason she expects to send the $100 000.00 to his bank account in about two weeks. Jason is worried about how this money will affect his income assistance eligibility. He would really just like to be able to save the money for the future, but he doubts the Ministry will let him do that.

While you were interviewing Jason, he told you that he has been struggling lately as he has been diagnosed with anxiety and depression. He also kept shifting around in his chair and, when you asked if he was comfortable, he told you that he has a lot of back pain that he sees a specialist for, and he's been diagnosed with something called Ankylosing spondylitis that he sees a specialist for. When you asked, he says he hasn't worked since about 10 years ago.

What options do you see for Jason? How would you approach this file?

Fourth question: How can the client manage non-exempt lump sums to minimize impact on benefits

Anyone on welfare who receives a non-exempt lump sum that is over their asset exemption level, has at least 3 options to manage their affairs:

1. Use some or all of the funds to buy exempt assets;
2. Use some or all of the funds to pay justly owing debts; and/or
3. Keep non-exempt assets up to their asset exemption level.

People with the PWD designation have two additional options:

a) put some or all of the funds into a disability trust (note: some TFSAs are deemed trusts) and/or

b) put some or all of the funds into an RDSP.

Managing non-exempt lump sums
Record keeping

If a client decides to spend some or all of a non-exempt lump sum to buy assets or pay just debts, they must **keep clear records** of all transactions:

- Get receipts for all assets purchased;
- Get proof of payment for all just debts paid;

  - they should also be prepared to show the Ministry documents to show they owed any debts they paid.

If a client does not keep clear records, the Ministry may say they “disposed of assets” and therefore are not eligible for welfare for a period of time.

CASE STUDY: VETERANS AFFAIRS DISABILITY AWARD

- PWD client approved for a disability award through Veterans Affairs Canada – for Pain and Suffering (PAS)
- Option to have a monthly payment paid out for rest of lifetime, or lump sum (less amount overall, based on calculations)
- Monthly PAS benefit of $608.36
- Minimal income exemption and no asset exemption
- Ministry classified all but $50 per monthly payment as unearned, non-exempt income
- Clawed off $558.36 first couple months client received as monthly benefit
- Any possible options to mitigate deductions?

INTERVIEWING CLIENT: WHAT ARE THEIR GOALS?

- Client's goal was to keep as much of their PAS as possible – both important as a financial resources, but to their dignity and principle of what they suffered while serving in Armed Forces
- Advised client that as long as this payment was monthly, all but $50 would be deducted dollar-for-dollar
- Asked/advised if client able to take out remaining award as a lump-sum
- Also needed to check for any potential complications between taking out a lump-sum vs. monthly benefit in terms of what VA health coverage they can continue to access – out of scope, referred to Legion (Command Service Officer)

RECEIPT OF LUMP-SUM & REPORTING

- Process for client to apply and have remaining award paid-out as a lump-sum
- However, end of December client received direct deposit of $206, 461.37
- Holiday closure – wasn't back in office until Thursday, Jan 5
- Worked as fast as possible – but income and asset disclosure letter not sent in until Jan 10 (following Tuesday), client not tech savy and did not have MySS account
- Still hoped it would be enough for cheque-cut off, but not and not reviewed in-time – now worried about overpayment. Advocate worked with a CRSQ – who basically gave the option for client: do you want assistance as normal, or to have it signaled and held (and avoid overpayment). Cl chose to have assistance held.

SUPPORTING DOCUMENTS

- Income and asset disclosure letter
- Confirmation letter from Service Canada re: lumpsum payment
- Bank transaction record
- Letter from advocate:
  - Client ineligible for following month's assistance
  - Will be assets in-excess following month
  - Reminder about assets-in-excess exemption, timeline and options (trust, RDSP, exempted asset purchase)

WHEN CLIENTS NEED ADDITIONAL TIME

- 3 month exemption not long enough for client to meet with lawyers, and establish trust
- However, more importantly – not the goal of client
- Client wanted to use funds to purchase a house (mortgage free) and was waiting on other potential award from Sexual Misconduct Class Action
- Refused to investigate RDSP or trusts further
- CI explicitly told Ministry reps their intention to not transfer excess assets, but still wanted more time and continued PWD benefits and did not tell advocate about conversations

PURCHASED EXEMPT ASSET

- Ultimately, client decided to purchase a primary vehicle using large portion of excess assets (after settling high volume of debt, credit cards, etc.)
- CI had to provide statement that they did not have any current primary vehicle, and would use for day-to-day transportation needs
- CI purchased $98,000 Jeep -> no longer assets in-excess -> no longer needed extension on temporary asset exemption

One option for Disability trusts: using a TFSA as a trust

Generally, if a client wants to set up a disability trust to exempt assets, they need to hire a private bar lawyer and pay them to draft a Trust Document.

An accessible alternative to that can be to use a Tax-Free Savings Accounts as a trust. This is possible as **some** TFSAs are set up using documents that include a Declaration of Trust, give the client the right to withdraw funds at any time, and can be considered "non-discretionary trusts" under the Ministry's guidelines. The Ministry's legal department reviews documents in each case to determine whether a valid trust has been established.

- See a) Prezi presentation
  b) Appendices on TFSAs as trusts, uploaded to Sched
  c) MSDPR Trusts, Committeeships and Structured Settlements Documentation Guidelines for Clients (updated June 2023), also uploaded to Sched

Section 2: Disposal of Asset Allegations



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Disposal of Asset Allegations

Section 14 of the EA Act and section 13 of the EAPD Act say:

14 (1)The minister may take action under subsection (3) if, within 2 years before the date of application for income assistance or hardship assistance or at any time while income assistance or hardship assistance is being provided, an applicant or a recipient has done either of the following:

(a)failed to accept or pursue income, assets or other means of support that would, in the minister's opinion, enable the applicant or recipient to be completely or partly independent of income assistance, hardship assistance or supplements;

(b)**disposed of real or personal property for consideration that, in the minister's opinion, is inadequate.**

(2)A family unit is not eligible for income assistance for the prescribed period if, within 2 years before the date of application for income assistance or hardship assistance or at any time while income assistance or hardship assistance is being provided, an applicant or a recipient has done either of the following:

(a)disposed of real or personal property to reduce assets;

(3)In the circumstances described in subsection (1), the minister may

(a)reduce the amount of income assistance or hardship assistance provided to or for the family unit by the prescribed amount for the prescribed period, **or**

(b)declare the family unit of the person ineligible for income assistance or hardship assistance for the prescribed period.

Disposal of property allegations: two types

“For inadequate consideration”

- “consideration” is what you receive in exchange for something else
  - if you sell a car worth $4000 for $4000, the consideration you get is the $4000 cash;
  - If you spend $1000 on lottery tickets worth $1000, the consideration you get is $1000 worth of lottery tickets (and is adequate)
  - If you spend $20 000 on a $20, 000 debt you can show you owe, the consideration you get is extinguishment of a $20 000 debt (and is adequate)

"To reduce assets”

- This implies that the person disposed of property to make themselves eligible for welfare
- The penalty for disposing of property to reduce assets is **double** the penalty for disposing of property for inadequate consideration
- This indicates this allegation is very serious. It requires an element of *intentionality: i.e.* that a client gave away things on purpose to qualify for welfare

Two types of disposal of property allegations Penalties

"For inadequate consideration"

- Where a person has disposed of property for inadequate consideration, the Ministry may
  - Reduce the family unit's benefit rate by $100 for each person in the family unit. The reduction lasts one calendar month for each $2000 of the foregone consideration; OR
  - Find the family unit ineligible for **one** calendar month for each $2 000 of the forgone consideration.

"To reduce assets"

- Where a person has disposed of property "to reduce assets"
  - the family unit is ineligible for benefits for **two** calendar months for each $2000 of the property that was disposed of to reduce assets

Disposal of property allegations: common Ministry errors

- When a client receives a non-exempt lump sum, an EAW may say that the client must live off the excess at no more than $2000 per month, (this comes from the $2000/month structure of the penalty for disposing of assets for inadequate consideration);
- An EAW who says this is legally wrong;
- clients who receive lump sums have all of the options for managing their situation outlined in earlier slides;
- The risk of an allegation about disposing of property for inadequate consideration or to reduce assets, highlights the need for clients to **keep good records** of how they use lump sums they receive

Working with clients with disposal of asset allegations

- If the Ministry alleges that a client has disposed of assets for inadequate consideration or to make themselves eligible for welfare, it is important to develop a relationship of enough trust for the client to tell you what they did with their money.
  - Clients may be afraid of your judgment or the Ministry's judgment if money was spent e.g. on addictions or travel, etc;
- The hardest situation to work with is one where a client won't tell you how part of all of a lump sum was spent;
- Any information from the client is better than none; most information can be worked with to show that in fact a client received adequate consideration for things they spent or sold.

Fact pattern: Roger

Roger comes to see you with a reconsideration package about some Worksafe benefits he received. You read over section 2 of the Employment and Assistance Request for Reconsideration which says:

> "Client is requesting a reconsideration of the decision to discontinue PWD assistance for inadequate consideration on disposal of assets. Client received a WCB permanent disability settlement of $220,000.00 on March 1, 2023. Client failed to declare the funds at the time received. It came to the attention of the Ministry on August 23. 2023. Client was interviewed on September 7, 2023 and indicated that he used the $220,000 to pay off loans to friends. Client provided limited documentation on where funds were spent. Total of repaid loans is $70,000. Client has been determined to be ineligible for 45 months based on inadequate consideration of $2,000 each month. One loan repayment for $30,000 to Jerry Smith was accepted as adequate consideration."

Roger - part 2

- Roger tells you he receives disability benefits and is a widow with three kids under 19. He was injured at work 6 years ago and hasn't worked since then. He still has pain every day and when he tries to work he feels worse.
- The family lives in a one-bedroom condominium Roger bought when he was working. Roger has a van but it has needed many repairs recently and still needs work. Roger hasn't had enough money to cover family expenses since he stopped work. He had to borrow money from several people. Roger tells you that when he received the WCB money he paid back his debts to everyone who loaned him money. Because one of the children a disability there are numerous doctor appointments for Roger, and the child.

How would you approach this file?

What else would you need to know?

What documentation, if any, would you try to get?

Fact pattern: John

John comes to see you about his PPMB file. He doesn't have any paperwork with him but he says the Ministry told him he is not eligible for any more benefits for about 18 months, and to come and see them again then.

When you ask him what happened, John he won $40 000 in the lottery a few months ago. He had been in recovery from a drug and alcohol addiction but had a serious relapse after he won the money. He has about $6 000 left still but spent the rest on drugs and alcohol. John has been seeing his doctor recently and is in recovery again, with supports in place, but he is very worried about what the Ministry said after he told them about his lotto winnings and what happened.

What issues do you see in this file? What would you tell John?

Section 3: When is a thing not an “asset”?



When is a thing not an asset?

This section looks at 3 situations (most often involving houses):

1. Jointly owned assets:
   - e.g. someone is joint owner of a house they don’t live in and needs time to sell it

2. Things that can’t be sold, even with reasonable efforts over time
   - e.g. house in a flood plain affected by climate change

3. Where a client is the legal owner of a thing, but not the beneficial owner
   - e.g. a parent puts an adult child on title to a house for estate planning purposes only

Definition of “asset”

Section 1 of the EA Regulation and EAPD Regulations define “asset”:

"***asset***" *means*

(a) equity in any real or personal property that can be converted to cash,

(b) a beneficial interest in real or personal property held in trust, or

(c) cash assets

This definition can be used to argue that something (a car, a house etc) is not an asset for the Ministry’s purposes.

(a) “Equity…. that can be converted to cash”

Jointly owned assets:

- where property is jointly owned, each owner is legally presumed to have a 50% share in the equity.
- If half the equity would put a client over their asset exemption level, and the other owner won’t agree to sell, the property can be exempted as an asset to allow time to sell it;
- The Ministry’s policy on jointly owned *assets* *says:*
- *When it is determined that an asset that is jointly owned cannot be disposed of because the other owner will not co-operate, the Supervisor may deem the asset not available. This decision is valid for a six-month period and may be extended for a maximum of two years.*
- This two year maximum exemption is only policy (not law).

Equity that cannot be converted to cash

There may be cases where something can't be sold *at all,* despite the person making reasonable efforts to sell them over time

In these cases, **depending on what evidence is available,** it may be possible to argue that the things are simply not "assets" at all. For example:

- Bare land in a remote location with no sales in years, with environmental damage;
- Property your client owns in another country, which your client fled as a refugee;
- Joint matrimonial home in New Brunswick, where client is on IA in BC, isn't eligible for legal aid, can't afford to travel to New Brunswick to sell, ex refuses to sell.

Where a client is the legal owner, not beneficial owner

- Remember "asset" is defined in part as:

  "a beneficial interest in real or personal property held in trust"

- if a person doesn't have a "beneficial interest" in property (or some other thing), then that property is not an "asset" under the legislation.

Legal ownership vs. beneficial ownership

There are at least 2 kind of ownership the law recognizes:

A) Legal ownership: this is determined purely by who is name as the owner on the registered legal title to a property (house, car etc); and

B) Beneficial ownership: this is about who owns a property in the sense of having all the benefits of ownership, regardless of who may be named as the "legal owner."

A lay person might say that a beneficial owner is the person who "really owns" something, no matter who might have legal title to it.

How to prove whether someone has beneficial ownership of something?

- Let's say you represent a client, Gabriela, whose elderly father put her on title to the family home, so that she will inherit it without probate when the father dies. The house is worth 1 million dollars.

- The Ministry says your client is ineligible for income assistance because the client owns (is on legal title to) an expensive house she doesn't live in.

- Is this house your client's asset? Is she just the legal owner, or does she also have a beneficial interest in the house?

Proving beneficial interest in a property

In **all** cases, what legally determines who the beneficial owner of a property is, are:

a) The intentions of the parties at the time that the property was put into the name of the client (or other legal owner); AND
b) What the law has to say about something called a "presumption of advancement" in your client's situation.

Presumptions of Advancement

- Legal presumptions are non-negotiable assumptions the law makes in a factual void. The presumption of innocence is one example of a legal presumption. Knowing no facts, the law presumes everyone is innocent until proven guilty. That is, evidence can disprove a legal presumption.
- Presumptions of advancement deal with situations where the law does (or does not) presume someone has a beneficial interest in property when they are put on legal title to that property as sole or joint owner

Presumptions of advancement

1. Where a parent puts an adult child on legal title to something (e.g. a bank account, a house etc), the law presumes that the parent **did not intend** to give the adult child beneficial ownership of the thing;

- This presumption can be disproven by evidence

2. Where a parent puts a minor child on legal title to something, the law presumes the parent did intend to give the minor child beneficial ownership of the thing;

- This presumption can also be disproven by evidence.

The Supreme Court of Canada decided these presumptions in 2007 in a case called Pecore v Pecore.

Gabriela's case continued

- In Gabriela's case, as she is an adult the law *presumes* her father didn't intend to make her the beneficial owner of the million dollar house by putting her on legal title;
- But, you still need evidence of what her father actually intended, as evidence can disprove a legal presumption;
- The BC Supreme Court has said that when someone argues they don't have a beneficial interest in property they legally own, they must supply **sworn evidence** (i.e. statutory declaration) to support their position. Letters are not enough.
- Therefore, you should get statutory declarations from the client, her father about their intentions in putting the client on title. If the father had an estate lawyer, that lawyer would also provide evidence.

CASE STUDY: INTERNATIONAL INHERITANCE

- PWD client named as beneficiary of late relative's estate
- Relative lived in the UK, and owned their own home
- Client expecting an interim inheritance payment + residue of estate after property eventually sold

CASE STUDY: INTERNATIONAL INHERITANCE

- Advocate helped disclosure of inheritance interim payment
- Will, bank transaction record (date/amount), email from executors (law firm in UK)
- Concern: current assessed value of property
  - Client has beneficial interest in property
  - Would Ministry consider it part of their current assets?
  - Assessed value converted = client over asset limit of $100,000

INCOME DISCLOSURE BUT UNKNOWN POTENTIAL FUTURE ASSET

- Argued cl had no legal title to dispose of property (held in-trust by the executors of relative's estate)
- Cl also had no legal citizenship or standing in country where property located
- Yes, beneficial interest, but only in the *residue:* what's left after sale proceeds have paid-out lawyers, closing costs, any taxes, etc.
- Argued client could not be assets-in-excess since the amount she would benefit from/eventually receive is unknowable

BRITISH COLUMBIA | Ministry of Social Development and Poverty Reduction

Trusts, Committeeships and Structured Settlements
Documentation Guidelines for Clients

Introduction

If you are applying for assistance or receiving assistance and you are a beneficiary of a trust, a person under a committeeship, or a plaintiff who received a structured settlement, you are required to report it to the ministry and submit documentation. With this information, the ministry will determine your eligibility for assistance.

The following information is intended to help you with the process of submitting documentation.

How to submit documents

Documents can be submitted:

- online through My Self Serve at myselfserve.gov.bc.ca
- by fax to the ministry's secure fax number at 1-866-455-0855
- in-person to any ministry or Service B.C. office

Trust documents

Trust documents fall into two general types. **Both types of documents** are required for the ministry to make an eligibility decision.

1) **Terms of the trust**

2) **Financial documentation**

Depending on the type of trust, different information is required. Below are general guidelines, but these are not exhaustive. If in doubt, please submit all documents related to the trust.

The ministry cannot provide specific advice about how to manage your affairs. If you have any questions in that regard, it is your responsibility to seek independent legal advice.

June 2023

1) Terms of the Trust

Trust Type	Documents Required
Formal Trust A formal trust will include a legal document, usually written by a lawyer or trust firm, outlining the trust.	Documents must: • include the trust agreement, trust deed, trust settlement, trust indenture, etc. • be signed and witnessed; and • include all pages of the agreement including any referenced schedules.
No Formal Trust A trust can exist in law without a formal trust document.	If there is no formal trust document, submit the trustee's detailed written explanation that describes their understanding of the arrangement. Documents must confirm: • that the parties intended to create a trust; • who the beneficiaries of the trust are and, if applicable, who would gain an interest in the trust assets if something happens (for example, if the main beneficiary dies); • specifically what property is held in the trust; • that the trustee has control of the assets held in trust; and • who decides when a payment is made from the trust.
Testamentary Trust A testamentary trust is created by a person in their will. The trust becomes effective when that person dies, so a separate trust agreement is not needed to put this trust into effect.	Documents must include: • a complete copy of the will; and • either a copy of the death certificate or a copy of the probate documents for the estate.

June 2023

Investment Accounts under a Declaration of Trust Sometimes investments such as a Tax-Free Savings Account (TFSA) or Registered Retirement Savings Plan (RRSP) are set up under a declaration of trust, with the financial institution as trustee. This situation creates an actual trust where the trustee simply holds the funds and invests them. The beneficiary can withdraw the funds as they wish.	Documents must: • include the Declaration of Trust language, which is often a standalone bank document; and • show the link between the Declaration of Trust and the account statements.

2) Financial documents

Financial documents are required for all trust types, and the documents must confirm:

- the current value of the assets held in trust;
- the total value of contributions made to all trusts;
- where the assets are held;
- who controls the assets in the trust; and
- who has signing authority (letter from financial institution or trust account set-up document).

Financial documents are most helpful when they show the institution name, account name, account holder(s), account number, date, and account balance.

A trust may initially be set up with a small asset or amount of funds, with additional funds to be added later. In such cases, please provide documents that show the initial amount has been transferred to the trustee to be held in trust. When the additional funds are added to the trust, this must be reported to the ministry, and documentation provided.

After your trust has been assessed and your eligibility has been determined by the ministry, you must continue to report any changes to the trust, or any funds added to the trust and provide updated documentation. The ministry has the authority to ask for information regarding a trust at any time, and trustees must keep accounts and be prepared to produce documentation on request regarding activity in the trust.

June 2023

Committeeships

A committeeship is an arrangement where a private individual, a trust company, or the *Public Guardian and Trustee* (PGT) is granted the authority to manage the affairs of an adult who is incapable of managing their own affairs.

Documentation must include either a certificate of incapacity or court documentation appointing the committee of estate for the person receiving assistance.

If the person is also a beneficiary of a trust, the trust documentation must also be included (see above).

Structured Settlements

A structured settlement is an agreement to pay damages to a plaintiff in a lawsuit, but by periodic payments rather than as a lump sum. To be considered a structured settlement under this policy, the settlement agreement must:

- be in relation to a claim for damages in respect of personal injury or death, and
- require the defendant to make periodic payments directly to the person for a fixed term or the life of the person through the purchase of a single premium annuity contract that is not assignable, commutable or transferable.

Documentation must confirm the above elements of a structured settlement. The settlement agreement, including the table of payments to be made to the person, and documentation showing the ownership of the underlying annuity generally satisfy this requirement.

More Information

If you require general information about the ministry's trust policy, please see the following resources:

- **Disability Assistance and Trusts Brochure**

  https://www2.gov.bc.ca/assets/gov/family-and-social-supports/services-for-people-with-disabilities/supports-services/disability_assistance_trusts.pdf

- **Online Policy Manual - Trust Section**

  https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/eligibility/trusts

Questions

If you have any questions, please contact the ministry by calling 1-866-866-0800. Due to the complexity of trust matters, responding to trust questions may require a call back from a ministry representative.

June 2023

APPENDIX 1 – Trust Legislation

(1)

Trust Related Legislation: October 2023

BC Employment and Assistance for Persons with Disabilities Regulation

Limits on income

9 (1) For the purposes of the Act and this regulation, **"income"**, in relation to a family unit, includes an amount garnished, attached, seized, deducted or set off from the income of an applicant, a recipient or a dependant.

(2) A family unit is not eligible for disability assistance if the net income of the family unit determined under Schedule B equals or exceeds the amount of disability assistance determined under Schedule A for a family unit matching that family unit.

Asset limits

10 (1) The following assets are exempt for the purposes of subsection (2):

(2) A family unit is not eligible for disability assistance if the family unit has assets with a total value of more than the following:

a) in the case of a family unit that includes one applicant or recipient who is designated as a person with disabilities, other than a family unit to which paragraph (b) applies, $100 000; (B.C. Reg. 99/2023)

(b) in the case of a family unit that includes one applicant or recipient who is designated as a person with disabilities, and another applicant or recipient who has applied for and has not been denied designation as a person with disabilities, $200 000;
(B.C. Reg. 99/2023)

(c) in the case of a family unit that includes 2 applicants or recipients who are designated as persons with disabilities, $200 000. (B.C. Reg. 99/2023)

Assets held in trust for person with disabilities

12 (1) In this section, **"disability-related cost"** means the cost of providing to a person with disabilities or a person receiving accommodation or care in a private hospital or a special care facility, other than a drug or alcohol treatment centre,

(a) devices, or medical aids, related to improving the person's health or well- being,

(b) caregiver services or other services related to the person's disability,

(c) education or training,

(d) any other item or service that promotes the person's independence, and

(e) if a person with disabilities does not reside in a special care facility, a private hospital or an extended care unit in a hospital,

(i) renovations to the person's place of residence necessary to accommodate the needs resulting from the person's disability, and

(ii) necessary maintenance for that place of residence.

(2) If a person referred to in subsection (1) complies with subsection (4), up to $200 000, or a higher limit if authorized by the minister under subsection (3), of the aggregate value of the person's beneficial interest in real or personal property held in one or more trusts, calculated as follows:

(a) the sum of the value of the capital of each trust on the later of April 26, 1996 or the date the trust was created, plus

(b) any capital subsequently contributed to a trust referred to in paragraph (a),

is exempt for the purposes of section 10 (2) *[asset limits]*.

(3) If the minister is satisfied that, because of special circumstances, the lifetime disability-related costs of a person referred to in subsection (2) will amount to more than $200 000, the minister may authorize a higher limit for the person for the purposes of subsection (2).

(4) A person referred to in subsection (2) who has a beneficial interest in one or more trusts must keep records of the following and make the records available for inspection at the request of the minister:

(a) for a trust created before April 26, 1996, the capital of the trust on that date;

(b) for a trust created on or after April 26, 1996, the capital of the trust on the date the trust was created;

(c) the amount of capital contributed in each subsequent year to a trust referred to in paragraph (a) or (b);

(d) all payments made after April 26, 1996 to or on behalf of the person from a trust in which that person has a beneficial interest.

(3)

(5) For the purposes of this section, the real or personal property of a "patient", as defined in the *Patients Property Act,* who is a person with disabilities is to be treated as if the real or personal property were held in trust for the patient by the patient's committee.

Temporary exemption of assets for person with disabilities or person receiving special care

12.1 (1) In this section, **"person receiving special care"** means a person who is receiving accommodation or care in a private hospital or special care facility, other than a drug or alcohol treatment centre.

(2) During the exemption period described in subsection (3), an asset received by a person with disabilities or by a person receiving special care is exempt for the purposes of section 10 (2) *[asset limits]* if the minister is satisfied that the person intends to

(a)establish a registered disability savings plan or trust, and

(b)contribute some or all of the asset to the registered disability savings plan or trust.

(3) The exemption under subsection (2) starts on the date the person receives the asset and ends 3 months after that date unless

(a) the exemption period is extended to a later date under subsection (4), or

(b) the exemption ceases to apply under subsection (5).

(4) The minister may extend the exemption period to a specified date if the minister is satisfied that the person is making reasonable efforts to establish a registered disability savings plan or trust.

(5) The exemption under subsection (2) ceases to apply if

(a) the person contributes all of the asset to a registered disability savings plan or trust, in which case the exemption ceases to apply to the asset on the date of the contribution,

(b) the person contributes a portion of the asset to a registered disability savings plan or trust, in which case the exemption ceases to apply to that portion on the date of the contribution, or

(c) the minister becomes aware of information that, in the minister's opinion, indicates that

(i) the person does not intend to contribute any portion of the asset to a registered disability savings plan or trust, in which case the exemption ceases to apply to the asset on the date specified by the minister, or
(ii) the person has contributed some of the asset to a registered disability savings plan or trust but does not intend to contribute any remaining portion of the asset to a registered disability savings plan or trust, in which case the exemption ceases to apply to the remaining portion on the date specified by the minister.

(6) Amounts expended from an asset to which the exemption under subsection (2) applies are deemed to be money or value received from a trust within the meaning of paragraph (1) of the definition of "unearned income" in section 1 (1).

[en. B.C. Reg. 197/2012, Sch. 2, s. 6.]

Schedule B

Exemptions - unearned income

7 (0.1) In this section:
"disability-related cost" means a disability-related cost referred to in paragraph (a), (b), (c) or (e) of the definition of disability–related cost in section 12 (1) *[assets held in trust for person with disabilities]* of this regulation;

"disability-related cost to promote independence" means a disability-related cost referred to in paragraph (d) of the definition of disability–related cost in section 12 (1) of this regulation;

"intended registered disability savings plan or trust", in relation to a person referred to in section 12.1 (2) *[temporary exemption of assets for person with disabilities or person receiving special care]* of this regulation, means an asset, received by the person, to which the exemption under that section applies;

(2.1) Repealed. [B.C. Reg. 204/2015, App. 2, s. 4 (b).]

(3) Repealed (B.C. Reg. 83/2012) (B.C. Reg. 197/2012)

APPENDIX 2

5

Ministry Policy Related to Trusts: October 2023

Available online at: https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/eligibility/trusts

Trusts

Policy

Eligibility and Trusts

Types of Trusts

Income Assistance Clients and Trusts

How a Trust is Set Up

Transferring Income or Assets into a Trust

Trust Payments

Structured Settlements

Committees

Trust Reporting Requirements

Random Annual Audits

Return on Investment in a Trust

Client as Trustee

Eligibility and Trusts

Effective: July 20, 2011

Among other things, trusts provide a way for some *clients* and their families to safeguard *assets* for meeting disability-related costs now and in the future while remaining eligible for assistance.

The following client types may transfer certain kinds of *assets* (*real property* or *personal property)* into a *discretionary trust* or a *non-discretionary trust*, under certain conditions, without

affecting eligibility for assistance:

- Clients who have the *persons with disabilities (PWD) designation*;
- A client who resides in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre);
- Clients or applicants awaiting a PWD adjudication decision or completing a PWD Application form [for more information, see Related Links - Designation Application].

Note: Throughout this topic, "client" will refer to both recipients and applicants.

Income assistance clients, other than those who reside in a private hospital or a special care facility, could have a discretionary trust that would not be considered an asset in certain narrow circumstances. [For more information, see Policy – Income Assistance Clients and Trusts.]

Top

Types of Trusts: October 1, 2012

Effective: October 1, 2012

A trust is a legal relationship where someone (the trustee) holds the legal interest in (legally owns) money or other *assets* for someone else's benefit (that person is called the "beneficiary"). The legal relationship is often, but not always, described in a written agreement, or in a will. There can be more than one trustee, and multiple beneficiaries, or there may be only one of each.

There are two basic types of trusts: "discretionary" and "non-discretionary." The distinction is important, because they are treated differently under BC Employment and Assistance legislation.

***Discretionary trust*:** a trust in which the trustee has absolute authority over payment of capital and income from the trust. In other words, the trustee has complete authority to decide whether to provide trust funds to the beneficiary, or to spend trust funds on their behalf.

- The ministry generally does not consider a discretionary trust to be an asset, provided the beneficiary has no legal right to end the trust and take the capital. Because such a trust is not considered an asset, there is no limit to the value of assets that can be held in a discretionary trust.
- If the beneficiary has a legal right to collapse the trust and gain control of the assets, the ministry considers the trust to be an asset. Such a trust is considered to be a *collapsible discretionary trust*.

***Non-discretionary trust*:** A trust in which the trustee does not have absolute authority over payments of capital and income from the trust. The beneficiary may have some control, or the



trustee may be required to make certain payments.

1. A non-discretionary trust is considered an exempt asset for eligible *clients* so long as the value of all capital contributions over time does not exceed **$200,000.**
2. Any return on investment generated by the trust can grow the value of the trust beyond $200,000 [see Policy - Return on Investment in a Trust for more information].
3. Capital contributions in excess of $200,000 are not exempt as an asset unless special approval is given by the minister.
4. The minister can approve capital contributions in excess of $200,000 if the minister is satisfied that the lifetime disability-related costs of the beneficiary will exceed $200,000 [see Procedures – Lifetime Maximum].

Note: Trust capital is the total of all contributions made to a trust. Trust income is any return on investment generated from capital contributions within a trust.

A Registered Disability Savings Plan (RDSP) is a registered matched savings plan specific for people with disabilities. An RDSP is not a trust but is an alternative tool for safeguarding and growing assets now and for the future. [see Related Links – Assets & Exemptions]

Top

Income Assistance Clients and Trusts

Effective: December 1, 2015

Income assistance *clients*, other than those who reside in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre), could have a *discretionary trust* provided they have no way of collapsing the trust and gaining control of the *assets*. This is because a discretionary trust is not considered an asset. However, whether they can have such a trust also depends on how, when, and by whom the trust was set up. For example, these clients may not be eligible for assistance if the trust was set up with capital that was within that client's control, within two years before their date of application for assistance or while in receipt of assistance. Further considerations include the underlying purpose of the contribution to the trust, and the purpose of the trust itself. **A legal opinion must be sought by the ministry through the Strategic Policy and Legislation Branch (SPLB) regarding such a contribution to a trust before making an eligibility decision.** [See Procedures]

Examples:

- A third party sets up a discretionary trust using their own resources, naming the client as beneficiary. The client cannot collapse the trust and gain control of the assets. In this case, the existence of the trust alone does not impact the client's eligibility for assistance.
- During the two years prior to applying for *income assistance*, a client receives some property and transfers it to a discretionary trust. The client cannot end this trust and take the capital. Depending on all the circumstances in this case, the client may not be eligible for assistance because of s. 13 of the *EAPWD Act* or s. 14 of the *EA Act*. In some cases it may be determined that the client disposed of *real property* or *personal property* in order to reduce assets by transferring them into a trust.

Top

How a Trust is Set Up

Effective: July 20, 2011

A trust is generally set up by transferring *assets* to someone to hold for the benefit of another person. Similarly, a trust can also be set up by a person declaring assets they own are owned for the benefit of another person. The fundamental concept of a trust is that the legal ownership of the asset (essentially, the authority to manage or dispose of the asset) is separated from the beneficial ownership (the right to benefit from the asset).

There are many ways to set up a trust. Two common trust arrangements are:

- The recipient/applicant or another party chooses someone to be a trustee, or to be a co-trustee with the *client*, to manage the trust. The client and the trustee sign a trust document showing all the terms under which the assets have been transferred to the trustee, to be held in trust. This type of trust is an inter vivos trust because the creator of the trust is still alive.
- A person creates a trust in their will. The trust becomes effective when that person dies, because the deceased person's assets are automatically transferred to their executor and trustee, so they can carry out the instructions in the will. Thus, a separate trust agreement is not needed to put this trust into effect. This type of trust is a testamentary trust, because it is created through a person's last will and testament.

A trust document itself is not enough to create a trust. The legal title to the asset in trust must be transferred to the trustee to make the trust effective.

Ministry staff must not provide recommendations or advice regarding whether a trust or other personal arrangement is right for a recipient/applicant. The ministry cannot give legal or investment advice to clients, and can only provide information regarding how an arrangement a client has already made affects their eligibility. If a trust is claimed by a client, a legal opinion must be sought by the ministry through the Strategic Policy and Legislation Branch (SPLB) before making an eligibility decision.

APPENDIX 2

(9)

Ministry staff use a Request for Trust Legal Opinion (HR2999) and send any other relevant documents to SPLB to determine whether the trust is valid, whether the trust is to be considered an asset, and if it is exempt.

[For more information, see Additional Resources – Trusts, Committeeships and Structured Settlements: Documentation Guidelines for Clients.]

Top

Transferring Income or Assets into a Trust: December 1, 2015

Effective: December 1, 2015

If an eligible *client* receives *earned income* or *unearned income* (such as CPP disability payments, money from a trust, or investment income from *assets* held outside a trust), it is considered income in the month received even if the income is redirected, or received and transferred, into a trust. Certain income exemptions apply [see Related Links – Income Treatment & Exemptions]. Unless deemed by the legislation to be unearned income by definition, transfers of assets are not treated as income [see Related Links – Assets & Exemptions].

Eligible clients may choose to transfer newly received income or assets to a trust or Registered Disability Savings Plan (RDSP) to avoid being over the asset limit in subsequent months [see Related Links – Assets & Exemptions]. If under $200,000 the asset(s) can be transferred into a trust. If the value of the asset(s) exceeds $200,000 the client should get legal advice, and they MAY be able to use a trust. For example, a possible concern is disposal of *real property* or *personal property* to reduce assets (section 13 of the *EAPWD Act* and section 12 of the *EA Act*). Whether or not this provision applies will depend on the circumstances of each case.

Ministry staff must not provide recommendations or advice regarding whether a trust or other personal arrangement is right for a recipient/applicant. The ministry cannot give legal or investment advice to clients, and can only provide information regarding how an arrangement a client has already made affects their eligibility. If a trust is claimed by a client, a legal opinion must be sought by the ministry through the Strategic Policy and Legislation Branch (SPLB) before making an eligibility decision.

If an asset passes directly into a trust or RDSP and the recipient/applicant did not receive the asset directly, then the asset is not considered income in the month received. For example, if a relative chooses to make regular deposits of money directly into a trust for the client, those deposits will not be considered income in the month received. Note that this is different than when a client has an entitlement to an asset, but directs the person holding the asset (the transferor) to transfer the asset into trust instead of paying the client directly. In such a case, it is the client and not the transferor who has chosen to transfer the asset in the trust. Accordingly, the ministry treats this situation the same as if the client actually received the asset before it was transferred to the trust.

APPENDIX 2

10

A legal opinion must be sought by the ministry through SPLB when ministry staff require advice regarding how to categorize a transfer of income or assets and, generally, whenever there may be a trust involved, before making an eligibility decision.

If an eligible client transfers an exempt asset into an exempt trust, for example, a residential property that serves as the client's primary residence, or a transfer from a personal RDSP, the asset remains exempt and does not impact eligibility for assistance. Likewise, funds rolled into an exempt trust from a deceased parent's RRSP or Registered Retirement Income Fund are not considered income in the month received.

If an eligible client does not have an exempt trust or RDSP and the client wishes to transfer an asset to a trust or RDSP, the ministry allows the client up to three months to do so (the first month being the month in which the asset is received). During this time, the ministry will exempt assets intended for the trust or RDSP. If, after three months, the client has not set up a trust or RDSP, the client's circumstances will be reassessed. If the client provides documentation (from a financial institution or lawyer) proving they are making reasonable efforts to establish an RDSP or trust, and the delay is beyond their control, the exemption for the asset may be extended on a month-by-month basis. The client must provide documentation each month for which an extension is requested. The exemption ceases to apply if the ministry becomes aware of information that indicates that a client does not intend to contribute the asset or a portion of the asset to a trust or RDSP.

Expenditures from an asset intended for a trust or RDSP will be exempt only so long as they are spent on "disability-related costs" [see Policy – Trust Payments]. However, if the client does not receive assistance for a month because of excess income in the month received, expenditures from the asset intended for a trust or RDSP are not restricted during this month (short of transactions making s. 13 of the *EAPWD Act* or s. 14 of the *EA Act* applicable).

Assets Reported Late or Discovered by Review or Investigation: Clients found to be ineligible for assistance as a result of reporting assets at a later date, or for failing to report assets (either before or after the client began receiving assistance) which were subsequently discovered as a result of a review or investigation, may reapply for assistance when they no longer have the assets, or when they transfer the assets into a trust [see Policy – Eligibility and Trusts]. If they choose to set up a trust, this must be done **before** they will be eligible for assistance (i.e., unlike clients who report assets, non-reporters are not eligible while they are setting up the trust). In such cases, ministry staff will expedite the review of the trust and the client will remain ineligible for assistance until the trust has been reviewed and determined to be valid and an exempt asset.

Exception:

If an asset described above (over the asset limit that is reported at a later date or following a review or investigation that has uncovered the asset which was not reported) is being held within an **existing trust**, the client **remains eligible** for assistance and the trust should be immediately reviewed.

APPENDIX 2

Amended Trusts: Clients found to be ineligible following a review of a trust may in some cases amend the terms of the trust. Ministry staff cannot advise whether a client can or should amend a trust. If the client chooses to amend a trust, ministry staff will expedite the review of the amended trust, and the client remains ineligible for assistance unless and until the trust has been reviewed and determined to be valid and an exempt asset.

Top

Trust Payments: December 1, 2015

Effective: December 1, 2015

Payments from both *discretionary* and *non-discretionary trusts* are considered *unearned income* subject to exemptions for certain trust payments. Exemptions apply only to *persons with disabilities* (PWD) *clients*, PWD applicants and clients who reside in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre); there are no trust payment exemptions for other clients or non-PWD members of a family unit. Trust payments are fully exempt for eligible clients when used for:

- Acquiring a place of residence for the client,
- A contribution to a Registered Education Savings Plan,
- A contribution to an Registered Disability Savings Plan (RDSP), or
- Disability-related costs:

Disability-related costs
Devices, or medical aids, related to improving the person's health or well-being. Examples of devices, or medical aids, related to improving the person's health or well-being include but are not limited to: • High performance wheelchairs for recreational/leisure or sports use • Vehicle modifications (hand controls, van lifts) • Lift chairs
Caregiver services or other services related to the person's disability. "Other services related to the person's disability" is interpreted broadly and includes many services. Examples include but are not limited to:

APPENDIX 2

12

• Home-maker services • Community Connectors (social network facilitators) • Employment services or supports • Speech therapy • Physiotherapy • Occupational therapy • Behavioural or communication therapy • Applied behavioural analysis • Counselling
Any other item or service that promotes the person's independence. "Any other item or service that promotes the person's independence" is interpreted broadly and is determined by the beneficiary or trustees, not ministry staff. Transferring assets out of trust could be considered to promote independence.
Education or training
Renovations or changes to the person's place of residence necessary to accommodate the needs resulting from the person's disability (not applicable to clients who reside in a special care facility, a private hospital or an extended care unit in a hospital)
Necessary maintenance on the person's place of residence (not applicable to clients who reside in a special care facility, a private hospital or an extended care unit in a hospital)

Notes: There is no income exemption for return on investment outside of a trust or RDSP.

Generally, *disability assistance* clients are not required to use *assets* from a trust to pay for items that may be provided by the ministry. For example, if a PWD client meets all eligibility criteria to be provided a wheelchair, their trust would not be considered an available resource and they would be eligible to receive the wheelchair. Assets from a trust can be used to pay for upgrades to items beyond what may be provided by the ministry.

If an individual who is not a ministry client with a non-discretionary trust applies for a health supplement under life-threatening health need, they are required to use assets from their trust before being considered for a supplement under life-threatening health need.

Trust payments are separate from RDSP payments. RDSPs are not subject to trust payments guidelines.

APPENDIX 2

13

Note on fees: Trust payments for investment commissions, or administration and legal fees required to operate a trust (for example, tax payments or payments to trustees) are not payments to the beneficiary.

Preferred Beneficiary Election

A preferred beneficiary election allows a trustee to allocate trust income to the client on the client's tax return, without actually paying the income to the client. The client's income tax return will show that they have received income, but since the client doesn't receive any money, it cannot be included in the client's income for the purpose of calculating the client's eligibility for assistance. This is not the same as income paid on behalf of the client to a third party. Staff are to obtain verification of a preferred beneficiary election from the client or trustee in order to exclude it.

Ministry staff have no authority to direct a client or a trustee regarding how they must use a trust, nor may they provide suggestions or advice as to how to use a trust; staff apply the Act, regulations and ministry policy to determine how the client and trustee have used their trust as it relates to determining eligibility for assistance.

Top

Structured Settlements: October 1, 2012

October 1, 2012

A structured settlement is an agreement to pay damages to a plaintiff in a lawsuit, but by periodic payments rather than as a lump sum. To be considered a structured settlement under this policy, the settlement agreement:

- must have been in relation to a claim for damages in respect of personal injury or death, and
- must require the defendant to make periodic payments directly to the person for a fixed term or the life of the person through the purchase of a single premium annuity contract that is not assignable, commutable or transferable.

If a settlement does not meet all of these criteria, it is not a structured settlement. These annuities are not assets. Some structured settlements require payments to be made into an actual trust, in which case the trust will determine how the arrangement is treated.

Payments received under structured settlements are treated the same as payments from trusts. The same trust payment income exemptions apply, regardless of whether the payment originated in a trust, or came from a structured settlement annuity.

APPENDIX 2

If a *client* receives a structured settlement and does not have the *persons with disabilities (PWD) designation* or is not a person receiving accommodation or care in a private hospital or a *special care facility*, the underlying annuity will not be considered their asset. However, there are no exemptions for payments under a structured settlement for these clients, so any payments under a structured settlement to a client who is neither a PWD nor a resident in a special care facility will be treated as unearned income.

If the structured settlement is set up to make payments into a trust, the payments may or may not be considered income; a legal opinion is required.

A legal opinion must be sought by the ministry through the Strategic Policy and Legislation Branch (SPLB) when structured settlements are reported, before making an eligibility decision.

Structured Settlement Reporting: Clients who are the beneficiary of structured settlement annuity payments are required to keep records of the following and make the records available for inspection at the request of the minister:

- the settlement agreement, including the table of payments to be made to the person
- documentation showing the ownership of the underlying annuity

Each year the ministry needs the following information:

- all payments made to or on behalf of the person under the structured settlement and what the money was used for

In addition, clients are required to report structured settlement annuity payments on their monthly report, as the payments may affect their eligibility.

Top

Committees: October 1, 2023

Effective: July 13, 2016

A committeeship is an arrangement where the *Public Guardian and Trustee* (PGT), a private individual, or a trust company is granted the authority to manage the affairs of an adult who is incapable of managing their own affairs. Under BC Employment and Assistance legislation,

15

a *patient*'s own *real property* and *personal property*, which is controlled by a *committee*, is treated by the ministry as if held in a discretionary trust for the adult; accordingly, it is not required to be held in an actual trust in order to not be considered an asset. A third party can still set up a trust for a patient. A patient would also generally continue to be the beneficiary of a trust that existed prior to their incapacity. Such actual trusts are considered on their terms, and in light of the patient's inability to manage their affairs.

A legal opinion must be sought by the ministry through the Strategic Policy and Legislation Branch (SPLB) in the case of a committeeship, to confirm the status of the committeeship as well as to determine how to apply the trust asset exemptions before making an eligibility decision. In seeking a legal opinion, it is important to include documentation showing who holds title to the assets in question and, if there is an actual trust, documentation showing that the property is held in trust and confirming the terms of any trust arrangement. Documentation should also include a copy of the court order or certificate of incapacity creating the committeeship.

The PGT provides assistance to adults who need support for financial and personal decision making. In that role, the PGT acts as the *client's* representative, no different from any other client advocate, committee or trustee. **As such, a legal opinion must be sought by the ministry through SPLB for all arrangements involving the PGT before making an eligibility decision.**

Payments made by the committee from assets held by the client are not considered as income and do not impact eligibility for assistance. If, however, a payment is made by the committee from an actual trust, trust payment policy applies [see Policy – Trust Payments].

For example, if a committee makes a payment from a client's bank account (such as for rent, transportation, a medical device, etc.), it is a payment from a client's own money and not income. The committee is spending the client's money on the client's behalf – therefore, the client's support and shelter assistance is not impacted. If however, any of these payments are made by the committee from an actual trust, the payments are unearned income and trust payment policy applies and each payment may or may not be exempt according to trust policy.

[For more information on documentation required, including for committees involving the PGT, see Additional Resources – Trusts, Committeeships and Structured Settlements: Documentation Guidelines for Clients.]

Top

Trust Reporting Requirements

Effective: December 1, 2015

Clients are required to report all trust changes and activity that may affect their eligibility on their monthly report. Clients are not required to regularly report trust balances.

APPENDIX 2

(16)

The ministry has the authority to ask for information regarding a trust at any time, and trustees must keep accounts and be prepared to produce documentation on request regarding activity in the trust. Each year the ministry needs all of the following information about a trust:

- how much money was disbursed from the trust to or on behalf of the client
- whether there were any changes to the trustees
- whether any new money was deposited to the trust

An updated legal opinion must be sought by the ministry through the Strategic Policy and Legislation Branch (SPLB) when a change in trustee or amendment to the terms of the trust is reported, before making an eligibility decision.

Top

Random Annual Audits

July 20, 2011

Exempt trusts held for clients with the *persons with disabilities designation* or persons in a private hospital or a *special care facility* (other than a drug or alcohol treatment centre) are subject to random annual audits. Audits will match reported trust activities with actual trust documentation to ensure accurate accounting of the trust.

Trustees holding exempt trusts for clients need to keep a record of all activity relating to the trust.

Top

Return on Investment in a Trust:

Effective: December 1, 2015

Income generated from return on investment within a trust can either be kept in the trust or paid out to the *client*, depending on how the trust is set up.

APPENDIX 2



While non-discretionary trusts have a maximum contribution limit, the value of the trust can exceed the contribution limit through return on investment. This means that the trust remains exempt regardless of whether the income generated in it brings the value of the trust over $200,000. Income accrued in a trust is **not** considered to be a capital contribution.

For example, if a client sets up a non-discretionary trust with a $199,000 contribution and income generated on that amount brings the value of the trust to $210,000, the entire value of this trust would still be considered an exempt *asset*.

If the income is paid out to the client through a trust payment, it does not matter whether the payments are made from capital, income or mixed capital and income. The entire payment is from a trust, and therefore income attributable to the client [see Policy - Trust Payments].

Note on topping a trust back up: If a client contributes $200,000 (or their approved lifetime maximum) to a non-discretionary trust, draws down the value of the trust, and subsequently makes further contributions to it, the additional contribution is not exempt. For example, a client withdraws $10,000 from their trust that they set up with $200,000. After the $10,000 withdrawal, the client contributes $5,000 of fresh capital. In this example, the $5,000 contribution is considered a non-exempt asset since the client has now contributed a total $205,000 to their trust – more than their lifetime maximum.

Note that it is only "new" contributions to the trust that count toward the exemption limit in the calculation; if the trust earns income that is simply kept by the trust and accumulated as trust capital, such capital has not been "contributed" to the trust for the purpose of this calculation.

Note on investment properties: *Real property* may be held within a trust. If the trust owns the property, rental income the property generates is income to the trust, like any other investment income. It is not a capital contribution nor is it the client's income. Assuming the trust is exempt, this income is exempt because it is income earned by the trust, not the client. If the income accumulates, it does not count as a capital contribution by the client.

Top

Client as Trustee

July 20, 2011

While not a common situation, a client/applicant can be a trustee of a trust where another person is the beneficiary. (A client can also be a co-trustee of a trust where the client is the beneficiary.)

If a client is a trustee of a trust where another person is the beneficiary, the assets in the trust and income generated in the trust are not considered to be the client's asset; however, a number of issues can still arise in this situation. **A legal opinion must be sought by the ministry through LLAB in every case where the client claims they are a trustee, or otherwise claims to be holding property for the benefit of another person, before making an eligibility decision.**

APPENDIX 3 – Intent to Establish a Trust (Template Letter)

18

Date:

RE: Mr. John Doe, SIN

Intent to Establish a Trust

ATTN: Ministry of Social Development and Poverty Reduction

To Whom it May Concern,

Mr. John Doe has requested that I provide the ministry with a brief outline establishing his intentions for the use of his recent income. Mr. Does has recently received $120, 000 in a recent inheritance (supporting documentation enclosed). It is Mr. Doe's intent to establish a non-discretionary trust with this income and to use the benefits of this trust for disability related costs.

I have advised Mr. Doe that it is ministry policy to exempt assets intended for the establishment of a non-discretionary trust for a period of three calendar months from the date that he receives his inheritance. Please notify me directly if any other course of action is taken so that I may be of assistance to both the ministry and Mr. Doe in correcting any error in understanding.

Yours sincerely,

_____

Your Name
Legal Advocate, Your Agency

19

APPENDIX 4 – Introduction to Financial Institution (Template Letter)

Date:

RE: Client Name - SIN

Dear RBC/Vancity Representative,

Mr. John Doe is currently in receipt/applying for persons with disability (PWD) benefits form the Ministry of Social Development and Poverty Reduction. Mr. Doe is in need of placing some inheritance monies into a Royal Bank/Vancity Tax Free Savings Account that meets the terms as set out in the attached Declaration of Trust. It is essential that the TFSA that Mr. Doe establishes to deposit this money into is governed by the attached agreement in order to ensure the continuance of his PWD benefits. Please provide Mr. Doe with the necessary application and trust agreement/declaration of trust so that I may review the forms with him prior to establishing the account.

If you have any questions concerning this request please feel free to contact me at (250) 361-3521. Mr. Doe has granted me a release of information to discuss this information with you.

Sincerely,

_____

Your Name
Legal Advocate, Your Agency

20

APPENDIX 5 – MSDPR Trust Disclosure (Template Letter)

Date:

RE: John Doe, SIN

Trust Agreement

ATTN: Ministry of Social Development and Poverty Reduction

To Whom it May Concern,

The following attached documents are in reference to a Tax Free Savings Account (acct # -123456789) established for the account holder, Mr. John Doe, who agrees to be bound by the terms and conditions of this account as set out in the application and the accompanying Trust Agreement. The Trustee, namely the Royal Bank of Canada/Vancity Credit Union, agrees to act as Trustee of the Account in accordance with the terms of the Trust Agreement. This trust relationship is clearly established in the documents that I have attached.

This trust qualifies as a Trust under Section 12 of the *Employment and Assistance for Persons with Disabilities Regulation*. I understand that the Ministry procedure at this point is to refer the Trust to the Legislation, Litigation and Appeals Branch for review and in the meantime to continue to pay Mr. Doe's disability benefits. Please advise me if any other course of action is taken so that we can apply for Reconsideration in the appropriate time period.

Yours sincerely,

Your Name
Legal Advocate, Your Agency

Appendix 6. (21)

VANCITY TFSA TRUST AGREEMENT (October 23/23)

DECLARATION OF TRUST OF THE TAX FREE SAVINGS ACCOUNT AGREEMENT

Vancouver City Savings Credit Union (the "Trustee") by this Declaration of Trust hereby agrees to act as the trustee of the Vancity Tax Free Savings Account (the "Account") established by the individual named on the application (the "Application") hereof (the "Holder") on the following terms and conditions:

1. Registration: Subject to the Holder having attained at least 18 years of age, the Trustee will elect, in the form and manner prescribed by the *Income Tax Act* (Canada) (the "Act"), as amended from time to time, and any applicable provincial income tax legislation (the "Applicable Tax Legislation") relating to tax free savings accounts, to register the arrangement as a tax free savings account under the Social Insurance Number of the Holder. The Holder shall be solely responsible for the acceptability for registration thereof, and the Trustee assumes no responsibility for any revocation of such registration for any reason including, without limitation, the failure of the Holder to comply with any of the conditions necessary for registration of a tax free savings account under the Applicable Tax Legislation. The ultimate responsibility for the administration of the Account however, remains with the Trustee. For greater certainty, unless the Holder has attained at least 18 years of age at the time that this arrangement is entered into, it shall not constitute a qualifying arrangement, as that term is defined in subsection 146.2(1) of the Act, susceptible of being registered as a tax free savings account.

2. Definition of Spouse: Notwithstanding anything to the contrary contained herein or any endorsements forming a part thereof, the term "Spouse", as it is used in this Declaration of Trust or in the Application, means the individual who is considered the Holder's spouse or common law partner but does not include any person who is not recognized as a spouse or common-law partner for the purposes of any provision of the Act respecting a tax free savings account.

3. Definition of Holder: Any reference to "Holder" in this Declaration of Trust or in the Application means the Holder, as that term is defined in subsection 146.2 (1) of the Act, or the Successor Holder.

4. Definition of Successor Holder: Any reference to "Successor Holder" in this Declaration of Trust or in the Application means a survivor, as that term is defined in subsection 146.2(1) of the Act, and who is the Spouse of the Holder immediately before the Holder's death.

5. Purpose of the Account: Contributions to the Account and the income therefrom will be held by the Trustee, subject to the terms hereof, until the arrangement is no longer considered a tax free savings account.

6. Account: The Trustee will establish and maintain the Account for the exclusive benefit of the Holder showing all contributions and transfers to and distributions and transfers from, the Account, the Holder's investments and the income earned from such investments. The Trustee shall provide the Holder with a statement of the Account at least annually as of December 31 each year.

7. Contributions: Only the Holder may make contributions to the Account. Contributions may be made in cash, and in such minimum amounts as may be acceptable to the Trustee as may be directed by the Holder as permitted by the Applicable Tax Legislation. It is the sole responsibility of the Holder to ensure that the contributions do not exceed the amounts permitted under the Applicable Tax Legislation in effect at that time.

8. Investments: Subject to such limitations as the Trustee may impose from time to time, contributions to the Account shall be invested and reinvested as directed by the Holder such investments as the Trustee shall make available from time to time; provided that such investments are qualified investments for trusts governed by tax free savings accounts and not prohibited investments. It is the responsibility of the Holder to ensure that such investments are and remain qualified investments and are not and do not become

22

prohibited investments, as those terms are defined in subsection 207.01(1) of the Act. No one other than the Holder and the Trustee shall have rights under the Account relating to the investment and reinvestment of the Account.

9. Tax Receipts: The Trustee will provide the Holder each year with appropriate information slips for income tax purposes and such other information as may be required by Applicable Tax Legislation.

10. Distributions: Subject to such reasonable requirements as the Trustee may impose and to the terms of any investment, the Holder may request in writing that the Trustee pay to the Holder all or a portion of the property of the Account in satisfaction of all or part of the Holder's interest (a "Distribution"), subject to the deduction of all proper charges, fees and expenses, together with such income or other taxes as may be required by applicable laws. Notwithstanding the terms of any investment, or any reasonable limits the Trustee may impose on the frequency of Distributions or any minimum Distribution requirement identified either in the Application or other notice given under the terms of this Declaration of Trust, the Trustee may make Distributions at any time in order to reduce the amount of tax otherwise payable by the Holder as a result of excess contributions made contrary to the Applicable Tax Legislation. No one other than the Holder and the Trustee shall have rights under the Account relating to the amount and timing of Distributions.

11. Transfers Out: The Holder may, upon 90 days written notice to the Trustee, or such shorter period as the Trustee may permit, request that the Trustee transfer all or a portion of the property in the Account to another tax free savings account of the Holder subject to the terms of the any investment. The Holder may, upon 90 days written notice to the Trustee, or such shorter period as the Trustee may permit, request that the Trustee transfer all or a portion of the property in the Account to a tax free savings account of his or her Spouse or former Spouse where the Holder and the Spouse or former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal, or under a written separation agreement, relating to a division of property between the individuals in settlement of rights arising out of, or on the breakdown of, their marriage or common-law partnership.

The Trustee shall promptly take all steps necessary to effect such transfer (subject to the deduction of all proper charges, fees and expenses, together with such income and other taxes as may be required by applicable laws) and upon such transfer the Trustee shall have no further liability to the Holder with respect to the property of the Account.

12. Transfers In: The Holder may transfer assets to the Account from another tax free savings account of the Holder or of the Spouse or former Spouse where:
(a) the Holder and the Spouse or former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal, or under a written separation agreement, relating to a division of property between the individuals in settlement of rights arising out of, or on the breakdown of, their marriage or common-law partnership; or
(b)the Holder is the Spouse's survivor and the transfer occurs as a result of an exempt contribution as that term is defined in subsection 207.01(1) of the Act.

13. Death of Holder: In the event of the death of the Holder where the Holder has validly designated the Successor Holder (and the Holder is domiciled in a jurisdiction designated by the Trustee as one in which a holder of a tax free savings account may validly designate a survivor), the Successor Holder shall become the Holder. In the event of the death of the Holder where the Holder has not designated the Successor Holder or where there is no Successor Holder, the Trustee shall, upon receipt of satisfactory proof of the death of the Holder and other such documentation as the Trustee may require and to the deduction of all proper charges, fees and expenses together with such income or other taxes as may be required by applicable laws, pay the proceeds of the Account in a lump sum to the designated beneficiary or the estate of the Holder, as the case may be (where the Holder is domiciled in a jurisdiction designated by the Trustee as one in which a holder of a tax free savings account may validly designate a survivor.)

14. Designation of Beneficiary: If the Holder is domiciled in a jurisdiction designated by the Trustee as one in which a holder of a tax free savings account may validly designate a beneficiary, the Holder may designate

23

one or more beneficiaries to receive the proceeds of the Account in the event of the Holder's death. If any such designated beneficiary is a minor at the time of the death of the Holder then the Trustee is expressly authorized to pay any infant beneficiaries' interest in the Account to his or her legally appointed representative or to the Office of the Public Trustee for the Province of British Columbia (or parallel legislation in any other relevant jurisdiction), at the Trustee's option, on behalf of the infant beneficiary.

The initial beneficiary will be the Holder's estate or such person or persons named by the Holder as beneficiary or beneficiaries under the Designation of Beneficiary section of the Application. A revocation or alteration of a designation of beneficiary will be effective if it is made by an instrument in writing in a form acceptable to the Trustee and is signed by the Holder or it is contained in a will or other testamentary document. The Holder agrees to deliver to the Trustee all instruments, wills and other testamentary documents which contain any revocation or alteration of a designation of beneficiary, provided however, that:
(i) the Trustee shall be entitled to make payment at any time after the date of death of the Holder to the beneficiary, having regard only to such instruments that are delivered to the Trustee prior to the Holder's death and wills and other testamentary documents that are delivered to the Trustee prior to the date of such payment, notwithstanding that the Holder fails to deliver such wills and other testamentary documents prior to the Holder's death; and
(ii) if more than one such instrument, will or other testamentary document has been made and so delivered, the Trustee shall make payment only in accordance with the instrument, will or other testamentary instrument bearing the latest execution.

15. Loans: The trust is prohibited from borrowing money or other property for the purposes of the Account.

16. Security: Where the Holder wishes to use his or her interest or right in the Account as security for a loan or other indebtedness, he must first advise the Trustee. Where the Holder uses his or her interest in the Account for such purposes, it is the Holder's responsibility to ensure that the terms and conditions of the indebtedness are terms and conditions that persons dealing at arm's length with each other would have entered into, and it can be reasonably concluded that none of the main purposes for that use is to enable a person, other than the Holder, or a partnership to benefit from the exemption from tax of any amount in respect of this Account.

17. No Advantage to Holder: The Holder or a person with whom the Holder does not deal at arm's length may not receive an advantage, as that term is defined in subsection 207.01 (1) of the Act.

18. Amendments: The Trustee reserves the right to amend this Declaration of Trust at any time, provided that no such amendment shall have the effect of disqualifying the Account as a tax free savings account within the meaning of Applicable Tax Legislation. The Trustee shall give the Holder written notice of any amendment by postage prepaid ordinary mail addressed to the Holder at the address set out in the Trustee's records for the Account and shall be deemed to have been given on the day following the mailing. In the event of changes to Applicable Tax Legislation, the Account will be deemed to have been amended to conform to such changes effective the date such changes come into force.

19. Date of Birth: The Holder's statement of his or her date of birth on the Application shall be deemed to be a certificate by the Holder of that information and an undertaking to provide the Trustee with any further evidence of proof of age that the Trustee may require.

20. Fees: The Trustee shall be entitled to payment out of the property of the Account for its services as a trustee, in accordance with its fee schedule. The Trustee may change its fee schedule from time to time upon giving the Holder notice as stipulated under Section 18.

21. Replacement of Trustee: The Trustee may resign as trustee of the Account on 90 days written notice to the Holder.

29

Upon resignation, the Trustee shall appoint a successor trustee and such appointment shall be in writing and signed by both the resigning Trustee and successor trustee. Subject to the approval of Canada Revenue Agency and any other applicable tax authorities, the successor trustee so appointed shall be vested with the property of the Account and the same powers, rights, duties and responsibilities as the resigning Trustee and the resigning Trustee shall execute and deliver to the successor trustee all such conveyances, transfers and assurances as may be necessary for the purposes of assuring the same to the successor trustee.

Any successor trustee appointed hereunder shall be a corporation resident in Canada that is licensed or otherwise authorized under the laws of Canada or a province therein to carry on in Canada the business of acting as trustee.

22. Governing Law: This Declaration of Trust and the Account shall be governed by the laws of British Columbia and the laws of Canada applicable therein.

Appendix 7 (2

RBC Direct Investing Inc.
TAX-FREE SAVINGS ACCOUNT
TRUST AGREEMENT

1. Definitions. Whenever used in this Trust Agreement or the Application, any capitalized terms shall have the meanings given to them below:

"Account" means the tax-free savings account established for the Holder;

"Agent" means RBC Direct Investing Inc and its successors and assigns;

"Applicable Laws" means the Tax Act and such other laws of Canada and of the provinces and territories applicable hereto;

"Application" means the Holder's application to the Agent to establish the Account;

"Contribution" means a contribution of cash, in whatever currency held within the Account or any Qualified Investment;

"Distribution" means a payment out of or under the Account in satisfaction of all or part of the Holder's interest therein in a currency agreed upon between the Trustee and the Holder; failing which agreement, the currency of which shall be Canadian dollars;

"Estate Documents" means proof of the Holder's death and such other documents letters probate, letters of administration, certificate of appointment of estate trustee with or without a will, representation grant, or other document of like import issued by any court in Canada as may be required by the Trustee in its sole discretion in connection with the transmission of the Property on the Holder's death;

"Estate Representative" means an executor, an administrator, an administrator with the will annexed, a liquidator, or an estate trustee with a will or without a will, whether one or more than one is so appointed;

"Expenses" means all (i)costs, (ii)charges, (iii)commissions,(iv) i investment management fees, brokerage fees, and other fees, (v) legal expenses and (vi) out-of-pocket expenses incurred from time to time in relation to the Account;

"Former Spouse" means the individual who is considered by the Applicable Laws to be the Holder's former Spouse;

"Investment Agent" means the person, whether compensated or not, who is authorized by the Holder to make and implement investment decisions for the Property;

"Holder" means the individual of a "qualifying arrangement" to be in accordance with subsection 146.2(1) of the Tax Act;

"Proceeds " means the Property, less any applicable Expenses and Taxes;

"Prohibited Investment" means Property (other than prescribed excluded Property as that term is defined in the Tax Act) that is:

(a) a debt of the Holder;

(b) a share of the capital stock of, an interest in or a debt of:

  (i) a corporation, partnership or trust in which the Holder has a significant interest;

  (ii) a person or partnership that does not deal at arm's length with the Holder or with a person or partnership described in subparagraph (i);

(c) an interest in, or right to acquire, a share, interest or debt described in paragraph (a) or (b); or

(d) prescribed property (as that term is defined in the Tax Act);

"Property" means any property, including the income on it, the proceeds from it and any cash, in whatever currency held within the Account, held in the Account from time to time;

"Qualified Investment" means any investment which is a qualified investment for a TFSA according to the Tax Act;

"Spouse" means an individual who is considered by the Tax Act to be the Holder's spouse or common-law partner;

"Survivor" of the Holder means an individual who is immediately before the Holder's death a Spouse of the Holder;

"Tax Act" means the Income Tax Act (Canada);

"Taxes" means any and all applicable taxes and assessments, including any penalties and interest, as may be required under Applicable Laws;

"TFSA" means a tax- free savings account, which is a "qualifying arrangement" (as that term is defined in the Tax Act) the issuer of which has elected, in the form and manner prescribed by the Tax Act, to register as a TFSA; and

"Trustee" means The Royal Trust Company in its capacity as trustee and issuer of the arrangement governed by this Trust Agreement, and its successors and assigns.

2. Acceptance of Trust. The Trustee agrees to act as trustee of the Account, which is to be maintained for the exclusive benefit of the Holder, and to administer the Property in accordance with the terms of this Trust Agreement.

3. Appointment of Agent. The Trustee has appointed RBC Direct Investing Inc. (the "Agent") as its agent to perform certain duties relating to the operation of the Account. The Holder authorizes the Trustee and the Agent, together or separately, to appoint and employ agents to whom each may delegate, respectively, any of its powers, duties and responsibilities under the Account. The Trustee acknowledges and confirms that ultimate responsibility for the administration of the Account remains with the Trustee.

4. Registration. Subject to the Holder having attained at least 18 years of age, The Trustee or the Agent will apply for registration of the Account as a tax free savings account under the social insurance number of the Holder and pursuant to the Applicable Laws. For greater certainty, unless the Holder has attained at least 18 years of age at the time that this arrangement is entered into, it shall not constitute a qualifying arrangement, as that term is defined in subsection 146.2(1) of the Tax Act, susceptible of being registered as a tax free savings account.

Should the Trustee or the Agent be advised by the Minister of National Revenue or the Canada Revenue Agency or other government authority that the Account has failed to be duly registered, then:

(a) any Contributions made shall be held by the Trustee in a bare trust, which was never a tax free savings account;

(b) this trust shall be terminated, and the assets paid or transferred to the Holder, at his or her direction; and if the Holder fails to give direction or cannot be located, then, the Trustee or the Agent may in their sole discretion

  (i) transfer the Assets to the Agent to be held in a non-registered investment account,

    a. either already existing in the name of the Holder with the Agent, or

    b. opened by the Agent subject to the Agent's further requirements in the name of the Holder using the information from the Application with the Holder deemed to have signed an application for the investment account;

    or

  (ii) liquidate the investments and forward the net proceeds of such sale to the Holder

(c) the Holder will indemnify the Trustee and the Agent and save them harmless in respect of any costs which may be imposed personally on the Trustee or the Agent as a result of the failure to register the Account, the termination of the trust and the liquidation and subsequent distribution of the Assets.

5. Account. The Agent shall maintain an account for the Holder which will record particulars of all Contributions, investments, Distributions and transactions under the Account in the currency in which such Contributions, investments, Distributions and transactions occurred, including all Expenses paid from the Account and shall provide to the Holder, at least annually, a statement of account, unless there have been no such transactions in the previous year and there is no Property held in the Account at the end of the year. The Holder must promptly examine each statement (and each entry and balance recorded in it) and notify the Agent in writing of any error, omission or objection to a statement (or an entry of balance recorded in it) within 30 days from the statement date. If the Holder does not notify the Agent as required, the Agent is entitled to treat the above statements, entries and balances as complete, correct and binding on the Holder and the Trustee and Agent will be released by the Holder in respect of those statements, entries and balances.

An account number will be assigned to the Account for identification purposes. If the Agent deems it necessary to change the original number assigned to a new number in order to comply with Applicable Laws or other regulatory or administrative purposes, then the statement of account for the period in which the change occurs will show both the old and new account number. The Agent will keep a record of the change and the reason for it. The Account will be deemed to be the same Account and all previously signed Account documents such as the application, any designation of beneficiary (or election of successor annuitant) and other instructions previously given by you will continue to govern the Account trust as if the new account number had been the original account number assigned to the Account.

6. Contributions. Only the Holder may make Contributions to the Account, in such amounts as are permitted under the Tax Act, or in such property as may be permitted in the sole discretion of the Trustee. It shall be the sole responsibility of the Holder to ensure that the amounts of Contributions are within the limits permitted under Tax Act.

7. Distributions to Reduce Tax. Notwithstanding any limit on the frequency of Distributions or any minimum Distribution requirement identified in the Application or other notice given under the terms of this Trust Agreement, any Distributions may be made at any time to reduce the amount of Taxes otherwise payable by the Holder as a result of excess Contributions made contrary to the Tax Act.

8. Tax Information. The Trustee shall provide the Holder with appropriate information slips for income tax purposes and such other information as may be required under the Applicable Laws.

9. Delegation by Trustee. The Holder expressly authorizes the Trustee to delegate to the Agent the performance of the following duties of the Trustee:

(a) receiving Contributions;

(b) receiving transfers of Property;

(c) investing and reinvesting the Property as directed by the Holder;

(d) registering and holding the Property in the Trustee's name, the Agent's name, in the name of their respective nominees or in bearer form as determined by the Agent from time to time;

(e) maintaining records, including information concerning the Survivor and the designation of beneficiaries, where applicable;

(f) providing to the Holder statements of account at least annually;

(g) preparing all government filings and forms;

(h) making Distributions pursuant to the provisions hereof; and

(i) such other duties and obligations of the Trustee as the Trustee in its sole discretion may from time to time determine.

The Holder acknowledges that, to the extent the Trustee delegates any such duties, the Trustee shall thereby be discharged from performing such duties, subject to paragraph 3.

10. Investment of the Property.

a) The Property shall be held, invested and reinvested on the direction of the Holder, or his or her Investment Agent, as applicable, without being limited to investments authorized by law for trustees.

b) The Holder shall be responsible for ensuring that an investment is and continues to be a Qualified Investment, and for determining whether any such investment is not and continues not to be a Prohibited Investment.

c) The Holder agrees not to provide any instructions or series of instructions that would cause the Account to contravene the Tax Act including but not limited to instructions that could be constituted as using the Account to carry on a business for the purposes of the Tax Act.

d) The Trustee, in its sole discretion, may require the Holder to provide such documentation in respect of any investment or proposed investment, as the Trustee deems necessary in the circumstances, including annual valuation documentation for private securities. The Trustee reserves the right to decline to make any particular investment if the proposed investment and related documentation do not comply with the Trustee's requirements at that time. The Trustee shall exercise the care, diligence and skill of a reasonably prudent person to minimize the possibility that the Account holds a non-Qualified Investment.

If the Trustee determines, in its sole discretion, that any investment held within the Account is no longer a Qualified Investment the Trustee may withdraw such investment from the Account in-kind with the valuation of such investment to be determined by the Trustee in its sole discretion.

e) The Trustee will not have any duty or responsibility regarding voting and giving proxies to vote in respect of Qualified Investments except to mail proxies and other notices received by the Trustee or the Trustee's nominees in respect of Qualified Investments to the Holder. As well, the Trustee will not have any duty or responsibility to investigate or participate in any process or proceedings involving Qualified Investments unless the Holder has given the Trustee written instructions to that effect and the Trustee has the right in its discretion to refuse to act despite such instructions and upon notice to the Holder and the Holder agrees that the Trustee will not be liable to the Holder for such refusal. For greater certainty, the Trustee will not accept dissenting shareholder instructions from the Holder. If the Holder wishes to commence a dissenting shareholder process to be paid fair value for the beneficially owned shares for which the Trustee is the registered owner, the Holder agrees to de-register these shares, by withdrawing them from the Account, prior to commencing such process. Neither the Trustee nor the Agent will be liable for rejecting dissenting shareholder instructions from the Holder or the taxation consequences of withdrawing shares from the Account in order to bring a dissenting shareholder process. If there is an Investment Agent appointed under Paragraph 10 (f) below, the Investment Agent may generally exercise all powers or rights of the Holder with respect to all Assets of the Account, including the right to vote or give proxies to vote in respect thereof, without the Trustee or the Agent being required to confirm the scope of the authority of the Investment Agent with the Holder.

f) If the Holder has appointed an Investment Agent, then:

(i) The Agent must review and may accept such appointment;

(ii) Neither the Agent or the Trustee will be required to review the terms of any agreement or agreements entered into between the Holder and an Investment Agent regarding the terms under which the Investment Agent may deal with Property and, for clarity, if there is a conflict between any provision of such investment management agreement and this Trust Agreement, the latter will prevail;

(iii) The Trustee, is authorized to accept the investment instructions given by the Investment Agent to the Agent, subject to the provisions of Paragraph 10 (e) above.

(iv) The Investment Agent may have a duty to the Holder to ensure that each investment of the Account is and remains a Qualified investment and will determine whether any such investment would result in the imposition of any penalty under the Applicable Laws and whether any investments should be purchased, sold or retained by the Trustee, and give such instructions as are needed. Such arrangement between the Holder and the Investment Agent under the terms of any investment management agreement or otherwise does not absolve the Holder of the obligation to monitor the Investment Agent's performance and choice of investments. Ultimately, notwithstanding the appointment of an Investment Agent, the Holder continues in its responsibility to the Trustee under Paragraph 10 (a) above respecting Qualified Investments and Prohibited Investments.

(v) If the Investment Agent is a person affiliated in any way with the Trustee, then the provisions of Paragraph 25 Self Dealing will apply.

11. Unclaimed Property.

a) If the Agent has no record of Account activity for a period of time prescribed under any Applicable Laws, the Agent and Trustee may be required to undertake reasonable efforts to locate the Holder.

b) If the Account becomes unclaimed property under Applicable Laws, the Account will continue to be charged all allowable Expenses including allowable fees. No statements will be mailed by regular mail when the Account is considered unclaimed.

c) If the Property is remitted to a government authority under Applicable Laws, the Agent and the Trustee shall no longer have any liability or responsibility with respect to the Account and it will be closed. If any Property is remitted to a government authority, the Holder may be able to reclaim the assets from that authority under Applicable Laws.

27

12. Uninvested Cash. Uninvested cash, in whatever currency held within the Account, will be placed on deposit with the Trustee or an affiliate of the Trustee and held in the same currency as received from the Agent, provided that such currency is a currency that has been agreed from time to time by the Trustee and Agent and repaid in the same currency. The interest on such cash balances payable to the Account will be determined by the Agent from time to time in its sole discretion with no obligation to pay a minimum amount or rate. The Trustee will pay interest to the Agent, in the same currency as the uninvested cash was received, as referred to above, for distribution to the Account and the Agent shall credit the Account with appropriate interest. The Trustee shall have no liability for such payment of interest once it is paid to the Agent for distribution.

13. Right of Offset. The Trustee and the Agent shall have no right of offset with respect to the Property in connection with any obligation or debt owed by the Holder to the Trustee or the Agent, other than the Expenses payable by the terms of this Trust Agreement.

14. Pledging. The Holder may not use his or her interest or right in the Account as security for a loan or other indebtedness. Any attempt by the Holder to use his or her interest or right in the Account as security for a loan or indebtedness shall not be recognized by the Trustee and shall be null and void.

15. Trustee Cannot Borrow. The Trustee is prohibited from borrowing money or other property for the purposes of the Account.

16. Cash Deficits in Account If the Account has a cash deficit in one or more currencies held within the Account at any time, the Holder agrees that the Agent will charge interest on the cash deficit until such deficit is eliminated. If the Holder fails to instruct the Trustee to liquidate Property and eliminate the cash deficit after the cash deficit in the Account arises, then the Holder authorizes the Trustee or Agent to sell the whole or any part of the Property in such manner and on such terms as the Trustee in its absolute discretion deems advisable to cover the cash deficit and to pay any interest the Holder owes the Agent within the Account.

17. Interest Charged. Interest charges owing on any cash deficit in one or more currencies held within the Account are calculated and payable monthly, in the same currency or currencies that is or are in deficit, based on an annual interest rate (divided by 365, or 366 in a leap year) and the average daily cash deficit or deficits during the calculation period. Any unpaid interest will be included in the calculation of the daily average cash deficit for the applicable currency. The rate of interest payable on the cash deficit will be determined by the Agent from time to time in its sole discretion. The rate of interest and method of calculation is available upon request to the Agent and will be the rate shown on the Holder's statement in respect of the Account.

18. Distributions. Subject to any limit on the frequency of Distributions or to any minimum Distribution requirement identified in the Application or other notice given under the terms of this Trust Agreement, and to the deduction of all Expenses and Taxes, the Holder may, at any time and upon 60 days' notice or such shorter period as the Agent in its sole discretion permits, request that the Agent liquidate part or all of the Property and pay to the Holder an amount, in a currency agreed upon between the Trustee and the Holder, failing which agreement, the currency of which shall be in Canadian dollars, from the Property not exceeding the value held under the Account immediately before the time of payment. No one other than the Holder and the Trustee shall have rights under the Account relating to the amount and timing of Distributions.

Such payments will only be made to the Holder by a cheque payable to the Holder or deposited to a Royal Bank of Canada bank account of which the Holder is the sole owner or is one of the joint owners. Although the Holder will have once verified to the Trustee or the Agent that he or she is the owner or one of the owners of such bank account, neither the Trustee nor the Agent will have any responsibility to confirm that the Holder is still an owner of such bank account at the time the payment is made.

19. Successor Holder and Beneficiary Designation. Subject to Applicable Laws the Holder (or if permitted by Applicable Laws his or her representative) may designate: a Spouse as successor holder of the account; or one or more beneficiaries to receive the Account Proceeds on the Holder's death and, at any time, change or revoke such designation. A designation may only be made, changed or revoked: (a), in a format acceptable to the Agent, adequately identifying the Account and signed by the Holder; or (b) by the will and, in either case, delivered to the Agent prior to the Proceeds being paid from the Account. If the designation is made by will, the Agent only will accept such designation to be recorded in the records of the Account as part of the Estate Documents to be provided after the death of the Holder and not earlier. The Holder acknowledges that it is his or her sole responsibility to ensure that a designation or revocation is valid under the laws of Canada, its provinces or territories

If under Applicable Laws expressly pertaining to the designation of beneficiaries, the Account is the subject of an irrevocable designation, the Account will no longer be subject to the control of the Holder. If there is any inconsistency between the provisions of this Trust Agreement and any such additional terms and conditions which may apply as a result of the irrevocable designation, the additional terms and conditions shall govern the manner in which the Account is dealt.

20. Death of Holder. Upon receipt of satisfactory evidence of the Holder's death and provided a Survivor is the successor holder of the Account, the Trustee will continue to hold the Property for such successor holder as Holder of the Account.

When a person who was not the Holder's Spouse at the time of the appointment is named as successor holder, the Trustee will be able to treat and rely on that election as a designation of beneficiary rather than of a successor holder.

If there is no successor holder,

(a) if the Holder has a designated beneficiary, the Account Proceeds will be paid or transferred to the designated beneficiary, subject to the Applicable Laws. The Trustee and the Agent will be fully discharged by such payment or transfer, even though any beneficiary designation made by the Holder may be invalid as a testamentary instrument or under the laws of the jurisdiction where the Holder is domiciled at death;

(b) if a trustee has been designated as beneficiary for the Account, the Agent and Trustee will be fully discharged by payment to the trustee without any obligation to see to the due execution of any trust imposed upon such trustee; and

(c) if the Holder's designated beneficiary has died before the Holder or if the Holder has not designated a beneficiary or if the Holder has designated his or her "estate", the Trustee will pay the Account Proceeds to the Holder's estate upon receipt of the instructions from the Estate Representative and in accordance with Applicable Laws.

21. Release of Information. The Trustee and the Agent each are authorized to release any information about the Account and the Proceeds, after the Holder's death, to any or all of the Holder's Estate Representative, the Spouse, or a beneficiary designated hereunder as the Trustee deems advisable.

22. Payment into Court. If there is a dispute about:

(a) a payout from the Account or equalization of Property or other dispute arising from a breakdown of the Holder's marriage or common law partnership;

(b) the validity or enforceability of any legal demand or claim against the Property; or

(c) the authority of a person or personal representative to apply for and accept receipt of the Proceeds on death of the Holder,

the Trustee and the Agent are entitled to either apply to the court for directions or pay the Proceeds into court, which payment shall be in Canadian dollars, and, in either case, fully recover any legal costs it incurs in this regard as Expenses from the Account.

23. Limitation of Liability. The Trustee shall not be liable for any loss suffered by the Account, by the Holder or by any Survivor or beneficiary designated for purposes of the Account as a result of the purchase, sale or retention of any investment including any loss resulting from the Trustee acting on the direction of the agent appointed by the Holder to provide investment direction.

24. Indemnity. The Holder agrees to indemnify the Trustee for all compensation, Expenses, and Taxes, other than those Taxes for which the Trustee is liable in accordance with the Tax Act and that cannot be charged against or deducted from the Property in accordance with the Tax Act, incurred or owing in connection with the Account to the extent that such compensation, Expenses and Taxes cannot be paid out of the Property.

25. Self-Dealing. The Trustee's services are not exclusive and, subject to the limitations otherwise provided in this Trust Agreement on the powers of the Trustee, the Trustee may, for any purpose, and is hereby expressly authorized from time to time in its sole discretion to, appoint, employ, invest in, contract or deal with any individual, firm, partnership, association, trust or body corporate, with which it may be directly or indirectly interested or affiliated with, whether on its own account or on the account of another (in a fiduciary capacity or otherwise), and to profit therefrom, without being liable to account therefore and without being in breach of this Trust Agreement.

26. Compensation, Expenses and Taxes. The Trustee and Agent will be entitled to such reasonable fees as each may establish from time to time for services rendered in connection with the Account. All such fees will, unless first paid directly to the Agent, be charged against and deducted from the Property in such manner as the Agent or Trustee determines. All Expenses incurred and Taxes shall be paid from the Account, other than those Taxes for which the Trustee is liable in accordance with the Tax Act and that cannot be charged against or deducted from the Property in accordance with the Tax Act.

28

For greater certainty, in the event of any executions of third party demands or claims against the Account, both the Trustee and the Agent are entitled to fully recover any Expenses incurred by them in this regard as Expenses and all such payments made under this Paragraph shall be in Canadian dollars, with the conversion to occur on the date of payment

If the Account is found to have been used to carry on a business, the Holder agrees to hold sufficient Property in the Account (or the Holder agrees to identify investments in the Plan that the Trustee may hold) to satisfy any tax, penalties and interest that may arise.

The Trustee, in its sole discretion, may request a tax clearance certificate from the Canada Revenue Agency before permitting any withdrawals or transfers out from the Account.

27. Sale of Property. The Trustee and Agent may sell Property in their respective sole discretion for the purposes of paying compensation, Expenses and Taxes, other than those Taxes for which the Trustee is liable in accordance with the Tax Act and that cannot be charged against or deducted from the Property in accordance with the Tax Act.

28. Transfers to the Account. Any property may be transferred to the Account from another TFSA of the Holder, or of the Spouse or Former Spouse where:

(a) the Holder and the Spouse or Former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal or under a written separation agreement, relating to the division of property between the Holder and the Spouse or Former Spouse in settlement of rights, arising out of, or on the breakdown of, their marriage or common-law partnership; or

(b) the Holder is the Spouse's survivor and the transfer occurs as a result of an exempt contribution (as that term is defined in the Tax Act).

29. Transfers out of the Account. Upon delivery to the Agent of a direction from the Holder in a form satisfactory to the Trustee, the Trustee shall transfer all or a portion of the Property as is specified in the written direction:

(a) to another TFSA of the Holder; or

(b) to a TFSA of the Spouse or Former Spouse where the Holder and the Spouse or Former Spouse are living separate and apart and the transfer is made under a decree, order or judgment of a competent tribunal or under a written separation agreement, relating to the division of property between the Holder and the Spouse or Former Spouse in settlement of rights, arising out of, or on the breakdown of, their marriage or common-law partnership.

30. Changes to Trust Agreement. The Trustee may change this Trust Agreement periodically. The Holder will be notified on how to obtain an amended copy of the Trust Agreement reflecting any such change and will be deemed to have accepted such changes. No change to this Trust Agreement (including a change calling for the Trustee's resignation as trustee or the termination of the trust created by this Trust Agreement) will be retroactive or result in the Account not being acceptable as a TFSA under the Applicable Laws.

31. Replacement of Trustee.

(a) The Trustee may resign by giving such written notice to the Agent as may be required from time to time under the terms of an agreement entered into between the Agent and the Trustee. The Holder will be given at least 30 days prior notice of such resignation. On the effective date of such resignation, the Trustee will be discharged from all further duties, responsibilities, and liabilities under this Trust Agreement, except those incurred before the effective date. The Trustee will transfer all Property, together with all information required to continue the administration of the Property as a tax free savings account under the Applicable Laws, to a successor trustee.

(b) The Trustee has agreed to resign upon it being provided with notice in writing by the Agent if the Trustee is satisfied that the successor trustee nominated by the Agent will properly assume and fulfill the Trustee's duties and liabilities hereunder in respect of the administration of the Account.

(c) In either event, the Agent shall forthwith nominate a person to replace the Trustee and the resignation of the Trustee shall not take effect until its replacement has been so nominated by the Agent and appointed as successor by the Trustee and approved by Canada Revenue Agency or its successor. Failing the nomination of a replacement by the Agent within 30 days after receipt by it of a notice of resignation, the Trustee shall be entitled to appoint a person as its own replacement.

(d) Upon any such appointment and resignation of the Trustee, the person so appointed as replacement trustee shall, without further act or formality, be and become the Trustee hereunder. Such replacement trustee shall, without any conveyance or transfer, be vested with the same power, rights, duties and responsibilities as the Trustee and with the assets of the Account as if the replacement trustee had been the original Trustee. The Trustee shall execute and deliver to the replacement trustee all such conveyances, transfers and further assurances as may be necessary or advisable to give effect to the appointment of the replacement trustee.

(e) Any person appointed as a replacement trustee shall be a corporation resident in Canada that is licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada the business of offering to the public its services as trustee. Any trust company resulting from the merger or amalgamation of the Trustee with one or more trust companies and any trust company that succeeds to substantially all of the trust business of the Trustee shall thereupon become the successor to the Trustee without further act or formality. In all such cases, Canada Revenue Agency or its successor shall be notified.

32. Assignment by Agent. The Agent may assign its rights and obligations hereunder to any other corporation resident in Canada authorized to assume and discharge the obligations of the Agent hereunder and under the Applicable Laws.

33. Notice. Any notice given by the Holder to the Agent shall be sufficiently given if delivered electronically to the Agent upon the Holder's receipt of an acknowledgement and response to same or personally or mailed, postage prepaid, to the office of the Agent, RBC Direct Investing Inc. at Royal Bank Plaza, 200 Bay Street, North Tower 9th Floor, P.O. Box 75, Toronto, Ontario M5J 2Z5 or such other address as the Trustee or the Agent may direct. Such notice shall be considered to have been given on the day that the notice is actually delivered to or received by the Agent. Further, the Agent may, in its discretion, honour any notice or other communication purporting to or claiming to be given by the Holder to the Agent under this Trust Agreement by telephone conversation with the Agent's employees, whether they are licensed or not as required by law, by facsimile or in any other manner as the Trustee or the Agent may determine, without the necessity of any verification or enquiry, other than the provision of the RBC Direct Investing Inc. identification number provided to the Holder. The Agent may, in its discretion, record any telephone conversations with the Holder. The Trustee and the Agent will not be liable to the Holder for such reliance. The Trustee or the Agent may, in its discretion, require that any notice must be in writing and given personally or by mail to the Agent as set out above. Any notice, statement, receipt or other communication given by the Trustee or the Agent to the Holder shall be sufficiently given if delivered electronically or personally to the Holder, or if mailed, postage prepaid and addressed to the Holder at the address shown on the Application or at the Holder's last address given to the Trustee or the Agent, and any such notice, statement, receipt or other communication shall be considered to have been given at the time of delivery to the Holder electronically or personally or, if mailed, on the fifth day after mailing to the Holder.

34. Date of Birth and SIN. The Holder's statement of his or her date of birth and Social Insurance Number in the Application shall be deemed to be a certification as to the Holder's age and Social Insurance Number, on which the Trustee and the Agent may rely, and an undertaking to provide any further evidence of proof of age and Social Insurance Number as may be required by the Agent.

35. Contribution While Holder is a Minor. Where the Holder makes a Contribution to the Account prior to the Holder having attained the age of majority in accordance with the Applicable Laws, the Holder will execute a ratification of the Application and all transactions made by the Holder in respect of the Account prior to reaching the age of majority.

36. SIN and Address of Holder. The Trustee shall be entitled to rely upon the Agent's records as to the social insurance number, and to the current address of the Holder as establishing his or her residency and domicile for the operation of the Account and its devolution on the death of the Holder subject to any written notice to the contrary respecting the Holder's domicile on death.

37. Heirs, Representatives and Assigns. The terms of this Trust Agreement shall be binding upon the heirs, Estate Representatives, attorneys, committees, guardians of property, other legal and personal representatives, and assigns of the Holder and upon the respective successors and assigns of the Trustee and the Agent and their directors, officers, employees, and agents, as well as their respective estates, Estate Representatives, heirs, attorneys, committees, guardians of property, other legal and personal representatives, and assigns.

29

38. Language. The Holder has expressly requested that this Trust Agreement and all related documents, including notices, be in the English language. Le titulaire a expressément demandé que cette Convention de fiducie et tous documents y afférents, y compris tout avis, soient rédigés en langue anglaise. (Quebec only/Québec seulement)

39. Interpretation. Unless the context requires otherwise, any terms or provisions importing the plural shall include the singular and vice versa.

40. Governing Law. This Trust Agreement and the Account shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein. The Holder expressly agrees that any action arising out of or relating to this Trust Agreement or the Account shall be filed only in a court located in Canada and the Holder irrevocably consents and submits to the personal jurisdiction of such court for the purposes of litigating of any such action.

Revised: May 16, 2017 (A)

Appendix 8

30

8 DISABILITY ALLIANCE BC
HELPSHEET
BC DISABILITY BENEFITS



2019

Trusts for People Receiving the Persons with Disabilities (PWD) Benefit

This Help Sheet is funded by the Health Sciences Association of BC and the Law Foundation of BC.

Disability Alliance BC has prepared this Help Sheet to help you understand about trusts. If you receive the Persons with Disabilities (PWD) benefit, have disability status, or live in a special care facility, you may be allowed to set money aside in a trust and still receive PWD benefits.

Families with one person on PWD can hold up to $100,000 in assets, and those with two people who both have PWD status can hold up to $200,000. As a result, individuals on PWD with assets under $100,000 most likely do not need to start a disability trust to receive PWD benefits. The disability trust is available for families with assets over $100,000.

A disability trust is set up as a legal document that has to follow certain guidelines. You will need to submit the trust document to the Ministry of Social Development and Poverty Reduction (MSDPR). Once your trust agreement is prepared and submitted to MSDPR, its legal advisors will tell you whether the trust is approved as a disability trust. This process can take a few weeks.

This Help Sheet explains what a trust agreement is and outlines some of the MSDPR rules on trusts. It does not tell you how to set up a trust—you should have a lawyer do that for you. Some community organizations may also be able to help. Please see the next page for details.

dabc disability alliance bc

Disability Alliance BC

Information in this Help Sheet is based on the legislation that was current at the time of writing. The legislation and policy may be subject to change. Please check the date on this Help Sheet.

HS8 - June 2019



31

Definition of a trust

A trust is a way to set money aside through a special legal agreement. It is not the same as a regular savings account or term deposit. This agreement allows a person (the trustee) to hold money or other assets for you (the beneficiary). The trustee must follow certain rules about how the money is spent.

Why you may consider setting up a trust

You should consider setting up a trust if you are going to receive a lump sum of money that is over your asset limit. To be eligible for PWD benefits, you may only have a certain amount of assets. For example, if you are a single person with no children, you cannot have more than $100,000. This is called an asset limit.

PWD recipients who are over their asset limit:

- must go off monthly benefits until they are within their asset limit, or
- may put the money into an exempt asset such as a trust, use it for certain things related to their disability and still receive monthly benefits.

We recommend that you look into setting up a trust before you actually receive the money. The sooner a lump sum is placed in a trust, the less likely it is to affect your monthly benefits. Ministry regulations require you to declare income shortly after you receive it and it may be decided that you are ineligible for a benefit cheque for one month. After the first month, a lump sum may be considered an asset, and if the trust is in place by then, your monthly entitlement should not be in question. See **Having your trust recognized by MSDPR** in this Help Sheet.

Different kinds of trusts

Under MSDPR regulations, PWD recipients may have one of the following types of trusts:

Discretionary trust - you do not have control over the money in the trust. The trustee makes spending decisions. There is no limit to the amount of money that can be placed in a discretionary trust.

Non-discretionary trust - you have control over the money in the trust through the trustee. The trustee makes all expenditures based on your requests. You may also act as a co-trustee. There is a $200,000 lifetime limit to money you can put in a non-discretionary trust. MSDPR may permit you to put in more by special approval only.

In addition to funds in a discretionary or non-discretionary trust, the welfare legislation provides that money held in certain kinds of structured settlement agreements, and money managed by the Office of the Public Guardian and Trustee, are also exempt as assets.



32

How trusts work

Trusts have beneficiaries and trustees. You are the beneficiary—the person who receives money from the trust.

The trustee is the person who manages or helps to manage the trust. The trustee arranges for money to go from the trust to you, the beneficiary. There may be more than one trustee.

You can choose your trustee. It should be someone who knows you well and understands your needs. You may also be named as a co-trustee for your trust. This means that you manage your trust with another trustee.

Once the trust is established, money can be added to it.

Using the trust money

You can spend your trust money on the following:

- Caregiver services
- Education or training
- Home renovations necessary because of your disability
- Home maintenance repairs
- Medical aids
- Independent living expenses: any other item or cost that will help you live more independently (these items and costs do not need to be approved by the Ministry).

Although there are no limits on how much of your trust money you spend on each category, the Ministry can ask for verification of any payment or disbursement of funds. You and/or your trustee should keep accurate up-to-date records of your expenditures.

Setting up the trust: next steps

As we noted above, you should have a lawyer or professional with legal knowledge set up your trust. This person should not only understand trust law, but also be familiar with the Ministry's regulations and policy regarding trusts. This will cost money, but you should be able to arrange for it to come out of your lump-sum payment.

Other people can set up a trust for you. A common way is for family members to create a trust provision in their will. This means that a trust will come into effect when the family member dies. If your family or friends are planning to establish a trust for you, make sure they understand that MSDPR has rules about how it must be set up.



Two community organizations that may provide information about trusts to you or your family are:

Coast Foundation

- Assists people who have mental health disabilities to set up trusts.
  Tel: 604-675-2321 or **Email**: trust@coastmentalhealth.com

Plan Institute

- For a list of lawyers who are knowledgeable about setting up a trust for people receiving PWD:
  Visit: planinstitute.ca/learning-centre/digital-downloads/ or **Tel:** 604-439-9566 or **Email:** learning@planinstitute.ca
- For specific questions about trusts:
  Tel: 1-844-311-7526 or **Email:** info@rdsp.com
- For in-person and webinar format workshops:
  Tel: 604-439-9566 ext.158 or **Email:** learning@planinstitute.ca

Having your trust recognized by MSDPR

Once your trust document has been drawn up, MSDPR has to approve it. Give your local office a copy and MSDPR will forward it to Victoria for a legal opinion. This process will help MSDPR decide whether or not your trust has been set up properly. A decision can take several weeks.

If you have not already set up a trust, and you receive a lump-sum payment, we recommend that you tell MSDPR you plan to set up a trust when you receive the funds. MSDPR will exempt these assets for three months, to give you time to set up your trust and get MSDPR approval. If it takes longer than three months, you will need to keep in touch with MSDPR and they will review the situation on a month-to-month basis.

Appealing

You have the right to appeal if the Ministry reduces or cuts off your benefits because it does not accept the terms of your trust. However, it is probably better to talk to your lawyer about changing your trust so that it meets MSDPR's rules.

You may also appeal MSDPR denials related to how you spend your trust money. If you want to appeal, you must notify the Ministry within 20 business days of receiving notification that your expenditures have not been approved. Contact MSDPR and ask for a Request for Reconsideration form. If possible, contact an advocate for help with your appeal.



34

Other resources

For the Ministry's brochure on trusts, "Disability Assistance and Trusts," contact your local MSDPR office or go to: https://www2.gov.bc.ca/assets/gov/family-and-social-supports/services-for-people-with-disabilities/supports-services/disability_assistance_trusts.pdf.

An alternative to trusts

Another way to exempt assets is to put money into a Registered Disability Savings Plan (RDSP). However, keep in mind that your age and eligibility requirements, such as the Disability Tax Credit, may determine whether you can open an RDSP. For more information on the RDSP, see **Help Sheet 14: The Disability Tax Credit** and **Help Sheet 15: The Registered Disability Savings Plan**.



35

This Help Sheet was prepared by Advocacy Access, a program of Disability Alliance BC. Thank you to the Health Sciences Association of British Columbia and the Law Foundation of British Columbia for funding the BC Disability Benefits Help Sheets.

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www.disabilityalliancebc.org/publications.

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HSA

THE LAW FOUNDATION OF BRITISH COLUMBIA

Appendix 9

(36)

BRITISH COLUMBIA
The Best Place on Earth

Ministry of
Social Development

Dear

We are writing to advise you of the ministry's decision following review of your trust arrangement.

The ministry has determined that your Tax Free Savings Account (TFSA) is set up by a Declaration of Trust. Under the terms of the trust, you can compel the plan trustee to withdraw funds for you at any time. As a result, the TFSA is considered to be a non-discretionary trust.

This means that the ministry will treat this trust property as your asset. Nevertheless, the trust property will be an exempt asset as long as the aggregate value of all trust property contributed to the trust is no more than $200,000 in value.

All payments made from the trust to or on behalf of you will be your unearned income, except for payments that are exempt because they are for "disability-related costs" as defined in the regulation.

Please also note that you must advise the ministry of any additional money or other assets placed in the trust, and of any changes made to the trust or the trustee.

You may find it helpful to review the general information in the booklet "Disability Assistance and Trusts" available at Employment & Assistance Centres or http://www.mhr.gov.bc.ca/publicat/pdf/DisabilitiesTrusts.pdf.

The ministry cannot provide specific advice about how best to arrange your affairs. If you have any questions in that regard, or if you have questions about the legal implications of the ministry decision, it is your responsibility to seek independent legal advice.

Sincerely,

for Donna Thompson
Manager, Litigation

Ministry of Social Development
MSD-MCFD Legislation, Litigation and Appeals Branch

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1.9