POVERTY LAW PRIMER

Welfare

Housing

Debt and Collections

Foreclosure

Bankruptcy and Insolvency

Employment Insurance

Legal Services Society

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Contents

Chapter 1: Welfare Law 1

Governing statutes, regulations, and rules 1
Common client problems 2
BC Welfare Checklist 4
Issues applying to First Nations clients living on reserve 12
Issues applying to seniors 13
Frequently Asked Questions (FAQ) 14
Case citations 20
Resources 23
BC Welfare Legislation — Limitation and statutory notice periods 25
Persons with Persistent and Permanent Barriers to Employment (PPMB) Checklist 32
Persons with Disabilities (PWD) Checklist 34
Daily Living Activities Checklist 36
Symptom Checklist 39

Chapter 2: Housing — Residential Tenancy 41

Governing statutes, regulations, and rules 41
Common client problems 42
Residential Tenancy Checklist 44
Issues applying to First Nations clients living on reserve 51
Issues applying to seniors 51
Frequently Asked Questions (FAQ) 52
Related Issues and Legislation 58
Resources 60
Residential Tenancy — Limitation and statutory notice periods 66

Chapter 3: Debt and Collections 71

Governing statutes, regulations, and rules 71
Common client problems 73
Debt and Collections Checklist 74
Issues applying to First Nations clients 81
Issues applying to seniors 81
Frequently Asked Questions (FAQ) 82
Resources 87
Debt and Collections — Statutory Limitation Periods 90

Chapter 4: Foreclosure 93
Governing statutes, regulations, and rules 93
Common client problems 94
Foreclosures Checklist 95
Issues applying to First Nations clients 101
Frequently Asked Questions (FAQ) 102
Related Issues 104
Resources 104
Limitation periods and time considerations in foreclosure actions 106
Mortgagor's (Debtor's) Options in Foreclosure Proceedings 107
Chapter 5: Bankruptcy and Insolvency 109
Governing statutes, regulations, and rules 109
Common client problems 110
Bankruptcy and Insolvency Checklist 112
Issues applying to First Nations clients 116
Frequently Asked Questions (FAQ) 117
Related Issues 122
Resources 123
Bankruptcy issues and important timelines 125
Chapter 6: Employment Insurance 127
Governing statutes, regulations, and policies 127
Common client problems 128
Employment Insurance General Checklist 131
Issues applying to First Nations clients 143
Frequently Asked Questions (FAQ) 144
Related Issues 148
Resources 148
Employment Insurance: Limitation and statutory notice periods 150
EI — Antedate Checklist 153
EI — Misconduct Checklist 154
EI — Voluntary Quit (Leaving Without Just Cause) Checklist 156
EI — False Representation Checklist 159

Chapter 1: Welfare Law
(Provincial Income Assistance Programs)

Welfare law is complex (both procedurally and substantively) and is subject to constant changes in policies and regulations. To check for changes, visit the Ministry of Housing and Social Development's (MHSD) website at: www.gov.bc.ca/meia/online_resource/ and see the "What's New" section of the Online Resource.

(See also the BC Welfare Legislation — Limitation and statutory notice periods chart located on page 25 and the BC Welfare Checklist for first interviews found on page 4.)

Welfare cases are often urgent as they involve basic necessities of life — food, shelter, and medical treatment. Clients may have had benefits suddenly denied, discontinued, or reduced. Frequently their cases have merit, but clients are unable to represent themselves against a large government bureaucracy. Always consider whether your client would be better served by an agency that specializes in assisting welfare recipients (see the Resources section on page 23).

Our provincial government provides 2 main forms of income assistance:

- "regular" benefits
- benefits for people with disabilities (PWD benefits)

Note: *Some of the rules governing "regular" benefits differ greatly from those governing PWD benefits.*

Governing statutes, regulations, and rules

- *Administrative Tribunals Act*, S.B.C. 2004, c. 45; B.C.
- *Employment and Assistance Act*, S.B.C. 2002, c. 40 (*EAA*); B.C. Reg. 263/2002 (as amended)
- *Employment and Assistance for People with Disabilities Act*, S.B.C. 2002, c. 41 (*EAPWDA*); B.C. Reg. 265/2002 (as amended)

  *(**Note:** You will find details about benefit rates, deductions from, and the schedules to the regulations.)*
- Employment and Assistance Appeals Tribunal Practices and Procedures Manual
- *EAA* and *EAPWDA* Forms Regulation; B.C. Reg. 315/2005 (as amended)
- *Judicial Review Procedures Act*, R.S.B.C. 1996, c. 241.
- Welfare policies — accessible to public online at www.gov.bc.ca/meia/online_resource/ (no longer available in manual form)

Those excluded from benefits include persons who:

- are in Canada illegally, on visitor's or student's permits, or in BC on temporary work permits

  *(**Exception:** Convention refugees or refugee claimants who apply for work permits may still be eligible for welfare.)*

- are full-time students in programs that qualify for student loans (funded programs) or in unfunded programs without prior permission of MHSD

  *(**Exception:** Persons taking approved training programs may qualify; PWD recipients may qualify for benefits if they are full-time students.)*

- have not been financially independent for 2 years (refer to the many exceptions noted in the BC Welfare Legislation — Limitation and statutory notice periods chart on page 25). See also the Ministry of Children and Family Development (MCFD) Agreements with Young Adults program that offers individuals between 19 and 23 years of age financial support and tuition assistance plus guidance from MCFD or community social workers.
- have 3 criminal convictions under *EAA* or one conviction under the *Criminal Code* for "welfare fraud"

Those who may qualify for repayable hardship benefits or reduced benefits include persons who:

- are on strike or locked out, or
- have left employment without just cause.

Common client problems

(For more details, see the BC Welfare Checklist in the following section and Frequently Asked Questions [FAQ] on page 14.)

General issues:

- **denial of eligibility**; for example, because the MHSD says client is living with spouse who should be responsible for support and shelter; or because client has resources that could be used for living expenses
- denial of **hardship assistance**; for example, on ground that client should take advantage of another source of available money
- refusal of **crisis grant**
- demand by MHSD for **repayment** of benefits; compelling execution of repayment agreement in order to receive benefits
- investigation of alleged **fraud** or initiation of civil proceedings in Supreme Court for recovery of funds allegedly obtained by fraud

Disability-related issues:

- refusal of Ministry of Health Services to grant PWD status
- denial of essential health-related benefit or bus pass
- discretionary trust problems

Family and immigration issues:

- insistence that client assigns rights to child support
- immigrant sponsorship issues

- child in home of relative; kith and kin custody arrangements
- intersection with MCFD and CFCSA jurisdictions

Employment issues:

- disputes about training and education
- failure to comply with employment plan

BC Welfare Checklist

This checklist applies only to BC economic security problems that come under the jurisdiction of the Ministry of Housing and Social Development (MHSD) or "the ministry." Always check whether your client's problem may be covered by other legislation such as Employment Insurance (EI), Canadian Pension Plan (CPP), Old Age Security (OAS), Guaranteed Income Supplement (GIS), or WorkSafeBC (formerly Workers' Compensation Board). Also refer to the checklists for PPMB and PWD medical information on pages 32 and 34 of this chapter.

Common abbreviations:
PPMB = person with persistent multiple barriers
PWD = person with disabilities

Information about client(s) — (if not already recorded elsewhere) _____

_____

_____

Full name(s): _____

Home address (or place where mail may be picked up if client has no fixed address):

_____

_____

Phone/fax/e-mail address (or number where client can pick up messages if client has no fixed address):

Phone _____ **Fax** _____ **E-mail** _____

Preferred method of contact? (include contact person's information if client is homeless or has no phone):

☐ **Phone** ☐ **Fax** ☐ **E-mail**

Is it safe/secure to leave messages on voicemail? ☐ **Yes** ☐ **No**

Client's education level *(relevant as exemption to the 2-year prior employment rule)*:

_____

Client's employment history (*may be relevant for PWD and PPMB applications and appeals*):

_____

_____

Is interpreter necessary? ☐ **Yes** ☐ **No**

Information about MHSD office:
Location of office (for phone numbers, addresses, etc., see the ministry website at www.eia.gov.bc.ca/contacts or phone 1-866-866-0800 [call no charge])
(***Note:*** *It is important to get the office fax number, so you can send in your client's confidentiality waiver as soon as possible. Otherwise, the ministry will refuse to give any information. Refer to Part 1 Initial contact below.)*

Name of any Employment Assistance Worker (EAW) or District Supervisor (DS) that client may have dealt with (if client knows them):

_____

PPMB & PWD clients
Contact information for physicians and other therapists (or use separate PPMB or PWD checklists on pages 32 and 34):

_____

Common abbreviations: **C** = client **DS** = District Supervisor of C's welfare office **EAAT** = Employment and Assistance Appeal Tribunal **EAW** = Employment assistance worker **MHSD** = Ministry **PPMB** = person with persistent multiple barriers **PWD** = person with disabilities (Section numbers refer to *EAA* and Regs. unless otherwise indicated.)			
Actions to consider (check relevant column)	**Not applicable**	**Yes**	**No**
1. Initial contact 1.1. If by phone, consider whether office interview immediately necessary.			
1.2. Will C be better served elsewhere? If yes, where? (See the Resources section on page 23.)			
1.3. Obtain names for conflicts check (this is not often applicable, but may arise where someone has complained about an alleged fraud by C, or problem involves roommates, ex-spouses, etc.)			
1.4. Identify exact nature of problem. Is it an emergency? (e.g., C's benefits have been cut off and C is in danger of losing, or has lost, home; C has lost welfare money and is in crisis.)			
1.5. Is there a limitation period? If yes, note in diary, or a bring-forward system, etc. (see BC Welfare Legislation — Limitation and statutory notice periods chart on page 25).			
1.6. Can C resolve problem(s) with your summary advice or assistance?			
1.7. What attempts has C already made? Specify:			

Actions to consider (check relevant column)	Not applicable	Yes	No
1.8. If applicable, ask C to obtain a Reconsideration Request Form from the ministry and bring it to initial interview. (This form is not available online and must be partially completed by ministry staff.)			
1.9. What are C's expectations? Specify:			
1.10. Have you obtained a signed and witnessed release of information/waiver of confidentiality to allow you to obtain disclosure from parties and witnesses?			
2. Stage of proceedings 2.1. Is there still an opportunity to negotiate or mediate a settlement with EAW, DS or other ministry staff?			
2.2. If no, does C have reasonable grounds for seeking reconsideration?			
2.3. If yes, has C applied for reconsideration? *(**Note:** Reconsiderations of denial of PWD status or health supplements are handled by the Health Reconsideration Branch of the ministry, not the local office. Reconsiderations of PPMB denials are handled by the Regional Reconsideration Adjudicator.)*			
2.4. If no, is there still time to apply? (limitation period)			
2.5. Has ministry rendered an adverse reconsideration decision?			
2.6. If yes, is it appealable to EAAT? ***Note:** The following ministry decisions are not subject to appeal:*[1] • *Requirement to sign and have certain conditions in an employment plan* • *Refusal to change, suspend, or cancel employment plan once it has been signed* (Discontinuance of assistance due to non-compliance with a condition of an employment plan is open to reconsideration and appeal) • *Determination of amount of overpayment owing to the ministry* • *Denial of access to program set up under welfare legislation such as community volunteer or employment program* • *Denial of benefits (appeal supplement) while case is under reconsideration or appeal* • *Denial of supplement related to employment plan or confirmed job*			

[1] Adapted from LSS publication *Your Welfare Rights.*

Actions to consider (check relevant column)	Not applicable	Yes	No
2.7. Has C already filed an appeal to EAAT?			
2.8. If no, is there time to apply? (limitation period is 7 business days from receipt of decision)			
2.9. If yes, help C complete Notice of Appeal, available at www.gov.bc.ca/eaat/down/notice_of_appeal_form_2008.pdf			
2.10. Has C received an adverse decision regarding appeal from EAAT?			
2.11. If yes, does C have grounds for judicial review? • Was there proper notice? Disclosure of evidence? • Did tribunal allow client to be heard? To present witnesses? To present evidence? • Was client present at hearing? • Oral or written hearing? • Is credibility a major issue, indicating that a written submission is inadequate? • Was decision patently unreasonable? • Is there evidence of tribunal bias? • Was tribunal within jurisdiction? • Any error of law?			
3. Legal action by ministry against client for overpayment or fraud (note stage of proceedings) 3.1. Audit and investigation			
3.2. Repayment agreement			
3.3. Charged with offence			
3.4. Action started in Provincial or Supreme Court			
3.5. Default order obtained			
3.6. Appeal from court decision			

Substantive problem	Not applicable	Yes	No
4. Substantive nature of problem[2] (check those that apply and refer to FAQ and Resources sections (pages 14 and 23) for other sources of information)			
4.1. **Denial at application stage** (Regs. Part 2, EAR & EAPWDR) • Failure to attend orientation session or conduct 3-week work search — check for exemptions; check immigration status. Physical and mental condition, senior, abuse victim, child under 3 years, etc. (EAR s.4.1, and EAPWDR, s.4.2) • Immigration issues — refugee claimant (now eligible for regular income assistance (IA) on production of immigration document IMM 1442) • Denial of emergency needs • Denial of hardship benefits • Above asset limit			
4.2. **Denial of PPMB status** (EAR, s.2 [see separate PPMB checklist on page 32]) • Lack of supportive medical evidence • Score of less than 15 on employability screen, Schedule E to Regs. • C has addiction • C has not been receiving regular or hardship benefits long enough (12 out of last 15 months) • Other			

4.3. **Denial of PWD status** (*EAPWDA*, s.2)
(see separate PWD checklist on page 34 for details of information and evidence to obtain)
• Lack of supportive medical evidence
• Not enough information in application about
  ○ restrictions in daily living
  ○ need for supervision
  ○ need for assistive device or assistance animal
• Other			

[2] This legislation is so wide and complex that only the most commonly presented problems are included here. For more detailed information, see LSLAP manual and other resources referenced on pages 23–24.

Substantive problem	Not applicable	Yes	No

4.4. **Refusal of crisis supplements and hardship assistance** — Crisis (EAR, s.59, Sch. C); Hardship (*EAA*, s.5, EAR, Part 4: *EAPWDA*, ss.5, 6; EAPWDR, Parts 4 and 5, Sch. C and D.)
 	
Reason for refusal of crisis supplement
• C is already over crisis grant limits set out in Schedules A and D
• Ministry says it is not a crisis — it is not an unexpected expense, or a need that will lead to danger to physical health of any family unit member or the removal of child under *CFCSA*
• Problems with security deposit for rental accommodation
• C has been convicted of fraud (but see EAR, s.47.1 — ministry has discretion to provide hardship benefits)
 	
Criteria for eligibility for hardship assistance (non-repayable)
• Is C over 19 years, a resident in BC, *and* in one of following categories:
  ○ C's sponsor has ceased support
  ○ C is waiting for SIN or other identification documents
 	
Hardship (repayable)
  ○ Waiting for money from another source; e.g., EI or WorkSafeBC benefits
  ○ On strike or locked out
  ○ Has dependent child(ren) and income/assets that are over the limit but cannot be immediately accessed
• Does C have written reasons for refusal from ministry in order to start appeal process?			

4.5. **Denial of health, medical, or dental benefits** — *EAA*, s.4; EAR, ss.67–77, Sch. C; *EAPWDA*, s.5; EAPWDR, ss.62–70, Sch. C. • Dental — basic, dentures, crown, bridgework (Sch. C, ss.4–5P) • Eyewear and eye exams (Sch. C, ss.2.1–2.2) • Health supplements — physiotherapy, chiropractic, massage therapies (Sch. C, s.2) • Medical equipment and devices — e.g., wheelchairs, orthotics, hearing aids (Sch. C, s.3) • Diet, nutritional, and natal supplements (Sch. C, ss. 6–8) • Transportation to medical services (Sch. C., s.2(1)(f)) • Other *(**Note:** Schedule C section numbers above refer to EAPWDR. If client is not classified as PWD, check Schedule C to EAR, which is substantially similar but may have different applicable section numbers.)*			

Substantive problem	Not applicable	Yes	No
4.6. **Alleged overpayments and accusations of fraud** — Overpayments (*EAA*, s.27–28; *EAPWDA*, s.18–19); Fraud: false and misleading statements (*EAA,* s.31; *EAPWDA*, s.22) *(**Note:** While researching merit of client's case, always check for availability of hardship benefits so that client can survive in the short term.)* • Undisclosed assets (e.g., expensive vehicle, property held in joint tenancy) • Undisclosed income — especially "unearned" (see extensive definitions in EAR & EAPWDR) • Undisclosed disposal of assets (e.g., in order to qualify for welfare) • Failure to pursue other sources of income • Falsified shelter costs (e.g., forged receipts for rent allegedly not paid) • Dependency relationship (e.g., roommates alleged to be spouses) • Collecting benefits for family member who no longer lives there • Problems with ministry process • Harassment by ministry investigators • Ministry withholding benefits until "consent" agreement signed • Hardship benefits denied until repayment agreement signed • Other			
4.7. **Miscellaneous PWD issues** • Ministry insisting on orientation session but client not well enough • Client needs help in completing PWD application form • Client has been asked to apply for CPP disability benefits or has received a retroactive payment that has been deducted from welfare PWD benefits (EAPWDR, s.11) • Ministry insisting that client's discretionary trust does not meet requirements • Other			

Substantive problem	Not applicable	Yes	No
4.8. **Miscellaneous family issues** • Ministry insisting that client sign an assignment of maintenance rights (EAR, ss.19–25; EAPWDR, ss.16–22) • Client has visited sick relative outside BC for more than 30 days in a year (EAR, s.17; EAPWDR, s.15) • Client not receiving benefits for child in joint custody but child stays with client 3–4 days per week • Ministry refusing to continue shelter or support benefits while child in care under CFCSA agreement or order			
4.9. **Other Miscellaneous** • Lost or stolen cheques • Administration of benefits • Refusal or loss of bus pass • Problems with employment plans • Denial of job supplements • Client homeless and ineligible for shelter allowance • Client in care facility • Other			
5. Related legal issues • Bankruptcy • CPP — regular and disability • Child protection (CFCSA) • Criminal law — fraud charges • Debt and collections • Disability tax credit and registered disability savings plan • EI (e.g., insufficient insurable hours, misconduct, voluntary quit) • Family law — separation, spousal abuse • Foreclosure — client is title holder or is tenant in foreclosed property • Housing — especially *RTA* and co-op issues • Human rights • Immigration (e.g., refugee and sponsorship issues) • Income tax and tax credits • Pensions other than CPP (e.g., long term disability, OAS/GIS, WorkSafeBC) • Right to counsel			

Issues applying to First Nations clients living on reserve[3]

A person who lives on reserve applies for social assistance through the social development worker of the "administering authority." The administering authority is usually the reserve's Indian band, but could be a tribal council or other First Nations administrative entity. The federal government has jurisdiction over welfare provided on reserve. It administers its program through a policy of Indian and Northern Affairs Canada (INAC). This policy is set out in INAC's *Social Development Policy and Procedure Guide*.

Note: *Nisga'a Lands are no longer Indian reserves, so INAC's Social Development Policy and Procedures no longer apply to those areas. Although the Nisga'a negotiated law-making authority over the delivery of social services to Nisga'a citizens, to date, the Nisga'a government is applying provincial social assistance law and standards. You should check the status of other First Nations who have signed treaties, such as Tsawwassen.*

Administrative review

Your client has the right to get a review of a social development worker's decision. If your client is already getting benefits and the decision is made to discontinue or reduce them, your client has a right to continue to receive benefits until the matter is resolved.

Your client will have to ask the social development worker for a Request for Administrative Review form. They must complete the form and mail it back or deliver it *within 20 business days* after they got the initial decision.

Indian and Northern Affairs Canada (INAC) will appoint a person to review the Request for Administrative Review. It might take another 20 business days to do this. INAC will then write its decision on an Administrative Review Decision and Request for Appeals Committee form.

Appeal hearing

If your client disagrees with the decision, they can complete Part 3 of the Administrative Review Decision and Request for Appeals Committee form explaining why they do not agree with the review decision. Your client must return this form *within 7 business days* after they got the review decision.

There will be an appeal committee of 3 people. Your client chooses one person, INAC chooses one person, and they together choose a chairperson. The committee will schedule an appeal hearing. Your client must attend the appeal hearing and take any relevant documents and witnesses. You may accompany your client to the hearing. The appeal committee will decide by majority vote whether to accept or reject the social development worker's initial decision.

INAC review

The manager of INAC's Social Development Unit will review the appeal committee's decision. The manager will endorse the decision if he or she feels it is consistent with INAC policy. If not, the manager will meet with the chairperson to try to reach an agreement as to how to proceed. They will tell the administering authority.

[3] This section has been copied in whole or part from *Aboriginal People and the Law in BC* (2006), Legal Services Society of British Columbia.

Judicial review

If your client disagrees with the decision, they may be able to apply to the Federal Court for judicial review. This is a complicated process involving time limits and technical and legal issues.

Issues applying to seniors

Applicants for welfare who are between 60 and 65 years old will be required to apply for any CPP benefits available to them. If the total is less than the current welfare rates, they are entitled to a "top up." If they are also unable to work due to a disability, they may qualify for a bus pass and other benefits.

Applicants who are over 65 years may qualify for the Senior's Supplement if their total income, including the federal Guaranteed Income Supplement (GIS), falls below applicable provincial welfare levels. For purposes of calculating eligibility for welfare, veterans benefits are included in income but are subject to a $50 per month exemption.

Frequently Asked Questions (FAQ)

The following questions merely skim the surface of the issues that confront legal service providers. See the Resources section on page 23 for links to more detailed information. Full case citations are listed below.

Application stages

General

1. **Rejection based on lack of information from client. What documents should she have submitted?**

   Submit 2 documents proving identity, including photo identification and a social insurance number, or citizenship or permanent residency documents, if client was not born in Canada.

   In addition:

   - confirmation number that proves attendance at orientation session (may not apply to PWD applicants)
   - proof of acceptable job search (may not apply to PWD applicants)
   - proof of 2 years' financial independence (not applicable to PWD applicants)
   - information about income and assets (see www.iaestimator.gov.bc.ca)

2. **Client found ineligible for benefits until ex-spouse agrees to close a joint bank account. Can client obtain benefits before account is closed?**

   If client takes reasonable steps to close the account and open a separate account, and informs the ministry of those steps, the ministry may approve benefits; for example, when the bank insists on both account holders' signatures when closing an account and one holder refuses. (There is a presumption that joint funds are accessible until applicant shows otherwise.) *Drobic* case.

3. **HRDC refused EI because client's Record of Employment (ROE) says "voluntary quit." Is it true that he is not eligible for welfare either?**

   Client should be eligible for repayable hardship benefits while this problem is investigated. If not out of time, client could appeal the EI decision to a Board of Referees and make a complaint to the Employment Standards Branch. If EI benefits are granted, hardship benefits will have to be repaid.

Applicants in crisis

4. **Client is homeless, mentally ill, has just been released from hospital and spent last night in a shelter. He has been told he must carry out a 3-week job search and attend an orientation session before he can obtain benefits. Can those requirements be waived so that he can obtain food and shelter?**

   Yes. He should apply for an immediate needs assessment. Staying in a shelter will not disqualify him. He will probably need help creating a written summary of reasons for immediate need that he can give to ministry staff at his intake interview.

5. **While 66-year-old client was on extended vacation, her only relative used a power of attorney to cancel her apartment lease and sell her furniture. The relative has also disappeared with her direct deposit OAS and GIS pensions. She is staying with a friend from her church. Is she eligible for immediate BC welfare benefits?**

   Yes — if she meets other criteria. People over 65 years do not have to do a job search before qualifying for benefits.

   Other applicants who are exempt from job search, include those who:

   - *are fleeing abusive spouse or relative*
   - *are applying for Child In the Home of a Relative (CIHR) benefits*
   - *are not allowed to work because of immigration status*
   - *already have PWD status*

Youth and students

6. **A 17-year-old client has left an abusive home and is living with her older cousin. Is she eligible for welfare benefits?**

   If she is living in the home of a relative, her relative can apply for **Child In the Home of a Relative (CIHR) benefit**. However, everyone in that home must submit to a criminal record check; give the ministry permission to check whether any of them has had prior contact with the Ministry of Children and Family Development (MCFD); and allow the ministry to use the resulting information to determine whether the home is a safe place for the client. If approved, the cousin may also receive the federal Universal Child Care Benefit and the Canada Child Tax benefit without having them deducted from welfare benefits.

   *(**Note**: A person who has **a kith and kin agreement** with MCFD is not eligible for CIHR benefits.)*

7. **What if the 17-year-old is couch surfing or living with a boy or girlfriend?**

   Client may be able to enter into a **Youth Agreement with MCFD** (available to youth from 16–18 years old) that will allow her to live independently; gain work skills; and experience and access therapy for alcohol, drug, or mental health issues. (see the MCFD website at: www.mcf.gov.bc.ca/youth/agreements.htm)

8. **What if client has just turned 19 years old and is not eligible for help under a Youth Agreement?**

   He or she may qualify for similar assistance under the **Agreements with Young Adults** program — open to people from age 19 up to 24 years. (see the MCFD website at: www.mcf.gov.bc.ca/youth/aya.htm)

9. **Does a youth who has been receiving At Home Program Medical Benefits from MCFD have to wait until he is 19 years old before qualifying for PWD benefits?**

   No. He may qualify for PWD benefits at age 18 when At Home benefits end. He should start the application process 6 months before he turns 18. Note that there is now a simplified procedure for him to apply for PWD if the At Home medical file provides sufficient information to meet PWD eligibility criteria.

10. **Client enrolled in a full-time training program without getting prior approval from the Ministry. Is there any way he can make himself eligible for welfare?**

    The general rule is that full-time students who are waiting for loans and people in client's position are ineligible for regular and hardship benefits.

    Exceptions:

    - Families with a full-time student under 19 years old and living at home can still receive welfare.
    - Part-time student may be eligible. Talk to the ministry to find out if client can restructure courses to comply with ministry requirements.
    - First Nations students who are participating in an Aboriginal Human Resources Development Agreement (AHRDA) may continue to receive welfare.
    - PWD recipients may continue to receive welfare while full-time students.

Immigrants

11. **Is it true that refugee claimants are eligible only for hardship benefits?**

    This was true until July 2008. Now refugee claimants may qualify for regular benefits and Family Bonus top-up if they produce the document "Acknowledgement of Refugee Claim" (IMM 1442) and if:

    - they are on temporary resident's or minister's permit
    - they are waiting for decision on, or appealing denial of, refugee status
    - they are claiming that denial of refugee status and deportation will lead to torture
    - Immigration Canada is not enforcing a deportation order

    Since February 2009 they are also eligible for Ministry of Health premium-assisted medical coverage through the Medical Services Plan (MSP).

12. **Client came to Canada under a sponsorship undertaking signed by her husband. They intended to sponsor her father once she was settled. Now her husband has deserted her. Can she apply for benefits and can she sponsor her father?**

    She is entitled to benefits, but the ministry may insist that she apply for spousal support unless her husband has abused her and she is reasonably afraid of him. The ministry is in a legal position to recover benefits paid to client. Unless client qualifies for PWD benefits, she may not sponsor anyone while on welfare.

13. **Client sponsored her husband years ago but stopped supporting him when he left her after a few months for a new partner. She says he was guilty of "marriage fraud." Now, years later, her wages are being garnisheed by the ministry to recover $30,000 in welfare benefits paid to her ex-husband. She is in a low-paying job, is a single mother, and has trouble making ends meet. Is there any way to have this debt written off or reduced?**

    Revenue Services of BC is aggressively pursuing sponsors who have defaulted. They will not do so if there are concerns about the possibility of family violence or abuse. The BC "Taxpayer Fairness and Service Code" applies. If client's net income is low enough, it may be possible to negotiate a

reduction or deferral in payments. If client goes on welfare, her repayments will stop until she resumes employment. (See also the Debt and Collections, and Bankruptcy and Insolvency chapters.)

Disability trusts and asset exemptions

14. PWD client is a beneficiary under a will and his brother is executor. Before distributing the estate, client's brother set up a trust so that client could continue to collect welfare benefits. Initially the ministry accepted this but now they are saying the trust is non-discretionary and client is ineligible for benefits. How can client organize the trust to comply with ministry requirements?

The answers to most questions can be found in the ministry publication "Disability Assistance and Trusts" at www.eia.gov.bc.ca/publicat/pdf/DisabilitiesTrusts.pdf. If client has any control whatsoever of the money in the trust, it will be defined as **non-discretionary** and will be considered an asset (with the first $100,000 being an exempt asset). If it is set up so that the trustee (not client) has complete control of disbursements, it will be defined as a **discretionary trust** which is not considered an asset. This is a complicated area of law and may require the assistance of a lawyer or agency that has special experience with setting up acceptable trusts (see Resources section on page 23).

Note: *Disbursements from the trust may be considered as income that may exceed the $500 per month earnings exemption.*

15. Can a PWD recipient set up a Registered Disability Savings Plan (RDSP) and if they do, will the ministry claw it back?

As long as they have filed an income tax return and are eligible for the federal Disability Tax Credit, they may establish an RDSP (available at financial institutions). Money in the plan is **exempt** under welfare legislation and will not be clawed back. Family members and friends may contribute to the plan. The Canada Disability Savings Grant provides that the government will contribute a set amount for low-income savers, ending when the beneficiary reaches 50 years old. PWD recipients are eligible for the Canada Disability Savings Bond under which the federal government will pay $100 per year whether or not contributions are made to the plan.

Note that there are restrictions on withdrawals from the plan. For more information see www.plan.ca and http://rdsp.wordpress.com.

16. Client has locked-in RRSP. Can the ministry deny benefits until he has used up this money, even though he can't access it?

Only genuinely locked-in (non-redeemable) RRSPs so designated under the *Pension Benefits Standards Act,* RSC 1985, c. 32. and RSBC 1996, c. 352 are exempt assets. Even if client has to pay a penalty for early redemption, other RRSPs are considered as assets for eligibility purposes.

Living arrangements

17. **Client separated from her husband 10 years ago and hadn't seen him since, until he turned up at her door with nowhere to stay. She felt sorry for him and has allowed him to sleep in a spare bed. Now the ministry is threatening to cut off her benefits if she refuses to submit to an assessment to determine whether they are in a "marriage-like dependency arrangement." What are the ministry rules around this?**

    The ministry presumes in situations like this that clients are cohabiting as spouses. This will apply to same-sex living arrangements as well as heterosexual. Theoretically, the sexual nature of the relationship is not considered but length of cohabitation, intermingling of assets, income, household chores and social friends is relevant. This is similar to the "separate and apart" issues when a couple who are sharing premises seek a divorce. See the following website: www.gov.bc.ca/meia/online_resource/verification_and_eligibility/verification/procedures.html#5 for ministry policy on this topic.

    *(**Note:** Roommates who merely share expenses and babysitting responsibilities may successfully argue their relationship is not marriage-like.)*

18. **Client and his ex-wife have a joint custody agreement respecting their 10-year-old son. There is no court order. She is employed and claims the Child Tax Credit, but the son now spends more than half his time with client whose welfare cheque is not enough to cover the extra food. His ex-wife won't help. Can he obtain extra money from the ministry?**

    Client should apply for a court order setting out the amount of time the son should spend with each parent. If the ex-wife agrees, this may done with the help of a family court counsellor. Meanwhile, the EAW has discretion to determine that the son is a **dependent child** of the client and pay benefits accordingly. If the son stays at least 40% of his time but less than 50%, client may be eligible for **Shared Parenting Assistance** to help with shelter costs (see www.gov.bc.ca/meia/online_resource/verification_and_eligibility/verification/procedures.html#5).

19. **Client and dependent daughter share a 2-bedroom apartment that the ministry says is too expensive. She wants to stay there so that her daughter can continue to go to a particular school. Rather than move, in order to cover the rent, client has rented her bedroom to a student who pays for room and board that helps to cover the rent. Is the ministry entitled to treat the renter's payments as earned income?**

    Yes. However, client can deduct operating costs such as food, room maintenance, pro-rated expenses, and portion of property taxes (when applicable).

20. **Is a client who receives room and board from his parents entitled to shelter benefits?**

    The general answer is no (see EAR, Sch. A, s.6). Shelter benefits in a familial room and board situation are available only to people aged 60–65. Client may receive shelter benefits if he pays rent for his room and carefully arranges his affairs so that he buys his groceries independently, cleans his own room, and prepares his own meals.

21. The ministry refuses to provide shelter benefits until subtenant client produces a rental agreement with his landlord. The ministry won't accept an agreement with the head-tenant, but the landlord won't sign one. What can client do?

See the *Stow* decision cited below. This is a grey area. The best solution is to obtain the landlord's agreement. The second best solution is to produce evidence of fruitless efforts to obtain agreement. A head-tenant is now included in the definition of landlord in the *Residential Tenancy Act, s*o this could be a winnable appeal case.

Family maintenance

22. The ministry is requiring client to sign an assignment of maintenance rights. She is afraid her ex-spouse will beat her up if he thinks she is trying to get money out of him. Must she sign in order to get or continue benefits?

She may have to sign, but if client can produce credible evidence of abuse or danger, the ministry will not seek support from her ex-spouse.

Tribunal hearings

23. Is client allowed to tape an appeal hearing?

No. Since taping is not permitted, it is a good idea to supplement oral arguments with a written submission that will become part of the record should judicial review be necessary.

24. If the decision is in client's favour, will he qualify for retroactive benefits?

When the tribunal rescinds a ministry's reconsideration decision, the effective date of eligibility is dependent on the type of assistance applied for. For example, new applicants and returning PWD applicants are eligible for benefits retroactive to the date of application; PPMB and PWD benefits are retroactive to the first day of the month after the date of the reconsideration decision.

25. Does the Employment Assistance Appeal Tribunal (EAAT) publish its decisions?

The EAAT now publishes some "Decisions of Interest" that are organized by topic. See the tribunal website at: www.gov.bc.ca/eaat/popt/decisions_of_interest.html. Although they do not have strict precedential value, these decisions offer some insight into the tribunal decision-making process and may provide useful arguments for your client.

Case citations

The current legislation was enacted as recently as 2002 when the Employment Assistance Appeal Tribunal (EAAT) replaced previous appeal tribunals. The EAAT does not publish its decisions.

*(**Note:** There are a few human rights tribunal cases that discuss matters under welfare legislation; however, these would not be binding — or probably even persuasive — at an EAAT hearing.)*

The reasoning applied in cases before the previous tribunal (BC Benefits Appeal Board) can be useful when preparing arguments for the EAAT. (Copies of their decisions are available from the Community Legal Assistance Society at 604-688-3425.)

Since proclamation of the *Administrative Tribunals Act* in 2004, the standards of review in the *ATA* apply. There are very few recent court level cases except those involving allegations of criminal fraud.

Drobic v. B.C. (Ministry of Employment and Income Assistance) and others (No. 2), 2008 BCHRT 143 (CanLII) — 2008-04-29 — D alleged discrimination on grounds of marital status when refused benefits several times because of **failure to close joint account** with separated husband. D argued husband would not cooperate in account closure. After divorce and eventual closure of account, D received benefits from another ministry office. *Held* — For Ministry. D had several opportunities to comply with ministry requirements. Despite difficulty with English, D came across as lacking credibility. No evidence of discrimination.

Dulay v. BC Benefits Appeal Board, [1999] B.C.J. No. 1237 (QL), 13 B.C.T.C. 48 — **disposal of assets for inadequate consideration** — discretion of appeal board. Title to family home (excluded asset) was transferred to recipient's daughter for $1.00. *Held* — Board had discretion whether or not termination of benefits was justified in these circumstances and properly considered the home as "property." Disposition of the home deprived it of its characterization as excluded asset.

Forward v. British Columbia (Benefits Appeals Board), 2002 BCSC 821 — reduction of benefits — **joint ownership of assets** — question of fact. F was 1 of 3 joint owners of properties that brought in $1500 rent. F claimed her name was on title only to avoid probate fees on mother's estate. Board agreed with province's application of presumption of advancement and ruled F was receiving unearned income. *Held* — For Ministry — appeal dismissed. F had not rebutted presumption. Irrelevant whether F received any rental money. As signatory to mortgage, she clearly benefitted from receipt of the income.

Note: *Presumption of advancement may not be on such firm grounds since the SCC decision in Griffin v. British Columbia (Ministry of Social Development and Economic Security), 2000 BCSC 1071 —* ***repeat applications for reconsideration*** *of denial of benefits after appeal board found that recipient was in a dependency relationship with ex-spouse. Ministry argued that it should not be required to continually reconsider its decision to deny benefits unless there was third party verification that G was no longer in dependency relationship. Held — For G. Ministry did not have legislative authority to deny G the right to reconsideration.*

Harley v. British Columbia (Employment and Assistance Appeal Tribunal), 2006 BCSC 1420 — whether GICs permissible assets — **requirement for EAAT to give reasons**. H was denied assistance for 4 months because ministry found that she could access GICs that H said were held in trust for her daughter. Tribunal agreed with ministry but failed to provide specific reasons. *Held* — For H. Sent back to new

panel. **Standard of review for non-compliance with statutory requirement to give reasons is correctness** (*ATA*, s.58(2)(c)).

Serebrova v. British Columbia (Employment and Assistance Appeal Tribunal), 2006 BCSC 213 — ineligibility — **over asset limit** — insufficient evidence funds held in trust. EAAT agreed S was ineligible for benefits because she had US bank account containing more than the $3000 allowable limit. *Held* — For ministry. S's evidence of trust was hearsay and unauthenticated. Tribunal was entitled to conclude that denial of benefits was reasonably supported by ministry's evidence.

Stow v. B.C. (Attorney General of), 1998 CanLII 5694 (BCSC) — S was subtenant — **no written agreement with head-tenant or owner/landlord.** Ministry would not accept rent receipt from head-tenant as proof of shelter costs and landlord would not provide anything. S was denied shelter allowance and had to move into SRO. *Held* — For S. The receipt from the head-tenant was a receipt from the "landlord" for the purposes of obtaining shelter benefits. "Nothing in the Act or Regulations can be interpreted to require an applicant for income assistance to provide documents which, for him or her, are impossible to produce." (para. 22) ("Once a legitimate receipt for rent is produced, it is the line worker's obligation to make such inquiries as are necessary to fulfill the requirements of [the previous legislation].")

*(**Note:** The legislative provisions in welfare and residential tenancy that apply to this situation have been modified.)*

***Civil fraud cases* —** Clients whose cases have merit and who have challenged these lawsuits with the help of a lawyer generally settle out of court with little or no penalty. This means that there are no recent reported cases. Lawyers at BC PIAC have experience with this issue. For advice and assistance call them at 604-687-3063.

Criminal fraud cases (chronological) — Note that clients charged with fraud should apply for legal aid under the criminal tariff. However, if no reasonable likelihood of incarceration, Lower Mainland clients may qualify for representation from LSLAP students; and those in Victoria from the Law Centre (see Resources section on page 23).

R. v. L.S.E., 2002 BCSC 615, 53 W.C.B. (2d) 436, [2002] B.C.J. No. 852 (QL) — fraud, **unreported co-habitation.** Clear evidence that LSE had jointly occupied residences for several years prior to divorce, despite husband's testimony that they operated as entirely separate financial units. *Held*— LSE and ex-husband had no credibility. No room for suggestion that LSE might have mistakenly believed that she did not have to report her living relationship. Court found deliberate concealment in order to obtain benefits.

R. v. Sigurdson, 2005 BCSC 1037, 66 W.C.B. (2d) 149, [2005] B.C.J. No. 1539 (QL) — fraud — separation — assets of partner — **"probable guilt" insufficient for conviction**. S charged with failure to disclose she was living with husband who was paying rent on her behalf, had bank accounts, and owned a car for which she received insurance proceeds after it was written off. S testified she was separated and husband used her address solely as a convenience because he was an alcoholic with no fixed address. She also managed his affairs in order to provide for the family. *Held* — S acquitted. Although some explanations were suspicious and self-serving, the Crown had failed to prove its case beyond a reasonable doubt.

R. v. Smith, 2007 BCCA 468 (CanLII) — Accused and wife **collected $90,000 benefits while working.** Wife pleaded guilty and received 12-month conditional sentence. S pleaded not guilty and appealed sentence

of 14 months incarceration. *Held*— For Crown. Agreed that S, unlike his wife, had taken "minimum responsibility for his actions." 14 months was not a "demonstrably unfit" sentence.

R. v. Simmons, 2007 BCCA 478 (CanLII) — **single Aboriginal mother obtaining $19,000 benefits while employed** — pleaded guilty — appeal from sentence of 6 months incarceration despite joint submission by Crown and defence for conditional sentence. *Held* — For S. "While in most cases involving fraud, general deterrence and denunciation are particularly important if not paramount, the appellant's personal circumstances here required that consideration be given to a conditional sentence."

R. v. Keuris, 2008 BCSC 480 (CanLII) — **undisclosed spousal relationship** — $25,000 fraud — guilty plea — accused now in good job. *Held* — Conditional discharge not sufficient. Given conditional sentence of 6 months to be served in community — house arrest except for going to work, etc.

*(**Note:** Consequence under welfare legislation is lifetime ban for a Criminal Code offence (with possibility of hardship benefits) while there is no such ban for a discharge.)*

Resources

*(**Note:** Information is always changing, so please check that websites are up to date.)*

Internet

- ***Aboriginal People and the Law in British Columbia*, Chapter 6 (2006) on the Legal Services Society website:** www.lss.bc.ca/assets/pubs/aboriginalpeopleandlaw.pdf
- **BC Coalition of People with Disabilities (BCCPD) fact sheets:** www.bccpd.bc.ca/publications/default.htm
- **BC Ombudsman website:** www.ombudsman.bc.ca
- **Employment and Assistance Appeals Tribunal Practices and Procedures Manual and tribunal decisions:** www.gov.bc.ca/eaat/popt/practice_and_procedures.htm or www.gov.bc.ca/eaat/down/practices_and_procedures_06262008.pdf (printable version)
- **Law Students Legal Advice Program (LSLAP) Manual, Chapter 21:** www.lslap.bc.ca/UserFiles/File/21_IncomeAssistance.pdf
- **Ministry of Housing and Social Development (location of offices):** www.eia.gov.bc.ca/contacts
- **PovNet website:** www.povnet.org is an online resource that includes a helpful welfare chat list for subscribed members.
- **Welfare rates and asset exemptions:** www.mhr.gov.bc.ca/mhr/rates.htm
- ***Your Welfare Rights*, Legal Services Society, 20th edition, 2008:** www.lss.bc.ca/publications/pub.aspx?p_id=167.m. This publication is designed for the public but it is an excellent source of information for lawyers and advocates.

Manuals (printed)

- **LSLAP manual** (see above — hard copies may be purchased)
- ***Your Welfare Rights*** (see above)

Individuals and organizations

Practice advisors

- **LawLINE staff at Legal Services Society**
  Phone: 604-408-2172 or 1-866-577-2525 (call no charge)
- **Poverty lawyers at BC Public Interest Advocacy Centre (BCPIAC)**
  Phone: 604-687-3063
  Website: www.bcpiac.com
- **Poverty lawyers at Community Legal Assistance Society (CLAS)**
  Phone: 604-685-3425
- **Pro Bono Law of BC (PBLBC) — roster program — judicial review**
  Phone: 604-893-8932
  E-mail: info@probononet.bc.ca
  Website: http://probononet.bc.ca/judicialreview.php

- **The Law Centre, Victoria**
  Phone: 250-385-1221
  Website: www.thelawcentre.ca

Advocates

- **PovNet:** www.povnet.org

Disability Issues

BC Coalition of People with Disabilities (BCCPD) — Advocacy Access: provides one-to-one advocacy assistance to people with mental, physical, cognitive, and sensory disabilities. BCCPD assists with BC disability and CPP cases.
Phone: 604-872-1278 or 1-800-663-1278 (call no charge)
Website: www.bccpd.bc.ca/programs/advocacy.htm

Seniors' issues

- **BC Centre for Elder Advocacy and Support (BC CEAS)**
  Phone: 604-437-1940 or 1-866-437-1940 (call no charge)
- **Community Response Networks (divided by health region)**
  For a location in your area, call 604-660-4482
  E-mail: crns@telus.net or visit
  Website: www.bccrns.ca/crns/index.php

Forms

- **Appeal adjournment request:**
  www.gov.bc.ca/eaat/down/new_appeal_adjournment_request_form.pdf
- **Application for Employment Assistance:**
  Part 1: www.hsd.gov.bc.ca/forms/pdf/HR0080A.pdf
  Part 2: www.hsd.gov.bc.ca/forms/pdf/HR0080.pdf
- Ministry of Housing and Social Development **Consent to Disclosure of Information**:
  www.hsd.gov.bc.ca/forms/pdf/HR3189.pdf
- **Consent to dismiss appeal:** www.hsd.gov.bc.ca/forms/pdf/HR2895.pdf
- **Monthly report:** www.hsd.gov.bc.ca/forms/pdf/HR0081.pdf
- **Notice of Appeal to EAAT:** www.hsd.gov.bc.ca/forms/pdf/HR2607.pdf

Add your local resources here:

BC Welfare Legislation — Limitation and statutory notice periods

Note: *Always check for changes in the law that may have occurred since this primer was published. This is an area where knowledge of limitation periods is crucial to the preservation of client rights.*

Common abbreviations:
EAA **=** Employment and Assistance Act
EAPWDA **=** Employment and Assistance for People with Disabilities Act

Limitation periods

Issue to which limitation period applies	EAA & Regs.	EAPWDA & Regs.	Time limits for submitting requests and starting appeals
Request for reconsideration of ministry decision *(**Note:** Appellants may now ask for an extension of time to submit **supporting evidence** after the 20-day time limit, but the request itself must meet the deadline.)*	Reg. s.79(2)	Reg. s.71(2)	within **20 business days** after person receives written notification of decision
Appeal to Employment and Assistance Appeal Tribunal from reconsideration decision	s.21; Reg. s.84	s.16(4); *EAA* s.21 & Regs. apply	within **7 business days** after person receives written notification of reconsideration decision
Application for judicial review of Employment Assistance and Appeal Tribunal's decision			within **60 days** of the date decision is issued by tribunal. *Administrative Tribunals Act (ATA),* s.57(1) — subject to extension of time, s.57(2). ***Note****: ATA does not say "business days."*

Statutory notice periods and other deadlines

Procedural Issues	EAA & Regs.	EAPWDA & Regs.	Time Requirements
Recipients' reporting requirements; *EAA,* s.11; *EAPWDA,* s.11			
Monthly reporting and deadlines for reporting changes	Reg. s.33	Reg. s.29	Recipient must submit prescribed report by the **5th day** of each calendar month. Changes should be reported no later than the 5th day of the month following the change.
Eligibility audit	Reg. s.34	Reg. s.30	If not required to attend personally, recipient must deliver form to ministry within **20 business days** after being notified of requirement to complete. **Penalty** for non-compliance — **termination of benefits**
Deadlines that apply to the ministry re: reconsiderations and appeals			
Ministry must deliver written reconsideration decision	Reg. s.80	Reg. s.72	within **10 business days** of receiving request for reconsideration. *(**Note**: EAR, s.80 and EAPWDR, s.72(b), allow an extension to 20 business days if circumstances warrant* and *person consents. This time period allows for delivery of additional evidence before a decision is made.)*
Tribunal must hold appeal hearing	Reg. s.85(1)	EAR Regs. apply	within **15 business days** after appeal form is delivered, unless parties and chair agree to an extension.
Tribunal must inform appellant of date, time, and location of hearing	Reg. s.85(2)	EAR Regs. apply	at least **2 business days** before hearing date.
Appeal panel must send all appeal documents to chair	Reg. s.86(f)	EAR Regs. apply	within **5 business days** of making its determination
Appeal panel must provide chair with its determination	Reg. s.87(2), (3)	EAR Regs. apply	within **5 business days** of conclusion of hearing. Subject to a maximum extension of **10 business days.**
Chair must mail decision to appellant	Reg. s.87(6)	EAR Regs. apply	within **5 business days** of receipt of determination from panel

Ministry must lay an information for offence under acts	s.32(2)	s.23(2)	within **12 months** after facts first come to ministry's attention

Other statutory rights and obligations where time limits are relevant

Issue	EAA & Regs.	EAPWDA & Regs.	Summary of Statutory Provisions and Exemptions
Qualifications and applications for welfare			
To qualify for regular welfare			
Requirement for 2 years employment	EAR, s.18 s.18(1)		Applicant is ineligible for benefits *unless* he or she:
• Hours of work	s.18(2)		has been employed for at **least 840 hours** in each of **2 consecutive years** and
• Required earnings	s.18(3)		has earned at least **$7000** in each of **2 consecutive years**
• **Important — see list of 16 exemptions** (For more details, see the LSS publication *Your Welfare Rights)*			Excludes applicants or spouses of applicants: • under 19 years of age • who were in care or had youth agreement under *CFCSA* • pregnant • who qualify for PWD or PPMB benefits • with certain medical conditions • with dependent children, child in home of relative, or foster child • residing with and caring for disabled spouse • separated from abusive spouse or who fled from other abusive relative within past **6 months** • previously supported by spouse for at least **2 years** • incarcerated for at least **6 months** of **2 years** prior to application • who have earned 2-year certificate or diploma, bachelor, or post-graduate degree

Issue	EAA & Regs.	EAPWDA & Regs.	Summary of Statutory Provisions and Exemptions
Application, Stage 1 (after completing Application for Income Assistance, Part 1). *Remember to consider eligibility for **immediate needs assessment** for clients who have need for emergency food or shelter, or urgent medical attention.*	EAR, ss.4.1, 4.2		Before continuing to Stage 2 and before receiving benefits, applicant must complete an **orientation session** *unless* applicant: 1. is seriously mentally or physically disabled, 2. is applying on behalf of child in home of relative (s.6), 3. is 65 years or older, 4. is prohibited by law from working in Canada (s.7), or 5. has been to orientation **within last 60 days** The applicant must also conduct a **3-week job search** that meets ministry requirements or show acceptable evidence of a job search during 30 days prior to application — *unless* the applicant: 1. meets one of the conditions (1–4) listed above, 2. is fleeing abusive spouse, 3. has immediate needs, or 4. has a dependant child under 3 years of age
Application for **Person with Persistent Multiple Barriers (PPMB)** benefits	EAR, s.2		must usually have been receiving regular or hardship benefits for at least **12 months out of last 15 months**
Hardship assistance *(**Note:** It may have to be repaid.)*	Part 4 EAR, s.39(2)		Usually available **1 month at a time** up to a maximum of **3 months in a row.** (**Note**: Refugee claimants may qualify for more than 3 months hardship assistance.)

Issue	EAA & Regs.	EAPWDA & Regs.	Summary of Statutory Provisions and Exemptions
Time limits for being on welfare EAR, s.27			**Subject to many exemptions**
• single (employable; i.e., non-exempt) recipient • family of 2 adults — no dependent child • 2 adults with 1 dependent child			Subject to exemptions, recipients will have benefits cut off or reduced as follows: • Cut off after receiving benefits for **24 months** in previous **60 calendar months** • As above, if both have been recipients for 24 months; **reduction of $300 per month** if only 1 has been recipient for 24 months • Reduction of **$100 per month** for each adult who has been recipient for 24 months
Exemptions from time limits for being on welfare			
Important — Check currency of exemptions (subject to sudden change via Order in Council)			1. Under 19 or over 65 years of age 2. On PPMB or PWD benefits 3. Child in home of relative 4. Pregnant 5. Single parent caring for disabled, foster or relative's child, or for own child under 3 years of age 6. Caring for disabled spouse 7. In extended care 8. Individual has: • an alcohol or drug problem • a mental health condition • a temporary medical condition • separated from abusive spouse or other relative in past 6 months or individual is in: • rehabilitation or treatment program (*that interferes with ability to search for, accept, or continue employment)* • ministry approved job placement or employment program

Penalties for failure to meet obligations

Issue	EAA & Regs.	EAPWDA & Regs.	Summary of statutory provisions and exemptions
Failure to meet employment-related obligations			
• Failure to accept suitable employment • Voluntarily leaving employment without just cause • Dismissed for just cause (compare with EI designations of just cause and misconduct)	*EAA*, s.13 EAR, s.29		**Penalties** apply to **each** applicant or recipient in family unit who does anything prohibited under *EAA,* s.13(1) Benefits will be reduced by **$100 per month for each of 2 calendar months** starting from date of Stage 2 application or date of default
• Failure to demonstrate reasonable efforts to search for employment			Benefits will be reduced by **$100 per calendar month** until the **later of** either 1 month or the date recipient demonstrates reasonable job search
• **Exemptions** **Important — Check currency of exemptions** (subject to sudden change via Order in Council)			See exemptions in previous section.
Dependent youth failing to enter or comply with employment plan	*EAA,* s.9(2),(5) EAR, s.30	*EAPWDA,* s.9(2),(5) EAPWDR, s.26	Benefits will be reduced by **$100 per month until youth enters into OR complies with employment plan**
PWD applicants or recipients failing to enter or comply with employment plan		*EAPWDA*, s.9 EAPWDR, s.25	As for people under *EAA* and EAR

Issue	EAA & Regs.	EAPWDA & Regs.	Summary of statutory provisions and exemptions			
Failure to meet obligations regarding income and assets						
Failure to pursue other sources of income or assets; failure to dispose of property for fair market value	*EAA*, s.14 EAR, s.31	*EAPWDA,* s.13 EAPWDR, s.27	General rule: Benefits will be reduced by **$100 per month** until failure is remedied OR for **1 month for each $2000 value** of income or assets, if income and assets are no longer available. (**Note**: Ministry may have discretion to reduce this amount.)			
Failure to report income or assets	*EAA,* s.15.1 EAR, s.32.1		Benefits will be reduced by **$25 per month** for • **3 calendar months** for first offence • **6 calendar months** for second • **12 calendar months** for third			
Penalties following court decisions about overpayments and fraud						
Type of penalty	*EAA,* ss.15, 15.1 EAR, ss.35–38	*EAPWDA,* ss.14, 14.1 EAPWDR, ss.31–34	Single recipient and couple (both guilty) • Couple without children (1 guilty) • Couple with children (both guilty) • Single or 2 parent family (1 guilty)			Ineligible for benefits Monthly reduction in family's benefits: $300 $200 $100
Duration of penalty	*EAA,* s.31(3)	*EAPWDA,* s.22(3)	First or repeat offence First Second Third	Civil court decision (may be applied) 3 months 6 months 12 months	Conviction under welfare laws (must be applied) 1 year 2 years life	Conviction under *Criminal Code* (must be applied) life life life

Persons with Persistent and Permanent Barriers to Employment (PPMB) Checklist

Limitation date(s) _____

Waiver signed ☐ **Yes** ☐ **No**

Criteria for eligibility (EAR, s.2)

Person must have been recipient of income or hardship assistance for at least 12 of the past 15 months.

The applicant must:

- score at least 15 on the employability screen (Schedule E);
- demonstrate, to the satisfaction of the ministry, barriers that seriously impede ability to search for, accept, or continue in employment; and
- have taken all reasonable steps to overcome these barriers.

A medical practitioner must agree that the applicant's medical condition *(other than an addiction)*:

- has continued for at least 1 year and is likely to continue for at least 2 more years; or
- has occurred frequently in the past year and is likely to continue for at least 2 more years; and
- is a barrier that seriously impedes his/her ability to search for, accept, or continue in employment.

(See BC Welfare Checklist on page 4 for client and ministry office information.)

Medical diagnoses: _____

_____

_____

Doctors and therapists

Family doctor:

Name: _____

Address: _____

_____

Phone: _____ Fax: _____ E-mail: _____

Specialists:

Name: _____

Address: _____

_____

Phone: _____ Fax: _____ E-mail: _____

Other therapists: (See page 34 for categories of assessors.)

Name: _____

Address: _____

_____

_____

Phone: _____ Fax: _____ E-mail: _____

Support people and/or groups: (List)

_____

_____

EAR, Schedule C information (Describe)

Special dietary needs: (See the BC Coalition of People with Disabilities (BCCPD) Help Sheet 7 at www.bccpd.bc.ca for list of conditions that may entitle person to dietary supplements; e.g., Celiac disease, diabetes, hepatitis B or C, or HIV/AIDS.)

Health supplement needs: (e.g., glasses, dental care, or medical equipment)

_____

_____

Other relevant medical or daily living information:

_____

_____

Documents received from client and/or ministry:
(e.g., initial application, denial of PPMB status, doctors' and therapists letters or forms, prescriptions, other)

_____

_____

If applicable, use the Daily Living Activities Checklist (page 36) and the Symptom Checklist (page 39) to make sure that client has disclosed as much relevant information as possible. Some important information may have been omitted from the rejected application.

Persons with Disabilities (PWD) Checklist

Limitation date(s) _____

Waiver signed ☐ **Yes** ☐ **No**

Criteria for eligibility (*EAPWDA*, s.2)

Person must be at least 18 years of age.

The disability (physical or mental) must:

- be likely to continue for at least 2 years; *and*
- directly and significantly restrict the person's ability to perform daily living activities either continuously or periodically for extended periods; *and*, as a result of these restrictions, the person requires help to perform those activities.

A person requires help for daily living activities if they require:

- an assistive device; or
- significant help or supervision of another person; or
- services of an assistance animal.
  (See BC Coalition of People with Disabilities (BCCPD) Help Sheet 2, Checklist of Daily Living Activities at www.bccpd.bc.ca.)

Applicant must have supportive and appropriate assessment from:

- a doctor
- an assessor, who can be the same doctor; registered psychologist, nurse or psychiatric nurse; occupational therapist or physical therapist; social worker; chiropractor; or nurse practitioner.

Income and asset limits

Assets: Single person may have up to $3,000, and families may have up to $5,000 of general assets. (**Note**: an approved trust fund may contain more than these limits.)
Vehicle up to $5,000 value or one that has been modified to accommodate a disability does not count as an asset if it is required for day-to-day transportation.
For complete list of exemptions, see EAPWDR, s.10.

Income: Single person may earn up to $500 and a family unit with 2 PWD recipients may earn up to $750 without having this money deducted from benefits.

(See BC Welfare Checklist on page 4 for client and ministry office information.)

Medical diagnoses: _____

_____

_____

Doctors and therapists

Family doctor:

Name: _____

Address: _____

_____

Phone: _____ Fax: _____ E-mail: _____

Specialists:

Name: _____

Address: _____

_____

_____

Phone: _____ Fax: _____ E-mail: _____

Other therapists: (See above for categories of assessors.)

Name: _____

Address: _____

_____

_____

Phone: _____ Fax: _____ E-mail: _____

Support people and/or groups: (List)

_____

_____

Special dietary needs: (Describe)

See BC Coalition of People with Disabilities (BCCPD) Help Sheet 7 at www.bccpd.bc.ca for list of conditions that may entitle person to dietary supplements (e.g., Celiac disease, diabetes, hepatitis B or C, HIV/AIDS).

Health supplement needs: (e.g., glasses, dental care, or medical equipment)

_____

_____

Other relevant medical or daily living information:

_____

_____

Documents received from client and/or ministry:
(e.g., initial application, denial of PPMB status, doctors' and therapists' letters or forms [check these carefully as errors or omissions in these often form the basis for denial], prescriptions, other)

_____

_____

Daily Living Activities Checklist[4]

This checklist has been adapted from BCCPD PWD applicants' checklist and will help lawyers determine whether EAPWDA, s.2 requirements have been or can be met — usually after denial of PWD status. Note that many clients are capable of completing this checklist themselves. Your help may be required with clients who have cognitive and communications disabilities.

When going through the checklist, you should also ask clients the following:

- Which activities do they have problems doing at least some of the time?
- If they have problems part of the time, how often do these problems happen?
- If there is no one to assist client, what help does she or he need?
- If there is no help and client is forced to do things alone, how much longer than normal does it take to do them?

A. Disability makes it difficult for client to do the following activities: (check as appropriate)

1. Personal hygiene and self care:

- ☐ getting in and out of the bathtub
- ☐ standing in the shower
- ☐ reaching up and down to wash my body and/or applying creams all over my body
- ☐ shaving, brushing my teeth, washing my hair, and washing my face
- ☐ remembering or having the motivation to do at least basic hygiene daily

2. Preparing and eating meals:

- ☐ standing at the sink, counter, and stove
- ☐ moving food from shelves to counters to stoves and ovens
- ☐ chopping, peeling, mixing, or stirring food
- ☐ opening cans and jars, opening and resealing bags
- ☐ understanding recipes and labels
- ☐ remembering to take food off the stove or out of the oven
- ☐ remembering to throw out expired or "gone off" food
- ☐ remembering to eat regular meals and healthy foods
- ☐ chewing and swallowing
- ☐ not vomiting after a meal

3. Taking medications:

- ☐ remembering to take the right medications at the right doses at the right times
- ☐ getting prescriptions filled and remembering to get them refilled

4. Keeping the home clean:

- ☐ doing dishes and putting them away, cleaning counters and sink, cleaning floors
- ☐ cleaning bathtub, toilet, bathroom sink, and floor
- ☐ vacuuming, dusting, cleaning windows
- ☐ carrying, doing laundry, and folding and putting it away
- ☐ remembering or having motivation to keep my home clean

[4] This checklist has been adapted from similar material made available courtesy of BC Coalition of People with Disabilities.

5. Shopping for personal needs:

- ☐ walking around stores, standing long enough to make good choices from the shelves, and managing cash register line-ups
- ☐ picking out items from shelves, loading them in the basket, taking them out of the basket and putting them onto the cashier's desk
- ☐ taking the groceries home (carrying them to the bus, on the bus, to my home, or loading them into and out of my car)
- ☐ not getting anxious, scared, frustrated, or angry in stores because of crowds, the light, sound and motion, or long line-ups

6. Moving about indoors and outdoors:

Indoors

- ☐ going up and down stairs or ramps
- ☐ getting in and out of furniture including my bed
- ☐ opening and closing doors and drawers
- ☐ walking from room to room
- ☐ bending to pick things off the floor
- ☐ kneeling and getting up from a kneeling position

Outdoors

- ☐ walking on flat ground
- ☐ walking on uneven ground
- ☐ going up or down stairs or ramps
- ☐ going out without being anxious or scared

7. Using public or personal transportation:

- ☐ walking to and standing at the bus stop
- ☐ getting on and off the bus or train
- ☐ standing, getting in and out of my seat, and remembering to get off at my stop
- ☐ understanding bus or train schedules

8. Managing personal finances:

- ☐ understanding bills and remembering to pay them on time, including the rent
- ☐ budgeting for groceries and other things I need
- ☐ stopping myself from buying things I don't need

B. Because of mental health disability client:

- ☐ experiences a lot of anxiety, agitation, stress, or depression
- ☐ experiences a lot of confusion
- ☐ has difficulty making decisions and planning ahead
- ☐ has difficulty doing the most important things first and finishing tasks
- ☐ has difficulty making rational (good) choices
- ☐ has difficulty remembering information and remembering appointments
- ☐ experiences sensitivity to light, sound, and motion
- ☐ has difficulty socializing without becoming anxious and scared
- ☐ has difficulty interacting with friends, family, and/or partner
- ☐ has difficulty interacting with strangers in public
- ☐ has difficulty establishing and maintaining relationships with people

- ☐ has difficulty asking for help when he/she needs it
- ☐ experiences difficulty being able to deal with unexpected situations

C. Communication *(**Note:** English language issues are not relevant here.)*

Client has difficulty with the following:

- ☐ making self understood by others when speaking or writing
- ☐ understanding what others say
- ☐ understanding what he or she reads
- ☐ hearing what others say in person or on the phone
- ☐ feeling anxious or scared when speaking to or listening to other people

D. Client gets or needs help from:

- ☐ community agencies
- ☐ counsellors
- ☐ family members
- ☐ friends
- ☐ health professionals
- ☐ home support workers
- ☐ roommates
- ☐ support groups
- ☐ volunteers
- ☐ other _____

E. Client gets or needs help from the following assistive devices:

- ☐ adaptive housing
- ☐ bathing aids
- ☐ braces
- ☐ breathing device
- ☐ cane
- ☐ commode
- ☐ communication devices
- ☐ crutches
- ☐ feeding device
- ☐ hospital bed
- ☐ interpretive services
- ☐ lifting device
- ☐ ostomy or urological appliances
- ☐ prosthesis
- ☐ scooter
- ☐ splits
- ☐ toileting aids
- ☐ walker
- ☐ wheelchair
- ☐ other _____

Client needs or has an assistance animal: ☐ **Yes** ☐ **No**

Symptom Checklist

Use this checklist when preparing for PWD, PPMB, and other disability appeals. It may be used in addition to the Daily Living Activities Checklist on page 36. Check symptoms as appropriate and record approximately how long the symptom has been present.

- ☐ **Fatigue** — generally made by physical activity
- ☐ **Memory problems**
  - ☐ unable to concentrate
  - ☐ short-term memory loss
  - ☐ saying the wrong word
  - ☐ problem-solving difficulties such as simple math, oral, and/or written skills
- ☐ **Psychological problems**
  - ☐ anxiety
  - ☐ depression
  - ☐ emotional (mood swings)
  - ☐ hallucinations
  - ☐ personality changes
  - ☐ psychosis
- ☐ **Recurrent flu-like illness** with chronic sore throat and fatigue, and muscle and joint pain
- ☐ **Severe nasal problems and other allergies, or bronchial problems**
- ☐ **Weight change** (gain or loss)
- ☐ **Muscle and joint pain** with very tender "trigger" points
- ☐ **Abdominal pain**, diarrhea, nausea
- ☐ **Other nervous system problems**
  - ☐ sleep disturbance
  - ☐ headaches
  - ☐ seizures
  - ☐ numb or tingling feelings
  - ☐ “spaced out”
  - ☐ frequent unusual nightmares
  - ☐ difficulty moving tongue to speak
  - ☐ ringing in the ears
  - ☐ paralysis
  - ☐ severe muscular weakness
  - ☐ blackouts
  - ☐ intolerance of bright lights
  - ☐ tolerance to alcohol
  - ☐ alteration of taste, smell, or hearing
  - ☐ inability to concentrate
  - ☐ inability to tolerate noise
- ☐ **Other symptoms**
  - ☐ carpal tunnel syndrome
  - ☐ chest pain
  - ☐ cold hands and feet
  - ☐ cough
  - ☐ dry eyes and mouth
  - ☐ fevers
  - ☐ hair loss
  - ☐ night sweats
  - ☐ rashes
  - ☐ TMJ syndrome
  - ☐ other

Chapter 2: Housing — Residential Tenancy

Note: *Always check for changes in the law that may have occurred since this primer was published. Knowing the many residential tenancy limitation periods is crucial to preserving client rights (see the Residential Tenancy — Limitations and statutory notice periods chart on page 66).*

Shelter is a basic human need. Homelessness robs clients of physical and mental security and makes it extremely difficult for them to rebuild their lives. In most housing cases, there is an urgent need of action to prevent loss of shelter, or to remove a menace to the client's (and family's) interest in quiet enjoyment.

Housing problems may affect clients' ability to make a living; for example, when they are required to miss work to attend legal proceedings, or when the stress associated with the legal problem affects their ability to function effectively. Housing problems may also lead to clients being unable to regain custody or access to their children because they have no suitable accommodation to house them. A landlord may "lock out" a tenant and deny access to tools or equipment used in their work. (See Chapter 3: Debt and Collections for exemptions from seizure.)

Poverty law housing cases typically involve tenants. The majority of these tenants are income-assistance recipients who are being evicted for non-payment of rent or for cause. Often they live in sub-standard housing that is in need of repair. The landlords and/or their staff may be exploitive, abusive, and threatening. The landlord may be a large property management company or housing society with resources to hire lawyers to represent their interest at dispute resolution hearings (formerly "arbitration") and in court.

In other cases, some landlords are themselves individuals struggling to survive on a low income. They may require legal assistance to deal with problem tenants.

Governing statutes, regulations, and rules

- *Residential Tenancy Act (RTA),* S.B.C. 2002, c. 78 (as amended): B.C. Reg. 477/2003
- *Manufactured Home Park Tenancy Act (MHPTA),* S.B.C. 2002, c. 77 (as amended); B.C. Reg. 481, 2003. Note: The *RTA* not the *MHPTA* applies to a tenancy agreement under which both the home and pad are rented to the same tenant. (Both statutes are available through the Residential Tenancy Branch website at: www.rto.gov.bc.ca/content/legislationRules/default.aspx.
- Dispute Resolution Proceedings Rules of Procedure, which can be found on the Residential Tenancy Branch website at: www.rto.gov.bc.ca/documents/2005.pdf.
- Policy Guidelines —published by the Residential Tenancy Branch; to review its interpretation of applicable law and regulations, visit its website at: www.rto.gov.bc.ca/content/publications/policy.aspx.
- *Administrative Tribunals Act (RTA)*, S.B.C. 2004, c. 45.
- *Judicial Review Procedures Act,* R.S.B.C. 1996, c. 241.

Excluded from *RTA* (s.4)

Living accommodation that falls under the following conditions is excluded from the RTA (s.4):

- rented by not-for-profit co-op to co-op member (contact Co-op Federation of BC for assistance at 604-879-5111 or 1-866-879-4611 (call no charge))
- rented by student from educational institution
- tenant shares bathroom or kitchen with *owner* of premises
- primarily occupied for business purposes and rented under a single agreement
- occupied as vacation or travel accommodation
- in community care facility under *Community Care and Assisted Living Act*; in continuing care facility under *Continuing Care Act*; in public or private hospital under *Hospital Act*; in provincial mental health facility, either an observation unit or psychiatric unit; in health facility that provides hospitality support services and personal health care; in rehab or therapeutic treatment facility.
- in correctional institution
- tenancy under an agreement that has term longer than 20 years
- to which *MHPTA* applies *(Note: RTA, not MHPTA, applies to rental of pad and home as one integrated unit.)*
- prescribed tenancy agreements, rental units, or residential property

For a list of legislation that may govern landlord and tenant relationships not covered by *RTA* or *MHPTA,* see Related issues and legislation in the Frequently Asked Questions (FAQ) section on page 58.

Common client problems

- client has been locked out and wants to reclaim possessions
- client has received order from the court to pay amount specified in Dispute Resolution Officer's (DRO's) decision and lacks money to pay
- denial of quiet enjoyment (nuisance tenants)
- denial of quiet enjoyment (trespass by landlord)
- disputes about date on which tenants gave notice they were leaving
- disputes about lock changes
- eviction
- failure of landlord to repair
- failure to return deposits
- harassment or discrimination by landlord, including refusal to rent (*Human Rights Code*)
- inability to pay judgment obtained in Small Claims Court
- landlord claiming that tenant has damaged property

- landlord has moved or disposed of client's property
- landlord is renovating and wants tenant out
- unfair procedure during dispute resolution process
- unlawful and hidden rent increases

(For more details, see the Residential Tenancy Checklist on page 44 and FAQs on page 52.)

Residential Tenancy Checklist

The following checklist applies only to *Residential Tenancy Act (RTA)* problems. It is primarily designed to assist in preparing for dispute resolution (DR) or judicial review. It assumes that you are representing the tenant not the landlord.

Note: *Always check whether the client's problem is excluded from RTA (page 42).*

Information about client(s) — (if not already recorded elsewhere): _____

_____

_____

Full name(s): _____

_____

Home address (or place where mail may be picked up if client has no fixed address):

_____

_____

Phone/fax/e-mail address (or number where client can pick up messages if client has no fixed address):

Phone _____ **Fax** _____ **E-mail** _____

Preferred method of contact? (include contact person's information if the client is homeless or has no phone):

☐ Phone ☐ Fax ☐ E-mail

Is it safe/secure to leave messages on voicemail? ☐ **Yes** ☐ **No**

Information about premises under dispute: _____

_____

Address of rental premises (if different from above):

_____

_____

Type of suite (e.g., basement, apartment, rooming house, subsidized, manufactured home, other):

☐ Basement ☐ Apartment ☐ Rooming house
☐ Subsidized ☐ Manufactured home ☐ Other

_____

Is the rental under a **fixed-term** lease or is it **month-to-month**?

☐ Fixed-term ☐ Month-to-month

Is it covered by the *RTA*? ☐ Yes ☐ No

If not, what **legislation and forum** may apply? _____

Information about landlord
Full name of individual or full legal business name of landlord: _____

_____

Address:

_____

Phone _____ **Fax** _____ **E-mail** _____

Management company (if applicable) _____

Phone: _____ **Fax:** _____ **E-mail** _____

Information about tenancy
Length of tenancy:
Start? _____ End? (if applicable) _____

Amount of rent _____ Amount of security deposit _____ Pet deposit _____

Number of tenants occupying suite _____

Is there a subtenant? ☐ Yes ☐ No If yes, authorized by landlord? ☐ Yes ☐ No

Common abbreviations:
DR = Dispute resolution
DRO = Dispute resolution officer
RTB = Residential Tenancy Branch
Note: Section numbers refer to *RTA* unless otherwise indicated.

Actions to consider (check relevant column)	Not applicable	Yes	No
1. Initial contact 1.1. If by phone, consider whether office interview immediately necessary.			
1.2. Will client be better served elsewhere? If yes, where? (See the Resources section on page 60.)			
1.3. Obtain names for conflicts check.			
1.4. Identify exact nature of problem. Is it an emergency? (e.g., imminent eviction)			
1.5. Is there a limitation period? If yes, then record in a diary or as part of a bring-forward system.			
1.6. Can client resolve problem(s) with your summary advice or assistance?			

Actions to consider (check relevant column)	Not applicable	Yes	No
1.7. What attempts has client already made? Specify:			
1.8. What are client's expectations? (Client wants to stay in premises; or, wants money, repairs, or time to find another place, etc.) Specify:			
1.9. Have you obtained a signed and witnessed waiver of confidentiality to allow you to obtain disclosure from parties and witnesses?			
2. Stage of proceedings 2.1. Is there still an opportunity to negotiate or mediate a settlement with landlord? 2.2. If no, has either party applied for DR? 2.3. If yes, has DRO rendered a decision or made an order? 2.4. If yes, has landlord applied for review of decision? 2.5. If no, does tenant have grounds for review? 2.6. If yes, is there time to apply? (Limitation period can be 2–15 days. See Residential Tenancy — Limitation and statutory notice periods on page 66 for one that applies.) 2.7. If tenant has applied, has DRO made a decision (or refused to review)? 2.8. If yes, does tenant have grounds for judicial review?			
3. Enforcement of orders 3.1. Has landlord or tenant filed a DRO's order in Supreme or Provincial Court? ss.84, 85 (*MHPTA*, ss.77, 78) 3.2. If yes, does court have jurisdiction? 3.3. Has landlord obtained a default order? 3.4. If yes, are there grounds for reopening or appealing to higher court? 3.5. If no such grounds, should tenant ask for payment hearing in Provincial Court?			
4. Substantive nature of problem (check those that apply)	**Not applicable**	**Yes**	**No**
4.1. Dispute eviction notice (this is the most common emergency problem) ss.46, 47 (*MHPTA*, ss.39, 40) • How much time left to file for DR? (many clients seek help at the last moment) • Does tenant have copy of eviction notice?			

Substantive nature of problem (check those that apply)	**Not applicable**	**Yes**	**No**
• Was it properly served? • What are landlord's reasons for evicting? (Non-payment of rent or for cause?) What evidence does landlord have to support eviction? • What are tenant's arguments for appealing eviction? • What evidence does tenant already have to support arguments? • Additional evidence required? • Does preliminary assessment of tenant's case indicate any legal merit?			
4.2. **Repair/service order** (*RTA*, s.32, Reg. Sch, s.8; *MHPTA,* s.26) • What needs repairing and why? Has tenant contacted landlord? • Has tenant made demand in writing? • If yes, did landlord respond? How? • Can repairs be categorized as emergency under *RTA,* s.33 (*MHPTA,* s.27)? (Tenant's health and safety are in danger or the premises are at risk [e.g., flooding, no heat, major leak, or broken lock].) • Has landlord provided valid contact numbers for emergencies and other issues? Regs. Sch, s.8(3)(a) *RTA* and *MHPTA*.			

4.3. **Denial of quiet enjoyment** s.28 (*MHPTA,* s.22)
• What conduct is tenant complaining of?
  ○ trespass (no notice or lack of adequate notice in non-emergencies); if yes, does tenant have any objective evidence or witnesses?
  ○ noisy neighbours
  ○ noisy equipment
  ○ health hazards
  ○ peeping tom
  ○ harassment/discrimination (sexual or otherwise) by landlord
  ○ abuse by co-tenant or roommate
  ○ other
• Does tenant have grounds for changing locks?
• Should police be involved?
• Should local licensing bodies be informed? (e.g., health inspector)			

4.4. **Landlord has breached material term** (common law of contract) • What is nature of breach and is it material? • How has it damaged tenant? • Have there been any attempts to remedy? By landlord? By tenant?			

Substantive nature of problem (check those that apply)	**Not applicable**	**Yes**	**No**
• Any corroborating evidence? (e.g., city inspection, witness statements) • Is further evidence necessary and available? • Has tenancy ended? • If so, how was it ended? • What remedy does tenant want? (e.g., damages, specific performance, other?) • Has landlord demanded an unlawful rent increase?			

4.5. **End of tenancy**
• **Landlord's own use** (*RTA,* s.48, *MHPTA*, s.42)
  ○ If landlord is reoccupying, demolishing, or selling suite, has tenant received adequate (2 months) notice?
  ○ Is tenant still in the premises and wanting to challenge termination?
  ○ If yes, is there time to apply for DR? (within 15 days from receipt of the Notice to End Tenancy)
  ○ Does tenant want to leave before notice period has expired? (tenant can give 10 days notice and pay pro-rated rent)
  ○ Has tenant already moved and wants to challenge landlord's good faith?
  ○ If yes, is there still time to seek compensation? (s.51(2))
• **Tenant no longer qualifies for subsidy** (s.49 (1))
  ○ Does landlord have reasons for finding that tenant no longer qualifies? What are they?
  ○ Does tenant have evidence to refute? (e.g., income tax returns, evidence that alleged unauthorized occupant lives elsewhere, or dependant still lives there)
• **Tenant moved without proper notice** (*RTA,* s.45; *MHPTA*, s.38)
  ○ When and why did tenant move?
  ○ Did tenant give adequate notice?
  ○ Did tenant give written notice? How and when was notice served on landlord?
  ○ If not, has landlord taken steps to mitigate by finding another tenant?
• **Return of security and pet deposits** (*RTA,* s.38)
  ○ When did tenancy end?
  ○ Does tenant have receipt for deposit(s)?
  ○ Has landlord carried out end-of-tenancy (move out) inspection?
  ○ If yes, was tenant present?
  ○ Does tenant have copy of move in condition report?
  ○ Has landlord completed move out condition report?			

Substantive nature of problem (check those that apply)	**Not applicable**	**Yes**	**No**
○ If yes, has tenant signed it? ○ If no, why not? (e.g., landlord has misrepresented condition) ○ Did tenant clean and repair any damaged premises before inspection? ○ Was there a pet deposit? ○ Has tenant delivered to landlord written notice of forwarding address for return of deposit(s)? ○ Has deadline passed for return of deposit? (15 days after end of tenancy or provision of forwarding address, whichever is later) ○ Has tenant requested return of deposit(s)? ○ If yes, has landlord replied? ○ If yes, does landlord give grounds for withholding all or part of deposit(s)? ○ Has tenant or landlord applied for DR? ○ If yes, has a hearing date been set? ○ Are there any corroborating witnesses, photos, etc.?			
4.6. **Orders of possession** (*RTA,* ss.54–57; *MHPTA,* ss.47–50) • Has landlord refused possession, without a DR hearing, on the date tenant was to move in? • Has landlord requested an order of possession? Reasons? • Has tenant applied to dispute end of tenancy? • Has order of possession been granted by DRO? • If yes, what is date of possession in the order? • Has tenant remained in premises despite order of possession? • Has landlord applied in BC Supreme Court for writ of possession? • Has landlord applied for compensation from tenant for over-holding?			
4.7. **Tenant's property — abandonment — damage and loss** (Regs. 24–30, *RTA*; 34–40, *MHPTA*) • Has landlord retained all or part of tenant's property? • If yes, does landlord have grounds for believing tenant has abandoned property? • Has tenant tried to get property back? • If so, how and with what result? • Has landlord disposed of property? If so, how and when? • Did landlord give tenant notice of disposition? • Is landlord claiming compensation for storage costs, etc.?			

Substantive nature of problem (check those that apply)	**Not applicable**	**Yes**	**No**
5. Procedural issues— possible grounds for judicial review			
5.1 Was there proper notice? Disclosure of evidence?			
5.2 Did DRO allow tenant to be heard? To present witnesses? To present evidence?			
5.3 Was tenant present at hearing?			
5.4 In person or telephone hearing?			
5.5 Is credibility a major issue, indicating that a telephone hearing is inadequate?			
5.6 Was decision patently unreasonable?			
5.7 Is there evidence of DRO bias?			
5.8 Was DRO within jurisdiction?			
5.9 Any error of law?			
6. Related issues			
6.1 Was tenant a caretaker whose tenancy was terminated due to dismissal from employment?			
If so, was tenant dismissed without cause? (e.g., employment standards, common law wrongful dismissal)			
6.2 Is tenant having difficulty finding somewhere to stay? Is tenant homeless?			
If so, is BC Housing involved?			
6.3 Is tenant having problems with Ministry of Housing & Social Development (MHSD) — welfare regarding security deposit, moving expenses, shelter amount, other support?			
6.4 Is tenant dealing with relationship breakdown? (*Family Relations Act* matters)			
6.5 Have tenant's children been placed in care of the ministry (MCFD) and tenant can't get them back because she lacks adequate housing?			
6.6 Has tenant been evicted for illegal activities and is facing criminal charges?			
6.7 Is tenant in danger of losing possessions because of inadequate storage facilities?			
6.8 Is landlord using harassing tactics to collect debt?			
6.9 Is tenant having debt problems with utilities providers? (e.g., co-tenant has left large phone bills and tenant's phone service has been cut off)			

Issues applying to First Nations clients living on reserve

Housing on reserve is governed by the

- *Indian Act,* R.S.C. 1985, c. I–5, and
- *First Nations Land Management Act,* S.C. 1999, c. 24.

This is a complicated legal area and requires special knowledge. For an overview, see the Legal Services Society (LSS) publication, *Aboriginal People and the Law in British Columbia,* Chapter 6, (2006), which is available on the LSS website at www.lss.bc.ca/publications/subject.aspx?s_id=2. Or see the Continuing Legal Education Society (CLE) publication, *Individual Rights under the Indian Act* (current to August, 2007), by Darwin Hanna & Christine J. Mingie, which is available on their website at www.cle.bc.ca/Practice%20Points/ABOR/Individualrighst.html.

The right to stay in accommodation on reserve varies according to the rules of each particular band and the written tenancy agreement (if any). The *RTA* may apply to some issues and not to others. If *RTA* doesn't apply, common law applies. For example, a landlord may terminate a month-to-month tenancy on reserve without cause as long as sufficient notice is given. This is not possible under the *RTA.*

To check whether the *RTA* applies, see Residential Tenancy Policy Guideline #27 — Jurisdiction, January 2004.

Issues applying to seniors

In general, seniors have the same rights as any other renters. However, if they are members of a not-for-profit housing cooperative or live in a care facility, the *RTA* does not apply to them. Their vulnerability may be increased by lack of access to *RTA* remedies. Often the eviction (cancellation of membership) procedures followed by managers and co-op boards are too overwhelming for seniors to exert their rights without legal assistance. The same need for help applies in rental situations as well.

Many seniors decide to rent out suites within their houses so that they have the means to remain in their own home. This sometimes leads to situations where the tenant(s) start abusing their landlord. For help in these circumstances, in addition to the remedies contained in legislation, you should consider contacting your local Community Response Network (CRN). To find the nearest CRN, visit their website at www.bccrns.ca/crns/index.php or e-mail crns@telus.net.

At the BC Centre for Elder Advocacy and Support (BC CEAS) Elder Law Clinic, a lawyer and paralegal provide free legal advice and advocacy for seniors. Call 604-437-1940 or 1-866-437-1940 (call no charge), or visit their website at www.bcceas.ca.

Low-income seniors may be eligible for SAFER (Shelter Aid for Elderly Renters) if they:

- are 60 years old or over;
- are Canadian citizens, permanent residents, or convention refugees;
- have lived in BC for the 12 months prior to application; and
- currently spend more than 30% of their gross income on shelter.

More information can be found on the BC Housing website at www.bchousing.org/programs/SAFER/Eligibility. This may be an option if your client is under threat of eviction from a subsidized co-op.

Links to various sites about seniors' housing can be found on the Ministry of Healthy Living and Sport website at www.hls.gov.bc.ca/seniors/guide/housing/index.htm.

Frequently Asked Questions (FAQ)

Status of tenant

1. **Can people under 19 years of age enter into an enforceable tenancy agreement under the *Residential Tenancy Act (RTA)* and the *Manufactured Home Park Tenancy Act (MHPTA)?***

   Yes; s.19 of the *Infants Act* does not apply (see *RTA,* s.3).

2. **Can people be denied accommodation because they are on welfare?**

   No. Discrimination on the ground of lawful source of income (along with other grounds) is now covered by the *Human Rights Code.*

3. **If a tenant is a caretaker who lives on the premises and their job is terminated, does the landlord have the right to evict them?**

   If employment on the premises is a condition of rental, lawful termination of employment gives the landlord grounds for eviction (see *RTA,* s.48).

4. **If a tenant is renting from the owner of a strata unit, does the *Residential Tenancy Act (RTA)* and/or *Strata Property Act* apply?**

   Application of each statute depends on the circumstances (see Residential Tenancy Policy Guideline #27 — Jurisdiction.)

What legislation applies?

5. **Does the *Residential Tenancy Act (RTA)* cover disputes between tenant and subtenant?**

   RTA, s.1 contains a lengthy and complex definition of who can be a landlord. Note that the exclusion in s.4 refers to sharing a bathroom or kitchen with an "owner" — not a "landlord." A tenant permitting another occupant to move in might face 3 potential situations:

   1. The new occupant moves in under a licence (s.1 definition of a "tenancy agreement" includes a licence to occupy a rental unit) where the tenant permitting occupancy does not stand in the position of landlord (for example, a temporary roommate who is "couch surfing"). In this case, the *RTA* does not apply.
   2. The new occupant moves in under a subtenancy where the head-tenant stands in the position of landlord. The *RTA* applies.
   3. The new occupant moves in under a co-tenancy. The *RTA* applies.

6. **What laws govern tenancies of living accommodation attached to a business?**

   Check for remedies under common law and the *Commercial Tenancy Act.* The *Commercial Tenancy Act,* for example, would apply to an artist leasing a shop with an apartment upstairs.

   G*ardiner v. 857 Beatty Street Project,* 2007 BCSC 1393 — **work/live premises** — **jurisdiction.** *Held* — For landlord. DRO was correct in finding that premises that were used 70% for a commercial studio and 30% for residence are excluded from *RTA.*

7. **Does the *RTA* cover student residences, residential hotels, and rooming houses?**

   Rooming houses and long-stay residential hotels come under the *RTA* but student residences and short-stay residential hotels do not.

8. **Tenant's suite is illegal under municipal rules. Does the *RTA* still apply?**

   Tenants of illegal suites are covered by the *RTA*. They can seek remedies through dispute resolution. If a city or municipality orders closure of the suite, check whether or not your client can seek damages against the landlord for premature termination.

9. **Do tenants who live in a manufactured home park come under the *RTA* or the *MHPTA*?**

   If they rent both home and pad, they come under the *RTA*. If they rent the pad and own the home, they come under the *MHPTA*.

10. **What happens if the legislation is silent on an issue?**

    Common law still applies unless superseded by *RTA* or *MHPTA*. If in doubt, contact an Information Officer (IO) at the RTB (Residential Tenancy Branch) to find out. If still in doubt, apply for a Dispute Resolution (DR) hearing to have the issue settled by a DRO. This leaves the door open for judicial review if the case has merit.

Repairs and maintenance

11. **When can a tenant carry out emergency repairs without going to dispute resolution and when can they deduct the cost of these repairs from their rent?**

    If the tenant has no heat, no vital plumbing, major leaks, or ineffective locks, etc. and the landlord has failed to respond to oral or written requests for emergency repairs, the tenant may carry out repairs and deduct the cost from the next month's rent if the landlord fails to reimburse the tenant. But the tenant must be very careful to make sure that it is a genuine emergency. For routine repairs, the tenant must still pay rent and claim reimbursement from the landlord. If the landlord fails to pay, the tenant must go to DR for a remedy. If in doubt, contact the RTB and ask whether the need for repair is an "emergency."

12. **Tenant is renting a leaky condo and landlord refuses to make repairs. Can tenant apply for an order under *RTA*?**

    Yes. Repairs to the interior of the premises are the responsibility of the landlord. Even if the cause of the problem originates outside the premises, the landlord may be ordered to pay damages and abate the rent until the tenant can resume quiet enjoyment. The landlord is responsible for informing the strata corporation of the problem and may be able to force the corporation to act. Always check the strata bylaws for rights and responsibilities of owners.

13. **Can tenants obtain damages from the landlord if they have had to move out of premises that are a health hazard due to mould?**

    Yes — as long as they make their claim within the limitation period.

    Erickson v. British Columbia (Attorney General), 2007 BCSC 353 — **mouldy apartment** — **availability of damages.** Tenants were not given an opportunity at arbitration (now DR) to provide evidence of expenses incurred when they were forced to move to a motel while mould was being removed from

their apartment. *Held* — For tenants. Although their application for arbitration was late, it was still within the statutory time limit. The arbitrator was patently unreasonable in disallowing evidence and reducing tenants' damages from $25,000 to $1,500.

14. Tenant has been given a 2 months' termination notice to leave on grounds that the landlord must renovate. Is a landlord entitled to terminate when renovations can be done in a few days and tenant can find alternative short-term accommodation?

The landlord cannot use this type of renovation to terminate. If vacant possession is not required in order to carry out renovations, the landlord cannot terminate.

Allman v. Amacon Property Management Services Inc. 2007, BCCA 141 — s.49 — **renovations**. *Held* — For tenants. If vacant possession is not required for carrying out renovations, s. 49 of *RTA* should not be read so as to give landlords discretion to terminate tenancies for sole reason that doing renovations in an empty unit is more convenient than doing them with the tenant in residence.

Berry v. British Columbia (Residential Tenancy Act, Arbitrator), 2007 BCSC 257 — **"renovation requiring vacancy"** — adds to *Allman* (above). *Held* — There must be no alternative to ending the tenancy. Ease and cost-effectiveness for landlords are not relevant factors.

*(**Note:** Watch for situations where landlords, when renovations are complete, talk tenants into signing a new tenancy agreement at higher rent without obtaining approval from the RTB. If landlords want to raise rents to cover such costs, they have the right to apply to a ruling from the RTB. In this way, both parties know that due process has been followed and the increase, if approved, is justified.)*

Termination of tenancy

15. Tenant has received a termination notice for cause. Can tenant do anything besides go to DR to extend tenancy?

Tenant can ask landlord to sign an agreement to end tenancy, offering to leave later. If both want to avoid a hearing, this might be the best solution. A form called Mutual Agreement to End a Tenancy is available on the RTB website at www.rto.gov.bc.ca/content/formsFees.

16. Tenant has breached a term of the tenancy agreement that could be a "material term." What is the definition of "material term" in s.47(1)(h)(i) of the *RTA*?

Subject to any statutory provisions to the contrary, it is likely that the common law of contract applies to the interpretation of this term. *Covey v. St. Denis et al.*, 2003 BCSC 1159.

17. Tenant's tenancy agreement has a "no pets" clause that landlord is threatening to enforce despite not enforcing this clause for years. Is there any way that tenant can stay there and still keep his pet?

Depending on the facts, it is possible that the no-pets clause is not a material term because of the landlord's track record of non-enforcement. In *Al Stober Construction Ltd. v. Long* [2001] B.C.J. No. 1086 (QL), the tenant was successful at tribunal and judicial review in arguing non-materiality. If a pet is essential for health and well being, there may also be a remedy under the *BC Human Rights Code.*

18. Tenant rents an apartment in a condo building. She has received a termination notice from the owner/landlord. Can she challenge this under the *RTA* or does the *Strata Property Act* apply?

If the termination is for reasons listed under s.47, *RTA*, the *RTA* applies. Always check the wording of the "Tenant's Undertaking" form (Form D) and strata bylaws to determine whether landlord is within his or her rights in terminating the tenancy. This undertaking will likely be presumed to be a material term of the tenancy agreement.

Deposits and rent increases

19. Landlord has not returned the deposit. He says that he needs the deposit to cover the cost of the carpet and other cleaning. The tenant has signed a move out condition report that says nothing about carpet cleaning. What can the tenant do?

Unless the tenant agrees that the landlord may keep the security deposit, the landlord must return it within 15 days of end of tenancy, provided that the tenant has given the landlord a forwarding address (see *RTA*, s.38). If landlord wants to keep the deposit, he must ask for a DR decision. If the landlord does nothing, the tenant may take this to DR and ask for return of all or part of the deposit.

20. How can tenant get deposit returned if the tenancy started before condition inspection reports were first required (January 1, 2004)?

The landlord must return deposits unless there is strong evidence to show that the premises have been damaged (more than normal wear and tear). The tenant should try to negotiate a settlement unless the landlord obviously lacks credibility and the tenant would make a good witness at a hearing. Note that if there is a valid condition report, it is evidence of the state of repair of the premises unless the tenant or the landlord produces a preponderance of evidence to the contrary (*RTA,* reg. 21; not applicable to manufactured home unless pad *and* home rented as a unit).

Note that ss.24 and 35 of the RTA extinguish the tenant's right to return of a security or pet damage deposit if the landlord complies with condition report requirements of the RTA and the tenant has not participated despite the 2 attempts by the landlord to have them do so. On the other hand, a landlord who fails to comply with condition report requirements loses his or her right to claim against these deposits.

21. How much interest must the landlord pay when returning the deposit?

The landlord must use the formula set out by the RTB. Use the calculator provided at www.rto.gov.bc.ca/content/calculator/calculator.aspx to automatically calculate the amount of interest owing from start to end of tenancy.

22. Are landlords limited in how much they may increase the rent? If so, what is the maximum they can charge?

Unless the tenant agrees to (or DRO has ordered) an additional rent increase, the maximum amount chargeable under the *RTA* is *inflation rate + 2%*. Landlords of manufactured home pads may charge *inflation rate + 2% + "proportional amount."* (Proportional amount is the change in government levies plus change in utility fees divided by number of sites.) For the current total percentage under *RTA* and *MHPTA*, see the Residential Tenancy Branch website, which is listed in the Resources section on page 60. [2008/09 *RTA* maximum = 3.7%]

23. How often may the landlord increase rent and how much notice must they give of a rent increase?

The landlord may increase rent no more than once every 12 months and must give the tenant 3 whole months' notice before the increase becomes effective. The landlord must also use the prescribed form.

Dispute Resolution hearings

24. What if client has no money to pay DR fee?

RTA, S.59(4) [*MHPTA*, s.52(4)] gives DRO discretion to waive or reduce this fee if applicant cannot reasonably afford it or the circumstances do not warrant the collection of a fee.

25. If the DRO is not obliged to follow strict rules of procedure that normally apply to court actions, what should the tenant be aware of before attending a hearing?

The rules of procedure specifically allow a DRO to conduct a hearing "in the manner he or she considers necessary" as long as the DR Rules are followed. DROs vary widely in their procedural preferences. If you intend to represent the tenant at the hearing, be prepared to encounter one who does not like the intervention of legal representatives. Note, however, that section 74(4) of the *RTA* now states that "a party to a dispute resolution may be represented by an agent or a lawyer." In such cases, you may not be serving your client well if you insist on adopting your accustomed adversarial role. Be ready to give the DRO a written submission (part of the "record," should the case go to judicial review) and intervene only if the process becomes blatantly unfair. Ask for your concerns to be part of the record.

Often the best service you can provide at the hearing is to keep clients from losing their temper or interrupting the landlord or the DRO. Set up a signal in advance that silently lets your clients know that they are going "over the top." This is especially effective when landlords start interrupting or shouting. Your calmer client inevitably makes a better impression.

26. Where are hearings held and how long do they usually last?

If you are close to an RTB office, you may be able to arrange for an in-person hearing. In most cases, hearings are held via teleconference. This creates problems if credibility and body language are important. If an in-person hearing is not an option, you *may* be able to argue an error of law if a DRO makes an adverse decision about credibility without having an opportunity to see your client. This would apply even more so if the landlord appears in person and your client by telephone. However, for most clients this is a theoretical rather than a practical strategy. The allotted time for most hearings is 1 hour.

27. Where can I find previous DR decisions?

Some decisions are available online at www.housing.gov.bc.ca/rtb/search.html .

Standard of review of DRO decisions

28. What is the standard applied at judicial review of a decision under the *RTA*?

Beacock v. Wetter, 2005 BCSC 1045 — **standard of review.** The standard of review with respect to jurisdiction is correctness; with respect to other grounds it is patent unreasonableness.

Example of correctness and procedure: *Weileby v. Lafleur*, 2006 BCSC 1852 — **unfair procedure.** Tenant sought judicial review from arbitrator's decision upholding eviction (because of noisy dog) from manufactured home park after a 13-year tenancy. Arbitrator refused adjournment, waiver of conduct money for witnesses, and, in tenant's view, adequate cross-examination. *Held* — For tenant. (1) Although *RTA* does not confer a right to counsel, it was unreasonable to refuse a 30-day adjournment to allow tenant to find a representative. (2) Arbitrator has no jurisdiction to waive conduct fees. (3) Arbitrator does have power to curtail cross-examination.

Example of patent unreasonableness: *Hernandez v. British Columbia*, 2007 BCSC 1771 — **nuisance—cause eliminated prior to DR** — Behaviour of tenant's son led to termination for cause. At hearing, although tenant testified that son was moving out, arbitrator upheld termination. *Held* — For tenant. It was patently unreasonable for arbitrator to omit determining whether this change of circumstances was likely to be permanent.

See also *Brown v. Johnson*, 2008 BCSC 1538 (citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190) and *Dualeh* below.

Failure to accept jurisdiction — *Lang v. BC (Residential Tenancy Arbitrator),* 2008 BCSC 1707 — Manufactured home situated on property otherwise used for seasonal recreation vehicles comes under the jurisdiction of *MHPTA.* Arbitrator's refusal of jurisdiction was neither reasonable not correct.

Failure to give adequate reasons is patently unreasonable: *Christiansen v. Woodward*, 2009 BCSC 311 — tenant's breach of fixed-term lease, landlord's duty to mitigate. *Held* — For landlord. No evidence set out that would justify DRO's decision.

Jurisdiction and First Nations

29. If First Nations adopts *RTA* rules for rental property on reserve, can it ask DRO to make a decision on a landlord/tenant dispute?

No. *Waterslides Campground v. Goulet*, 2006 BCPC 297 — **First Nations arbitration order — jurisdiction.** First Nations attempted to file in Provincial Court an order of an arbitrator operating under similar rules to those under *RTA*. *Held* — First Nations cannot confer jurisdiction on Provincial Court judges by enacting bylaws under the *Indian Act*, whether or not they attempt to mirror the *RTA*.

Statutory deadlines and procedures

30. If the landlord fails to file for DR within the statutory deadline, will he be able to obtain an extension of time?

Not normally. *Braut v. Johnson*, 2006 BCSC 1484; also 2008 BCSC 427 — **delays in seeking remedy.** Arbitrator awarded tenant $10,050 against landlord for wrongful seizure of property. Court adjourned review and directed landlord to first exhaust internal review procedures. Landlord delayed filing for review and missed limitation period, then asked for review of arbitrator's refusal of an extension of time. Landlord also missed 60-day deadline for filing for judicial review. *Held* — For tenant. Landlord's petition dismissed with costs. Even though Landlord's substantive case may have had merit, there were no exceptional circumstances that could justify such an egregious delay.

Dualeh v. British Columbia Housing Management Commission, 2006 BCCA 196 — **strict adherence to statutory notice periods — oral promises.** Tenant testified that landlord orally agreed that he could store property in suite during March but would be charged rent only until end of February.

BCSC upheld arbitrator's denial of landord's claim for March rent. *Held* — For landlord. It was patently unreasonable for arbitrator to rely on "oral exchanges" when *RTA* requires at least 30 days notice to end a tenancy. Landlord was not stopped from claiming March rent.

Seizure of property and orders of possession

31. What can be done if a bailiff has seized or is about to seize the tenant's possessions?

The tenant must act fast to minimize loss. He or she has only ***2 days*** after lawful seizure to claim exemptions under the *Court Order Enforcement Act***.** This may jeopardize the right to retain personal possessions and work tools. Prolonged storage costs and bailiff fees soon exceed the value of most clients' goods.

32. If tenant has missed the limitation period to appeal an eviction for non-payment of rent, how soon may the landlord obtain an order of possession?

Most tenants understand that if they fail to pay rent and do not ask for a DRO decision, they must be prepared to move as soon as possible. But some tenants retreat into a state of denial and ignore eviction notices. The landlord must use the prescribed form for this type of eviction (available at www.rto.gov.bc.ca/documents/RTB-30.pdf) and state the move out date, which is usually 10 days after service of the notice. If the landlord has good reason to believe that the tenant will not move out on the set date (or if tenant does not move out on the set date), the landlord may apply at the RTB for an Order of Possession. This is a desk order that gives grounds to apply for a Writ of Possession from the BC Supreme Court (another desk order). The writ gives the landlord the right to hire a bailiff who will act quickly to remove the tenant.

Related issues and legislation

Housing

- *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57 — may apply to living accommodation that is primarily occupied for business purposes.
- *Cooperative Associations Act,* S.B.C. 1999, c. 28 — applies to members of co-operative housing; most often encountered with clients who are members of subsidized housing.
- *Hotel Keepers Act,* R.S.B.C. 1996, c. 206 — guests in non-single room occupancy hotel rooms.
- *Human Rights Code*, R.S.B.C. 1996, c. 210 — discrimination, including "source of income" ground.
- *Law and Equity Act*, R.S.B.C. 1996, c. 253 — relief against forfeiture.
- Municipal bylaws (e.g., illegal suites, standards of maintenance, and health and safety bylaws).
- Issues and legislation related to the following: community care, assisted living, hospital and student accommodation.
- *Property Law Act*, R.S.B.C. 1996, c. 377 — leases over 3 years.
- *Strata Property Act*, S.B.C. 1998, c. 43, s.177 — lists certain disputes between strata corporation and tenant that must go to arbitration under the *Strata Property Act (SPA).*

Other possibly related issues

For more information, see the applicable chapter in this primer.

- Bankruptcy
- *Criminal Code* (e.g., marijuana grow ops)
- Debt and collections
- Employment (caretakers)
- Foreclosure (landlord in default under mortgage)
- Welfare (deposits, moving expenses, and shelter allowances)

Resources[5]

Note: *Always check to ensure that information on websites is up to date.*

Internet

- ***Aboriginal People and the Law in British Columbia*, Chapter 6 (2006) on the Legal Services Society website:** www.lss.bc.ca/assets/pubs/aboriginalpeopleandlaw.pdf
- **Application to waive filing fee:** www.rto.gov.bc.ca/documents/RTB-17.pdf
- **BC Housing website — tenant resources:** www.bchousing.org/tenants/handbook
- **BC Housing website — seniors' supportive housing:** www.bchousing.org/tenants/SSH
  See: 1) search page; 2) tenant handbook (tenant rent contribution, annual review process, conflicts and complaints, housing transfers, contact phone numbers); 3) housing provider kit (rent subsidies, income calculation, and other policy from the housing provider's perspective); 4) housing programs such as Family Rental Assistance Program, SAFER, RAP, Independent Living BC, emergency shelters.
- **CBA Dial-A-Law scripts — residential tenancy:** www.cba.org/BC/public_media/housing/410.aspx.
- **Community Legal Assistance Society (CLAS) publications:** www.clasbc.net/publications.php. Contains a long list of guides and forms related to judicial review and interim stay applications for use by lay litigants. CLAS also runs a self-help clinic primarily for people in the Lower Mainland.
- **Courthouse library website** — electronic resources regarding residential tenancy: www.bccls.bc.ca/index.cfm7group ID=2664
- **Dispute resolution decisions:** www.housing.gov.bc.ca/rtb/search.html
- **Federal Court of Canada**
  Phone: 604-666-3232 (Vancouver)
  Location: Vancouver Local Office, c/o Pacific Centre, PO Box 10065, 701 West Georgia Street
  Website: http://cas-ncr-nter03.cassatj.gc.ca/portal/page/portal/CAS/locations_eng/vancouver_eng
  See the link to "Information about Registry Services to Assist Self Represented Litigants." May be helpful for problems associated with housing on reserve.
- **Landlord Guide, TRAC:** www.tenants.bc.ca/main/?landlordguide. Available in English, Chinese and Punjabi.
- **Law Students Legal Advice Program (LSLAP) manual, Chapter 13:** www.lslap.bc.ca/pdfs/UserFiles/File/13_LandlordTenant.pdf
- **PovNet:** www.povnet.org is an online resource that includes a helpful housing chat list for subscribed members.
- **Residential Tenancy Branch:** www.rto.gov.bc.ca has fact sheets, forms, and guides. This website also lists 25 statutes related to the *RTA*.

[5] Information about many of these resources has been provided courtesy of TRAC.

- **Tenant's application for DR:** www.rto.gov.bc.ca/documents/RTB-12-T.pdf
- **Tenant Survival Guide is produced by Tenants Resource & Advisory Centre (TRAC):** www.tenants.bc.ca/main/?tenantSurvivalGuide. Available in English, French, Chinese, and Spanish.

Manuals (printed)

- Allan J. Wotherspoon, ***The Annotated British Columbia Residential Tenancy Act,*** Canada Law Book, 2005 (loose-leaf publication). Available in courthouse libraries, but it is essential to check for currency.
- Robert J. Maguire, Rose H. McConnell, CCH, ***British Columbia Real Estate Law Guide*****,** loose-leaf (Toronto, ON: CCH, undated). Contains current legislation.
- ***Real Property,*** **"Landlord and Tenant"** — CLE loose-leaf service available at courthouse libraries. Also accessible electronically at some libraries. Contains case digests.
- **LSLAP manual** (see above) — hard copies may be purchased.
- **Tenant Survival Guide** and **Landlord Guide** (see above).

Individuals and organizations

- **Residential Tenancy Branches:**
  Phone: 604-660-1020 (Lower Mainland)
  250-387-1602 (Victoria)
  1-800-665-8779 (call no charge)
  Locations: Walk-in offices are located in Burnaby, Victoria, and Kelowna. Information officer visits the Vancouver Downtown Eastside 1 or 2 days a week from 1:00 – 3:30 p.m. The schedule varies, so call Pathway Information Centre (390 Main Street) at 604-682-7353 for dates. First-come/first-served only (no appointments).
  Website: www.rto.gov.bc.ca

Practice advisors

- **LawLINE staff at Legal Services Society**
  Phone: 604-408-2172 or 1-866-577-2525 (call no charge)
- **Poverty lawyers at Community Legal Assistance Society (CLAS)**
  Phone: 604-685-3425
- **Pro Bono Law of BC (PBLBC) — roster program — judicial review**
  Phone: 604-893-8932
  E-mail: info@probononet.bc.ca.
  Website: http://probononet.bc.ca/judicialreview.php
- **Tenant Resource and Advisory Centre (TRAC)**
  Phone: 604-255-0546 or 1-800-665-1185
  Advocates line: 604-255-3099

Seniors' issues

- **BC Centre for Elder Advocacy and Support (BC CEAS)**
  Phone: 604-437-1940 or 1-866-437-1940

- **Community Response Networks**
  These networks are divided by Health Region.
  Phone: 604-660-4482
  Locations: See their website at www.bccrns.ca/crns/index.php or e-mail: crns@telus.net.

  To find an advocate in your geographical area — see the PovNet website listed above for contact information.

Forms

- Most actions, such as an application for DR, rent increase, condition inspections, etc.,require a mandated form.
- Forms are available at www.rto.gov.bc.ca/content/formsFees/default.aspx; at RTB offices in Burnaby, Victoria, and Kelowna; or from any BC Government Agent's office.
- If you have no immediate access to the Internet or these offices and the limitation period ends today, contact RTB (see above) and request that they fax a blank form so you can fax back a completed application within the deadline. (Note that you may have to wait awhile before your call is answered.)

Additional sources of assistance

- **Access Justice (Pro Bono clinics)**
  Phone: 604-878-7400 or 1-877-762-6664 to book an appointment
  Location: Various
  Website: www.accessjustice.ca
  Free summary legal advice and help with court forms by volunteer lawyers.

- **BC Active Manufactured Home Owners Association**
  Phone: 250-544-1456
  E-mail: jklein@amhoa.ca
  Location: Saanichton, BC
  Website: www.amhoa.ca
  Small non-profit established in 1971 and geared to addressing issues affecting manufactured home owner community. $10 membership fee. Some summary advice or representation in *RTA/MHPTA* matters provided by principal Joyce Klein.

- **BC advocates listed on PovNet**
  To see a map of advocates around the province, see www.povnet.org/find_an_advocate/bc. Most advocates will provide advice and representation on tenancy matters.

- **BC CEAS**
  Phone: 604-437-1940 or 1-866-437-1940 (call no charge)
  Location: 411 Dunsmuir Street, Vancouver, BC V6B 1X4
  Website: www.bcceas.ca
  Lawyer and paralegal at the elder law clinic provide free legal advice and advocacy for seniors.

- **City of Vancouver**
  (Community Services Housing Centre Program & Tenant Assistance Program [TAP])
  Phone: 604-873-7488
  Website: www.city.vancouver.bc.ca/commsvcs/housing
  See: information on affordable rental housing in Vancouver, the tenant assistance program (some direct assistance to find housing for homeless persons by an advocate), and a map index page that shows neighbourhood maps detailing locations of non-market housing.

- **The Law Centre:** Free legal services by University of Victoria law students.
  Phone: 250-385-1221
  Location: 1221 Broad Street, Victoria, BC
  Website: www.thelawcentre.ca
  See: Small Claims Procedures factsheets and sample forms (for non-*RTA* clients). Some representation in *RTA* disputes.

- **Law Students Legal Advice Program (LSLAP):** Free legal services by UBC (Vancouver) law students.
  Phone: 604-822-5791
  Locations: Various clinics across Lower Mainland. Phone for nearest clinic and appointment.
  Website: www.lslap.bc.ca
  See online version of the LSLAP manual and look at Chapter 14: Landlord and Tenant Law. Some representation in *RTA* disputes.

- **Lower Mainland Network for Affordable Housing**
  Website: www.affordablehousingnetwork.ca
  See: the "I'm looking for housing" link for lists of affordable housing organized by subject, such as co-ops, seniors, women, shelters.

- **Salvation Army (Pro Bono clinics)**
  Phone: 604-694-6647
  Location: Various
  Website: www.probono.ca
  Free summary legal advice and help with court forms by volunteer lawyers.

- **Seniors' Services Society**
  Phone: 604-520-6621
  Location: Lower Mainland
  Website: www.seniorshousing.bc.ca
  See: housing counselling and outreach for seniors at risk of homelessness; housing directory (for persons over 55 years) administered by Seniors Housing Information Program (SHIP).

Specifically for landlords

- **BC Apartment Owners and Managers Association (BCAOMA)** (formerly Greater Vancouver Apartment Owners Association). The society provides information and education for landlords of large and small properties.
  Phone: 604-733-9440 or 877-700-9440
  Location: 203 – 1847 West Broadway, Vancouver, BC V6J 1Y6.
  Website: www.bcapartmentowners.com

- **Rental Owners' and Managers' Society of BC (ROMS)** is a province-wide not-for-profit. Will speak to all size landlords regardless of whether they are members of the society.
  Phone: 250-382-6364 or 1-888-330-6707 (call no charge)
  Location: 830B Pembroke Street, Victoria, BC V8T 1H9
  Website: www.suites-bc.com

Co-ops and Strata housing

- **BC Arbitration and Mediation Institute (BCAMI)**
  Phone: 604-736-6614 or 1-877-332-2264
  Website: www.amibc.org/public_news.php
  Strata Mediation Pilot flat fee $350, plus tax for a 2-hour mediation of strata bylaw-related disputes.

- **BC Financial Institutions Commission (FIC)** is a provincial government agency which administers 10 statutes, including *Strata Property Act*.
  Website: www.fic.gov.bc.ca
  See the link from home page to Strata Property. It lists strata owners associations and 29 Strata Property Instruction Guides including topics related to tenants and strata rental restrictions.

- **Condominium Home Owners' Association (CHOA)**
  For a list of law firms and mediation/dispute resolution firms in BC who specialize in strata disputes, visit their website at www.choa.bc.ca/business.html#legal

- **Cooperative Housing Federation of BC (CHF)**
  Phone: 604-879-5111 or 1-866-879-5111
  Website: www.chf.bc.ca
  See: the link to "effective governance resources" that includes a plain language "Guide to the Co-op Act".

Additional mediation services

- **BC Mediator Roster Society**
  Phone: 250-356-8147 (local 2) or 1-888-713-0433
  Location: Mediators across BC
  Website: www.mediator-roster.bc.ca; see "Directory of Civil Mediators." These are professional mediators, some of whom quote sliding scale fees and expertise in housing-related disputes. Also see their Mediator Consultation Program which allows individuals to consult with a mediator for half an hour for a $10 fee.

- **CoRe Conflict Resolution Clinic**
  Non-profit provides affordable mediation to Lower Mainland community including landlord/tenant disputes.
  Phone: 604-827-5024
  Location: UBC Faculty of Law, 1822 East Mall, Vancouver
  Website: www.coreclinic.ca

Add your local resources here:

Residential Tenancy — Limitation and statutory notice periods

Note: *Always check for changes in the law that may have occurred since this primer was published. Knowledge of limitation periods is crucial to the preservation of client rights.*

Common abbreviations:
DRO = Dispute resolution office
LL = Landlord
MHPTA = Manufactured Home Park Tenancy Act
RTA = Residential Tenancy Act
SRO = Single room occupancy
T = Tenant

The following chart lists the statutory limitation periods for starting dispute resolution (DR) applications or taking remedial action.

Issue	RTA	MHPTA	Time limits
Time limit for **serving other party** with application for DR. See exception re: rooming houses (SROs)	s.59(3)(6)	s.52(3)	within **3 days** of making the application (unless premises are an SRO, or if director specifies a different time limit)
Eviction for non-payment of rent (also applies to eviction for non-payment of utilities if utilities remain unpaid 30 days after LL gives T written notice)	s.46(4)(b) s.46(6)(b)	s.39(4)(b) s.39(6)(b)	within **5 days** of receiving eviction notice
Payment of rent to void eviction notice	s.46(4)(a)	s.39(4)(a)	within **5 days** of receiving notice
Termination for cause • Non-payment of deposits • Repeatedly late with rent • Unreasonable number of occupants • Miscellaneous nuisances • Illegal activity • Extraordinary damage • Breach of material term • Unauthorized assignment or sublet • Giving false information • Non-compliance with DRO order	s.47	s.40	within **10 days** of receiving termination notice *(**Note:** Security deposits are not required under MHPTA.)*

Issue	RTA	MHPTA	Time limits
Termination for LL's own use • LL or direct family (parent, child, spouse) moving in • Property sold in good faith • Property to be demolished or significantly renovated • Conversion to strata or not-for-profit co-operative, or to non-residential use • Suite to be used by caretaker	s.49	s.42	within **15 days** of receiving notice (**Note**: *MHPTA* states that "LL's own use" is restricted to conversion of manufactured home park (MHP) to non-residential use or residential use other than MHP.)
T ceases to qualify for subsidized rental unit	s.49.1		within **15 days** after date T receives notice
Termination because employment with LL has ended	s.48	s.41	within **10 days** of receiving notice
If act is silent regarding applying for DR	s.60(1)(2)	s.53(1)(2)	within **2 years** of end or assignment of tenancy

The following chart lists the limitation periods for challenging dispute resolution decisions (DRO).

Requests and applications for DRO decision reviews			Time limits
Request for clarification of decision or order	s.78(1.1)(b)	s.71(1.1)(b)	within **15 days** of receiving decision or order
Application for review of decision re:			
• Unreasonable withholding of consent to sublet or assign; non-payment of rent; order of possession	s.80(a)	s.73(a)	within **2 days** of receiving decision or order
• Repairs or maintenance; terminating or restricting services; other reasons, not including non-payment of rent	s.80(b)	s.73(b)	within **5 days** of receiving decision or order
• Matters not covered under subsections (a) or (b)	s.80(c)	s.73(c)	within **15 days** of receiving decision or order
• Time limit for judicial review of DRO decision (under *Administrative Tribunals Act [ATA]*)	***ATA,*** s.57		within **60 days** of decision, but court has discretion to extend time limit

The following chart lists notice periods and other statutory deadlines.

Common abbreviations:
DR = Dispute resolution
DRO = Dispute resolution officer
LL = Landlord
MHPTA = Manufactured Home Park Tenancy Act
RTA = Residential Tenancy Act
T= Tenant

Issue	RTA	MHPTA	Time limits
LL must **deliver tenancy agreement**	s.13(3)	s.13(3)	within **21 days** after LL and T have entered into tenancy agreement
LL must **deliver Condition Inspection Report** to T	Reg. 18(1)	N/A	within **7 days** of moving in inspection and within **15** days of moving out inspection
LL wishes to **enter T's premises** (non-emergency)	s.29(1)(b)		written notice of at least **24 hours** and not more than **30 days**
T wants to terminate month-to-month tenancy	s.45(1)		last day of calendar month in order to take effect on last calendar day of following month
T wants to give **early notice** if LL terminates for own use	s.50(1)(a)		**10 days** notice
LL's deadline for **returning security deposits**	s.38(1)	N/A	**15 days** after end of tenancy, unless LL applies for DR to retain all or part of deposit
LL gives **notice to vacate for:**			T must leave within:
• non-payment of rent	s.46(1)		**10 days** of receiving notice
• failure to pay deposits	s.47(1)(a)		**1 month** after receiving notice
• LL's own use (*RTA*)	s.49(2)		**2 months** after receiving notice
• LL's own use (*MHPTA*)		s.42(2)	**12 months** after receiving notice or end of fixed term
• T's employment ended	s.48(3)		not earlier than **1 month** after T receives notice, and not earlier than last day of employment

Issue	RTA	MHPTA	Time limits
• T no longer qualifies for subsidy	s.49.1		**2 months** after receiving notice
• other s.47 reasons (see above)			**1 month**
T has **abandoned property**; if worth more than $500, LL must:			
• store property	Reg. 25	Reg. 35	for **60 days** after removal from premises
• keep particulars of disposition	Reg. 25		for **2 years** following date of disposition
Minimum time in which DRO's order may be filed in court	s.85(2)	s.78(2)	when review of DRO decision has been refused, dismissed, or concluded; OR time period to apply for review has expired

Chapter 3: Debt and Collections[6]

Note: *Always check for changes in the law that may have occurred after this primer was published.*

Clients often present with inextricably mixed problems. It may be impossible to assist with one problem without considering the others. This section focuses on debt and collections. Before giving legal advice about debt and collections, it is essential to consider how possible solutions to a debt problem may affect the outcome of related legal issues (e.g., the division of assets under family law or eligibility for income assistance under welfare law). Sometimes an inability to cope with increasing debt leads to family breakdown, loss of housing, and mental health issues. Alternatively, family breakdown, loss of employment, or unexpected disability may lead to a financial crisis. Most clients with low incomes are debtors who may be overwhelmed by harassing demands from creditors — often government agencies. A few clients are low-income creditors who are unable to recover money loaned to family or friends, and who have urgent need for repayment in order to pay for their basic needs, such as rent and utilities.

Governing statutes, regulations, and rules[7]

Legislation directly related to most common debt situations

- *Bills of Exchange Act*, R.S.C. 1985, c. B-4
- ***Business Practices and Consumer Protection Act*,** S.B.C. 2004, c. 2; B.C. Reg. 294/2004 as amended (*BPCPA*). See also *Debt Collection Industry Regulation*, 295/2004 as amended; *Disclosure of the Cost of Consumer Credit Regulation,* 273/2004.
- ***Court Order Enforcement Act***, R.S.B.C. 1996, c. 78 (*COEA*) and ***Court Order Enforcement Exemption Regulation***, 28/98
- *Court Order Interest Act*, R.S.B.C. 1996, c. 79
- *Creditor Assistance Act*, R.S.B.C. 1996, c. 83 — multiple creditors paid on *pro rata* basis— exception — family maintenance enforcement
- *Enforcement of Canadian Judgments and Decrees Act*, S.B.C. 2003, c. 29 (judgments from outside BC)
- *Garnishment, Attachment and Pension Diversion Act* R.S.C. 1985, c. G-2 (*GAPDA*), (garnishment of federal employees)
- *Law and Equity Act*, R.S.B.C. 1996, c. 253 (accepting less in satisfaction of debt)
- *Limitation Act, R.S.B.C. 1996,* c.266
- *Personal Property Security Act,* R.S.B.C. 1996, c. 359 (secured transactions)
- *Repairers Lien Act,* R.S.B.C. 1996, c. 404 (right to repossess chattel for unpaid repairs)
- *Sale of Goods Act*, R.S.B.C. 1996, c. 410
- *Sheriff Act*, R.S.B.C. 1996, c. 425 (governs court bailiffs' right to repossess)

[6] Information about bankruptcy and insolvency, and foreclosure are contained in separate chapters of this primer.
[7] Statutes marked in bold are the ones that you will refer to most often.

- Small Claims Rules, B.C. Reg. 261/93 [*Small Claims Act*]
- Supreme Court Rules, B.C. Reg. 221/90 [*Court Rules Act*]
- *Warehouse Lien Act*, R.S.B.C. 1996, c. 480 (governs right to charge fees for storage of goods)

Additional legislation that may apply

- *Builders Lien Act*, S.B.C. 1997, c. 45
- *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163
- *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164
- *Infants Act*, R.S.B.C. 1996, c. 223
- *Interest Act*, R.S.C. 1985, c. I-15

Amounts of exemptions from debt collection

***COEA* — Exemption Regulation**

- for household furnishings and appliances: $4,000
- for 1 motor vehicle (if debtor is not a maintenance debtor as defined in the *Family Maintenance Enforcement Act)*: $5,000
- for 1 motor vehicle if debtor is a maintenance debtor: $2,000
- for tools and other personal property used by debtor to earn income: $10,000
- exempt equity in principal residence located in Capital Regional District or Metro Vancouver: $12,000
- exempt equity in principal residence elsewhere in BC: $9,000

Note: *If chattels are subject to security under the Personal Property Security Act and client has not kept up payments, even exempt assets may be seized by secured creditors.*

Wages, pensions, EI, and welfare payments

No more than 30% of wages (after statutory deductions) may be garnisheed unless the debtor is a "maintenance debtor" where the maximum rises to 50%. Canadian Pension Plan (CPP), Old Age Security/Guaranteed Income Supplement (OAS/GIS), Employment Insurance (EI), and welfare payments are exempt from garnishment. However, if this money — or any other money — is deposited directly into the debtor's bank account, it loses its original characteristic and is vulnerable to garnishment. Also, debts to the Crown may be recovered from these sources.

Common client problems

Client cannot pay bills and creditors are demanding payment. Issues include:

- **utilities** have been cut off for non-payment
- client has "maxed out" **credit cards** and has lost employment
- client is **guarantor** or co-signor of loan and borrower has disappeared
- client has taken out **payday loans** and is going deeper and deeper into debt (see FAQ #19 on page 85 for information about changes to the BPCPA)

Client is being harassed by collection agency, for example:

- by frequent phone calls, including night calls
- at place of work
- for debt of close relative
- despite client's attempt to negotiate monthly payments

Creditor has sued client

- client has no defence but wants to make small periodic payments
- creditor has obtained default judgment that client wants to set aside
- creditor has served client with subpoena to debtor
- client's wages, pension, tax benefits, or other sources of income are being garnished at source by government (welfare clients may be deemed to be receiving this money).
- client has been or is in danger of being charged with contempt of court
- client is a maintenance debtor who has lost employment but has not applied for support variation

Creditor has seized or is attempting to seize client's property

- car has been seized and client says it is worth less than exempt amount
- client has hidden goods and is evading bailiff

Low-income creditors

- roommate has disappeared without paying his/her share of rent, utilities, etc.
- client has sold car to a "friend" and "friend" refuses to continue agreed payments
- client has paid bills as guarantor and wants money back from debtor
- client has judgment against creditor but has been unable to collect
- client wants to know if he/she can sell possessions loaned by debtor in unrelated transaction in order to retrieve money owing
- purchaser refuses to pay client for item sold through Craigslist because of alleged defects

Debt and Collections Checklist

Although this checklist does not apply to bankruptcy and foreclosure problems, you should always keep these issues in mind when working your way through the checklist.

Information about client(s) — (if not already recorded elsewhere) _____

_____

Full name(s): _____

_____

Home address (or place where mail may be picked up if client has no fixed address):

_____

_____

Phone/fax/e-mail address (or number where client can pick up messages if client has no fixed address):

Phone _____ **Fax** _____ **E-mail** _____

Preferred method of contact? (include contact person's information if the client is homeless or has no phone):

☐ **Phone** ☐ **Fax** ☐ **E-mail**

Is it safe/secure to leave messages on voicemail? ☐ **Yes** ☐ **No**

Information about opposing party (conflicts check)

Is this the original creditor or collection agency? (check as applicable) ☐ **Yes** ☐ **No**

Full name (including any applicable business or other name used):

_____

Address: _____

_____

_____

_____

Phone/fax/e-mail addresses: _____

Phone _____ **Fax** _____ **E-mail** _____

Agent (if applicable) _____

Phone/fax/e-mail addresses: _____

Nature and amount of debt _____ **Date incurred** _____

Date of last payment _____

Does debt involve chattels secured under the PPSA? ☐ **Yes** ☐ **No**

If so, describe _____

_____

Was the debt incurred due to a "consumer transaction"? (See special protections under *Sale of Goods Act, PPSA, and Bills of Exchange Act* for purchase of goods or services for personal use.)

☐ **Yes** ☐ **No**

Are there other creditors who have made or may make claims? ☐ **Yes** ☐ **No**

If yes, record details _____

_____

_____

Note: Client is debtor

Actions to consider (check relevant column)	Not applicable	Yes	No
1. Initial contact			
1.1. If by phone, consider whether an office interview will be immediately necessary.			
1.2. Will client be better served elsewhere? If yes, where? (see Resources section on page 87)			
1.3. Obtain names for conflicts check.			
1.4. Identify exact nature of problem. Is it an emergency? (e.g., imminent court date or expiry of limitation period)			
1.5. Is there a limitation period? If yes, record in a diary or a bring-forward system. When did the cause of action, if any, arise? Has there been a confirmation that extends limitation period? (*Limitation Act*, ss.3(5), 5) Is there a judgment under which the 10-year limitation period applies? (ss.3(3), 11 and see the *Limitation Act*)			
1.6. Can client resolve with your summary advice or assistance?			

Actions to consider (check relevant column)	Not applicable	Yes	No
1.7. What attempts has client already made? For example, has client offered and creditor accepted a payment of less than the full amount to satisfy the debt? If so, client does not have to pay any more (*Law and Equity Act*, s.43). Specify: 1.8. What are client's expectations? (wants to deny debt, stop harassment, make periodic payments, stop garnishment, etc.) Specify: 1.9. Have you obtained a signed and witnessed waiver of confidentiality to allow you to obtain disclosure from parties and witnesses?			
2. Stage of proceedings 2.1. Client has received written demand threatening transfer to collection agency. 2.2. Creditor has transferred to collections agency. 2.3. Collections agency has sent "final demand." 2.4. Client has received writ or summons but has not filed defence. 2.5. There has been garnishment before judgment. 2.6. Client has filed defence. 2.7. There is a default judgment against client. 2.8. Client has appeared in court and there is a judgment against him or her. 2.9. Client has received judgment summons or subpoena to debtor. 2.10. Client should ask for payment hearing. 2.11. Client is being garnisheed after judgment. 2.12. Creditor has filed liens against client's property. 2.13. Creditor has seized client's property. 2.14. Client should consider bankruptcy? (see Chapter 5: Bankruptcy and Insolvency)			

Actions to consider (check relevant column)	Not applicable	Yes	No
3. Status of client and debt 3.1. Does **client** dispute the amount or existence of the debt? 3.2. If yes, are there any viable defences? Is there any evidence of: misrepresentation, unconscionability, duress, undue influence, mistake, *non est factum,* breach of Business Practices and Consumer Protection Authority (BPCPA) consumer or other provisions? Circle any that might apply. 3.3. Is there evidence that would support a counterclaim? 3.4. Was client a minor when the contract was signed? 3.5. If yes, was there a guarantor? If yes, record name and relationship. 3.6. Did client have capacity to contract? (intoxicated, on drugs, etc.) If no, record details. 3.7. Is debt related to a payday loan? (see FAQ #19 on page 85) 3.8. Does any applicable interest comply with federal and provincial rate and disclosure laws? (*Interest Act* (Canada), *Court Order Interest Act, Criminal Code, BPCPA)* 3.9. Is creditor in breach of any provisions of Part 6 of *BPCPA* relating to credit reporting? (for example, entered a false report) 3.10. Has client conveyed any money or property that might be a fraudulent preference or fraudulent conveyance? 3.11. Has client responded to creditor's demands for payment? Orally ___ In writing ____ 3.12. If no, is there a realistic possibility of a settlement that could be facilitated by lawyer or advocate? 3.13. Would this case be more effectively resolved by the Credit Counselling Society? (See Resources section on page 87.)			
4. No action initiated but client is being unduly harassed by demands 4.1. Is creditor using any of the following harassing tactics? (Prohibited by *BPCPA*, Part 7, Division 1 — Prohibited debt collection practices) • Contacting and complaining to employer • Phoning client at work • Phoning frequently and abusively and/or outside business hours despite client's request for written communications only or despite client disputing debt			

Actions to consider (check relevant column)	Not applicable	Yes	No
• Harassing family members • Collection agency keeps threatening legal action but does nothing • Creditor is threatening to publish an article or advertisement about the debt • Creditor is stalking, threatening physical force, or is committing some other *Criminal Code* offence • Are there grounds for bringing an action for damages under *BPCPA*, s.171? *(**Note**: Action may be brought in Provincial Court even if the contravention constitutes defamation.)* • Have there been threats by *unsecured* creditor of seizing assets? • If yes, any possibility of a freezing order (Mareva injunction)? (very unlikely with low-income, low-asset client) 4.2. If collection agency is involved, has it notified client of assignment of debt? (*BPCPA*, s.121) 4.3. Are there any grounds for complaint to *BPCPA* for removal of business licence?			
5. Court action has been initiated against client 5.1. Has client been served with writ, statement of claim (BCSC), or Notice of Claim (BCPC)? 5.2. Has client filed an appearance or reply (or counterclaim)? 5.3. If no, how much time, if any, is left to file? (see Debt and Collections — Statutory Limitation Periods chart on page 90) • Does client have copy of court documents? • Were they properly served? • Is amount of claim accurate? • Has there been garnishment before judgment? • If yes, are there grounds for setting aside — faulty procedure, lack of fairness, undue hardship? (*COEA*, ss.3-5) • What evidence does client already have to support defences or counterclaim? • Is there additional evidence required? • Does preliminary assessment of client's case indicate any legal merit? 5.4. Has Creditor obtained a default judgment against client?			

Actions to consider (check relevant column)	Not applicable	Yes	No
5.5. If yes, is there any merit in asking for it to be set aside? (viable defences?) 5.6. If no defences, should client ask for a payment hearing to obtain an installment payment order?			
6. Client has ignored a judgment 6.1. Does judgment order payment of full amount? 6.2. If yes, see item 5.6 above. 6.3. If judgment has ordered installment payments, does client have any excuse for non-payment that would justify request for reduced installments? If yes, describe. 6.4. If no, is there a likelihood of an action for contempt? (see items 7.4 and 7.5 below)			
7. Client has failed to attend a payment hearing 7.1. Which level of court? BCSC — examination in aid of execution or subpoena to debtor (SCR 42); BCPC — summons to payment hearing (Small Claims Rule 14) 7.2. Once? Why? 7.3. More than once? Why? 7.4. Has client been served with an arrest order? If yes, when was it received? (7 days to arrange new payment hearing date with small claims court registry) 7.5. Is there any likelihood of judge making a contempt order? (SCR 56; Small Claims Rule 19)			
8. Client's funds are being garnished after judgment 8.1. Is bank account being garnished? 8.2. Are wages or other money from third parties (e.g., government tax benefits) being garnished? 8.3. If yes, are the amounts deducted from wages within the 30% limit? (50% if "maintenance debtor") 8.4. Are there grounds for setting garnishing order aside and asking for installment payments or reduced installment payments? 8.5. Does client have significant assets that would be protected from court seizure if installment order is obtained? (*COEA*, s.5)			

Actions to consider (check relevant column)	Not applicable	Yes	No
9. Client's chattels have been seized or are about to be seized by *unsecured* creditor 9.1. Is there a threat of seizure but no actual seizure yet? 9.2. Has creditor obtained a court order for seizure? (Writ of Seizure and Sale, SCR 42; Order of Seizure and Sale, Small Claims Rule 11) 9.3. Has bailiff attempted to seize chattels (car, stocks and bonds, coin or stamp collection, etc.) — (*COEA*, ss.47–78 — procedures to be followed) 9.4. Has bailiff provided a list of chattels to be seized? If no, obtain one. 9.5. If yes, are any of the chattels exempt from seizure under *COEA* (car below value, work tools, etc.) — (*COEA*, s.71 and exemption regulation — see list on page 72 of this section) 9.6. Are there any liens against any of client's chattels that reduce his or her equity in chattel? 9.7. Any other exemptions? • Certain annuity payments — *Insurance Act* • Certain credit union shares — *Credit Union Act* • Property on reserve — *Indian Act* • Pensions of teachers, provincial and municipal employees • EI payments, veterans allowances, OAS/GIS payments 9.8. If there has been a seizure, can client meet the 2-day time limit to object?			
10. Related issues 10.1. Secured transactions — seizures under *Personal Property Security Act* 10.2. Foreclosure 10.3. Bankruptcy 10.4. Consumer protection			

Issues applying to First Nations clients

This is a complicated legal area and requires special knowledge. For an overview, see Chapter 1 of the Legal Services Society (LSS) publication, *Aboriginal People and the Law in British Columbia*, (2006), available on the LSS website at: www.lss.bc.ca/assets/pubs/aboriginalpeopleandlaw.pdf. Or, see *Individual Rights under the Indian Act* (current to August 2007), by Darwin Hanna and Christine J. Mingie, available on the Continuing Legal Education Society of BC (CLE) website at: www.cle.bc.ca/Practice%20Points/ABOR/Individualrighst.html.

In summary:

- Real and personal property of an Indian or a band situated on reserve are not subject to attachment or seizure. [*Indian Act*, s.89(1)]
- Property whose main location is on reserve but is used off reserve is, in law, "located on reserve."
- Wages earned on reserve cannot be garnished from an Indian Band employer. However, property such as a bank account located off reserve is not protected under the *Indian Act* even if the funds in it are wholly generated by wages earned on reserve.
- "Cultural property" is usually exempt from seizure.

Note: *An Indian's chattels that are subject to a conditional sales contract are not exempt from seizure. However, if two thirds or more of the purchase price has been paid, the creditor must obtain a court order before seizure.*

Issues applying to seniors

Seniors are subject to the same laws as everyone else but may run into debt due to financial abuse by those around them or abuse by consumer scam artists. For example, a relative with power of attorney may have emptied the client's bank account so that the client is unable to pay her utility bills. The client may have used her credit card to pay a fly-by-night "renovator" who has disappeared without doing the job. Or, she may have signed a promissory note that has been sold to a holder in due course who is demanding payment. If the note is stamped "consumer purchase" she will have a viable defence. If not stamped, she may have to pay unless she can raise a defect of title defence.

As noted above, certain annuities and pensions plus federal CPP and OAS/GIS payments are exempt from seizure, but once deposited in a bank account these payments are vulnerable to seizure.

For help in these circumstances, in addition to the remedies contained in legislation, consider contacting:

- your local Community Response Network (CRN). To find the nearest location, go to their website at: www.bccrns.ca/crns/index.php, or e-mail crns@telus.net;
- the BC Centre for Elder Advocacy and Support (BC CEAS) advocacy and elder law program at 604-437-1940 or 1-866-437-1940 (call no charge). The lawyer and paralegal at the elder law clinic provide free legal advice and advocacy for seniors. Their website is: www.bcceas.ca.

Frequently Asked Questions (FAQ)

Before court action

1. **Client missed only 1 installment and has received a demand letter that gives him only 1 week to pay before court action starts. He thinks he can manage to find most of the money within a month. Is a week a reasonable time for payment?**

   The answer to this question depends on the facts of the case such as (1) the amount of the loan; (2) the risk to the creditor of losing his money or the security; (3) the length of the relationship between the debtor and the creditor; (4) the character and reputation of the debtor; (5) the potential ability to raise the money required in a short period; (6) the circumstances surrounding the demand for payment; and (7) any other relevant factors. *Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal* (1979), 25 O.R. (2d) 198, cited in *Hinkson Holdings Ltd. v. Silver Sea Developments Limited Partnership,* 2007 BCSC 118 (CanLII).

2. **If client has been ignoring demands for payment, what chance is there that creditor will settle?**

   Most creditors are in a hurry to be paid. Corporate creditors (and some individuals) know enough about court processes to realize that an offer of a few cents on the dollar may be more cost effective for them than long, drawn out legal proceedings (especially if the most realistic outcome is an order to pay small monthly amounts). If client has any money, try for a lump sum settlement. Consider sending a "without prejudice" letter. If creditor refuses to negotiate, try to delay proceedings. The longer creditors have to wait, the more likely they are to settle. (There is a premise that 50% of creditors will settle for 50% of the debt — the 50/50 rule.)

3. **What if client has no money for a lump sum payment and creditor keeps demanding money?**

   If the debt is legitimate and creditors refuse an offer of periodic payments, write to creditor and request they cease all contact with client except for service of court documents initiating legal action. This opens the door to a consent order or default judgment that will allow client to access a payment hearing. If judgment debtor makes the periodic payments ordered by the court, they cannot be subject to a garnishing order.

4. **How can client be protected from further harassment after an agreement to settle?**

   Make sure client obtains an acknowledgement of payment and release from all further claims. If creditor has reported the default of payment to the Credit Bureau, ask for a letter from creditor to the Credit Bureau stating that claim has been resolved.

5. **Client's utilities will be or have been cut off for non-payment. This is endangering his health and safety. How can you help?**

   It is often possible to negotiate a solution with utilities companies. If client is on welfare, his employment assistance worker may assist by paying part of the debt and arranging for "pay as you go" billing to take care of current use and past debt. Usually utilities companies will require a fairly high security deposit before reinstatement. Telus may be more willing to offer a solution if client can show that access to a phone is a medical necessity.

6. **Client's car has been repossessed by garage for non-payment of repair bill. Can client get it back?**

   It depends on whether the repairer has followed the correct processes under the *Repairers Lien Act* including proper registration at the Personal Property Registry and compliance with statutory deadlines. (Repairer has 21 days from date of release of vehicle to client to register a lien which is good for 180 days and is renewable.) Check whether bailiff followed correct procedures (no threats or force). If there is no dispute about the bill and all procedures have been properly followed, there may be no merit in challenging repossession. Best route may be negotiating a settlement that may allow return of vehicle.

7. **Client's house was sold in a foreclosure and he put furniture in storage until he could get back on his feet. Now he is having trouble paying the storage fees, and the storage company is threatening to sell the furniture. Can they do that?**

   As long as they follow the procedures in the *Warehouse Lien Act* (proper notice, etc.), the answer is probably "yes."

8. **Client incurred student loans and is unable to repay because of a disability. Is there any way she can stop or defer collection of this debt?**

   There are a number of ways of reducing Canada Student Loan amounts:

   - debt reduction in repayment (for exceptional long-term financial difficulty)
   - interest relief (for temporary financial difficulties)
   - permanent disability benefit (for exceptional financial hardship due to disability)
   - revising loan terms (a way of reducing monthly payments)

   For more information, see the Human Resources and Skills Development Canada website at: www.hrsdc.gc.ca/en/learning/canada_student_loan/index.shtml. Client should act fast before her case is sent to collections. Collection agencies are notoriously difficult to deal with. Because of the many changes to student loan systems, check whether the loan is with federal or provincial government, or with a bank.

Judgment obtained against client

9. **How to assist a client on welfare who is unable to pay anything?**

   Consider asking for **stay of execution** until client can make payments without endangering health and safety of self and family. This could be useful when client's CPP benefits are being topped up by provincial welfare but are being garnished at source. (Welfare deems the CPP benefits to have been paid and will not generally make up the difference.) The need for court process may be avoided by an aggressive advocate who can persuade the collector to back off. This is not always possible when a government agent is the collector.

10. **Client could represent self at a payment hearing but needs help to prepare. What documents will they need?**

    You should assist client to prepare evidence and arguments to support submission that they can pay only a small amount. They should take with them the following:

    - list of assets and liabilities,
    - statement of income and expenses,

- copies of recent tax returns and CRA assessments,
- bank statements and other relevant financial documents, and
- documentation for application for indigent status if client is on welfare.

11. Creditor has registered in BC a United Kingdom judgment against client. Is this enforceable?

Yes. The UK is a **reciprocating state** under Part 4 the *COEA*. Part 2 deals with judgments from other reciprocating states, which include other Canadian provinces, Australian states, Germany, Austria, and some US states (Washington, Oregon, California, Alaska, Colorado, and Idaho).

Garnishment after judgment

12. Can creditor garnish a joint bank account?

Not unless all joint account holders are parties (debtors) to the action. But be aware of fraudulent conveyance arguments if the joint account was set up to avoid garnishment.

13. Client's boss has been threatening to fire her since her wages started to be garnished. Is this a legitimate ground for termination?

No — not if it is the only ground. Employer is committing an offence under the *COEA* and is subject to a fine and/or imprisonment. However, most employers will produce a long list of other reasons for the termination that may or may not be legitimate.

14. How do government garnishing powers of bank accounts differ from those of private individuals and businesses?

Usually private parties must obtain a new garnishing order each time they want to obtain money from a bank or other account. Governments can obtain continuing garnishment.

15. Are federal employees subject to the same garnishment rules as everyone else?

The *Garnishment, Attachment, and Pension Diversion Act* (*GAPDA*), R.S.C. 1985, c. G-2 as amended permits the garnishment of public servants' salaries and payments to federal contractors as well as the diversion of certain pension benefits. The Garnishment and Attachment Regulations, made under the *GAPDA*, outline at section 4 the place of service of documents on Her Majesty in connection with garnishment proceedings permitted by the act. If federal and provincial garnishment rules are inconsistent, the federal act will prevail where *GAPDA* applies.

Note: *Provincial family maintenance enforcement programs can garnish federal funds through this legislation.*

16. To what extent can family maintenance programs garnish or divert federal payments to a maintenance debtor?

The federal government may garnish up to:

- 50% of any income type funds, including EI and CPP benefits
- 100% of income tax rebates, GST rebates, and interest on Bank of Canada Savings Bonds

The federal government charges the support payor a fee of $38 for each year that the federal support deduction notice remains active.

First Nations

17. Can a creditor who supplies goods to a reserve garnish funds in a bank off reserve if the sole source of these funds is the federal government?

Yes. See *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] 2 S.C.R. 846, 2006 SCC 58 (CanLII) — **First Nations** — creditor suing for payment for construction materials supplied for projects on reserve — funds from federal Comprehensive Funding Arrangement banked in Winnipeg — exemption from seizure — whether situated on reserve. *Held (6:3)* **—** For creditor. "Situated on reserve" to be given it plain and ordinary meaning.

Payday loans

18. Are there any precedents for arguing that many payday loans charge criminal interest rates?

Yes. See *Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2008 BCSC 669 (CanLII) (Brown, J) — one of several payday loan cases — class action — criminal interest rates — unjust enrichment. (Good overview of law in this area). *Held* — For debtor. Finance charges constitute interest at a criminal rate under s.347 of the *Criminal Code*. Standard form loan agreement is an agreement or arrangement to receive interest at criminal rate. Instaloan and its directors were unjustly enriched and participated in an illegal conspiracy. They are jointly and severally liable for damages.

19. The client does not want to go to court but wants to know if the interest charged is too high. Are there any other rules that govern this situation?

The Payday Loan Regulation pursuant to the *Business Practices and Consumer Protection Act (BPCPA)* is effective from November 1, 2009 (proclaimed March 2, 2009). Business Practices and Consumer Protection Authority is the watchdog. Section 13 of Schedule 2 to the regulation sets out minimum requirements for signage that gives information about acceptable interest rates. Provisions include the following:

- The maximum rate of interest is 23% of the principal.
- If the loan is not repaid on time, the lender may charge up to 30% per annum in default fees plus $20 each for any NSF cheques.
- The loan may be no greater than 50% of the borrower's net pay or net income received during the term of the loan.
- The agreement must not contain a provision that permits the lender to collect delinquent payments from the borrower's employer.
- The lender must not accept endorsed third-party cheques. Cheques must be made out by the borrower to the lender.
- If the lender ignores the above prohibitions (among others), the maximum payable by the borrower is the amount of the principal outstanding.

For more information, see the BPCPA website at www.bpcpa.ca and CanLII at www.canlii.ca/en/bc/laws.

Jurisdiction

20. If a client wants to dispute a claim for unpaid income taxes and counterclaim for harassing collections practices, can the BCSC deal with both issues?

No. See *Canada (Attorney General) v. Hanover,* 2007 BCSC 1378 (CanLII) (Romilly, J) — Show cause action for sale of land to satisfy judgment for unpaid income and excise taxes. Court jurisdiction. No evidence that underlying debt was disputed. *Held* — For AG. Any dispute about underlying debt must be heard by the federal Tax Court. Certificates filed under federal tax acts (s.223(3) of the *ITA* and s.316(2) of the *ETA*) are to be treated as if they were judgments of the Federal Court. However, the government creditor may take action under provincial *COEA* to enforce these certificates.

Limitation period

21. When the 10-year limitation on collecting under a judgment is about to expire, can the creditor in effect extend the limitation period by starting an action to enforce the judgment?

Yes, if there has been no abuse of process by creditor. See *Young v. Verigin*, 2007 BCCA 551 (CanLII) (Newbury, Low & Tysoe, JJ) — whether last-minute action on old judgment to avoid 10 year limitation period was abuse of process and counter to spirit of *Limitations Act*. *Held* — For creditor (Young). Onus is on debtor to show abuse of process. *Limitation Act* in and of itself does not prevent such an action on a judgment (cites numerous authorities).

Client is creditor

(Most of the above information can be adapted for use by creditors as well.)

22. Should correspondence with debtor always be marked "without prejudice"?

If you are acting for a creditor who has been unsuccessful in collecting a debt, send a demand letter containing a fixed deadline for payment before initiating court action (see FAQ #1 above). This letter will be used as evidence and should not say "without prejudice."

23. When is it practical to garnish before judgment?

When the claim is for liquidated damages (fixed amount), and/or client knows location of debtor's bank account, payday, etc.

Resources

Note: *Information is always changing, so always check that websites are up to date.*

Internet

- ***Aboriginal People and the Law in British Columbia*, Chapter 2 (2006)**: www.lss.bc.ca/assets/pubs/aboriginalpeopleandlaw.pdf
- **Business Practices and Consumer Protection Authority website**: www.bpcpa.ca is a good source of information about changes to law and practice
- **Canadian Bar Association Dial-A-Law scripts** on debt and small claims: www.cba.org/BC/Public_Media/dal/credit.aspx; www.cba.org/BC/Public_Media/dal/small.aspx
- **Clicklaw** — provides links to legal information, education, and help for British Columbians: www.clicklaw.bc.ca
- ***Consumer Law and Creditor/Debt Law — A Guide for British Columbia*, (2005)**: www.lss.bc.ca/assets/pubs/consumerLawAndCreditDebitLaw.pdf
- ***Credit, Debt and Bankruptcy Law Resource Guide*** — a comprehensive list of books, CLE materials, manuals, and legislation, including links to other websites — on the **Courthouse Libraries BC website** at: www.bccls.bc.ca/cms/index.cfm?group_id=63914
- **Federal Court of Canada**
  Phone: 604-666-3232 (Vancouver)
  Location: Vancouver Local Office c/o Pacific Centre, PO Box 10065, 701 West Georgia Street
  Website: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Contact_Us
  See: Link to "Self-Represented Litigants."
- **Law Society Professional Legal Training Course (PLTC) material on creditors' remedies**: www.lawsociety.bc.ca/ licensing_membership/pltc/material-toc.html
- **Law Students Legal Advice Program (LSLAP) manual**: www.lslap.bc.ca/UserFiles/file/10_CreditorsRemediesandDebtorsAssistance.pdf

Small claims guides

- **The Law Centre's website** at: http://thelawcentre.ca/self_help/small_claims_factsheets?
- **Ministry of Attorney General website** at: www.ag.gov.bc.ca/courts/small_claims/index.htm

Manuals (printed)

- ***British Columbia Creditors' Remedies: An Annotated Guide*** (KN305.1 B74)
  Explains how to evaluate a collection claim, commence an action, and handle prejudgment collections. Covers injunctions, garnishment, bankruptcy remedies, guarantees, and writs of execution. The guide also includes forms, precedents, and checklists.
- ***British Columbia Debtor-Creditor Law and Precedents*** (KN305.1 R62)
  Focuses on the methods of enforcement available to a judgment creditor from both a creditor and debtor perspective. It also includes cases, legislation, and forms.

- **LexisNexis Butterworths, *British Columbia limitations manual,* 1st ed.** (Markham: LexisNexis Canada, 2005). Loose-leaf service. Can be searched by subject and contains case digests.
- **LSLAP manual and LSS material** (see the Internet section above). Printed copies may be purchased.

Individuals and organizations

Practice advisors

- **LawLINE staff at Legal Services Society**
  Phone: 604-408-2172 or 1-866-577-2525 (call no charge)
- **Poverty lawyers at Community Legal Assistance Society (CLAS)**
  Phone: 604-685-3425
- **Pro Bono Law of BC (PBLBC)**
  Phone: 604-893-8932
  Website: http://probononet.bc.ca/rosterprograms.php

Seniors' issues

- **BC Centre for Elder Advocacy and Support (BC CEAS)**
  Phone: 604-437-1940 or 1-866-437-1940
- **Community Response Networks** (divided by health region)
  Phone: 604-660-4482
  For a location in your area, see www.bccrns.ca/crns/index.php or e-mail: crns@telus.net.

Advocates

- **PovNet:** www.povnet.org.

Other sources of assistance

- **Access Justice (pro bono clinics)**
  Phone: 604-878-7400 or 1-877-762-6664 to book appointment
  Location: Various
  Website: www.accessjustice.ca
  Free summary legal advice and help with court forms by volunteer lawyers.
- **Credit Counselling Society**
  Free counselling in dealing with debt. Good resource where there is no dispute about existence and amount of debt, and where consolidation of debts and installment payments are best option. The society will also advise regarding the possibility of bankruptcy. They will answer questions online and by phone.
  Phone: 1-888-527-8999
  Website: www.nomoredebts.org
- **The Law Centre:** Free legal services by University of Victoria law students.
  Phone: 250-385-1221
  Location: 1221 Broad Street, Victoria, BC
  Website: www.thelawcentre.ca
  See: Small Claims Procedures factsheets and sample forms

- **Law Students Legal Advice Program (LSLAP).** Free legal services by UBC (Vancouver) law students.
  Phone: 604-822-5791
  Locations: Various clinics across Lower Mainland. Phone for nearest clinic and to book appointment.
  Website: www.lslap.bc.ca
  See: Online version of the LSLAP manual and look at "Chapter 10: Creditors' Remedies and Debtors' Assistance." Some representation in debt/collections disputes.

- **Salvation Army (pro bono clinics).** Free summary legal advice and help with court forms by volunteer lawyers.
  Phone: 604-694-6647 for nearest clinic and to book appointment
  Website: www.probono.ca

Mediation services

- **BC Mediator Roster Society**
  Phone: 250-356-8147 (local 2) or 1-888-713-0433
  Location: Mediators across BC
  Website: www.mediator-roster.bc.ca
  See: "Directory of Civil Mediators." These are professional mediators, some of whom quote sliding scale fees. Also see their Mediator Consultation Program which allows individuals to consult with a mediator for half an hour for a $10 fee.

- **CoRe Conflict Resolution Clinic** (includes debt and small claims matters)
  Phone: 604-827-5024
  Location: UBC Faculty of Law, 1822 East Mall, Vancouver
  Website: www.coreclinic.ca

- **Small Claims Mediation Programs**

  For claims up to $10,000, see the following webpage on the Ministry of Attorney General website: www.ag.gov.bc.ca/courts/small_claims/info/guides/mediation_up.htm

  For claims from $10,000 to $25,000, see the following webpage on the Ministry of Attorney General website: www.ag.gov.bc.ca/courts/small_claims/info/guides/mediation_between.htm

Add your local resources here:

Debt and Collections — Statutory Limitation Periods

Issue	Limitation Act	Other statute	Time limits for starting court action
General rule	s.3(5)		within **6 years** from the date on which the right of action arose (usually the date of default)
If debt is confirmed after right of action arose (e.g., by debtor making a payment towards the debt) There are 12 **exceptions** to above rules (not often applicable to poverty law clients but should be checked)	s.5 s.3(4)(a-l)		within **6 years** of confirmation (acknowledgement) of the debt (this means that the clock will start running again following a subsequent default) No limitation period
Action on judgment for payment of money **Exceptions** re: actions on judgment	s.3(3) s.11	*Income Tax Act*, s.222	within **10 years** from the date of judgment Running time is suspended if there is stay of execution on judgment If there is enforcement process outstanding, it may be continued past the 10 years
Registration of Canadian judgments from outside BC		*Enforcement of Canadian Judgment & Decrees Act*, s.5(1)	Must be registered before time for enforcement in other jurisdiction has expired, or no later than **10 years** after date that judgment became enforceable
Registration of foreign judgment from reciprocating state		*COEA*, s.29(1)	As above

Issue	Limitation Act	Other statute	Time limits for starting court action
Litigation limitation periods			
Entering an appearance		SCR, 14(3)	within **7 days** of service of writ
Entering statement of defence		SCR, 21(5)	within **14 days** of delivery of statement of claim or **21 days** if writ and statement of claim were served together
Reply to Notice of Claim		Small Claims Rule 3(4)	within **14 days** after service of Notice of Claim if defendant served within BC (**30 days** if served outside)
Deadline to respond to arrest order to avoid actual arrest		Small Claims Rule 14	within **7 days** of receiving arrest order; debtor must arrange with court registrar a date for payment hearing
Claim for exemption from seizure		*COEA*, s.73(2) Exemption Reg. s.2	within **2 days** of any seizure or notice of seizure by court bailiff (whichever is later)

Chapter 4: Foreclosure

Note: *Always check for changes in the law that may have occurred after this primer was published.*

Demand for advice about foreclosure inevitably increases during times of recession. Banks and other financial institutions that act as mortgagees are almost always represented by lawyers. Mortgagors under threat of foreclosure seldom have money to pay for a private bar lawyer, but they often have urgent need for informed legal advice, especially when they have been served with notice of a court hearing.[8] Even clients who have the capacity to help themselves will likely have to be educated about relevant substantive law and court procedure. Vulnerable clients may require significant assistance.

Foreclosure proceedings are held in Supreme Court. Mortgagors have several defences available to them. Although most defences will not allow them to keep their property, many well-presented defences will maximize the amount of money left to mortgagors when the property is sold.

Risk to client

Foreclosures rarely happen in isolation. Clients usually face related legal and personal problems, including job loss, business failure, matrimonial issues, and other debts. They stand to lose their home and credit rating. Without help, they may be forced out of their home much sooner than necessary. If the property is sold by the mortgagee at a "fire sale" price and then deductions are made from the sale price, such as real estate commission, receiver's fees, interest, and other disbursements, the mortgagor may be left with a much larger outstanding debt than necessary. Legal assistance may help them avoid bankruptcy.

Service level considerations

Many cases are urgent because clients have delayed taking action and a court hearing is imminent. At the very least, these clients will require summary advice and assistance with self-help resources. If court action has not commenced, you may be able to help by writing a letter or otherwise negotiating with the mortgagee for reinstatement of the mortgage and an extension of time to pay.

Complexity

The legal issues are complex in all foreclosures. However, the facts may leave only 1 or 2 solutions, such as asking for a 6-month redemption period and conduct of sale. On the other hand, there may be a combination of secured and unsecured creditors who have placed liens on title, making sale of the property more difficult.

Governing statutes, regulations, and rules

Substantive law of foreclosure is governed by the law of equity and case precedents, but the process of foreclosure relies on a variety of statute law. The following statutes, regulations, and rules are the most important (particularly those in bold), but the list is not exhaustive.

- ***Land Transfer Form Act***, R.S.B.C. 1996, c. 252, Schedule 6 (provisions for mortgagee to take possession on mortgagor's default)

[8] This section concentrates on mortgages. However, much of the information applies also to the more unusual Agreements for Sale under which the lender retains title until the borrower has paid the debt in full.

- ***Law and Equity Act***, R.S.B.C. 1996, c. 253, ss.13–25 (various provisions applying to mortgagors, including the discretion of the court to award costs regardless of terms in the mortgage (20(2)); relief from the effect of an acceleration clause (25); right of mortgagor to apply for an order or judgment without a hearing (18); venue (21))
- ***Property Law Act***, R.S.B.C. 1996, c. 377, s.32 (personal covenant of mortgagor is not enforceable after making of the order absolute)
- ***Supreme Court Rules*, Rule 50 (Foreclosure)**
- *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, ss.81–116 (enforcement of money judgments against real property)
- *Court Order Interest Act*, R.S.B.C. 1996, c. 79 (calculation of interest due on mortgage and on personal covenant)
- *Land Title Act*, R.S.B.C. 1996, c. 250 (application of Torrens system — does not define "mortgage" but does provide for a form of mortgage)
- *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313 (deals with disclosure of money payable by commissions, finders' fees, discounts, etc.)
- *Real Estate Services Act*, S.B.C. 2004, c. 42 (governs duties and obligations of real estate agents)

Common client problems

Client ignored a demand letter

- client has no equity in property; quit claim may be possible
- client has some equity that may make refinancing possible
- client needs time to sell property
- client is in temporary financial difficulties because of strike or layoff

Client has received petition that asks for reduced redemption period and conduct of sale

- appearance has or has not been filed
- client is trying to arrange new mortgage
- property is or is not listed with real estate agent
- mortgagee is asking for Scale C costs (normal is Scale B)

Mortgagee is seeking possession and is threatening to evict client

- mortgagee is harassing client
- client seeks relief from forfeiture
- client has tenant on the property who does not want to move

Foreclosures checklist[9]

Although this checklist does not apply to bankruptcy and debt problems, you should always keep these issues in mind as you work through this list with your client.

Information about client(s) — (if not already recorded elsewhere): _____

_____

_____

Full name(s): _____

_____

Home address (or place where mail may be picked up if client has no fixed address):

_____

_____

Phone/fax/e-mail address (or number where client can pick up messages if client has no fixed address):

Phone _____ **Fax** _____ **E-mail** _____

Preferred method of contact? (include contact person's information if the client is homeless or has no phone):

☐ **Phone** ☐ **Fax** ☐ **E-mail**

Is it safe/secure to leave messages on voicemail? ☐ **Yes** ☐ **No**

Information about opposing party (conflicts check):

_____

_____

Is this the first or subsequent mortgagee (or both)?

☐ **First mortgagee** ☐ **Subsequent mortgagee** ☐ **Both**

Full name (including any applicable business or other name used): _____

_____

Address:

_____

_____

Phone _____ **Fax** _____ **E-mail** _____

[9] The BC Law Society has a practice checklist on their website at: www.lawsociety.bc.ca/practice_support/checklists/docs/E-1.pdf, which is a useful reference. However, it assumes that the lawyer is acting for the mortgagee.

Representative (e.g., author of demand letter, if applicable)

_____

Phone _____ **Fax** _____ **E-mail** _____

Are there other creditors who have made or may make claims? ☐ **Yes** ☐ **No**

If yes, record details:

_____

_____

Actions to consider (check relevant column)	Not applicable	Yes	No
1. Initial contact 1.1. If by phone, consider whether office interview is immediately necessary.			
1.2. Will client be better served elsewhere? If yes, where? (see Resources section on page 104)			
1.3. Obtain names for conflicts check.			
1.4. Identify exact nature of problem. Is it an emergency? (e.g., imminent court date or expiry of limitation period)			
1.5. Is there a limitation period? If yes, note in a diary or a bring-forward system, etc.			
1.6. Can client resolve with your summary advice or assistance?			
1.7. What attempts has client already made? (e.g., has client tried to renegotiate mortgage or find another lender?) Specify:			
1.8. What are client's expectations? (e.g., wants to reinstate mortgage, delay foreclosure, have conduct of sale, preserve credit rating, etc.) Specify:			
1.9. Have you obtained a signed and witnessed waiver of confidentiality to allow you to obtain disclosure from parties and witnesses?			

Actions to consider (check relevant column)	Not applicable	Yes	No
2. Stage of proceedings **Client has received a warning letter or a demand letter from mortgagee about missed payments** Client may be in temporary difficulty with some prospect of reinstating or renegotiating the mortgage. On the other hand (and more likely), client's unpaid mortgage is only one of several debts. **Your level of service** at this stage will consist mostly of legal information and advice. Very vulnerable clients may need your help to interpret the terms of the mortgage agreement and to list the financial information necessary for a financial counsellor to give informed assistance. You should also *be aware of and discuss other legal issues that may be relevant to client's circumstances* (for example, general debt matters and bankruptcy).			
2.1. What is the location and nature of the property? (e.g., single family dwelling, townhouse, condo, manufactured home, farm, etc.) (Frequently Asked Questions [FAQ] #8–10)			
2.2. What is the approximate market value of the property? (If client is not sure, ask for the latest assessed value.)			
2.3. Is the property in good or deteriorating condition?			
2.4. Is client still living in it or has he/she abandoned it or rented it to tenants?			
2.5. How much is currently owing on the mortgage if it were not in default?			
2.6. When was the last payment made?			
2.7. How many payments has client missed? (Usually lenders will not start foreclosure action until 3 payments have been missed.)			
2.8. What is the date of default (first missed payment)?			
2.9. What are the exact default provisions in the mortgage? (e.g., is there an acceleration clause?)			
2.10. If client has received a demand letter, what form does it take? (e.g., arrears only, acceleration and demand of whole balance, other?) When does time to pay expire?			
2.11. Is there a covenantor or guarantor for the mortgage?			
2.12. Is there a second or subsequent mortgage on the property? If so, how much? Are they in arrears as well?			
2.13. Are client's property taxes and insurance payments up to date? Other relevant payments (e.g., strata dues)?			

Actions to consider (check relevant column)	Not applicable	Yes	No
2.14. Are there any liens or judgments or *lis pendens* on the property?			
2.15. Does mortgage include a "basket clause" that could pull in credit card and line of credit debt?			
2.16. Approximately how much equity does client have in the property? (amount remaining after deducting mortgages and other registered charges)			
2.17. Is the amount of equity greater or lower than the market value of the property?			
2.18. Is there any realistic prospect that client will be able to make mortgage payments in future? (e.g., client is still working, can borrow from relatives, can take in a boarder or rent a room, can reduce expenses, etc.)			
2.19. Is there still an opportunity to negotiate a reinstatement of the mortgage? If yes, consider contacting the mortgagee on client's behalf if there is imminent danger of service of a foreclosure petition. If client has several other debts, consider referring client to the Credit Counselling Society (see FAQ #1) (See Resources section in Chapter 3: Debt and Collections on page 87.)			
2.20. If no, is there a realistic prospect of obtaining a new mortgage from another lender in order to pay off the existing mortgagee? (Consider offering client a list of reputable lenders in client's location.)			
2.21. Is client willing to sell the property (assuming it is worth more than the mortgage debt)?			
2.22. Has client indicated a wish to "do nothing" and let the mortgagee do their worst? If yes, advise about the downside of this course of action — no voice in court, little notice of need to move out, earlier move than may be necessary.			
3. Client has been served with a foreclosure petition This is often the first time that client will seek outside help. Usually they are in default for at least 3 months. The real remedy sought by mortgagee(s) is sale of the property as quickly as possible. If this happens before the Order Absolute, the mortgagee can sue for any shortfall under the covenant to pay. **Your level of service** at this stage would be to assist with filing an appearance and, if appropriate, a response with affidavit attached. If the client is especially vulnerable and unable to self-represent, and if there is a substantial benefit available to him or her, you should consider attending court to argue the client's case on a limited representation basis (assuming long-term representation is not possible).			

Actions to consider (check relevant column)	Not applicable	Yes	No
3.1. See paragraphs 2.1 – 2.16 above.			
3.2. What was the date of service of the Petition?			
3.3. Was it properly served? (SCR 11 — personal service)			
3.4. Is the venue correct? (*Law & Equity Act*, s.21(2)) (see FAQ #2 and #3)			
3.5. Has client entered an Appearance? If not, is there still time to meet the 7-day deadline? (Rule 14(3)). Note that Rule 14(4) allows for a late entry of an Appearance.			
3.6. Contents of Petition: 3.6.1. Does client dispute the amount owing in the Petition? Is the information in the Petition consistent with the information in the mortgage agreement? 3.6.2. Is mortgagee requesting a redemption period shorter than 6 months? If so, are they arguing abandoned or wasting property; unlikelihood of redemption? (FAQ #4) 3.6.3. Is mortgagee asking for conduct of sale? 3.6.4. Is mortgagee suing for judgment on the covenant? 3.6.5. Is anyone else named as a respondent in the Petition? (e.g., guarantor, tenant, or other charge holders) 3.6.6. Is the mortgagee asking for costs that are too high? *(Law & Equity Act*, s.20(2)); SCR — Appendices B & C; Foreclosures usually come under Scale A — $60 per unit			
3.7. Do any of the following responses have a likelihood of success? • Request an accounting before the Registrar re: dispute about arithmetic. • Provide evidence of income that will allow client to make future payments under the mortgage or find another lender. • List the property with a real estate agent as evidence of good faith efforts to pay off the mortgage and maximize sale price. (Mortgagee is not usually interested in the highest price, just an amount that will cover the debt.) • Ask for a delay of judgment on the covenant in order to preserve credit rating and find another lender. • Fight a request for shortened redemption period by providing evidence from realtor(s) or appraiser that price of the property is not likely to drop. • Fight allegations that client is neglecting the property by showing evidence of good maintenance (repair bills, etc.).			
3.8. Has any other mortgagee asked for conduct of sale?			

Actions to consider (check relevant column)	Not applicable	Yes	No
4. Mortgagee has obtained an Order Nisi, the property has not been sold, and the redemption period is still running			
4.1. Has the court agreed to a shortened redemption period, or granted the mortgagee or subsequent charge holder an order for conduct of sale? (FAQ #4)			
4.2. Has there been an offer to purchase the property?			
4.3. If yes, has the mortgagee sought court approval? Are there any grounds for client to fight an order approving sale? (e.g., client wants higher price, later possession date, continuation of redemption period)			
4.4. Is there any merit in asking for the Order Nisi to be set aside or to apply for an interlocutory order for a longer redemption period, conduct of sale, etc.? (see 3.6 and 3.7, above) (FAQs #5 and 6)			
4.5. If no and client is still living in the property, advise client how to co-operate with mortgagee so that they can continue to stay there while the property is being sold.			
4.6. Has client abandoned the property? If yes, there is little alternative but to let the process run its course unless there is some prospect of selling for a higher price than mortgagee intends to list it for.			
5. **Miscellaneous issues** One or more of the following may be relevant:			
5.1. Are any residential tenants occupying the property? (see *Residential Tenancy Act*, S.B.C. 2002, c. 78, s.94) (FAQ #11)			
5.2. Is the property under foreclosure a manufactured home? (FAQ #8)			
5.3. Is the client a farmer, as defined by the *Farm Debt Mediation Act*, S.C. 1997, c. 21? (FAQ #9)			
5.4. Has there been an Order for Sale? (FAQ #7)			

Issues applying to First Nations clients

This is a complicated legal issue and requires special knowledge of the *Indian Act* and the various treaties that govern the nature of land ownership within First Nations land. You should seek advice from a lawyer who practises this area of law. For an overview of these issues, see the LSS publication, *Aboriginal People and the Law in British Columbia,* Chapter 6, (2006) which is available at: www.lss.bc.ca/assets/pubs/aboriginalpeopleandlaw.pdf.

The following is a summary from *Aboriginal People and the Law in British Columbia*:

Title to reserve land is held by the federal government for the use and benefit of the band. The general rule is that because the band or a band member can only legally *possess* reserve lands — usually under a "Certificate of Possession" — banks are not allowed to take possession of the land if the mortgagor fails to make their mortgage payment. For this reason, money used to finance construction of housing on reserve is subject to a Ministerial Guarantee by the Minister of Indian Affairs.

Because new treaties come into force and some bands no longer come under the *Indian Act,* always check what new provisions may be in effect with respect to ownership of real estate on First Nations land.

To determine if the land falls under the *First Nations Land Management Act*, S.C. 1999, c. 24, see the website for the First Nations Land Management Resource Centre at: www.fafnlm.com. Note that some bands, such as the Sechelt band, have adopted the Torrens system.[10]

[10] For more detailed information, see the BC Law Society's Foreclosure Practice Checklist.

Frequently Asked Questions (FAQ)

1. **How can you facilitate negotiations with the mortgagee(s)?**

   If you see a lot of foreclosure clients, it is useful to get to know the applicable staff of your local lending institutions. This may reduce the need for court appearances, even if their head office is already handling the case.

2. **My property is in Surrey, but the mortgagee's petition says my case will be heard in the Vancouver courthouse. Why do I have to go there rather than New Westminster?**

   Although your closest courthouse is in New Westminster, for the purposes of a foreclosure action, the Vancouver and New Westminster registries are deemed to be the same registry. So the mortgagee has a choice of starting the foreclosure action in either one.

3. **There is no Supreme Court anywhere near my property. Where will I have to go if the mortgagee starts a court action to foreclose?**

   The mortgagee may start an action in any court registry located in the Judicial district where your property is situated (*Law & Equity Act*, R.S.B.C. 1996, c. 253, s.21(2)(b)). Judicial districts (*Supreme Court Act,* R.S.B.C. 1996, c. 443, s.8) are constituted by counties as defined in the *County Boundary Act*, R.S.B.C. 1996, c. 75. You may find a map of the 8 provincial Judicial districts on the Courthouse Libraries BC website at: www.bccls.bc.ca/pdf_files/jdistricts2002.pdf.

4. **When will the mortgagee be successful in obtaining an order for a shortened redemption period** (less than 6 months)?

   The 6-month period may be varied if the property is in disrepair and deteriorating and the client has no realistic prospects of paying what is due or selling.

5. **When may the mortgagor be granted a longer redemption period?**

   This is very unusual and will rarely be granted unless the equity in the property is substantial and there is no risk to the mortgagee's security.

6. **The redemption period is going to run out soon. Is there any way I can get it extended?**

   It is very unlikely that you will get an extension unless you can show that there is a reasonable prospect that you will soon be able to pay the amount owing and that there is enough value in the property to act as security for that amount.

7. **What is the effect of an Order for Sale?**

   It takes away the mortgagor's right to redeem. If your client has already listed the property and a sale is likely, you should fight against a short redemption period. If there is money still owing after the sale, the mortgagee may sue on the covenant and obtain a judgment against the client. Many mortgagees will elect to rely on the judgment rather than asking for an Order Absolute because the latter has the effect of extinguishing the personal covenant and any judgment taken on it.

8. My property is a manufactured home. Can I remove and sell it if I can't make my mortgage payments for the land it is on?

The answer depends on whether the home is considered to be a chattel or a fixture. If it is the latter, removal of it from the land could, by itself, be construed as a breach of the mortgage. Whether it is a fixture depends on the degree of connection to the land — a matter of fact in each case. For example, see *The Toronto-Dominion Bank v. Zaleschuk,* 1996 CanLII 880, where a manufactured home attached only by wiring and plumbing was found to be a chattel. To be included in a real estate mortgage, the manufactured home must be deregistered (if previously registered) from the Manufactured Home Registry. (See s.5(1), Manufactured Home Regulation, B.C. Reg 441/2003, under the *Manufactured Home Act*, S.B.C. 2003, c. 75 — *Ferrero v. Bowater Pulp and Paper Canada Inc.,* 2005 BCSC 675 (CanLII).) A manufactured home that has been exempted from registration under s.21 is deemed to be part of the land. Note that a manufactured home that is not covered under the real estate mortgage may be subject to a lien under the *Personal Property Security Act*. (**Note**: According to s.23 — a manufactured home located in a manufactured home park is not part of the land unless there is a written agreement to the contrary filed in the Manufactured Home Registry.)

9. I have heard that there are special rules for farms and farmers. What are they?

Farmers who cannot pay their farm mortgage may be covered by the federal *Farm Debt Mediation Act*, S.C. 1997. Under ss.5 and 6, insolvent farmers may apply to an administrator for a stay of foreclosure proceedings, a review of their financial affairs, and mediation to assist in reaching a settlement with creditors. This does not mean that foreclosure is impossible, but it provides more time to find alternative solutions.

10. I owe money to my strata corporation. How does this affect my mortgagee?

The strata corporation's common expenses — but not penalties or fines — have priority over mortgages. These expenses may include special assessments for repairs and maintenance.

11. I have tenants in my basement suite. Does the *Residential Tenancy Act* apply if they have to move?

If your tenants were in the home when the foreclosure action started, they should have been served with the Petition and named as respondents. Section 94 of the *RTA* states the following: "Despite any other enactment, no order of a court in a proceeding involving a foreclosure, an estate, or a matrimonial dispute, or another proceeding that affects possession of a rental unit is enforceable against a tenant of the rental unit unless the tenant was a party to the proceeding." If they became tenants after the Order Nisi, they don't have to be served for the mortgagee to obtain possession (*CIBC v. Garneau* (1986), 1 B.C.L.R. (2d) 53 (S.C.)). Tenants must obey applicable terms in an Order for Conduct of Sale, such as allowing the realtor access to show the property. Once the property is sold, they will have to move out by possession date unless the buyer agrees to let them stay. They will also have to move out if an Order Absolute is made.

12. I own a leaky condo and have been assessed $30,000 for repairs. I can't pay this plus the mortgage (which is Canadian Mortgage and Housing Corporation [CMHC] approved). What if I walk away and allow the mortgagee to foreclose?

The mortgagee will likely seek Conduct of Sale. If the property does not sell in 90 days, CMHC will most likely offer to purchase the condo for the latest appraisal price. CMHC will go after you for the

balance owing after payment of the $30,000 and the mortgage (information from www.bankruptcycanada.com/leakycondo1.htm).

Related Issues

- **Bankruptcy**
- **Consumer (e.g., unscrupulous mortgage brokers, unlawful attempts at possession)**
- **Debt and collections, including *Personal Property Security Act (PPSA)* and other lien matters connected with foreclosure**
- **Family law**

Resources

Internet

Unlike other topics in this primer, there are few Internet resources on foreclosure.

- ***Can't Pay Your Mortgage?*** is a resource for people facing foreclosure and is available on the Legal Services Society website at: www.lss.bc.ca/assets/pubs/cantPayYourMortgage.pdf.
- **CBA Dial-A-Law script on foreclosure** can be found on the Canadian Bar Association's website at: www.cba.org/BC/public_media/housing/415.aspx.

Manuals (printed)

- ***British Columbia Real Estate Guide*** (CCH Canada Ltd.) — Loose-leaf service available at courthouse and other libraries.
- ***Foreclosures, 2009*** (CLE Society of BC) — A comprehensive review of foreclosure law from the viewpoint of lawyers representing the mortgagee.

Individuals and organizations

See lawyers with preferred areas of practice (foreclosure) in the CBA BC Branch lawyer directory. Contact authors of the latest CLE manual for advice but keep the case hypothetical and do not identify the morgagee(s) as this could place the author in a conflict of interest and prevent him or her from giving advice.

Practice advisors

- **LawLINE staff at Legal Services Society**
  Phone: 604-408-2172 or 1-866-577-2525 (call no charge)

Additional sources of assistance

- **Access Justice (pro bono clinics)**
  Phone: 604-878-7400 or 1-877-762-6664 (to book appointment)
  Location: Various
  Website: www.accessjustice.ca. Free summary legal advice and help with court forms by volunteer lawyers

- **Civil Duty Counsel at Supreme Court** (operated by Pro Bono Law of BC)
  Contact: Amina Rai, Civil Chambers Pro Bono Duty Counsel Project Manager
  Phone: 604-893-8932 (to find out if client would be eligible)
  E-mail: arai@probononet.bc.ca
  Website: http://probononet.bc.ca
- **Salvation Army (pro bono clinics)**
  Phone: 604-694-6647 (for locations to book appointment)
  Location: Various
  Website: www.probono.ca
  Free summary legal advice and help with court forms by volunteer lawyers.

Add your local resources here:

Limitation periods and time considerations in foreclosure actions[11]

Issue	Source	Applicable time periods
Deadline for filing appearance	SCR 14(4), (5)	7 days from receipt of petition; it may be extended
Deadline for filing a response to petition (See Supreme Court Rules for other applicable civil procedure deadlines.)	SCR 10(5), (6)	Response on Form 124 (on or before the 8th day after the date on which the respondent entered an appearance)
Usual period between initial default and start of foreclosure proceedings		3 months (3 missed mortgage payments)
Usual redemption period		6 months following Order Nisi

[11] This list is not comprehensive. It contains only those issues most often referred to by front-line service providers.

Mortgagor's (Debtor's) Options in Foreclosure Proceedings[12]

Unable to continue making payments
Missed 1 or more payments
Lender has sent a demand letter
Lender has delivered a Foreclosure Petition

Do nothing

Consequences:

- no voice in court
- little notice of need to move out
- earlier move than necessary

Solve the problem

Possible alternatives:

- refinance with lower payments and/or longer amortization period (but check cost of doing so first)
- obtain new mortgage with another lender and pay off original mortgagee
- sell the property if enough equity in it to make this worthwhile

Go to court

If Petition served:

1. file Appearance within **7 days** of receipt
2. check accuracy of petition
3. choose defence or response to petition including asking for: conduct of sale; longer redemption period; lower legal costs; access to property
4. deliver Response and Affidavit
5. obtain some legal advice and watch other foreclosure actions
6. prepare an outline of argument and use it when speaking to the judge

[12] Adapted from a chart prepared for the LSS publication *Can't Pay Your Mortgage?*

Chapter 5: Bankruptcy and Insolvency

Note: *Always check for changes in the law that may have occurred since this primer was published.*

The federal *Bankruptcy and Insolvency Act* (*BIA*) is a very detailed statute and the subject of extensive case law. It is accompanied by numerous regulations and administrative directives. This primer is designed to give you enough information to deliver initial advice and summary service with respect to the most common problems encountered by clients with low incomes who are, or are about to become, insolvent. It should be used in conjunction with Chapter 3: Debt and Collections in this primer.

The most common causes of personal bankruptcy are:

- pay cuts and outright job loss,
- marriage breakdown, and
- inability to work due to illness or injury.

This means that you may also be confronted with clients' legal issues such as wrongful dismissal and employment insurance, divorce and separation, and denial of disability insurance or CPP benefits. There is often an urgent need to determine which remedy under the *BIA*, if any, is appropriate for a particular client.

The *BIA* actually incorporates 3 remedies for those considering bankruptcy:

- assignments in bankruptcy (either voluntary or forced by creditors),
- proposals to pay so much on the dollar so as to avoid bankruptcy, and
- orderly payment of debts (OPD).

Note: *Although provisions for OPD are still included in the BIA, the program previously provided by the provincial government is no longer available in BC.*

There is no such thing as "do your own bankruptcy." The law requires debtors to use the services of a licensed trustee for assignments and proposals. Before advising clients to consult a trustee, it may be appropriate to refer them to a debt counselling service to find out whether there is any realistic prospect of satisfying creditors without resorting to *BIA* remedies.

Governing statutes, regulations, and rules

- ***Bankruptcy and Insolvency Act*****,** R.S.C. 1985, c. B-3**.** Bankruptcy and Insolvency General Rules, C.R.C., c. 368; Eligible Financial Contract General Rules (*Bankruptcy and Insolvency Act*), SOR/2007-256; Orderly Payment of Debts Regulations, C.R.C., c. 369 (latter not applicable in BC) — as amended. In addition, the Superintendent of Bankruptcy publishes numerous policy directives describing the operation of the *BIA*, which is available on the Superintendent of Bankruptcy website (see Resources section on page 123).
- ***Court Order Enforcement Act***, R.S.B.C. 1996, c. 78 (*COEA*) and Court Order Enforcement Exemption Regulation*,* 28/98
- Supreme Court Rules, B.C. Reg. 221/90 (*Court Rules Act*, R.S.B.C. 1996, c. 80)

Debts that survive discharge from bankruptcy (BIA, section 178)

When discussing the advisability of bankruptcy with a client, it is essential that you know what debts will survive after discharge. For example, if the only significant debt is arrears in child support, there will be little point in declaring bankruptcy because the debt will survive. In fact, your client could be worse off than before. Pursuant to Section 178(1), the following debts are not forgiven following discharge:

- fines, penalties, restitution orders imposed by a court in respect of an offence or any debt arising out of a recognizance or bail
- civil damages awarded by a court in respect of battery or sexual assault, or wrongful death resulting from these
- arrears in child or spousal support payments
- debts or liabilities arising from the bankrupt's fraud, breach of fiduciary duty
- debts to a creditor that were not disclosed to the trustee in bankruptcy where the creditor had no knowledge of the bankruptcy
- student loans where the date of bankruptcy occurred:
    - before the bankrupt ceased to be a student
    - within 7 years after the date on which the bankrupt ceased to be a student

Section 178(1.1) gives the court discretion to discharge the bankrupt from the student loan debt at any time after 5 years of ceasing to be a student, if the bankrupt:

- has acted in good faith in connection with their liabilities under the debt; and
- has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

This hardship provision is available to ex-students who became bankrupt both before and after July 7, 2008.

Common client problems

Note: *For those who have already declared bankruptcy, the most common client problems are connected with the discharge from bankruptcy.*

Risks to clients may range from minor to severe, depending on:

- number of creditors
- short and long-run circumstances of client
- nature and extent of client's income and assets[13]

[13] If creditors have ceased pestering the client (see Chapter 3: Debt and Collections on harassing creditors), there is often little point in putting through the hoops of bankruptcy those clients on welfare who have little or no assets and few prospects of gaining any in future. However, always check their circumstances carefully; for example, for the likelihood of inheritances and other changes of financial circumstances. If bankruptcy is a helpful option and the client cannot find a trustee, consider pressuring the Superintendent's office for a trustee under the Bankruptcy Assistance Program, which receives little publicity and is therefore underutilized. (See Bankruptcy and Insolvency Checklist, Item 2.12 and Frequently Asked Questions [FAQ] #12)

- *delay in declaring bankruptcy* — may result in loss of assets that would otherwise be exempt (e.g., car, work tools, furniture, equity in family home)
- *inability of impoverished client to find a trustee willing to act* — may result in continuing harassment by creditors who are unwilling to accept that client is on welfare, OAS, GIS, etc.
- *errors in calculating income or decrease in income* — may result in mandatory payments to the trustee that are so high as to cause hardship
- *opposition to a discharge from bankruptcy* — may leave a client in a legal limbo due to inability to borrow, set up a business, or obtain resources for education and training

Bankruptcy and Insolvency Checklist

Common abbreviations: **BIA =** Bankruptcy and Insolvency Act **DIR =** Superintendent of Bankruptcy directives **Rules =** General BIA Rules **SOB =** Superintendent of Bankruptcy ***Note:*** *Section numbers refer to BIA unless otherwise indicated.*			
Actions to consider (check relevant column)	**Not applicable**	**Yes**	**No**
1. Initial contact 1.1. If by phone, consider whether office interview is immediately necessary.			
1.2. Will client be better served elsewhere? If yes, where? (see Resources section on page 123)			
1.3. Obtain names for conflicts check (usually list of creditors).			
1.4. Identify exact nature of problem. Is it urgent? (e.g., discharge hearing date imminent)			
1.5. Is there a limitation period or relevant time period? If yes, note in a diary or a bring-forward system, etc. (see Bankruptcy Issues and Important Timelines chart on page 125)			
1.6. Can client resolve with your summary advice or assistance?			
1.7. What attempts has client already made? (e.g., client has already received advice from the Credit Counselling Society, has tried and failed to negotiate a settlement with biggest creditors, or has been unable to reduce payments of a student loan) Specify:			
1.8. What are client's expectations? (e.g., wants to end stress from debt collectors, wants informed advice about whether to go bankrupt, needs help preparing statement of affairs and other documents required by trustee, wants absolute discharge, etc.) Specify:			
1.9. Have you obtained a signed and witnessed waiver of confidentiality to allow you to obtain disclosure from parties and witnesses?			

Actions to consider (check relevant column)	Not applicable	Yes	No
2. Stage of proceedings **Client unsure about going bankrupt** Client may have multiple debts or one huge one that they can't pay. For some debtors with previously middle to high income, coping skills for living in poverty are completely lacking. Creditors are banging on their door. Should they just give up and go bankrupt or should they see a credit counsellor? **Your level of service** at this stage will consist mostly of legal information and advice. Very vulnerable clients may need your help to identify and assemble the documents and other evidence required by the trustee in bankruptcy.			
2.1. Is client insolvent? (s.2 definition; Frequently Asked Questions [FAQ] #1)			
2.2. Is there still an opportunity to negotiate or mediate a settlement with creditors without involving a trustee in bankruptcy?			
2.3. If no, has client already contacted the SOB or a trustee? (s.13.1; FAQ #2)			
2.4. If yes, what is the name and contact information for the trustee (if applicable)?			
2.5. Would a Proposal in Bankruptcy be feasible or desirable? (ss.66.11–66.40; DIR 1R2; FAQ #3)			
2.6. Does client have property that is exempt under *BIA*? If yes, list: (*COEA* exemption regulation applies); *BIA* s.67(1); Rule 59.2; DIR 22; FAQs #4, 6, 7)			
2.7. Does client have student loans? (ss.178; 178(1.1); FAQ #5)			
2.8. Does client have any property that is subject to liens, such as secured property under the *Personal Property Security Act*, *Builders' Lien Act*, etc.? If yes, list: (FAQ #6)			
2.9. If a business bankruptcy, has client signed a personal guarantee for loans? (FAQ #8)			
2.10. Are there any joint debts with a spouse, family separation issues, etc? (FRA triggering events; ss.155(f); 66.12(1.1); DIR 2R; FAQs #9 and 10)			

Actions to consider (check relevant column)	Not applicable	Yes	No
2.11. Can client afford the cost of going bankrupt? (ss.128, 129; DIR 5R; FAQs #11 and 12)			
2.12. If not, would client qualify for access to the Bankruptcy Assistance Program (BAP)? (FAQ #12)			
3. Client has been forced into or has chosen to go bankrupt It is extremely unusual for creditors to force the debtors you will see into bankruptcy unless there are significant assets at stake. This section deals with voluntary bankruptcy. **Your level of service at this stage** would be mainly advice and referral, but there may be a need to assist some clients by speaking with or writing to the trustee to clarify and perhaps resolve a problem or dispute.			
3.1. Is client having problems finding a trustee because of lack of funds? (DIR 11; FAQ #12)			
3.2. Has client organized all the information and documents required by the trustee? If not, do they need help organizing this material? (s.158; DIR 16R — Statement of Affairs; DIR 7 — Credit Cards; DIR 7 — Inventory of Estate Assets; s.68(1); DIR 11R — Surplus Income; FAQ #13)			
3.3. Has client been for counselling as required by the *BIA*? If not, why not? (Rule 115; FAQ #14)			
3.4. Is client having problems paying the amount designated as surplus income? If so, have they attended mediation yet? (s.68, 170.1; DIR 11R — Surplus Income; FAQs #15 and 16)			
3.5. Has client come into any money since declaring bankruptcy; for example, an inheritance, lottery winnings, tax refund? (FAQ #17)			
3.6. Has client transferred any property or paid any creditors in a way and at a time that could be considered a fraudulent conveyance or preference? (s.91(1)(2); FAQ #18)			
3.7. Is trustee holding up a discharge because fees have not been paid in full? (ss.27(2), 37, 39(2); FAQ #19)			

Actions to consider (check relevant column)	Not applicable	Yes	No
4. Client is having difficulties obtaining a discharge In some cases, creditors will oppose a discharge. More commonly, the trustee will oppose a discharge on the ground that the client has not complied with disclosure requirements, has not paid mandatory contributions to the bankrupt's estate, or has otherwise acted in a way that shows that rehabilitation is unlikely. **Your level of service** at this stage might well include representation in court if your mandate allows for this. If not, you should be prepared to assist in the drafting of court documents, including affidavits, and in the preparation of legal arguments that will help the client. If the trustee (or creditor) is willing to compromise — often unlikely — you should consider negotiating for an acceptable conditional discharge.			
4.1. Is client likely to get an automatic discharge without difficulty? If yes, when? If no, why? (ss.168.1, 170(1) — Trustee report; DIR 12 — Terms of Discharge; FAQs #20 and 21)			
4.2. Is trustee opposing discharge by imposing demanding onerous conditions that client can't or won't meet? (ss.190, 170.1; FAQ #22)			
4.3. Is any creditor opposing discharge?			
4.4. Has there been any mediation relating to their opposition?			
4.5. Is a court hearing inevitable? (FAQs #23 and 24)			
4.6. If yes, are there grounds for adjourning it?			
4.7. What is the most likely outcome of a discharge hearing? Absolute, conditional, suspended, or refused discharge? (FAQ #24)			
5. Client has been or is about to be discharged and is concerned about future financial affairs This is not strictly a legal matter, but you may want to provide some summary service and a referral where client can obtain more detailed financial advice.			
5.1. Does client want to know how bankruptcy affects their credit rating? (FAQ #25)			
5.2. Do they want to know how to re-establish a good rating? (FAQ #26)			

Issues applying to First Nations clients

This is a complicated legal area and requires special knowledge. For an overview, see the LSS publication *Aboriginal People and the Law in British Columbia*, Chapter 1, (2006), which is available on the LSS website at: www.lss.bc.ca/assets/pubs/aboriginalpeopleandlaw.pdf.

The following is a summary from *Aboriginal People and the Law in British Columbia*, which includes case law and statute citations:

The general laws of bankruptcy apply to First Nations people with a number of exceptions and qualifiers:

- The real property of an "Indian," including cultural property that is situated on reserve, is protected from bankruptcy (section 29, *Indian Act*).
- Real and personal property situated on reserve cannot be subject to charges, mortgages, etc., in favour of anyone other than an "Indian or a band."
- Property situated off reserve is included in the bankrupt's estate. This includes wages deposited in a bank account off reserve for work done on reserve.
- Property whose main location is on reserve but is sometimes used off reserve (e.g., a vehicle) is not included in the bankrupt's estate.
- Cultural property, including objects that have sacred, ceremonial, historical, traditional, or cultural importance, are not included unless it has been manufactured for sale by "Indians" section 91, *Indian Act*.
- The value of the above exempt assets, and the client's ability to earn income from them, may be taken into consideration in determining whether to discharge the bankrupt.

Frequently Asked Questions (FAQ)

Before an act of bankruptcy

1. **I've told creditors I can't pay; the bank refuses to lend more money and won't consolidate my debts. Should I declare bankruptcy?**

   If you owe $1000 or more, can't meet your payments when they become due, have fallen into arrears, and your assets are worth less than your debts, you should consider bankruptcy. But, if you have not already done so, you should talk to the Credit Counselling Society to find out whether they can help you reach a workable arrangement with your creditors before taking further steps. See Chapter 3: Debt and Collections (s.2 definitions "insolvency," *BIA*, RSC 1085, c.B-3).

2. **The Credit Counselling Society can do nothing further and has recommended bankruptcy. Can I go bankrupt on my own? How do I start the process?**

   You can't go bankrupt without hiring a trustee. Trustees are licensed by the Superintendent of Bankruptcy. For names of BC trustees, see www.bankruptcy-canada.ca or www.bankruptcycanada.com (s.13.1).

3. **Are there still ways of avoiding bankruptcy?**

   With the assistance of the trustee, you may be able to avoid bankruptcy by making a proposal to your creditors to pay all or part of your debts over time. If you are an individual and owe less than $75,000[14] (not including the mortgage on your home), you may be able to make a **consumer proposal**. If your creditors accept it, they will have to stop any legal actions they have started against you and, as long as you comply with the proposal, you will avoid bankruptcy. Performance of duties under the proposal must be completed within 5 years (s.66.12(5)). If the creditors reject the proposal, you will go immediately into bankruptcy (Division II, ss.66.11–66.40. See also DIR 1R2 — Counselling in Insolvency Matters).

   Note: Your employer is **not allowed to suspend or terminate you** on the sole ground that you have filed a proposal in bankruptcy (s.66.36).

   If your debts are higher, or you have a business that is insolvent, you may be able to make a Division I proposal (Division I, ss.50–66).

4. **Am I allowed to keep anything if I go bankrupt**?

   In BC**,** you are allowed to keep equity in:

   - a home in Greater Vancouver and Victoria: $12,000; in the rest of BC: $9,000.
   - household items: $4,000
   - a vehicle: $5,000 (but if you are behind in child support payments, this drops to $2,000)
   - work tools: $10,000
   - all essential clothing, and medical and dental aids
   - RRSPs, RRIFs, and DPSPs (deferred profit-sharing plans) — subject to limitations (see FAQ# 7).

[14] Legislation to increase this to $250,000 has been passed but not yet proclaimed as of writing this primer. You should check its status before advising clients. See Bills, c. 47 (2005) and c. 36 (2007).

The onus of having an asset declared exempt from execution lies with the bankrupt at his own expense (s.67(1); Rule 59.2; DIR 22 — Realization of Estate Assets).

5. Is it worth my while to go bankrupt because I can't repay my student loans?

If you have few debts other than your student loans and you have only recently ceased to be a student, it may not be worth your while to declare bankruptcy right now as you won't be eligible for a discharge for 7 years following the date you stopped being a student. On the other hand, if you have several other debts and you stopped being a student 4 or more years ago, bankruptcy may be your best solution (see page 110 for more about student loans — s.178, including hardship provisions in s.178(1.1).)

6. Although I have paid off part of the price of some exempt assets, others still have liens on them. Can I keep these too?

If the creditor has security under the *Personal Property Security Act (PPSA),* they have a right to repossess and sell exempt assets even after you go bankrupt. If you have paid off more than 2/3 of an item, the creditor must have a court order before seizure. If you owe unpaid income tax, you should search the PPSA registry to see whether Canada Revenue Agency (CRA) has registered a claim. You will need more detailed advice if your principal debt is unpaid tax.

7. For some years I was unable to make RRSP contributions. I got a large tax refund last year and used it to max out my RRSP allowance. What will happen to that money?

Although RRSPs are now protected under the *BIA*, any contributions made during the 12 months prior to the date of bankruptcy will be clawed back and used by the trustee to pay creditors (s.67(1)(b3)).

8. Will RESPs and RDSPs be treated the same way as RRSPs?

Although the Senate recommended that RESPs should be treated the same way as RRSPs and RRIFs, RESPs are not protected. You either have to hand them over to the trustee or buy them back (if that is possible). At the moment, RDSPs are in the same position as RESPs and are not exempt under the *Court Order Enforcement Act*. This may change at any time, so check with a bankruptcy expert for current law.

9. A friend and I incorporated a small business and it is the business that is insolvent. I've been told that I am personally protected from bankruptcy. Is that true?

If you are personally solvent, you may be protected as long as you did not sign a personal guarantee for any business loans, lines of credit, etc. (It is unusual for lenders to forego the extra security of a guarantee.)

10. **My spouse is not insolvent but our relationship is almost on the rocks. Does he have to go bankrupt too?**

    No. Bankruptcy severs real estate joint tenancies and the trustee would step into your shoes. If property is sold, the trustee obtains your portion for paying creditors; your spouse would keep the money that represents his share. If there is a *Family Relations Act* triggering event prior to bankruptcy or at any time prior to discharge, the trustee obtains a vested half interest in family assets. The non-bankrupt spouse keeps their half interest.

    If they have a credit card that is supplemental to yours, they may be responsible for that debt.

11. **My spouse and I have many joint debts and we may both have to go bankrupt. Can we file a joint assignment in bankruptcy?**

    If your debts are substantially the same, you may be allowed to file a joint consumer proposal and/or make a **joint assignment**. Your assets and debts will then be treated as 1 estate. This simplifies paperwork as you will need only 1 statement of receipts and disbursements (s.155(f); 66.12(1.1); DIR 2R — Joint Filing).

12. **How much does it cost to go bankrupt and how can I pay when I'm broke?**

    The first meeting with the trustee where he or she reviews your financial situation and discusses options is usually free.

    If you consult a trustee for guidance in solving your financial problems, you will have to pay a reasonable consultation fee. If you decide to go bankrupt within 60 days of making this payment, this money will be considered as part of the bankruptcy process and will be deposited in the estate bank trust account.

    Fees for a simple bankruptcy — summary administration — can be as much as $2,000. You may also be responsible for various court costs. Depending on your circumstances, the trustee may require an up-front payment or may agree to be paid in monthly installments. Alternatively, the trustee may ask for a guarantee from one of your friends or relatives. If you are unemployed and don't have enough assets to pay the fee, the trustee is entitled to refuse to assist you.

    See General Rules (s.128 covers **trustee fees and disbursements** for summary administration, s.129 covers **costs of a consumer proposal);** DIR 5R — Third Party Deposits and Guarantees.

Client has started the bankruptcy process

13. **I have seen 1 trustee, but he says he can't help me because there is not enough money to pay his fee. What can I do?**

    You can go to the office of the Superintendent of Bankruptcy and ask for a referral to a trustee who may be willing to help you under the **Bankruptcy Assistance Program (BAP).** If 2 trustees turn you down (or 1 turns you down, in the case of an area that has only 1 trustee participating in the BAP), the Superintendent's office will designate a trustee for you. This program is not widely advertised or used but could be a useful last resort for you (DIR 11 — Bankruptcy Assistance Program).

14. What does the trustee do and what do I have to do?

The trustee will carry out an **assessment of your financial situation** prior to filing an assignment. You will be given an assessment certificate. The trustee may identify a need for non-financial counselling but such counselling is not mandatory (DIR 6R — Assessment).

If a proposal is not desirable, the trustee will help you make an assignment in bankruptcy. You will have to provide a **Statement of Affairs** setting out all of your assets, debts, income, and expenses (s.158; DIR 16R — Preparation of the Statement of Affairs). The trustee notifies your creditors about the bankruptcy. At that point, they can no longer demand money from you but must deal with the trustee. For a comprehensive bankruptcy application form, see www.bankruptcycanada.com/applicat1.htm.

You turn all of your assets over to the trustee — including **credit cards**. The trustee will make an inventory of assets (DIR 3 — Credit Cards; DIR 7 — Inventory of Estate Assets).

Depending on your income, you may have to make monthly payments to the trustee for distribution to creditors (DIR 11R — Surplus Income).

15. My trustee says I have to go for counselling. Is this true? Why?

In order to be eligible for a discharge or complete a consumer proposal, you must attend **2 counselling sessions** as part of the bankruptcy process. This can be individual or group counselling. The first must be held between 10 and 60 days following bankruptcy; the second must be held no later than 210 days following bankruptcy. The purpose is to prevent you from going bankrupt again and to give you a better understanding of managing your financial affairs. You will have to pay a fee (Rule 115).

16. I am having a tough time making ends meet, but my trustee says that I have to pay some of my earnings to him. Is this correct?

The Superintendent of Bankruptcy sets out standards derived from Statistics Canada Low-Income Cut-Offs. These are updated each year to take into account rises in the cost of living. The trustee calculates how much is left over (if any) based on your family size and family income (after deductions) minus a list of allowable expenses such as support payments, medical expenses, etc. At least 50% of this surplus is payable to the trustee (s.68, 170.1; DIR 11R — Surplus Income).

17. I work on commission and disagree with the trustee about how much I owe. What can I do?

If you can't reach an agreement about how much surplus income you must pay, your trustee **must** request mediation. A creditor may request mediation in these circumstances. If there is no agreement at mediation, you may have to go to court. A useful brochure, *All about Bankruptcy Mediation* is available on the Office of the Superintendent of Bankruptcy Canada (OSB) website (see the Resources section on page 123) (s. 68(6)–(11).)

18. My father died and left me an inheritance. Can I keep it?

All property acquired after declaration of bankruptcy and before discharge goes to the trustee for the benefit of creditors. This includes lottery winnings, inheritances, tax refunds, and employment bonuses.

19. I put the family home into my spouse's name 5 years ago to protect her if my business was sued. My trustee says this could be a fraudulent conveyance. What does this mean?

Settlements of property:

- within 12 months prior to bankruptcy are void
- within 5 years, if the trustee can prove that at the time of the settlement you were unable to pay all of your debts without that property, are also void

20. Can my trustee delay his report and hold up my discharge because I haven't paid all of his fee?

Once the trustee has agreed to administer the estate, he or she must usually complete the process. Payment is supposed to be made out of the proceeds of the estate, not directly from the bankrupt. The maximum fee is 7.5% of the amount remaining after claims of secured creditors have been realized. If you are earning a surplus, for instance, the fee can be taken out of that. You may appeal to the court against the trustee but will probably require a lawyer's assistance to do so.

Client is having difficulties obtaining a discharge from bankruptcy

21. If I do what my trustee tells me, when will I get my discharge?

If you are a **first-time individual bankrupt** and have received counselling, the automatic discharge takes place **9 months after the date of your assignment**. The trustee must file a report with the Superintendent of Bankruptcy within 8 months of your assignment and give notice to you, your creditors, and the SOB not less than 15 days before the date of your discharge (s.168.1, s.170(1) — Trustee Report; DIR 12 — Terms of Discharge).

22. I am a second time bankrupt. How long must I wait for a discharge?

As a second-time bankrupt, you will be eligible for an automatic discharge after **24 months from the date of bankruptcy.** If you have surplus income, you will be required to make payments for 24 months. If the surplus income remains after 24 months, you will be required to make surplus income payments for a further 12 months and for such further time as the Court may order.[15]

23. My trustee wants to impose unfair conditions that he says I must meet before I can qualify for a discharge. He says I have not provided enough information about my earnings and that I am not sticking to my budget.

If the trustee opposes discharge because you did not pay the agreed-upon surplus income or filed for bankruptcy instead of making a viable proposal, he must request **mediation**. If you cannot reach an agreement or if he opposes because he says you have failed to give him required information, you may have to fight him in court. If a **creditor opposes discharge**, the trustee must request mediation. Note: discharge mediation is available only for **first-time bankrupts**. You are also entitled to ask for mediation before the 9 months are up if you do not agree with the trustee's recommendations (usually involving a **conditional discharge**) (ss.170, 170.1).

[15] This information is subject to change if new s. 168.1(b) provisions in Bills c. 47 (2005) and c. 36 (2007) are proclaimed.

24. Must I go to court to get a discharge?

No. In most cases the trustee prepares a **Certificate of Discharge** before the 9th month and files it with the Superintendent of Bankruptcy. A court-ordered Certificate is required only when there is a dispute for a court to decide.

25. If I have to go to court for a discharge, what alternatives can the judge order?

The court may postpone the hearing, refuse the discharge, or may order:

- an **absolute discharge,** which, apart from s.178 exceptions, will relieve you from paying all pre-bankruptcy debts, or
- a **conditional discharge** where certain conditions must be met before an absolute order of discharge is issued, or
- a **suspended discharge** where the court orders a delay before the discharge becomes effective.

Client has been or is about to be discharged

26. Will I ever be able to borrow again? What about my credit rating?

The Superintendent of Bankruptcy notifies the credit bureau when you obtain your discharge. This information will stay there for **6–7 years.**

27. How can I re-establish a good rating?

This is a practical rather than a legal question. There is very good advice on the Bankruptcy Canada website at www.bankruptcycanada.com/rebuildcredit1.htm.

For example, you could open a savings account, use it as collateral for a small loan, and then pay back the loan on time and in full.

Related Issues

For more information, if available, see applicable chapters in this primer:

- Debt and Collections (Chapter 3)
- Consumer Protection
- Foreclosure (Chapter 4)
- Income Tax (if CRA is withholding refunds, credits, etc.)

Resources

Internet

- **Bankruptcy Canada** (website of the Superintendent of Bankruptcy) at: www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/home
  For Directives, see "Resources for Trustees" at: www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br01088.html
- ***Consumer Law and Creditor/Debt Law*** — *A Guide for British Columbia*, (2005) at: www.lss.bc.ca/ assets/pubs/consumerLawAndCreditDebitLaw.pdf
- ***Aboriginal People and the Law in British Columbia*,** (2006), Chapter 2 at: www.lss.bc.ca/ assets/pubs/aboriginalpeopleandlaw.pdf
- **Law Students Legal Advice Program (LSLAP) manual** at: www.lslap.bc.ca/ pdfs/06/10_CreditorsRemediesandDebtorsAssistance.pdf
- **Courthouse Libraries BC website**— Credit, Debt and Bankruptcy Law Resource Guide (a comprehensive list of books, CLE materials, manuals, and legislation, including links to other websites) at: www.bccls.bc.ca/ cms/index.cfm?group_id=63914
- **CBA Dial-A-Law script on debt** at: www.cba.org/BC/Public_Media/dal/credit.aspx
- **Clicklaw** at www.clicklaw.ca
- **Websites produced by trustees** at: www.bankruptcycanada.com and www.bankruptcy-canada.ca (not to be confused with the government site)
- **Small business website** at: sbinfocanada.about.com/od/bankruptcyincanada/a/bankruptcyfaqs.htm

Forms

Many bankruptcy forms have been revised to facilitate electronic filing. You will find lists of forms on the Superintendent's site as appendices to Directive 8R4 (Forms Directive) at: www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01594.html.

Manuals (printed)

- L.W. Houlden and C.H. Morawetz, ***The Annotated Bankruptcy and Insolvency Act*** (Carswell)
- Earl Sands, ***Bankruptcy Guide: Personal and Small Business*** (Self Counsel Press)
- Frank Bennett, ***Bennett's A–Z guide to bankruptcy: a professional's handbook***
  (This comprehensive list of available texts and manuals is available on the Courthouse Libraries BC website, listed above)
- **LSLAP manual and LSS material** (see above; hard copies may be purchased)

Individuals and organizations

- See Lawyers with preferred area of practice ("Insolvency Law") in the CBA BC Branch lawyer directory.
- See above trustee and superintendent websites for lists of trustees in your area.
- **Office of the Superintendent of Bankruptcy of Canada (BC office):**
  300 Georgia Street W, Suite 2000
  Vancouver, British Columbia V6B 6E1
  Tel.: 604-666-5007
  Fax: 604-666-4610

- **Probate/Bankruptcy Registry, Vancouver:** 604-660-2876

Practice advisors

- **LawLINE staff at Legal Services Society**
  Phone: 604-408-2172 or 1-866-577-2525 (call no charge)

Additional sources of assistance

- **Access Justice (pro bono clinics)**
  Phone: 604-878-7400 or 1-877-762-6664 to book an appointment
  Location: Various
  Website: www.accessjustice.ca
  Free summary legal advice and help with court forms by volunteer lawyers.

- **Credit Counselling Society** — Free counselling in dealing with debt. Good resource where there is no dispute about existence and amount of debt, and where consolidation of debts and installment payments are best option. They will also advise regarding the possibility of bankruptcy. Will answer questions online and by phone.
  Phone: 1-888-527-8999
  Website: www.nomoredebts.org

- **Salvation Army (pro bono clinics)**
  Phone: 604-694-6647 (for locations to book appointment)
  Location: Various
  Website: www.probono.ca
  Free summary legal advice and help with court forms by volunteer lawyers.

Add your local resources here:

Bankruptcy issues and important timelines[16]

Issue (B = the bankrupt)	BIA, Rule or Directive	Applicable time periods
Time or date of bankruptcy	s.2.1	The date of assignment or granting of a bankruptcy order (involuntary bankruptcy).
Times for counselling (1) Consumer and credit education (2) Identification of road blocks to solvency and rehabilitation	DIR 1R2	(1) **between 10 and 60 days** following date of bankruptcy or filing of consumer proposal; and within **10 days** of refusal of Division I bankruptcy proposal; and (2) no sooner than **30 days** after (1) and no later than **210 days** following date of bankruptcy or filing of consumer proposal.
Redirection of mail from **B** to trustee	s.35	Notice to redirect mail operates for only **3 months** following the date of bankruptcy.
Objections to discharge of trustee	s.41(5)	An interested party may file notice of objection up until **5 days** before the scheduled discharge hearing.
Term of consumer proposal	s.66.12(5)	Performance must be completed in **5 years.**
Acceptance of consumer proposal	s.66.18	Deemed accepted **45 days** after filing if no creditor has asked for a creditors' meeting.
Non-exempt RRSP or RRIF contributions	s.67(b.3)	Only those made in the **12 months** before the date of bankruptcy are included in the bankrupt's estate.
Mediation re: amount of surplus income payable to creditors	s.68(7)	Creditor may request mediation **within 30 days** of date of bankruptcy.
Settlement of property	s.91(1)	Void against trustee if made by **B** in **year** prior to date of bankruptcy unless made to bona fide purchaser for value.
Property settled while **B** is unable to pay debts without aid of that property	s.91(2)	Void if made during **5 years** prior to date of bankruptcy unless made to BFPV.
Fraudulent preference to creditor	ss.95(1); 96	Void if made in **3 months** prior to date of bankruptcy; or, if creditor is a relative, in **1 year** prior to bankruptcy.

[16] This list is not comprehensive. It includes the timelines that are the source of most frequent inquiries by consumer bankrupts.

Issue (B = the bankrupt)	BIA, Rule or Directive	Applicable time periods
Student loans (waiting time for discharge)	ss.178, 178.1	A discharge from bankruptcy releases **B** from obligation to repay student loans if he or she filed for bankruptcy at least **7 years** after ceasing to be a part- or full-time student. (But see also hardship provision below.)
Time period under hardship provisions	s.178.1	The Court can order a release from the obligation to repay a student loan as early as **5 years** after B has ceased their studies if repaying the student loan will result in **B** continuing to experience major financial difficulty (undue hardship) and if B has made efforts to repay loan.
Automatic discharge for first-time bankruptcy unless trustee or creditor objects		**9 months** after date of bankruptcy
Time limit for conditional discharge where **B** fails to comply with surplus income requirements; or total amount paid by **B** to estate is disproportionate to indebtedness; or **B** could have filed a proposal but chose to declare bankruptcy	ss.68, 170, 170.1; DIR 12	Conditional discharge may be no longer than **12 months** following trustee's report. Maximum time that **B** is to be in state of bankruptcy following date of bankruptcy is **21 months** (9 months re: usual discharge plus 12 months of conditions)
Notice sent pursuant to *BIA* or Rules	Rule 6	Must be received at least **4 days** before the event to which it relates (does not include Saturdays or holidays).[17] Must be sent at least **10 days** before the event if using mail or courier. Subject to extension at discretion of court.
Appeal to court from Registrar's decision	Rule 30	Must be within **10 days** of decision
Involuntary bankruptcy — court order	s.43, Rule 83	Order must be delivered to trustee within **2 days** of issuance and to **B** within **2 days** of receipt by trustee
Time lines re: mediation	Rule 105	See rule for various timelines

[17] Rule 4. "If a period of less than 6 days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays."

Chapter 6: Employment Insurance

Note: *Always check for changes in the law that may have occurred since this primer was published.*

Employment insurance (EI) cases encompass a wide range of complicated legal issues that cannot all be covered in this primer. The federal courts are bound by statute and do not exercise any equitable jurisdiction. This means that what may seem like a minor infraction may lead to a complete loss of benefits or the imposition of draconian penalties that clients may never be able to pay. Any conflicts regarding EI eligibility involve legal issues that will be contested in a formal legal arena unless you are able to negotiate a resolution at an early stage. At all stages of the EI process, most clients require assistance from service providers who are familiar with applicable substantive law as well as administrative procedures. Not only are clients up against a large government bureaucracy, but they may also be in conflict with an ex-employer who has joined forces with that bureaucracy.[18]

Split administrative jurisdictions

EI comes under the umbrella of the Human Resources and Skills Development Canada (HRSDC) and is managed by the Canada Employment Insurance Commission (CEIC or the "Commission"). However, the Canada Revenue Agency (CRA) has exclusive jurisdiction to make rulings about matters of insurability, including the collection of premiums and the calculation of insurable hours a client has worked.

Appeal structure

Issues not covered by CRA (note that decisions of the Umpire — Canadian Umpire Benefits (CUBS) — create precedents that are binding on the Board of Referees and Commission):

Appeal from decision by Commission → Board of Referees → Umpire → FCA → SCC

Issues subject to rulings by CRA (e.g., number of insurable hours):

Appeal from decision by Commission → CRA → MNR → Tax Court → FCA → SCC

Reconsiderations

The Commission, Board of Referees, and the Umpire all have jurisdiction to reconsider their decision if presented with new facts or evidence that were not available at the time the decision was made. (*EIA,* s.120)

Governing statutes, regulations, and policies

- *Employment Insurance Act (EIA)*, S.C. 1996, c. 23 and regulations
- Employment Insurance — Digest of Benefit Entitlement Principles — policy manual at: www.servicecanada.gc.ca/eng/ei/digest/table_of_contents.shtml
- *Federal Courts Act (FCA)*, R.S.C. 1985, c. F-7
- *Tax Court of Canada Act*, R.S.C. 1985, c. T-2

[18] Note that EI matters may adversely affect a client's access to welfare benefits.

Common client problems

Dismissed for own misconduct (*EIA,* ss.30, 33; FAQs #9 – 11; EI Misconduct Checklist). For example:

- unauthorized absences from work place
- insubordination, swearing at superiors, breach of rules
- dishonesty, breach of trust
- criminal conviction that impairs ability to do job

Leaving without just cause (voluntary quit) (*EIA, s*s.29(b.1), (c), 30, 33; Reg 51.1; FAQs #7 and 8; EI Voluntary Quit Checklist). For example:

- constructive dismissal versus voluntary leaving
- leaving prematurely (before securing other employment)
- leaving after briefly "trying out" a job
- abandoning an "on call" job when little or no work is available
- leaving 1 of 2 part-time jobs without a reasonable prospect that the remaining job will become full-time
- leaving to pursue studies

Examples of "just cause" in *EIA* that may have chances of success:

- sexual or other harassment
- obligation to accompany spouse or dependant child
- discrimination under *Canadian Human Rights Act*
- dangerous working conditions
- obligation to care for child or immediate family member
- reasonable assurance of alternative employment
- significant change in working conditions or salary
- excessive overtime work or refusal to pay for overtime
- antagonism between employee and supervisor
- employer practices that are contrary to law
- discrimination due to membership in union
- undue pressure by employer to leave employment
- "any other reasonable circumstances that are prescribed"[19]

[19] Reg. 51.1 (passed in 2001) prescribes circumstances that include: obligation to accompany to another place a person with whom they have been living in a conjugal relationship for less than one year, where the claimant or the other person is pregnant, has given birth or has adopted a child; obligation to care for a member of their immediate family. (For more details, see the EI Issues checklists.)

Theoretically, the above categories are not definitive but are merely illustrative of some "just cause" circumstances. The general definition includes as "just cause": "No reasonable alternative to leaving or taking leave, having regard to all the circumstances, *including*…" the above list. In practice, it may be difficult to persuade decision makers to look beyond the enumerated categories.

False or misleading statements (*EIA,* s.38, 52(5), 135(1)(c); FAQs #12–14; EI False Representation Checklist). For example:

- whether made knowingly
- confusion about work status (for example, unpaid work, starting own business, or casual on-call work)
- availability
- incorrect attribution of earnings to specific report period
- failure to declare certain earnings

Penalties:

- whether amount appealable
- whether write-off possible (refusal to write off is not appealable [see below] but *may* be attainable through negotiation)

Other common EI issues[20]:

- earnings allocation
- lack of insurable hours (Frequently Asked Question [FAQ] #2)
- self-employment
- special benefits (sickness, pregnancy, parental, compassionate care)
- availability for work
- antedate — (*EIA* s.10(4); FAQ #6; EI Antedate Checklist)
- training issues

Issues that cannot be appealed[21]:

- refusal of application for training program; termination of training program (s.25(2))
- period of disqualification for unjustified job loss (s.30)
- refusal of job sharing (s.24(2)) or job-creation agreement

[20] For a full list of issues, see the Service Canada website containing decisions favourable to worker at: www.ae-ei.gc.ca/eng/board/favourable_jurisprudence/favourable_decisions_toc.shtml.

[21] Many of these issues that are supposedly not appealable may be challenged on the grounds that the Commission failed to act "judicially"; for example, they failed to consider relevant material and/or considered irrelevant material when exercising their discretion. If in doubt, always start an appeal in order to reserve clients' rights and meet limitation deadlines.

- *imposition* of a penalty for false and misleading statements as long as Commission has acted judicially (s.38(1)(2)). (However, the *amount* of the penalty may be appealed. For more detail, see the various EI checklists at the end of this chapter.)
- refusal to write off overpayment
- refusal of extension of time to appeal to Board of Referees (if decision made judicially) (s.114)[22]
- waiver or variation of administrative requirement (s.50(10)).These are procedural matters in making a claim for benefits. The Commission has some limited discretion to waive or vary legitimate requirements. If the issue is improper deprivation of benefits, the client should appeal.

[22] A creative advocate can usually find grounds to argue that the Commission failed to take into account "special circumstances" or relied on irrelevant material. If in doubt, appeal the refusal.

Employment Insurance General Checklist

This checklist applies only to employment insurance problems that come under the jurisdiction of the HRSDC/Commission. Always check whether client's problem may also be covered by other legislation, such as welfare, Canadian Pension Plan (CPP), Old Age Security (OAS), Guaranteed Income Supplement (GIS), or WorkSafeBC (formerly Workers' Compensation Board).

Information about client(s) — (if not already recorded elsewhere): _____

_____

Full name(s): _____

_____

Home address (or place where mail may be picked up if client has no fixed address):

_____

_____

Phone/fax/e-mail address (or number where client can pick up messages if client has no fixed address):

Phone _____ **Fax** _____ **E-mail** _____

Preferred method of contact? (include contact person's information if the client is homeless or has no phone):

☐ **Phone** ☐ **Fax** ☐ **E-mail**

Is it safe/secure to leave messages on voicemail? ☐ **Yes** ☐ **No**

_____

Client's employment history (*may be relevant for PWD and PPMB applications and appeals*):

_____

_____

Is interpreter necessary? ☐ **Yes** ☐ **No**

Information about HRSDC office:

Location of HRSDC office:

_____

_____

Phone _____ **Fax** _____ **E-mail** _____

(*It is important to obtain the fax number so that you can send in client's confidentiality waiver as soon as possible. Otherwise, the HRSDC will refuse to give any information.)*

Name of EI agent or other contacts at HRSDC office: _____

Name, address, and contacts for ex-employer (opposing party) conflicts check:

_____

_____

_____

General nature of EI problem: _____

_____

_____

_____

Stage of proceedings (go to applicable section of checklist)

- ☐ pre-application
- ☐ dispute with agent but no decision yet
- ☐ decision letter received but no appeal yet to Board of Referees
- ☐ appeal to Board started but no hearing date set (date is usually set in 2 weeks or less)
- ☐ adverse decision from Board of Referees
- ☐ client or Commission has started appeal to Umpire
- ☐ appeal to the Umpire filed but case not yet heard
- ☐ adverse decision from Umpire
- ☐ client wants to go to judicial review

Common abbreviation: **EIA =** Employment Insurance Act			
Actions to consider (check relevant columns)	**Not applicable**	**Yes**	**No**
1. Initial contact 1.1. If by phone, consider whether office interview immediately necessary.			
1.2. Will client be better served elsewhere? If yes, where? (See Resources section on page 148.)			
1.3. Obtain names for conflicts check (usually list of ex-employers).			
1.4. Identify exact nature of problem. Is it urgent? (e.g., deadline for appealing imminent)			
1.5. Who has decision-making jurisdiction: Commission or CRA?			
1.6. Is there a limitation period or relevant time period? If yes, note in diary, or bring-forward system, etc. (See EI: Limitation and statutory notice periods chart on page 150.)			
1.7. Can client resolve with your summary advice or assistance?			
1.8. What attempts has client already made? (for example, client has tried unsuccessfully to explain situation to EI agent or has tried to obtain favourable information from ex-employer) Specify:			
1.9. What are client's expectations?			
1.10. Have you obtained a signed and witnessed waiver of confidentiality to allow you to obtain disclosure from parties and witnesses?			
2. Stage of Proceedings **Pre-application stage** (e.g., about to quit job for some reason; trying to obtain Record of Employment [ROE]) Client may have been harassed at work, been a victim of discrimination, or may have received spurious warnings that indicate dismissal "for cause" is imminent. Or, client may have been laid off but suspects that it is really a permanent termination. Alternatively, client has been terminated but employer won't provide an ROE. **Your level of service** at this stage will most likely be confined to information and advice about the EI issue. Very vulnerable clients may need your help to negotiate with the employer.[23] (For more information about the most common and most serious problems, see various EI checklists at the end of			

[23] You may have to provide other services related to employment standards, wrongful dismissal, sickness benefits, etc.

this chapter, or see the quick reference tool for appellants on the Service Canada website at: www.ae-ei.gc.ca/ eng/board/ quick_reference_page.shtml.)			
Actions to consider (check relevant columns)	**Not applicable**	**Yes**	**No**
2.1. Is client still employed?			
2.2. Does client have more than 1 job?			
2.3. If still employed, does termination seem imminent?			
2.4. If yes, what are the reasons? (e.g., harassment, discrimination, warnings "for cause," business going downhill, other)			
2.5. If client is no longer employed, have they been laid off, terminated, or did they quit?			
2.6. What was the last date client worked?			
2.7. Did client receive severance pay? (affects the start date of EI benefits) — (Reg 36(9); FAQ #4)			
2.8. If terminated, did employer state it was "for cause"? (possible "Misconduct" under *EIA*) *EIA,* ss.30, 33; FAQ; EI Misconduct Checklist			
2.9. Does client have the Record of Employment (ROE) required by HRSDC? If yes, what reasons for termination has employer recorded? (Reg 19(5); FAQ #3)			
2.10. If no, does client have pay stubs that show how much they earned? (Reg 19(5); FAQ #3)			
2.11. Does client have enough insurable hours to qualify for EI?			
2.12. Should client be applying for special rather than regular EI benefits? (sickness, pregnancy, parental, compassionate)?			
2.13. Does client need additional information or assistance to complete the application for EI?			
3. Dispute with HRSDC agent but no decision yet Disputes sometimes occur due to such factors as communication problems; conflicting evidence from employer and client; refusal by client to allow access to certain information; inconsistent statements by client; apparent lack of evidence of job search or of disability; delay in applying for EI; disagreement about the number of hours worked. **Your level of service** at this stage might include assistance in assembling and presenting additional evidence, writing letters, negotiating or mediating with the HRSDC agent. A successful reconsideration will avoid the stress and effort needed to mount a successful appeal.			

Actions to consider (check relevant columns)	Not applicable	Yes	No
3.1. Does client have enough insurable hours? (*EIA,* s.7; FAQ #2)			
3.2. What is the nature of the dispute? (See checklist items in section 2 above.)			
3.1. What documentation has client already submitted? List:			
3.3. Does agent require more evidence? If so, what and from whom should it be obtained? (e.g., client, family members, employer [including payroll records re: hours], co-workers, doctor, bank, other)			
3.2. What action should you take on client's behalf?			
4. Adverse decision letters(s) received but not yet appealed Apart from issues that are unappealable, many cases may seem hopeless on the surface, but after closer investigation and legal research, they turn out to have sufficient merit to provide some level of service. **Level of service** at this stage: First of all, you must safeguard appeal rights while assessing merit (see the EI: Limitation and statutory notice periods chart on page 150). Depending on the vulnerability of the client and the risks and benefits involved, you may choose to represent the client fully or to provide summary assistance for self-representation; for example, organizing evidence and drafting a written submission if the case goes to appeal. For appeal forms, see Resources section on page 148.			
4.1. Is the issue appealable? (See the list of issues above.)			
4.2. If yes, does the case have sufficient merit to warrant your assistance?			
4.3. When did client receive the decision letter(s)? How much time is left before the 30-day deadline for appealing?			
4.4. Should you ask the agent to reconsider or should you start an appeal immediately?			
4.5. Is there any chance of extending the period in which to appeal by inducing the agent to issue a second decision letter that will supersede the first?[24]			

[24] This course of action is a useful option if client has already missed the appeal deadline. However, if the appeal period is still running, you must be cautious about inducing a second decision. You must obtain written evidence that the agent has consented to reconsider or to look at new facts.

Actions to consider (check relevant columns)	Not applicable	Yes	No
4.6. Are there any new facts that might persuade the agent to reconsider and change opinion? (s.120; see also s.52 — reconsideration — often used by Commission to recalculate and assess overpayment but can be used by claimant when benefits have been withheld). (List new evidence and from whom it may be obtained.)			
5. Appeal to Board of Referees — within limitation period (*EIA* s.114) *Remember that disputes about topics listed under s.90(1) cannot be appealed to the Board of Referees but must be appealed through CRA and the Tax Court. These are:* *a) whether employment is insurable* *b) how long insurable employment lasts* *c) amount of insurable earnings* *d) number of insurable hours* *e) whether premium is payable* *f) amount of premium* *g) who is the employer of the insured person* *h) whether employers are associated employers* *i) amounts of refunds* This section deals with cases that are appealable and have merit. **Level of service at this stage** usually requires significant amount of time and effort by client and lawyer/advocate. The Commission's appeal document (the "Docket") may be long and involved. However, it will contain references to case law and CEIC policy that provide a good start for your research.			
5.1. What is the limitation date? (30 days after *receipt* of decision letter)			
5.2. Has client filed a notice of appeal? (See Forms website listed in Resources section on page 148.)			
5.3. If not, should you file it as representative or assist client in representing him or herself?			
5.4. Has employer filed an appeal of a Commission decision in client's favour? If so, client has 7 days after receipt of notice of appeal in which to apply for a hearing (Reg 80).			
5.5. Has a hearing date been set? When and where?			
5.6. Should you ask for an extension of time to prepare your appeal? (Contact the Clerk at the Board of Referees.)			
5.7. Has an extension been confirmed?			

Actions to consider (check relevant columns)	Not applicable	Yes	No
5.8. Have you asked for and received the Docket?			
5.9. Have you made an Access to Information application to see client's complete file? (The Docket does not always include all of the relevant facts and evidence.)			
5.10. What additional evidence should you seek? List: Who obtains what. (Record in your bring-forward system.)			
5.11. Should you interview any witnesses? If so, whom? List:			
5.12. Have you researched the law on the relevant issue(s)?			
5.13. Have you prepared a submission, assembled new evidence and sent to Board of Referees?			
5.14. Will representatives of the Commission or employer be attending the hearing? (This is very rarely the case.)			
5.15. Have you prepared client for testimony, questions from the referees and argument (if client is representing self)?			
6. Appeal to Board of Referees (client has missed the 30-day limitation period) The Commission (not the Board of Referees) has discretion to allow an appeal to go ahead after the 30-day time limit if there are special reasons. (s.114(1) *EIA*)			
6.1. How long ago should client have appealed?			
6.2. Has client already asked for an extension of time?			
6.3. Is there any evidence of "special reasons"? (*EIA* s.114(1)) For example, can client show: • error in HRSDC process • failure to receive the agent's decision • honest belief that an appeal had already been initiated (objective test) • evidence of a genuine intention to preserve rights • reasonable actions in the circumstances • other			

Actions to consider (check relevant columns)	Not applicable	Yes	No
6.4. If application for extension of time has been denied, are there grounds for appeal to Board of Referees on denial issue; for example, did the Commission: • ignore relevant factors • base denial on irrelevant considerations • otherwise fail to act judicially			
6.5. Is there any new evidence that would justify a reopening of the case under s.120? (If client has previously represented self, new facts are usually not too hard to find.)			
7. Appeal to Umpire from decision of Board of Referees (*EIA* s.115) This may be an appeal by client of an adverse decision or an appeal by the employer or the Commission from a decision in client's favour. Umpires are usually Federal Trial Court judges or senior lawyers. Appeals would be more accurately described as judicial reviews. Hearing are held in Vancouver (check other locations). Appeals may be heard orally or by written submissions. **Level of service:** Most clients require extended service up to and including oral and written presentations. If you have not been involved at the Board of Referees level, you will be unfamiliar with the facts and law. Several hours of work will be necessary to prepare an appeal.			
7.1. When did client receive adverse decision? (Limitation period — deadline for appeal — 60 days after client receives decision (*EIA*, s.116))			
7.2. Was there a dissenting opinion that might be helpful to client?			
7.3. Should client be asking for a reconsideration of decision of Board of Referees? (*EIA*, s.120) on following grounds: • new facts not available at time of hearing • material issue not addressed in decision • ambiguous reasons • biased panel ***Note**: You cannot ask for reconsideration if an appeal to the Umpire has been commenced. If new evidence has come to light and you think that client will obtain a positive outcome from reconsideration, you would have to drop the appeal before you receive a new decision.*			
7.4. Has client initiated an appeal? Does it have merit?			
7.5. Has hearing date been set? If yes, what, when, and where?			

Actions to consider (check relevant columns)	Not applicable	Yes	No
7.6. If yes, does client need more time to prepare for appeal? If yes, contact the Office of the Umpire and request an extension of time.			
7.7. Has client received the Docket? (Reg. 85(3))			
7.8. Should client apply for access to information to see complete file?			
7.9. Should client ask for an oral hearing or rely on written submissions only?[25] ***Note** the limitation period: After receipt of the Docket, client has only 15 days in which to ask for an oral hearing.*			
7.10. Have employer or Commission appealed? If so, when? (Limitation period — client has 15 days in which to respond. (Reg. 85)) ***Note**: Commission must file an appeal within 21 days of the decision if they wish to avoid payment of benefits approved by Board of Referees* (*EIA*, s.121(1)(a)*).*			
7.11. What are possible grounds of appeal for client to rely on? (*EIA*, s.115(2)) • failure of natural justice • lack of jurisdiction • error of law • erroneous finding of fact • new evidence that was unavailable at Board hearing			
7.12. If the appeal is to be based on new facts, what additional evidence is required?			
7.13. Are there any *Charter* issues? (**Note**: The Board of Referees has no jurisdiction to address the application of the *Charter* in the absence of "other factors." *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)* [1991] 2 S.C.R. 22 at 28.)			
8. Appeal to Umpire — Client has missed limitation date In this case, it is the Umpire who has discretion to allow an extension for "special reasons." (*EIA*, s.116) Decisions on extensions may not be made until the hearing date.			

[25] Submissions are filed through the local HRSDC office.

Actions to consider (check relevant columns)	Not applicable	Yes	No
8.1. How long ago should client have appealed?			
8.2. Is there any evidence of special reasons? Can client show: • Board of Referees' decision was radically defective • serious illness that prevented filing • no prejudice to Commission • new information received after limitation date • other			
8.3. Is there any new evidence that would justify a reconsideration under s.120?			
9. Judicial review by Federal Court of Appeal of decision of Umpire The *Federal Courts Act*, R.S.C. 1985, c. F-7, s.28(1)(m) gives the FCA exclusive jurisdiction to hear appeals from the Umpire. FCA procedures are complex and cumbersome.[26] Very few clients can handle their own appeal. The FCA website contains some information for self-represented litigants at cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Litigants.			
9.1. When did client receive the adverse decision? (Limitation period — 30 days from receipt of decision [or such further time as the court may allow].)			
9.2. What are the possible grounds for review? (s.18.1(4) of the *Federal Courts Act)* Tribunal: • acted without or beyond jurisdiction or refused to exercise jurisdiction • failed to observe a principle of natural justice, procedural fairness, or other procedure that it was required by law to observe • erred in law in making a decision or an order, whether or not the error appears on the face of the record • based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it • acted, or failed to act, by reason of fraud or perjured evidence • acted in any other way that was contrary to law			

[26] Court registry staff are helpful and will instruct you on what material is required, how many copies, etc.

Actions to consider (check relevant columns)	Not applicable	Yes	No
9.3. Are there any *Charter* issues?			
10. Disputes about insurable hours and other matters within the jurisdiction of the Canada Revenue Agency (CRA) Sometimes a client will be turned down for 2 or more reasons: 1 related to matters within the jurisdiction of the Board of Referees and the other related to such issues as insurable hours or insurability of employment. The latter must be appealed through the CRA and Tax Court. If in doubt, start appeals through both systems to avoid missing limitation dates. For example, if it is decided that the hours on the ROE were too high, the Commission may declare an overpayment and impose a penalty and violation on the ground that the client used a false document to start the claim. To argue that the ROE was correct, the client would have to appeal to the CRA, etc. To challenge the penalty and violation, the client has to appeal to the referees.			
10.1. How many hours are necessary to qualify for EI benefits in your area?			
10.2. Is client a new entrant or a re-entrant? (different qualification requirements)			
10.3. Has client been turned down for regular or special benefits?			
10.4. If so, what evidence is the rejection based upon? (payroll statements of employer, etc.)			
10.5. Does client disagree with the number of hours allotted? If so, does client have any additional evidence that can challenge the information that was the basis for denial? (e.g., direct deposits from bank account, pay stubs, personal log, etc.)			
10.6. Did employer require client to come to work before and/or after the start of paid hours? (e.g., to change into or out of uniform; to prepare and put away tools) (Reg. 10.01)			
10.7. If this extra time could be legitimately added, would client then have enough insurable hours?			

Actions to consider (check relevant columns)	Not applicable	Yes	No
10.8. Has client asked CRA for a ruling? If yes, what was the result?			
10.9. Has client been subject to a clawback of benefits pursuant to *EIA*, s.145? If so, this comes under the jurisdiction of the Tax Court.			

Issues applying to First Nations clients

Employers and employees both on and off reserve must pay EI premiums whether or not they are First Nations. EI premiums are not defined as “taxes.” Therefore, bands and First Nations individuals are not exempt from payment. The information in this primer applies equally to First Nations and non-First Nations workers.

However, it should be noted that HRSDC administers two programs to assist First Nations organizations and individuals to access training and improve their employment prospects: Aboriginal Skills and Training Strategic Investment Fund (ASTSIF) to help reduce barriers to employment and build employment skills; and Aboriginal Skills and Employment Partnership program (ASEP) to promote increased participation of Aboriginal people in major economic developments through collaborative partnerships.

Information about these programs can be found on the HRSDC website at: www.hrsdc.gc.ca/eng/employment/aboriginal_training/projects/index.shtml or at: www.hrsdc.gc.ca/eng employment/aboriginal_employment/astsif/index.shtml.

Frequently Asked Questions (FAQ)[27]

1. **How long can I collect regular EI benefits?**

   The law has been changed recently and may change again. At the moment, your benefit period depends on the rate of unemployment where you live — the higher the unemployment, the longer the period, up to a maximum of 50 weeks. This maximum is due to return to 45 weeks for claims started after September 11, 2010. You should check the HRSDC website or contact your local office for any changes (www.hrsdc.gc.ca/eng/employment/ei/index.shtml).

2. **I have been in my job for almost 2 years and have at least 900 insurable hours. But I've been denied sickness benefits because they say that I have worked less than 600 hours during my qualification period. Is this correct?**

   To qualify for special benefits, including sickness, you must have worked at least 600 insurable hours during the year prior to your application (your "qualifying period"). If you have evidence that you did work 600 hours during that year, you can ask the Commission to reconsider and apply for a CRA ruling. To make sure that the Commission's records are accurate, you may ask for a copy of your "Work sheet — Allocation of insured and/prescribed hours," and their "Calculation result on file." If their results differ from your records, it may be worth asking for a reconsideration or appealing.

3. **My employer fired me last week and hasn't given me my ROE. I'm afraid he'll prevent me from getting EI benefits by reporting me for misconduct. I'm scared of him. What should I do?**

   Even though you don't have an ROE, you should apply for EI as soon as possible. If you have any pay stubs or other proof of employment, take it with you. (Reg. 19(5) deals with the situation where an employer can't or won't provide a ROE.) If you disagree that there was cause for your termination, explain your side of the story in your application. You should also consider a complaint to the Employment Standards Branch if you have received no severance pay.

4. **I arranged with my employer to put half of my 90-day severance pay into an RRSP. The Commission won't start my claim until the 90 days are up. Should they not have to start it after 45 days?**

   No. The *EIA* counts (allocates) severance pay as earnings. Payment into an RRSP does not change the characterization of severance pay even when the employer, rather than you, put the money into an RRSP.

5. **If I rely on erroneous information from an HRSDC employee and lose benefits because I relied on this information, can I sue the government for lost benefits?**

   You can sue if you can prove all of the elements necessary to prove negligence (duty and standard of care, causation, damages, etc.). In *Goddard v. Canada*, 2001 FCT 1248 (CanLII), Goddard sued the government when a Commission employee gave false information about entitlement to maternity benefits while collecting severance. The judge found that Ms. Goddard was 50% responsible for her loss through contributory negligence (for relying solely on the employee and failing to research the

[27] A comprehensive Q & A resource is available from Community Legal Assistance Society (CLAS): James F. Sayre, *The Employment Insurance System in British Columbia: Questions and Answers for E.I. Claimants*, revised April 2009. See Resources section on page 148.

law herself). However, the judge implied that more vulnerable plaintiffs might be awarded a higher percentage, if not 100%.

Antedate

6. I received 6 months' severance pay when my job ended. My friend told me that I wouldn't qualify for EI benefits until this money ran out. When I applied at the end of 6 months, I was told that I would lose benefits because of a late application. Can I backdate my claim?

Ignorance of the law is not a defence unless there are additional circumstances that add up to "good cause" for your late application. Reliance on a friend would not, by itself, constitute good cause. If you apply as soon as you stop work, your benefit period is postponed until the severance period ends. If you delay, you may lose several weeks of benefits. Recent court decisions have gone against claimants in this position (see EI — Antedate Checklist on page 153).

Voluntary Quit

7. I asked my employer several times to correct some unsafe working conditions but he refused. I complained to WorkSafe BC. After that my employer kept picking on me and giving me dirty jobs. Eventually I got mad, swore at him, and quit. I tried to go back the next day but my employer said he would fire me for cause. The Commission has refused to pay me any benefits. They say I left without just cause. Should I appeal?

You should always appeal a complete disqualification. You have nothing to lose and a lot to gain if you win. If your workplace was unsafe, you have a good chance of proving "just cause." However, you should be ready to argue against termination for misconduct as the Board of Referees may consider this issue as well if your employer says that your swearing was grounds for dismissal. Note that there should be no reasonable alternative but to leave work. Failure to ask employer to remedy the problem may remove the element of just cause. *Canada (Attorney General) v. Hernandez*, 2007 *FCA* 320 (CanLII).

8. My spouse has been offered a promotion in a city 1000 km away. Will I be entitled to EI benefits if I leave my job to go with her?

This would be just cause for leaving employment and you would be eligible for benefits. But if you are living common law and have been together for less than a year, you may not be eligible. *Canada (Attorney General) v. Thompson,* 2007 *FCA* 391). This could be a Catch-22 because if she moves and you stay until the year is up, you might have difficulty proving that you are still spouses (unless you can afford to travel to stay with her on a regular basis). Note that Reg. 51.1 says that it is just cause for a person to follow a spouse of less than 1 year if either of them is pregnant, has given birth, or has adopted a child during their period of cohabitation.

Misconduct

9. I suffer from a sleep disorder that makes it very difficult for me to wake up even when I use several alarm clocks and the radio. I have been seeing a doctor for this but was too embarrassed to tell my employer. After 2 written warnings he fired me for coming late. Now I can't get EI because he marked "misconduct" on my ROE. Is there any way I can qualify for EI?

To be disqualified for misconduct there has to be an element of wilfulness connected with your lateness for work. You should get some written confirmation from your doctor about your disability

and your problems with waking up. The Commission may reconsider your case and grant you benefits when they see this new evidence. If they still refuse, you should appeal the refusal to the Board of Referees. In the meantime, if your medical condition prevents you from working, you may qualify for sickness benefits which are available even if you are guilty of misconduct. Leading case on wilfulness: *Canada (AG) v. Tucker*, [1986] 2 F.C. 329 (*FCA*). (See EI — Misconduct Checklist on page 154.)

10. I complained to Employment Standards because my employer refused to pay overtime. After that, he kept harassing me and criticizing my work to the point that I had to go on stress leave. Then I was fired for absenteeism. Is this misconduct as my ROE says?

If you have medical evidence that you were too ill to work, your absence should not be characterized as misconduct. A legitimate complaint about your employer is not misconduct either. If your evidence is credible, you should win an appeal against such a finding.

11. My employer tried to fire me for cause but when I hired a lawyer and started a wrongful dismissal action we reached a settlement. I signed a release which said that neither party admits or alleges fault. The Commission still refuses to pay EI benefits. Are they not bound by the settlement?

An employer's withdrawal of allegations of misconduct does not automatically mean that you will receive benefits. The Commission is not bound by either party's characterization of the conduct in question but, depending on the nature of the "misconduct," the settlement would be useful evidence in your favour.

False statements and penalties

12. I collected EI last year and now the Commission is saying that I did not accurately report my earnings while on benefits. They are relying on my employer's payroll records. I can't get copies but I know I reported everything I earned. It all went into my bank account via direct deposit. Now they are assessing a penalty for every reporting period. I can't afford to pay. Is there anything I can do?

If you can obtain your bank deposit records, this evidence should be enough to prove you were telling the truth. If you appeal, the Commission must prove that you knew the statements you made were false. The Commission treats every one of your reports as a separate statement. If you lose on appeal, you may be penalized for a serious violation and will have to repay all of the benefits you received. This will affect your rights to future EI benefits (many more hours needed to qualify). Unfortunately, penalties for false statements cannot be written off. However, if you did make misrepresentations but they were innocent, you will not be subject to a penalty — just repayment — which could possibly be written off. *Canada (Attorney General) v. Gates (1995)*, 125 D.L.R. (4th) 348 (*FCA*)

13. When I lost my job, I tried to start up a consulting business of my own but didn't earn any money. During this time I was also looking for paid employment but couldn't find anything. Now the Commission has demanded repayment of EI benefits plus a huge penalty. I genuinely had no idea that my reports contained "false statements" when I said I didn't work.

This is a grey area. Some cases hold that any work — paid or unpaid — should be reported as "work." However, if you can show that you reasonably and genuinely believed that you were telling

the truth, you have a chance of winning on appeal or at least succeeding in the elimination of the penalty.

14. **I am in my fourth year of full-time studies. For the first 3 years, I also held down a full-time job. When my employer had to terminate me, I claimed EI benefits and reported that I was available for work. The Commission now accuses me of making false statements because they say I cannot be available while studying full time. Is it worth fighting this decision?**

    Although the general rule is that you are not entitled to benefits while attending a course of instruction unless referred by the Commission (s.25), you should appeal if you can show a track record of at least 1 year of full-time work while you have been a student.

Related Issues

- *Charter* issues
- Human rights (e.g., harassment by employer in voluntary quit cases)
- Access to information and privacy issues
- Employment, labour, and wrongful dismissal in misconduct cases
- WorkSafeBC, CPP, and long-term disability benefits (EI sickness benefits cases)
- Welfare (refusal or delay until client applies for EI)
- Debt/collections (re: the unusual and extensive garnishing powers of government)

Resources

Internet

- **Employment Insurance Act at:** http://laws.justice.gc.ca/en/showtdm/cs/E-5.6
- **EI economic region search at:** http://srv129.services.gc.ca/eiregions/eng/postalcode_search.aspx
- **EI payroll information at:** www.cra-arc.gc.ca/tx/bsnss/tpcs/pyrll/clcltng/ei/menu-eng.html
- **EI Regulations:** http://laws.justice.gc.ca/en/showtdm/cr/SOR-96-332//?showtoc=&instrumentnumber=SOR-96-332
- **Employment Insurance — Digest of Benefit Entitlement Principles** — HRSDC policy manual at: www.servicecanada.gc.ca/eng/ei/digest/table_of_contents.shtml
- **Employment Insurance (EI) home page at:** www.hrsdc.gc.ca/en/ei/menu/eihome.shtml
- **Employment Insurance Jurisprudence Library at:** www.ae-ei.gc.ca/eng/library/search.shtml
- **Employment Insurance (EI) Publications Index at:** www.servicecanada.gc.ca/eng/ei/publications/pubindex.shtml
- **To make a repayment arrangement at:** www.servicecanada.gc.ca/eng/goc/repayment.shtml
- **Employment Insurance appeal decisions favourable to workers at:** www.ae-ei.gc.ca/eng/board/favourable_jurisprudence/favourable_decisions_introduction.shtml
- **Board of Referees website at:** www.ae-ei.gc.ca/eng/board/home.shtml
- **Mouvement Action-Chômage de Montréal inc. [Montreal unemployment action movement].** Unemployment Insurance Benefits "Practical Guide & Tips" at: www.macmtl.qc.ca/Conseils_pratiques/en.htm
- **Law Students' Legal Advice Program (LSLAP) Manual** — Chapter 8: Employment Insurance: www.lslap.bc.ca/UserFiles/File/8_EI.pdf

Manuals (printed)

- T. Stephen Lavender, ***The Annotated Employment Insurance Statutes*** (Thompson-Carswell), loose-leaf or annual update.

- **LSLAP manual** (see above — hard copies may be purchased)

Individuals and organizations

Practice advisors:

- **LawLINE** staff at Legal Services Society
  Phone: 604-408-2172; 1-866-577-2525
- **Community Legal Assistance Society (CLAS)** poverty lawyers
  Phone: 604-685-3425

Additional sources of assistance

- **Access Justice (pro bono clinics)**
  Phone: 604-878-7400 or 1-877-762-6664 to book appointment
  Location: Various
  Website: www.accessjustice.ca
  Free summary legal advice and help with court forms by volunteer lawyers

- **BC advocates listed on PovNet**
  To see a map of advocates around the province, see www.povnet.org/find_an_advocate/bc.
  Most advocates provide advice and representation on EI matters.
- **Community Legal Assistance Society (CLAS)**: Specialized services for EI test cases.
  Phone: 604-685-3424 or 1-888-685-6222
  Website: www.clasbc.net/how_do_i_get_help.php

- **Law Students Legal Advice Program (LSLAP):** Free legal services by UBC (Vancouver) law students.
  Phone: 604-822-5791
  Locations: Various clinics across Lower Mainland. Phone for nearest clinic and appointment.
  Website: www.lslap.bc.ca

- **The Law Centre:** Free legal services by University of Victoria law students.
  Phone: 250-385-1221
  Location: 1221 Broad Street, Victoria
  Website: www.thelawcentre.ca

- **Salvation Army (pro bono clinics)**
  Phone: 604-694-6647 to book appointment
  Location: Various
  Website: www.probono.ca
  Free summary legal advice and help with court forms by volunteer lawyers.

Appeal forms

Forms for appealing to Board of Referees and Umpire: www.ei.gc.ca/eng/appeal_forms.shtml

Employment Insurance: Limitation and statutory notice periods

Note: *Always check for changes in the law that may have occurred since this primer was published. This is an area of law where knowledge of limitation periods is crucial to the preservation of client rights.*

Common abbreviations:
CEIC = Canada Employment Insurance Commission
EIA = Employment Insurance Act

Statutory Limitation Periods

Issue to which limitation period applies	EIA & Regs.; and other applicable statutes	Time limits for starting or replying to actions under EIA
Issues appealable to Board of Referees and Umpires[28]		
Appeal by client to Board of Referees from CEIC decision	*EIA,* s.114(1)	**30 days** after decision is communicated in writing to client. May be able to obtain an extension from CEIC if there are "special reasons" for delay but if denied, the only ground of appeal is CEIC's failure to use its discretion "judicially."
Response to appeal by employer from CEIC decision	Reg. 80	**7 days** after receipt of notice of appeal
Appeal to Umpire from decision of Board of Referees	*EIA,* s.116	**60 days** after decision is communicated to appellant
Time to respond to an appeal by CEIC or employer	Reg. 85	**15 days** after receipt of notice of appeal
Request for an oral hearing	Reg. 86	**15 days** after receipt of Docket
Application to Federal Court of Appeal for judicial review of decision of Umpire	*Federal Courts Act*, s.18.1(2)	**30 days** after decision is communicated "or within any further time that a judge of the Federal Court may fix or allow."

[28] If CEIC wishes to withhold payment of benefits after a decision in favour of client, they must appeal with **21 days** of the decision. (s.121(2)(a)) If they miss this deadline, they must pay benefits pending the results of an appeal to the Umpire.

Issues appealable to CRA, MNR, and Tax Court		
Request by client for a ruling on matter within CRA jurisdiction	*EIA,* s.90(2)	"Before the **June 30 following the year to which the question relates**." (**Note**: CEIC may request a ruling at any time.)
Appeal to Minister of National Revenue (MNR) from CRA ruling	*EIA*, s.91	within **90 days** after the person is notified of the ruling
Appeal to Tax Court from MNR decision	s.5(1) and 6(3)(b) Tax Court Regs.	within **90 days** of communication of the decision, "or within such longer time as the court may allow on application made to it within 90 days after the expiration of those 90 days." Reg. 6(3)(b) sets out grounds for granting extensions (inability to act or obtain counsel or good faith intentions to appeal).
Response by CRA	s.12(2)(a) Tax Court Regs.	within **60 days** from the day on which the notice of appeal or notice of intervention was served on the minister, or within such longer time as the court, on application made to it within those 60 days, may allow.
Recovery of overpayments	*EIA,* s.47(3)	HRSDC can demand repayment up to **72 months** after the day on which the liability arose
Overpayment of EI premiums — application for refund	*EIA*, s.96(1)	within **3 years** after the end of the year in which overpayment of premiums occurred

Other relevant time periods

Time limit for employer to give client the ROE after termination	Reg. 19	within **5 days** of stopping work
Special benefits		
Maximum duration of sickness benefits	s.12	**15 weeks** for a major attachment client (600 or more insurable hours)
Maximum duration of pregnancy benefits	s.12	**15 weeks** starting no more than 8 weeks before the week the baby is due. The latest date to claim is during the week when the baby is born.
Maximum duration of parental benefits	s.12	**35 weeks** (need not be consecutive)
Maximum duration of compassionate care benefits	ss.12, 23.1	**6 weeks** during the period of 26 weeks, beginning with the first day of the week that client obtains a certificate or a doctor certifies the medical condition of the person requiring care
Length of time that violations (convictions, penalties, or warnings) stay on, and affect, EI record		**5 years**
Reduction of benefits for refusing to accept a suitable job or being aware of and failing to apply for a suitable job		disqualification for **7–12 weeks**

EI — Antedate Checklist

(Also see EI General Checklist on page 131 for stage of procedure and client's personal details.)

S.10(4),(5) A claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day, and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.
Reg. 26 A claim shall be made by a claimant within 3 weeks after the week for which benefits are claimed.

If client had applied for benefits earlier, would they have been granted? ☐ Yes ☐ No

How long is the delay? _____

_____

What are the reasons for client's delay?

Examples:

- erroneous information from HRDC employee? (Who, when, how, what position at HRSDC?)
- good faith but unsuccessful efforts to obtain accurate information
- initial assumption of ineligibility (error in calculating insurable hours)
- waiting for employer to provide ROE
- ROE said misconduct (waiting for resolution of wrongful dismissal action)
- waiting for severance pay to run out
- misunderstanding about eligibility for special benefits
- expecting new employment in near future
- waiting for a call back to work while believing still employed (not laid off)

_____

_____

_____

For a quick review of jurisprudence see:

Digest of Benefit Entitlement Principles (Chapter 3) on the Service Canada website at: www.servicecanada.gc.ca/ eng/ei/digest/3_3_0.shtml#a3_3_0

Serving Employment Insurance Appellants — Antedate, which is located on the Services Canada website at: www.ae-ei.gc.ca/eng/board/quick_reference/antedate.shtml

Antedate is usually difficult to obtain. Each case depends on its own unique circumstances but "good cause" is interpreted narrowly.

EI — Misconduct Checklist

(Also see EI General Checklist on page 131 for stage of procedure and client's personal details.)

***EIA*, Sections 29–35, 51**

S.30 Claimant is disqualified (disentitled) from receiving *any* benefits if claimant has lost employment because of their misconduct, unless, since losing employment, they have been employed in insurable employment for the number of hours required by ss.7 or 7.1.

S.34 Disentitlement is suspended during any week for which claimant is otherwise entitled to special benefits (sickness, pregnancy, parental, compassionate care — s.12).

S.49(2) Benefit of the doubt should go to claimant.

Who is alleging misconduct?
☐ Commission ☐ Employer ☐ Both Which ROE box was ticked? _____

What was the nature of the job? Describe briefly: _____

_____

_____

Where and when did alleged misconduct occur?

☐ in the workplace
☐ outside the workplace
☐ during work hours
☐ outside work hours
☐ was it connected with a labour dispute?

Has client been charged, convicted or acquitted of a criminal offence directly connected with alleged misconduct? (e.g., driving while impaired) ☐ Yes ☐ No

What is nature of alleged misconduct?

☐ assault
☐ breach of employer's rules
☐ breach of specific condition of employment (describe)
☐ competing with employer
☐ fraud
☐ intoxication
☐ lying/dishonesty
☐ refusal to carry out employer's order(s)
☐ theft
☐ unauthorized absence from work
☐ verbal abuse/insubordination
☐ other (describe) _____

_____

Does information relied upon by Commission/employer appear to justify finding of misconduct? (i.e., is there *prima facie* evidence?)	☐ Yes	☐ No
Has Commission/Board of Referees/Umpire made erroneous assumptions about client's credibility?	☐ Yes	☐ No
Can client provide any evidence to show that there is an innocent explanation? For example: • lack of willfulness or extreme recklessness (i.e., honest mistake, incompetence, misunderstanding with supervisor) • evidence to show honesty and credibility	☐ Yes	☐ No
Was this an isolated incident?	☐ Yes	☐ No
If not, did client receive a warning about the conduct?	☐ Yes	☐ No
Was this type of conduct common and/or acceptable in this particular workplace? (e.g., swearing on a logging or construction site)	☐ Yes	☐ No
Was conduct detrimental to employer's interest? (e.g., did it cause loss of income, customer loyalty, good working relationships?)	☐ Yes	☐ No
Did the conduct cause the loss of employment or was it just an excuse to fire client?	☐ Yes	☐ No
Has client complained to Employment Standard Branch about wrongful termination?	☐ Yes	☐ No
Has client sued for wrongful dismissal?	☐ Yes	☐ No
If yes, has there been a settlement?	☐ Yes	☐ No
If no, should client be referred to a private bar lawyer/lawyer referral?	☐ Yes	☐ No
If this was a union job, has client started grievance procedure?	☐ Yes	☐ No
If yes, has it been resolved?	☐ Yes	☐ No
If yes, was it for or against client?	☐ For	☐ Against
If no, can or should client initiate grievance?	☐ Yes	☐ No
Does client qualify for any special benefits?	☐ Yes	☐ No
Has client worked since alleged misconduct?	☐ Yes	☐ No
If yes, how many hours?		

Additional notes: _____

_____

_____

EI — Voluntary Quit (Leaving Without Just Cause)[29] Checklist

(Also see EI General Checklist on page 131 for information about stage of procedure and client's personal details)

***EIA*, Sections 29–35, 51**

S.30 Claimant is disqualified (disentitled) from receiving *any* benefits if claimant has lost employment because they have voluntarily left any employment without just cause unless, since leaving that employment, they have been employed in insurable employment for the number of hours required by ss.7 or 7.1.

s.29(b.1) Sets out situations that are defined as "voluntarily leaving employment": refusal of alternative employment, refusal to resume employment, refusal to stay with successor employer.

s.29(c) Sets out situations where claimant could argue just cause. This list (see below) is illustrative only and does not preclude reliance on the general statement that "just cause for voluntarily leaving employment or taking leave from an employment exists if the claimant had *no reasonable alternative to leaving or taking leave, having regard to all the circumstances."*

S.34 Disentitlement is suspended during any week for which claimant is otherwise entitled to special benefits (sickness, pregnancy, parental, compassionate care — s.12).

s.49(2) Benefit of the doubt should go to claimant.

s.111(5)(b) Authorizes chairperson to exclude from the hearing the claimant, or employer, or either of their representatives, or any witness while testimony about harassment is being presented.

Who is alleging lack of just cause?
Commission, employer, or both. (Circle as required.) Which ROE box was ticked?

What was the nature of the job? Describe briefly: _____

_____

_____

Where and when did the voluntary quite occur? _____

_____

_____

Did client, in fact, resign or was he or she dismissed? (If the latter, see EI — Misconduct Checklist on page 154.)	☐ Resigned ☐ Dismissed
Did client take steps to find another job before leaving this one?	☐ Yes ☐ No
Was client merely "trying out" a new job before leaving?	☐ Yes ☐ No
If client resigned, did he or she attempt to withdraw resignation?	☐ Yes ☐ No
If yes, how soon after the resignation?	

[29] Good cause is not always equivalent to "just cause" under the *EIA*.

Do "all the circumstances" indicate that client had no alternative but to leave? ☐ Yes ☐ No

Can client rely on any s.29(3) exceptions?

i. sexual or other harassment
ii. obligation to accompany spouse or dependent child
iii. discrimination on prohibited ground under *Canadian Human Rights Act*
iv. working conditions that constitute danger to health or safety
v. obligation to care for child or member of immediate family
vi. reasonable assurance of employment in immediate future
vii. significant modification of terms and conditions re: wages or salary
viii. excessive overtime work or refusal to pay for overtime work
ix. significant changes in work duties
x. antagonism with supervisor if claimant is not primarily responsible for antagonism
xi. practice of employer that is contrary to law
xii. discrimination re: employment because of membership in association, organization, or union of workers
xiii. undue pressure by employer on claimant to leave employment
xiv. any other reasonable circumstances that are prescribed (Reg. 51.1)

Does information relied upon by Commission/employer appear to justify finding of lack of just cause? (i.e., is there *prima facie* evidence?)[30] ☐ Yes ☐ No

Did client take steps to remedy situation before leaving? ☐ Yes ☐ No

If so, what were they? _____

_____

_____

Has Commission/Board of Referees/Umpire made erroneous assumptions about client's credibility? ☐ Yes ☐ No

Did Commission/Board/Umpire properly address client's reasons for leaving; i.e., did they make a specific determination about existence or lack of just cause? ☐ Yes ☐ No

Was employer looking for an excuse to force client to leave without severance pay? ☐ Yes ☐ No

Has client complained to Employment Standard Branch about wrongful termination or unlawful working conditions? ☐ Yes ☐ No

Has client sued for wrongful (constructive) dismissal? ☐ Yes ☐ No

If yes, has there been a settlement? ☐ Yes ☐ No

If no, should client be referred to a private bar lawyer/Lawyer Referral? ☐ Yes ☐ No

[30] Commission must show leaving was voluntary, then claimant must prove just cause.

If this was a union job, has client started grievance procedure?	☐ Yes	☐ No
If yes, has it been resolved?	☐ Yes	☐ No
If yes, for or against client?	☐ Yes	☐ No
If no, can or should client initiate grievance?	☐ Yes	☐ No
Does client qualify for any special benefits?	☐ Yes	☐ No
Has client worked since alleged voluntary quit?	☐ Yes	☐ No

If yes, how many hours? _____

Additional notes:

_____

_____

EI — False Representation Checklist

(Also see EI General Checklist on page 131 about stage of procedure and client's personal details.)

***EIA*, Ss.38–41** affects claimant and any other person acting for claimant who knows that representations are false.

S.38(2) Maximum penalty is 3 times the overpayment, if overpayment results from undeclared earnings.

S.38(3) Repayment of benefits, voluntary or otherwise, will not reduce higher entrance qualifications for subsequent claims.

Higher entrance qualifications are imposed after a violation and remain effective for 5 years or for next 2 claims, whichever occurs first.

S.40 Commission has 36 months from date of misrepresentation to take action against claimant.

S.41 Commission may issue a warning.

What is the nature of alleged misrepresentation?

☐ False or misleading representation
☐ Failure to declare earnings
☐ Non-disclosure of facts
☐ Failing to return money to which not entitled
☐ Import or export of document issued by Commission with intent to deceive
☐ Participation in, assent to, acquiescence in any of above

How many false representations alleged? _____

What was client's benefit rate at relevant time? _____

What penalty, if any, has Commission set? _____

Is Commission within the 36-month time limit? ☐ Yes ☐ No

Has Commission issued a warning under s.41.1? ☐ Yes ☐ No

Does Commission have evidence of intention to deceive at time of alleged misrepresentation? ☐ Yes ☐ No

List possible evidence that may show innocence, excuse, or justification:

☐ false representation was made innocently (precludes penalty)

☐ misrepresentation by employer of true situation

☐ client reasonably ignorant of relevant fact

☐ commission relying on incomplete or inaccurate data

☐ client did not receive money for alleged work

☐ client confused about employment status

☐ client available for work (e.g., despite allegations of self-employment or student status)

☐ client made mistake about when money earned

☐ client reported net rather than gross earnings

☐ client was mentally ill at relevant time

Should client make voluntary admission to Commission? Invoke discretion to rescind penalty or issue a warning instead? ☐ Yes ☐ No

Are there special circumstances that might lead to a reduction in penalty under s.41? ☐ Yes ☐ No

List: _____

_____

_____

_____