

Aboriginal People and the Law in British Columbia



June 2006



Legal
Services
Society

British Columbia
www.lss.bc.ca

Aboriginal People and the Law in British Columbia



June 2006

© 2006, 2002 Legal Services Society, BC
Second edition: June 2006

First edition: June 2002, February 2004
(chapters 13 and 16); reprinted April
2005

Acknowledgments

Writers: Cliff Thorstenson, Darwin Hanna,
and Cynthia Callison

Legal reviewer: Cliff Thorstenson

Editors: Gayla Reid and Jacqueline Wood

Legal citation editor: Cynthia
Bartholomew

Designer: Dan Daulby

Project sponsor: Fran Auckland

Publishing coordinator: Candice Lee

This publication may not be commercially
reproduced, but copying for other
purposes, with credit, is encouraged.

This manual is a publication of the Legal
Services Society (LSS). LSS is a non-
government organization that provides

legal aid and legal information to low-
income British Columbians. LSS is funded
primarily by the provincial government,
and also receives grants from the Law
Foundation, the Notary Foundation, and
the federal Legal Aid Renewal Fund.

*Aboriginal People and the Law in British
Columbia* is also available in PDF at
www.lss.bc.ca (look under Resources >
Publications > Publications by subject
> Aboriginal/Native law). Updates and
revisions will be made to the online
version as necessary. For more information
or to contribute updates, please contact
us at:

Legal Services Society
400 – 510 Burrard Street
Vancouver, BC V6C 3A8

Fax: (604) 682-0965

To order publications:

E-mail: distribution@lss.bc.ca

For suggestions and feedback:

E-mail: aboriginallaw@lss.bc.ca

This publication explains the law in general. It is not intended to provide legal
advice on a particular problem. Because each person's case is different, your client
may need to get legal help. This publication is up to date as of June 2006.

Library and Archives Canada Cataloguing in Publication Data

Thorstenson, Cliff.

Aboriginal people and the law in British Columbia. -- 2nd ed.

"Writer: Cliff Thorstenson. Editors: Gayla Reid and
Jacqueline Wood."--P.

Previously issued 2004, under title: Aboriginal poverty
law manual.

Available also on the Internet.

Includes bibliographical references: p.

ISBN 0-7726-5567-7

1. Native peoples - Legal status, laws, etc. - British Columbia. 2. Native peoples - Legal status,
laws, etc. - Canada. I. Reid, Gayla. II. Wood, Jacqueline. III. Legal Services Society of British
Columbia. IV. Title: Aboriginal poverty law manual.

KE7722.P8H36 2006
KF8210.F5H36 2006

342.71108'72

C2006-960111-9

Contents



Contents

Introduction	2
Who this guide is for.....	2
How to use this guide.....	2
Why this guide is needed.....	2
Unique legal environment	2
A snapshot of Aboriginal people in BC	3
Social and economic conditions.....	4
1. Bankruptcy and Insolvency.....	8
Common client problems	8
General law	8
Options for resolving debts.....	8
Aboriginal legal issues.....	10
Common client questions.....	10
For more information.....	13
Statutes and regulations	13
Case citations	13
2. Consumer Issues	16
Common client problems	16
General law	16
Getting out of bad contracts: Defences.....	16
Getting out of bad contracts: Time limits.....	17
Other protections	19
Dealing with debt collectors	19
Business Practices and Consumer Protection Authority.....	20
Aboriginal legal issues.....	21
Common client questions.....	21
For more information.....	23
Statutes and regulations	23
Case citations	23
3. Criminal Law	26
Common client problems	26
General law	26
Understanding the criminal prosecution process.....	27
Understanding court appearances	28
Provincial criminal court process.....	29
Aboriginal legal issues.....	30
Common client questions.....	30
For more information.....	34
Statutes and regulations	35
Case citations	35
4. Family Law	38
Common client problems	38
General law	38
Jurisdiction of Provincial and Supreme Court in family matters.....	39
Separation and Divorce	39
Aboriginal legal issues.....	41
Separation and divorce	41

Child protection	42
Adoption	43
Family law services.....	44
Legal aid.....	44
Family duty counsel and advice lawyers	45
Family justice counsellors.....	46
Family Maintenance Enforcement Program.....	46
Family Law in BC website	46
For more information.....	47
Statutes and regulations	48
Case citations	48
5. Harvesting Rights: Hunting, Fishing, Trapping, & Gathering	50
Common client problems	50
Aboriginal rights.....	50
Treaty rights	50
Aboriginal legal issues.....	51
Common client questions.....	51
For more information.....	53
Statutes and regulations	53
Treaties	53
Case citations	54
6. Housing and Reserve Lands.....	56
Common client problems	56
General law	56
Legal rights of renters.....	56
Protection for homeowners	57
Aboriginal legal issues.....	57
Common client questions.....	57
For more information.....	61
Statutes and regulations	62
Case citations	62
7. Human Rights	64
Common client problems	64
General law	64
Canadian Human Rights Act.....	64
BC Human Rights Code.....	65
Making a human rights complaint.....	65
Discrimination and the Canadian Charter of Rights and Freedoms	66
Aboriginal legal issues.....	67
Common client questions.....	67
For more information.....	69
Statutes and regulations	69
Case citations	69
8. Immigration and Trans-Boundary Trade	72
Common client problems	72
General law	72
Aboriginal legal issues.....	73
Common client questions.....	73

For more information.....	75
Statutes and regulations	75
Case citations	75
9. Indian Status and Band Membership.....	78
Common client problems	78
Indian status under the Indian Act	78
Registration under the Indian Act.....	78
Registration before 1985	79
Registration after 1985	80
Adoption	81
Band membership	81
Indian Affairs controlled membership	81
Band controlled membership.....	81
Adoption	82
Voting rights.....	82
Indian Act elections	82
Custom leadership selection	82
Aboriginal legal issues.....	83
Common client questions.....	83
For more information.....	87
Statutes and regulations	87
Case citations	87
10. Law Enforcement Complaints.....	90
Common client problem	90
General law	90
Complaints against police officers.....	90
Complaints against provincial law enforcement officers	93
Complaints against federal enforcement officers	94
Taking a law enforcement officer to court	94
Finding out what's on a police record	94
Aboriginal legal issues.....	95
For more information.....	95
Statutes and regulations	96
11. Mental Health/Adult Guardianship.....	98
Common client problems	98
General law	98
Helping someone with mental capacity issues.....	99
Planning for the future.....	99
Consent to health care	101
Adult guardianship and abuse, neglect, and self-neglect	101
Aboriginal legal issues.....	102
Common client questions.....	103
For more information.....	104
Legal information	104
Mental health services	104
Aboriginal services.....	105
Statutes and regulations	105
12. Motor Vehicle/Traffic.....	108
Common client problems	108
General law	108

Aboriginal legal issues.....	108
Common client questions.....	108
For more information.....	112
Statutes and regulations	112
Case citations	112
13. Prisoners.....	114
Common client problems	114
General law	114
Earned remission	114
Parole.....	115
Prison discipline.....	116
Aboriginal legal issues.....	117
Common client questions.....	117
For more information.....	119
Statutes and regulations	120
Case citations	120
14. Residential School Abuse	122
Client problem	122
General law	122
Civil justice	122
Alternative dispute resolution	123
Independent assessment and “common experience” process	124
Criminal justice	126
Crime Victim Assistance Program.....	126
For more information.....	127
Statutes and regulations	127
Case citation.....	127
15. Schools	130
Common client problems	130
General law	130
Kindergarten to Grade 12.....	130
Funding for post-secondary education.....	131
Aboriginal legal issues.....	131
Common client questions.....	131
Statutes and regulations	134
Case citation.....	134
16. Social Assistance	136
Common client problems	136
General law	136
Off reserve.....	136
On reserve.....	136
Aboriginal legal issues.....	137
Common client questions.....	137
For more information.....	140
Statutes and regulations	140
17. Taxation	142
Common client problems	142
General law	142
What doesn’t get taxed under the Indian Act.....	142

Taxes on Nisga’a Lands	143
Aboriginal legal issues	143
Common client questions	143
For more information	145
Statutes and regulations	145
Case citations	145
18. Wills and Estates	148
Common client problems	148
General law	148
Wills and estates under provincial law	148
Wills and estates under the Indian Act	149
Nisga’a cultural property	150
Aboriginal legal issues	150
Common client questions	150
For more information	153
Statutes and regulations	153
Case citation	153
19. Work	156
Common client problems	156
General law	156
WorkSafeBC	156
Employment Insurance	157
Aboriginal legal issues	157
Common client questions	157
For more information	162
Statutes and regulations	163
Case citations	163
To order publications	166
Glossary	170
Appendix A: Judicial Reviews and Charter Challenges	174
Appendix B: Legal Services Society	178
Appendix C: Freedom of Information	184
Index	186

Introduction



Introduction

Who this guide is for

This guide is for professionals who work with Aboriginal people, including legal advocates. It summarizes some of the common legal issues facing Aboriginal people in their daily lives. It is not intended to be a “stand-alone” reference. Each chapter includes suggested resources for more information.

How to use this guide

This guide summarizes the general law for each subject area, explains any areas of law that are different for Aboriginal people, describes some of the legal issues clients may face, and lists the relevant legislation, cases, and resources for that topic.

To find out if a chapter contains the legal information you need to help your client, read the beginning sections called “This chapter covers” and “Common client problems” as well as “Common client questions” under “Aboriginal legal issues.” These sections should help you determine if the chapter has what you are looking for.

Some of the terms used in this guide are in bold type and defined on the first page of each chapter in which the terms are found. A glossary of terms relating specifically to Aboriginal people is on page 170.

To make the most effective use of this guide, you will need some or all of the following:

- Experience with the law in a particular topic area.
- Access to the *LSLAP Manual* of the UBC Law Students’ Legal Advice Program. Ideally you will have a hard copy of the guide. It is available online at www.lslap.bc.ca.
- Access to a telephone to contact LawLINE for legal information and advice when necessary. See Appendix B for details about LawLINE.
- Access to online resources, such as LawLINK (www.lawlink.bc.ca).
- Access to key print resources on Aboriginal law, such as *Native Law* by Jack Woodward. See page 166 for publication details and how to order.

Why this guide is needed

Aboriginal people live in a unique legal environment. Most legal publications, however, ignore or gloss over aspects of the law specific to Aboriginal people.

Few resources are aimed at advocates and other professionals who work with Aboriginal people. We hope this guide can help to fill the gap.

Unique legal environment

The following subjects are some of the most important features of the legal environment for Aboriginal people.

Aboriginal rights: As the original inhabitants of this country, Aboriginal people have Aboriginal rights, including Aboriginal title and the right to govern themselves. These rights have been “recognized and affirmed” by the Constitution of Canada, but their *content* is subject to extensive and complicated litigation.

Treaty rights: Some, but by no means most, Aboriginal people in British Columbia are also “beneficiaries” of treaty rights. Most of these treaties were negotiated more than a century ago, but the Nisga’a people of the Nass Valley achieved the first modern-day treaty in the province in 2000. These treaties have replaced or modified Aboriginal rights.

Government’s duties: The courts consider the Crown to be a “fiduciary” in many aspects of its relationship with Aboriginal people. A fiduciary is a trustee who owes the highest standard of good faith in its dealing with the trustor (in this case the trustor is Aboriginal people). Even in those aspects where the Crown is not a fiduciary, the “honour of the Crown” requires a very high standard when dealing with Aboriginal people.

Indian Act: The *Indian Act* is a key component of the legal environment for Aboriginal people. This antiquated legislation governs Indian reserves and Indian band governments. Although reserves are set aside for the use and benefit of Indian bands, special rules prohibit individuals from owning land on reserve and greatly affect the ability to obtain credit.

Effects of colonization, including residential schools: From the late 1800s to the late 1900s, generations of Aboriginal children were taken from their families and placed in “residential schools” — institutions operated by churches and later by government — in some cases for years. The residential school system and other results of colonization, such as disease and alcohol abuse, destroyed some Aboriginal communities; others are still in a period of recovery. To date, on average, Aboriginal people have worse health, less income, less education, and more involvement with the criminal legal system than other Canadians.

A snapshot of Aboriginal people in BC

Aboriginal people are diverse culturally, geographically, and historically. The following statistics provide some background on Aboriginal peoples who live in British Columbia.¹

- Out of BC’s total population, 5.4 percent are Aboriginal. Of the 65 Native dialects spoken in Canada, about 28 are spoken in BC.
- BC has one-third of Canada’s Indian bands, and three-quarters of the total number of Indian reserves in Canada.
- When Bill C-31 came into force in 1985, more than 17,000 individuals regained their Indian status in British Columbia.
- It is estimated that half of BC’s registered Indians live on reserve, while the other half live off reserve, in rural and in urban communities.

¹ These figures are based on the 2001 census.

- BC's total Métis population is approximately 44,000.
- The majority of Aboriginal people live in the Lower Mainland and on Vancouver Island. The North Coast, Nechako, Northeast, and Cariboo have the next highest concentrations of Aboriginal people.
- The Aboriginal population is younger and growing at a faster rate than the rest of the population in BC.

Social and economic conditions

The following statistics illustrate the social and economic conditions of BC's Aboriginal people:

- Although Aboriginal people represent about 5 percent of the population, they are overrepresented in both provincial and federal prisons (19 percent of provincial inmates and 17 percent of federal inmates, based on appearance only).
- National statistics indicate that Aboriginal people are 8 times more likely than non-Aboriginal people to become victims of homicide, and 10 times more likely to commit homicide.
- Aboriginal women and children (under the age of 15) suffer the highest rates of abuse. One in three Aboriginal women reports being abused by her partner. Of the children who are removed from parental custody by voluntary agreements, 13 percent are Aboriginal, and by court order, 53 percent are Aboriginal.
- Suicide rates are three to four times higher, with rates among young age groups being five to six times higher.

For more information

To find out more about Aboriginal culture, legal matters, and services, consult the following:

Indian and Northern Affairs Canada (INAC): The federal government department responsible for meeting the government's constitutional, treaty, political, and legal responsibilities to First Nations, Inuit, and Northerners.

Website: www.ainc-inac.gc.ca/bc/index_e.html

Telephone: (604) 775-5100; 1-800-665-9320 (toll free within BC)

E-mail: InfoPubs@ainc-inac.gc.ca

First Nations Profiles: This website provides current First Nation community profiles, including general information about the First Nation and its government, and information about Tribal Councils, representative First Nation and Inuit political organizations, and reserves.

Website: http://pse2-esd2.ainc-inac.gc.ca/FNProfiles/FNProfiles_home.htm

Services for First Nations People: An online guide to federal government services and programs for First Nations people.

Website: www.ainc-inac.gc.ca/sg

Your feedback, please

Much of the information and analysis contained in this guide is from government legislation, case law, legal texts, and articles. However, the topics and - situations covered are largely based on the collective personal experience of lawyers and others like you who work with Aboriginal people.

Help us keep this guide relevant and up to date. E-mail your suggestions and your experiences using this guide to **aboriginallaw@lss.bc.ca**.

I. Bankruptcy and Insolvency



1. Bankruptcy and Insolvency

This chapter covers:

- BC and Canadian laws for bankruptcy
- Ways of resolving debts:
 - Orderly Payment of Debts
 - Proposals
 - Bankruptcy
- Exceptions to BC and Canadian laws that apply to Aboriginal people:
 - What property is protected from seizure under a bankruptcy
 - What a discharge from bankruptcy means

Common client problems

- I am in debt and cannot make all of my payments.
- I have property on reserve and have decided to go bankrupt.

General law

In general, the laws of bankruptcy and debt described below apply to Aboriginal people living on or off reserve.

Jurisdiction for bankruptcy and insolvency issues is split between the federal parliament and provincial legislatures.

Federal parliament	Provincial legislature
<i>Bankruptcy and Insolvency Act</i>	<i>Court Order Enforcement Act</i>
The legislation that deals with bankruptcy.	The rules about which assets you can keep during a bankruptcy.

Options for resolving debts

Informal options for resolving debts include:

- budgeting;
- direct negotiations with the creditors (e.g., extending time for repayment, waiving interest charges, or settling for less than the amount owing); and
- debt consolidation loans.

Definitions

Assets: Generally any item of property (land or personal possessions) that has monetary value.

Discharge from bankruptcy: A court order following all legal steps in processing a bankrupt person's assets and debts, which cancels any remaining debts that cannot be paid.

Exempt: Something that is not included or that you are allowed to keep.

Indian: A person who is registered or entitled to be registered as an Indian under the *Indian Act*.

Insolvency: The inability of a person to pay their debts when they're due.

Jurisdiction: The right and power to make law or interpret and apply the law.

Trustee in bankruptcy: Court-appointed person who will administer the affairs of a bankrupt individual (the debtor). Acts on behalf of the debtor to ensure that both the creditor's and debtor's interests are protected under the law, and often negotiates between the two.

Seizure: When property is taken away by legal right.

Formal options for resolving debts are in the federal *Bankruptcy and Insolvency Act*. They include (and are explained below):

- Orderly Payment of Debts
- Proposals
- Bankruptcy

Orderly Payment of Debts

Orderly Payment of Debts is described in Part X of the *Bankruptcy and Insolvency Act*. It allows a debtor to consolidate most of their debts (meaning they join them together into one debt) and make a monthly payment directly to the court.

For help consolidating their debts, clients will have to rely on for-profit agencies or volunteer debt counselling services such as the Credit Counselling Society of BC (toll-free number: 1-888-527-8999).

Proposals

People who have the ability to pay some but not all of their debts may be eligible to make a Consumer Proposal for total debts of \$75,000 or less, or an Ordinary Proposal for total debts over \$75,000.

In this situation, the debtor “proposes” to pay part of the amount owed to creditors. If the majority (based on the amount of the debt) of creditors agree, the proposal is accepted, and the debtor is protected against legal action by the creditors as long as the proposal is in effect.

To make a proposal, your client (the debtor) will need the help of a **trustee in bankruptcy**. To find a trustee, see “For more information” at the end of this chapter.

Bankruptcy

Bankruptcy is the process by which a person in debt who cannot pay the bills can “assign” or surrender their **assets** to a **trustee in bankruptcy**. The trustee uses these assets to pay as many of the debts as possible.

To be eligible for bankruptcy, your client must be “insolvent.” This means that they:

- owe at least \$1,000,
- cannot make regular payments when they are due, and
- cannot pay all debts even if their assets are sold.

Exemptions from bankruptcy

In BC, the following **assets** are exempt from bankruptcy, meaning you can keep these things (see *Court Order Enforcement Act*, s. 71; *Court Order Enforcement Exemption Regulation*, s. 2):

- Necessary clothing and medical and dental aids for self and dependants
- Household furnishings and appliances of a value not exceeding \$4,000
- A motor vehicle of a value not exceeding \$5,000 (\$2,000 if the client is a debtor under the *Family Maintenance Enforcement Act*)

- Tools and other personal property of a value not exceeding \$10,000, where the tools and other personal property are used to make an income from the client's occupation
- Personal residence if the client has less than \$9,000 (\$12,000 if the residence is in the Capital Regional District or Greater Vancouver Regional District)

A debtor may also keep earnings reasonable for the number of people in their family and for their personal circumstances. Earnings above this reasonable amount will be collected by the trustee in bankruptcy and used to pay the creditors.

A debtor is usually eligible for **discharge from bankruptcy** nine months after the assignment. Once someone is discharged from bankruptcy, the debts subject to the bankruptcy are cancelled — meaning the person gets a fresh start.

Debts that won't be cancelled by bankruptcy

However, a bankruptcy does not cancel the following debts:

- Alimony or maintenance payments
- Court imposed fines or penalties
- Debt arising out of fraud or embezzlement
- Student loan debts where the bankruptcy occurs less than 10 years after the debtor is no longer a student

The bankruptcy process costs about \$1,500. If possible, this money comes from the sale of your client's **assets**. Otherwise, they can arrange to pay over time.

Aboriginal legal issues

There are exceptions to the general laws of bankruptcy and debt relief that apply to Aboriginal people:

- the real and personal property of an "Indian," including cultural property situated on reserve, is protected from bankruptcy, and
- some forms of cultural or heritage property situated off reserve may also be protected from bankruptcy.

Common client questions

- If I declare bankruptcy, will I lose my property on reserve?
- Do I get to keep my cultural property?
- When do I get free of my debt?

If I declare bankruptcy, will I lose my property on reserve?

Your client's property on reserve may be protected from bankruptcy because of two provisions in the *Indian Act*:

- Section 29 of the *Indian Act* protects Indian reserve land from seizure, including seizure under bankruptcy.

- Section 89(1) of the *Indian Act* says that “the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.”

This means that on-reserve **assets** are generally protected from **seizure** under a bankruptcy (see *Sioui [Re]*).

However, the value of those assets, and the client’s ability to earn income from them, can be taken into consideration in determining whether to **discharge** the client from bankruptcy (see *Davey [Re]*).

Property considered “situated on reserve”

If your client’s personal property is situated on reserve, it may not be included in the bankruptcy process. If it is not situated on reserve, it is included in the bankruptcy process.

If the main location of someone’s property is on reserve, the property is said to be “located on reserve” even though it is used off reserve (see *Leighton v. British Columbia [Gov’t]*). For example, the location of a private vehicle is at the owner’s residence on reserve — that is where it is kept when not in use and where the car is returned after use (see *Danes v. British Columbia*).

Similarly, a bus in for repairs at an off-reserve mechanic’s shop is considered to be situated on reserve if it is usually used and stored on reserve (see *Wahpeton Dakota First Nation v. Lajeunesse*).

Personal property bought by the government with Indian money or money “appropriated by parliament for the use and benefit of Indians or bands, or given to Indians or to a band under a treaty or agreement” is also considered situated on reserve according to section 90 of the *Indian Act*.

If your client’s wages are earned on reserve, they can’t be garnished from an Indian Band employer. (Garnishing means there’s a legal order to take someone’s wages to pay off a debt.) However, once those wages are deposited in an off-reserve bank account, the contents of that account can be garnished or **seized** under bankruptcy.

Property not considered situated on reserve

Personal property is usually considered to be situated where it is *physically* located. That means a piece of jewelry in an off-reserve safety deposit box is subject to **seizure** under bankruptcy (see *Maracle v. Ontario [Minister of Revenue]*). The same is true of the contents of an off-reserve bank account.

Note: Courts look at a variety of factors in determining where personal property is “situated.” Advise your client to talk to a lawyer about this.

Do I get to keep my cultural property?

Your client’s “cultural property” may be **exempt** from the bankruptcy process.

Cultural property includes objects that have sacred, ceremonial, historical, traditional, or cultural importance.

Unless an item has been manufactured *for sale* by “Indians,” section 91 of the *Indian Act* makes it unlawful for any person to acquire title to:

- an Indian grave house,
- a carved grave pole,
- a totem pole,
- a carved house post, or
- a rock embellished with paintings or carvings.

These items cannot even be removed from the reserve without the permission of the Indian Affairs minister.

The federal *Cultural Property Export and Import Act* prohibits the removal from Canada of certain types of cultural property described on a Control List in section 4 of the act.

The BC *Heritage Conservation Act* also contains provisions about “heritage” objects. These objects cannot be removed from the province without a minister’s permit according to section 13 of the act. Many of them cannot even be moved from their current location without such a permit.

Although neither the *Cultural Property Export and Import Act* nor the *Heritage Conservation Act* actually exempt cultural property from bankruptcy, these acts might affect how these items are dealt with in bankruptcy proceedings.

Note: Cultural property may be held communally or in trust for the Aboriginal community. Such property is not subject to bankruptcy.

When do I get free of my debt?

A **discharge from bankruptcy** means you no longer have to pay certain debts. However, your client’s personal circumstances may affect their discharge from bankruptcy (*Bankruptcy and Insolvency Act*, s. 172 and 173).

Generally, the court will consider if the bankrupt has been cooperative and financially responsible during the period of bankruptcy, but cultural factors such as family responsibility may be considered.

For example, in *Lemaigre (Re)*, a northern Aboriginal person was considered eligible for discharge from bankruptcy even though they continued to spend a lot because of their financial obligations to an extended family and the high cost of living in the community.

Although on-reserve property is **exempt** from the bankruptcy process, a court may consider the property’s value and the ability of the bankrupt to benefit from it financially in determining whether to discharge them from bankruptcy (see *Davey [Re]*).

For more information

- *Consumer Law and Credit/Debt Law: A Guide for British Columbia* (Legal Services Society). Available at www.lss.bc.ca, or see “How to order publications.”
- Chapter 10 of the *LSLAP Manual* (UBC’s Law Students’ Legal Advice Program) has general information about bankruptcy and other forms of debtors’ assistance. Available at www.lslap.bc.ca.
- To find a list of trustees in bankruptcy, look in the yellow pages of the phone book under “Bankruptcy Trustees.”
- LawLINK: www.lawlink.bc.ca. Click the “Consumer and Debt” button.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the “Law by Subject” button, then scroll down the page and choose “Credit, Debt and Bankruptcy.”
- Office of the Superintendent of Bankruptcy Canada:
<http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/home>
- Credit Counselling Society of BC: www.nomoredebts.org

Statutes and regulations

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2

Court Order Enforcement Act, R.S.B.C. 1996, c. 78

Court Order Enforcement Exemption Regulation, B.C. Reg. 28/98 [Court Order Enforcement Act]

Cultural Property Export and Import Act, R.S.C. 1985, c. C-51

Debtor Assistance Act, R.S.B.C. 1996, c. 93

Family Maintenance Enforcement Act, R.B.S.C. 1996, c. 127

Heritage Conservation Act, R.S.B.C. 1996, c. 187

Indian Act, R.S.C. 1985, c. I-5

Case citations

Danes v. British Columbia (1985), 61 B.C.L.R. 257; 18 D.L.R. (4th) 253; [1985] 2 C.N.L.R. 19 (B.C.C.A.) (alternate name: Watts v. British Columbia)

Davey (Re) [2000] 3 C.N.L.R. 48 (Ont. Sup. Ct. Jus.)

Leighton v. British Columbia (Gov’t) (1989), 35 B.C.L.R. (2d) 216, [1989] 3 C.N.L.R. 136 (B.C.C.A.)

Lemaigre (Re) [1997] S.J. No. 130 (Q.L.) (Sask. Q.B.)

Maracle v. Ontario (Minister of Revenue) (1993), 1 GTC 6214 (Ont. Gen. Div.)

Sioui (Re) [2000] 3 C.N.L.R. 382 (Que. C.A.)

Wahpeton Dakota First Nation v. Lajeunesse, [2002] 3 C.N.L.R. 285 (Sask. C.A.)

2. Consumer Issues



2. Consumer Issues

This chapter covers:

- The law that deals with contracts
- The circumstances under which you can get out of a contract
- Dealing with debt collectors
- What salespeople and debt collectors can and cannot do on reserve

Common client problems

- I was pressured by a door-to-door salesperson into buying an item I don't want.
- I am being harassed by a debt collector.

Definitions

Assets: Generally any item of property (land or personal possessions) that has monetary value.

Exempt/exemption: Something that is not included.

Indian: A person who is registered or entitled to be registered as an Indian under the *Indian Act*.

Seizure: When property is taken away by legal right.

Set aside: When the court says the contract does not apply.

Supplier: A person who provides goods or services in the course of their business.

General law

Consumer contracts are made when you acquire goods from another person in the course of business. When you acquire goods you are called the “buyer” or “consumer.” The other person is often called the “seller” or **supplier**. When you owe money for goods or a service, you are the “debtor” and the other party is the “creditor.”

In general, consumer contracts fall under provincial law, but some aspects are covered by federal law. The main piece of provincial legislation dealing with consumer contracts is the *Business Practices and Consumer Protection Act*.

There are also elements of common law that apply to contracts. (Common law is law that has been created by judges when they decide on cases.) For example, common law identifies the elements that go into the making of a contract.

The general laws of consumer protection apply to Aboriginal people living on or off reserve.

Getting out of bad contracts: Defences

A consumer doesn't usually have the right to change their mind and get out of a contract unless the supplier agrees. However, there are the following exceptions:

Illegality

In general, a contract made for an illegal purpose (like committing a crime) is unenforceable (impossible to apply under the law).

The *Criminal Code of Canada* (s. 347) says that an agreement to collect interest at an annual rate of 60 percent or more is illegal. Processing fees charged on short-term or “payday” loans are considered to be interest for the purpose of this calculation (see *Kilroy v. A OK Payday Loans Inc.*).

Misrepresentation

If a seller makes a false statement to get a consumer to enter a contract, the consumer may be entitled to take the supplier to court. A consumer may be able to get the contract **set aside** or get compensation.

Section 4 of the *Business Practices and Consumer Protection Act* prohibits misrepresentation (saying things are a certain way when they really aren't) by a **supplier** about the availability, quality, price advantage, or prior history of a product.

Unfairness

Courts sometimes **set aside** contracts that are unfair because one of the parties was under undue influence (too much pressure) or duress (was forced).

A contract may also be set aside as “unconscionable” (not guided by conscience and therefore shockingly unfair) in cases where the parties have unequal bargaining power and the stronger one uses that power to gain an unfair advantage. In contract law, a contract that is unconscionable is not binding (legally enforceable) on the consumer.

Section 8 of the *Business Practices and Consumer Protection Act* requires a court, in determining whether a consumer transaction is unconscionable, to consider a number of factors, including:

- undue (too much) pressure;
- a consumer's infirmity (physical weakness), ignorance, illiteracy, or other factors that may have affected their understanding of the contract;
- excessive pricing relative to the market for value of similar goods or services;
- the improbability of the consumer being able to make payment in full given financial circumstances at the time of the transaction; or
- harsh or adverse terms to the contract (terms that are clearly not in the best interests of the consumer).

Mistake

If the buyer and seller did not understand a fundamental (basic) aspect of a contract, such as the nature or subject matter of the agreement, a court may **set it aside**.

A consumer usually can't get out of a contract if they didn't read the “fine print” unless it has an unfair effect on the relationship between the consumer and the seller (see *Tilden Rent-a-Car v. Clendenning*).

Getting out of bad contracts: Time limits

Direct sales (includes door-to-door sales)

Under the provincial *Business Practices and Consumer Protection Act*, a “direct sales contract” is one that takes place somewhere other than at the **supplier's** permanent place of business. Direct sales include door-to-door sales.

A consumer has 10 days to cancel a direct sales contract, such as a door-to-door contract. The 10 days starts when the consumer gets a copy of the contract (*Business Practices and Consumer Protection Act*, s. 21).

Under some circumstances, a direct sales contract may be cancelled within one year after the consumer receives a copy of the contract. This may apply in the following situations:

- the supplier was under a direct sales prohibition order at the time of the contract (meaning they were not legally allowed to sell),
- the goods or services weren't supplied within 30 days of the supply date, or
- the contract did not meet the content requirements set out in the legislation.

Distance (Internet and catalogue) sales

Under the *Business Practices and Consumer Protection Act*, a distance sales contract is one that a consumer does not enter into in person. In the case of goods, a distance sales contract is one where consumers did not have an opportunity to inspect the goods when they entered into the contract. Distance sales include Internet and catalogue sales.

A consumer may cancel a distance sales contract by giving notice of cancellation to the supplier. The time limits for giving notice are:

- not later than 7 days after the date that the consumer receives a copy of the contract if the contract doesn't include details required in the legislation,
- not later than 30 days after the date of the contract if the seller does not supply a copy of the contract within 15 days after making it, or
- at any time if the goods or services aren't delivered within 30 days of the supply date, or within 30 days after the contract if no supply date is specified.

Future performance contracts

A future performance contract is a contract for goods or services that are not supplied or paid for at the time the contract is made.

A consumer may cancel a future performance contract within a year of receiving the contract if the contract doesn't include details required in the legislation, such as the supply date and the amount of periodic payments required.

Continuing service contracts

A continuing service contract is a kind of future performance contract (described above) for services provided on a continuing basis. Consumer service contracts include music lessons and gym memberships.

A consumer may cancel a continuing services contract by giving notice of cancellation to the supplier not later than 10 days after the date that the consumer receives a copy of the contract. The contract may also be cancelled at any time if there is a material change in the circumstances of the consumer (such as death, disability, or relocation) or supplier (such as relocation or discontinuance of services).

Time share contracts, pre-need cemetery or funeral services contracts, and funeral or interment right contracts

The *Business Practices and Consumer Protection Act* deals specifically with a consumer's right to cancel time-share contracts, pre-need cemetery or funeral services contracts, and funeral or interment right contracts. All have time limits.

For information about cemetery and funeral services, go to the Business Practices and Consumer Protection Authority website at www.bpcpa.ca/Consumers/help/consumers-help-cemeteries.htm.

Other protections

Breach of condition

In common law, a buyer may be entitled to be compensated or have a contract **set aside** if the seller breaches (breaks) a material condition of the contract (meaning it destroys the value of the contract).

The provincial *Sale of Goods Act* provides some additional protection to buyers by implying certain conditions in almost all sales of goods. Implied conditions to almost all transactions include:

- the seller owns the goods they are attempting to sell, and
- the goods are free of encumbrance (a mortgage or other charge on property) unless otherwise stated.

Under the *Sale of Goods Act*, there is also an implied condition that new goods are reasonably durable.

Where the seller is selling goods in the usual course of business (such as a new or used car dealer), and the buyer is relying on the seller's judgment, there is an implied condition that the goods are reasonably fit for their intended purpose.

Unsolicited goods and services

If someone doesn't ask for a seller's goods or services, they can't be forced to buy them. When goods or services are supplied to someone who didn't ask for them it means they were "unsolicited."

Section 12 of the *Business Practices and Consumer Protection Act* says that "a consumer has no legal obligation in relation to unsolicited goods or services unless and until the consumer expressly acknowledges to the supplier in writing his or her intention to accept the goods or services." This means the consumer has to say they want the goods or services in writing, usually by signing a contract.

Dealing with debt collectors

Section 114 of the *Business Practices and Consumer Protection Act* prohibits (forbids) the harassment of:

- a debtor;
- a member of the debtor's family or household;
- a relative, neighbour, friend, or acquaintance of the debtor; or
- a debtor's employer.

Harassment includes:

- using threatening, profane, intimidating, or coercive language;
- using undue, excessive, or unreasonable pressure; and
- publishing or threatening to publish a debtor's failure to pay.

If a debt is being collected by a person other than the creditor, the debt collector must:

- contact the debtor in writing at least five days before verbal contact;
- contact the debtor only once at work;
- contact the debtor's employer only with the debtor's consent or for the purpose of confirming employment;
- communicate with the debtor only in writing if so requested;
- deal only with the debtor's lawyer if so requested;
- communicate with the debtor by phone or in person only between the hours of 7:00 a.m. and 9:00 p.m., Monday through Saturday, and 1:00 p.m. and 5:00 p.m. on Sundays; and
- act within the debt collection limitations set out in the *Business Practices and Consumer Protection Act*, *Business Practices and Consumer Protection Regulation*, and bulletins issued by the Business Practices and Consumer Protection Authority (see below).

Under Section 171 of the *Business Practices and Consumer Protection Act*, a debtor subjected to an unfair debt collection practice may sue in Small Claims Court. Awards for harassment can be up to \$10,000 (see *Toban v. Total Credit Recovery*).

Business Practices and Consumer Protection Authority

The province has established the Business Practices and Consumer Protection Authority of BC to regulate business practices and consumer protection relating to:

- debt collection services,
- credit reporting agencies,
- travel agencies,
- funeral homes, and
- cemeteries.

A client who is facing an unfair practice by a debt collector can contact the authority at 1-888-564-9963 (toll free).

Under Section 172 of the *Business Practices and Consumer Protection Act*, a debtor or the director of the Business Practices and Consumer Protection Authority may apply to the Supreme Court for a temporary or permanent injunction (an order to stop a specific activity) against a supplier or debt collector. In such cases, the court may also make an order for the return of goods or money.

The website of the Business Practices and Consumer Protection Authority contains online information about unreasonable collection practices at www.bpcpa.ca/Industry/debt/industry-debt-unreasonable.htm.

Aboriginal legal issues

The general laws of consumer protection apply to Aboriginal people living on or off reserve; however the circumstances may be different, as described below.

Common client questions

- Can I get out of a purchase I made from a door-to-door salesperson on reserve?
- A creditor or debt collector is harassing me. What can I do?
- A creditor or debt collector is trying to seize the goods he sold me. What can I do?
- How can we keep door-to-door salespeople off our reserve?

Can I get out of a purchase I made from a door-to-door salesperson on reserve?

Your client can get out of a door-to-door sale at any time within 10 days after the transaction by giving notice of an intention to do so. After that time, your client's options are greatly diminished.

However, even if your client bought goods more than 10 days ago, they may still be able to get out of the deal with good advocacy, especially if your client is vulnerable and was exploited.

Find out all you can about the circumstances surrounding the transaction, including the age, literacy, and level of understanding of your client, and whether there was undue pressure, especially if the seller is a family member. If you are going to advocate on the client's behalf, you may want to talk to a lawyer or paralegal on LawLINE (see Appendix B).

A debt collector is harassing me. What can I do?

The *Business Practices and Consumer Protection Act* is a provincial law that applies on and off reserve.

Although the rules governing debt collection practices are the same on and off reserve, the tactics are sometimes different.

People on reserve are often surrounded by family members. Creditors and debt collectors sometimes try to use these family members or band staff to collect debts. This may amount to an unfair debt collection practice under the *Business Practices and Consumer Protection Act*.

Collection agencies must be licensed under the *Business Practices and Consumer Protection Act*. The Business Practices and Consumer Protection Authority (BPCPA) has the authority to cancel or suspend a licence.

The BPCPA accepts complaints about unfair debt collection practices by collection agencies. Your client may complain to the BPCPA by calling 1-888-564-9963 (toll free). It is important to have the name of the collection agency.

A creditor or debt collector is trying to seize the goods he sold me. What can I do?

Sometimes creditors try to seize (take) property instead of money from debtors in default of a contract (when the debtor fails to make payments). Creditors are usually only allowed to do so if they have a “security interest” in the property (when property is the creditor’s guarantee against loss) or a court order.

Protected from seizure

Your client’s property on reserve may be protected from seizure because of two provisions in the *Indian Act*:

- Section 29 of the *Indian Act* protects Indian reserve land from seizure.
- Section 89(1) of the *Indian Act* says that “the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.”

The effect of these *Indian Act* provisions is that the on-reserve assets of your client are generally exempt from seizure (see *Sioui, Re*). For a definition of “situated on reserve,” see page 11 in Chapter 1.

Not protected from seizure

Protection under section 89(2) of the *Indian Act* does not apply to transactions where “the right of property or right of possession thereto remains wholly or in part in the seller.” These transactions are often called “conditional sales agreements,” and the seller keeps the right to seize the goods subject to the agreement.

Also note that goods situated on a reserve are not protected from seizure when the creditor is an Indian or an Indian band. A non-Indian can “assign” (transfer) a debt to an Indian debt collector and avoid the **exemption** under section 89 of the *Indian Act* — so long as the Indian gets all or most of the benefit of collecting the debt. This is not the case when the Indian debt collector has to pay most of the money collected to the non-Indian creditor.

Section 4(2) of the *Indian Act* allows the minister of Indian and Northern Affairs Canada to exempt individuals from the effect of section 89. However, the minister does not exercise this authority as a matter of policy.

How can we keep door-to-door salespeople off our reserve?

Exploitation by door-to-door salespeople is widespread on reserve. To fight it, some band councils use their authority under section 81 of the *Indian Act* to stop solicitors from trespassing on reserve.

A person who trespasses on reserve commits an offence (*Indian Act*, s. 30). Therefore, an on-reserve client may have the right to **set aside** a contract as illegal if it was made with a door-to-door salesperson. This is a difficult legal argument to make, however, and should be referred to a lawyer.

For more information

- *Consumer Law and Credit/Debt Law: A Guide for British Columbia* (Legal Services Society). Available at www.lss.bc.ca, or see “How to order publications.”
- Chapter 9 of the *LSLAP Manual* (UBC’s Law Students’ Legal Advice Program) has general information about consumer protection. Available at www.lslap.bc.ca.
- LawLINK: www.lawlink.bc.ca. Click the “Consumer and Debt” button.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the “Law by Subject” button, then scroll down the page and choose “Credit, Debt and Bankruptcy.”
- Business Practices and Consumer Protection Authority: www.bpcpa.ca. Website contains help for consumers.

Statutes and regulations

Criminal Code, R.S.C. 1985, c. C-46

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2

Business Practices and Consumer Protection Regulation, B.C. Reg. 294/2004
[Business Practices and Consumer Protection Act]

Court Order Enforcement Act, R.S.B.C. 1996, c. 78

Debt Collection Industry Regulation, B.C. Reg. 295/2005 [Business Practices and Consumer Protection Act]

Indian Act, R.S.C. 1985, c. I-5

Sale of Goods Act, R.S.B.C. 1996, c. 410

Case citations

Danes v. British Columbia (1985), 61 B.C.L.R. 257; 18 D.L.R. (4th) 253; [1985] 2 C.N.L.R. 19 (B.C.C.A.) (alternate name: Watts v. British Columbia)

Kilroy v. A OK Payday Loans Inc., 2006 B.C.S.C. 1213

Leighton v. British Columbia (Gov’t) (1989), 35 B.C.L.R. (2d) 216; [1989] 3 C.N.L.R. 136 (B.C.C.A.)

Maracle v. Ontario (Minister of Revenue) (1993), 1 GTC 6214 (Ont. Gen. Div.)

Sioui, Re [2000] 3 C.N.L.R. 382 (Que. C.A.)

Tilden Rent-a-Car Co. v. Clendenning (1978) 18 O.R. (2d) 601; [1978] 1 A.C.W.S. 604 (Ont. C.A.)

Toban v. Total Credit Recovery (B.C) Ltd. [2001] B.C.J. No. 1921 (Sept. 5, 2001) (B.C. Prov. Ct.)

Wahpeton Dakota First Nation v. Lajeunesse [2002] 3 C.N.L.R. 285 (Sask. C.A.)

Williams v. Joe [1973] 5 W.W.R. 97; [1973] B.C.J. No. 734 (QL) (B.C. Co. Ct.)

3. Criminal Law



3. Criminal Law

This chapter covers:

- The criminal prosecution process
- The court process
- The options available outside of going to court
- The law regarding the possession of weapons
- The law regarding fishing and hunting gear
- What circle sentencing is
- What banishment is
- What legal aid coverage is available

Common client problems

- I want to know if I can get legal aid.
- I have been charged with a criminal offence and would like to deal with it outside the court system.
- I am facing a firearms prohibition but I need my gun to hunt for food for my family.
- A fisheries officer seized my fishing/hunting gear and I need it to catch fish/hunt for food for my family.
- I was convicted of a criminal offence and have been banished from my community.

General law

Criminal law describes what happens when a person has been charged with an offence and is facing a fine or other form of penalty.

Most criminal law is covered by the *Criminal Code of Canada*, but offences and punishments are also described in other federal laws such as the *Youth Criminal Justice Act* (for people 12 years old and over but under 18 years old), the *Controlled Drugs and Substances Act*, and the *Fisheries Act*.

Provincial laws such as the *Motor Vehicle Act* and *Wildlife Act* also contain offences and penalties that are dealt with in much the same way as criminal offences.

Criminal offences are prosecuted by the government. The Attorney General of British Columbia usually prosecutes offences under provincial laws and the *Criminal*

Definitions

Adjournment: When a court hearing or trial is stopped until a later stated time.

Appeal: An examination by a higher court of the decision of a lower court. The higher court may affirm, vary, or reverse the original decision.

Arraignment: A court hearing when the accused's name is called, the charge is read, and the accused pleads guilty or not guilty. At this time, the accused may also elect to be tried by a judge or by a judge and jury in a higher court, or by a judge in a lower court.

Crown counsel: The court lawyer who represents the provincial or federal government.

Indictable offence: More serious offence.

Preliminary inquiry: A hearing before a Provincial Court judge to determine whether there is enough evidence of an offence to go to trial.

Prohibition/prohibiting: An order that doesn't allow something.

Seize/seizure: To take away by legal right.

Sentencing: The judge's decision about what penalty, if any, a person convicted of an offence should get.

Summary offence: Less serious offence; carries a lighter sentence.

Trial: When the court examines the evidence and applicable laws to decide upon the charges against an accused.

Warrant: A writ (written order) from a court commanding police to perform specified acts.

Code of Canada. The Attorney General of Canada usually prosecutes offences under other federal laws such as the *Controlled Drugs and Substances Act* and *Fisheries Act*.

Understanding the criminal prosecution process

When someone is accused of a crime, the police start investigating to find out if there is enough evidence to charge that person.

Investigation stage

For minor offences by first-time or “unseasoned” offenders who take responsibility for their action, the police have the option of referring an accused to a community program instead of recommending criminal charges to **Crown counsel**. This process is referred to as “police diversion” or “restorative justice.”

Under police diversion or restorative justice, the accused may be asked to agree to participate in some form of mediation or other process to find an appropriate remedy to restore their relationship with the victim and the community.

The remedy may include:

- a letter of apology,
- payment of restitution,
- community service work, and/or
- working for the victim.

If the police decide not to “divert” the accused, they will provide a report and recommendations to Crown counsel.

Charge approval stage

If police recommend that criminal charges be laid, **Crown counsel** has the option of laying the charge or considering “alternative measures.” The *Criminal Code* (s. 717[1][a]) states that Crown counsel may refer an accused person to a “program of alternative measures authorized by the Attorney General” provided:

- it is not inconsistent with the protection of society;
- the accused person accepts responsibility for the “act or omission that forms the basis of the offence”;
- it is appropriate to the needs of the accused and the interests of society (and, in the case of an adult accused, the interests of the victim);
- there is enough evidence and no other bar to proceeding with the prosecution; and
- the accused person gives informed consent to participate in alternative measures.

Provincial Crown counsel and federal Crown counsel take slightly different approaches to alternative measures. However, they will almost always be considered if the accused has:

- no criminal record,
- no history of previous diversions, and

- has committed a less serious offence such as theft under \$5,000 or possession of a small quantity of marijuana.

In some circumstances, diversion may be considered for break-and-enter or possession of a controlled drug for the purposes of trafficking. Other offences will never be considered: murder, attempted murder, manslaughter, and trafficking drugs to youth.

If charges are laid, the accused will go to court as described below.

Understanding court appearances

When a person is charged with a criminal offence, the investigation officer will require them to attend court either by:

- keeping the person in custody until their first court appearance, or
- giving the person a document such as a “Summons” or “Promise to appear” stating the date and location of the first court appearance.

At their “first appearance,” the accused is required to tell the judge what they intend to do with the charge, even if it is to ask for more time to speak with a lawyer or apply for legal aid. The judge will usually grant the accused an **adjournment** for a number of days for such purposes. Further adjournments are possible, but at the discretion of the judge.

The next court appearance after the first appearance (and any adjournments) is called the **arraignment** hearing. At this hearing, for most offences, the accused will be required to enter a plea — either guilty or not guilty. If the plea is guilty, a time will be set for **sentencing**, usually on the same day. If the plea is not guilty, the court will advise the accused how to “fix” (arrange) a trial date for a trial before a Provincial Court judge.

If the accused has been charged with a very serious offence (an **indictable offence**), they will usually have an opportunity at the arraignment hearing to choose the method of trial. The accused can choose a trial before:

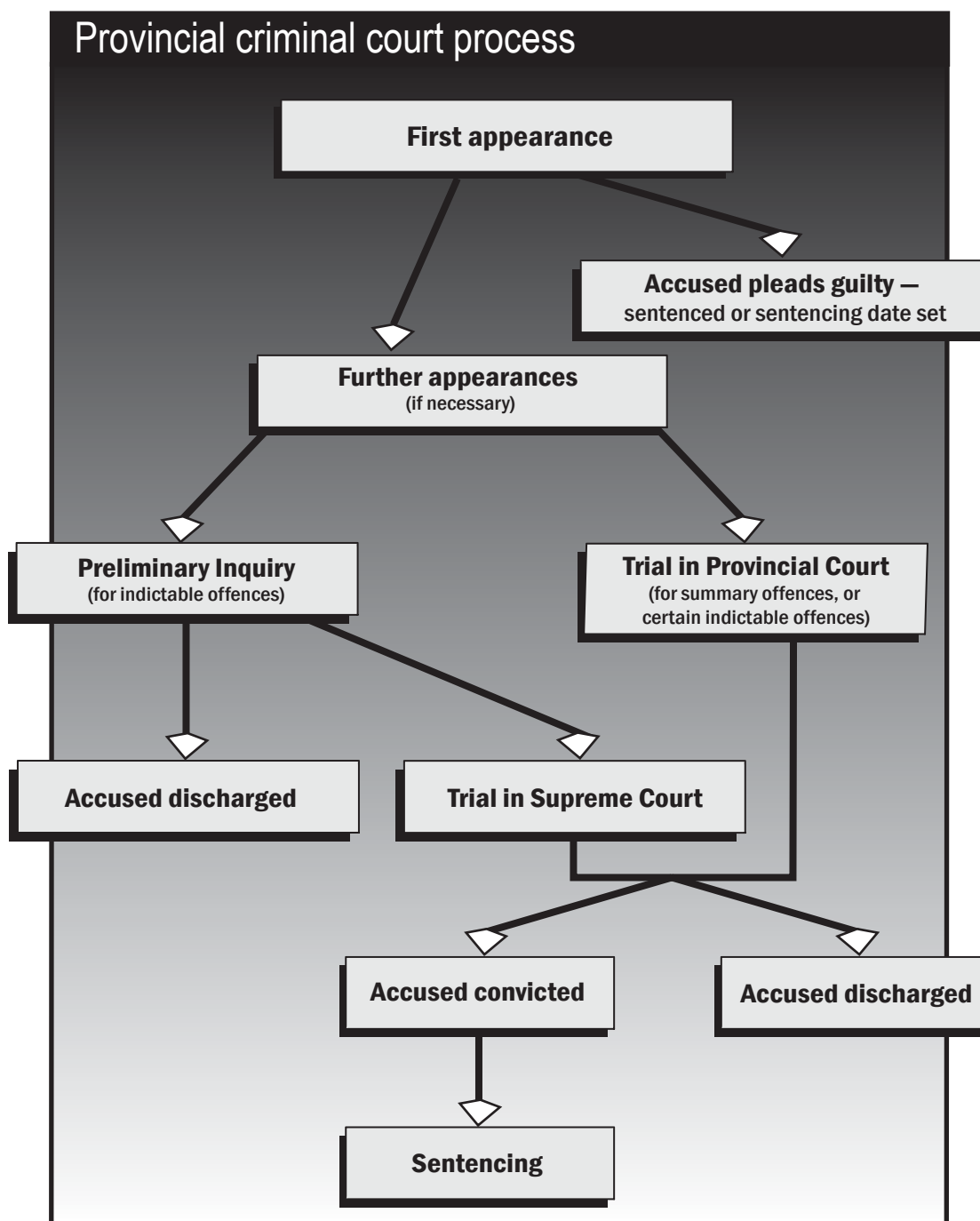
- a Provincial Court judge,
- a Supreme Court judge without a jury, or
- a Supreme Court judge with a jury.

If the accused chooses a trial by a Supreme Court judge, with or without a jury, they may have a **preliminary inquiry** into the charge before the actual **trial**.

At trial, the accused will be found either guilty or not guilty. If they are found guilty, a time will be set for sentencing.

Usually a trial or sentencing is the last court appearance an accused is required to make. However, both a finding of guilty or not guilty and the sentence imposed by the judge are subject to an **appeal** to a higher level of court on certain grounds.

Note: If an accused person misses a scheduled court appearance without making prior arrangements with the court, the judge may issue a **warrant** for the arrest of the accused. This authorizes the police to arrest the accused and hold them in custody, often until released by a judge. Clients who have missed court appearances or who cannot attend an upcoming court appearance should consult a lawyer right away.



This is a general guideline only. It has been adapted from a chart of the Law Courts Education Society of BC.

Aboriginal legal issues

A range of barriers can face Aboriginal clients in the Canadian criminal justice system, including:

- the Aboriginal cultural value of accepting responsibility,
- the absence of readily available criminal legal advice, and
- the desire to “get it over with” even when the person is not technically or actually guilty of an offence.

If your client has been charged with a crime, start by explaining how the Canadian criminal justice system works. The approach is different from the cultural values of many societies, including some Aboriginal communities, which places a high importance on accepting responsibility for one’s actions.

Explain, for example, that your client has the right “to remain silent” until they get legal help. And if your client pleads not guilty to a crime, tell them that the Crown (counsel representing the government) must prove the offence “beyond a reasonable doubt.”

Common client questions

- What happens if I’m accused of a crime?
- What happens if I’m found guilty of a crime?
- What is “circle sentencing”?
- What if I’ve had my fishing or hunting gear seized?
- What if I’ve been banished from my community?
- Can I get legal aid?

What happens if I’m accused of a crime?

When someone is accused of a crime, the police investigate to find out if there is enough evidence to charge that person. Start by finding out if your client is being investigated by police, or if the police have already recommended criminal charges to **Crown counsel**.

If your client’s offence is minor, they may be recommended for “police diversion” or “restorative justice.” A number of restorative justice programs throughout the province are provided by Aboriginal organizations. Contact the local police detachment for information about the services in your area. The community program will monitor the offender’s performance of the remedy (the agreed actions to correct the offence).

If your client has already been charged with a criminal offence, their main decision is whether to plead guilty or not guilty. This decision should not be made until the client has reviewed the “information” (a document that sets out the formal charges) and “circumstances” (a copy of the report sent to Crown counsel by the police). These documents can be obtained from Crown counsel before or at your client’s first appearance in court.

Your client may still be considered for alternative measures once the Crown has laid a charge, or at any time prior to or during a trial. For more on alternative measures, see “Charge approval stage” on page 27.

If you have experience dealing with police or Crown counsel, you may be able to intervene on your client’s behalf early in the process. If not, consider referring the matter to a lawyer as soon as possible. See “Legal aid” later in this chapter for how to get a legal aid lawyer.

Note: Your Aboriginal client may have an “Aboriginal rights defence” to a criminal charge, especially if the charge is related to fishing, hunting, or gathering. For a more detailed discussion on Aboriginal rights defences, see Chapter 5, Harvesting Rights.

What happens if I’m found guilty of a crime?

A judge will sentence someone if they plead guilty to an offence at any stage of the proceedings or if they are found guilty following a trial.

Section 718.2(e) of the *Criminal Code of Canada* states that, in sentencing:

... all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with particular attention to the circumstances of Aboriginal offenders.

This provision is intended to address factors experienced by many Aboriginal people and the serious overrepresentation of Aboriginal people in the criminal justice system (see *R. v. Gladue*). However, sentencing is done individually, and s. 718.2(e) is not intended to necessarily result in an easier sentence, especially for violent offences (see *R. v. Wells*).

It is the responsibility of the accused or their counsel to tell the judge about any circumstances that apply to section 718.2(e). The court can consider any relevant evidence, including oral or written reports from professionals or community members familiar with those circumstances.

Note: If your client wants to find out what’s contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

What is “circle sentencing”?

One sentencing option available to Aboriginal clients is “circle sentencing.”

Circle sentencing is when the sentencing judge and appropriate community members meet, usually outside the courtroom, to discuss an appropriate sentence for the accused person, usually emphasizing rehabilitation and restoration rather than punishment.

The group attempts to agree on a sentence, but the judge has the final authority to impose it. That way, the sentence becomes an order of the court.

Circle sentencing takes a lot of time and effort to prepare. The hearing itself can also take a long time, and the consent of the court is required. If your client is interested in a sentencing circle, arrangements need to be made well in advance.

Courts have found that circle sentencing may be appropriate when:

- the accused acknowledges guilt, and disputed facts are resolved prior to the circle;
- both the accused and the victim consent to the circle taking place;
- the accused has deep roots in the community where the circle is held and the participants are from;
- respected elders and non-political leaders are willing to participate; and
- appropriate support is available to the victim (see *R. v. Joseyounen*).

Even if a judge will not agree to participate in a sentencing circle, they will often welcome the advice of the community on sentencing options (see *R. v. Rich*).

Circle sentencing programs that would otherwise be considered discriminatory under section 15(1) of the *Charter of Rights* may be protected by section 15(2) as programs aimed at disadvantaged groups (see *R. v. Willocks*).

What if I've had my fishing or hunting gear seized?

Aboriginal people exercising their Aboriginal right to harvest fish and game often come into conflict with enforcement authorities.

Fisheries Act seizures

Section 51 of the *Fisheries Act* authorizes a fisheries officer or fisheries guardian to **seize** vessels, vehicles, fish, or other things that they believe were obtained by or used in an offence under the act. It doesn't matter whether the things seized actually belong to your client.

Unless Crown counsel decides not to proceed with charges, the only way your client can get seized items back before court proceedings are finally concluded is by giving security "to Her Majesty in a form and amount that is satisfactory to the Minister."

You can assist your client by demonstrating to the Crown how the **seizure** of goods has created a hardship for your client. This may reduce the amount of the security required. Otherwise, the court will decide at trial whether the items should be returned to your client or forfeited as part of a conviction (see *Fisheries Act*, ss. 71 and 72).

Wildlife Act seizures

Section 94(1) of the provincial *Wildlife Act* gives a conservation officer the authority to seize wildlife and other evidence of an offence.

A client who has had items, including wildlife, seized under the *Wildlife Act* may, with three days prior notice to the Ministry of Environment, apply to the provincial court for return of those items. The judge will consider hardship and other factors in deciding whether to return them.

What if I'm facing a firearms prohibition?

A person faces a *mandatory* weapons **prohibition** under section 109 of the *Criminal Code* if they have been convicted of any of the following:

- A violent crime for which they could be sentenced to 10 years or more in prison
- Serious offences involving weapons

- Other offences involving weapons if they are already under a weapons prohibition
- Trafficking, importing, or producing controlled drugs, or having possession for controlled drugs for those purposes

For other offences, a person may get a *discretionary* prohibition of up to 5 or 10 years (ss. 110 and 111 of the *Criminal Code*) if the judge feels the prohibition is in the interests of safety of the person or of another person.

If the circumstances which led to a section 111 prohibition end, a judge may cancel the order (see *Criminal Code*, s. 112).

Even in the case of mandatory prohibitions, a judge may, under section 113 of the *Criminal Code*, authorize a chief firearms officer or the registrar of firearms to issue a licence or registration certificate, with appropriate conditions, to allow the client to use weapons for sustenance or employment.

Alternatively, in very rare circumstances where the prohibition would create an injustice, the court may waive or reduce the client's prohibition through a "constitutional exemption." Such exemptions have been applied to Aboriginal sustenance hunters (see *R. v. Chief*).

What if I've been banished from my community?

Sometimes a sentencing court will make a probation order with a term **prohibiting** an individual from being within a certain geographic area for the period of probation. A restriction prohibiting your Aboriginal client from being in his or her home community amounts to "banishment."

Courts are reluctant to order banishment, especially in the absence of an agreement with another community to accept the offender (see *R. v. Malboeuf*).

However, banishment may be upheld where it is expected to have a positive effect on someone's behaviour (see *R. v. Taylor*).

Note: Regardless of what a court orders, band councils have authority under section 81(1)(p) of the *Indian Act* to declare a person — even a band member — a "trespasser" on an Indian reserve. However, this has the same effect as banishment, and will only be supported by the courts if the process was fair (see *Edgar v. Kitasoo Band*).

Can I get legal aid?

The consequences of a criminal conviction can be serious, and the assistance of a lawyer can be extremely important. The Legal Services Society (LSS) provides legal aid in BC. The guidelines for coverage and eligibility are described below.

Legal aid coverage for criminal matters

LSS will pay for a lawyer to represent your client if they are financially eligible and will, if convicted:

- go to jail,
- face a conditional sentence that would severely limit their liberty,
- lose their way of earning a living, or

- face an immigration proceeding that could lead to deportation from Canada.

Legal representation is also available to:

- youths charged with federal offences;
- people who, through mental or emotional illness, are unable to represent themselves; and
- Aboriginal people facing restrictions to a traditional livelihood, such as hunting or fishing.

Legal aid financial eligibility guidelines

People have to be financially eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available on the LSS website at www.lss.bc.ca under Legal aid > Legal aid offices.

Your client will be required to provide “proof of income,” such as a pay stub or a letter from an employer.

If your client is facing the loss of a traditional livelihood such as fishing or hunting, you can help your client by preparing information on their fishing or hunting practices. (See Chapter 5, Harvesting Rights.)

For more information

- *Martin's Annual Criminal Code 2007* with annotations by Edward L. Greenspan, QC, and the Honourable Justice Marc Rosenberg (Canada Law Book, Inc). Authoritative resource on the *Criminal Code* and other federal criminal legislation. See “To order publications.”
- Chapter 1 of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) has general information about criminal matters. Available at www.lslap.bc.ca.
- For more about restorative justice, see the Justice Canada website, Community-based Justice Programs page at <http://justice.gc.ca/en/ps/ajs/programs/bc.html>.
- LawLINK: www.lawlink.bc.ca. Click “Crime” and follow the relevant links.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the “Law by Subject” button and follow the links for criminal matters.
- Legal Services Society website: www.lss.bc.ca. Click the “Legal aid” button to find information on legal aid coverage and eligibility.

Statutes and regulations

Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11]

Controlled Drugs and Substances Act, S.C. 1996, c. 19

Criminal Code, R.S.C. 1985, c. C-46

Firearms Act, S.C. 1995, c. 39

Fisheries Act, R.S.C. 1985, c. F-14

Motor Vehicle Act, R.S.B.C. 1996, c. 318

Wildlife Act, R.S.B.C. 1996, c. 488

Youth Criminal Justice Act, S.C. 2002, c. 1

Case citations

Edgar v. Kitasoo Band (Council), 2003 FCT 166; [2003] 2 C.N.L.R. 124 (Fed. Ct. Trial Div.)

R. v. Chief (1989), 74 C.R. (3d) 57; 51 C.C.C. (3d) 265 (Y.T.C.A.)

R. v. Gladue (1999), 133 C.C.C.(3d) 385; [1999] 1 S.C.R. 688 (S.C.C.)

R. v. Joseyounen [1996] 1. C.N.L.R. 182 (Sask. Prov. Ct.)

R. v. Malboeuf (1982), 68 C.C.C. (2d) 544 (Sask. C.A.)

R. v. Rich [1994] 4 C.N.L.R. 167 (Newfoundland S.C.) (alternate name R. v. S.R. (No. 1))

R. v. Taylor (1997), 122 C.C.C. (3d) 376 (Sask. C.A.)

R. v. Wells [2000] 1 S.C.R. 207 (S.C.C.)

R. v. Willocks (1992), [1994] 1 C.N.L.R. 167 (Ont. Prov. Div.), affirmed (1995), 22 O.R. (3d) 552 (Ont. Ct. Gen. Div.)

4. Family Law



4. Family Law

This chapter covers:

- Provincial and federal jurisdiction over family law
- What happens to children and property in a divorce or separation
- Where to get help if violence is involved
- The rights of parents if a child is taken from the home by the Ministry of Children and Family Development
- Custom adoptions
- The family law services that may be available to your clients

Definitions

Assets: Generally any item of property (land or personal possessions) that has monetary value.

Indian: A person who is registered or entitled to be registered as an Indian under the *Indian Act*.

Jurisdiction: The right and power to make law or interpret and apply the law.

Maintenance: Also called “support” and in the case of divorce, “alimony.” This is money paid by a spouse or parent to the other spouse or parent in a divorce or separation to help with living expenses.

Party/parties: Person who takes a role in legal proceedings.

Common client problems

- I am separating from my partner and need to know what the law says, especially about the children.
- I am separating from my partner and we have possession of a house on reserve.
- My partner is not paying child support.
- My children were removed by the Ministry of Children and Family Development. I want to know what my Aboriginal community and I can do.
- I was adopted by custom and want to know what rights I have.
- My partner is abusive. I want to know if legal aid can help me.

General law

Family law describes the following legal relationships within families:

- marriage,
- adoption, and
- child welfare.

Family law also regulates separation or family breakdown issues, such as:

- Custody and guardianship of children
- Access to children
- Maintenance: spousal support (alimony) and child support
- Division of family assets (BC Supreme Court only)
- Divorce (BC Supreme Court only)

Jurisdiction for family matters is divided between the federal parliament and provincial legislature (see table).

Jurisdiction of Provincial and Supreme Court in family matters			
	Divorce Act (federal) Applies to legal marriages only	Family Relations Act (provincial) Applies to legal marriages and common-law relationships	Common Law (The law that is created by judges when they decide on cases.)
BC Supreme Court	• Divorce • Child support • Spousal support • Custody and access	• Child support • Spousal support (alimony) • Guardianship • Custody and access • Occupancy of family residence and use of its contents • Judicial separation • Division of family assets (legal marriages only)	• Division of family assets in common-law relationships
Provincial Court of BC	• Enforcement of custody, access, and support orders	• Child support • Spousal support (alimony) • Guardianship • Custody and access	

Family law matters are also regulated by the *Federal Child Support Guidelines*, which are a set of rules that help parents determine how much child support should be paid in a divorce or separation (to find the guidelines online, see “For more information” at the end of this chapter).

The solemnization (performance) of marriage comes under the provincial *Marriage Act*; adoption is regulated by the provincial *Adoption Act*; and child welfare is covered by the provincial *Child, Family and Community Services Act*.

Separation and divorce

This section covers the general law on the following topics:

- Custody and access to children
- Division of property
- Violence in a relationship
- Family maintenance (support)

Custody and access to children

The regulations under the *Family Relations Act* and the *Divorce Act* regarding custody and access apply to all parents, including Aboriginal parents. In determining custody and access, the court will consider what's in the best interests of the child.

Custody, access, and guardianship may be granted to grandparents, stepparents, aunts, and other extended family members.

Division of property

The *Family Relations Act* applies to Aboriginal people living on or off reserve, except for property located on reserve (see “Aboriginal law issues” below). Family property consists of land, money, pensions, and business interests.

Married couples

Under the provincial *Family Relations Act*, family **assets** — both land and personal property — are divided between married spouses upon separation. When a married couple separates, the property accumulated during the marriage may be divided between the spouses.

Common-law couples

In the case of separating common-law couples, ownership of property is considered to lie with the person who possesses the property or is the registered owner (if ownership could be registered).

The BC Supreme Court has **jurisdiction** to redistribute property if it is unfair not to. Making a claim to property on the basis of fairness can be very difficult and time-consuming.

It is recommended that people consult a lawyer if they are accumulating property and are in a common-law relationship.

Violence in a relationship

If there is violence in your client's relationship, first make sure that they are safe. Your client should then contact a lawyer or the Legal Services Society (LSS) without delay. LSS provides legal aid to victims of domestic violence and/or their children for restraining orders (also called protection orders). See “Legal aid” on page 44.

There is extensive information about family violence on LawLINK and on the LSS Family Law website. See “For more information” on page 47.

Family maintenance (support)

The requirement to pay maintenance (support) is the same for Aboriginal people on or off reserve as it is for non-Aboriginal people (see *Potts v. Potts*).

When they separate, both parents are obligated to support the children of the relationship. The rules are set out in the provincial *Family Relations Act* and the federal *Divorce Act* and *Child Support Guidelines*. (Note that if the payer of child support is receiving tax-exempt income, the court may order higher payments than are set out in the *Federal Child Support Guidelines*.)

A spouse might also be responsible for supporting the other spouse for a period of time following separation.

What to do if the other person doesn't pay

If the other spouse/parent does not agree to pay adequate maintenance (support) after separation, your client can apply for a child support or spousal support order in either the Provincial Court (Family Division) or the BC Supreme Court. Clients may be able to get help with this; see “Family duty counsel and advice lawyers” on page 45.

Maintenance orders may be enforced by the spouse who obtained the order (with assistance from a lawyer, if necessary), or through the Family Maintenance Enforcement Program. The program is described under “Family law services” on page 46.

Aboriginal legal issues

This section covers common client questions about:

- Separation and divorce
- Child protection
- Custom adoption

Separation and divorce

- What will happen to my children?
- What will happen to my house on reserve?

What will happen to my children?

The regulations under the *Family Relations Act* and the *Divorce Act* regarding custody and access apply to all parents, including Aboriginal parents (see “Separation and divorce” under “General law”). However, Aboriginal parents may have access to services — such as an elder or leader in their community — to assist in making mutually satisfactory arrangements for the children.

If Aboriginal parents cannot agree, they may seek a court order for custody, access, and guardianship through standard court procedures (see the self-help guides on the Family Law website at www.familylaw.lss.bc.ca). The court may allow the band social worker to do a home study, and may take into consideration the support that either party has from their Aboriginal community.

What will happen to my house on reserve?

The **jurisdiction** for “Indians and Lands Reserved for the Indians” comes under the federal *Constitution Act*, 1867. That means that, upon separation, a client who does not have a recognized legal interest in a family home on reserve cannot get a court order for possession of the home through the provincial *Family Relations Act* (see *Derrickson v. Derrickson*). However, a court may order that the client be financially compensated in place of an order for possession (see *George v. George*).

Note that an Indian spouse (but not a non-Indian spouse) can enforce maintenance (support) orders against the on-reserve property of the other Indian spouse (see *Director of Support and Custody Enforcement v. Nowegejick*; *Indian Act*, s. 89[1]).

Some exceptions

A number of First Nations are taking control of their own reserve lands through the *First Nations Land Management Act*, S.C. 1999, c. 24. Section 6 of the act enables a First Nation to adopt a land code and establish “the general rules and procedures applicable to the use and occupancy of first nation land.” Through this code, a First Nation can regulate how reserve land is distributed upon divorce or separation.

Nisga’a Lands are no longer “lands reserved for Indians,” so provincial legislation applies to the division of real estate **assets** there.

Note: The division of family **assets** is a highly technical legal matter. Advise your clients to speak with a lawyer.

Child protection

- What are my rights if my child is removed from the home?
- Who must be notified when an Aboriginal child is taken from the home?

What are my rights when my child is removed from the home?

The provincial Ministry of Children and Family Development has responsibility for both Aboriginal and non-Aboriginal children in need of protection. Children exposed to abuse, neglect, and harm or threat of harm are considered to be in need of protection. The safety and well-being of children is what’s most important.

The *Child, Family and Community Services Act* applies to Aboriginal children, and contains special provisions for their protection:

- Preserving cultural identity is part of an Aboriginal child’s safety and well-being (s. 2[f]), in the best interests of the child (s. 4[2]), and a necessary consideration in a plan of care for the child (s. 35[1][b]).
- Aboriginal communities should be involved in the planning and delivery of services to Aboriginal families and their children (s. 3[b]).
- Appropriate Aboriginal organizations must be notified of child protection proceedings involving Aboriginal children (ss. 33.1 and 36).
- Designated representatives of Indian bands, Aboriginal communities, and the Nisga’a Lisims government are entitled to be **parties** to a child protection hearing for a child from their community (s. 39).

Many Aboriginal organizations have been delegated to act as agents for the Minister of Children and Family Development in child protection hearings. The Spallumcheen Indian Band Council has direct authority for the protection of children who are members of the band and residing on reserve (see *Section [E.G.] v. Spallumcheen Band Council*).

The *Nisga’a Final Agreement* provides that the Nisga’a Lisims government may make laws comparable to provincial standards about the welfare of Nisga’a children. To date, the Nisga’a have not assumed this authority. For now, they operate a child protection agency with authority delegated from the provincial government.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Who must be notified when an Aboriginal child is taken from the home?

By authority of the *Child, Family and Community Service Act*, if a child is apprehended (removed from the home), the Ministry of Children and Family Development is obliged to notify a representative of the child's Aboriginal community, band council, or tribal organization.

If the representative decides to participate, they are a **party** to the action (the legal proceeding) and have a right to:

- Receive all records and information
- Speak at the hearing
- Call witnesses and question other witnesses
- Participate in any mediation
- Propose support for the child's parents or suggest another culturally appropriate plan for the care of the child

Adoption

- What is the effect of custom adoption?
- What if my child is placed for adoption?

What is the effect of a custom adoption?

Many Aboriginal communities have traditions of adoption by custom that pre-date federal and provincial law-making. The courts have recognized these custom adoptions as legal (see *Re Adoption of Katie*).

Where they are an "integral part of the distinct culture" of the community, custom adoption is an Aboriginal right protected by section 35(1) of the *Constitution Act, 1982* (see *Casimel v. Insurance Corporation of British Columbia*).

A valid custom adoption requires that:

- the natural and adopting parents, and where appropriate, the child, consent (agree) to the adoption;
- the adoptive parents are Aboriginal and entitled to rely on the Aboriginal custom;
- if the child is able, they consent voluntarily to be placed with the adopting parents;
- there is a rationale for custom adoption in the case (see *Re Tagornak Adoption Petition*); and
- the parties understand that the relationship created is fundamentally that of adoption under the *Adoption Act* (see *Re B.C. Birth Registration No. 1994-09-04399*).

Adoptions in British Columbia are regulated by the provincial *Adoption Act*. The act provides that a court may recognize a custom adoption as having the same effect as an adoption under the act (s.46).

What if my child is placed for adoption?

The *Adoption Act* provides that a designated representative of the child's Aboriginal community must be consulted before the child is placed for adoption (s. 7). An adoption order does not affect any Aboriginal rights the child has (s. 37[7]).

The adoption of an Aboriginal child by non-Aboriginal parents does not affect the child's entitlement to band membership where that membership is under the Ministry of Indian and Northern Affairs' control (see *G. [C.L.] v. Smith*). However, it is open to a band that controls its own membership to deny membership to such a child (see *G. [J.-G.], Re*).

Family law services

The following services may be available to clients who need help with family law matters:

- Legal aid
- Family duty counsel and advice lawyers
- Family justice counsellors
- The Family Maintenance Enforcement Program
- Family Law in BC website

Legal aid

The Legal Services Society (LSS) provides legal aid in BC. The guidelines for coverage and eligibility are described below.

Legal aid coverage for family matters

LSS will pay for a lawyer to represent financially eligible clients who:

- need a restraining order or change to a custody or access order because they or their children are at risk of physical violence,
- need a supervised access order because their children are at risk,
- face threats from the other parent to take their child out of the province permanently, or
- have had children removed or threatened to be removed by the Ministry of Children and Family Development.

Under certain circumstances, a person may qualify for exceptional coverage. LSS provides legal representation to financially eligible clients who:

- cannot represent themselves because of a serious condition or disability and face a family matter that may result in further harm if not resolved;
- have documented experience of sexual, physical, or emotional abuse from a partner or other parent who is back in the community;

- have a court order for custody of a child kidnapped by the other parent;
- are a respondent (other **party**) to a maintenance enforcement hearing that may result in the client's imprisonment;
- have access through a court order or separation agreement, but have been refused access for three months or more; or
- face other unusual or extenuating circumstances.

Legal aid clients who are at risk because there is a high level of conflict in their case may qualify for additional services if the case goes to trial. Clients should ask their legal aid lawyer if their situation might qualify them for extended family services.

Legal aid financial eligibility guidelines

People have to be financially eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available online at www.lss.bc.ca under Legal aid > Legal aid offices.

Your client will be required to provide “proof of income,” such as a pay stub or a letter from an employer.

Note: If your client is financially eligible for legal aid and has a family problem, consider helping them with the legal aid application. Many clients are hesitant to discuss the details of their family problems and don't make their “best case” on the legal aid application. This can result in denial of legal aid and huge and lasting problems for the client. Your help in identifying all of the relevant issues may make the difference.

Family duty counsel and advice lawyers

Family duty counsel and family advice lawyers are located in many supreme courts and most provincial courts to help low-income people deal with legal issues related to separation and divorce.

Family duty counsel can give legal advice, assist with documents, appear in court to request an adjournment to get an order, help with straightforward uncontested hearings, and attend case conferences.

Family advice lawyers can help people prepare their case and follow up on what takes place during the proceedings.

Both family duty counsel and family advice lawyers can give advice and speak in court on simple matters even if a client is not financially eligible for legal aid. However, they will not take on an entire case or represent a client at trial.

There is no charge for family court duty counsel and family advice lawyer services.

To find out when duty counsel and advice lawyers are available, go to the LSS website at www.lss.bc.ca and look under Legal aid > Legal advice.

Family justice counsellors

Family justice counsellors are trained mediators who can assist your client with:

- coming to an agreement with the former spouse about custody, guardianship, access, or spousal or child support;
- changing a custody, guardianship, access, or support order in provincial court;
- emotional support and short-term counselling;
- court-ordered custody and access assessments;
- learning about separation, divorce, the court process and available services for family matters; and
- referrals to legal, emergency, and community services.

Note: Family justice counsellors cannot assist with Supreme Court orders or changes to them. Your client would need to get help from a family duty counsel or family advice lawyer.

For further information on family justice counsellors, see www.ag.gov.bc.ca/family-justice/help/counsellors/index.htm.

A list of family justice centres can be found at www.ag.gov.bc.ca/family-justice/resources/brochures_booklets/counsellors/FJCentres.pdf.

There is no charge for family justice counsellor services.

Family Maintenance Enforcement Program

If your client lives in BC and is having difficulty collecting on an existing court order or agreement dealing with child support or spousal support, they can enroll with the provincial government's Family Maintenance Enforcement Program (FMEP). Once enrolled, the program's staff will help your client to monitor and enforce the agreement. They will try to get voluntary payments from the other **party**.

However, if the other party does not pay, the program can take enforcement action that is not otherwise available to individuals.

FMEP can be very effective, but clients sometimes find the process quite slow. A client can get a copy of the enrollment application and other information online at www.fmep.gov.bc.ca or by calling 1-800-668-3637.

Family Law in BC website (www.familylaw.lss.bc.ca)

Use this site to find helpful information about family law. The site contains:

- Publications, videos, links to websites, and online self-help materials
- Self-help guides for anyone who has to go to court without a lawyer to get an uncontested divorce or to get or change an order for custody, access, guardianship, and/or child or spousal support
- Information about and links to people and services who can help with family law issues

For more information

- Chapter 3, “Family Law” and Chapter 5, “Children and the Law” of the *LSLAP Manual* (UBC’s Law Students’ Legal Advice Program) have general information about family law and child welfare. Available online at www.lslap.bc.ca.
- Legal Information for Battered Women fact sheet 5. *Can You Stay in the Family Home on Reserve?* (Legal Services Society). Available at www.lss.bc.ca or see “To order publications.”
- *Speaking of Abuse: Violence against Aboriginal Women in Relationships*, booklet (Legal Services Society). Available at www.lss.bc.ca or see “To order publications.”
- *If Your Child Is Taken by the Ministry of Children and Family Development*, brochure (Legal Services Society). Available at www.lss.bc.ca or see “To order publications.”
- *Parents’ Rights, Kids’ Rights: A Parents’ Guide to Child Protection Law in BC*, booklet (Legal Services Society). Available at www.lss.bc.ca or see “To order publications.”
- *For the Sake of Our Children: A Video Guide to Child Protection Law in BC* (Legal Services Society). Listen to the video online at www.lss.bc.ca (go to Resources > Publications > Publications by title > F), or see “To order publications” in this guide. Single copies are free for non-profit organizations; contact LSS for bulk orders.
- Family Law in British Columbia website: www.familylaw.lss.bc.ca. Extensive help on family law matters, including self-help guides, fact sheets, videos, and detailed information on the child protection process.
- LawLINK: www.lawlink.bc.ca. Click “Family” and follow the relevant links.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the “Law by Subject” button and follow the links to “Adoption,” “Child Support and Custody,” “Divorce and Separation,” “Family Law,” or “Marriage (legal and common law).”
- The Federal Child Support Guidelines can be found at www.justice.gc.ca/en/ps/sup/grl/glp.html.
- Adoption website of the Ministry of Children and Family Development (includes a fact sheet on custom adoptions): www.mcf.gov.bc.ca/adoption.

Statutes and regulations

Adoption Act, R.S.B.C. 1996, c. 5

Child, Family and Community Service Act, R.S.B.C. 1996, c. 46

Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) reprinted R.S.C. 1985, App. II, No. 5

Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11]

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127

Family Relations Act, R.S.B.C. 1996, c. 128

Federal Child Support Guidelines SOR/97-175

First Nations Land Management Act, S.C. 1999, c. 24

Indian Act, R.S.C. 1985, c. I-5

Marriage Act, R.S.B.C. 1996, c. 282

Nisga'a Final Agreement Act, S.B.C. 1999, c. 2

Nisga'a Final Agreement Act, S.C. 2000, c. 7

Case citations

Casimel v. Insurance Corporation of British Columbia, [1994] 2 C.N.L.R. 22; 82 B.C.L.R. (2d) 387 (B.C.C.A.)

Derrickson v. Derrickson, [1986] 2 C.N.L.R. 45; [1986] 1 S.C.R. 285 (S.C.C.)

Director of Support and Custody Enforcement v. Nowezejick, [1989] 2 C.N.L.R. 27 (Ont.Fam.Ct.)

G. (C.L.) v. Smith, [1985] 2 W.W.R. 155 (B.C. Co. Ct.)

G. (J.-G.), Re, [2000] 4 C.N.L.R. 104 (C.Q.), affirmed (2001), 2001 Carswell Que 3112 (Que. C.A.)

George v. George (1992), 95 D.L.R.(4th) 333; [1993] 2 C.N.L.R. 112 (B.C.S.C.); affirmed [1997] 2 C.L.N.R. 62; 139 D.L.R.(4th) 53 (B.C.C.A.); additional reasons at (1997) 30 B.C.L.R.(3d) 107 (B.C.C.A.)

Potts v. Potts, [1992] 1 C.N.L.R. 182; 77 D.L.R. (4th) 369 (Alta.C.A.)

Re Adoption of Katie (1961) 38 W.W.R. 100; 32 D.L.R. (2d) 686 (N.W.T.Terr.Ct.)

B.C. Birth Registration No.1994-09-040399 (Re), [1998] 4 C.N.L.R. 7; 45 R.F.L. (4th) 458 (B.C.S.C.)

Re Tagornak Adoption Petition, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.)

Section (E.G.) v. Spallumcheen Band Council, [1999] 2 C.N.L.R. 318 (B.C.S.C.)

5. Harvesting Rights: Hunting, Fishing, Trapping, & Gathering



5. Harvesting Rights: Hunting, Fishing, Trapping, & Gathering

Definitions

Aboriginal title: A legal term that recognizes an Aboriginal interest in the land. It is based on the long-standing use and occupancy of the land by today's Aboriginal people as the descendants of the original inhabitants of Canada.

This chapter covers:

- Recognized Aboriginal rights in Canada
- Treaty rights in Canada
- How Aboriginal people can rely on their Aboriginal rights

Common client problems

- I consider myself Indian/Inuit/Métis and want to know if I have Aboriginal rights.
- The government is interfering with my Aboriginal/treaty right to hunt, fish, trap, or gather.

Aboriginal rights

Aboriginal rights are the common law rights of Aboriginal people flowing from their occupation of the land before the British Crown claimed sovereignty (exercised authority) over it (see *Delgamuukw v. British Columbia*).

Aboriginal rights include traditional harvesting activities such as fishing, hunting, gathering, and trapping. They may also include other activities such as self-government (see *Campbell v. British Columbia [Attorney General]*).

Aboriginal title is an Aboriginal right giving its holders the communal right to the “exclusive use and occupancy” of an area of ancestral land (see *Delgamuukw v. British Columbia*).

To be an Aboriginal right, “an activity must be an element of a practice, custom or traditional integral to the distinctive culture of the Aboriginal group claiming the right” (see *R. v. Van der Peet*).

Aboriginal rights are protected under the Constitution of Canada (see *Constitution Act, 1982*, section 35[1]).

Aboriginal rights may be claimed by an Aboriginal person of Canada. Section 35(2) of the *Constitution Act, 1982*, defines Aboriginals as the “Indian, Inuit and Métis peoples of Canada.” For a definition of each group, see the glossary at the end of this guide.

Treaty rights

A treaty is “an exchange of solemn promises between the government and various Indian nations” (see *R. v. Badger*).

Many treaties were made with Aboriginal people, usually “Indians,” across Canada from the 18th century to the early part of the 20th century.

These older treaties usually made some provision for harvesting rights, such as the “liberty to hunt over unoccupied lands” and the right to carry on fisheries “as formerly” (see *Treaty 8*; *Douglas Treaties*).

In exchange, the Aboriginal people who signed the treaty would give up any other Aboriginal rights, including **Aboriginal title**.

Until the latter part of the 20th century, Aboriginal people throughout most of British Columbia and northern Canada did not sign one of these early treaties. Since then, several treaties, including the *Nunavut Final Agreement* and the *Yukon Umbrella Agreement*, have been signed in northern Canada, and one, the *Nisga’a Final Agreement*, has been signed in British Columbia.

The Nisga’a Final Agreement contains very detailed provisions dealing with Nisga’a harvesting rights. The Nisga’a agreed that, in the future, they will only rely on the rights described in their treaty and not on any other pre-existing Aboriginal rights.

Over a hundred First Nations in British Columbia are currently involved in treaty negotiations under the BC Treaty Process.

Note: If your client’s Aboriginal community has signed a treaty with Canada, your client may be a treaty *beneficiary*. This may mean that their *Aboriginal rights* have been largely replaced by *treaty rights*, which will be written out in the treaty agreement.

Aboriginal legal issues

Common client questions

- Do I have Aboriginal or treaty harvesting rights?
- What can I do if my Aboriginal or treaty rights are infringed?
- Can I get legal aid?

Do I have Aboriginal or treaty harvesting rights?

If your client is Indian (as defined in the *Indian Act*) or Inuit, they can claim Aboriginal rights.

If your client is Métis, or of other mixed Aboriginal heritage, their Aboriginal rights will depend on a number of factors (see *R. v. Powley*) including:

- community acceptance
- self-identification
- ancestry
- adoption
- marriage
- cultural and language affiliation and knowledge
- shared history and treatment

A Métis person does not have an Aboriginal hunting right in an area unless they can demonstrate that there has been a community “on the land, participating in a distinctive culture for generations” (see *R. v. Willison*).

In general, your client’s Aboriginal rights will include the right to fish, hunt, trap, or gather for “food, social or ceremonial purposes,” even if your client uses modern methods of harvesting (see *R. v. Sparrow*).

The Aboriginal right may include the right to trade, barter, or sell part of the harvest if such transactions were integral to your client’s Aboriginal community (see *R. v. Gladstone*; *R. v. Van der Peet*).

Your client generally only has Aboriginal rights within the ancestral territory of their Aboriginal community. However, they may be permitted to exercise these rights in other territories by agreement with other Aboriginal governments.

The taking of “scrip” (payment in place of treaty benefits) by an ancestor does not extinguish a Métis’ Aboriginal right to fish (*R. v. Morin*).

Note: If your Aboriginal client wishes to practice a harvesting right, it is often best that they contact the local band, tribal council, or Aboriginal organization. This will help establish:

- whether the person’s harvesting right is recognized by the community, and
- what restrictions may be imposed on that right.

What can I do if my Aboriginal or treaty rights are infringed?

The most common infringement (violation) of an Aboriginal harvesting right occurs when someone is charged with an offence against the federal *Fisheries Act* or provincial legislation dealing with fish or wildlife.

Aboriginal clients may claim the defence of “Aboriginal rights” or “treaty rights” to such a charge. Crown Counsel (the lawyer that represents the government in court) will generally dispute the Aboriginal right itself, and if the right is proven, argue that the law your client broke was a reasonable limit on the right, enacted for a valid objective.

Note: This area of law is complex. If your client is seeking assistance with their treaty rights, they should talk to a lawyer with experience in the field.

Can I get legal aid?

The Legal Services Society (LSS) provides legal aid in BC. LSS will pay for a lawyer to represent financially eligible people if the case affects a person’s ability to earn a living or to follow a traditional livelihood of hunting and fishing. If your client has been charged with a harvesting offence and can assert an Aboriginal or treaty rights defence, they may be eligible for legal aid.

Help your client by preparing information on their fishing or hunting practices.

To find a list of legal aid offices, go to the LSS website at www.lss.bc.ca and look under Legal aid > Legal aid offices.

Legal aid financial eligibility guidelines

People have to be financially eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Your client will be required to provide “proof of income,” such as a pay stub or a letter from an employer.

For more information

- A client who needs legal advice may wish to contact LawLINE at (604) 408-2172, or toll free throughout BC at 1-866-577-2525. For more on LawLINE, see Appendix B.
- *Native Law* by Jack Woodward (Carswell). See “How to order publications.”
- For a fact sheet on Aboriginal rights in BC, go to the website of Indian and Northern Affairs Canada at www.ainc-inac.gc.ca/pr/info/abr_e.html.
- The BC Treaty Commission is an independent body that describes Aboriginal rights issues on its website at www.bctreaty.net/files_3/issues_rights.html.
- The Treaty Justice website contains information about federal and provincial decisions that affect Aboriginal treaty rights at www.treatyjustice.org.

Statutes and regulations

Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11]

Fisheries Act, R.S.C., 1985, c. F-14

Indian Act, R.S.C. 1985, c. I-5

Treaties

Nisga’a Final Agreement Act, S.B.C. 1999, c. 24

Canada, Treaty No. 8, Made June 21, 1899 and Adhesions, Reports, etc.

Douglas Treaties (1850-1854)

Case citations

Campbell v. British Columbia (Attorney General) [2000] 4. C.N.L.R. 1; [2000] 8 W.W.R. 600 (B.C.S.C.)

Delgamuukw v. British Columbia, [1998] 1 C.N.L.R. 14 (S.C.C.)

R. v. Badger (1996), 105 C.C.C. (3d) 289; [1996] 2 C.N.L.R. 77 (S.C.C.)

R. v. Gladstone, [1996] 2 S.C.R. 723; [1996] 4 C.N.L.R. 65 (S.C.C.)

R. v. Marshall, [1999] 3 S.C.R. 456; [1999] 4 C.N.L.R. 161 (S.C.C.)

R. v. Marshall, [1999] 3 S.C.R. 533; [1999] 4 C.N.L.R. 301 (S.C.C.)

R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220; [2005] 3 C.N.L.R. 214 (S.C.C.)

R. v. Morin, [1998] 1 C.N.L.R. 182 (Sask. Q.B.)

R. v. Powley, [2003] 2 S.C.R. 207

R. v. Sparrow, [1990] 1 S.C.R. 1075; [1990] 3 C.N.L.R. 160 (S.C.C.)

R. v. Van der Peet, [1996] 2 S.C.R. 507; [1996] 4 C.N.L.R. 177 (S.C.C.)

R. v. Willison, 2006 B.C.S.C. 985

6. Housing and Reserve Lands



6. Housing and Reserve Lands

This chapter covers:

- The law that protects renters on and off reserve
- What parts of the law don't apply on reserve
- The legal issues regarding land ownership on reserve
- Certificates of Possession
- Traditional ownership
- What are surrendered and designated lands
- What authority bands have over land
- What housing programs are available to Aboriginal people

Definitions

Crown: Canadian government.

Exempt: Something that is not included.

Interest: Legal right or title, as in property.

Jurisdiction: The right and power to make law or interpret and apply the law.

Seizure: When property is taken away by legal right.

Common client problems

- My band doesn't agree that I own land on reserve.
- I have been evicted from my residence on reserve without cause or notice.
- I am Aboriginal and would like to get housing on or off reserve.

General law

Jurisdiction over housing issues is divided between the federal parliament and the provincial legislature.

The provincial legislature has jurisdiction over lands, land ownership, and tenancy relations, except on Indian reserves and other federal lands in the province.

The federal parliament has jurisdiction over reserve lands and deals with them mainly through the *Indian Act*.

Legal rights of renters

The most important law for people who rent is the provincial *Residential Tenancy Act* of British Columbia. Under this act:

- Tenants cannot be evicted from their residence without reason or notice.
- Landlords must maintain residential premises in accordance with health, safety, and housing standards required by law.
- Tenants must maintain reasonable health, cleanliness, and sanitary conditions.
- Restrictions are placed on the landlord's right to enter the residence without reason or notice.
- Landlords cannot raise the rent more than once a year.
- A tenant who has a dispute with a landlord, including a dispute concerning eviction, may refer the matter for binding arbitration.

The *Manufactured Home Park Tenancy Act* has similar, but not identical, provisions that apply to the rental of manufactured homes.

Protection for homeowners

Of importance to people who own their home is the provincial *Land Title Act*. This act establishes a “land registry” system. Registration of an **interest** in land is conclusive evidence of that interest, as long as the interest remains in place (the owner doesn’t lose or sell their house).

People who own their home can lose it through a process called foreclosure. If someone has a mortgage and is behind in payments, the lender can ask the BC Supreme Court for an order of foreclosure. In most cases, the person has a period (usually six months) to “redeem” the mortgage by paying it off together with related costs.

Aboriginal legal issues

Common client questions

- Do I own my house on reserve?
- Does the *Residential Tenancy Act* apply on reserve?
- What rights do bands have over land?
- How can I find housing?

Do I own my house on reserve?

Under the federal *Indian Act*, Indians cannot “own” land on reserve. Title to reserve land is held by the federal government, which holds it for the use and benefit of the band (s. 18).

The highest **interest** an Indian can hold in reserve land is the “right to possess” it. A Certificate of Possession is evidence of this right (s. 20).

Certificates of Possession

A Certificate of Possession requires:

- an “allotment” by the band council by way of a valid band council resolution (see *Leonard and the Kamloops Indian Band v. Gottfriedson*), and
- approval by the Minister of Indian and Northern Affairs Canada (INAC).

The holder of a “location ticket” as of September 4, 1951, is said to hold a “Certificate of Possession.”

A Certificate of Possession entitles the holder, with the approval of the INAC minister, to:

- Transfer the right to possession of the land to the band or another band member (s. 24).
- Give the right to possession of the land to band members (or others entitled to reside on the reserve) by will.

- Have the right to possession of the land pass to next-of-kin band members (or others entitled to reside on the reserve) if the holder dies without a will.

A Certificate of Possession does not necessarily entitle the holder to decide how the land will be used, even with the consent of the minister, if that use is contrary to the interests of the band generally (see *Tsartlip Indian Band v. Canada*).

A person who has not been approved by the INAC minister for a Certificate of Possession may be entitled to a Certificate of Occupancy for up to two years.

Traditional ownership vs. “the right to possess”

The main problem with the *Indian Act* arrangement for the possession of land on reserve is that it often conflicts with the way that Aboriginal communities have traditionally understood their land holdings.

As a result, the *Indian Act* is not uniformly used by Indian bands for a variety of reasons, including the following:

- A Certificate of Possession requires a land survey. Most reserve land parcels are unsurveyed. Surveys are costly and time-consuming.
- Many band councils recognize “traditional ownership” of some, if not all, of their reserve lands. They do not encourage land holders to obtain Certificates of Possession.

The result is that on some reserves no one holds a Certificate of Possession. On other reserves, only a few people have certificates.

Claiming a traditional right to land

If you have a client who is claiming a traditional right to possess land on reserve and the band council disagrees, the client will need to collect the best possible evidence of their traditional holding. This may include band records, records of band council proceedings, and affidavits from knowledgeable elders. (Affidavits are formal sworn written statements of fact witnessed by a taker of oaths.)

Courts are reluctant to uphold a traditional holding over the objection of a band council in the absence of a Certificate of Possession because “the recognition of traditional or customary use of land cannot create a legal interest in the land that would defeat or conflict with the provisions of the act” (see *Lower Nicola Indian Band v. Trans-Canada Displays Ltd*).

Sometimes, however, lawful possession can be concluded from circumstances other than a Certificate of Possession, such as when a band council and INAC approve a loan document that refers to an individual’s “right of possession” of a parcel of reserve land (see *George v. George*).

The client may also be able to argue that “traditional ownership” is an Aboriginal right protected by section 35 of the *Constitution Act, 1982*.

People, including band members, in possession of reserve land without proper authority are considered trespassers (see *Joe v. Findlay*).

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Does the Residential Tenancy Act apply on reserve?

Under section 91(24) of the *Constitution Act, 1867*, only the federal parliament can make laws about “Indians and lands reserved for the Indians.”

Under section 92(13) of the same act, the provinces have the **jurisdiction** to make laws about “property and civil rights,” such as the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*.

Courts have found that where a provision of the *Residential Tenancy Act* (RTA) affects the “use and occupation” of reserve lands, it *does not apply* on reserve (see *Anderson v. Triple Creek Estates*; *Matsqui Indian Band v. Bird*).

Provisions that do not apply on reserve

The following sections of the *Residential Tenancy Act* deal with the “use and occupation” of land and therefore do not apply on reserve:

- Order respecting a service or facility (s. 27): This section deals with the landlord’s ability to eliminate or restrict a service or facility that is not essential to the tenant’s use of the residence (e.g. cablevision).
- Notice to end a tenancy agreement (s. 44): This section describes the various ways in which tenancy can end.
- Order of possession (ss. 54 and 55): These sections describe how a tenant or a landlord can apply to arbitration for an order of possession.

Similar provisions in the *Manufactured Home Park Tenancy Act* are:

- Order respecting a service or facility (s. 21)
- Notice to end a tenancy agreement (s. 37)
- Order of possession (ss. 47 and 48)

(See *Residential Tenancy Policy Guideline #27 — Jurisdiction*, January 2004.)

If a client has a tenancy problem that is not covered by the *Residential Tenancy Act*, find out if there is a written tenancy agreement with the landlord. If not, common law rules apply to tenancy. (Common law is the law that has been created by judges when they decide on cases.)

What this means is that under common law, both a landlord and a tenant may terminate the tenancy with reasonable notice. In a month-to-month tenancy, a month’s notice is often considered to be appropriate.

Tenancy on Nisga'a Lands

Since May 11, 2000, there are no more Indian reserves within Nisga'a Lands. Therefore, the provincial *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act* apply throughout Nisga'a Lands.

What rights do bands have over land?

A band council has the authority to make bylaws regulating various uses of land on reserve (s. 81) and may obtain overall authority for the management of reserve lands through the *First Nations Land Management Act* and section 60 of the *Indian Act*.

The council may use its authority under section 81 to prohibit non-band members from residing on reserve (see *Six Nations of the Grand River Band v. Henderson*).

However, such a bylaw cannot limit the right of band members to live on reserve with their dependent children or children of whom they have custody, whether or not those children are band members themselves (see *Indian Act*, s. 18.1).

Surrendered and designated lands

Under sections 37 – 41 of the *Indian Act*, a band may surrender to the **Crown** some or all of its rights and **interests** in reserve land. This surrender may be conditional or unconditional; it may be absolute or not absolute.

A surrender that is not absolute is called a “designation,” and is used by bands to allow for the creation of leases and other interests in the land by non-band members. Designated lands are still part of the reserve (s. 2[1]). An Indian's interest in designated lands is **exempt** from taxation under section 87 of the *Indian Act* (see *Mission [District] v. British Columbia*).

Surrenders must be made to the Crown only, and must be assented to by the majority of band electors and accepted by the federal cabinet. Designated lands are managed by the Minister of Indian and Northern Affairs Canada, though the minister may delegate the management to the band or other person.

Unlike other land interests, which are still exempt from **seizure** under sections 29 and 89(1) of the *Indian Act*, leasehold interests in designated lands are subject to charge, pledge, mortgage, attachment, levy, seizure, distress, and execution (see *Indian Act*, s. 89[1.1]).

How can I find housing?

There are a variety of programs for Aboriginal clients seeking housing on or off reserve.

On-reserve programs

Indian and Northern Affairs Canada (INAC) and the Canada Mortgage and Housing Corporation operate a variety of programs to reduce the cost of construction, operation, and maintenance of housing on reserve. These programs are usually administered by the band council, which may delegate some of its authority to a housing committee.

You can find a summary of current programs on the INAC website at www.ainc-inac.gc.ca/ch/rcap/sg/si38_e.html.

Off-reserve programs

Several housing units were constructed for Aboriginal clients in British Columbia under the now-defunct Urban Native Housing Program and the Rural and Native Housing Program. These units currently house about 85,000 Aboriginal people across Canada, and have different eligibility criteria.

A good source of information about off-reserve Aboriginal housing in BC is the Aboriginal Housing Management Association. Its website is www.ahma-bc.org.

For more information

- Chapter 13 of the *LSLAP Manual* (by UBC's Law Students' Legal Advice Program) has general information about landlord and tenant law. Chapter 10 deals in part with foreclosure. Available at www.lslap.bc.ca.
- *Tenant Survival Guide and Fact Sheets* (Tenants Rights Action Coalition — TRAC). Available at www.tenants.bc.ca. TRAC also has a hotline for tenants: 1-800-665-1185.
- *Residential Tenancy Act: A Guide for Landlords & Tenants in British Columbia* (Residential Tenancy Office: www.rto.gov.bc.ca). Available at www.rto.gov.bc.ca/content/publications/guides.aspx.
- *Manufactured Home Park Tenancy Act: A Guide for Manufactured Home Park Landlords & Tenants in British Columbia* (Residential Tenancy Office: www.rto.gov.bc.ca). Available at www.rto.gov.bc.ca/content/publications/guides.aspx.
- Aboriginal Housing Management Association: www.ahma-bc.org
- LawLINK: www.lawlink.bc.ca. Click the "Aboriginal" or "Housing" button.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button, then the links for "Housing" or "Real Estate."
- Continuing Legal Education Society: www.cle.bc.ca. Click the "Practice Points" button, then the link for "Aboriginal Practice Points."

Statutes and regulations

Access to Information Act, R.S.C. 1985, c. A-1

Constitution Act, 1867, 30 & 31 Victoria, c. 3, (U.K.) reprinted R.S.C. 1985, App. II, No.5

Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.]

First Nations Land Management Act, S.C. 1999, c. 24

Indian Act, R.S.C. 1985, c. I-5

Land Title Act, R.S.B.C. 1996, c. 250

Manufactured Home Park Tenancy Act, S.B.C. 2002, c. 77

National Housing Act, R.S.C. 1985, c. N-11

Privacy Act, R.S.B.C. 1996, c. 373

Privacy Act, R.S.C. 1985, c. P-21

Residential Tenancy Act, S.B.C. 2002, c. 78

Case citations

Anderson v. Triple Creek Estates, [1990] B.C.J. No. 1754 (Q.L.) (B.C.S.C.)

Danes v. British Columbia (1985), 61 B.C.L.R. 257; 18 D.L.R. (4th) 253; [1985] 2 C.N.L.R. 19 (B.C.C.A.) (alternate name: Watts v. British Columbia)

George v. George (1992), 95 D.L.R. (4th) 333; [1993] 2 C.N.L.R. 112 (B.C.S.C.); affirmed [1997] 2 C.L.N.R. 62; 139 D.L.R. (4th) 53 (B.C.C.A.); additional reasons at (1997) 30 B.C.L.R. (3d) 107 (B.C.C.A.)

Joe v. Findlay (1981), 26 B.C.L.R. 376; [1981] 3 C.N.L.R. 58 (B.C.C.A.)

Lower Nicola Indian Band v. Trans-Canada Displays Ltd., [2000] 4 C.N.L.R. 185 (B.C.S.C.)

Leonard and the Kamloops Indian Band v. Gottfriedson (1980), 21 B.C.L.R. 326; [1982] 1 C.N.L.R. 60 (B.C.S.C.)

Matsqui Indian Band v. Bird, [1993] 3 C.N.L.R. 80 (B.C.S.C.)

Mission (District) v. British Columbia (Assessor of Area No. 13 — Dewdney/Alouette), [1993] 1 C.N.L.R. 66 (B.C.S.C.)

Six Nations of the Grand River Band v. Henderson, [1997] 1 C.N.L.R. 202 (Ont.Gen. Div.)

Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development) (1999), 181 D.L.R. (4th) 730; [2000] 2 F.C. 314 (Fed. C.A.)

7. Human Rights



7. Human Rights

This chapter covers:

- What's considered discrimination
- Which laws deal with human rights
- How to make a human rights complaint
- Which the Charter of Rights says that might affect Aboriginal organizations
- What to do about discrimination by an Indian band

Definitions

Discrimination: Unfavourable treatment based on prejudice.

Jurisdiction: The right and power to make law or interpret and apply the law.

Prohibits: Doesn't allow.

Systemic discrimination: Widespread attitudes in laws, policies, or programs that firmly establish inequality and disadvantage for certain groups in society.

Common client problems

- I was denied a benefit/service because I am Aboriginal.
- I was discriminated against by an Indian band.

General law

Human rights law **prohibits discrimination** in employment and the provision of goods and services based on such grounds as:

- race,
- national or ethnic origin,
- colour,
- religion,
- age,
- sex,
- sexual orientation,
- marital status,
- family status,
- disability,
- criminal record, or
- conviction for an offence for which a pardon has been granted.

Jurisdiction over human rights is divided between the federal parliament and the provincial legislatures.

Canadian Human Rights Act

The *Canadian Human Rights Act* **prohibits discrimination** by:

- federal regulated employers or service providers such as federal departments, agencies, and Crown corporations;

- chartered banks;
- television and radio stations;
- interprovincial telephone, communications, bus, and railway companies; and
- Indian bands.

Examples of areas regulated by the federal government and governed by the *Canadian Human Rights Act* would include employment and services of:

- the federal government and all its ministries;
- all arms of the federal government, such as the RCMP, the Employment Insurance Commission, or Canada Post;
- Indian bands and tribal councils;
- telecommunications, which are regulated by the CRTC and all inter-provincial transportation, such as Air Canada and VIA Rail;
- chartered banks, but not credit unions; and
- all unions attached to any of the above.

BC Human Rights Code

The provincial *Human Rights Code* applies to employers, service providers, and all other provincially regulated businesses and agencies. The BC code also applies to the purchase of property and rental accommodations. Examples of provincially regulated areas include:

- all provincial, local, and municipal government departments, services, and programs;
- schools and universities;
- hospitals and medical clinics;
- all private businesses and services, such as stores, restaurants, and movie theatres;
- credit unions;
- non-profit organizations and some of the services they provide;
- rental accommodations, including hotels and rental property; and
- the purchase of either residential or commercial property.

Making a human rights complaint

To help a client who believes they were a victim of **discrimination**, you will need to find out where the action took place and which level of government regulates that area.

If the employer or service provider is federally regulated

If your client believes they were **discriminated** against by a federally regulated employer or service provider, they should contact the Canadian Human Rights

Commission (CHRC) by telephone, e-mail, fax, or mail. An officer will determine if a complaint can be filed and, if so, send a complaint kit to the complainant (the person making the complaint). If not, the office will make a referral to an alternative agency.

Your client will generally have to make the complaint to the CHRC within *one year* of the last alleged discriminatory act.

The CHRC can approve settlements achieved through mediation, conciliation, or even during investigation. The commission can also dismiss complaints for insufficient evidence, appoint a conciliator, or refer the matter to the Canadian Human Rights Tribunal.

Canadian Human Rights Tribunal

The Canadian Human Rights Tribunal holds public hearings into complaints. It can dismiss the complaint, or where it makes a finding of discrimination, it can order:

- that the employer or service provider cease and desist from discriminating;
- financial compensation for lost wages or other benefits; and
- general damages for loss of dignity, hurt feelings, and loss of respect.

The Canadian Human Rights Tribunal can also make orders concerning discriminatory policies and procedures, and even order the establishment of a special program to correct **systemic discrimination**.

If the employer or service provider is provincially regulated

If your client believes they were **discriminated** against by a provincially regulated employer or service provider, they can file a complaint online. Go to the BC Human Rights Coalition website at www.bchrcoalition.org/index.html. Click on “Process” and then click on “Filing Your Complaint.” Or go to the website of the BC Human Rights Tribunal at www.bchrt.bc.ca. Click on “Forms,” then click on “Complaint Form.”

Your client will generally have to make the complaint to the BC Human Rights Tribunal within *six months*.

BC Human Rights Tribunal

The BC Human Rights Tribunal has similar powers to the Canadian Human Rights Tribunal (see above). People wishing to file a complaint can do so directly with the tribunal. Throughout the processing of their complaint, your client may be able to get help from a human rights legal clinic provided by the BC Human Rights Coalition and the Community Legal Assistance Society (see “For more information” at the end of this chapter).

Discrimination and the Canadian Charter of Rights and Freedoms

Section 15(1) of the *Canadian Charter of Rights and Freedoms* also **prohibits discrimination** by government action or legislation based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. However, the charter also contains provisions that give Aboriginal organizations some elbowroom:

- Section 1 allows for otherwise discriminatory laws and actions, provided there are reasonable limits set down in law that can be “demonstrably justified in a free and democratic society.”
- Section 15(2) allows for otherwise discriminatory laws, programs, and activities that are aimed at making the conditions of disadvantaged individuals or groups better.
- Section 25 says that the other charter rights (including the right to not be discriminated against under section 15[1]) are not intended to “abrogate” (cancel) or “derogate” (take away) from any Aboriginal, treaty, or other rights or freedoms that pertain to the Aboriginal people of Canada.

Section 35(1) of the *Constitution Act*, 1982, also recognizes and supports existing Aboriginal and treaty rights of the Aboriginal people of Canada.

Therefore, if an Aboriginal government passes an otherwise discriminatory law, it may argue that:

- it is doing so in accordance with an Aboriginal or treaty right,
- the discriminatory practice is intended to improve the conditions in their disadvantaged community, or
- the discrimination is justifiable in a free and democratic society.

The combined effect of sections 1, 15(1), 15(2), 25, and 35(1) of the *Constitution Act* can create a dilemma for courts. The Supreme Court of Canada was asked to look at the combined effect of these sections in *Corbiere v. Canada*. In that case, the Batchewana Indian Band argued that off-reserve members did not have the right to vote in band elections.

The Supreme Court of Canada found that this denial of voting rights was contrary to section 15(1) of the charter. They acknowledged that sections 25 and 35(1) may provide a defence under different circumstances, but had not been “triggered” in the Corbiere case. That left section 1, and the court found that the restriction of voting rights was not justified under that section.

Note: If your client wants to find out what’s contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Aboriginal legal issues

Common client questions

- Who can I complain to?
- What can I do about discrimination by an Indian band?

Who can I complain to?

Most human rights complaints come under provincial **jurisdiction**, unless the discrimination is by a federally regulated employer or service provider, such as an Indian band (see below).

Other Aboriginal organizations, such as band schools and tribal councils, may also come under federal regulation. (For a more detailed discussion of the types of organizations that may come under federal jurisdiction, see Chapter 19, Work.)

For information on how to make a complaint, see “Making a human rights complaint” above, or check the websites listed in “For more information” at the end of this chapter.

What can I do about discrimination by an Indian band?

A client’s complaint of **discrimination** against an Indian band is complicated by section 67 of the *Canadian Human Rights Act*, which says:

Nothing in this act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.

The courts have interpreted this to mean that where the discrimination results from an act or decision of a band council that is within its authority under the *Indian Act* — such as the allocation of band housing under section 20 of the act — there is no jurisdiction for a complaint under the *Canadian Human Rights Act* (see *Canada [Human Rights Commission] v. Gordon Band Council [re Laslo]*).

However, if the band is acting outside of its *Indian Act* authority by, for example, denying welfare to non-band members living on reserve, they are subject to a complaint under the *Canadian Human Rights Act*.

Note: If your client is subjected to discrimination by an Indian band or its employees that is not covered by the *Canadian Human Rights Act*, they may still have a remedy in court through section 15 of the *Canadian Charter of Rights and Freedoms* (see *Canada [Human Rights Commission] v. Gordon Band Council [re. Laslo]*).

Encourage your client to talk to a lawyer about this. There is brief information about charter cases in Appendix A.

Human rights authority for the Nisga’a Nation

Since May 11, 2000, the Nisga’a Nation and Nisga’a Village governments are no longer federal employers. Most aspects of the *Indian Act* do not apply to them or to other Nisga’a organizations. Therefore, alleged **discrimination** in employment with the Nisga’a Lisims government or a Nisga’a Village government falls under provincial human rights authority. However, a chartered bank or post office on Nisga’a lands still comes under federal jurisdiction.

Note: Staff at the Canadian Human Rights Commission are very helpful when deciding whether the commission has the **jurisdiction** to hear a human rights complaint. However, their opinion is not the final word. If commission staff say the complaint is not covered, advise your client to talk to a lawyer.

For more information

- Chapter 19 of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) has general information about human rights. Available at www.lslap.bc.ca.
- *Human Rights, Your Rights to Know* (BC Human Rights Coalition): www.bchrcoalition.org. To get the PDF, go to www.bchrcoalition.org/files/RightsToKnow.pdf.
- BC Human Rights Coalition: www.bchrcoalition.org
- Community Legal Assistance Society Human Rights Clinic: www2.povnet.org/hr_clinic_clas
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button and then the link for "Human Rights."
- Canadian Human Rights Commission: www.chrc-ccdp.ca
- BC Human Rights Tribunal: www.bchrt.bc.ca

Statutes and regulations

Canadian Human Rights Act, R.S.C. 1985, c. H-6

Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.) 1982, c.11]

Criminal Code, R.S.C. 1985, c. C-46

Human Rights Code, R.S.B.C. 1996, c. 210

Indian Act, R.S.C. 1985, c. I-5

Case citations

Canada (Human Rights Commission) v. Gordon Band Council (re Laslo), [2001] 1 C.N.L.R. 1 (Fed. C.A.), reversing (1997) 140 F.T.R. 230 (F.C.T.D.)

Corbiere v. Canada (Minister of Indian Affairs and Northern Development) [1999] 3 C.N.L.R. 19; [1999] 2 S.C.R. 203 (S.C.C.)

8. Immigration and Trans-Boundary Trade



8. Immigration and Trans-Boundary Trade

This chapter covers:

- The legal categories of people who can enter Canada
- Aboriginal rights to work, live, or study in the U.S.
- Customs and duties for cross-border trade
- Deportation rules
- What legal aid coverage is available

Common client problems

- I am Aboriginal and want to work in the U.S.
- I was born in the U.S. and want to obtain Canadian Indian status.
- I want to import goods from the U.S. and don't believe I should have to pay taxes or duties.
- I am Aboriginal and facing criminal charges in the U.S. Can I be extradited?
- Am I eligible for legal aid?

General law

Immigration law covers who can enter Canada and for how long. There are different categories of individuals under this area of law:

- **Canadian citizens:** Canadian citizens are people born in Canada and successful applicants for citizenship under the federal Citizenship Act.
- **Permanent residents:** A permanent resident (or “landed immigrant”) is a person who has been admitted to Canada as an immigrant, but who does not yet have Canadian citizenship. Permanent residents have many of the rights and benefits of citizens, but are still subject to deportation.
- **Foreign nationals:** Foreign nationals are citizens of other countries who are in Canada as visitors, students, workers, temporary residents, or Convention Refugee applicants. Foreign national students, workers, temporary residents, and Convention Refugee applicants require special permission to stay in Canada. So do visitors wishing to stay in Canada for more than six months.
- **Convention refugees:** Refugees are entitled to protection in Canada from persecution or danger in their home country. Refugees must establish the need for this protection, either to a visa officer outside Canada or to the Immigration and Refugee Board if they are inside Canada.

Aboriginal legal issues

Common client questions

- What rights do I have to work, live, or study in the U.S.?
- Can an American Aboriginal live, work, or study in Canada?
- Do I have to pay customs taxes and duties?
- Are there special rules for an Aboriginal who faces deportation?
- Can I get legal aid?

What rights do I have to work, live, or study in the U.S.?

Article 3 of the 1794 *Jay Treaty* between Britain and the U.S. says:

(At) all times be free ... to Indians dwelling on either side of the ... boundary line freely to pass and repass by land, or inland navigation, into the respective territories and countries of the two parties on the continent of America ... and freely to carry on trade and commerce with each other.

The U.S. Congress codified this part of the *Jay Treaty* in section 289 of the *Immigration and Naturalization Act*, which says:

Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

Here is some information you can give your client:

- If they have at least one-half Indian blood — Canadian or American — they may live, work, and study in the U.S. without going through the usual immigration process. They may also be eligible for many benefits, including Native American scholarships.
- U.S. immigration officials will require your client to provide proof of blood quantum (amount) through birth and baptism records, band records, and other documents. A Canadian certificate of Indian status (status card) is not sufficient.
- If your client intends to work or live permanently in the United States, they will have to file a Memorandum of Creation of Record of Lawful Permanent Residence (Form 1-181) at the port of entry.
- Even though a person with the required amount of Indian blood doesn't need a U.S. permanent resident card (green card), having one will make it much easier to travel, work, and obtain benefits in the United States.

If your client has questions about crossing the border or getting a green card, they may find additional information online at www.ptla.org/wabanaki/jaytreaty.htm#Cross%20Border.

Can an American Aboriginal live, work, and study in Canada?

Canadian courts and immigration officials have interpreted the *Jay Treaty* much more narrowly than their American counterparts. Some Canadian courts have found that the *Jay Treaty* is not a treaty as defined in section 35(1) of the *Constitution Act, 1982*, and that it therefore doesn't grant Aboriginal rights (see *R. v. Vincent*).

Even so, it is still open for an Aboriginal person with some “nexus” (connection) to a tribe in Canada to argue a right to free passage into Canada because the *Immigration Act* has not completely put an end to such a right (see *Watt v. Liebelt*).

If your client wants to avoid regular *Immigration Act* procedures, tell them to talk to a lawyer.

Do I have to pay customs taxes and duties?

Aboriginal people have been unsuccessful in relying on the *Jay Treaty* and Aboriginal rights for a general right to cross-border trade.

In *Mitchell v. Canada (Minister of National Revenue)*, a Mohawk tribal member claimed immunity from customs duties. Five of the Supreme Court of Canada judges found that the Mohawks had not proven an Aboriginal right to trans-boundary trade. The other two judges said that any right to trans-boundary trade was incompatible with Canadian sovereignty and would have been extinguished even if it existed.

Because of the division in the court in the *Mitchell* case, any claim to an Aboriginal right to trans-boundary trade would be a very difficult legal argument and your client would definitely need legal counsel.

Also see Chapter 17, Taxation.

Are there special rules for an Aboriginal who faces deportation?

Relying on the *Jay Treaty* and section 289 of the U.S. *Immigration and Naturalization Act*, American courts have refused to deport a Canadian Indian for heroin possession — normally an offence resulting in deportation (see *Matter of Yellowquill*).

Because of Canada's different treatment of the *Jay Treaty*, an American Indian is unlikely to get the same protection in Canada.

Can I get legal aid?

The Legal Services Society (LSS) provides legal aid in BC. The guidelines for coverage and eligibility are described below.

LSS will pay for a lawyer to represent financially eligible clients who are:

- facing an immigration proceeding that may result in their deportation from Canada, or
- claiming refugee status.

Legal aid financial eligibility guidelines

People have to be financial eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available online at www.lss.bc.ca. Look under Legal aid > Legal aid offices.

Your client will be required to provide “proof of income,” such as a pay stub or a letter from an employer.

Note: If your client wants to find out what’s contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

For more information

- Chapters 17 and 18 of the *LSLAP Manual* (UBC’s Law Students’ Legal Advice Program) have general information about immigration and citizenship, respectively. Available at www.lslap.bc.ca.
- LawLINK: www.lawlink.bc.ca. Click the “Immigration and Refugee” button and follow the relevant links.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the “Law by Subject” button and then the link for “Citizenship and Immigration.”

Statutes and regulations

Citizenship Act, R.S.C. 1985, c. C-29

Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.), reprinted R.S.C. 1985, App. II, No.5

Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11]

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Immigration and Naturalization Act, 8 U.S.C. § 1359 (1999)

Indian Act, R.S.C. 1985, c. I-5

Jay Treaty, (1794) 12 Bevens 13, art. III

Case citations

Matter of Yellowquill, 16 I. & N. Decisions at 576

Mitchell v. Canada (Minister of National Revenue) [2001] 1 S.C.R. 911; [2001] 3 C.N.L.R. 122 (S.C.C.)

R. v. Vincent [1993], 2 C.N.L.R. 165; 80 C.C.C. (3d) 256 (Ont. C.A.)

Watt v. Liebelt [1999] 2 C.N.L.R. 326; 169 D.L.R. (4th) 336 (alternate name: Watt v. Canada), (Fed. C.A.)

9. Indian Status and Band Membership



9. Indian Status and Band Membership

Definitions

Affidavit: A formal, sworn written statement of fact witnessed by a taker of oaths.

This chapter covers:

- Who can register under the *Indian Act*
- The historical consequences of registration
- How to apply for registration
- How to appeal a decision regarding registration
- Who is entitled to band membership
- How to appeal a decision regarding band membership
- Who is entitled to vote in band elections
- How to appeal the results of an election

Common client problems

- I want to apply for Indian status.
- I want to apply for membership in an Indian band.
- I have been denied the right to vote in a band election.

Indian status under the Indian Act

Section 35(2) of the *Constitution Act, 1982*, defines Aboriginal peoples as the “Indian, Inuit and Métis peoples of Canada.” Of these three Aboriginal groups, only Indians are subject to legislation providing for their registration (see *Indian Act*, ss. 5 – 7).

An Indian registered under the *Indian Act* is known as a “status Indian.” A person of Indian ancestry who is not registered under the *Indian Act* is sometimes known as a “non-status Indian.”

Registration under the Indian Act

The *Indian Act* has a complex set of rules governing who is entitled to be registered as an Indian. In the 19th century, legislators presumed that most Indians wanted to be assimilated into mainstream culture and provided opportunities such as “enfranchisement” and “scrip” for Indians who wanted to vote, own property, and exercise other rights of Canadians.

Prior to 1985, the rules for registration were also highly sexist: Indian women who married non-Indians lost their Indian status and non-Indian women who married Indians attained status, whereas men’s status did not change upon marriage.

Most, but not all, discriminatory provisions of the *Indian Act* were amended in 1985 through Bill C-31.

In assessing a person’s eligibility for Indian status today, it is often necessary to understand the rules for registration prior to 1985.

Registration before 1985

Before Bill C-31 was passed by the federal parliament in 1985, the following people were entitled to be registered under the *Indian Act*:

- A member of an Indian band or a person entitled to registration under 1874 legislation.
- A legitimate or illegitimate child of an Indian male.
- An illegitimate child of an Indian female, unless the father was a non-Indian.
- A wife or widow of an Indian male (s. 11).

The following people were not entitled to registration:

- A person who took “scrip,” (explained below) or a descendant of that person.
- A person who was “enfranchised” (explained below) (s. 12).

Those who lost entitlement to registration at the age of 21 years were:

- People whose mother and paternal grandmother were both not entitled to registration (s. 12). This was called the “double mother rule.”

Enfranchisement

Enfranchisement was a process whereby an Indian person could lose their right to registration by choice or by operation of law.

An Indian person was eligible for enfranchisement if he was 21 years of age and capable of “supporting himself and his dependants” and “assuming the duties and responsibilities of citizenship.”

Enfranchisement meant that:

- If an Indian male was enfranchised, his wife and minor unmarried children were automatically enfranchised with him.
- A woman who married a non-Indian male was automatically enfranchised, and her children born prior to her marriage were also subject to enfranchisement.

Entire bands could also choose enfranchisement, but enfranchisement was compulsory for an Indian who became a doctor, lawyer, Christian minister, or university graduate.

Enfranchisement was abolished in 1985 (see *Indian Act*, s. 6[1][d]).

Scrip

Scrip is a form of payment in either money or cash that was offered by the federal government, primarily to Métis people, instead of treaty benefits. However, because of the difficulty of establishing the presence of European ancestry, scrip was offered to other Aboriginal people to opt out of treaty benefits. Many Indian people in the prairie provinces and the territories took scrip.

A person who took scrip and their descendants were not entitled to registration under the *Indian Act*.

Registration after 1985

In 1985, responding to pressure from the courts, Aboriginal women's groups, and the requirements of the *Charter of Rights and Freedoms*, the federal parliament passed Bill C-31 to amend the registration sections of the *Indian Act*.

Registration under subsection 6(1)

Under the amended *Indian Act*, persons registered as Indians prior to 1985 continue to be entitled to registration under s. 6(1).

In addition, the following people are entitled to reinstatement as registered Indians under s. 6(1):

- women who lost their entitlement through marriage to a non-Indian,
- children who were enfranchised as a result of their mother's marriage,
- people who were not registered because of the "double mother rule" (see below), and
- the illegitimate children of Indian women born prior to 14 August 1956.

The "double mother rule" meant that a person whose parents married on or after September 4, 1951, and whose mother and paternal grandmother were non-Indians before marriage would lose their Indian status and band membership on their 21st birthday.

A person whose parents are or were both entitled to registration is also entitled to registration under s. 6(1).

Registration under subsection 6(2)

A person who has or had only one parent entitled to registration under section 6(1) is entitled to registration under subsection 6(2) of the *Indian Act*.

The child of a person who is registered under subsection 6(2) is not entitled to registration unless their other parent is also entitled to registration.

The effect of subsection 6(2) is that the entitlement to registration ends after two successive generations of intermarriage between Indians and non-Indians.

Continuing discriminatory provisions

The *Indian Act* registration provisions continue to discriminate on the basis of gender. For example:

- the children of Indian women who lost status through a pre-1985 marriage are only entitled to registration under subsection 6(2), but the children of Indian men who married non-Indian women prior to 1985 are entitled to registration under subsection 6(1); and
- if an Indian male had children with a non-Indian female between September 4, 1951, and April 17, 1985, the male children are entitled to registration under subsection 6(1), but the female children are only entitled to registration under subsection 6(2).

Adoption

Adoption of an Indian child by non-Indian parents does not affect the child's entitlement to registration under the *Indian Act* (see *Natural Parents v. British Columbia [Supt. of Child Welfare]*).

Children adopted by an Indian parent or parents, either by custom or under the provincial *Adoption Act*, are entitled to registration as if they were the biological children of their adoptive parents (see *Indian Act*, s. 2[1]).

For more information on custom adoptions, see Chapter 5, Family Law.

Band membership

Section 8 of the *Indian Act* says that each band must maintain a band list with the name of each member.

Section 10 says that a band may assume control over its own membership and establish its own membership rules.

Indian Affairs controlled membership

Under section 11 of the *Indian Act*, when membership is controlled by Indian and Northern Affairs Canada, a person is entitled to membership if they:

- were entitled to be on the band list before April 17, 1985;
- are entitled to be registered as an Indian under s. 6(1)(c) or (d), and ceased to be a band member due to the prior discriminatory and enfranchisement provisions of the *Indian Act*; or
- are the child of parents who are both entitled to have their names entered onto the band list.

Band controlled membership

A band that has assumed control of its membership may establish its own membership rules, but those rules cannot deny membership to a person who:

- regained Indian status under the 1985 amendments to the *Indian Act* (see *Scrimbitt v. Sakimay Indian Band Council*)
- was entitled to band membership immediately before the membership rules came into effect (see *Indian Act*, s. 11)

The application of the *Canadian Charter of Rights and Freedoms* to band membership is still somewhat uncertain. Even under the charter, a court may uphold a practice that would otherwise be contrary to the charter if the band can demonstrate that the practice is:

- “a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society” (see *Constitution Act, 1982*, s. 1)
- an expression of an Aboriginal or treaty right or a right under the *Royal Proclamation of 1763* or a land claim agreement (see *Constitution Act, 1982*, s. 25)

These practices may still be disallowed if they discriminate based on gender (see *Constitution Act*, s. 28).

Adoption

The adoption of an Indian child by non-Indian parents does not affect the child's entitlement to band membership where that membership is under INAC control (see *G. [C.L.] v. Smith*).

However, it is open to a band that controls its own membership to deny membership to such a child (see *G [J.-G.], Re*).

Voting rights

Indian bands are governed by an elected chief and council with delegated federal authority described in sections 81, 83, and 85.1 of the *Indian Act*.

Band councils are elected according to either:

- rules set out in the *Indian Act* and *Indian Band Election Regulations*, or
- a custom election code agreed to by the band members.

Indian Act elections

Band councils elected under the *Indian Act* and *Indian Band Election Regulations* are composed of 1 chief and from 2 to 12 councillors, depending on the size of the band (s. 74[2]).

All band members of at least 18 years are entitled to vote regardless of whether they ordinarily reside on or off reserve (see *Corbiere v. Canada [Minister of Indian Affairs and Northern Development]*).

A person may run for chief, regardless of whether they live on or off reserve, or whether or not they are a band member. Non-Aboriginals may run for chief under the *Indian Act* regulations. On the other hand, a person running for the position of councillor must be a band member ordinarily resident on reserve.

The results of an election may be appealed within 45 days on any of the following grounds:

- There was a corrupt election practice.
- There was a violation of the *Indian Act* or *Indian Band Election Regulations* that may have affected the result of the election.
- A nominee was ineligible to be a candidate.

The appeal must be submitted in **affidavit** form (see *Indian Band Election Regulations*, s. 12).

Custom leadership selection

Section 2(1) of the *Indian Act* says that a band may “choose” its council “according to the custom of the band.” About one-third of the bands in Canada have done so to date.

The choice of band leadership by custom may be made “unimpeded by the act” and “does not necessarily require an election” (see *Crow v. Blood Band Indian Council*).

The establishment of custom leadership selection rules requires the “broad general consensus” of the band members, and may be changed over time (see *McLeod Lake Indian Band v. Chingee*).

Custom Leadership Selection Codes may provide for elections quite similar to those under *Indian Act* regulations, or they may follow traditional or hereditary practices of the community.

The application of the *Canadian Charter of Rights and Freedoms* to custom election practices is still somewhat uncertain. Even under the charter, a court may uphold a practice that would otherwise be contrary to the charter if the band can demonstrate that the practice is:

- “... a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society” (see *Constitution Act, 1982*, s. 1), and
- an expression of an Aboriginal or treaty right or a right under the *Royal Proclamation of 1763* or a land claim agreement (see *Constitution Act, 1982*, s. 25).

These practices may still be disallowed if they discriminate based on gender (see *Constitution Act, 1982*, s. 28).

People who have had their membership reinstated under Bill C-31 cannot be denied the right to vote in band elections (see *Scrimbitt v. Sakimay Indian Band Council*).

Some custom leadership selection practices do not provide for an election appeal process. However, a council elected by custom is still considered to be a “federal board, commission or other tribunal” and therefore subject to judicial review by the Federal Court of Appeal (see *Frank v. Bottle*). (See Appendix A for information on judicial reviews.)

Aboriginal legal issues

Common client questions

- How do I apply for registration under the *Indian Act*?
- What if I am turned down for registration?
- How do I apply for band membership?
- What if I am turned down for band membership?
- What if I have been denied the right to vote in a band election?
- Can I appeal the results of an election?

How do I apply for registration under the Indian Act?

Your client can register (including children) by completing the appropriate form — either an “Application for Registration of Children under the *Indian Act*” or an “Application for Registration of an Adult under the *Indian Act*.”

These forms are available from Indian and Northern Affairs Canada, or online at www.ainc-inac.gc.ca/frm/rrb_e.html. Band offices and tribal council offices sometimes have applications as well.

Your client should be sure the form is completed as fully and accurately as possible. It should include:

- information about their Aboriginal status and ancestors;
- the names and Indian status numbers of registered relatives;
- the names of adoptive parents and proof of adoption, if any;
- birth certificates; and
- two passport photos.

If there is any question about your client's entitlement to registration, they should include all relevant supporting records, including those of their ancestors, such as birth and baptismal records, genealogical charts, and **affidavits** from people familiar with the family.

Your client should send the completed application and supporting documents to the Registrar of Indian Registration and Band Lists, Indian and Northern Affairs Canada, Ottawa, Ontario, K1A 0H4.

Note: There are many print and web-based resources for tracing genealogy. Many Christian church dioceses or archdioceses have extensive archives with records of the births, deaths, and marriages of Aboriginal people.

What if I am turned down for registration?

Indian and Northern Affairs Canada (INAC) considers applications for registration and compares the evidence with its own records.

If INAC says it is unable to conclude that your client is entitled to registration, your client may "protest" under section 14.2 of the *Indian Act* by notifying the Registrar in writing with a brief statement of the grounds for the protest.

The protest must occur within *three years* after the application for registration was turned down.

If the protest is turned down, your client may appeal to the BC Supreme Court. They have to file the appeal within *six months* after the Registrar's decision on the protest (see *Indian Act*, s. 14.3).

How do I apply for band membership?

The first step is to determine whether your client's band has assumed control of its own membership under section 10 of the *Indian Act*. This can be done by contacting INAC or the band.

If the band controls its own membership, your client should obtain a copy of the membership code. Your client has the right to access the code under the federal *Access to Information Act* (see *Twinn v. Canada [Minister of Indian Affairs and Northern Development]*). They must follow the application process established in the code.

If band membership is under INAC control, band membership should be automatic upon registration.

What if I am turned down for band membership?

If the band has control of membership

If the band has assumed control of its own membership, its membership code must contain a “mechanism for reviewing decisions on membership” (see *Indian Act*, s. 10[2][b]). Your client should use this mechanism.

If your client feels the mechanism is not followed, or the decision made is unfair, they may apply for judicial review to the Federal Court of Appeal. This application must be made within *30 days* after the review decision. (See Appendix A for information about judicial reviews.)

If INAC has control of membership

If band membership is under INAC control, and your client has been denied membership, they may “protest” under section 14.2 of the *Indian Act* by notifying the registrar in writing with a brief statement of the grounds for the protest. Write to: Registrar of Indian Registration and Band Lists, Indian and Northern Affairs Canada, Ottawa, Ontario, K1A 0H4.

The protest must occur within *three years* after the application for registration was turned down.

If your client’s protest is turned down, they may appeal to the BC Supreme Court. Your client has to file the appeal within *six months* after the Registrar’s decision on the protest (see *Indian Act*, s. 14.3).

What if I have been denied the right to vote in a band election?

The first step is to find out whether the band selects its council under the *Indian Band Election Regulations* or by a custom selection process. Contact INAC or the band to find out.

Custom election code

A custom election code may set out a process for appealing the voter’s list. Your client should follow this process. If your client feels the appeal process is not followed or the decision made is unfair, they may apply for judicial review to the Federal Court of Appeal. This application must be made *within 30 days* after the review decision. (See Appendix A for information about judicial reviews.)

Indian Band Election Regulations

If your client’s band runs its elections according to the *Indian Band Election Regulations* (IBER), it must post the voters’ list in at least one conspicuous place on reserve at least *30 days before* the election (see *IBER*, s. 4.2).

If your client’s name is not on this voters’ list, they can demonstrate to the Registrar that it should be by showing that they are:

- on the band list or entitled to be on the band list;
- at least 18 years of age; and
- qualified to vote at band elections.

The voter's list should be revised accordingly (see *Indian Band Election Regulations*, s. 4[5]).

Write to: Registrar of Indian Registration and Band Lists, Indian and Northern Affairs Canada, Ottawa, Ontario, K1A 0H4.

If the Registrar doesn't add your client to the list, they may apply for a judicial review to the Federal Court of Appeal. This application must be made *within 30 days* after the review decision. (See Appendix A for information about judicial reviews.)

Can I appeal the results of an election?

First find out whether the band selects its council under the *Indian Band Election Regulations* or by a custom selection process. This can be done by contacting INAC or the band.

Custom election code

A custom election code may set out a process for appealing the results of an election. Your client should follow this process. If your client feels the appeal process is not followed or the appeal decision is unfair, they may apply for a judicial review to the Federal Court of Appeal. This application must be made *within 30 days* after the review decision. (See Appendix A for information about judicial reviews.)

Indian Band Election Regulations

If your client's band runs its elections according to the *Indian Band Election Regulations*, they may lodge an appeal under section 12(1) on the grounds that:

- there was a corrupt election practice,
- there was a violation of the act or regulations that might have affected the results of the election, or
- a nominated person was ineligible to be a candidate.

Your client must lodge the appeal in writing *within 45 days* after the election, and give the facts in an **affidavit**.

The Minister of INAC will consider the appeal and may investigate. If it appears to INAC that any of the above practices occurred, it will report the matter to the Governor in Council (see *Indian Band Election Regulations*, s. 14).

If INAC rejects the election appeal, your client can't ask for a judicial review without first applying for reconsideration by Cabinet. Cabinet's decision is subject to judicial review (see *Charles v. Semiahmoo Band Council*). (See Appendix A for information on judicial reviews.)

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

For more information

- *Entitlement to Indian Status and Membership Codes in Canada* by Larry Gilbert (Carswell). See “How to order publications.”
- *2006 Annotated Indian Act and Aboriginal Constitutional Provisions* by Shin Imai (Carswell). See “How to order publications.”
- *Native Law* by Jack Woodward (Carswell). See “How to order publications.”
- The Congress of Aboriginal Peoples has a website with good information on Bill C-31 and registration under the *Indian Act* at www.abo-peoples.org.

Statutes and regulations

Access to Information Act, R.S.C. 1985, c. A-1

Adoption Act, R.S.B.C. 1996, c. 5

Canadian Charter of Rights and Freedoms, Being Part 1 of the Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11]

Federal Courts Act, R.S.C. 1985, c. F-7

Indian Act, R.S.C. 1985, c. I-5

Indian Band Council Election Order SOR/97-138. [Indian Act]

Indian Band Council Procedure Regulations, C.R.C. 1978, C. 950. [Indian Act]

Indian Band Election Regulations, C.R.C. 1978, c. 952. [Indian Act]

Case citations

Assu v. Chickite, [1999] 1 C.N.L.R. 14 (B.C.S.C.)

Charles v. Semiahmoo Band Council, (1998) 140 F.T.R. 300 (Fed. Ct. Trial Div.)

Corbiere v. Canada (Minister of Indian Affairs and Northern Development) [1999] 3 C.N.L.R. 19; [1999] 2 S.C.R. 203 (S.C.C.)

Crow v. Blood Band Indian Council (1996) 107 F.T.R. 270 (Fed. Ct. Trial Div.)

Frank v. Bottle [1994] 2 C.N.L.R. 45 (Fed. Ct. Trial Div.)

G. (C.L.) v. Smith, [1985] 2 W.W.R. 155 (B.C. Co. Ct.)

G. (J.-G.), Re, [2000] 4 C.N.L.R. 104 (C.Q.), affirmed (2001), 2001 CarswellQue 3112 (Que. C.A.)

McLeod Lake Indian Band v. Chingee, 165 D.L.R. (4th) 358; [1999] 1 C.N.L.R. 159 (Fed. Ct. Trial Div.)

Natural Parents v. British Columbia (Supt. of Child Welfare), [1976] 2 S.C.R. 751; 60 D.L.R.(3d) 148 (S.C.C.)

Scrimbitt v. Sakimay Indian Band Council, [2000] 1 C.N.L.R. 205; [2000] 1 F.C. 513 (Fed.Ct.Trial.Div.)

Twinn v. Canada (Minister of Indian Affairs and Northern Development), [1987] 3 F.C. 368; [1998] 1 C.N.L.R. 159 (Fed.Ct.Trial.Div.)

10. Law Enforcement Complaints



10. Law Enforcement Complaints

This chapter covers:

How to make a complaint against:

- a municipal police officer
- the RCMP
- a provincial enforcement officer
- a federal law enforcement officer

Common client problem

I am Aboriginal and was badly treated by a law enforcement officer, such as a:

- Police officer
- Bylaw enforcement officer working for an Indian Band
- Fisheries or conservation officer

General law

Law enforcement officers have special federal, provincial, or band powers to enforce certain laws. These special powers often include the authority to arrest, search, and charge individuals and to seize goods in their possession. However, law enforcement officers must exercise their authority reasonably and lawfully.

Law enforcement officers who exceed their authority or use excessive force may be subject to a criminal charge or a civil lawsuit for assault, negligence, or trespass.

Some law enforcement officers, such as RCMP and municipal police officers, are subject to statutory complaint procedures.

Provincial officers, such as conservation officers, may be subject to investigation by the provincial ombudsman.

Others, such as federal fisheries officers, don't come under statutory complaints procedures. However, they may face internal disciplinary measures by their government employer.

The following complaints procedures apply to both Aboriginal and non-Aboriginal people.

Complaints against police officers

The complaint procedures are different for RCMP and municipal police. If your client wants to file a complaint, they should follow the steps outlined below for each force.

Definitions

Complainant: A person who files a complaint.

Jurisdiction: The right and power to make law or interpret and apply the law.

Seize: To take away by legal right.

Statutory: Required or created by statute. A statute is a formal, written law of Canada or the provinces, written and enacted by its legislative authority.

Summarily dismissed: When something is dealt with quickly and no longer investigated.

RCMP officers

RCMP officers and staff are governed by the federal *Royal Canadian Mounted Police Act*. The RCMP has **jurisdiction** throughout British Columbia and is the sole police force in most parts of the province.

Filing a complaint

Your client can make a complaint about the on-duty conduct of any RCMP member by contacting either the officer-in-charge of the local RCMP detachment or the Commission for Public Complaints (CPC) against the RCMP. Contact the CPC at:

E-mail: complaints@cpc-cpp.gc.ca

Telephone: (604) 501-4080 or toll free at 1-800-665-6878

Fax: (604) 501-4095.

Your client will be asked to complete a complaint form. This form is available online at www.cpc-cpp.gc.ca.

The complaint will be resolved in one of three ways:

1. Investigation

Whether someone makes the complaint to the RCMP detachment or to the CPC, the officer in charge of the RCMP detachment will attempt to resolve the matter informally. If this is not possible, the RCMP will investigate the complaint further. They will provide the **complainant** with a report setting out the results of the investigation and any steps taken.

2. Review

If your client is not satisfied with the RCMP's report, they can ask the CPC to review the handling of the complaint by completing a "Request for Complaint Review" form. The form is online at www.cpc-cpp.gc.ca. Follow the links under "Make a Complaint."

The chair of the CPC may:

- investigate the complaint further,
- ask the RCMP to investigate the complaint further, or
- order a public hearing.

Public hearings are rare, and usually only for very serious complaints.

3. Report and recommendations

In its review, the CPC will either agree with the RCMP's handling of the complaint or make further recommendations in an interim report. Your client will receive a copy of the final report.

Municipal police officers

A number of municipalities, such as Abbotsford, Central Saanich, Delta, Nelson, New Westminster, Oak Bay, Port Moody, Saanich, Vancouver, Victoria, and West Vancouver operate their own police departments. These forces come under the jurisdiction of the provincial *Police Act*.

Filing a complaint

Your client may complain about the conduct of a police officer under provincial **jurisdiction** by mailing, faxing, or delivering a “Form 1 Record of Complaint” to the municipal police station or the Office of the Police Complaint Commissioner. The form is available online at www.opcc.bc.ca. Follow the links to “Making a Complaint.”

Your client should file the complaint *within 12 months* of the incident or the complaint may be **summarily dismissed**.

A complaint will be resolved in one of three ways:

1. Informal resolution

This process may involve face-to-face meetings or mediation between the **complainant** and the police officer. Nothing said or written by either party can later be used as evidence in civil, criminal, or administrative proceedings. The matter is considered resolved when the complainant and the officer sign an agreement. After 10 days, if neither party changes their mind, the complaint is officially closed.

2. Summary dismissal

Following a preliminary review of the complaint, the investigating police department may decide to dismiss the complaint on the basis that it:

- has no air of reality (is “frivolous or vexatious”),
- there is no reasonable likelihood that further investigation will produce evidence of misconduct, or
- the event occurred more than 12 months ago.

If your client is unhappy that their complaint was **summarily dismissed**, they may, *within 30 days*, ask for a review of their file by the Office of the Police Complaint Commissioner. Find contact information on its website at www.opcc.bc.ca

3. Investigation and conclusion

If the complaint cannot be resolved by informal resolution or is not summarily dismissed, a full investigation is conducted. The investigation is usually assigned to an officer with the department’s Internal Investigation Section, or by a senior member specially assigned by the chief constable.

The **complainant** will receive updates during the investigation, advising them of the steps that have been taken. In some cases, the chief constable may request another department to conduct the investigation or, if necessary, the Police Complaint Commissioner may order another department to investigate.

Once the investigation is completed, a report is given to the chief constable (the “Discipline Authority”), who decides whether the allegations against the officer have been substantiated (proved to be true). If the complaint is substantiated, they must then decide on the appropriate corrective or disciplinary measures, which can range from a verbal reprimand right up to dismissal.

Your client will be advised of the results of the investigation and the decision of the chief constable by registered letter. If they are not satisfied with either the investigation or the decision, they can write to the Office of the Police Complaint Commissioner and request a public hearing into the complaint. The client must do this *within 30 days* of receiving the decision. Find contact information on the office website at www.opcc.bc.ca.

Public hearings

To determine whether to order a public hearing, the commissioner will consider a number of factors, including the seriousness of the complaint and the need to ensure public confidence in the police and the complaint process itself.

At a public hearing, all the evidence is heard by an adjudicator (a retired judge) who then either confirms the Discipline Authority's decision or rules as they see fit. Your client may be required to testify at a public hearing and, if they choose, can also make written submissions to the adjudicator on what they think is appropriate.

The decision of the adjudicator is final and the only appeal available is to the BC Court of Appeal on questions of law.

For more information, visit the Office of the Police Complaint Commissioner's website at www.opcc.bc.ca.

Complaints against provincial law enforcement officers

If your client has a complaint against a provincial law enforcement officer, such as a conservation officer, they can take it to the provincial ombudsman. The Ombudsman of British Columbia investigates complaints of unfair actions or decisions by provincial public servants, including provincial and municipal enforcement officers. Unfair actions include delay, rudeness, negligence, arbitrariness, oppressive behaviour, and unlawfulness.

Before you suggest that your client make a complaint to the ombudsman, check to see if there is an internal review or appeal process the client can use.

To make a complaint to the ombudsman, your client must complete a complaint form. It is available online at www.ombudsman.bc.ca. Follow the link to "Complaint Forms." Your client may also obtain the form and other information by contacting the Office of the Ombudsman by telephone at 1-800-567-3247 (toll free from anywhere in BC), or (250) 387-5855 in the Victoria area.

Once the ombudsman has received the complaint, an ombudsman officer will contact your client. If the officer determines that an investigation is necessary, they will contact the public agency named in the complaint.

If the agency responds with appropriate action, the ombudsman may close the file. If not, the investigation will continue as follows:

- The ombudsman may make recommendations to the public agency to remedy the unfairness (see *Ombudsman Act*, s. 23[2]).
- If the public agency still does not take suitable action, the ombudsman may make a report on the investigation to cabinet or the legislative assembly (see *Ombudsman Act*, s. 25).

or

- As part of the investigation, the ombudsman may decide to hold a hearing (see *Ombudsman Act*, ss. 15 – 27).

It is an offence for a public agency or anyone else to penalize a person for making a complaint to the ombudsman (see *Ombudsman Act*, s. 16).

Complaints against federal enforcement officers

There are no **statutory** processes for complaints against many federal enforcement officers, such as fisheries officers.

You can assist your client by contacting the law enforcement agency involved to see if it has a policy in place to deal with public complaints. If it does, your client should use that process. Even if the agency has no public complaint policy, the behaviour of the enforcement officer may still be a matter for disciplinary action.

Taking a law enforcement officer to court

There are two ways to take a law enforcement officer to court:

1. Ask for a judicial review

If your client has exhausted all other options, they may be able to ask for a judicial review. The decisions and actions of bodies that come under federal **jurisdiction**, such as the Department of Fisheries and Oceans, may be judicially reviewed in the Federal Court of Appeal. The decisions and actions of provincial agencies, such as municipalities and wildlife conservation officers, may be judicially reviewed in the Supreme Court of British Columbia.

See Appendix A for more information about judicial reviews.

2. By suing

If your client has been assaulted, unlawfully imprisoned, defamed, or has had property damaged by a law enforcement officer, they may be able to sue the officer and the officer's employer in court.

Keep in mind that there are sometimes very short time limits for suing, and that such lawsuits are usually strongly fought against. Advise your client to speak with a lawyer as soon as possible.

Finding out what's on a police record

If your client wants to know what's on their police record — or any law enforcement agency record — they have a right to access that information under provincial and federal laws. For more information, see Appendix C: Freedom of Information.

Aboriginal legal issues

The complaint procedures listed under “General law” apply to both Aboriginal and non-Aboriginal people. However, please note the following:

- Some tribal police forces come under the provincial *Police Act*. These include the Stl'atl'imx Tribal Police (Lillooet) and KITASOO XAIXAIS Police Service (Klemtu).

- Many Aboriginal organizations, including Indian bands, do not have formal complaint processes. If the complaint involves an employee or agent of an Indian band or other Aboriginal employer, your client may wish to ask to meet with the council of the band or the board of directors of the Aboriginal employer.
- If your client is unhappy with the decisions or actions of bodies that come under federal **jurisdiction**, such as band councils, they may be able to get a judicial review in the Federal Court of Appeal. See Appendix A for more about judicial reviews.
- If the decision or action of a public law enforcement officer is discriminatory, your client may be able to deal with it through a Charter challenge in court or a human rights complaint. See Chapter 8, Human Rights and Appendix A: Judicial Reviews and Charter Challenges.

For more information

- Chapter 20, “Public Complaint Procedures,” of the *LSLAP Manual* (UBC’s Law Students’ Legal Advice Program) has general information about complaints against law enforcement officers. Find it online at www.lslap.bc.ca.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the “Law by Subject” button and then the link for “Police.”
- Commission for Public Complaints against the RCMP website: www.cpc-cpp.gc.ca. Complaint form available online.
- Office of the Police Complaint Commissioner (provincial) website: www.opcc.bc.ca. Complaint form available online.
- Office of the Ombudsman (British Columbia) website: www.ombud.gov.bc.ca. Complaint form available online.
- Pivot Legal Society website: www.pivotlegal.org. Follow the link to “Policing.” The Pivot Legal Society is a not-for-profit organization that focuses on the rights of residents in the Downtown Eastside of Vancouver.

Statutes and regulations

Employment and Assistance Act, S.B.C. 2002, c. 40

Employment and Assistance Regulation, B.C. Reg. 263/2002 [Employment and Assistance Act]

Ombudsman Act, R.S.B.C. 1996, c. 340

Police Act, R.S.B.C. 1996, c. 367

Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10

II. Mental Health/Adult Guardianship



11. Mental Health/Adult Guardianship

Definitions

Jurisdiction: The right and power to make law or interpret and apply the law.

What this chapter covers:

- The laws that govern mental health
- Committee
- Enduring power of attorney
- Involuntary admission
- Representation agreements
- Consent to health care
- Adult guardianship and abuse, neglect, and self-neglect

What this chapter doesn't cover

Some of your Aboriginal clients may have mental health challenges that will affect your ability to help them with their legal problems. However, this chapter does not focus on the social aspects of mental health and capacity, but rather on the laws that deal with those issues. For a list of resources that may help, see "For more information" at the end of this chapter.

Common client problems

- I have an Aboriginal relative who is not capable of making their own decisions or managing their financial affairs.
- I know an Aboriginal adult who is being abused/neglected and cannot get help and support on their own.

General law

In general, mental health laws come under provincial **jurisdiction**.

There are three main provincial laws dealing with mental health issues:

- *Patients Property Act*
- *Power of Attorney Act*
- *Mental Health Act*

These laws use the terms "mental incapacity" and "mental incompetence," meaning a person can't make decisions on their own behalf.

In 2000, a group of provincial laws was passed that are described as the "adult guardianship legislation." These newer laws recognize that even though people may not be capable of managing all of their affairs, they may have the ability to participate to some extent in the management of their affairs.

There are four acts that comprise the "adult guardianship" legislation:

- *Representation Agreement Act*

- *Health Care (Consent) and Care Facility (Admission) Act*
- *Adult Guardianship Act*
- *Public Guardian and Trustee Act*

To date, some parts of this legislation have not been proclaimed.

Helping someone with mental capacity issues

Committee

A committee (pronounced com-mit-TEE) is someone who is appointed by the BC Supreme Court under the *Patients Property Act* to act on behalf of people who are not mentally capable of managing their own affairs.

When someone applies to have a committee appointed, they need a lawyer to prepare the documents and present the facts in court. The opinion of two doctors is required for the application.

The application declaring a person incapable and the application to appoint a committee can be filed in the court at the same time.

If the judge finds the person incapable, they will then appoint a committee. The judge can say who must be notified about the application, including the person who is the subject of it.

The court can appoint a committee to take care of “the estate” (financial matters) and/or take care of “the person” (health care and personal care matters). A committee can be one or more people or an institution (such as the Public Guardian and Trustee’s office).

Involuntary admission

Anyone who wants psychiatric help can ask to be admitted to hospital for treatment. The *Mental Health Act* also allows authorities to send people to hospital even if they don’t want to go. A doctor can sign a medical certificate stating that a person has a mental disorder and needs to be hospitalized:

- to prevent the person’s substantial mental or physical deterioration, or
- for the person’s protection or the protection of others.

When a doctor does that, the person can be admitted involuntarily for up to 48 hours. That period can be increased with a similar medical certificate from a second doctor.

A person who has been hospitalized has the right to have the hospitalization reviewed. A review panel must be appointed if the person (or someone acting on their behalf) asks for it. The person has the right to have a lawyer, friend, or advocate speak for them at the review panel hearing. To find out more about review panels, see “For more information.”

Planning for the future

People in BC often make an enduring power of attorney for their legal and financial affairs and a representation agreement for their health and personal care.

Enduring power of attorney

An enduring power of attorney allows a person to give someone power to make decisions about one's legal and financial affairs even if they become incapable of making decisions. All powers of attorney are limited to legal and financial affairs only. They do not cover health and personal care decisions.

In a power of attorney, you give someone (the "attorney") power to make financial and legal decisions on your behalf. You can limit the scope of the decisions the attorney can make, and say when they are to take effect. However, an ordinary power of attorney ceases to have effect if you become mentally incapable.

An enduring power of attorney includes a sentence that says that the attorney can continue to act for you if you become mentally incapable (see *Power of Attorney Act*, s. 8).

Information about enduring power of attorney can be found on the Representation Agreement Resource Centre site at www.rarc.ca.

Representation agreements

When people are incapable of making a contract or managing their health care, personal care, legal matters, financial affairs, business or assets, they may still be able to:

- communicate a desire for another person to make decisions on their behalf,
- demonstrate choices and preferences and express feelings of approval or disapproval of others,
- be aware when another person is making decisions on their behalf, and
- have relationships characterized by trust.

A person with some or all of these abilities is able to make a representation agreement. A representation agreement authorizes another person (a "representative") to handle routine finances, make health care and personal care decisions, and hire a lawyer to assist with, for example, accident claims (see *Representation Agreement Act*, ss. 7 – 8).

Adults who authorize their representative to handle financial affairs must usually appoint another person to "monitor" the handling of those affairs (see *Representation Agreement Act*, s. 12).

If an adult is capable of understanding the powers they are giving to the representative and what effect that may have, they may give the representative additional powers. For example, they can give their representative the power to:

- override their denial for help when ill,
- consent to treatment they agreed to when they were well (some examples of conditions where this might be useful include a mood disorder, dementia, anorexia, and addiction), or
- give or refuse consent to being physically restrained.

The representative with additional powers may also sell real estate and make care arrangements for the adult's minor children (see *Representation Agreement Act*, s. 9).

Information about representation agreements can be found on the Representation Agreement Resource Centre site at www.rarc.ca. They also have representation agreement kits for a modest fee, available online.

Note: Your client may ask about a “living will,” which is a document that contains instructions to a doctor to discontinue life-saving medical treatment under certain conditions. Living wills are not recognized in British Columbia unless their terms are contained in a representation agreement, though they may be useful to help family members and doctors make important decisions.

Consent to health care

The provincial *Health Care (Consent) and Care Facility (Admission) Act* only applies to health-care consent (the part of the act dealing with admission to care facilities is not yet in force).

This act confirms the right of all adults over the age of 19 to make their own health-care decisions. If an adult cannot make a health-care decision, the act recognizes the role of family and friends in supporting adults who may need assistance with health-care decisions.

Under sections 7 and 8 of this act, a mentally capable adult has the right to choose or refuse health care. In this case, adults are considered capable if they demonstrate an understanding of:

- what condition the doctors will be treating,
- what health care the doctors want to give,
- what the benefits and risks are, and
- what other health care might be used (alternatives).

The health-care provider must explain these matters to the adult in a way they can understand. If the adult is unable to give consent, the act sets out who can make decisions as follows:

- A committee (described on page 99)
- A representative named in a representation agreement (described on page 100)
- A temporary substitute decision-maker (the health-care provider must choose the nearest relative)
- If there is no one else, the Public Guardian and Trustee

Adult guardianship and abuse, neglect, and self-neglect

Part 3 of the *Adult Guardianship Act* deals with the protection of adults from abuse, neglect, and self-neglect. Some adults are unable to seek the help they need because they are not capable of making decisions. This law gives the authority to intervene to “a designated agency.”

A report of abuse or neglect of an adult can be made to the following designated agencies:

- The regional provincial Health Authority (Northern, Interior, Vancouver Island, Vancouver Coastal, and Fraser regions)
- Community Living British Columbia (for people with developmental disabilities)

You can get the telephone number of a designated agency by calling the Health Information Line at 1-800-465-4911 (toll free).

The telephone numbers of designated agencies are listed on the website of the Public Guardian and Trustee. See “For more information” at the end of this chapter.

What to do if someone is being abused

If your client knows someone who is being abused or neglected, give them the following general information:

- Make notes of all the evidence of abuse or neglect.
- Get some information about what options are available. A good place to start is the website of the Office of the Public Guardian and Trustee (www.trustee.bc.ca/pdfs/STA/abuseneglect.htm). Look for its information on what to do in cases of abuse and neglect.
- Where appropriate and safe to do so, tell the abused/neglected person about the possible options and ask them what they want to do.
- Contact the designated agency responsible for investigating abuse and neglect of vulnerable adults (see above).
- The designated agency cannot reveal the name of a person who makes a report of abuse or neglect under the *Adult Guardianship Act*.

If your client makes a report of abuse or neglect, someone from the designated agency must look into it. If the adult is in need of support and assistance, the designated agency can offer services. If the adult refuses the support and assistance offered, the designated agency’s role is to determine whether the adult is capable of accepting or refusing the service. The designated agency must report criminal offences to the police.

It is helpful to know the exact name and telephone number of the individual at the designated agency in your community. It can take time to track down who to talk to, so it’s a good idea to do this before a client needs the information.

Note: If your client wants to find out what’s contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Aboriginal legal issues

Section 51 of the federal *Indian Act* gives the Minister of Indian and Northern Affairs authority over “mentally incompetent Indians.” This authority usually applies only to Indians on reserve.

Common client questions

- How can I help my mentally incapable Aboriginal relative with his financial affairs?
- Can I get legal aid?

How can I help my mentally incapable Aboriginal relative with his financial affairs?

Ask your client if their relative can still make some choices and participate even to a limited extent in managing their own affairs. If so, your client can help their relative make a representation agreement. See “Representation agreements” on page 100.

If your client’s relative lives on reserve, the Minister of Indian and Northern Affairs Canada (INAC) will have to approve the representation agreement. To contact INAC, see “For more information” at the end of this chapter.

If your client’s relative is completely incapable of participating in managing their own affairs or choosing someone to do so, your client may need to obtain an order appointing someone to administer the relative’s affairs.

If the relative lives on reserve, your client should apply to the Minister of INAC. See “For more information.”

If the relative lives off reserve, your client may want to contact the Office of the Public Guardian and Trustee for information. Either the Public Guardian and Trustee or another person has to apply to the court to appoint a “committee” (described on page 99). See “For more information” to contact the Office of the Public Guardian and Trustee.

Even if the Aboriginal person lives on reserve, INAC prefers that their off-reserve property be dealt with through provincial laws. As a general rule, INAC will appoint people to administer the “estate” of a mentally incapable Indian. However, they will not appoint someone to handle issues related to personal or health care. These need to be dealt with through the provincial system, often involving the Public Guardian and Trustee.

Can I get legal aid?

The Legal Services Society (LSS) provides legal aid in BC. LSS will pay for a lawyer to help financially eligible clients if they are:

- facing a review panel hearing under the *Mental Health Act*, or
- facing a criminal charge and have a mental or emotional illness that makes it impossible for them to represent themselves, or
- unable to represent themselves in a family matter due to a serious condition or disability, and the family matter must be resolved to avoid further harm (requires special approval).

Legal aid financial eligibility guidelines

People have to be financial eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available online at www.lss.bc.ca. Look under Legal aid > Legal aid offices.

Your client will be required to provide “proof of income,” such as a pay stub or a letter from an employer.

For more information

Legal information

- Chapter 14 of the *LSLAP Manual* (UBC’s Law Students’ Legal Advice Program) has general information about Mental Health Law. Available at www.lslap.bc.ca.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the “Law by Subject” button and follow the links to “Mental Health” and “Representation Agreements.”
- LawLINK: www.lawlink.bc.ca. Click “Wills and Trusts” for information on committees, powers of attorney, and representation agreements.
- Indian and Northern Affairs Canada: Call (604) 775-5100 or toll free within BC at 1-800-665-9320. Address: 600 – 1138 Melville Street, Vancouver, BC, V6E 4S3. E-mail: bcinfo@ainc-inac.gc.ca. Website: www.ainc-inac.gc.ca/index_e.html.
- Office of the Public Guardian and Trustee: www.trustee.bc.ca. Click “Reports and Publications” and then “Adult Guardianship.” This section contains information about representation agreements, including a check list. There is also useful information about abuse and neglect on the site.

To report cases of abuse or neglect, contact one of the designated agencies listed on the site under Services > Assessment and Investigations, then click “Designated agencies contact list.”
- Representation Agreement Resource Centre (RARC): www.rarc.ca. The RARC has information about power of attorney and representation agreements. Booklets and some documents are online.

Mental health services

- Ministry of Health: www.healthservices.gov.bc.ca/mhd. Information on mental health services in BC.
- BC Mental Health Information Line: Free information about mental health and mental illness, 24 hours a day. Call (604) 669-7600 in the Lower Mainland, or 1-800-661-2121 elsewhere in BC.
- BC Alcohol and Drug Information and Referral Service: Provides information and referral services for people across BC who need help with any kind of substance abuse. Includes information and referral to education, prevention, and treatment services and regulatory agencies.

Call (604) 660-9382 in the Lower Mainland, or 1-800-663-1441 elsewhere in BC.

- Health Authorities in BC: www.healthservices.gov.bc.ca/socsec. Use this site to find the closest health authority.
- For information on review panels, contact the Mental Health Law Program at the Community Legal Assistance Society at (604) 685-3425, or toll free at 1-888-685-6222. The society's website is www.clasbc.net.
- BC Health Information Line: 1-800-465-4911 (toll free)

Aboriginal services

If a client has mental health or capacity challenges, one of the following services may be able to help them:

Aboriginal Health Services

Vancouver Coastal Health Authority
2nd Floor, 520 W. 6th Avenue
Vancouver, BC V5Z 4H5
(604) 714-3796

Native Mental Health Association of Canada

800 Wellington Avenue, P.O. Box 242
Chilliwack, BC V2P 6J7
(604) 793-1983

Statutes and regulations

Adult Guardianship Act, R.S.B.C. 1996, c. 6

Designated Agencies Regulation, B.C. Reg. 19/2002 [Adult Guardianship Act]

Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996, c. 181

Indian Act, R.S.C. 1985, c. I-5

Indian Estates Regulations, C.R.C. 1978, c. 954 [Indian Act]

Mental Health Act, R.S.B.C. 1996, c. 288

Patients Property Act, R.S.B.C. 1996, c. 349

Power of Attorney Act, R.S.B.C. 1996, c. 370

Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383

Representation Agreement Act, R.S.B.C. 1996, c. 405

12. Motor Vehicle/Traffic



12. Motor Vehicle/Traffic

This chapter covers:

- The motor vehicle laws that apply on and off reserve
- Exceptions to the *Motor Vehicle Act* for Aboriginal people on reserve
- What to do if you're in a motor vehicle accident
- When it's a good idea to get a lawyer
- When you can get a legal aid lawyer

Definitions

Jurisdiction: The right and power to make law or interpret and apply the law.

Settlement: An agreement regarding a lawsuit or legal dispute without going forward to a final court judgment. Most settlements are achieved by negotiation.

Common client problems

- I was charged with a motor vehicle offence when I was driving on reserve.
- I was in a motor vehicle accident on reserve.

General law

The province has **jurisdiction** over motor vehicles. Provincial laws, such as the driving offences described in BC's *Motor Vehicle Act*, generally apply to Aboriginal people operating a vehicle on roads both on and off reserve.

Provincial law also covers the licensing, registration, and insurance of vehicles on or off reserve. The BC *Insurance (Motor Vehicle) Act* states that everyone who drives on or off reserve must have a licence and that all vehicles must be registered and insured.

Despite the province's general authority over motor vehicle law, the federal parliament has jurisdiction over criminal offences — such as impaired or dangerous driving — committed with a motor vehicle.

Section 73(1)(c) of the *Indian Act* also gives the federal government the authority to regulate the speed, operation, and parking of vehicles on roads within reserves. The *Indian Act* authorizes Indian bands to make bylaws for the regulation of traffic on reserve.

Aboriginal legal issues

Common client questions

- Does an offence under the *Motor Vehicle Act* apply to me when I'm driving on reserve?
- Do I need a driver's licence and do I have to register and insure a vehicle to drive on reserve?
- What if I am in a car accident on reserve?
- Can I get legal aid for a motor vehicle offence or if I've had a car accident?

Does an offence under the Motor Vehicle Act apply to me when I'm driving on reserve?

Although the federal parliament has the authority to regulate the speed, operation, and parking of vehicles on roads within reserves under s. 73(1)(c) of the *Indian Act*, it has not done so to any great extent. The *Indian Reserve Traffic Regulations* are very general.

Instead, the federal parliament has adopted provincial motor vehicle laws. Section 6 of the *Indian Reserve Traffic Regulations* reads:

“The driver of any vehicle shall comply with all laws and regulations relating to motor vehicles, which are in force from time to time in the province in which the Indian reserve is situated, except where such laws or regulations are inconsistent with these regulations.”

Note: If your client wants to dispute the application of provincial laws on reserve, they should talk with a lawyer.

Band traffic bylaws

If your client wants to argue against a provincial motor vehicle offence on a road on reserve, they will probably have to produce a valid traffic bylaw made by the Indian band. Very few bands have such bylaws. Even if the band has a traffic bylaw, your client will face an argument that the provincial law should apply anyway. Your client should talk to a lawyer.

Roads for the use of band members

The provincial *Motor Vehicle Act* defines a “highway” as including roads and streets meant for general public use. Some roads on reserve are intended for the use of band members, not the “general public.” If your client was driving on such a road, they may be able to argue that the *Motor Vehicle Act* should not apply.

A similar defence may apply to a *Motor Vehicle Act* charge of driving while prohibited on a “highway” or “industrial road,” or a federal *Criminal Code* charge of driving while prohibited on “a street, road, highway or other public place” (see *R. v. Bigeagle*). For any of these cases, your client should talk to a lawyer.

Penalties

Even if a court finds that a provincial motor vehicle offence applies on reserve, it may find that the provincial *penalties* do not. Section 9 of the *Indian Reserve Traffic Regulations* says that a person who violates the regulations is liable to a penalty of “not less than \$1 and not more than \$50, or to imprisonment for a term not exceeding two months.”

Courts have found that these federal penalty provisions apply even when a person is convicted of a provincial motor vehicle offence on reserve (see *R. v. Francis*).

Do I need a driver's licence and do I have to register and insure a vehicle to drive on reserve?

In general, provincial law applies. Courts have consistently found that licensing, registration, and insurance of vehicles are administrative matters that come solely under provincial **jurisdiction**. Likewise, provincial penalties apply to motor vehicle licensing, registration, and insurance offences (see *R. v Bellegarde*).

Under provincial law, a person who is driving on a “highway” without a valid driver's licence or without vehicle registration or insurance commits an offence. You may be able to avoid this requirement if you are driving on a part of the reserve that is not a “highway” (see *Galligos v. Louis*).

What if I am in a car accident on reserve?

Clients who are injured in an accident on reserve while in a motor vehicle licensed and insured in BC, or (in some circumstances) while on foot or on a bicycle, are entitled to “no-fault benefits” from the Insurance Corporation of British Columbia (ICBC).

Give your clients the following general information:

- No-fault ICBC benefits cover basic medical and rehabilitation expenses, wage loss, and homemaker benefits, funeral expenses, and death benefits. If another person caused the accident (in whole or in part), your client may be entitled to other compensation for injury or damages in addition to the “no-fault” benefits.
- “No-fault” death benefits are payable to spouses, common-law partners, or dependants of a deceased motor vehicle accident victim. Aboriginal people frequently have dependants outside of their “nuclear” family. In one court decision, an insurance benefit was paid to dependent grandparents (see *Casimel v Insurance Corporation of British Columbia*).
- Homemaker services are covered only where a non-family member provides them. Aboriginal accident victims living in rural or remote areas may have difficulty finding a “non-family member” to act as a homemaker. ICBC may take some convincing to provide these benefits.
- If you were in an accident in a place on an Indian reserve that does not fit the provincial definition of “highway” or the federal definition of “road,” some aspects of insurance coverage, such as uninsured motorist protection, may not apply.
- If ICBC or another insurer is involved, its agents may settle the claim. But if you are not satisfied with the **settlement** offer, you may sue the person responsible for the accident. This lawsuit must be started within a certain period of time, usually (*but not always*) two years from the date of the accident.

Should I refer my client to a lawyer?

If your client is in a motor vehicle accident, they have a number of obligations, such as reporting the accident in a timely manner. There may also be other limitation periods involved, some of them very short.

If your client was involved in a motor vehicle accident and suffered injury or loss, or could be held even partly at fault for the accident, refer them directly to a lawyer. Urge the client to speak with a lawyer as soon as possible, to make sure that all deadlines and limitation periods are met.

Injured clients who are not 100 percent at fault for an accident can often retain a lawyer on a “contingency fee” basis. That means they don’t pay the lawyer’s fees unless they get a **settlement** of their claim. The lawyer will then recover fees at an agreed-upon fixed percentage and take expenses out of the settlement.

If your client was in an accident, and is *clearly* 100 percent responsible for it, and *clearly* not in breach of the insurance policy (hasn’t broken a condition of the policy), they could contact the insurer (usually ICBC) directly. However, your client should talk to a lawyer before doing this.

The insurer will settle the claim or appoint a lawyer to act on the client’s behalf. However, the job of motor vehicle insurers is to keep down the cost of claims. Agents have techniques for limiting the amount of money they pay to clients. There are many lawyers in private practice who are experts in dealing with ICBC and willing to speak with a client in an initial interview for free.

Can I get legal aid for a motor vehicle offence or if I’ve had a car accident?

Some provincial and federal driving offences call for mandatory imprisonment. If so, a financially eligible client is entitled to legal aid from the Legal Services Society.

Legal aid is also available to financially eligible people if a conviction is likely to cause them to go to jail or lose a means of earning a living, or they are youths (12 to 17 years old) facing federal offences.

Legal aid financial eligibility guidelines

People have to be financial eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available online at www.lss.bc.ca. Look under Legal aid > Legal aid offices.

Your client will be required to provide “proof of income,” such as a pay stub or a letter from an employer.

For more information

- Chapter 11, “Motor Vehicle Law,” and Chapter 12, “Automobile Insurance” of the *LSLAP Manual* (UBC’s Law Students’ Legal Advice Program) have general information about motor vehicle and traffic law. Available online at www.lslap.bc.ca.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the “Law by Subject” button, then the link for “Motor Vehicles.”
- Insurance Corporation of British Columbia (ICBC) (Head Office): 151 West Esplanade, North Vancouver, BC, V7M 3H9. For general information, call (604) 661-2800.
- ICBC Dial-a-Claim: (604) 520-8222 in the Lower Mainland, and 1-800-910-4222 (toll free) outside the Lower Mainland.

Statutes and regulations

Criminal Code, R.S.C. 1985, c. C-46

Indian Act, R.S.C. 1985, c. I-5

Indian Reserve Traffic Regulations, C.R.C. 1978, c. 959 [Indian Act]

Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231

Motor Vehicle Act, R.S.B.C. 1996, c. 318

Revised Regulation (1984) under the Insurance (Motor Vehicle) Act, B.C. Reg. 447/83

Transportation Act, S.B.C. 2004, c. 44

Case citations

Casimel v Insurance Corporation of BC, [1994] C.N.L.R. 22; 82 B.C.L.R. (2d) 387 (B.C.C.A.)

Danes v. British Columbia (1985), 61 B.C.L.R. 257; 18 D.L.R. (4th) 253; [1985] 2 C.N.L.R. 19 (B.C.C.A.) (alternate name: Watts v. British Columbia)

Galligos v. Louis (1986) 46 M.V.R. 288; 33 D.L.R. (4th) 638 (B.C.C.A.)

R. v. Bellegarde [1984] 1 C.N.L.R. 98 (Sask.Q.B.)

R. v. Bigeagle, (1978) 43 C.C.C. (2d) 528 (Sask. C.A.)

R. v. Francis, [1988] 1 S.C.R. 1025; [1988] 4 C.N.L.R. 98 (S.C.C.)

13. Prisoners



13. Prisoners

This chapter covers:

- The rights of convicted prisoners serving a sentence in federal or provincial prison
- How to apply for parole
- What happens if an inmate doesn't follow prison rules
- What support is available for Aboriginal prisoners
- Legal aid help

Definitions

Earned remission: When an inmate earns a credit of one day for each full two days served in prison.

Jurisdiction: The right and power to make law or interpret and apply the law.

Sanctions: Penalties for not following rules.

Segregation: Being separated from the other prisoners.

What this chapter doesn't cover

This chapter does not deal with the rights of people in jail who have been accused of a crime but not yet convicted of it. Such prisoners are often said to be "on remand" and are usually held separately and treated differently from sentenced prisoners.

Common client problems

- I am facing a disciplinary hearing in prison.
- I want to apply for parole or conditional release from prison.
- I am Aboriginal and need access to culturally appropriate support in prison.

General law

Jurisdiction for prisons is divided between the federal parliament and the provinces. The federal government operates correctional facilities (formerly called penitentiaries) for people who have been sentenced to at least two years in prison. The province operates correctional facilities for people awaiting sentencing or serving sentences of less than two years.

Federal correctional facilities are operated by the Correctional Service of Canada and regulated under the *Corrections and Conditional Release Act* and *Corrections and Conditional Release Regulations*.

BC correctional centres are operated by the BC Corrections Branch of the Ministry of Public Safety and Solicitor General, and regulated under the provincial *Correction Act* and *Correction Act Regulation*.

Earned remission

Under both federal and provincial law, prisoners who comply with institutional rules and participate in programs are entitled to **earned remission**, which means they are released after serving two-thirds of their sentence.

Earned remission can be taken away by breaking prison disciplinary rules (see “Prison discipline” below) or by breaching a condition of parole (see “Denial or loss of parole” below).

Parole

Under both federal and provincial law, a prisoner is entitled to apply for day parole or full parole after serving a portion of their sentence.

Day parole

Most federal and provincial prisoners are eligible to apply for day parole after one-sixth of their sentence. However, day parole is generally limited to prisoners attending treatment or programs not available in prison. Day parole requires 24-hour supervision or electronic monitoring.

Full parole

Full parole enables prisoners to complete a portion of their sentence in the community, as long as they comply with certain conditions. The purpose of parole is to assist the prisoner’s re-integration into society.

Most prisoners are eligible for full parole after one-third of their sentence or seven years, whichever is less. Some first-time federal prisoners are eligible for parole after a shorter period (see *Corrections and Conditional Release Act*, s. 125). The *Criminal Code* sets out longer minimum parole eligibility periods for very serious offences.

To apply for parole

A prisoner who is serving a sentence in a federal prison applies for parole to the National Parole Board. A prisoner who is serving a sentence in a provincial prison applies to the Board of Parole for the Province of British Columbia. Prison officials will facilitate the application process.

The application should be started well in advance of the eligibility date. Parole boards will consider the applicant’s criminal record, institutional record, a community risk assessment from corrections officials, the nature of the offence, and the impact it had on the victims. The applicant will have the opportunity to review these materials before the hearing, and the right to attend the hearing.

Under the *Corrections and Conditional Release Act*, s. 102, before it grants parole, the parole panel must be satisfied that:

- the offender will not present an undue risk of re-offending during the remainder of the sentence, and
- the release of the offender will contribute to the re-integration of the offender into society.

Denial or loss of parole

A parolee will be required to report to a parole supervisor and abide by such conditions as a curfew or electronic monitoring. A parolee who violates one of these conditions will be returned to prison, with a loss of **earned remission**.

A federal prisoner who is denied parole may, within two months after the decision, appeal to the Appeal Division of the National Parole Board (see *Corrections and Conditional Release Regulations*, s. 168).

A provincial prisoner who is denied parole may, within 30 days after the decision, apply to the chair of BC's Board of Parole to re-examine the decision on the grounds that the board:

- exceeded or failed to exercise its jurisdiction,
- didn't follow proper or prescribed procedures or policies, or
- erred in law.

The prisoner may re-apply for parole after 60 days.

Prison discipline

Prisoners who do not follow prison rules or do not participate in programs aimed at their rehabilitation and reintegration into society may be subject to discipline.

Disciplinary offences in federal prisons are listed in section 40 of the federal *Corrections and Conditional Release Act*. Disciplinary offences in provincial prisons are listed in section 20 of the *Correction Act Regulation*.

Federal and provincial prison staff are required to attempt to resolve minor disciplinary matters informally. If this is not possible, or if the offence is more serious, there will be a disciplinary hearing before another prison official or an independent panel.

A prisoner has the right to be present at the hearing under most circumstances (see *Corrections and Conditional Release Act*, s. 43, *Correction Act Regulation*, s. 26). Offences must be proved beyond a reasonable doubt.

Disciplinary **sanctions** are listed in section 44 of the *Corrections and Conditional Release Act* and section 27 of the *Correction Act Regulation*. Possible sanctions include a reprimand, fine, restitution order (which requires the offender to pay an amount directly to the victim of the offence), loss of privileges and **earned remission**, and **segregation**. Segregation is only used in the most serious cases.

Disciplinary review

There is no appeal or review procedure for disciplinary **sanctions** in federal prisons.

A provincial prisoner may apply (within seven days after the decision) to the prison director for a review of the decision (see *Correction Act Regulation*, s. 29).

A prisoner has the right to have counsel if a disciplinary hearing is likely to lead to a loss of liberty such as **segregation** or loss of **earned remission** (see *Howard v. Stony Mountain Institution*). However, this does not mean that they are necessarily entitled to legal aid (see *Winters v. Legal Services Society*).

A person who is dissatisfied with the results of a disciplinary review or appeal may apply for judicial review. See Appendix A for more information about judicial reviews.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Aboriginal legal issues

Common client questions

- I am facing discipline in prison; what can I do?
- How do I apply for parole?
- What support is available to help my relative with healing while they are in prison?
- Can I get legal aid?

I am facing discipline in prison; what can I do?

Your client has the right to a hearing and the right to be present at that hearing. The alleged disciplinary offence must be proved beyond a reasonable doubt before a **sanction** is imposed.

If your client is facing a loss of liberty, such as **segregation** or loss of **earned remission**, they are entitled to counsel. Some prisons have inmate advocates who can assist them.

Disciplining an Aboriginal prisoner for spiritual practices, such as tobacco use or the possession of spiritual items, such as a prayer bundle, may be contrary to the *Canadian Charter of Rights and Freedoms* (see *Regina Correctional Centre v. Saskatchewan* and *Bearshirt v. The Queen*).

Sections 100 and 101 of the federal *Corrections and Conditional Release Regulations* protect the right to express one's spirituality in a federal prison.

How do I apply for parole?

Most prisoners are eligible for full parole after serving one-third of their sentence. Your client should begin preparing for a parole application several weeks before their eligibility date.

The parole board's main concerns are whether:

- someone will commit another offence while on parole, or otherwise violate their parole conditions; and
- parole will help reintegrate the prisoner into society.

The board is also concerned about the environment the prisoner will enter while on parole. Many Aboriginal clients come from a home community (often an Indian reserve) where they have a large number of family and friends. Returning to this community may provide excellent support. However, the parole board will be wary if this environment contributed to the original offense.

What support is available to help my relative with healing while they are in prison?

The Correctional Service of Canada has established an Aboriginal Initiatives Branch to deliver culturally appropriate services and programs to Aboriginal people in federal prisons. This branch also assists Aboriginal communities in developing community corrections programs.

There is no equivalent in the provincial prison system, though most institutions offer native brotherhood, elders' visits, sweat lodges, and programs aimed at Aboriginal prisoners.

The Correctional Service of Canada operates the Kwikwèxwelhp Institution near Mission, British Columbia. It focuses on Aboriginal offenders and facilitates spiritual and cultural teachings.

Part of the process for any offender sentenced to prison is an assessment of which institution is most appropriate. Factors in this assessment include the nature of the offence, the security risk of the offender, and the programs and services offered in the various institutions.

To get some help for someone in prison who needs healing, start with the nearest probation (community corrections) office. To find a community corrections office, look under "Corrections" in the British Columbia section of the blue pages of the phone book.

If a client has a relative who is applying for federal parole or is already on federal parole, contact the federal parole office. Look under "Correctional Facilities, Institutions and Programs" in the Government of Canada section of the blue pages of the phone book.

Remember that prison officials, probation officers, and parole supervisors are generally very receptive to support from the family and friends of a prisoner. For Aboriginal prisoners, the importance of being close to their family and home community has been recognized by the courts as a right under the *Canadian Charter of Rights and Freedoms* (see *R. v. Daniels*).

Can I get legal aid?

Even though prisoners may be entitled to a legal aid lawyer for disciplinary hearings and parole hearings, your client's situation may not be covered by legal aid. The Supreme Court of Canada's decision in *Winters v. Legal Services Society* acknowledged the right to a lawyer but found that the extent of legal support was limited by the *Legal Services Society Act* and available funding.

Legal aid services are delivered in British Columbia through the Legal Services Society (LSS) and the West Coast Prison Justice Society (WCPJS). Your client should contact the LSS Call Centre first, which will make a referral to the WCPJS. Services range from legal advice to representation by a lawyer.

If your client is in prison, they can contact the LSS Call Centre at the following numbers:

- Federal prisons: 1-888-839-8889 (toll free)
- Provincial prisons: (604) 681-9736

The Legal Services Society generally approves representation for prisoners who are facing:

- internal disciplinary hearings,
- involuntary transfers to higher security,
- detention hearings at the point of statutory release,
- segregation, and
- parole suspension or revocation.

The West Coast Prison Justice Society can also advise prisoners on a range of other legal matters. Its number is (604) 853-3114.

Legal aid financial eligibility guidelines

People have to be financial eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available on the LSS website at www.lss.bc.ca. Look under Legal aid > Legal aid offices.

Your client will be required to provide proof of income, such as a pay stub or a letter from an employer.

For more information

- *Planning for Success* (John Howard Society). An excellent guide for provincial prisoners applying for parole. Available online at www.jhslmbc.ca/publications.html.
- *Provincial Inmate Guide to Parole* (Board of Parole for the Province of BC). Available at www.gov.bc.ca/bcparole. Click “Brochures.”
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the “Law by Subject” button and then “Parole.”
- LawLINK: www.lawlink.bc.ca. Click the “Crime” button, then look for information on corrections and parole.

Statutes and regulations

Canadian Charter of Rights and Freedoms, Being Part 1 of the Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11]

Correction Act, S.B.C. 2004, c. 46

Correction Act Regulation, B.C. Reg. 58/2005 [Correction Act]

Corrections and Conditional Release Act, S.C. 1992, c. 20

Corrections and Conditional Release Regulations SOR/92-620 [Corrections and Conditional Release Act]

Criminal Code, R.S.C. 1985, c. C-46

Legal Services Society Act, S.B.C. 2002, c. 30

Case citations

Bearshirt v. The Queen, [1987] 2 C.N.L.R. 55 (Alta. Q.B.)

Howard v. Stony Mountain Institution, [1984] 2 F.C. 642 (Fed. C.A.)

R. v. Daniels, [1990] 4 C.N.L.R. 51 (Sask. Q.B.)

Regina Correctional Centre v. Saskatchewan (Department of Justice) (1995), 133 Sask. R. 61; (1995) 30 C.R.R. (2d) 371 (Sask. Q.B.)

Winters v. Legal Services Society (1999), 73 B.C.L.R. (3d) 193; [1999] 3 S.C.R. 160 (S.C.C.)

14. Residential School Abuse



14. Residential School Abuse

This chapter covers:

- How survivors of residential schools can take legal action against their abusers.

Client problem

- I was abused in a residential school and want to know my legal options.

General law

There are a number of legal options for people who were abused in a residential school:

- Civil justice
- Alternative dispute resolution
- Independent assessment and “common experience” process
- Criminal justice
- Crime Victim Assistance Program

Civil justice

If a person causes harm to another intentionally, or even unintentionally, that harm may constitute a civil wrong. A civil wrong is called a “tort.”

In the case of residential abuse, the people who caused the harm had a “duty of care” to the children in their care.

People who were physically, emotionally, or sexually harmed in an Indian residential school may be able to sue the individual who caused the harm, the religious organization that ran the school, and the federal government (see *Blackwater v. Plint*).

If the crime was a sexual assault or sexual misconduct against someone under the age of 19, there is no time limit on when you can begin the court action (see *Limitation Act*, s. 3[4][k] and ss. 6 – 7).

However, if you are speaking to your client about harm that occurred more than two years ago, and was not of a sexual nature, your client may not be able to go to court because of limitation periods under the *Limitation Act* (see *Blackwater v. Plint*). Refer your client to a lawyer right away.

Using a lawyer

People who were harmed in Indian residential schools can use the civil justice system to obtain compensation (usually money) from the person or persons who are proven responsible for the harm done.

Residential school abuse claims come under the general area of legal practice called “personal injury.” There are many lawyers who practise personal injury law. They may be willing to take on cases on a “contingency fee” basis, meaning

that the lawyer does not take a fee unless and until the client gets a monetary settlement, either by agreement or court order.

Some law firms specialize in residential school abuse claims. For the names of these firms, contact the Lawyer Referral Service. Call during business hours, 8:30 a.m. – 4:30 p.m., Monday to Friday at (604) 687-3221 or 1-800-663-1919 (toll free).

Group or class actions

People who have suffered similar harm at the hands of the same person or persons may wish to sue together. In such cases, a common right is pursued by one individual or a small number of people who act as the agent(s) for the group or class. This allows the plaintiffs (the people who are suing) to save on costs such as hiring lawyers and expert witnesses to testify. Members who are part of the class action usually are not active participants in the litigation (lawsuit), but they share in the damages awarded if it is successful.

The provinces have rules for these class actions, which require the plaintiffs to have “the same interest.” Courts are cautious in the interpretation of this requirement, so very few class actions are approved by the courts.

The website for Indian Residential School Resolution Canada (IRSRC) has a list of proposed class actions that have been started on behalf of former students who wish to pursue their claim in court. Go to www.irsr-rqpi.gc.ca.

These class actions are “proposed” because each must be certified by a court before it can proceed. That means that the judge has to give permission to the people suing to resolve the claims together. The government opposes certification in the courts. So far only one of the class actions has been certified.

Proposed and certified class actions include:

- The Baxter National Class Action — launched on behalf of all residential school survivors throughout Canada (certified)
- The Dieter Class Action — Western Provinces Residential Schools between November 1, 1920, to December 31, 1996
- The Pauchay National Class Action — all Aboriginal persons who attended various residential schools across Canada from the 1940s to the 1980s

Alternative dispute resolution

Alternative dispute resolution is often known by its initials, ADR. It is a resolution that does not rely on the court process.

The federal government has established a voluntary alternative dispute resolution process for people who suffered physical abuse, sexual abuse, or wrongful confinement in an Indian residential school.

Claimants (the people making the claim) complete a detailed application and submit it to Indian Residential Schools Resolution Canada (IRSRC). Your client can get an information package containing the application form by contacting the IRSRC helpdesk at 1-800-816-7293 or e-mailing info@irsr-rqpi.gc.ca.

If your client’s application is accepted, they will appear in a closed hearing before a decision-maker who will decide if the claim is valid, and the amount your

client should be compensated. IRSRC says that compensation will be similar to amounts awarded in court.

In this process, your client may decide to accept or refuse the decision-maker's final decision. If your client accepts the decision, they have to sign a form saying they will not make any further claim for the matter against the federal government. If they reject the decision, they may still pursue court action.

Here are some of the features of the alternative dispute resolution process:

- Priority is given to elderly (70 years and over) claimants.
- IRSRC will contribute 15 percent of reasonable legal costs of any successful claimant who retains a lawyer. It will also pay up to \$600 to a lawyer to advise on the signing of a release.
- Independent counselling and personal support (including travel costs for family members to attend hearings) are available.
- Information on claims, the claim process, counselling, and support is available through a toll-free helpdesk: 1-800-816-7293.

Note: Clients can apply for alternative dispute resolution even if they have started a case in court. However, your client must tell their lawyer about this decision.

Independent assessment and “common experience” process

In November 2005, the federal government and the Assembly of First Nations reached an Agreement in Principle on a process that modifies the Alternative Dispute Resolution process described above. Here are some of the features of the new proposed process:

- Eligible “common experience” claimants will receive \$10,000 for the first year and \$3,000 for each additional year spent at a residential school. Common experience claimants include those who did not suffer sexual abuse or major physical abuse.
- People claiming for sexual or serious physical abuse will be eligible for further compensation through an “Independent Assessment Process” (IAP). At the time of writing, the Independent Assessment Process (IAP) had not yet received court or federal cabinet approval, and this approval may take several months. In the meantime, IRSRC is still accepting applications and processing claims under the Alternative Dispute Resolution process described above.
- There will be an expedited/early process for claimants 65 years of age or over to provide them with an initial \$8,000.
- Additional funds will be allocated for a Truth and Reconciliation process, Commemoration, and activities of the Aboriginal Healing Foundation.
- The application for the early payment and IAP will be available after approval by the federal minister responsible and court approval of the common experience payment.

Tips about the process

There are several important additional features that your clients should know about:

- A separate application is needed for the 30 percent holdback.

Your client will have to apply for the 30 percent holdback from the Catholic, Anglican, and Presbyterian churches after the IAP is approved by the courts. This will require a separate application. (To date, most people have received no payment from the Catholic Church.) If your client has a lawyer, they can discuss this with the lawyer. If not, you can obtain more information for your client from the IRSRC helpdesk.

- The early payment and the common experience payment require separate applications.

If someone is making an application for the early payment, it is important for them to know that they will have to make another application for the common experience payment because they are not signing a release for the early payment. While it is difficult to make two applications, they must not assume the first application will cover the common experience payment.

- Some clients might not have completed the correct IRSRC form.

Your clients may have completed a form outlining their experience and may believe they have filed a claim for the common experience payment. But the forms they filled out were likely not forms from IRSRC. The forms were probably from an Aboriginal group gathering names for their database of former students.

- Clients should make a will before they apply for their common experience payment.

Few community members have a signed will and it can create difficulty for claimants. Before your clients apply for their common experience payment, they should make out a will with a lawyer or, at a minimum, do a handwritten will from a drug store. In the event that they have applied and die before receiving their money, their money will be sent over to the estates section of INAC.

- Family members of claimants who die prior to their hearing can apply for funeral costs.

If your client is a family member of a claimant who died after filing a claim, your client can apply to IRSRC for costs incurred for the funeral up to \$5,000 if they have receipts for the funeral. Your client can talk with their lawyer about this. (If the lawyer does not know about this, the client should tell the lawyer to contact IRSRC.)

Note: According to IRSRC helpdesk staff, people who have completed their alternative dispute resolution application will not have to complete a new application when the new process is approved, even if they suffered sexual abuse or serious physical abuse. People will be eligible for “common experience” compensation even if they have accepted a settlement through alternative dispute resolution or litigation.

It is probably best for people to apply under the current alternative dispute resolution process, rather than waiting for the new “common experience” and Independent Assessment Processes to come into force. This is especially true if the person is elderly.

Criminal justice

A person who has been assaulted or sexually assaulted may file a criminal complaint with the police. If there is enough evidence, the Attorney General will prosecute the offender in criminal court.

Criminal court gives victims the opportunity to tell their story in court and may result in the offender being separated from future victims. However, the criminal justice system is highly adversarial and the standard of proof is very high — it must be beyond a reasonable doubt.

As with any court process, the victim can expect to be cross-examined by the offender’s lawyer. Also, the purpose of the criminal justice system is denunciation, deterrence, and punishment, not compensation. Therefore, it may not meet many needs of the victim.

Crime Victim Assistance Program

This is a BC program designed to compensate victims of violent or personal crimes. It is based on the premise that society has the moral duty to respond to the innocent victim. (The program used to be known as “Criminal Injuries Compensation.”)

This program comes under the Victim Services Division of the Ministry of Public Safety and Solicitor General. Here are some features of the program:

- The crime must have been committed after July 1, 1972.
- If the crime was a sexual assault or sexual misconduct against someone under the age of 19, there is no time limit on when someone can apply.
- The case does not have to have gone through the criminal justice system. An adjudicator considers the evidence and makes a decision.
- The victim can still take a civil action against the offender, but anything received in compensation from the action would first be used to offset any amount of compensation that the government has already paid to the victim.
- The range of benefits available and the application form are available on the program’s website at www.pssg.gov.bc.ca/victim_services/cva.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

For more information

- Indian Residential School Resolution Canada (IRSRC): www.irsr-rqpi.gc.ca. This site provides extensive information on alternative dispute resolutions of Indian Residential School claims.

Information on claims, the claim process, counselling, and support is available through a toll-free helpdesk: 1-800-816-7293.

Or write to:

Indian Residential School Resolution Canada
300 – 1166 Alberni Street
Vancouver, BC V6E 3Z3

- The Healing Foundation: www.ahf.ca. This site has extensive residential school resources.
- Indian Residential School Survivors' Society: www.irsss.ca. Contains information specific to residential schools in BC. Call 1-800-721-0066.
- Assembly of First Nations: www.afn.ca. The site provides information about residential schools under Policy Areas > Indian Residential Schools Unit.
- For information about the Residential Schools Agreement in Principle, call 1-800-816-7293.
- The National Survivors Support Line is available 24 hours a day, seven days a week at 1-866-925-4419.
- Surviving the past — options for dealing with abuse: www.survivingthepast.ca/aboriginal.html. This site has basic information about legal options for those who suffered abuse in residential schools. You may want to print out some of the information and give it to your clients.

Statutes and regulations

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

Limitation Act, R.S.B.C. 1996, c. 266

Case citation

Blackwater v. Plint, (2005) SCC 58; (2005) 258 D.L.R. (4th) 275 (S.C.C.)

15. Schools



15. Schools

Definitions

Jurisdiction: The right and power to make law or interpret and apply the law.

This chapter covers:

- Who has **jurisdiction** over schools
- The process for challenging school disciplinary decisions
- The process for challenging post-secondary education funding decisions

Common client problems

- My child has been unfairly disciplined at school.
- I have been turned down or limited by my band or Aboriginal organization for post-secondary funding.

General law

Kindergarten to Grade 12

The province has **jurisdiction** over education in the province, including preschool, kindergarten to Grade 12 (K–12), community colleges, and universities.

However, under the *Indian Act* (ss. 4, 114 – 122), the federal government has jurisdiction over education for Indian children who live on reserve. At the K–12 level, the federal government:

- provides funding to the province on a per capita basis for Indian students enrolled in provincial schools; or
- establishes, operates, and maintains schools for Indian children (often known as “Indian Band schools”).

Public schools

Public schools in British Columbia are governed by the provincial *School Act*. Under this law:

- Students of school age (generally 5 – 19 years old) have access to a public school education (*School Act*, s. 2).
- Parents have opportunities to consult with school staff and participate in Parent Advisory Councils (*School Act*, s. 7[2]).
- The school board of trustees sets up a code of conduct for students, and the school principal authorizes school rules (*School Act*, s. 6).
- The principal of the school has primary responsibility for the discipline of students under policies of the school board of trustees (*School Regulation*, s. 7).
- Agreements are made with local Indian band councils for the education of Indian children (*School Act*, s. 86[3]), including the teaching of an Indian language in the school (*School Regulation*, s. 14).

Independent schools

Some Indian Band schools are registered as independent schools and come under provincial jurisdiction (*Independent School Act*). These schools are certified by the province and must meet provincial standards. They are entitled to receive, free of charge, standard provincial school textbooks and curriculum materials.

The principal of an independent school is responsible for administering and supervising the school, and this responsibility includes disciplining students.

Other Indian Band schools

Other Indian Band schools are not registered as independent schools and come under federal jurisdiction. Although the Minister of Indian and Northern Affairs has the authority under section 115 of the *Indian Act* to provide for and make regulations about standards for buildings, equipment, teaching, education, inspection, and discipline in connection with Indian Band schools, there are no regulations in place. Instead, these matters are left to the school.

Note: The Nisga’a people have effective control of the K–12 schools in their territory. However, they operate these schools through the provincial public school system as School District 92.

Funding for post-secondary education

Through Indian and Northern Affairs Canada, the federal government also provides some funding for post-secondary Indian and Inuit students through the Post-Secondary Student Support Program. Funding is available to support:

- tuition,
- travel, and
- living expenses.

Post-Secondary Student Support Program funds are usually provided to the Indian band for distribution. Bands have considerable freedom in setting priorities for the funding.

For more information, go to the website of Indian and Northern Affairs Canada at www.ainc-inac.gc.ca. Click the “A – Z Index” button and look under “Post-secondary education.”

Aboriginal legal issues

Common client questions

- I feel my child has been unfairly disciplined at school. What can I do?
- I was turned down by my band for post-secondary education funding. What can I do?

I feel my Aboriginal child has been unfairly disciplined at school. What can I do?

What the client should do to address this problem depends on what kind of school the child attends. You can give your client the following general information:

If the child is in public school

The principal of a public school is ultimately responsible for discipline under school rules established by the principal and a code of conduct established by the school board and enforced by the principal (*School Act*, s. 6; *School Regulation*, s. 7).

The first step in addressing a school disciplinary issue is to make sure that your client has all the facts. A parent is entitled to meet with school staff to establish those facts (*School Act*, s. 7[2]).

Your client should get a copy of the school rules and the code of conduct and follow the process it describes for voicing concerns. Most codes of conduct contain a procedure for the process. For serious issues, the code of conduct may say there must be a formal hearing and an appeal, usually to the school board.

If the child is in an independent school

Discipline in independent schools is the responsibility of the principal. Although the *Independent School Act* does not set out requirements for school rules and a code of conduct, independent schools are regulated by the province.

These schools can and should have standards and procedures for disciplinary matters that are similar to those in the public schools. Your client should follow the same steps as for a public school.

If the child is in a federally regulated school

The principal of a federally regulated school is likely the person responsible for discipline. It is also likely that the school has a set of rules and a code of conduct.

Suggest that your client ask the principal for a copy of any rules that may be in place and follow the procedures set out there.

If no formal procedures are in place, your client may have recourse to the band council.

Judicial review

Even if there are no formal school rules dealing with your child's disciplinary issue, the "principles of natural justice" apply to school discipline. This means your client should be entitled to:

- information about what happened,
- a fair opportunity to respond, and
- reasons for the decision.

If these principles are not followed or if the final decision is unreasonable, your client may be able to go to judicial review (see *Skyrme v. Board of School Trustees of School District No. 89 [Shuswap]*). However, the procedure is complicated. There are time limits and technical and legal issues. If your client wants a judicial review, they

need to talk to a lawyer as soon as possible. See Appendix A of this guide for more about judicial reviews.

Note: Judicial reviews of decisions made by a provincially regulated school go to the Supreme Court of British Columbia. Judicial reviews of decisions made by federally regulated schools go to the Federal Court. For more on judicial reviews, see Appendix A.

I was turned down by my band for post-secondary education funding. What can I do?

Post-secondary education for status Indians and Inuit people is currently funded in part through the Indian and Northern Affairs Post-Secondary Student Support Program. The distribution of the funds is generally administered for status Indians by their band.

Many bands will have written guidelines and an education committee that makes funding decisions. If your client has been turned down for necessary funding for tuition support, travel support, or living expenses, they should ask the band education staff or band administrator for a copy of the band's guidelines for post-secondary education funding. They should then follow any procedures the band has in place to review or appeal its funding decision. If no formal procedures are in place, your client may want to bring it up with the band council.

Judicial review

Even if there are no procedures in place for your client to challenge the band's funding decision, the "principles of natural justice" apply to school funding, and your client should be entitled to:

- information about the application criteria,
- a fair and unbiased opportunity to meet the application criteria, and
- reasons for being turned down for funding.

If these principles are not followed or if the final decision is unreasonable, your client may be able to go to judicial review. But time limits and technical legal issues can make court procedures complicated. If your client wants a judicial review, they should talk to a lawyer as soon as possible. See Appendix A of this guide for more information about judicial reviews.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Statutes and regulations

Independent School Act, R.S.B.C. 1996, c. 216

Indian Act, R.S.C. 1985, c. I-5

School Act, R.S.B.C. 1996, c. 412

School Regulation, B.C. Reg. 265/89 [School Act]

Case citation

Skyrme v. Board of School Trustees of School District No. 89 (Shuswap), 1993
CanLII

16. Social Assistance



16. Social Assistance

Definitions

Jurisdiction: The right and power to make law or interpret and apply the law.

This chapter covers:

- The kinds of social assistance benefits available in BC
- How to apply for social assistance on and off reserve
- How to appeal a benefits decision on and off reserve

Common client problems

- I need to apply for social assistance and don't know where to go.
- I have been turned down for social assistance/my social assistance benefit has been cut off, and I need to know how to appeal.

General law

Social assistance is also called welfare. It consists of funds and services provided to people who don't have enough money from any other source to meet their basic needs.

Social assistance benefits on and off reserve in British Columbia include:

- Regular benefits for shelter (rent, phone, utilities) and support (food and other living expenses)
- Disability benefits for shelter and support (rates are higher than for regular benefits)
- Hardship assistance for people in temporary need to pay for basic needs
- Guardian financial assistance for people caring for children other than their own
- Various allowances for specific needs such as diet, work clothes, school start-up, natal expenses, relocation expenses, and burial and cremation expenses

To get social assistance, the applicant and any dependant adult must be a Canadian citizen, a landed immigrant, an approved refugee, or a sponsored immigrant who the sponsor cannot support.

Off reserve

The province has **jurisdiction** over social assistance off reserve. It administers its programs through the Ministry of Employment and Income Assistance.

A person who lives off reserve applies for social assistance at the nearest office of the provincial Ministry of Employment and Income Assistance.

On reserve

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*.

The federal government has agreed to harmonize social assistance on reserve with social assistance elsewhere in the province. For that reason, social assistance on and off reserve in BC are similar. However, sometimes changes to social assistance benefits on reserve lag behind those in the rest of the province by several months.

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.

Aboriginal legal issues

Common client questions

- Where do I apply for social assistance?
- How do I appeal a decision turning me down or cutting me off social assistance?

Where do I apply for social assistance?

If your clients have questions about social assistance, refer them to the Legal Services Society booklets listed under "For more information" at the end of this chapter. You can also give them the following general information.

Where your client applies for welfare depends on where they live:

- Off reserve: Apply to the nearest office of the provincial Ministry of Employment and Income Assistance.
- On reserve: Apply to the Indian band or "administering authority." Contact the band office to find out how to make an application for social assistance.

Appointments are usually required.

When your client makes the appointment, they must be sure to ask what documents to bring. Your client will probably need:

- two pieces of identification (one with picture) for self and spouse;
- one piece of identification for each dependant child;
- an up-to-date bank book or statement;
- recent receipts for shelter, fuel, and utilities;

- pay stubs for any recent family income, including WorkSafeBC or Employment Insurance benefits; and
- documents about assets (e.g., car, boat, house).

How do I appeal a decision turning me down or cutting me off social assistance?

Refer your clients to the Legal Services Society booklets listed under “For more information” at the end of this chapter. You can also give your clients the following general information.

On reserve

Make sure your client knows who the reserve’s administering authority is. Provide them with the following steps in the appeal process:

Administrative review

Your client has the right to get a review of a social development worker’s decision to either:

- turn down their application for benefits, or
- reduce, suspend, or cancel their allowance or service.

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 seven business days* after they got the review decision.

There will be an appeal committee of three people. Your client chooses one person, INAC chooses one person, and those two 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.

Note: Although the *Social Development Policies and Procedures Guide* says that the appeal committee can consider any “relevant information,” it also says that it can only consider information, records, or testimony submitted for Administrative Review. It is therefore important to make a complete and thorough submission at the Administrative Review stage.

INAC review

The manager of INAC’s Social Development Unit will review the appeal committee’s decision. The manager will endorse the decision if they feel 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.

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. Your client needs to speak to a lawyer as soon as possible. See Appendix A of this guide for more information about judicial reviews.

Off reserve

Help your client by printing out the Legal Services Society fact sheets on appeals (see “For more information” to find them online). Depending on what stage of appeal your client is at, give them fact sheet 8a: *Welfare and Appeals: Step 1: Reconsideration*, or fact sheet 8b: *Welfare and Appeals: Step 2: Tribunal Hearing*.

Go through the information with your client. *Point out the time limits* and check to see that your client understands them. With minor differences, the process and timeframes for reconsideration and appeal are similar to those for on-reserve appeals (above).

Give your client the following general information:

- The process begins by completing the Request for Reconsideration form with all relevant documents.
- If your client is not satisfied with the Reconsideration decision, they can ask for a Tribunal Hearing.

Note: It is extremely important that your client include all relevant documentation at the Request for Reconsideration stage. If the matter goes to an appeal hearing, your client may only rely on supporting information submitted with the Request for Reconsideration.

Note: If your client wants to find out what’s contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

For more information

The following booklets and fact sheets on this topic are essential:

- For information about welfare **on reserve**: *Social Assistance on Reserve in British Columbia*
- For information about welfare **off reserve**: *Your Welfare Rights* and the *Welfare fact sheets* series

These publications are free from the Legal Services Society. To obtain copies for your office, see “To order publications” at the end of this guide. They are also available online at www.lss.bc.ca. Go to Resources > Publications > Publications by subject > Welfare.

- Chapter 21 of the *LSLAP Manual* (UBC’s Law Students’ Legal Advice Program) has general information about social assistance. Available online at www.lslap.bc.ca.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the “Law by Subject” button and then the link to “Income Support.”
- LawLINK: www.lawlink.bc.ca. Click the “Welfare” button.
- PovNet: www.povnet.org. Click “Find an Advocate” to find a local advocate who has expertise in welfare issues. Most welfare advocates deal with off-reserve welfare, but phone the advocate and find out.

Statutes and regulations

Employment and Assistance Act, S.B.C. 2002, c. 40

Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41

Employment and Assistance Regulation, B.C. Reg. 263/2002 [Employment and Assistance Act]

Employment and Assistance for Persons with Disabilities Regulation, B.C. Reg. 265/2002 [Employment and Assistance for Persons with Disabilities Act]

Employment and Assistance Act and Employment and Assistance for Persons with Disabilities Act Forms Regulation, B.C. Reg. 315/2005

17. Taxation



17. Taxation

This chapter covers:

- The different kinds of taxes
- Which taxes **Indians** on reserve don't have to pay
- Which taxes Aboriginal people off reserve have to pay

Definitions

Indian: A person who is registered or entitled to be registered as an Indian under the *Indian Act*.

Exempt/Exemptions: Things that aren't included; in this chapter, things that aren't taxable.

Common client problems

- I am Aboriginal and want to know if I have to pay PST, GST, excise tax, and customs duties on my purchases.
- I am Aboriginal and want to know if I have to pay income tax on my earnings or Employment Insurance benefits.

General law

Both the federal government and the provincial government have the authority to tax and impose royalties and duties on income and commercial transactions.

The different kinds of taxes include:

- **Income tax:** Both the federal and the provincial government impose taxes on the income of individuals and the income and capital of corporations.
- **Sales tax:** The federal government imposes a Goods and Services Tax on most consumer transactions. BC also imposes a provincial sales tax on most consumer transactions.
- **Property tax:** Municipalities, including regional districts, impose property taxes on residential, industrial, and commercial real estate in BC. (Municipalities come under provincial authority.)
- **Excise tax:** Both the federal and provincial government impose taxes on certain goods such as gasoline, cigarettes, and alcohol.
- **Other taxes:** From time to time, the federal and provincial governments impose taxes on other consumer items. For example, BC has an 8 percent tax on hotel accommodation.

What doesn't get taxed under the Indian Act

Section 87(1) of the *Indian Act* says the following property of an **Indian** or an Indian band isn't taxable:

- an interest in reserve or surrendered lands, and
- personal property situated on a reserve.

Section 90(1) of the *Indian Act* says that the following personal property is "situated on reserve" and therefore isn't taxable:

- personal property purchased by the government with Indian money or money allocated by Parliament for the use and benefit of Indians or bands; and
- money from a treaty or other agreement between the government and a band.

Taxes on Nisga'a Lands

Nisga'a Lands are no longer Indian reserves, so sections 87 and 90 of the *Indian Act* no longer apply there. However, in their treaty, the Nisga'a negotiated to keep the tax **exemptions** under those sections for 8 years (in the case of sales taxes) and 12 years (in the case of personal income tax). This means that for the next few years, the Nisga'a get the same *Indian Act* tax exemptions as other Indians. After that, they will have to pay federal and provincial taxes.

Aboriginal legal issues

Common client questions

- Do I have to pay GST, PST, and other transaction taxes?
- Do I have to pay customs duties?
- Do I have to pay tax on my earned income or Employment Insurance benefits?
- When is income “situated on reserve”?

Do I have to pay GST, PST and other transaction taxes?

If a client wants to dispute a tax issue, they should talk to a lawyer. However, give your client the following general information.

The *Indian Act* tax **exemptions** apply only to **Indians** and Indian bands. They do not apply to other Aboriginal people, such as Inuit and Métis. They also don't apply to corporations owned and operated by Indians (see *Kinookimaw Beach Association v. HMTQ [Saskatchewan]*).

Whether or not these taxes are payable depends on the “point of sale” — meaning where the sales transaction takes place. If it is on reserve, the *Indian Act* exemptions apply. If it is off reserve, the *Indian Act* exemptions don't apply.

There can be a dispute over where the “point of sale” is. For example, if the product is delivered by the seller to the reserve, the point of sale may be considered “on reserve.”

If your Indian client buys a motor vehicle on reserve, it is exempt from tax even if they intend to move it off reserve almost immediately (see *Danes v. British Columbia*). This exemption applies to Indians even if they don't live on reserve but buy the motor vehicle on reserve.

On the other hand, if you buy goods off reserve, they are taxable even if the goods will be consumed entirely on reserve (see *Union of New Brunswick Indians v. New Brunswick [Minister of Finance]*).

Do I have to pay customs duties?

Customs duties are taxes that the government charges an importer or exporter who brings goods into the country or takes them out of the country. Aboriginal people have been unsuccessful in arguing that the *Indian Act* exemptions apply to customs duties, even if the point of entry to the country is on an Indian reserve (see *Mitchell v. Minister of National Revenue*).

However, it might be possible to argue that cross-border trade is an important feature of a tribe's identity, and therefore an Aboriginal right protected by section 35 of the *Constitution Act, 1982*. This is a complex legal argument. A client who has a dispute about cross-border trade should talk to a lawyer.

Do I have to pay tax on my earned income or Employment Insurance benefits?

Income is "personal property," so the income of an **Indian** or a band situated on reserve is **exempt** from taxation under section 87 of the *Indian Act* (see *Nowegijick v. R.*)

This **exemption** also applies to Employment Insurance benefits, where the income that generated the benefits was situated on reserve (see *Williams v. Canada*).

Note: Even if your client is not required to pay income tax, they may still be required to file an income tax return (see *R. v. Point*).

When is income "situated on reserve"?

The courts look at a number of factors to determine whether or not your client's income is situated on or off reserve. These include:

- the location of the employer,
- the residence of the client,
- the place from which the cheques are issued, and
- the location where the work was performed (*Williams v. Canada*).

The courts will also consider the amount of benefit to the reserve of the work performed by your client (see *Shilling v. Canada [Minister of National Revenue]*).

Analyzing income tax exemptions can get complicated, as in these two cases:

- The income of an **Indian** living on reserve and performing 50 percent of his work on reserve, but whose office, place of payment, and bank are off reserve, was found to be **exempt** from taxation (see *Clarke v. Minister of National Revenue*).
- The income of an Indian living on reserve and working in a factory partially on reserve and partially off reserve was found to be exempt from taxation, even though the person performed the majority of his duties in the off-reserve part of the factory. The court put weight on the fact that the land lease from the band to the factory required the hiring of band members (see *Amos v. R.*).

Note: The Canada Revenue Agency sets out its view of the income tax exemptions in its *Indian Act Exemption for Employment Income Guidelines*. A person could rely on these guidelines, but still argue that income should be exempt if it falls outside the guidelines. However, this would be a technical legal argument and your client would need to talk to a lawyer.

For more information

- *Native Law* by Jack Woodward (Carswell). See “To order publications” at the end of this guide.

Statutes and regulations

Employment Insurance Act, S.C. 1996, c. 23

Excise Tax Act, R.S.C. 1985, c. E-5

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Indian Act, R.S.C. 1985, c. I-5

Social Service Tax Act, R.S.B.C. 1986, c. 431

Tobacco Tax Act, R.S.B.C. 1996, c. 452

Case citations

Amos v. Canada, [1999] 1 C.N.L.R. 7; (1998) 98 D.T.C. 1740 (T.C.C.)

Clarke v. Minister of National Revenue, (1997) 148 D.L.R. (4th) 314; [1997] 3 F.C. 269 (Fed. C.A.) (alternate name: *Folster v. R.*)

Kinookimaw Beach Association v. HMTQ (Saskatchewan), [1979] 6 WWR 84; [1979] 4 C.N.L.R. 101 (Sask. C.A.)

Mitchell v. Minister of National Revenue, [2001] 3 C.N.L.R. 122 (S.C.C.)

Nowegijick v. R., [1983] 1 S.C.R. 29; [1983] 2 C.N.L.R. 89 (S.C.C.)

R. v. Point (1957), 22 W.W.R. 527; (1957) 119 C.C.C. 117 (B.C.C.A.)

Shilling v. Canada (Minister of National Revenue) (1999) 176 D.L.R. (4th) 226; [1999] 4 F.C. 178 (F.C.T.D.); (2001) 201 D.L.R.(4th) 523; [2001] 3 C.N.L.R. 332 (Fed.C.A.)

Union of New Brunswick Indians v. New Brunswick (Minister of Finance), [1998] 3 C.N.L.R. 295; [1998] 1 S.C.R. 1161 (S.C.C.)

Williams v. Canada (Minister of National Revenue), [1992] 1 S.C.R. 877; [1992] 3 C.N.L.R. 181 (S.C.C.)

18. Wills and Estates



18. Wills and Estates

This chapter covers:

- The laws regarding wills, including what the *Indian Act* says about wills and estates
- What makes a will legally valid
- What the roles of the **administrator** and **executor** are
- The special circumstances of Aboriginals who want to write a will

Common client problems

- I am Aboriginal and I want to write a will.
- I have been appointed as executor/administrator of an Aboriginal person's estate.

General law

A will is a legal document containing instructions as to what a person (the **testator**) wants done with their property (the **estate**) when they die. A will may also be used to appoint a guardian for children under 19 that the testator had sole guardianship of at the time of death.

In a will, people appoint someone, called an **executor**, to **administer** their estate.

The province has general **jurisdiction** over wills and estates in the province. However, under sections 4 and 42 to 50.1 of the *Indian Act*, the Minister of Indian and Northern Affairs Canada has jurisdiction over the wills and estates of Indians ordinarily resident on reserve or Crown lands.

Wills and estates under provincial law

To be completely valid, a will under the provincial *Wills Act* must:

- be made by a mentally capable person 19 years of age or over (though married people, members of the armed forces, and mariners at sea may make wills at any age);
- be clear that it is to take effect on the person's death;
- be signed at the end by the **testator** in the presence of two mentally capable witnesses who are neither **beneficiaries** nor spouses of beneficiaries of the will; and
- be signed at the end by both of the witnesses in the presence of each other and in the presence of the testator.

Definitions

Administer: To take charge of and settle the estate that the deceased left behind.

Administrator: The person assigned to distribute the estate of someone who dies.

Beneficiary(ies): The person or people named in a will to receive all or part of the deceased's estate.

Estate: The property that the deceased owned at the time they died.

Executor: The person who will be responsible for carrying out instructions in someone's will after they die.

Indian: A person who is registered or entitled to be registered as an Indian under the *Indian Act*.

Intestate: When a person dies without leaving behind a valid will.

Issue: Your children and their children, down through the generations.

Jurisdiction: The right and power to make law or interpret and apply the law.

Testator: The person who makes the will (who decides what it should say).

Generally, a will is binding, though a person may challenge a will if the testator was not mentally competent at the time of making it, or if the will does not meet formal requirements set out in the provincial *Wills Act*.

A will may also be challenged under the provincial *Wills Variation Act* on the basis that it does not adequately provide for the proper maintenance and support of the testator's spouse (including a common-law spouse of two years or more) or the testator's children.

If a person dies without a will (**intestate**), in most cases, their property is distributed to next of kin according to the provincial *Estate Administration Act*. The formula for distribution is:

- The first \$65,000 goes to the surviving spouse (including common law), if any.
- The rest of the estate is divided among a surviving spouse, if any, and the testator's surviving **issue** (descendants).
- If there is no surviving spouse or issue, the estate is distributed to surviving next of kin in the following order: parents, siblings, nieces and nephews, and then the next of kin according to consanguinity (blood connection).

Wills and estates under the Indian Act

The Minister of Indian and Northern Affairs Canada (INAC) may accept as a will any written document signed by an **Indian** ordinarily resident on reserve or Crown land, provided it expresses the intention to dispose of property upon death (*Indian Act*, ss. 4 and 45[2]).

However, such a document has no legal force until INAC has approved it or the Supreme Court of British Columbia has granted probate of it (*Indian Act*, s. 45[3]).

Under the *Indian Act*, as long as the document is in writing, expresses the intention to dispose of property upon death, and is signed by the **testator**, INAC may accept it as a valid will, even if there are no witnesses and it otherwise does not meet the formal requirements of the provincial *Wills Act*.

Note: INAC staff currently take the position that only the INAC minister has **jurisdiction** to accept a will if the testator was ordinarily resident on reserve or Crown Land *at the time of death* regardless of whether the testator lived on reserve *at the time of writing the will*. Although the writer of this guide disagrees with that interpretation, it demonstrates that on-reserve clients should always be encouraged to write a will that complies with the requirements of the provincial *Wills Act*.

The INAC minister has the authority under section 46 of the *Indian Act* to declare the will void (invalid) in whole or in part if they are satisfied that:

- it was executed under duress (too much pressure) or undue influence;
- the testator did not, at the time of writing the will, have testamentary capacity (the mental ability needed to make a valid will);
- the terms of the will would impose hardship on people the testator had a responsibility to provide for;

- the will disposes of Indian reserve land in a manner contrary to the interest of the band or the *Indian Act*; or
- the terms of the will are too vague, uncertain, or capricious (meaning they were made by impulse or whim rather than by necessity or reason).

A person may appeal INAC's decision to declare a will void and some other estate-related decisions to the Federal Court of Appeal. The matter being appealed must be worth at least \$500, and the person must bring the appeal *within two months* of INAC's decision.

Where an **Indian** ordinarily resident on reserve or Crown land *at the time of their death* dies without a valid will (intestate), the property is distributed to next of kin according to section 48 of the *Indian Act*. The formula for distribution is:

- The first \$75,000 goes to the surviving spouse or to the common-law partner of at least one year.
- The rest of the estate is divided among a surviving spouse, if any, and the testator's surviving **issue** (descendants).
- If there is no surviving spouse, common-law partner or issue, the estate is distributed among surviving parents. If there are no surviving parents, the estate is distributed among surviving siblings (brothers and sisters) of the deceased.
- If there are no surviving siblings of the deceased, their interest in reserve land goes to the Crown for the benefit of the band, and the rest of the estate is distributed among the deceased's nieces and nephews, or next of kin according to consanguinity (relationship by blood).

A person who is not entitled to reside on a reserve cannot inherit a right to possess or occupy reserve land. The superintendent of Indian Affairs will offer the interest in land for sale. The proceeds of the sale will be given to the **beneficiary** or beneficiaries (*Indian Act*, s. 50[2]).

If there are no valid offers to buy the right to possess or occupy the land within six months after it is offered for sale, the right reverts to the band, but the beneficiary is compensated for improvements to the land, such as buildings, fencing or infrastructure (*Indian Act*, s. 50[3]).

Nisga'a cultural property

In their treaty, the Nisga'a negotiated for law-making authority over the transfer of cultural property in the possession of a person who dies **intestate**. These Nisga'a laws and not federal or BC law determine how cultural property on Nisga'a lands is dealt with upon death when there is no will.

Aboriginal legal issues

Common client questions

- I am Aboriginal and want to write a will. What should I do?
- I am the nearest relative of an Aboriginal person who died. What should I do about their estate?

- What should I do if I am the beneficiary of land on the reserve of a band of which I am not a member?

I am Aboriginal and want to write a will. What should I do?

Encourage all of your clients to write a will.

Although **Indians** ordinarily resident on an Indian reserve or federal Crown land don't need to comply with the formal requirements of the provincial *Wills Act* (e.g., two witnesses, signed at the end), they should always be encouraged to do so to ensure that the document is clearly recognized as a will after death.

Many Aboriginal clients only require a simple will, and there are many general publications on how to do your own will. The Legal Services Society has a booklet specifically for people on reserve called *How to Make a Will and Settle an Estate: A guide for First Nations people living on reserve* (see "For more information" at the end of this chapter).

However, it is a good idea for your client to get some legal advice if they have special circumstances. For example, if your client:

- says they "own" land on an Indian reserve, but does not hold a Certificate of Possession or Certificate of Occupation (see Chapter 6, Housing and Reserve Land),
- wants to leave reserve land to a non-band member, or
- wants to leave one or more of their children out of their will.

I am the nearest relative of an Aboriginal person who died. What should I do about their estate?

Keep in mind that family members of a recently deceased person will need to deal with their loss. Ceremonies to celebrate the deceased's life will facilitate healthy grieving over the passing on of their relative. With a few exceptions, **estate** matters can wait.

However, the most immediate estate-related issues after death are:

- securing the property of the deceased,
- notifying creditors and others, and
- determining who will **administer** the estate.

Determining who will administer the estate

First, find out if the deceased wrote a will. In many cases, family members will know if there is a will, and where it is located. The will most likely names a person as **executor**. That person will be responsible for **administering** the **estate**.

The executor or, if there is no known will, the next of kin, must do a "wills search" with the provincial Vital Statistics Branch to see if the deceased registered their will. If the deceased is an **Indian**, the executor should also check with INAC to see if the deceased provided INAC with a copy.

If there was no will, a relative of the deceased may apply to administer the estate.

Jurisdiction over the estate

If the deceased was ordinarily resident on reserve at the time of death, INAC will help **administer** the estate, whether or not there was a will. The **executor** (if there was a will) or near relative (if there was no will) should contact an INAC estate officer at 1-888-917-9977.

If the deceased was not ordinarily resident on reserve at the time of death, their **estate** will be administered according to provincial law. Where there is a will, the executor applies to the BC Supreme Court for a “grant of probate” — official confirmation given by the court that the person named as executor is the proper person to settle the estate.

Where there is no will, a near relative or other person applies to the BC Supreme Court for “letters of administration.” Both a grant of probate and letters of administration give the applicant the authority to pay debts, call in money owed to the deceased and distribute the estate.

Under section 44 of the *Indian Act*, the INAC minister may consent to the BC Supreme Court having **jurisdiction** over an estate. This usually happens at the request of the executor or administrator or where the **testator** had significant **assets** located off reserve.

Note: The many steps involved in probating or administering an estate are beyond the scope of this guide. However, there are many resources available to assist a client in doing so. Indian and Northern Affairs Canada staff can be particularly helpful if the estate falls within their jurisdiction. Also find out more on the Indian and Northern Affairs website at www.ainc-inac.gc.ca/bc/proser/fnp/esttst/esttst_e.html.

What should I do if I am the beneficiary of land on the reserve of a band of which I am not a member?

If your client is a **beneficiary** of land on reserve through a will, it is essential to determine if they are “entitled” (have a right) to reside on the reserve.

In general, the people who are entitled to reside on reserve are band members, their dependent children, and the children of whom they have custody (*Indian Act*, s. 18.1).

However, band councils have the authority to determine the residence of people on reserve (*Indian Act*, s. 81[p.1]). Even a band member occupying reserve land without council approval can be considered a trespasser (see *Joe v. Findlay*).

If your client is not entitled to live on the reserve, the Minister of Indian and Northern Affairs will offer your client’s interest in the land for sale. If no valid offers are received within six months, the interest in land will revert to the band, but your client will be compensated for improvements to the land.

If your client is in these circumstances, they should make immediate contact with INAC (see page 4). It may also be advisable for your client to speak with a lawyer.

For more information

- Chapter 16, “Wills and Estates,” of the *LSLAP Manual* (UBC’s Law Students’ Legal Advice Program) has general information about wills and estates. The chapter includes detailed suggestions for interviewing clients who want to write a will and precedents for wills. Available online at www.lslap.bc.ca.
- *How to Make a Will and Settle an Estate: A guide for First Nations people living on reserve* (Legal Services Society). Available online at www.lss.bc.ca under Resources > Publications. To get a copy from the Legal Services Society, see “To order publications” at the end of this guide.
- *Writing Your Will* (Peoples Law School). Available online at www.publiclegaled.bc.ca. This booklet focuses on wills under the provincial *Wills Act*.
- *Wills for British Columbia* (Self-Counsel Press): www.self-counsel.com/ca.
- LawLINK: www.lawlink.bc.ca. Click on the “Wills and Trusts” button.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the “Law by Subject” button and follow the links for “Death” and “Wills.”

Statutes and regulations

Estate Administration Act, R.S.B.C. 1996, c. 122

Indian Act, R.S.C., c. I-5

Wills Act, R.S.B.C. 1996, c. 489

Wills Variation Act, R.S.B.C. 1996, c. 490

Case citation

Joe v. Findlay [1981] 3 C.N.L.R. 58; [1981] 3 W.W.R. 60 (B.C.C.A.)

19. Work



19. Work

This chapter covers:

- The laws that apply to employment
- Which laws apply to Aboriginal employees and employers
- How to get Workers' Compensation
- What to do if you've been fired
- What to do if you've been discriminated against

Definitions

Jurisdiction: The right and power to make law or interpret and apply the law.

Exempt/Exemptions: Things that aren't included; in this chapter, things that aren't taxable.

Common client problems

- My employer didn't give me benefits.
- I've been fired from my job with an Aboriginal organization.
- I've been discriminated against in the workplace.
- Deductions for Workers' Compensation have been taken out of my honorarium cheque.
- I've been denied Employment Insurance benefits.

General law

Employment law describes the legal relationship between an employer and an employee.

Jurisdiction for employment law is split between the federal parliament and the provinces. The federal government regulates the employment relationship in "federal works, undertakings or businesses." The province legislates in other areas.

The *Canada Labour Code* is the main piece of federal legislation about employment in "federal works, undertakings or businesses" for both union and non-union workers. In general, it regulates employment by band councils and employment activities specific to Aboriginal people.

The BC *Employment Standards Act* sets out minimum standards for employment under provincial jurisdiction. The *Industrial Relations Act* of British Columbia regulates unionized employment and collective bargaining.

The common law is also important in employment law, especially in the area of wrongful dismissal.

WorkSafeBC

WorkSafeBC is the new name for the Workers' Compensation Board.

Regulations under the provincial *Workers' Compensation Act* set the safety standards for the workplace in British Columbia. The act also provides benefits to workers in "compulsory industries" (most workplaces) who are injured on the job. These benefits include:

- compensation for lost wages,

- rehabilitation support, and
- pensions for permanent injuries.

Workers' Compensation benefits are paid to workers regardless of whether they, their employer, or a third party are at fault for the injury. In exchange for coverage under the act, the injured worker loses the right to sue a negligent employer in court. However, WorkSafeBC, which administers the *Workers' Compensation Act*, can sue a negligent third party in the worker's name.

A worker who is unhappy with a decision of WorkSafeBC can usually request a review by the review board. The time limit for doing so is 90 days after the decision.

Most review board decisions can be appealed to the Workers' Compensation Appeal Tribunal. The time limit for doing so is 30 days after the review board decision.

Employment Insurance

Employment Insurance (EI) is a federally regulated program that provides benefits to workers who find themselves out of work for a period of time through no fault of their own.

Employment Insurance is funded through payments made by the employer and deductions taken from workers' paycheques.

Pregnant women, new parents, people who take care of the very ill, and workers upgrading their skills may also be eligible for EI benefits. There are special benefits for out-of-work fishers.

To qualify for regular EI benefits, an employee must have worked a minimum number of hours (often 600) during a qualifying period (often the previous 12 months).

Information on applying for EI benefits can be found at the Human Resources and Skills Development Canada website at www.hrsdc.gc.ca. Use the drop-down box entitled, "How do I...," and click on "apply for Employment Insurance?"

Employment Insurance Appeals

A worker may appeal most decisions of the Employment Insurance Commission to a "board of referees." The time limit for appealing is *30 days*.

Some decisions of the board of referees may be appealed to the "umpire." The time limit for appealing to the umpire is *60 days*.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Aboriginal legal issues

Common client questions

- Which law applies to me?
- What can I do about my grievance with my employer?

- What can I do if I've been fired?
- Can my income be taxed?
- What can I do if I've been discriminated against?
- Does Workers' Compensation apply to Aboriginal employers?
- Does Employment Insurance apply to Aboriginal employers?

Which law applies to me?

When thinking about how employment law applies to an Aboriginal client, first ask yourself whether the employer comes under federal or provincial **jurisdiction**.

Whether it is federal or provincial law that applies depends on whether your client has a federal or a provincial *employer*. It does not depend on whether an *employee* is Aboriginal or not. This means that a non-Aboriginal person employed by an Indian band comes under the federal *Canada Labour Code* and an Aboriginal employee of a private business on or off reserve comes under provincial legislation.

Indian bands and closely related employers are considered to be “federal works, undertakings or businesses.” They therefore fall under the *Canada Labour Code* (see *Public Service Alliance of Canada v. Francis*; *Paul Band v. R.*)

Note: Since their treaty came into effect on May 11, 2000, the Nisga'a Nation and Nisga'a village governments are no longer Indian bands or “federal works, undertakings or businesses.” They now come under provincial employment law jurisdiction.

Canada Labour Code

The courts have found that the *Canada Labour Code* applies to Indian bands, band councils, and tribal councils (see *Pierre v. Roseau River Tribal Council*).

The courts have also found that the *Canada Labour Code* applies to school boards operating schools on reserve (see *Manitoba Teachers' Society v. Fort Alexander Indian Band, Chief and Council*).

Businesses that operate on Indian reserves are generally not “federal works, undertakings or businesses,” and therefore fall under provincial legislation. However, it isn't always easy to determine. For example:

- An extended care home that is controlled and operated by the band council and gives priority to Aboriginal people may come under provincial employment **jurisdiction** if many of its residents are non-Aboriginal (see *Westbank First Nation v. British Columbia* [Labour Relations Board]).
- Where a business is closely tied to the administration and operation of the band and has characteristics of “Indianness,” it may come under federal jurisdiction and the *Canada Labour Code* (see *Four B Manufacturing Ltd. v. United Garment Workers of America*).

The *Canada Labour Code* governs industrial relations (Part I), occupational health and safety (Part II), and labour standards (Part III).

The labour standards provisions of the code give more protection for non-union employees than provincial legislation, especially in the area of wrongful dismissal (getting fired without just cause).

What can I do about my grievance with my employer?

Both the federal *Canada Labour Code* and the *BC Employment Standards Act* set out minimum standards for such things as wages, hours of work, vacations, and holidays.

For more on the *Canada Labour Code*, see the pamphlets on the website of Human Resources and Skills Development Canada at www.sdc.gc.ca/en/gateways/topics/lxn-pup.shtml.

For more on provincial labour standards, see the guide on the Ministry of Labour and Citizens' Services website at www.labour.gov.bc.ca/esb/igm.

To help a client who has a grievance with their employer, determine who the employer is, then under which legislation the employer falls. If the employer is a "federal work, undertaking or business," the *Canada Labour Code* applies. If not, provincial legislation probably applies.

A unionized employee may want to file a grievance against their employer through the union. A non-unionized employee should start by writing a formal complaint to their employer.

Here are some general questions you can ask your client to determine the exact nature of the grievance:

- Who is the employer?
- What was the nature of the job?
- How long did you work there?
- What were your duties?
- What were the hours of work?
- What was the salary?
- What does the contract of employment (if any) say?
- What can we find out about the employer's policies, procedures, and guidelines about employees (if any)?

What can I do if I've been fired?

If your client has been fired, gather all the information you can about their employment (as outlined above for grievances).

If your client has worked for an employer covered by the *Canada Labour Code* for 12 continuous months, they may file a complaint for unjust dismissal. Outline for your client the complaint procedure. For details, see pamphlet 8: *Unjust Dismissal*, a publication available from Human Resources and Skills Development Canada, listed under "For more information."

Your client has *90 days* from the date of the dismissal to file a complaint with the labour program of Human Resources and Skills Development Canada. An

inspector looks into the complaint to see if it has merit. If the inspector is unable to resolve the complaint, the matter goes to an adjudicator (a person experienced in dispute resolution), who holds a hearing.

The adjudicator may order an employer to:

- Reinstatement the employee (give them back their previous position).
- Compensate the employee for lost wages with or without reinstatement.
- Take other appropriate measures, such as deleting any reference to the dismissal from the employee's personal record.

Reinstatement is not a common remedy. It will only be ordered where there has not been "a breakdown in the relationship between employer and employee such as would make reinstatement an impossibility" (see *Atomic Energy of Canada Ltd. v. Sheikholeslami*).

Note: Whether or not an employment relationship has broken down is often complicated in an Aboriginal setting. Your client may be a member of the band or community that employs them. Your client might even be related to a supervisor or co-worker. In such cases, there will be a continuing relationship even if the employment ends, making it difficult for the employer to argue that reinstatement is "an impossibility."

An employee or employer who is unhappy with the adjudicator's decision may apply for a judicial review to the Federal Court of Appeal *within 30 days of the decision*. The grounds for review are set out in section 18.1 of the *Federal Courts Act*.

Your client should talk to a lawyer before making a decision to go to judicial review. See Appendix A for more information about judicial reviews.

Other remedies for wrongful dismissal

A client who is wrongfully dismissed may also sue in court for damages. They could bring an action in the provincial Small Claims Court for damages up to \$25,000, or Supreme Court for damages exceeding \$25,000 (see *Brougham v. Carrier-Sekani Tribal Council*).

Advise the client to talk to a lawyer before making a decision to go to court.

Can my income be taxed?

Under section 87 of the *Indian Act*, Indians, regardless of whether they live on or off reserve, are **exempt** from taxation on real and personal property located on reserve. This also applies to the Indian bands themselves, but does not apply to Inuit or Métis people.

Income is personal property, so if your client's income is "situated" on reserve, it is exempt from taxation. So are Employment Insurance benefits.

In determining whether income is situated on reserve, courts look at a number of "connecting factors," such as the location of the actual work, the residence of the employer and employee, and the place where the employee is paid.

For a more detailed discussion on taxation, see Chapter 17, Taxation.

What can I do if I've been discriminated against?

Aboriginal people often face discrimination in the workplace. Discrimination on the basis of such things as race, religion, or national or ethnic origin is against human rights laws.

Who your client should make a complaint of discrimination to depends on where they work. The *Canadian Human Rights Act* applies to the federal government and federal businesses. The *BC Human Rights Code* applies to the provincial government and businesses under provincial **jurisdiction**. Most businesses are under provincial jurisdiction. See Chapter 7, Human Rights for how to make a complaint.

In general terms, Indian bands come under federal human rights jurisdiction. However, section 67 of the *Canadian Human Rights Act* states that:

“Nothing in this act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.”

Courts have interpreted section 67 to mean that Indian bands and other *Indian Act* entities are subject to the *Canadian Human Rights Act* when they act in a manner that takes them outside of their *Indian Act* authority.

For a more detailed discussion on discrimination in employment, see Chapter 7, Human Rights.

Does Workers' Compensation apply to Aboriginal employers?

The *Workers' Compensation Act* applies to employers throughout the province, whether or not they are Aboriginal, and whether or not they are located on reserve.

Workers employed in Aboriginal operations on reserve have the same right to Workers' Compensation coverage as all other workers in the province. If their employer is operating in a compulsory industry under the *Workers' Compensation Act*, workers are entitled to Workers' Compensation benefits regardless of whether their employer has registered with WorkSafeBC or paid assessments (see *Isaac v. British Columbia [Workers' Compensation Board]*).

If the employer is not covered by the *Workers' Compensation Act*, an employee who is injured on the job may be able to sue the employer in court.

How to get Workers' Compensation

Workers' Compensation can be quite complicated and involve a lot of medical evidence. Unless you have experience with the process, it may be best to refer your client to the office of the Workers' Advisers (under the Ministry of Labour and Citizens' Services). It provides general assistance with applying for reviews and appeals, and occasionally provides representation at review board and appeal hearings.

The Workers' Advisers office can be reached at (250) 387-6121 in Victoria, (604) 660-2421 in Vancouver, or toll free at 1-800-663-7867 elsewhere in BC. Its website is at www.labour.gov.bc.ca/wab.

The Community Legal Assistance Society in Vancouver takes on test cases dealing with Workers' Compensation through its Workers' Compensation Program.

Call (604) 685-3425 in Vancouver, or toll free at 1-888-685-6222 elsewhere in BC. Its website is at www2.povnet.org/clas.

Note: Many Aboriginal communities pay honoraria to elders and other community members for attending meetings and providing traditional knowledge. Workers' Compensation Assessment Policy AP1-38-2(b) says that all "wages, salaries, commissions, holiday pay, bonuses, and piecework, as well as any other means or manner by which a worker is paid for services" are subject to Workers' Compensation deductions. In this interpretation, this includes honoraria.

Does Employment Insurance apply to Aboriginal employers?

Employment Insurance law applies to Aboriginal employers on and off reserve.

If clients have questions about Employment Insurance (EI), suggest they try LawLINK (see "For more information"). The site contains links for both general and specific information, such as how to apply for benefits, including compassionate care benefits, and how to appeal EI decisions. Your clients may find *Employment Insurance*, listed under "Community Legal Education Ontario Publications," particularly useful.

The Community Legal Assistance Society in Vancouver takes on test cases dealing with Employment Insurance through its Employment Insurance Program. Call (604) 685-3425 in Vancouver, or toll free at 1-888-685-6222 elsewhere in BC. Its website is at www2.povnet.org/clas.

For more information

- Chapter 6 of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) has general information about employment law, focusing on provincial legislation. Chapter 7 deals with Workers' Compensation, and Chapter 8 deals with Employment Insurance. Available online at www.lslap.bc.ca.
- *Native Law* by Jack Woodward (Carswell). See "To order publications."
- *Consolidated Federal Employment and Labour Statutes and Regulations 2006* (Carswell). See "To order publications."
- LawLINK: www.lawlink.bc.ca. Click "Work," and follow the relevant links, such as "Employment Insurance."
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button and then the link for "Employment."
- Labour standards publications: information pamphlets on the Canada Labour Code. Available from Human Resources and Skills Development Canada at www.sdc.gc.ca/en/gateways/topics/lxn-pup.shtml.
- Information about Workers' Compensation and appeals of WorkSafeBC decisions can be found on the Workers' Advisers website at www.labour.gov.bc.ca/wab.

Statutes and regulations

Canada Labour Code, R.S.C. 1985, c. L-2
 Canada Pension Plan, R.S.C. 1985, c. C-8
 Canadian Human Rights Act, R.S.C. 1985, c. H-6
 Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) reprinted R.S.C.1985, App. II, No.5
 Criminal Code, R.S.C. 1985, c. C-46
 Employment Insurance Act, S.C. 1996, c. 23
 Employment Standards Act, R.S.B.C. 1996, c. 113
 Federal Courts Act, R.S.C. 1985, c. F-7
 Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165
 Human Rights Code, R.S.B.C. 1996, c. 210
 Indian Act, R.S.C. 1985, c. I-5
 Labour Relations Code, R.S.B.C. 1996, c. 244
 Workers Compensation Act, R.S.B.C. 1996, c. 492

Case citations

Atomic Energy of Canada Ltd. v. Sheikholeslami (1997) 137 F.T.R. 122 (F.C.T.D.), affirmed [1999] F.C.J. No. 869 (Fed.C.A.)
 Isaac v. British Columbia (Workers Compensation Board), [1995] 1 C.N.L.R. 26; 93 B.C.L.R. (2d) 273 (B.C.C.A.)
 Brougham v. Carrier-Sekani Tribal Council, [1998] B.C.J. No. 2319 (QL) (B.C.S.C.)
 Four B Manufacturing Ltd. v. United Garment Workers of America, [1980] 1 S.C.R. 1031; [1979], 4 C.N.L.R. 21 (S.C.C.)
 Manitoba Teachers' Society v. Fort Alexander Indian Band, Chief and Council, [1985] 1 C.N.L.R. 172 (F.C.T.D.)
 Paul Band v. R., [1984] 2 W.W.R. 540; [1984] 1 C.N.L.R. 87 (Alta.C.A.)
 Pierre v. Roseau River Tribal Council (T.D.), [1993] 3 F.C. 756 (F.C.T.D.)
 Public Service Alliance of Canada v. Francis, [1982] 4 C.N.L.R. 94; [1982] 2 S.C.R. 72 (S.C.C.)
 Roseau River Tribal Council v. James and Nelson, [1989] 4 C.N.L.R. 149 (Can.Adj. L.R.B.)
 Westbank First Nation v. British Columbia (Labour Relations Board), [1997] .C.J. No. 2410 (B.C.S.C.) affirmed 2000 BCCA 163; (2000) 95 A.C.W.S. (3d) 302 (B.C.C.A.)

To order publications



To order publications

Legal Services Society

The Legal Services Society publishes brochures and booklets on a range of legal topics, including the ones mentioned in this guide. Most of these publications are available online at www.lss.bc.ca (look under Resources > Publications).

To order publications or find out more, contact:

Legal Services Society
400 – 510 Burrard Street
Vancouver, BC V6C 3A8

Telephone: (604) 601-6075
Fax: (604) 682-0965
E-mail: distribution@lss.bc.ca

Carswell

Carswell publishes several of the books mentioned in this guide:

- *Native Law* by Jack Woodward
Clearly written coverage on virtually every topic relating to the law as it applies to Canada's Indian, Inuit, and Métis people and their lands.
Note: It is a loose-leaf text service, requiring the purchase of several updates each year, by subscription.
Cost: \$225; annual updates: \$200
- *Consolidated Federal Employment and Labour Statutes and Regulations 2006*
- *Entitlement to Indian Status and Membership Codes in Canada* by Larry Gilbert
- *2006 Annotated Indian Act and Aboriginal Constitutional Provisions* by Shin Imai

To order publications or find out more, contact:

Carswell
2075 Kennedy Road
Scarborough, ON M1T 3V4
Telephone: 1-800-387-5164
Fax: (416) 298-5082
E-mail: carswell.customerrelations@thompson.com
Website: www.carswell.com
Online catalogue: www.carswell.com/customersupport/order

Canada Law Book Inc.

Canada Law Book publishes *Martin's Annual Criminal Code 2007* by Edward L. Greenspan and Marc Rosenberg.

This book sets out the Criminal Code and other federal criminal legislation, annotated with decisions from all court levels, both reported and unreported. Includes more than 4,300 decisions as well as supplements (including statutory updates and recent amendments), Forms of Charges, and an Offence Grid.

Cost: \$84; hardcover

To order, check the publisher's website at www.canadalawbook.ca.

Glossary



Glossary

Aboriginal people

In Canada, this term refers to the descendants of the original inhabitants of North America. The Canadian Constitution recognizes three groups of Aboriginal people — Indians (including non-status Indians), Métis, and Inuit. These are three separate peoples with unique heritages, languages, cultural practices, and spiritual beliefs (see below for definitions).

The term Aboriginal is also used in other countries to refer to the indigenous people or first inhabitants of a given area.

Band

A body of “Indians” who collectively use and benefit from lands or money held by the Crown. Also refers to a body of Indians declared to be a band for the purposes of the *Indian Act*. Each band has its own governing council, usually consisting of one chief and several councillors. Community members choose the chief and councillors by election or, sometimes, through custom. The members of a band generally share common values, traditions, and practices rooted in their ancestral heritage. Today, many bands prefer to be known as First Nations.

Band council

A body elected according to provisions of the *Indian Act* or a Custom Election Code to be responsible for “the good government of the band” and delegated the authority to pass bylaws on reserve lands. Also known as chief and council.

Chief and council

See Band council

Department of Indian and Northern Affairs

The federal department responsible for meeting the government’s constitutional, treaty, political, and legal responsibilities to First Nations, Inuit, and others in the North. Referred to as Indian and Northern Affairs Canada or INAC. The department provides a range of programs and services to support First Nations and Inuit communities. Some people call this department “DIA.”

First Nation

A term that came into common use in the 1970s to replace the word “Indian.” Although it is widely used, no legal definition of First Nation exists. It refers to both status and non-status Indians, and some bands have chosen to replace the word “band” with First Nation in the name of their community.

Indian

A term used historically to describe the first inhabitants of the “New World,” and a legal term defined in the *Indian Act*. Under section 2(1) of the act, Indian is defined as “a person who ... is registered as an Indian or is entitled to be registered as an Indian.”

Although some people still refer to themselves as Indians, the term has been generally replaced by Aboriginal people (as defined in the *Constitution Act, 1982*) or First Nations. First Nations people are also referred to as status Indians, non-status Indians, and treaty Indians (see definitions below).

Indian Act

Canadian federal legislation first passed in 1876 and amended several times since. It sets out certain federal government obligations and regulates the management of Indian reserve lands, money, and other resources.

Indian and Northern Affairs Canada

See Department of Indian and Northern Affairs

Indian reserve

Initially created by colonial governors, and later by the Canadian government, Indian reserves are defined in section 2 of the *Indian Act* as parcels or tracts of land that have been set apart by the federal government for the use and benefit of an Indian band. The legal title to Indian reserve land is vested in the federal government.

Indian status

Refers to an individual’s legal status as an Indian, as defined by the *Indian Act*.

Inuit

Indian and Northern Affairs Canada defines the Inuit as “an Aboriginal people in Northern Canada, who live in Nunavut, Northwest Territories, Northern Quebec and Northern Labrador.” The singular of Inuit is Inuk.

Métis

Métis are people with both Aboriginal and European (usually French or Scottish) heritage. The Métis have been recognized as a “distinct people with their own customs, way of life and recognizable group identity separate from their Indian, Inuit and European forebears” (*R. v. Powley*).

Mixed ancestry

Many people of mixed ancestry identify themselves as Indian or Inuit. For example, people with some Indian heritage self-identify as Indians even if they are not registered or entitled to registration under the *Indian Act*. Métis people, by definition, have mixed ancestry.

A person of mixed ancestry may claim Aboriginal rights, depending on a number of indicators, including self-identification, ancestral connection, and community acceptance.

Non-status Indian

An “Indian” who is not registered as an Indian under the *Indian Act*. They are not a member of a band and not entitled to any of the rights and benefits specified in the *Indian Act*.

Off reserve

A term used to describe services or objects that are not part of a reserve but relate to Aboriginal people.

Registered Indian

A person who is defined as an Indian under the *Indian Act* and who is registered under the act.

Status Indian

A person who is registered as an Indian under the *Indian Act*. The term is often used interchangeably with Registered Indian.

Treaty Indian

A status Indian who belongs to a First Nation that signed a treaty with the Crown.

Tribal council

A regional group of First Nations members that delivers common services to a group of First Nations.

Parts of this glossary were adapted from terminology listed on the Indian and Northern Affairs Canada website at www.ainc-inac.gc.ca/pr/info/tln_e.html.

Appendix A: Judicial Reviews and Charter Challenges



Appendix A: Judicial Reviews and Charter Challenges

The following information provides more detail on two court procedures referred to in this guide: judicial reviews and Charter challenges.

Judicial reviews

If a client is unhappy with the decision of a public body, they may be able to challenge the decision by going to judicial review. Judicial review means that you apply to the court to have a judge review the decision.

A person generally goes to judicial review to argue that the court's decision was reached unfairly or unreasonably. For example:

- They did not get an impartial hearing or a reasonable opportunity to present their case.
- The body acted outside its jurisdiction.
- The body based its decision on a misinterpretation of the facts.
- The body made a mistake in law in its decision.

Judicial review can be applied for in relation to any public body, including government departments, local authorities, the police, and any organization exercising a public function. The usual remedy if a case succeeds is that the public body will be ordered by the court to reconsider or change its decision.

You can only go to judicial review after you have exhausted all of the appeal procedures for that particular public body.

BC Supreme Court

You go to BC Supreme Court for a judicial review of a decision by a body that comes under provincial jurisdiction. In most cases this is a tribunal. There are different kinds of tribunals. An arbitrator under the *Residential Tenancy Act* is one example. Other tribunals include the Human Rights Tribunal and the Labour Relations Board.

For more information about judicial review in BC Supreme Court, see the publications on the Community Legal Assistance Society website at: www2.povnet.org/publications_clas.

Federal Court

You go to the Federal Court for a judicial review of a decision by a body that comes under federal jurisdiction. In most cases this is a tribunal. A Band council is considered a federal tribunal under the *Federal Courts Act*.

The Federal Court has two divisions, the Trial Division and the Appeal Division. Each has authority for judicial review in certain areas.

For more information about judicial review in the Federal Court, contact the Community Legal Assistance Society: (604) 685-3425 or 1-888-685-6222 (toll free).

Note: There are always time limits to applying for judicial review. It is a complicated procedure and your client will need legal advice.

Charter challenges

The *Canadian Charter of Rights and Freedoms* was adopted as part of the constitution in 1982. The Charter protects rights of free speech, free expression, individual liberty and security, and free assembly; guarantees the right to participate in democratic elections and to have a fair and prompt trial; and acknowledges the rights of minority groups.

The federal and provincial governments cannot pass laws that infringe on the freedoms set down in the Charter. Canadian courts interpret and enforce the Charter.

If your client thinks a provincial or federal law or action denies their Charter rights, they can ask a court to rule that the law is invalid or ask the court to order the government to uphold the right that's being denied. When someone does this, they are making "a Charter challenge."

A Charter challenge is a complicated process. First, a person has to show the court that a Charter right was denied. But even if someone can show that, Charter rights are not unlimited or absolute. They are balanced against the rights of others and the interests of the rest of society.

If a court finds a government has denied someone's rights, the court must then decide if the government had a good reason to deny the rights. In other words, the court must decide whether the denial of a Charter right is reasonable and justified in a free and democratic society.

To determine if an action is reasonable and justified, the Supreme Court of Canada must ask three questions:

- Is the law likely to achieve or at least partly achieve its intended purpose?
- Was there some other way the government could have achieved the same purpose without violating anyone's rights or freedoms, or violating them to a lesser degree?
- Is the government's purpose important enough and are the benefits of the law significant enough to justify violating a Charter right?

The more severe the violation of rights, the more difficult it is for government to show that it was justified in denying the rights.

If a court decides that a law discriminates and violates the Charter, it can "strike down" the law. Once a law is struck down, it can no longer be used. The government usually writes a new law that does not discriminate to replace the old one. Challenging a law in court is often the last choice, because going to court is very expensive and takes a long time.

Appendix B: Legal Services Society



Appendix B: Legal Services Society

If your client has a legal problem and their income is limited, the Legal Services Society (LSS) can provide help through its legal information, advice, and representation services. The kind of services available to your client will depend on what their legal problem is, whether they need to go to court, and how best we can help them.

Legal representation

LSS will pay for a lawyer to represent financially eligible people if they have one of the following serious legal problems:

Family law

- They need a court order or other legal assistance to protect them or their children from their partner's violence.
- They need a court order to stop the other parent from taking their children to live out of the province.
- The Ministry of Children and Family Development has taken or is threatening to take their children.

Under certain circumstances, someone may be eligible for a lawyer to represent them in other situations. Ask at a legal aid office if your client's situation might qualify for exceptional coverage.

If your client has been referred to a legal aid lawyer and is at risk because there is a high level of conflict in the case, they may qualify for additional services if the case goes to trial. Your client should ask the lawyer if their situation might qualify them for extended family services.

If your client cannot avoid taking their case to the Supreme Court, they may be able to get a limited family referral. This means they can get some help from a lawyer to deal with the case.

Criminal law

- Your client has been charged with a criminal offence and is likely to go to jail, be given a conditional sentence that includes house arrest, lose their job, or be deported if they are found guilty.
- Your client has been found unfit to stand trial or not criminally responsible for a crime because of a mental disorder and they need legal representation at a BC Review Board hearing.

Mental health law

Your client is being held against their will under the *Mental Health Act*, and they need a lawyer to represent them at a review panel hearing.

Financial eligibility

A person qualifies financially for legal representation if they have very few assets and a net household income (after allowable deductions) at or below LSS guidelines. Find the guidelines online at www.lss.bc.ca (look under Legal aid > Legal representation).

To find out if they qualify, your client should contact the nearest legal aid office or the LSS Call Centre (see the end of this section for contact information).

Your client will need to have proof of their income, proof of the value of their assets, and any papers about their case. They should bring these documents to the legal aid office or have them handy if they apply by phone.

Legal advice

LSS provides the following legal advice services.

Brydges line

Lawyers provide emergency legal advice on criminal matters to people who have been arrested or detained. They also give advice to people who are being investigated by a law enforcement agency, even if they have not been charged.

See the end of this section for contact information.

Duty counsel

Duty counsel are lawyers located at the courthouses who can provide low-income people with legal advice and assistance. Duty counsel representation services are limited to what is described below.

Criminal and youth court duty counsel: These lawyers can help if your client is charged with a crime but does not have their own lawyer. They will give advice about the charges against your client, court procedures, and their legal rights. They may also represent your client at a hearing to apply for release (if they are in custody), to enter a guilty plea, or to speak to the judge before your client is sentenced.

Family duty counsel: These lawyers are in most Provincial Courts and in many Supreme Courts to help low-income people deal with family law and child protection problems.

If your client does not have their own lawyer, duty counsel can give them legal advice about custody, access, guardianship, and child support; property (limited); tentative settlement agreements; and court procedures.

Family duty counsel can also speak for your client in court on simple matters such as adjournments, consent and emergency restraining orders, and uncontested custody, access, and support hearings. And they can help your client draft documents, review documents your client has prepared to be filed in court, and negotiate and settle issues.

To find out when duty counsel are available at your courthouse, call your local legal aid office or go to www.lss.bc.ca and click on Legal aid > Legal advice.

Family advice lawyers

Family advice lawyers can give your client free legal advice if they are a low-income parent trying to reach an agreement in a separation or divorce. They will need a referral from a family justice counsellor or child support officer. The lawyers are available at family justice counsellor offices in Kamloops, Kelowna, Prince George, Surrey, Vancouver, and Victoria.

LawLINE

The toll-free LawLINE phone service provides brief legal advice to eligible callers. LawLINE lawyers and paralegals give legal advice, make phone calls or write letters on people's behalf, help with correspondence and documents, provide written legal opinions, and refer people to other agencies that can help.

See the end of this section for contact information.

Financial eligibility

To get LawLINE advice, and most family duty counsel and family advice lawyer services, your client will need to be financially eligible. A person qualifies financially for these services if their net household income is at or below LSS guidelines. Find the guidelines online at www.lss.bc.ca (look under Legal aid > Legal advice).

Your client should be prepared to answer a few questions about their income when they request advice services. If their net income is higher than LSS eligibility limits, they can still get legal information, criminal duty counsel services, and some family duty counsel and family advice lawyer services.

Legal information

LSS provides the following free legal information services. There is no financial eligibility test for legal information services.

LawLINE

The toll-free LawLINE phone service offers free information about legal matters, including Aboriginal law, consumer rights, criminal law, debt, employment, family law, health, housing, and human rights. Staff can also refer callers to other agencies that can help.

See the end of this section for contact information.

Legal information outreach workers

Legal information outreach workers can help your client find information, fill out court forms, and use public access computers. They can also refer your client to appropriate resources.

Workers are available to give talks at community agencies to explain how to access various LSS services. To find the worker nearest to you, call your legal aid office or go to www.lawlink.bc.ca (look under Legal aid > Legal information, and click on the link for Legal information outreach workers).

Publications and websites

LSS produces legal information and self-help materials in plain language to help people identify, avoid, or resolve common legal problems. Most of our publications are on the LSS website at www.lss.bc.ca (look under “Resources”) or are available from any legal aid office. We also maintain the following legal information websites:

Family Law in British Columbia

This website (www.familylaw.lss.bc.ca) contains general family law information and self-help guides about family law problems. It also contains links to LSS family law publications and some videos that you can view online or order from LSS, as well as a section on how to solve family law problems, and links to more resources.

LawLINK

LawLINK (www.lawlink.bc.ca) is a website that connects people to reliable information and the tools they need to resolve their legal problems.

Computers with LawLINK as the home page are available to the public at LSS regional centres, as well as some local agent offices, courthouses, and community agencies. Or visit LawLINK on a public access computer at a local government agent’s office, a local library, or any other computer with Internet access. Contact a legal aid office to find the closest public access computer.

LSS website

In addition to publications, the LSS website (www.lss.bc.ca) contains information about legal aid services.

To contact LSS

Brydges Line

If your client has been arrested or detained, they can reach a lawyer toll free at:

1-866-458-3300 (for area code 205)

1-866-458-5500 (for area code 604)

The service is available 24 hours a day, BC-wide.

Legal aid

To find out if legal aid can help, your client should call the LSS Call Centre:

In the Lower Mainland: (604) 408-2172

Outside the Lower Mainland: 1-866-577-2525 (toll free)

If they have a hearing or speech impairment:

TTY (Lower Mainland): (604) 601-6236

TTY (outside the Lower Mainland): 1-877-991-2299 (toll free)

LawLINE

For LawLINE information or advice services, call:

In the Lower Mainland: (604) 408-2172

Outside the Lower Mainland: 1-866-577-2525 (toll free)

LawLINE is very popular, so your client may have to wait a while to speak to someone.

Publications

To order publications or get a catalogue:

Website: www.lss.bc.ca (look under Resources > Publications)

Phone: (604) 601-6075

Fax: (604) 682-0965

Appendix C: Freedom of Information



Appendix C: Freedom of Information

BC's Freedom of Information and Protection of Privacy Act

The purpose of BC's *Freedom of Information and Protection of Privacy Act* is to make public bodies more accountable to the public and to protect personal privacy. The act says that a "public body" is:

- (a) a ministry of the government of British Columbia,
 - (b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, or
 - (c) a local public body,
- but does not include
- (d) the office of a person who is a member or officer of the Legislative Assembly, or
 - (e) the Court of Appeal, Supreme Court or Provincial Court.

Under the act, the public has a right to access records about themselves. However, the act does not apply to some materials, for example certain judicial and legislative documents.

To request access to information, write to the information and privacy office of the public body that you think has the records you want. Describe the records as clearly and completely as possible.

For more information, go to the website of the Office of the Information and Privacy Commissioner (OIPC) at www.oipcbc.org. The Office of the Information and Privacy Commissioner is independent from government and monitors and enforces British Columbia's *Freedom of Information and Protection of Privacy Act*.

Canada's Access to Information Act

The purpose of Canada's *Access to Information Act* is to provide a right of access to information in records under the control of federal government institutions. These institutions are listed in Schedule 1 of the act, and include federal government ministries, the Correctional Service of Canada, the RCMP, the Office of Indian Residential Schools Resolution of Canada, the Canadian Human Rights Commission and many other federal agencies.

The act does *not* include Indian bands or Nisga'a government, though many band documents can be obtained from Indian and Northern Affairs Canada.

To request access to a record under the act, write to the government institution that has control of the record. Describe the records as clearly as possible.

To find out which records government institutions hold, go to the Info Source website at infosource.gc.ca/index_e.asp. Info Source contains a series of publications about the Government of Canada, how it's organized, and what's in its information holdings.

Index



Index

A

Aboriginal Housing Management Association, 61
Aboriginal Initiatives Branch, 118
Aboriginal people
 definition of, 78
 government duty toward, 3
 history of, 3
 social and economic conditions of, 4
 statistics about, 3, 4
Aboriginal rights
 and adoption, 44
 and band membership, 81
 and cross-border trade, 74, 144
 and custom leadership selection, 82
 and discrimination, 66, 67
 and moving from US, 74
 and moving to US, 73
 and “scrip,” 52
 and traditional ownership, 58
 claiming, 51, 52
 defense of, 31, 52
 definition of, 3, 50
 infringement of, 52
 of Indians, 51
 of Inuit, 51
 of Métis, 51, 52
 to harvest fish and game, 32, 50–52
Aboriginal title, 3, 50, 51
Abuse and adult guardianship, 101–102
 domestic, 4, 40
 in residential schools. *See* Residential School Abuse
Access and custody for children, 40, 41
Access to Information Act, 84, 184
Adjournments, 28
Administration of will, 148, 151, 152
Admittance to hospital (involuntary), 99
Adoption
 and band membership, 44, 82
 and Indian Act registration, 81
 custom, 43, 44, 81
 provincial, 44, 81
 special provisions for Aboriginal, 44
Adoption Act, 39, 43, 44
Adult Guardianship. *See* Mental Health
Adult Guardianship Act, 99, 101, 102
Alternative dispute resolution (ADR), 123–126
Apprehension of children, 4, 42, 43

Arraignment hearings, 28

Assets

 division upon separation, 40–42
 seizure of, 10–12, 22
 exempt from bankruptcy, 9–12

B

Band council elections. *See* Election of band council (custom); Election of band council (Indian Act)

Band membership

 and aboriginal rights, 81
 and adoption, 82
 and children, 81, 82, 152
 and discrimination, 81
 and judicial review, 85
 and right to reside on reserve, 57–60, 152
 and treaty rights, 81
 entitlement to, 81, 82
 how to apply for, 84
 how to protest if denied, 85
 under band control, 81, 82
 under government control, 81

Banishment from community, 33

Bankruptcy

 alternatives to, 8, 9
 and cultural property, 10–12
 and heritage objects, 12
 and personal property, 9, 11
 and real property, 10, 11
 and reserve land, 10
 and seizure of property, 10–12
 and wages, 10, 11
 assets exempt from, 9–12
 debts not cancelled by, 10
 definition of, 9
 discharge from, 10–12
 eligibility for, 9
 government jurisdiction over, 8
 trustee, 9

See also Debts

Bankruptcy and Insolvency Act, 8, 9, 12

BC Treaty Process, 51

Beneficiaries

 of treaty rights, 51
 of wills, 57, 148, 150, 152

Benefits. *See* Social Assistance

Bill C-31, 78–80, 83

- Board of Parole for BC, 115–117
- British Columbia Human Rights Coalition, 66
- British Columbia Human Rights Code, 65, 161
- British Columbia Human Rights Tribunal, 66, 174
- British Columbia Supreme Court, 174
- Brydges line, 179, 181
- Business Practices and Consumer Protection Act, 16–21
- Business Practices and Consumer Protection Authority (BPCPA), 20–21
- Business Practices and Consumer Protection Regulation, 20

- C**

- Canada Labour Code, 156, 158, 159
- Canada Law Book, 167
- Canada Mortgage and Housing Corporation, 60
- Canadian Charter of Rights and Freedoms
 - and band membership, 81
 - and circle sentencing, 32
 - and custom election practices, 83
 - and discrimination by a law enforcement officer, 95
 - and discrimination by an Indian band, 66–68
 - and spiritual practices in prison, 117
 - overview of Charter challenges, 175
- Canadian citizenship, 72
- Canadian Human Rights Act, 64, 65, 68, 161
- Canadian Human Rights Commission (CHRC), 65, 66, 68, 184
- Canadian Human Rights Tribunal, 66
- Cancelling consumer contracts. *See* Consumer contracts
- Car accidents, 110, 111
- Carswell, 166
- Certificate of Possession, 57, 58, 151
- Charges, criminal. *See* Criminal charges
- Charter challenges, 175
 - See also* Canadian Charter of Rights and Freedoms
- Child. *See* Children
- Child, Family and Community Services Act, 39, 42, 43
- Children
 - adoption of, 43, 44, 81, 82
 - custody and access to, 40, 41
 - government responsibility towards, 42, 43
 - in wills, 149, 151
 - protection of, 42, 43
 - removal from home of, 4, 42, 43
 - special provisions for Aboriginals, 42, 43
 - support/maintenance for, 40, 41, 149
- Circle sentencing, 31, 32
- Class actions, residential school abuse, 123
- Commission for Public Complaints (CPC), 91
- Committee (mental health), 99, 101, 103
- “Common experience process,” 124, 125
- Community Legal Assistance Society, 161, 162, 174
- Community Living BC, 102
- Compensation for residential school abuse, 122–126
- Complaints
 - about band councils, 84–85
 - about human rights, 65–68, 95, 161
 - about law enforcement officers, 90–95
 - See also* Law enforcement complaints
- Conditional release (parole), 115–117
- Consolidating debts, 9
- Constitution Act (1867), 41, 59
- Constitution Act (1982)
 - and band membership, 81
 - and custom elections, 83
 - and definition of Aboriginal peoples, 78
 - and protection of Aboriginal rights, 50, 67, 144
 - and right to custom adoption, 43
 - and traditional ownership, 58
 - and treaties, 74
- Consumer contracts
 - breach of conditions of, 19
 - cancelling, 16–19, 21
 - cemetery, 19
 - conditional sales agreements, 22
 - continuing service, 18
 - definition of, 16
 - direct sales, 17–18
 - distance sales, 18
 - door-to-door sales, 17, 18, 21, 22
 - funeral services, 19
 - future performance, 18
 - illegal, 16
 - implied conditions of, 19
 - misrepresentation in, 17
 - mistake in, 17
 - time limits for, 17–19, 21
 - time share, 19
 - unfair, 17
 - unsolicited goods and services, 19

- Contracts, consumer. *See* Consumer contracts
 - Controlled Drugs and Substances Act, 26, 27
 - Convention refugees, 72
 - Correction Act, 114
 - Correction Act Regulation, 114, 116
 - Correctional facilities/centres, 4, 114, 118
 - Correctional Service of Canada, 114, 118, 184
 - Corrections and Conditional Release Act, 114–116
 - Corrections and Conditional Release Regulations, 114, 116, 117
 - Council elections. *See* Election of band council (custom); Election of band council (Indian Act)
 - Court Order Enforcement Act, 8, 9
 - Court Order Enforcement Exemption Regulation, 9
 - Court process. *See* Criminal court process
 - Creditors. *See* Debt collectors
 - Crime Victim Assistance Program, 126
 - Criminal charges
 - against law enforcement officers, 90
 - against residential school abusers, 126
 - alternative measures to, 27, 28, 31
 - and Aboriginal rights, 31, 32
 - and deportation, 74
 - for driving offenses, 108, 109
 - for first-time offenders, 27
 - government jurisdiction over, 26–27
 - investigation before, 27, 30
 - legal aid for, 28, 31, 33, 34, 178, 179
 - options to, 27–28
 - police diversion, instead of, 27, 30
 - restorative justice, instead of, 27, 30
 - Criminal Code of Canada
 - and illegal contracts, 16
 - and options to laying charges, 27
 - and parole, 115
 - and prohibitions of weapons, 32–33
 - driving offenses, 109
 - prosecution under, 26, 27
 - sentencing under, 31
 - Criminal court process
 - adjournments, 28
 - appeals, 28
 - arraignment hearings, 28
 - circle sentencing, 31, 32
 - entering a plea, 28, 30
 - first appearance, 28
 - going to trial, 28
 - missing a court appearance, 29
 - overview of, 29
 - preliminary inquiry, 28
 - sentencing, 28, 31–32
 - Criminal duty counsel, 179
 - Criminal Injuries Compensation. *See* Crime Victim Assistance Program
 - Criminal justice system
 - aboriginal barriers to, 30
 - aboriginal experience of, 31
 - experience of victim in, 126
 - explaining to client about, 30
 - government jurisdiction over, 26
 - Cross-border trade, 74, 144
 - Cultural Property Export and Import Act, 12
 - Custody and access to children, 40, 41
 - Custom adoption, 43, 44
 - Custom leadership selection. *See* Election of band council (custom); Election of band council (Indian Act)
 - Customs taxes and duties, 74, 144
- ## D
- Debt collectors
 - and conditional sales agreements, 22
 - behaviour of, 20
 - harassment by, 19–21
 - Indian, 22
 - protection from, 20–22
 - seizure of property by, 22
 - Debts
 - consolidating, 9
 - getting free of, 12
 - not cancelled by bankruptcy, 10
 - orderly payments for, 9
 - proposals to pay part of, 9
 - resolving informally, 8
 - See also* Bankruptcy
 - Deportation, 74
 - Designated lands, 60
 - Discharge from bankruptcy, 10–12
 - Discipline
 - in school system, 130–132
 - of prisoners, 116, 117
 - Disciplinary review, 116, 117
 - Discrimination
 - and band membership, 81
 - and Canadian Charter of Rights and Freedoms, 66, 67, 95, 175
 - by Indian band, 68
 - by law enforcement officer, 95
 - in workplace, 161
 - in registration under the Indian Act, 78–80

- making a complaint about, 65, 66, 68
- systemic, 66
- See also* Human rights
- Dismissal (firing), 159, 160
- Divorce
 - and custody and access to children, 40, 41
 - and family maintenance (support), 40, 41
 - and property division, 40–42
- Divorce Act, 39–41
- Domestic violence, 4, 40
- Door-to-door sales, 17, 18, 21, 22
- Double mother rule, 79, 80
- Driving
 - accidents, 110, 111
 - licensing, registration, and insurance, 108, 110
 - offenses, 108–111
 - See also* Motor vehicle laws
- Duty counsel, 179

E

- Earned remission, 114–117
- Education. *See* Schools
- Election of band council (custom)
 - and Bill C-31, 83
 - and Canadian Charter of Rights and Freedoms, 83
 - and discrimination, 83
 - appealing results of, 83, 86
 - denied right to vote in, 85
 - judicial reviews of, 83, 85, 86
 - rules for, 82, 83
- Election of band council (Indian Act)
 - appealing results of, 82, 86
 - denied right to vote in, 85, 86
 - eligibility to vote in, 82
 - eligibility to run in, 82
 - judicial reviews of, 86
- Eligibility
 - for bankruptcy, 9
 - for legal aid. *See* Legal aid eligibility
 - for social assistance, 136
- Emigration
 - from United States, 74
 - to United States, 73
- Employment Insurance (EI)
 - benefits, 144, 157, 160, 162
- Employment Insurance
 - Commission, 65, 157
- Employment law
 - Canada Labour Code, 156, 158, 159

- discrimination, 161
- Employment Insurance (EI), 144, 157, 160, 162
- firing (dismissal), 159, 160
- grievance against employer, 159
- honoraria, 162
- human rights complaints, 161
- income tax, 160
- judicial review for job dismissal, 160
- jurisdiction over, 156, 158, 159, 161
- Nisga'a, 158
- provincial labour standards, 159
- remedies for wrongful dismissal, 159, 160
- safety standards, 156
- WorkSafeBC benefits, 156, 157, 161, 162
- WorkSafeBC deductions, 162
- Employment Standards Act, 156, 159
- Enduring power of attorney, 99, 100
- Enfranchisement, 78–80
- Estate Administration Act, 149
- Estates. *See* Wills (and estates)
- Evictions, 56
- Executor of will, 148, 151, 152
- Exemptions
 - from bankruptcy, 9–12
 - from customs taxes and duties, 74, 144
 - from taxation, 60, 142–145, 160
- Exporting goods, 74, 144
- Extradition, 74

F

- Family advice lawyers, 45, 180
- Family duty counsel 45, 179
- Family justice counsellors, 46, 180
- Family law
 - adoption, 43, 44
 - child protection, 42, 43
 - custody and access to children, 40, 41
 - division of property, 40, 41
 - family maintenance, 40
 - government jurisdiction over, 39
 - legal aid for, 44–46, 178–180
 - services, 44–46, 178–182
 - violence in a relationship, 40
- Family Law in BC website, 40, 46, 181
- Family law services, 44–46, 178–182
- Family Maintenance Enforcement Act, 9
- Family Maintenance Enforcement
 - Program (FMEP), 41, 46
- Family maintenance (support), 40, 41
- Family Relations Act, 39–41
- Family violence, 40

Federal Child Support Guidelines, 39, 40
 Federal Courts Act, 160, 174
 Firearms prohibition, 32, 33
 Firing (dismissal), 159, 160
 First appearance in court, 28
 First Nations
 and Independent Assessment Process, 124
 and regulation of reserve lands upon separation, 42
 and treaty negotiations, 51
 websites about, 4, 5
 See also Band membership
 First Nations Land Management Act, 42, 60
 Fisheries Act offenses, 26, 27, 32, 52
 Fishing rights, 31, 32, 50–52
 Foreclosure, 57
 Foreign nationals, 72
 Freedom of information, 184
 Freedom of Information and Protection of Privacy Act, 184
 Funding for post-secondary students, 131, 133

G

Goods and Services Tax (GST), 142, 143
 Green card (US), 73
 Group actions, residential school abuse, 123
 Guardianship, adult. *See* Mental health

H

Harvesting rights, 31, 32, 50–52
 Health Care Consent and Care Facility (Admission) Act, 98, 101
 Health Information Line, 102
 Health, mental. *See* Mental health
 Health-care decisions, 98–101, 103
 Heritage Conservation Act, 12
 Heritage objects, 12
 Homeowners' rights, 57, 58
 Homeownership, 57, 58
 Hospitalization, involuntary, 99
 Housing
 and Certificate of Possession, 57, 58
 and designated lands, 60
 and homeowners' rights, 57, 58
 and ownership on reserve lands, 57, 58
 and "right to possess," 57, 58
 and tenants' rights, 56, 59
 and traditional ownership on reserves, 58

band authority over, 60
 finding, off reserve, 61
 finding, on reserve, 60
 First Nations control of, 42
 government jurisdiction over, 56, 59
 in bankruptcy, 10
 in debt collection, 22
 on Nisga'a lands, 60
 on surrendered lands, 60
 upon separation, 41, 42

Human rights

and Aboriginal and treaty rights, 67
 and Canadian Charter of Rights and Freedoms, 66, 67
 and discrimination, 64–68
 and systemic discrimination, 66
 government jurisdiction over, 64, 65, 68
 making a complaint about, 65, 66, 68, 95, 161

Human Rights Code, 65, 161

Hunting rights, 31, 32, 50–52

I

ICBC claims, 110, 111

Immigration

from United States, 74
 general law, 72
 to United States, 73

Immigration Act, 74

Immigration and Naturalization Act (US), 73, 74

Importing goods, 74, 144

Income taxes, 142, 144, 145, 160

Independent Assessment Process (IAP), 124–126

Independent School Act, 131, 132

Independent schools, 131, 132

Indian Act

Aboriginal rights, 51
 adoption, 81
 band membership, 81, 85
 bankruptcy, 10–12
 debt collection, 22
 definition of, 3
 discrimination, 68, 161
 education, 130, 131
 enfranchisement, 78, 79
 Indian status, 78
 land ownership, 56–58, 60
 mental health, 102
 protection of property, 10–12, 22
 registration under, 78–81, 83, 84

- scrip, 78
- separation and divorce, 41
- taxation, 142–144
- tenancy, 56
- traffic regulations, 108, 109
- voting rights (band leadership), 82, 83
- wills, 148–152
- Indian Act Exemption for
 - Employment Income Guidelines, 145
- Indian and Northern Affairs Canada (INAC),
 - contacting, 4
- Indian Band Election
 - Regulations, 82, 85, 86
- Indian band schools, 130–132
 - See also* Schools
- Indian Reserve Traffic Regulations, 109
- Indian Residential School Resolution
 - Canada (IRSRC), 123–125, 184
- Indian status, 3, 78
 - See also* Registration under the Indian Act
- Indictable offenses, 28
- Industrial Relations Act, 156
- Information and Privacy Commissioner, 184
- Injuries in workplace, 156, 157, 161
- Insolvency, 8, 9
- Insurance Corporation of BC, 110, 111
- Insurance (Motor Vehicle) Act, 108
- Inuit people, 50, 78, 131, 143, 160
 - See also* Registration under the Indian Act
- Involuntary admission to hospital, 99

J

- Jay Treaty (US), 73, 74
- Judicial reviews
 - in BC Supreme Court, 174
 - in Federal Court, 174
 - of actions of law enforcement officers, 94
 - of band council decisions, 95
 - of decision about social assistance benefits, 139
 - of decision on band membership, 85
 - of dismissal from job, 160
 - of elections of band councils, 83, 86
 - of federal bodies, 95
 - of prison disciplinary review or appeal, 116
 - of school discipline, 132, 133
 - of voters' list, 85, 86
 - overview of, 174, 175
 - reasons for, 174

L

- Labour. *See* Employment law
- Labour Relations Board, 174
- Land. *See* Reserve lands
- Land Title Act, 57
- Landed immigrants, 72
- Law enforcement complaints
 - against Aboriginal employer, 95
 - against band council, 95
 - against employee of Indian band, 95
 - against conservation officers, 90, 93, 94
 - against federal enforcement officers, 90, 94, 95
 - against fisheries enforcement officers, 90, 94
 - against municipal police officers, 90–93
 - against provincial enforcement, officers, 90, 93, 94
 - against RCMP officers, 90, 91
 - government jurisdiction over, 90
 - judicial reviews of, 94, 95
- LawLINE, 2, 21, 180, 182
- LawLINK, 2, 40, 181
- Lawsuits
 - against law enforcement officers, 94
 - for car accidents, 110
 - for injuries in the workplace, 161
 - for residential school abuse, 122–123, 126
 - for wrongful dismissal, 160
- Lawyer Referral Service, 123
- Leadership selection. *See* Election of band council (custom); Election of band council (Indian Act)
- Legal action. *See* Lawsuits
- Legal aid contact information, 181
- Legal aid eligibility
 - and deportation, 74, 75
 - and refugee status, 74, 75
 - financial, 179, 180
 - for family law matters, 44–46, 178–180
 - for harvesting offenses, 52, 53
 - for immigration issues, 74, 75
 - for mental health issues, 103, 178
 - for motor vehicle offenses/accidents, 111
 - for prisoners, 116, 118, 119
 - for victims of violence, 40, 178
 - if charged with criminal offense, 28, 31, 33, 34, 178, 179

Legal information outreach workers (LIOWs), 180
 Legal Services Society (LSS)
 publications of, 166, 181, 182
 services of, 178–182
 website, 181
 Legal Services Society Act, 118
 Limitation Act, 122
 Living will, 101

M

Maintenance (support), 40, 41, 149
 Manufactured Home Park Tenancy Act, 57, 59, 60
 Marriage Act, 39
 Membership in band. *See* Band membership
 Mental health
 abuse or neglect (adult guardianship), 101, 102
 and legal and financial affairs, 99–101, 103
 and personal and health care, 99–101, 103
 and planning for the future, 99–101, 103
 and power of attorney, 99, 100
 and writing wills, 149
 committee, 99, 101, 103
 consent to health care, 98–101, 103
 government jurisdiction over, 98, 102
 incompetency/incapacity, 98, 99, 102, 103, 149
 involuntary admission to hospital, 99
 legal aid, 103, 104, 178
 Public Guardian and Trustee's, Office, 99, 101–103
 representation agreement, 99–101, 103
 Mental Health Act, 98, 99, 103, 178
 Mental incompetency/incapacity, 98, 99, 102, 103, 149
 Métis people, 4, 50, 51, 78, 79, 143, 160
 Ministry of Children and Family Development, 42
 Motor Vehicle Act, 26, 108, 109
 Motor vehicle laws
 accidents, 110, 111
 and ICBC claims, 110, 111
 and legal aid, 111
 and need for a lawyer, 109–111
 exceptions for Aboriginals on reserve, 109, 110
 general law, 108

government jurisdiction over, 108
 licensing, registration, and insurance, 108, 110
 offenses under, 108–111
 penalties under, 109
 roads for band members only, 109, 110
 traffic regulations, 108, 109

N

National Parole Board, 115–117
 Neglect (adult guardianship), 101–102
 Nisga'a Final Agreement, 42, 51
 Nisga'a
 and access to information, 184
 and human rights, 68
 and child protection, 42
 and division of real estate assets, 42
 and employment law, 158
 and harvesting rights, 51
 and social assistance, 137
 and taxation, 143
 and tenancy on lands, 60
 and transfer of cultural property when no will, 150
 schools, 131
 treaty of, 3
 Nunavet Final Agreement, 51

O

Ombudsman Act, 93, 94
 Ombudsman of BC, 90, 93, 94
 Ordering Legal Services Society publications, 166, 181, 182
 Ordinary power of attorney, 100

P

Parole
 applying for, 115, 117
 definition of, 115
 denial of, 115, 116
 Patients Property Act, 98, 99
 Permanent resident card (US), 73
 Permanent residents, 72
 Personal injury law, 122
 Pleas, entering, 28
 Police Act, 91, 94
 Police Complaint Commissioner, 92, 93
 Police officers
 complaints about, 90–93
 tribal, 94
 Police records, 94

Post-secondary funding for students, 131, 133

Post-Secondary Student Support Program, 131

Power of attorney, 99–100

Power of Attorney Act, 98, 100

Preliminary inquiry, 28

Prisoners

- and Canadian Charter of Rights and Freedoms, 117, 118
- and judicial reviews, 116
- denial or loss of parole, 115, 116
- disciplinary review, 116
- discipline of, 116, 117
- earned remission, 114–117
- government jurisdiction over, 114
- how to apply for parole, 115, 117
- legal aid for, 116, 118, 119
- overrepresentation of Aboriginal, 3, 4
- sanctions, 116, 117
- segregation, 116, 117
- spiritual practices of, 117, 118
- support for healing of, 118

Prohibition

- from community, 33
- of weapons, 32, 33

Property

- and bankruptcy, 10–12
- cultural, 11, 12, 150
- protection under the Indian Act, 10–12, 22
- taxation, 142–145, 160
- See also* Housing; Reserve lands

Property division

- in separation/divorce, 40–42
- when no will, 149, 150

Property seizure

- by law enforcement officer, 90
- fisheries, 32
- in bankruptcy, 10–12
- in debt collection, 22
- of designated lands, 60
- wildlife, 32

Proposals to pay debts, 9

Protection of children, 4, 42, 43

Provincial ombudsman, 90, 93, 94

Provincial sales tax (PST), 142, 143

Public Guardian and Trustee, 99, 101–103

Public Guardian and Trustee Act, 99

Public school system, 130, 132

Publications of Legal Services Society, 166, 181, 182

R

RCMP, 65, 90, 91, 184

Refugees, 72

Registration under the Indian Act

- after 1985, 80, 81
- and adoption, 81
- and Canadian Charter of Rights and Freedoms, 80
- and discrimination, 79, 80
- and scrip, 78, 79
- and sexism, 78–80
- before 1985, 79
- Bill C-31, 78–80, 83
- double mother rule, 79, 80
- enfranchisement, 78–80
- how to apply for, 83, 84
- how to protest if denied, 84

Removal of children from home, 4, 42, 43

Renters' rights, 56, 59

Representation agreement, 99–101, 103

Representation Agreement Act, 98, 100

Representation Agreement Resource Centre, 100, 101

Reserve lands

- and homeowners' rights, 57, 58
- and homeownership, 57, 58
- and taxation, 142
- and tenants' rights, 56, 59
- and traditional ownership, 58
- and wills, 150–152
- band authority over, 60
- Certificate of Possession for, 57, 58
- designated lands, 60
- First Nations control of, 42
- government jurisdiction over, 56, 59
- in bankruptcy, 10
- in debt collection, 22
- "right to possess", 57, 58
- right to reside on, 57–60, 152
- surrendered lands, 60
- upon separation, 41, 42

Residential school abuse

- alternative dispute resolution (ADR), 123–126
- and Crime Victim Assistance Program, 126
- and funeral expenses, 125
- and wills, 125
- claimants, senior, 124–126
- "common experience claimants," 124, 125
- compensation for, 122–126

- criminal complaints against abuser, 126
- group or class actions, 123
- history of, 3
- Independent Assessment Process for, 124–126
- lawsuits, 122, 123, 126
- lawyers for, 122, 123
- 30 percent holdback, 125
- Residential Tenancy Act, 56, 57, 59, 60, 174
- Resolving debts, 8, 9
- Reviews, judicial, 174, 175
 - See also* Judicial Reviews
- “Right to possess,” 57, 58
- Rights. *See* Aboriginal rights; Human rights; Treaty rights
- Royal Canadian Mounted Police (RCMP), 65, 90, 91, 184
- Royal Canadian Mounted Police Act, 91
- Royal Proclamation of 1763, 81, 83

S

- Safety in workplace, 156, 157, 161
- Sale of Goods Act, 19
- Sales contracts. *See* Consumer contracts
- Sales, door-to-door, 17, 18, 21, 22
- Sales taxes, 142, 143
- Sanctions of prisoners, 116, 117
- School Act, 130, 132
- School Regulation, 130, 132
- Schools
 - abuse in residential. *See* Residential School Abuse
 - and “principles of natural justice,” 132–133
 - challenging disciplinary decisions in, 132
 - denied post-secondary funding for, 133
 - discipline in, 130–132
 - federally regulated, 130–132
 - funding for post-secondary students, 131, 133
 - government jurisdiction over, 130, 131
 - independent, 131, 132
 - Indian band, 130–132
 - judicial reviews of school discipline, 132, 133
 - Nisga’a, 131
 - public, 130, 132
- Scrip, 78, 79
- Segregation of prisoners, 116, 117
- Seizure of property
 - and designated lands, 60
 - by law enforcement officer, 90
 - due to fisheries offense, 32
 - due to wildlife offense, 32
 - in bankruptcy, 10–12
 - in debt collection, 22
- Selection of band council. *See* Election of band council (custom); Election of band council (Indian Act)
- Sentencing. *See* Criminal court process
- Separation
 - and custody and access to children, 40, 41
 - and family maintenance (support) 40, 41
 - and property division, 40–42
- Sexism, 78–80
- Sexual abuse, residential schools, 122–126
- Social assistance
 - and Nisga’a, 137
 - eligibility for, 136
 - government jurisdiction over, 136, 137
 - how to appeal a decision about, 138, 139
 - how to apply for, 136, 137
 - judicial reviews of benefits decisions, 139
 - kinds of benefits, 136
- Social Development Policy and Procedure Guide, 137, 139
- Spiritual practices, 117, 118
- Spousal support, 40, 41
- Status Indian, 3, 78
 - See also* Registration under the Indian Act
- Student funding (post-secondary), 131, 133
- Students. *See* Schools
- Suing. *See* Lawsuits
- Support (maintenance), 40, 41, 149
- Surrendered lands, 60, 142
- Survivors. *See* Victims

T

- Tax exemptions
 - of customs taxes and duties, 74, 144
 - of designated lands, 60
 - under Indian Act, 142–145, 160
- Taxation
 - and Aboriginal rights, 144
 - and employment insurance benefits, 144
 - and Nisga’a lands, 143
 - and reserve lands, 142
 - custom duties, 74, 144

- different kinds of, 142
- filing tax returns, 144
- government jurisdiction over, 142
- income tax, 142, 144, 145
- of “personal property,” 142–144
- on imported goods, 74, 144
- on surrendered land, 142
- sales taxes (GST, PST, and other), 142, 143

Taxes. *See* Taxation; Tax exemptions

Tenants’ rights, 56, 59

30 percent holdback, 125

Title, Aboriginal, 50–51

Traditional ownership, 58

Traffic regulations. *See* Motor vehicle laws

Trans-boundary trade, 74, 144

Treaty rights

- and band membership, 81
- and custom leadership elections, 83
- and discrimination, 67
- defense of, 52
- definition of, 3, 50, 51
- infringement of, 52

Trials, 28

Tribal police forces, 94

Trustee in bankruptcy, 9

U

United States

- deportation, 74
- importing goods from, 74, 144
- moving from, 74
- moving to, 73

V

Victims

- of domestic violence, 4, 40, 178
- of residential school abuse, 122–126
- of violence or personal crimes, 126

Violence in a relationship, 4, 40, 178

Voting rights (band elections), 82, 83, 85, 86

W

Wages (in bankruptcy), 10, 11

Weapons prohibition, 32–33

Welfare. *See* Social assistance

West Coast Prison Justice Society (WCPJS), 118, 119

Wildlife Act offenses, 26, 32, 52

Wills Act, 148, 149, 151

Wills (and estates)

- and children, 149, 151

- and reserve lands, 149–152
- appealing decision about (Indian Act), 150
- beneficiaries of, 148, 150, 152
- challenging (provincial), 149
- division of property when no will, 149, 150
- executor and administration of, 148, 151, 152
- jurisdiction over, 148, 149, 152
- Nisga’a laws, 150
- validity of, 148–150
- writing of, 151

Wills Variation Act, 149

Work. *See* Employment law

Workers’ Compensation Act, 156, 157, 161

Workers’ Compensation Appeal Tribunal, 157

Workers’ Compensation Board. *See* WorkSafeBC

WorkSafeBC, 156, 157, 161, 162

Y

Youth court duty counsel, 179

Youth Criminal Justice Act, 26

Yukon Umbrella Agreement, 51