Civil Chambers Handbook

1. An Overview of Access Pro Bono

1.1 Mission

To promote access to justice in British Columbia by providing and fostering quality pro bono legal services for people and non-profit organizations of limited means.

1.2 Objectives

1. To relieve poverty by fostering, organizing and providing quality pro bono legal services to individuals and organizations of limited means.

2. To facilitate access to justice by persons and organizations of limited means and to promote and strengthen the provision of pro bono legal services in British Columbia by:

    i. improving the quality and capacity of existing pro bono and other legal service programs;

    ii. developing and operating, or assisting in the development and operation of, programs that enhance access to justice and to legal services in communities throughout British Columbia, including pro bono programs and community clinics offering free legal advice and assistance; and

    iii. assisting organizations to establish pro bono or volunteer components to their services and programs.

3. To provide training, resources and information to individuals and organizations facilitating access to justice or providing pro bono legal services;

4. To conduct research into issues which relate to access to justice, the provision of pro bono legal services and volunteerism in the legal sector.

1.3 Principles

1. Pro bono legal services are those legal services that are provided to people and non-profit organizations of limited means without expectation of a fee.

2. Pro bono legal services should be designed and provided according to the changing social and legal needs of the people and non-profit organizations of limited means for whom they are intended.

3. Pro bono legal services should be provided to people and organizations of limited means according to the same standards of dedication, excellence, and professional ethics as paid legal services.

4. Pro bono legal services should serve to complement and not replace government-funded programs advancing access to justice; a collaborative pro bono system should not substitute for a properly funded legal aid system.

1.4 History

History of the Western Canada Society to Access Justice (1990 to 2010)

The Western Canada Society to Access Justice ("Access Justice") was incorporated in August of 1990 and was originally known as the Lower Mainland Society to Assist Research of Trials (START), comprised mainly of senior litigation lawyers. Its founder and champion for many years until his untimely death in 2006 was Dugald Christie.

Access Justice had a history of research and provided a number of working papers on the length of court proceedings and other legal access issues. It was a leader in issues such as advocating for the abolition of PST and GST on legal bills. From 1999 onwards, one of the Society's main thrusts was the development of pro bono clinics across western Canada. Dugald Christie had originated the clinic model while working with the Salvation Army's Pro Bono Program, and later went on to establish clinics throughout BC.

For individuals who are interested in more detail about the origins of Access Justice and Mr. Christie's work, there are several printed and web-based resources including his self-published monograph "A Journey Into Justice" (2000), a commemorative issue of the UBC Law Review (Volume 40, Number 2; October 2007), and various annual reports for the organization. These materials are available through the APB office.

History of Pro Bono Law of British Columbia (2002 to 2010)

Pro Bono Law of BC (PBLBC) arose from a joint initiative of the Canadian Bar Association (BC Branch) and the Law Society of BC to promote pro bono legal services in BC. A series of reports and a community forum in October 2001 culminated in the incorporation of PBLBC in April 2002. It's original mandate, as supported by Law Foundation of BC funding, was to engage in community development, lawyer recruitment, and development of a pro bono website.

PBLBC began its program delivery initiatives with its Supreme Court Civil Duty Counsel Project, with a Court of Appeal pro bono project in cooperation with the Salvation Army, and through support of the Vancouver Self-Help Information Centre. Roster programs were then added for representation services in selected case areas, including for judicial review, for cases in the Federal Court of Canada, and for solicitors' services for non-for-profit organizations. PBLBC also developed various supportive resources such as the Community Partnership Manual.

For individuals who are interested in more detail about the establishment of PBLBC, there are a number of reports and other resources available including the 2002 report entitled "Pro Bono Publico - lawyers serving the public good in British Columbia". This report is available online, and other materials of interest are available through the APB office.

History of the Merger (2008 to 2010)

The growth of the organized pro bono movement in BC during the early 2000s was accompanied by a growing expectation within the profession that there was an obligation to ensure service delivery was provided as efficiently as possible. Various informal meetings between the two organizations led to a collaborative research project in early 2008 focused on the possibility of merger. Later in the year, the two organizations met under the sponsorship of the Law Foundation of British Columbia and a commitment in principle was agreed to by the respective boards of directors. During the early part of 2009, the two organizations began the groundwork for the merger and in October 2009 moved to a joint office at our current location. The merger was formalized in April 2010 with the incorporation of the new society, and its registration as a charitable entity.

1.5 Other Access Pro Bono Programs

For more information on these programs, or to register as a volunteer, visit www.accessprobono.ca.

Summary Legal Advice Program

APB operates an extensive network of summary legal advice clinics throughout the province. Clients can make appointments through our Vancouver office and, in some instances, directly through the local clinic. Our volunteer lawyers provide up to a half-hour of free legal advice to clients, and additional appointments may be available.

The Roster Program

The Roster Program provides pro bono representation services for particular case types to qualifying individuals and non-profit organizations. Client applications are screened by APB staff and volunteer coordinators, and then sent to a number of lawyers for their consideration. If a lawyer responds to the particular case, they choose the scope of their services. Insurance and disbursement coverage is made available to roster lawyers.

Children's Lawyer Program

This program is currently available in Nanaimo and Victoria but may extend to other locations and levels of court in the future. This initiative, dealing with high conflict custody and access cases, provides a "voice to children" ages 10 through 18, in court hearings.

Paralegal Program

APB has partnered with the Vancouver Justice Access Centre and the Law Courts Center to provide support for self-represented litigants who need assistance in preparing court documents. The Program operates as a weekly evening clinic at the Vancouver Justice Access Centre at the downtown Vancouver courthouse.

Wills Clinic Program

APB, in partnership with the federal Department of Justice and the provincial Ministry of Justice, operates a weekly Will and Representation Agreement preparation clinic at the Vancouver Justice Access Centre for low-income seniors (ages 55+) and people with terminal illnesses.

Mental Health Program

As of mid-2014, APB will operate the Mental Health Program in partnership with the BC Mental Health Review Board and the Community Legal Assistance Society's Mental Health Law Program. The Mental Health Review Board will send otherwise unserved client requests for legal representation to APB for matching with trained volunteer lawyers and law students.

2. An Overview of the Civil Chambers Program

2.1 Program Overview

The Civil Chambers Program operates out of the library at 800 Smithe Street in Vancouver. Each Tuesday and Thursday, a volunteer lawyer provides pro bono legal assistance and representation to unrepresented low- and modest-income litigants appearing in civil chambers in the Supreme Court of British Columbia and the Court of Appeal for British Columbia. Individuals (not organizations or companies) may call 604-603-5797 to determine their eligibility and to book an appointment with Duty Counsel.

Sometimes, the unrepresented civil chambers litigant is paired with a volunteer lawyer through the Civil Chambers Roster Program a few days to several weeks before the scheduled hearing. This time allows the volunteer lawyer to consult with the client to assess his or her chambers-related needs, and to provide him or her with any and all assistance deemed appropriate before and during the scheduled hearing.

2.2 Program Services

For those unrepresented chambers litigants whose cases show merit, who clear conflict checks, and who meet the Program's financial eligibility criteria (set out below), volunteer lawyers provide a range of helpful services in connection with the matter scheduled for hearing in chambers, which may include:

- evaluating the merits of the matter scheduled for chambers;
- advising the client on substantive legal issues and on the client's legal rights and responsibilities;
- reviewing the client's documents;

- drafting and filing documents on behalf of the client (rarely – clients are usually referred to APB's paralegal program and are required to file their own documents);
- exploring the possibility of resolution by agreement or settlement; and
- (if the matter proceeds) representation in chambers.

2.3 Project Eligibility Criteria

To qualify for pro bono assistance and representation through the Program, the client must:

- be going (or thinking of going) to chambers on a civil matter in Vancouver;
- be unrepresented because he or she cannot afford a lawyer;
- be an individual (not an organization or a company)
- not present a conflict of interest for the volunteer lawyer serving as Duty Counsel; and
- have a case that shows some legal merit.

The Program applies the following financial eligibility criteria for individuals seeking pro bono assistance or representation (or both) for chambers matters:

- 1 – 4 members in household: $3170/month for the household
- 5 members in your household: $3625/month for the household
- 6 members in your household: $4200/month for the household
- 7 + members in your household: $4750/month for the household

2.4 Contact Information

Individuals may determine their eligibility, inquire about the Program's services, and ultimately book an appointment with Duty Counsel by phoning 604-603-5797 at any time. All calls will be answered immediately or messages will be returned within 24 hours.

To obtain the full benefit of Program services, individuals are encouraged to call the Program telephone number as soon as possible – preferably before

filing any chambers documents. Clients will be better served by calling the Program telephone number several weeks before a scheduled chambers hearing.

2.5 Pro Bono Duty Counsel FAQ

As Duty Counsel, how much time must I commit to the Program?

Each Duty Counsel must commit to providing pro bono legal services for one half day (9:00 am to 1 pm or 12:30 pm to 4:30 pm) per year at the Civil Chambers Pro Bono Duty Counsel office, located in the Courthouse Library at 800 Smithe Street. You may or may not assist and/or represent more than one client on your scheduled duty counsel day, depending on presented need, your preferences, and your stated capacity. If you are unable to attend on your scheduled service day, it is your responsibility to advise the Project Manager.
You are welcome to volunteer for more than one half day if your schedule permits. You may also choose to serve on a roster of lawyers who are willing to consider providing pro bono representation to civil chambers litigants on a referral basis. If you are on the list of roster lawyers there is no requirement to volunteer for Duty Counsel days as well.

When and how is the Program administered?

Duty Counsel services are available at 800 Smithe Street on every Wednesday. Duty Counsel have full use of the private Program office, which includes a full computer workstation with internet access and access to free copying and scanning in the Courthouse library. Duty Counsel are welcome to work on their own files when client service is not required. The Program Manager provides on-site assistance to Duty Counsel and screens and schedules eligible clients throughout the service day. Usually law student volunteers will be present on duty counsel days to take notes during the appointments with clients and to perform any needed research.

What skills do I need to volunteer as Duty Counsel?

Access Pro Bono strives to deliver high-quality pro bono services to all clients and therefore views effective Duty Counsel as:

- creative and open-minded;
- compassionate and aware of barriers to justice experienced by litigants who cannot afford legal representation;
- resourceful and capable of prompt self-education;

- poised while speaking before different judges and masters on a variety of cases in a single day;
- comfortable working in a fast-paced environment; and
- looking for opportunities to give back to the community through pro bono service.

How are conflicts of interest identified or cleared?

The Program Manager will conduct conflict checks by contacting Duty Counsel before any client appointments or meetings are made. Duty Counsel will not provide any legal services before clearing of conflicts.

Will I be expected or obligated to provide services to Program clients beyond my scheduled service day?

No. Clients sign a waiver form showing that they understand that the service of pro bono legal advice is limited to the time of their appointment.

What are the limitations to my services as Duty Counsel?

Unless you choose otherwise, you will not:

- represent or advise Project clients on matters not pertaining to civil actions in the Supreme Court of British Columbia or the Court of Appeal for British Columbia;
- represent or advise Project clients beyond your scheduled service day;
- draft legal documents on your scheduled service day; or
- sign legal documents on your scheduled service day.
- Furthermore, you may not:
    - accept fees for any services rendered as Duty Counsel; or
    - actively solicit for paid service from program clients.

Are my Duty Counsel services insured?

Yes. If you are not ensured through your private practice, the Law Society has arranged for the provision of insurance for certain pro bono legal services, without cost to the lawyer.

This insurance will also benefit lawyers in practice who do pay the insurance fee, provided the other requirements for this particular insurance are met. The benefit to lawyers who carry insurance is that the normal financial consequences that arise if a claim is paid by the insurer are waived. See the current insurance policy for more details.

The insurance provided is not comprehensive coverage. Coverage is provided for "sanctioned services," which is a defined term in the insurance policy. Services are sanctioned, and you will be eligible for coverage, if the services:

a. are provided without financial gain;

b. by a lawyer who is a member in good standing with the Law Society (persons who have not maintained their membership in good standing with the Law Society are not entitled to the benefit of the coverage);

c. to an individual (Pro bono legal advice provided to an organization, firm, company, or partnership is not covered by this insurance);

d. who was not previously known to the lawyer (Pro bono legal advice to friends, relatives and acquaintances, for example, is not covered);

e. who is of limited financial means;

f. only through a program approved for insurance purposes (including Access Pro Bono's Civil Chambers Program);

g. the services provided fall within the approved category of services.

There is no obligation to notify any person of a change in status of a program, or of a change in the services for which insurance is available. The obligation rests with the lawyer to ensure that, at the time pro bono services are provided, the program and services are still approved for insurance purposes.

A reminder that, as with any policy of insurance, there are other terms and conditions in the insurance policy that may limit coverage. All lawyers will want to familiarize themselves with the terms of the insurance policy, and are reminded of their obligation under the insurance policy to report claims

or potential claims immediately. A copy of the current insurance policy is available in the Member's Manual for Law Society members, as well as posted on the Law Society's website (www.lawsociety.bc.ca – go to Lawyers > Insurance).

When providing pro bono legal services, lawyers are expected to meet the same quality and standard of service as would be provided to any client.

How do I sign up as a volunteer?

APB offers several different pro bono programs and projects to suit volunteer lawyers' schedules, interests and needs. Lawyers who wish to volunteer with the Civil Chambers Program or with any other APB program are encouraged to register online at http://www.accessprobono.ca/lawyer-registration.

3. Practice Notes

3.1 Procedural Practice Points (Court of Appeal)

3.1.1 Consideration When Preparing Your Chambers Day

- An excellent general resource is H.A. Brinton's *Civil Appeal Handbook.*[1]
- The Court of Appeal's website[2] also has links to the key instruments governing procedure (other than judicial decisions): the *Court of Appeal Act*,[3] the Court of Appeal Rules,[4] practice directives issued by the Chief Justice, practice notes, and notices to the procession issued by the registrar.
- Chambers applications are commenced by notice of motion and affidavit.
- Expect as otherwise indicated below, a notice of motion must be filed and served at least two days before the date set for the hearing of the application.[5]
- Justices in chambers do not like getting huge amounts of material the night before the chambers application, so file and serve your materials as early as possible.
- Materials should be delivered to the opposing side (especially in-person opponents) as early as possible. This will help avoid adjournments for late delivery or perceptions of prejudice.
- It is very useful to provide a written argument, which will help show the justice in chambers that you have a plan in mind. This written argument can be very basic and need not be a fancy "factum".

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1 Vancouver: Continuing Legal Education Society of British Columbia, 2002 and looseleaf.

2 http://www.courts.gov.bc.ca/Court_of_Appeal/practice_and_procedure/

3 R.S.B.C. 1996, c. 77

4 B.C. Reg. 297/2001.

5 Court of Appeal Rules, *supra*, note 7, Rule 33(1)(d).

- Think about the remedy that is desired (and available in light of the *Court of Appeal Act* and the Court of Appeal rules) and work backward so as to arrive at that result.

- Provide the justice in chambers with copies of the authorities on which you will be relying, bound if possible. Authorities may be double-sided.

- The Court of Appeal Registry prefers that all written materials be prepared in Arial 12 point font. Materials should generally be "bound on the left", meaning that the right-hand page is blank.

3.1.2 Considerations On Your Chambers Day

- No need to gown (although it is not a problem if you need to appear gowned because of something else).

- Chambers are generally held in courtroom 70 and start at 9:30 a.m.

- Check in with court clerk at 9:15 a.m., review the case list and identify the number of the case on which you are appearing, give the clerk your name and indicate on whose behalf you are appearing, indicate whether any other appearances are expected, and give a time estimate for the hearing.

- Do not underestimate the hearing time just to get an early berth.

- The sequence in which matters are heard in chambers is: release of reserved judgements, then criminal in custody matters in order of time estimates, then civil matters in order of time estimates.

- Do not approach the counsel table until your case is called. Once the case is called, the appellant (and counsel, if represented) sit on the left hand side as you face the bench and the respondent (and counsel, if represented) sit on the right hand side. This is so regardless of which party is the applicant.

- Justices in chambers should be addressed as "My Lord"/"Your Lordship" or "My Lady"/"Your Ladyship".

- Avoid informalities: do not greet the Court, do not say "Good morning", etc.

- The justice in chambers will generally have been able to prepare and read much or all of the materials filed, but do not assume that the justice has been able to read or know everything.

- Don't dawdle on making submissions. Your arguments should be crisp and succinct.

- Adhere to the time estimate you provided.

- Do not ask, as a matter of course, to dispense with approval as to the form of Order by the opposing side (in-person). That request should be made only if the opposing in-person has a history of being difficult about approval as to form.

- It goes without saying, but: act in a manner that is respectful, courteous, helpful, civil, and patient. Do not take "cheap shots", especially when facing an in-person opponent.

3.1.3 Considerations After Your Chambers Day

- Pro bono counsel will often be asked to prepare the formal Order, whether pro bono counsel won or lost.

3.2 Substantive Practice Notes

3.2.1 Leave to Appeal

See generally chapter 3 of H. A. Brinton's Civil Appeal Handbook.[6]

Without leave of a justice, an appeal does not lie to the Court of Appeal from:

i. an interlocutory Order (which includes an interim Order made under the Family Relations Act14 and an Order made under the Rules of Court of the Supreme Court of British Columbia on a matter of practice or procedure);
ii. an Order respecting costs only; or
iii. an Order or determination under Rule 50 of the Rules of Court of the Supreme Court of British Columbia.[7]

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6 Vancouver: Continuing Legal Education Society of British Columbia, 2002.

7 *Court of Appeal Act*, RSBC 1996, c *77*, s 7(2).

Pursuant to s. 14 of the Act and Rule 3, an application for leave to appeal must be brought within 30 days after the order below is pronounced. The notice of application for leave to appeal must be filed and served within that time.[8] The notice of application for leave to appeal may be amended without leave before the appellant's motion book is filed.[9] A notice of motion (in Form 3) for leave to appeal and the appellant's motion book (in Form 4) for leave must be filed and served within 30 days after filing a notice of application for leave to appeal.[10] The notice of motion and motion book must be served at least five days before the hearing of the application.[19] A reply book must be filed and served at least one business day before the hearing of an application for leave to appeal.[11]

8 *Ibid*, s 14; *Court of Appeal Rules*, BC Reg 297/01, rule 3

9 *Court of Appeal Rules*, supra note 3, rule 4.

10 *Ibid,* rule 7(1).

11 *Ibid,* rule 8.

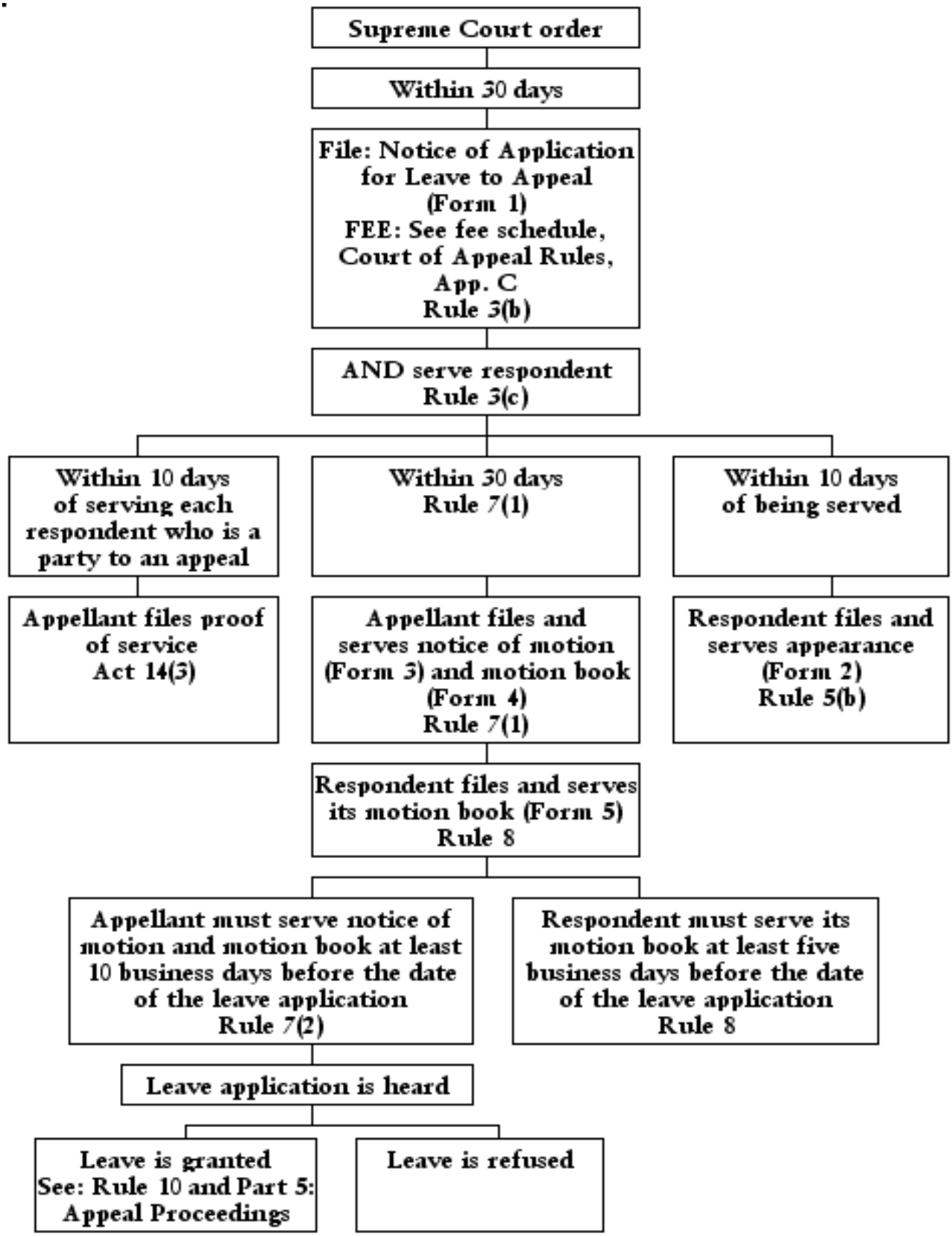

Figure 1: Civil Appeal Handbook, [s. 3.39], 'Leave to appeal flowchart'

Motion for directions

If it is not clear whether leave to appeal is necessary, a party may apply in chambers for directions, pursuant to the Civil Practice Directive on "Commencing an appeal when uncertain if leave to appeal is required" issued on September 19, 2011:

> Where the party bringing the appeal is uncertain whether leave is required, both a Notice of Appeal and a Notice of Application for Leave to Appeal may be filed and served. A Notice of Motion for an application for directions, leave to appeal if required, and any extension of time sought must be filed and served at the same time. Only one filing fee will be payable.

Interlocutory versus final orders

An appeal does not lie to the Court of Appeal from a limited appeal order without leave of a justice.[12] The long-standing test (called the "order approach") for determining whether an Order is final or interlocutory was reiterated in 2011 as follows:

> Does the judgment or order as made finally dispose of the rights of the parties? If it does then I think it ought to be treated as a final order; but if it does not it is then, in my opinion, an interlocutory order.[13]

The Order approach to a leave as established in the *Forest Glen Wood Products Ltd. v British Columbia (Minister of Forests)* addressed the issue of appeal as of right or leave being required, and could be allowed on several tests:[14]

i. Whether the point on appeal is of significance to the practice;
ii. Whether the point raised is of significance to the action itself;
iii. Whether the appeal is prima facie meritorious or frivolous;
iv. Whether the appeal will unduly hinder the progress of the action

12 *Court of Appeal Act*, supra note 2, s 7(2).

13 Weyerhauser Company Ltd. v Hayes Forest Services Limited (2008), 78 B.C.L.R. (4th) 251 at 257 (para. 15), 291 D.L.R. (4th) 49, [2008] 6 W.W.R. 421, 51 C.P.C. (6th) 221, 2008 BCCA 120.

14 *Unlu v Air Canada*, 2012 CarswellBC 1201 at para 4.

The distinction between final Orders, which may be appealed as of right, and interlocutory Orders, which may be appealed only with leave, is not always clear and cases can be difficult to understand. Admittedly, there are circumstances where the cases may not be reconcilable, partly because conflicting decisions have been issued given the nature of chambers practice, and partly because older cases are not consistent with later binding decisions. In that respect, care must be taken when considering cases decided before 2013.

Test for leave to appeal from interlocutory orders

The criteria for leave to appeal are well known:

i. whether the point on appeal is of significance to the practice;
    i. whether the point raised is of significance to the action itself;
    ii. whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
    iii. whether the appeal will unduly hinder the progress of the action.[15]

Note that Form 4 of the Court of Appeal Rules, which sets out the format of the motion book for leave, sets out the test differently:

> Part III: A brief statement setting out the reasons why leave should be granted,
> which statement should state the position of the party regarding the following:
>
> ii. the importance of the proposed appeal generally and to the parties;
> iii. the utility of the proposed appeal in the circumstances of the parties;
> iv. the prospect of success of the proposed appeal;
> v. if applicable, any statutory provision granting a right to appeal with leave.

15 *Power Consolidated (China) Pulp Inc. v B.C. Resources Investment Corp*. (1988), 19 CPC (3d) 396 at para 3 (CA chambers).

Test for leave to appeal discretionary orders

Leave to appeal a discretionary order will not ordinarily be granted unless the order is clearly wrong, a serious injustice will occur if leave is not granted, or the discretion was not exercised judicially or was exercised on a wrong principle. [16]

Some illustrative types of discretionary orders include:

i. An appeal from an order granting an interlocutory injunction turns on the balance of convenience.[17]
ii. A conflicting authority concerning the role of the balance of convenience with a strong prima facie case presenting breach of an established negative covenant.[18]
iii. An order denying an interlocutory injunction where a refusal of leave would determine the parties' rights.[19]
iv. An order granting an injunction that has great significance to the action of the case.[20]

Foreclosure proceedings

A party seeking to appeal an Order is required to appeal from any order under Supreme Court Civil Rule 21-7. The former Rule 50 (Foreclosure and Cancellation) of the Rules of Court in the Supreme Court of British Columbia continues to be relevant.[21] The fact that the Order arose within a foreclosure action is not determinative; what matters is the substance of the Order.[22]

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16 *Gichuru v Law Society of British Columbia*, 2012 BCCA 159.

17 *Jules v Harper Ranch Ltd.*, [1991] 1 CNLR vi (BCCA), per Wood J.A., application to vary dismissed (1991), 81 DLR (4th) 323 (BCCA).

18 *Belron Canada Inc. v TCG International Inc.*, 2009 BCCA 332 (chambers).

19 *Coast Hotels Ltd. v Northwest Hotels Inc.,* 2001 BCCA 481 (chambers).

20 *Global Internet Management Ltd. v McLeod*, 2003 BCCA 398 (chambers). See also *Provincial Rental Housing Corp. v Hall*, 2003 BCCA 67 (chambers).

21 *Pacifica Mortgage Investment Corp. v Laus Holdings Inc.*, 2011 BCCA 317 (chambers), reconsideration allowed on another point 2011 BCCA 459.

22 *First Island Financial Services Ltd. v Marall Homes Ltd*, 2000 BCCA 212 at paras 4, 13, 31 RPR (3d) 167.

An Order for sale is a foreclosure remedy that cannot be said to be incidental to the foreclosure proceedings. It is an interlocutory Order from which leave to appeal is required.[23]

Appeals from special tribunals

See generally §3.30-3.31 of H.A. Brinton's Civil Appeal Handbook.[24]

The test that is relevant on applications for leave to appeal from special tribunals is different from the general test for leave. The justice hearing the application will consider the merits of the appeal, the importance of the issues, the practical utility of the appeal and the effect of delay.[25]

i. whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from
ii. whether the appeal is limited to questions of law involving:
    - the application of statutory provisions
    - a statutory interpretation that was particularly important to the litigant; or
    - interpretation of standard wording which appears in many statutes;
iii. whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward;
iv. whether there is some prospect of the appeal succeeding on its merits ...; although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;
v. whether there is any clear benefit to be derived from the appeal; and

23 *Valley Mortgage and Investment Co. v Lakers Golf Club Inc*. (2004), 2004 BCCA 496 at paras 13-15, 4 CPC (6th) 368 (chambers).

24 Supra note 1.

25 *Brooks-Martin v Martin*, 2011 BCCA 357 at para 8 (chambers); *College of New Caledonia v Kraft Construction Co. Ltd*., 2011 BCCA 172 at para. 25 (chambers); *Seminoff v Seminoff*, 2007 BCCA 403 at paras 2-4 (chambers); *Neufeld v Foster*, 2000 BCCA 485 (chambers); *Albion Securities Co. v Milne*, 2000 BCCA 274 (chambers) at para 12; *Moss v College of Opticians of British Columbia*, 2002 BCCA 602 (chambers) at para 3; *Chang v Thindh*, 2004 BCCA 447 (chambers) at para 9; *Pierce v Chaplin and Sun Life Assurance Company* 2004 BCCA 361 (chambers) at para 10, reconsideration denied 2004 BCCA 655

vi. whether the issue on appeal has been considered by a number of appellate bodies.[26]

The Court may more readily grant leave to appeal if the hearing before the Court of Appeal is the first appeal than if there has already been an appeal to a lower decision making body or is under consideration in another case.[27]

3.2.2 Stays of Proceedings (For an Appeal)

See generally §§5.6 – 5.28 of H. A. Brinton's Civil Appeal Handbook.[28]

A single justice in chambers has the discretion to make an interim Order where it is necessary to preserve the rights of the parties pending further proceedings[29] and may, on terms considered "appropriate", order that all or part of the proceedings (including execution) in the cause or matter from which the appeal has been taken be stayed in whole or in part.[30]

The general principles are that:

i. generally, a successful plaintiff is entitled to the fruits of the judgment but the Court of Appeal may stay proceedings if satisfied that it is in the interests of justice to do so;
ii. the trial judgment must be assumed to be correct and protection of the successful plaintiff is a pre-condition to granting a stay; and
iii. the applicant for a stay must satisfy the familiar three-stage test[31] – that is, the applicant must show that there is some merit in the appeal, that the applicant will suffer irreparable harm if the stay should be refused, and that, on balance, the inconvenience to the applicant if the stay should be refused would be greater than the inconvenience to the respondent if the stay should be granted. [32]

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26 *Omineca Enterprises Ltd. v British Columbia (Minister of Forests),* (2000), 91 BCLR (3d) 74 at para 11, 31 Admin LR (3d) 318, 6 CPC (5th) 91, 2000 BCCA 591, citing *Queens Plate Development Ltd. v British Columbia (Assessor, Area 9 Vancouver)* (1987), 16 BCLR (2d) 104 at 109, 22 CPC (2d) 265 (CA chambers).

27 *British Columbia (Minister of Transportation and Highways) v Reon Management Services Inc.*, 2000 BCCA 522 at para. 14 (chambers).

28 Supra note 1.

29 *Court of Appeal Act,* supra note 2, 18(2)

30 *Ibid,* 18(1).

31 See *RJR-Macdonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 at 333-34, 164 NR 1, 11 DLR (4th) 385.

32 *Susan Heyes Inc. v South Coast B.C. Transportation Society*, 2009 BCCA 348 at para. 4 (chambers).

A variation on the "familiar three stage test" uses two elements, combining the irreparable harm and balance of convenience elements.[33] The two tests are functionally identical.

The "some merit" factor is determined on the basis of whether an appeal is without merit or has no reasonable prospect of success; it is not necessary to establish "a strong prima facie case".

A stay of proceedings (including execution) may be granted "on terms the justice considers appropriate."[34] A Voth order may be appropriate in certain circumstances. A Voth order will be granted only where significant amounts of money are involved or where special circumstances exist. The terms of a Voth order are:

> … ordering a stay of execution on payment of the amount of the judgment in to court by the defendant, and ordering payment out to the plaintiff on terms, first, that if the defendant is successful on its appeal it will be entitled to interest on the funds repaid to it and, second, that the plaintiff provide sound security, sufficient to secure the repayment of the amount paid out, together with an amount representing an estimate of the defendant's costs of the appeal on a party and party basis, and an amount representing interest on the funds that would be repaid if the defendant were to be successful in the appeal.[35]

3.2.3 Applications for Extensions of Time

See generally §4.35 for the commencement of the appeal time period and §4.53-4.57 for the test for extension of time in H. A. Brinton's Civil Appeal Handbook.[36]

A justice in chambers may extend or shorten the time within which an appeal to the court or application for leave to appeal may be brought[37] and

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33 *British Columbia (Attorney General) v Wale* (1986), 9 BCLR (2d) 333 at 345-46, 120 NR 212, [1987] 2 WWR 331, [1987] 2 CNLR 36 (CA), aff'd, [1991] 1 SCR 62, 120 NR 208, [1991] 2 WWR 568, 53 BCLR (2d) 189 (BC).

34 *Court of Appeal Act*, supra note 2, s 18(1).

35 *Voth Bros. Construction (1974) Ltd. v National Bank of Canada* (1987), 12 BCLR (2d) 43 at 44-45 (CA chambers).

36 Supra note 1.

37 *Court of Appeal Act, supra* note 2, s 10(1).

may extend or shorten the time provided for in the Court of Appeal Act, the Court of Appeal Rules, or in an Order extending or shortening time for the doing of an act or taking of a proceeding.[38]

Commencement of appeal time period

The time limit for filing and serving a notice of appeal or a notice of application for leave to appeal is 30 days, commencing on the day after the Order appealed from is pronouncement unless a different period is specified in another enactment.[39] If a judgment is not pronounced in open court, it is pronounced when reasons are published and that is the date stamped at the registry. This is true whether the Order is pronounced orally from the bench or when written reasons are released,[40] and notwithstanding that there may be incidental matters such as prejudgment interest or costs to be settled before the formal judgment is perfected. Time does not run from the date of entry of the Order.

Test for extension of time

A five-part test governs applications to extend time for initiating an appeal (or cross appeal) in civil matters:

i. Was there a bona fide intention to appeal?
ii. When were the respondents informed of the intention?
iii. Would the respondents be unduly prejudiced by an extension?
iv. Is there merit in the appeal? And
v. Is it in the interests of justice that an extension be granted? The fifth question is the most important as it encompasses the other four questions and states the decisive question.[41]

The same five-part test is used for failure to take procedural steps to prosecute the appeal (e.g., file appeal record, file appeal book, file factum). The test is less stringently applied where the extension sought is for procedural steps once an appeal has been brought properly.

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38 *Ibid* s 10(2).

39 See *Ibid*, s 14 and *Court of Appeal Rules*, *supra* note 3, rule 3.

40 *Burlington Northern Railroad Co. v Baseline Industries Ltd* (1992), 15 BCAC 172, 27 WAC 172, 20 CPC (3d) 90 (CA).

41 *Davies v Canadian Imperial Bank of Commerce* (1987), 15 BCLR (2d) 256 at 259-60 (CA).

Intention to appeal

Generally, appellants who evince no intention to bring an appeal in a timely way are not entitled to an extension of time.[42]

The failure to order transcripts or arrange for the appeal book within the time required by the Rules may be taken as a sign that there was no settled or genuine intention to proceed with the appeal.

However, delay caused by counsel combined with a demonstrable intention to pursue the appeal is generally sufficient for a justice to find that it is in the interests of justice to extend time. The appellant may not be able to rely on counsel's failure to take necessary steps where the delay is inordinate and inexcusable.

Informing respondents of intention to appeal

The question of when the respondents were informed of the intention to appeal is usually a relatively simple determination of fact.

Undue Prejudice to Other Parties

When there has been inordinate or inexcusable delay on the part of the plaintiff in pursuing an action, the burden falls on the plaintiff to show that the defendant would not be prejudiced by the delay. "In other words, the prejudice to the other parties must flow from the delay, not from the fact of the appeal."

The existence of prejudice is not determinative. Prejudice will not be fatal where it may be remedied (e.g., expeditiously setting the matter for hearing).

Merits of the Appeal

An examination of the merits is limited to an examination of whether the appeal is bound to fail. If an appeal has no merit, then an extension of time to appeal should not be ordered. However, this is a disputable question as to whether this can be in the sole judgment of a single justice to order the

42 *Terrapin Mortgage Investment Corp v Ruby Lake Country Developments Ltd*, 2011 BCCA 4, at para 22 (chambers); *Green v FSC Financial Services Centre Ltd*. (1994), 96 BCLR (2d) 73 (CA); *V (KL) v R (DG)* (1993), 86 BCLR (2d) 126 (CA) (chambers).

appeal has no merits. It is suggestible that the counsel submits a draft factum of argument on the argument to extend time.

Interests of Justice

The interests of justice is the decisive factor.[43] While self-representation is not a basis upon which to depart broadly from the rules that govern litigation, the combination of self-representation alongside mental illness and a "guillotine" Order may require an extension of time in the interests of justice.[44]

The erroneous advice of a solicitor regarding the ability to appeal may justify an extension of time in the interests of justice.[45] It generally is not in the interests of justice to grant an extension of time where the appellant does not move quickly to seek an extension after becoming aware of the defect.[46]

3.2.4 Inactive Appeals

See generally §§4.45 and 4.73 – 4.75 of H. A. Brinton's Civil Appeal Handbook.

An appeal is placed on the inactive appeal list: (a) if a certificate of readiness is not filed within one year after the filing of the notice of appeal or notice of application for leave to appeal, or (b) if a notice of hearing has not been filed within two months after the filing of the certificate of readiness.[47]

Once on the inactive list, the appeal is under the threat of being dismissed as abandoned. An appeal or application for leave to appeal must be removed from the inactive appeal list when a justice grants leave to appellant or the applicant to proceed.[48] On an application to have an appeal or application for

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43 *Davies, supra* note 33.

44 *Hanlon v Nanaimo (Regional District),* (2007), 72 BCLR (4th) 341 at paras 16-18, 2007 BCCA 538 (chambers).

45 In *Le Soleil Hospitality Inc. v Louie*, 2008 BCCA 142, 254 BCAC 51, 53 CPC (6th) 9, for example, a solicitor wrongly but understandably thought that the Order was a "trial ruling", not an "Order", and therefore that it was not appealable until conclusion of trial.

46 *Bronson v Hewitt,* 2011 BCCA 519 (chambers).

47 *Court of Appeals Act*, supra note 2, 25(1).

48 *Ibid,* 25(2). On this, see the discussion under the heading "Appeals Dismissed as Abandoned", infra. As discussed below, subsection 25(6) deals with the restoration of an appeal that has been dismissed as abandoned.

leave to appeal removed from the inactive appeal list, the applicant bears the onus. There is no rigid test to apply in determining whether an inactive appeal ought to be restored to the active list. The overriding issue is whether it is in the interests of justice to grant the application. The factors considered are:[49]

i. Extent of the delay, and in particular, whether the delay has been inordinate;
ii. Explanation for the delay, and in particular, whether the delay is excusable;
iii. Existence or not of any prejudice arising from the delay; and
iv. Extent of the merits of the appeal

The question of what constitutes inordinate delay must be resolved having regard to the circumstances of the particular case. The cause of the delay can be considered, e.g., the delay was caused by counsel; the delay was the result of both parties and could be explained; or, as a negative factor, the delay was part of the appellant's deliberate strategy.

A justice in chambers may order that an appeal be restored to the active list on terms. Terms can include strict filing dates for appeal materials.

3.2.5 Appeals Dismissed as Abandoned

See generally §§4.73 – 4.75 of H. A. Brinton's Civil Appeal Handbook.[50]

A justice in chambers may dismiss an appeal as abandoned where the appellant has failed to comply with a provision of the Court of Appeal Act, the Court of Appeal Rules, or an Order extending or shortening time.[51] A respondent may bring an application for an order dismissing an appeal in desire of prosecution before or in conjunction with an extension of time. In addition, if an appeal or application for leave to appeal remains on the inactive appeal list for 180 consecutive days, on the 181st day it stands dismissed as abandoned.[52] An appeal or application that stands dismissed as

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49 *Olenga v Insurance Corp. of British Columbia* (2007), 235 BCAC 315, 2007 BCCA 87 (chambers), reconsideration denied (2007), 239 BCAC 320, 2007 BCCA 256, leave to appeal refused [2007] SCCA No 332 (QL); *Deline v Kidd* (2003), 180 BCAC 124, 2003 BCCA 170; *Cimolai v Hall* 2006 BCCA 274 (chambers); *Arnott v Tundra Steel Products Ltd*, 2002 BCCA 211, 166 BCAC 217 (chambers) at para 10; *White v White*, 2005 BCCA 469 (chambers).

50 *Supra* note 1.

51 *Court of Appeal Act*, *supra* note 2, ss 10(2)(e) and 28(a).

52 *Ibid*, s 25(5).

abandoned must not be reinstated unless a justice orders otherwise.62 Different principles, and a more stringent test, apply in respect of an application to reinstate an appeal that stands dismissed as abandoned than in respect of an application to remove an appeal from the inactive appeal list.[53]

Dismissing as Abandoned

The test to determine whether an appeal should be dismissed as abandoned has been articulated in at least two ways. It is not enough for a respondent to argue that the appeal must fail because it challenges to findings of fact. One formulation involves the following five-part test:

i. was there a bona fide intention to appeal?
ii. when were the respondents informed of the intention?
iii. would the respondents be unduly prejudiced by an extension?
iv. is there merit in the appeal?
v. is it in the interests of justice that an extension be granted? The fifth question is the most important as it encompasses the other four questions and states the decisive question.[54]

Another formulation involves the following three-part test:

i. there must first be inordinate delay;
ii. the delay must be unexplained or inexplicable; and
iii. there must be prejudice.[55]

Usually, an application by the respondent to dismiss an appeal as abandoned will be countered with an application by the appellant seeking the necessary extensions of time. The five-part test identified above has been described as "a compendious guide to both applications."[56]

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53 See *Haldorson v Coquitlam (City)* (2000), 2000 BCCA 672 at para 3, 3 CPC (5th) 225 (chambers); *Convoy Supply Ltd. v Drummond* (1996), 78 BCAC 27 at para 14, 6 CPC (4th) 5 (CA chambers) and *Canada (Attorney General) v No String Enterprises Ltd*, 2001 BCCA 671 at para 7 (chambers).

54 *Davies*, supra note 33 at 260.

55 *Frew v Roberts* (1990), 44 CPC (2d) 34 at 37 (BCCA).

56 *Verlaan v Von Deichman,* 2006 BCCA 389 (chambers).

Reinstating Appeals Standing Dismissed As Abandoned

As with the test applied to remove an appeal from the inactive list, the Court has been reluctant to articulate a rigid test on applications to reinstate appeals dismissed as abandoned. Again, the most important element is whether granting the application would be in the interests of justice. The five factors considered are whether:

i. there has been inordinate delay;
ii. the delay is excusable;
iii. the respondent has suffered prejudice as a result of the delay;
iv. there is merit to the appeal; and
v. the interests of justice are served by reinstatement.[57]

See also the discussion under the heading "Inactive Appeals", supra.

3.2.6 Standard of Review Generally (Appeals)

See generally chapter 2 of H. A. Brinton's Civil Appeal Handbook.[58]

Issues concerning the standard of appellate review do not come up directly in most chambers work. The standard of appellate review does, however, have bearing on the possibility of success on the merits of the appeal. As seen in several of the topics dealt with in this hand-out, the merit of the appeal (or the possibility of success) is a factor in a number of chambers matters. Accordingly, it is beneficial to have in mind the basic principles of the standards of appellate review.

Different standards of appellate review apply in respect of (1) questions of law; (2) questions of fact; and (3) questions of discretion.[59] An appellate court cannot interfere with the decision of a lower court, nor can it simply come to a different conclusion on the evidence, unless the requisite error is an error of law or inherently erred.

The distinction between questions of law, fact, and mixed law and fact is not always clear. Questions that ask what are the applicable legal principles are

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57 *British Columbia (Attorney General) v Malik*, 2012 BCCA 58 (chambers); reconsideration denied 2012 BCCA 175; *Davies v Canadian Imperial Bank of Commerce* (1987), 15 BCLR (2d) 256 at 259 (CA); *Cross v Cross* (1997), 33 RFL (4th) 387 (BCCA) (chambers).

58 *Supra* note 1.

59 *Housen v Nikolaisen*, [2002] 2 SCR 235 at para 7, 286 NR 1, 211 DLR (4th) 577.

questions of law; questions that ask whether the facts satisfy the applicable legal tests are questions of mixed fact and law.

The standard of review on questions of law is one of correctness.

On matters of fact, the question is whether the trial judge is shown to have made a palpable and overriding error. This includes findings of credibility and inferences drawn from the facts. An apportionment of fault is a finding of fact. An assessment of damages by a trial judge is generally a finding of fact. Appellate interference with findings of fact is appropriate only where there is no proper evidentiary foundation for a finding of fact in the sense that evidence has been misapprehended or there is no evidentiary foundation for the finding (a palpable error) and the error is material to the outcome (overriding).[60]

Questions of mixed fact and law fall on a continuum and attract the standard of review applicable to the kind of question truly at stake. The construction of statutes is also a question of law.[61]

Where the appeal concerns the exercise of a trial judge's discretion, the standard of review is whether it is shown that he failed to give sufficient weight to relevant considerations or whether the decision may result in injustice.

Conclusions of summary trial judges in cases under Rule 18A are to be afforded the same deference as is given to decisions of trial judges after conventional trials.

The verdict of a jury will not be set aside unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. The appellate court will vary a jury's assessment of damages only if the assessment is so inordinately high or low as to be wholly out of proportion or erroneous.

60 *Lines v W & D Logging Co. Ltd.*, 2009 BCCA 106 at para 8.

61 *Sander v Sun Life Assurance Co. of Canada*, 2011 BCCA 3 at para. 41, appeal abandoned [2011] SCCA No 98 (QL).

3.2.7 Amendment of Pleadings

NOTE: Under the New Rules, parties are able to amend their pleadings once without leave or consent up until service of the Notice of Trial or the date of the first Case Planning Conference, whichever occurs first. Parties are still able to amend after this time with leave of the court or the consent of the parties.

- No reference to amendments being dated
- Serve amended pleadings within 7 days by ordinary service, unless original pleading amended – then to be served promptly by personal service

The purpose of seeking an amendment is to change the pleadings so as to place the real
matter in issue between the parties properly before the court. The court will usually permit all amendments that are necessary in order to ensure that justice is done between the parties, provided that the amendments do not prejudice any other party. In *Cropper v. Smith* (1884), 26 Ch.D. 700, at p. 710, Bowen L.J. stated:

> I think it is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party.
>
> It seems to me that as soon as it appears that the way in which a party has framed its case will not lead to a decision of [the] real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.

Although amendments are granted liberally, they are not granted automatically. The party seeking an amendment must be acting in good faith and must be seeking, by amendment, to raise an allegation that has some substance to it. If, therefore, the court is not satisfied as to the truth and substantiality of the proposed amendment, and the application is made late in the proceedings, it may be refused (*Young v. Young*, [1952] OWN 297 (Ont HC)).

Further, an amendment raising a new cause of action arising out of a different event may be denied if that new cause of action is barred by a

limitation date—even though it would not have been as of the date the action was commenced (*Pootlass v. Pootlass* (1999), 63 BCLR (3d) 305 (S.C.)). Factors a court will consider on an application to amend after the expiration of a limitation period are set out in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd*. (1996), 19 B.C.L.R. (3d) 282 (C.A.).

When you realize that an amendment is needed, you should check to see whether the other side will agree; it might save a trip to chambers.

Adding a new party

Under SCCR 6-2(7), the power to add parties is considerably broad. On an application to add a party, there must be some evidence that there exists between the person and any party to the action a question or issue, related to or connected with the subject matter or relief claimed in the original action. Once this threshold has been met, the Court will consider whether it would be just and convenient to add the party, considering such guidelines as the extent and reasons for delay, prejudice caused by the delay, and the extent of the connection between the existing claims and proposed cause of action. The expiration of a limitation period does not preclude the addition of parties, but it does give rise to a rebuttable presumption of prejudice. When an application under SCCR 6-2 is granted, the newly added party loses any limitation defence it had at the time it was added (s. 4 of the *Limitation Act* RSBC 1996 c 266; *Lui v. West Granville Manor Ltd. 2*, [1987] BCJ No 332 (BCCA)). It is not clear whether the courts have authority to include as a term of an order to add a party that the party preserves its limitation defence that had accrued at the time of the order to add; but *Lui*, supra, suggests that a court may be able to make such an order.

Relevant Cases

In *TJA v RKM* (http://www.courts.gov.bc.ca/jdb-txt/SC/11/08/2011BCSC0820.htm), the Defendant sought to amend its' pleadings by introducing the defences of absolute and qualified privilege, however the Plaintiff refused to agree, claiming he would be prejudiced by the amendments. The Court allowed the amendments.

Langret Investments v McDonnell, BCCA March 18, 1996 CA 020285 Vancouver Registry:

> Rule 24(1) of the Rules of Court of British Columbia allows a party to amend an originating process or pleading. Amendments

> are allowed unless prejudice can be demonstrated by the opposite party or the amendment will be useless.
>
> The rationale for allowing amendments is to enable the real issues to be determined. The practice followed in civil matters when amendments are sought fulfils the fundamental objective of the Civil Rules which is to ensure the "just, speedy and inexpensive determination of every proceeding on the merits". (See also *McLachlin and Taylor*, in British Columbia Practice, 2d ed. looseleaf (Butterworths, 1991) pages 24-1 to 24-2-10, and the decision of this Court in *Chavez v. Sundance Cruises Corp*. (1993), 15 CPC (3d) 305, 309-10).

McNaughton and Baker, [1988] 25 BCLR (2d) 17, BCJ No 515 (CA):

> [37] It is submitted, however, that on the principle discussed in *Adams*, these claims cannot succeed because the third party accountants were at all times acting as agents of the plaintiff. This raises the question whether the allegations in question are necessarily confined to circumstances where the accountants were acting as agents of the plaintiff. The defendant lawyers assert they are not so confined, and question whether the retainer between the plaintiff and the accountants covered the acts on which the proposed amendments are based.
>
> [38] In Adams, it was clear from the nature of the allegations against the third party that they all necessarily related to acts committed as agents for the plaintiff. The same cannot be said here. On the contrary, the scope of the retainer between the plaintiff and the accountants appears to be in dispute. In these circumstances, amendments alleging that the accountants owed an independent duty to the defendants of which they were in breach, disclose a "possible" third party claim against the accountants and should be permitted.
>
> [41] It remains to consider whether there is any other basis upon which the proposed amendments can be excluded. It is not suggested that they will unduly prejudice the plaintiffs or proposed third parties. Nor does undue delay appear to be established; the defendants have been struggling for some time to be permitted to plead their third party claim against the accountants.

Victoria Grey Metro Trust Company v Fort Gary Trust Company (1982), 30 BCLR (2d) 45 at pages 46 — 47 (SC):

> Before addressing the proposed pleadings, I refer to the principles which govern the granting of amendments to pleadings. The basic rule, set out expressly in the former rules and no doubt still applicable, is that such amendments should be permitted as are necessary to determine the real question in issue between the parties ... However, the court will not allow useless amendments ... it may be noted that it is only in the clearest cases that a pleading will be struck out as disclosing no reasonable claim; where there is doubt on either the facts or law, the matter should be allowed to proceed for determination at trial .... If there is any doubt, it should be resolved in favour of permitting the pleadings to stand ... While these cases deal with striking out claims already pleaded, consistency demands that the same considerations apply to the question of amendment to permit new claims.

See also *Quintette Coal Ltd. v Bow Valley Resource Services Ltd*. (1986), 6 BCLR (2d) 347 at 354 (SC).

Shaw Cable Systems Ltd. v Concord Pacific Group, 2009 BCSC 203:

> [8] Rule 24(1) allows a party to amend a pleading at any time with leave of the court. Applications for leave to amend should be considered on the same basis as applications to strike existing pleadings. In *Victoria Grey Metro Trust Company v. Fort Gary Trust Company* (1989), 30 BCLR (2d) 45 at page 47 (S.C.) McLachlin J. (as she then was) said:
>
> …it seems to me obvious that the court will not give its sanction to amendments which violate the rules which govern pleadings. These include the requirements relating to conciseness (R. 19(1)); material facts (R. 19(1)); particulars (R. 19(11)); and the prohibition against pleadings which disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious (R. 19(24)). With respect to the latter, it may be noted that it is only in the clearest cases that a pleading will be struck out as disclosing no reasonable claim; where there is doubt on either the facts or law, the matter should be allowed to proceed for determination at trial… While these cases deal with striking out claims already pleaded, consistency demands that the same considerations apply to the question of amendment to permit new claims.

See also *Forliti v Wooley*, 2003 BCSC 1082, 17 BCLR (4th) 184, and McNaughton v Baker (1988) 25 BCLR (2d) 17, [1988] 4 WWR 742 (CA).

Brazeau v IBEW, 2003 BCSC 1041:

> [4] In regards to the applications for amendments of pleadings, the law is clear. The law is that amendments to pleadings should be allowed unless there is no hope of success in the pleadings themselves, or the opposing party, in this case the defendant, can show prejudice which cannot be cured by way of costs or an adjournment. Recent authority for that is the *Meingast v. Paul Revere Life Insurance Co*., [2002] BCJ No 999.

3.2.8 Petitions for Judicial Review

The application must be made by petition and supporting affidavits. Rule 16-1 sets out the process related to petitions

Time limits

Under the *Administrative Tribunals Act*, (SBC 2004, c 45, ss 57 (1), (2)) the normal time limit for filing an application for judicial review in court is 60 days from the date of the tribunal's decision. If you do not file your judicial review application within the time limit, you may lose your right to apply.

NOTE: The 60-day time limit does not apply to all administrative tribunals. Sometimes the court will grant an extension of the time, but there is no guarantee that it will do so.

The 60 day time limit applies to decisions of the following bodies:

- Agricultural Land Commission
- British Columbia Human Rights Tribunal
- Director, Business Practices and Consumer Protection
- Director of the Residential Tenancy Branch (decisions made by Dispute Resolution Officers)
- Employment and Assistance Appeal Tribunal
- Employment Standards Tribunal
- Farm Industry Review Board
- Financial Services Tribunal
- Hospital Appeal Board
- Industry Training Appeal Board
- Labour Relations Board
- Mediation and Arbitration Board
- Mental Health Review Panels

- Passenger Transportation Board
- Safety Standards Appeal Board
- Workers' Compensation Appeal Tribunal
- Residential Tenancy Board

Standard of review with privative clause (s 58)

Section 58 applies to:

- Residential Tenancy Board
- Employment Standards Tribunal
- Workers' Compensation Appeal Tribunal
- Safety Standards Appeal Board

Standard of review if tribunal's enabling Act has no privative clause (s 59)

Section 59 applies to:

- British Columbia Human Rights Tribunal
- Mediation and Arbitration Board
- Mental Health Review Panels

Standards of Review

Correctness: A court applying the "correctness" test is entitled to reverse the decision in question on the simple basis that the court disagrees with the tribunal on the point in issue. The court will review the evidence and decide whether or not it agrees with the Tribunal. Correctness is the least deferential standard of review, meaning the court will be more willing to interfere with the Tribunal's decision where correctness is the standard of review.

See: *University of British Columbia v Berg*, [1993] 2 SCR 353; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board),* [1997] 2 SCR 890

Reasonableness: Where the standard of review is reasonableness, you need to show that, given all the evidence that was before the Tribunal and given the applicable law, the Tribunal's findings were not within the range of reasonable options. On these standards of review the court might disagree with the Tribunal's decision but will not interfere with the decision if it is within the range of reasonable options.

- **"Reasonableness simpliciter:"** an "intermediate" standard of review, that entitles a court to disturb an administrative tribunal's decision if it is "clearly wrong".
- The most deferential standard of review is the **"patently unreasonable"** test, pursuant to which only a "clearly irrational" decision may be disturbed by the court.

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.
>
> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable

Canada (Attorney General) v Public Service Alliance of Canada (1993), 101 DLR (4th) 673 (S.C.C.) at pp. 690-91:

> It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet the test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary, "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational.... Not acting in accordance with reason or good sense." Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said

> that there was a loss of jurisdiction. This is clearly a very strict test.....

Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles), [1993] 2 S.C.R. 756:

> The patently unreasonable error test is the pivot on which judicial deference rests. As it relates to matters within the specialized jurisdiction of an administrative body protected by a privative clause, this standard of review has a specific purpose: ensuring that review of the correctness of an administrative interpretation does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision. The process by which this standard of review has progressively been accepted by courts of law cannot be separated from the contemporary principle of curial deference, which is, in turn, closely linked with the development of extensive administrative justice (see Cory J.'s reasons in *PSAC No. 1* and *PSAC No. 2*, supra, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 (per Wilson J.)).
>
> Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. For the purposes of judicial review, statutory interpretation has ceased to be a necessarily "exact" science and this Court has, again recently, confirmed the rule of curial deference set forth for the first time in *Canadian Union of Public Employees, Local 963 v.*
> *New Brunswick Liquor Corp…*

More information

- Judicial Review Guidebook: http://www.supremecourtbc.ca/sites/default/files/web/Judicial-Review.pdf
- Judicial Review Publications:
- http://www.clasbc.net/publications/details.php?ID=83

3.2.9 Bankruptcy and Insolvency for Individuals

Useful Resources

- Roderick J Wood, Bankruptcy and Insolvency Law, Toronto: Irwin Law, 2009.
- Geoffrey Dabbs, 'General Overview of Bankruptcy and Insolvency Law", Bankruptcy and Insolvency Basics for Lawyers, CLE BC, 2011.
- Justice Education Society, "Discharge from Bankruptcy", http://www.supremecourtbc.ca/sites/default/files/web/Discharge%20from%20Bankruptcy%20v3.pdf (includes sample forms).
- Lloyd Houlden, Geoffrey Morawetz, and Janis P. Sarra, The 2013 Annotated Bankruptcy Act, Carswell, 2013.

General Principles

Bankruptcy law has 3 main objectives: liquidation and distribution of the debtor's assets, rehabilitation of the debtor as a productive citizen (especially important for APB clients who may not have many assets), and the promotion of commercial morality and the integrity of the credit system.[62]

Statutory Scheme

> The bankruptcy process for individuals in BC is governed by the federal *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (*BIA*), with some details added by the provincial *Insurance Act*, SBC 2012, c.1 (*IA*) and the provincial *Court Order Enforcement Act*, RSBC 1996, c. 78 (*COEA*).
>
> The *BIA* provides that the superior courts of each province have jurisdiction in bankruptcy proceedings.[63] All of a judge's bankruptcy powers can be exercised in chambers.[64] The Chief Justice may also appoint registrars who can hear discharge applications and unopposed matters, and can make interim orders.[65]

Procedure

Under the BIA, an insolvent person can either make a proposal to creditors or become bankrupt.

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62 Roderick J Wood, *Bankruptcy and Insolvency Law*, Toronto: Irwin Law, 2009, at 36ff.

63 *BIA* s 183.

64 *BIA* s 187.

65 *BIA* s 192.

Proposals

Consumer proposals are governed by Part III of the Act. For a debtor to be able to make a proposal, the debtor's total debts (excluding debts secured by the debtor's principal residence) cannot exceed $250 000.[66] The proposal must provide for a term of no more than five years, and must provide for all the debts, as well as fees and expenses.[67] The procedure for proposals is set out in the Act at ss. 66.13-66.4.

Bankruptcy

An individual can become bankrupt in two ways: by a voluntary assignment, or by a petition from creditors.

Voluntary Assignment: *BIA* s. 49 governs voluntary assignments. Notably, subsection (6) provides that where the realizable assets of the bankrupt, minus the claims of secured creditors, are less than $5000, the summary procedures outlined in sections 155-157 will apply. Section 158 imposes duties on the bankrupt, such as disclosing to the trustee of all property owned or controlled, turning over all credit cards, and helping the trustee make a list of assets. Once the assignment is made, the trustee will then distribute the property to creditors.

Petition: It is unusual for individuals to be petitioned into bankruptcy. Section 43 of the *BIA* provides that a creditor can apply for a bankruptcy order against a debtor if the debts owing to that creditor are over $1000 and the creditor alleges that the debtor has committed one or more acts of bankruptcy in the preceding six months (acts of bankruptcy are set out in s. 42). Subsection (10) provides that if the debtor disputes the facts alleged, the court may stay the proceeding, but may also impose terms to prevent the debtor from alienating his or her property while the facts are being determined.

Effects of Bankruptcy and Distribution of Assets

All of the debtor's unsecured property, wherever situated (including property that the debtor acquires during bankruptcy, but excluding certain exempt property) vests in the trustee, who will generally liquidate it. Bankruptcy does not affect the rights of secured creditors (who can simply seize their collateral), nor does it affect the beneficiaries of property that the debtor

66 *BIA* s 66.11.

67 *BIA* ss 66.12 (5), (6).

holds in trust. *BIA* s. 69 provides that all proceedings against the debtor are to be stayed (though this is subject to some limitations, set out in ss. 69-69.6).

The bankrupt person must turn over 'surplus income' to the trustee. Generally, income that exceeds ordinary living expenses will be considered surplus. The rules around surplus income are set out in BIA s. 68. The bankrupt person must also disclose his or her bankrupt status to business associates and prospective creditors, or else be subject to quasi-criminal penalties![68]

BIA s. 136 (together with several other sections) sets out the scheme for distribution of the bankrupt's assets. Wages owed to employees of the bankrupt up to $2000,[69] unpaid suppliers,[70] unpaid pension contributions,[71] and the costs of environmental clean-up[72] take priority. Next come secured creditors, then the trustee's costs, then pre-bankruptcy support arrears, then municipal taxes, and then money owed to the bankrupt's landlord for the preceding 3 months. Finally, the unsecured creditors share rateably in the rest, subject to the Superintendent's levy of 5%.

Some of the bankrupt's property is not divisible among creditors. GST credit payments, prescribed payments relating to the individual's essential needs, RRSPs (other than contributions made in the 12 months preceding the bankruptcy), and property held in trust are all exempt.[73] BIA s. 67(1)(b) provides that property that is exempt from seizure under the laws of a particular province will not be divisible among creditors.

Section 71 of the provincial *COEA* provides a list of exempt property: necessary clothing, household furnishings up to a certain value, one motor vehicle up to a certain value, income-earning tools up to a certain value, medical and dental aids, and any other personal property prescribed by the regulations. Section 71.1 provides that the debtor's personal residence, if its value or the debtor's equity in it does not exceed the prescribed amount, will be exempt from seizure. If the value of an item in ss. 71 or 71.1 of the

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68 *BIA* s 199.

69 *BIA* s 81.3.

70 *BIA* ss 81.1 and 81.2.

71 *BIA* s 81.5.

72 *BIA* s 14.06(7).

73 *BIA* s 67.1.

COEA does exceed the prescribed amount, s. 71.2 provides for the seizure and sale of the item, with the proceeds, up to the prescribed amount, going to the debtor and then becoming exempt.

Section 2 of the *COEA* Regulations, BC Reg 28/98 provides that the exempt amounts are: $4000 for household furnishings and appliances; $5000 for one motor vehicle ($2000 if the debtor is a 'maintenance debtor' as defined in s. 1 of the Family Maintenance Enforcement Act); and $10 000 for income-earning tools. Section 3 of the regulations sets out the prescribed amount of equity in the debtor's principal residence: $12 000 if the residence is located in the GVRD or the Capital Regional District, and $9000 if it is located elsewhere.

Finally, there is an exemption for insurance money. BC's Insurance Act provides in s. 65(1) that "[if] a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured" and in s. 65(2) that "[while] there is in effect a designation in favour of any one or more of a spouse, child, grandchild or parent of a person whose life is insured, the insurance money and the rights and interests of the insured in the insurance money and in the contract are exempt from execution and seizure".

Discharge from Bankruptcy

Discharge is governed by *BIA* ss. 168.1-182. The aim of discharge is to give an honest but unfortunate debtor a fresh start. Generally, a first-time bankrupt will be discharged after 9 months of bankruptcy. However, creditors or the trustee may oppose the discharge. Discharges may be absolute, conditional, or suspended. Common reasons for refusal to grant a discharge include: a) the bankrupt's assets total less than 50 cents on the dollar of total claims without a valid excuse; b) the bankrupt has continued to trade during bankruptcy; c) the bankrupt has spent extravagantly or ignored his or her responsibilities; d) improper book-keeping. The trustee must prepare a report recommending the type of discharge.

Once a person is discharged from bankruptcy, all provable claims against that person disappear, except for those set out in BIA s. 178(1): damage awards for intentional bodily harm or sexual assault, alimony, child support, debts arising from fraud, student loans, and others.

3.2.10 Applications for Summary Judgement

Summary judgment is designed to provide a mechanism where the plaintiff can, at an early stage get judgment on an issue or on the entire claim in a summary way by showing that the defense has no merit. Conversely, the defendant can get rid of an action by showing that the plaintiff's claim has no merit. The court in a summary judgment application does not try issues; it is not a trial by affidavit like a summary trial. Rather, it determines whether there are genuine issues to be tried.

Rule 9-6 governs summary judgment. In a summary judgment application, "claiming party" is the term given to the party that filed an originating pleading (e.g., plaintiff). "Answering party" is the term given to the party that serves on the claiming party a responding pleading to the originating pleading (e.g., defendant). Refer to Rule 9-6(1).

When you can seek summary judgment?

If you are the plaintiff, you may apply for summary judgment under Rule 9-6 on the grounds that:

i. The defendant does not have a defence against all or part of your claim; or
ii. The defendant does not have a defence against your claim except about the amount. In this case, you must be able to prove the amount you are owed.

If you are the defendant, you can apply for summary judgment on the ground that there is no merit to all or part of the claim that the plaintiff is making against you.

Plaintiff's Application for Summary Judgment

Under Rule 9-6(2) a claiming party (e.g., a plaintiff) can apply for summary judgment against the answering party (e.g., a defendant) on all or part of the claim.

When responding to a plaintiff's application for summary judgment, the defendant can respond by alleging that the claiming party's originating pleading (e.g., Notice of Civil Claim) does not raise a cause of action. If the defendant wants to go further, the defendant cannot rest on the denials in its Response to Notice of Civil Claim, but must set out, in affidavit material

or other evidence, specific facts showing there is a genuine/triable defense for trial. Refer to Rule 9-6(3).

Defendant's Application for Summary Judgment/Dismissal

For its part, the defendant may, after filing a defense, apply for summary judgment dismissing all or part of the claim of the plaintiff. Refer to Rule 9-6(4).

The Powers of the Court

Rule 9-6(5) sets out the powers of the court in regards to summary judgment.

On a summary judgment application, the court will not weigh evidence, or choose between conflicting versions of an event. The onus of establishing that there is no triable issue rests on the applicant and must be carried to the point that making it manifestly clear, which means much the same as beyond a reasonable doubt.

Evidence

Witnesses are not permitted in a summary judgment application. All evidence is set out in affidavits.

The affidavit evidence must address the key question of whether the claim is bound to fail or bound to succeed. An affidavit in support of a plaintiff's application for judgment should set out the facts verifying the claim or part of the claim and may state that the deponent knows of no fact which would constitute a defence to the claim or part of the claim except as to amount. With respect to a defendant's application for summary dismissal, the supporting affidavit should set out the facts verifying the defendant's contention that there is no merit in the whole or part of the claim and may state that the deponent knows of no facts which would substantiate the whole or part of the claim.

In responding to an application for summary judgment, the respondent must show reasons why summary judgment should not be granted. A defendant responding to a plaintiff's summary judgment application can argue that the plaintiff's Notice of Civil Claim does not raise any cause of actions. Outside of this argument, the defendant can respond to the application by setting out in affidavit evidence specific facts showing there is a genuine defence.

Similarly, a plaintiff responding to a summary dismissal application should set out in affidavit evidence specific facts showing there is a genuine claim.