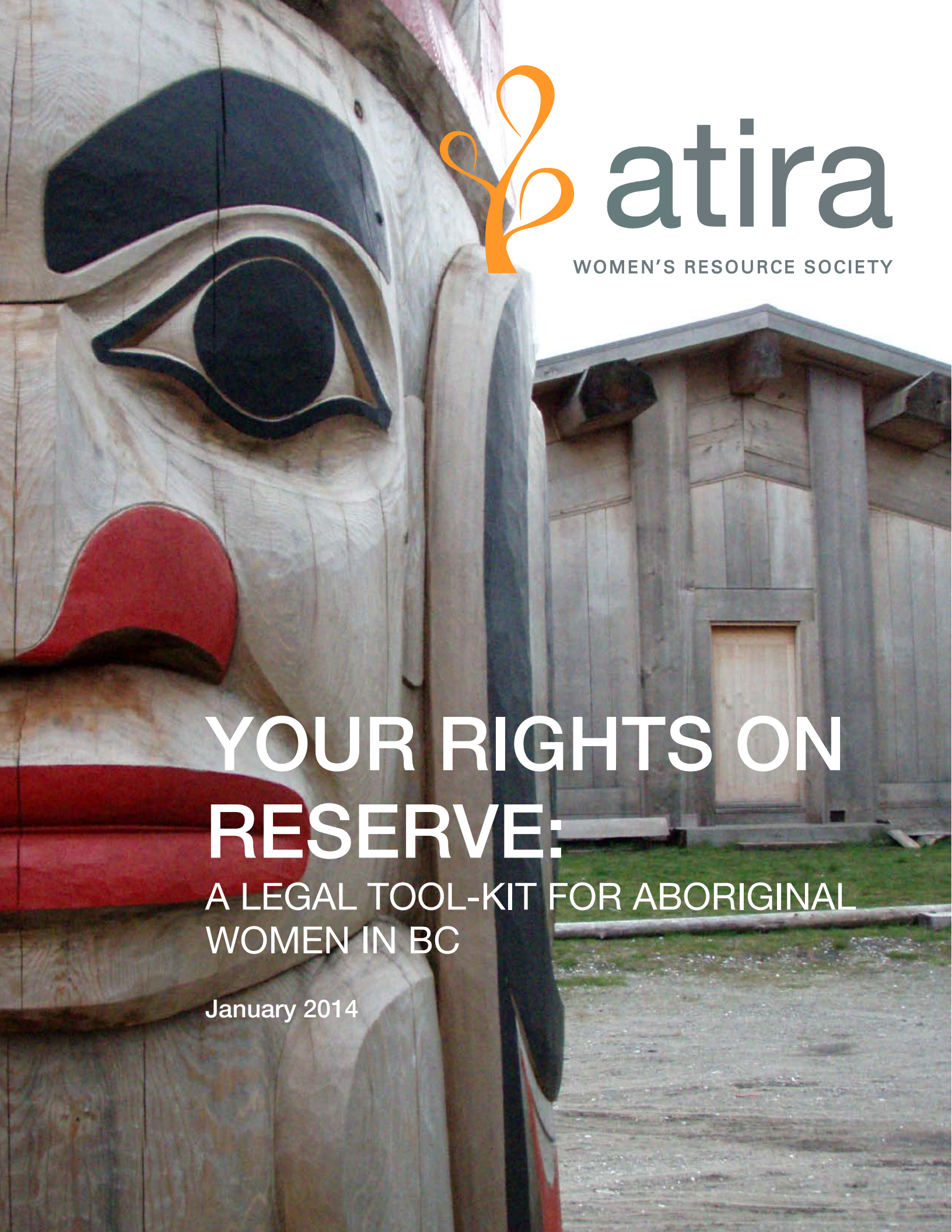

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WOMEN'S RESOURCE SOCIETY

YOUR RIGHTS ON RESERVE:

A LEGAL TOOL-KIT FOR ABORIGINAL WOMEN IN BC

January 2014

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How to Obtain A Free Copy of this Tool-Kit: Additional copies of this Tool-Kit can be obtained at: www.atira.bc.ca or by contacting Atira at:

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Email: legaladvocate@atira.bc.ca

THIS TOOL-KIT EXPLAINS THE LAW IN GENERAL. IT IS NOT INTENDED TO GIVE YOU LEGAL ADVICE ON YOUR SPECIFIC LEGAL ISSUE. EACH CASE IS DIFFERENT AND YOU MAY NEED TO OBTAIN LEGAL ADVICE FROM A LAWYER ABOUT YOUR SPECIFIC LEGAL ISSUE.

Atira Women's Resource Society is a non-profit organization that supports all women, and their children, who are experiencing the impact of violence committed against them and/or their children.

We are grateful to the Law Foundation of British Columbia for its support and funding the publication of this Tool-Kit. We are also grateful to the BC Legal Services Society for its support of this project through staff time.

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INTRODUCTION

This Tool-kit was created by Aboriginal women for Aboriginal women. As Aboriginal women with varying experiences with the law, we have seen in our work and in our lives how gaps in legal information create hardship for Aboriginal women in BC.

These gaps were also identified by Aboriginal women across the province in a consultation report prepared by West Coast LEAF, called *Mapping the Gap: Linking Aboriginal Women with Legal Services and Resources* (available at: http://www.westcoastleaf.org/userfiles/file/mapping%20the%20gap-aboriginal%20-Final.pdf).

This Tool-kit aims to address some of the identified gaps in legal information for Aboriginal women. We hope this Tool-kit will be of assistance to you, your family, your community, and your service providers in understanding some of your legal rights in BC, especially as it applies on reserve.

Tip for using this publication

You will see internet addresses for legislation, court cases and websites throughout this publication.

If the address no longer exists or has been moved, search the name of the legislation, the court case or the organization on any search engine like Google or Yahoo to find another link. See also the Resources Section of this Tool-kit for further legal websites and other legal resources.

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CHAPTER 1: TAXATION

How Do You Know Whether You Will Be Taxed?

Section 87 of the *Indian Act*, R.S.C. 1985, c. 1-5 is a starting place to determine if you will be taxed or not. Here is a link to the federal government's website that has the *Indian Act*: http://laws-lois.justice.gc.ca/eng/acts/i-5/.

Section 87 of the *Indian Act* states that two types of property are exempt from taxation:

(1) The interest of an Indian or a Band in reserve lands or surrendered lands; and

(2) The personal property of an Indian or a Band situated on reserve.

Throughout history, many Aboriginal peoples have fought to protect the tax exemptions as set out in treaties, agreements with Canada, and confirmed in section 87 of the *Indian Act.* Disagreements between Aboriginal peoples and provincial and Canadian governments have often ended up in court, with Canadian courts interpreting the meaning and scope of Section 87 of the *Indian Act.*

Contrary to some public perceptions that Aboriginal peoples are exempt from all or most taxes, the tax exemptions provided in section 87 of the *Indian Act* are limited.

It is also important to note that tax exemptions under the *Indian Act* no longer apply to some First Nations in BC as a result of their treaty negotiations and / or self-government agreements with the Canadian (federal) and BC governments.

For a complete list of First Nations who no longer receive tax exemptions under section 87 of the *Indian Act*, see:

> Notice # 238 by Canada Revenue Agency (First Nations Having Self-Government Agreement Ending Indian Tax Relief – Determining Tax Relief for Indian Members Who Are Not Citizens) available online at: http://www.cra-arc.gc.ca/E/pub/gi/notice238/notice238-e.pdf.

It is also important to note that section 87 of the *Indian Act* applies only to individual Indian or Indian Bands and not to other entities such as corporations and trusts. If you are a status Indian, see the following scenarios of when you will be exempt from paying taxes, including Goods and Services Tax (GST) and Provincial Sales Tax (PST).

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Only a person who is a registered under the Indian Act as a status Indian is eligible for tax exemption.

Example: Pauline is a status Indian but her sister Alice is not.

Pauline will be eligible to receive tax exemptions (per section 87 of the *Indian Act*) in certain circumstances. Even though Pauline's sister Alice is also of Aboriginal descent, self-identifies as being Aboriginal and lives on reserve, she is not a status Indian, and therefore will not be eligible for tax exemptions like her sister Pauline.

Goods purchased on reserve by a status Indian will be tax exempt, even if the status Indian does not live on reserve.

Example: clothing, tobacco, gas, and vehicles purchased on reserve.

Example: Jennie is a status Indian who lives off reserve in Prince George. She buys a car on reserve nearby and brings the car home, off reserve. Even though Jennie lives off reserve, she does not have to pay tax on the vehicle because she is status Indian and bought the car on reserve. After Jennie buys the vehicle it does not matter where she lives or uses the vehicle.

Services performed on reserve and paid for by a status Indian will be tax exempt.

Examples: car repairs, hair cuts or home repairs done on reserve paid for by a status Indian.

Services performed off reserve and related to a real property interest located on reserve will be tax exempt

Example: this would include off reserve "Band Management Activities" provided the work is in relation to the provision of governmental services to citizens or in respect of lands or infrastructure.

Example: Legal or tax services that relate to Band governance, services, administration or lands.

Good purchased off reserve may be exempt if the vendor or vendor's agent delivers the goods to a reserve.

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Example: Shirley is a status Indian living on reserve. She buys a fridge and stove from a store off reserve. Shirley arranges to have the store deliver the fridge and store to her on reserve. She does not have to pay taxes.

How Do You Know Whether Your Employment Income Is Exempt From Taxation?

Section 87 of the *Indian Act* is the starting place to determine whether employment income is exempt. Section 87 of the *Indian Act* provides that the "personal property" of a status Indian or Band, situated on reserve, will be exempt from taxes. Income is included in the definition of personal property and will be tax exempt if the income is located on reserve. Canadian courts have decided that the employment of a status Indian on reserve will be deemed to be "employment income situated on reserve" and therefore tax exempt.

In the case of *Williams v. Canada*, [1992] 1 S.C.R. 877, http://canlii.ca/t/1fscq, the Supreme Court of Canada held that whether a status Indian's income will be tax exempt depends on "connecting factors" that link the employment income to a reserve.

In general, employment income of a status Indian will be exempt when a status Indian performs at least 90% of her / his employment duties on a reserve.

When less than 90% of employment duties are performed on reserve, the tax exemption may be pro-rated. For example, if 55% of the employment duties are performed on reserve, then the tax exemption will apply to the 55% of the employment income.

When the employer lives on reserve and the status Indian employee lives on reserve, all of the employment income will usually be exempt from taxes.

When more than 50% of a status Indian's employment duties are performed on reserve, and either the employer or status Indian employee reside on the reserve, all of the income will generally be exempt from taxes.

Status Indian employees of Bands and Tribal Councils may be exempt from paying taxes if:

(1) the employer is resident on reserve;

(2) they work for Bands / Tribal Councils;

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(3) their employer is a Band organization and is "dedicated exclusively to the social; cultural, educational, or economic development of Indians who for the most part live on reserves;" and

(4) the duties of their employment include activities that only benefit status Indians that live on reserve.

Employment Insurance (EI) benefits, Canada Pension Plans (CPP) benefits, wage-loss benefits, retiring allowances, or other registered pension plan benefits from employment income that was tax exempt will usually be exempt from income tax. In other words, if your employment income is exempt from tax, your employment related income will also be exempt.

For more information and examples of tax exemptions for employment income, see: http://www.cra-arc.gc.ca/brgnls/gdlns-eng.html.

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CHAPTER 2: EMPLOYMENT ISSUES ON RESERVE

If you have an employment issue on reserve it will be important to determine if your employer is governed by federal or provincial law.

Generally, the provinces have jurisdiction over employment issues so it should not be automatically assumed that an Aboriginal workplace will fall under federal jurisdiction. The fact that work takes place on reserve will not be enough to guarantee it will fall under federal law.

Employment on Reserve Under Federal Jurisdiction

If you are employed by a First Nation Band, Indian Band, Band Council or Tribal Council on reserve, the *Canada Labour Code*, R.S.C. 1985, c. L-2.will most likely govern your employment rights. The *Canada Labour Code* is available here: http://laws-lois.justice.gc.ca/eng/acts/L-2/.

See these court cases that found that the *Canada Labour Code* applies to employment by a First Nation Band, Band Council or Tribal Council:

- *Public Service Alliance of Canada v. Francis*; [1982] 2 S.C.R. 72, http://canlii.ca/t/1z1cn;
- *R. v. Paul Band*, 1983 ABCA 308, http://canlii.ca/t/2f0fp; and
- *Pierre v. Roseau River Tribal Council,* [1993] 3 F.C. 756, http://canlii.ca/t/4gqm.

An exception to this is the Nisga'a First Nation, which is provincially governed under BC employment law as a result of their treaty agreement. For more information about the Nisga'a Treaty, see: http://www.nisgaanation.ca/understanding-treaty.

Canadian courts have also found that the *Canada Labour Code* applies to school boards operating schools on reserve. See for example:

- *Manitoba Teachers' Society v. Fort Alexander Indian Band, Chief and Council,* [1985] 1 C.N.L.R. 172, where the Federal Court affirmed the application of the *Canada Labour Code* to teachers and school boards on Indian reserves.

Generally, if you are employed by a Band Council, or a school board on reserve, you would look to the *Canada Labour Code* to determine your employment rights.

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Employment on Reserve Under Provincial Jurisdiction

Other employers / services on reserve have been found by Canadian courts to fall under provincial jurisdiction. Generally, if your type of employment is under provincial legislation, you would turn to the BC *Employment Standards Act*, R.S.B.C. 1996, c. 113 to determine your rights as an employee. The BC *Employment Standards Act* is available here: http://www.bclaws.ca/Recon/document/ID/freeside/00_96113_01.

Employment Law and Your Rights

Once you have been able to establish whether your employer on reserve is governed by the federal *Canada Labour Code* or the provincial BC *Employment Standards Act*, you can look to the applicable legislation for more information about your employment rights.
Both the *Canada Labour Code* and the BC *Employment Standard Act* set out minimum standards for employment relationships. You can look at whichever act applies to you to determine:

- The maximum hours you can be expected to work in a week;
- When you are entitled to overtime pay;
- Statutory holidays and whether you will have these days off or receive extra pay for working on a statutory holiday;
- When you are entitled to vacation and for how long;
- Your rights around pregnancy, maternity leave, parental leave and adoption leave;
- Taking a leave for sickness, death in the family, family responsibility leave, or compassionate care leave; and
- Termination of your employment.

Protecting Yourself as an Employee

In addition to knowing what law applies to your employment and the rights set out under that law, there are a few other things you can do to protect yourself as an employee.

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When you start a new job it is good practice to have an employment agreement (also called a contract) in writing setting out:

- The job description;
- Wages;
- Number of hours; and
- Working conditions.

With an agreement in place, expectations of the employment relationship will be clear, and it can help limit misunderstandings along the way.

If you have been told about a probation period or future raises, you can ask that these matters be included in your employment agreement.

If you are unsure about an employment agreement, don't sign it. It is recommended that you take the employment agreement to a lawyer for review to make sure it is fair and complies with the law.

Another employment resource to look at are your employer's written policies or procedures.

If you start to become concerned about issues at your work place, you may want to take notes of your concerns, including the dates of incidents, details and potential witnesses to the incidents.

Keep a copy of your signed employment agreement so you can refer to it later if needed.

What Can You Do if You Have Problems in Your Workplace?

If you have concerns about issues in your workplace there are a number of things you can do.

- Consult the law that applies to your situation, either the *Canada Labour Code* or the BC *Employment Standards Act.*
- Contact the government body responsible for the law that applies to you.

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- If your employment is governed by the *Canada Labour Code* you can contact Labour Canada. Here is a link to their website with more information: http://www.labour.gc.ca/eng/home.shtml

- If your employment is governed by the BC *Employment Standards Act* you can contact the BC Employment Standards Branch. Here is a link to their website with more information: http://www.labour.gov.bc.ca/esb/

Both the Labour Canada website and the BC Employment Standards Branch website set out the process for bringing complaints or concerns about your employer.

- If you need assistance with raising a concern with your employer or bringing a complaint against them, you may be able to seek the assistance of an advocate, law student or a lawyer.

- You can find advocates throughout out the province by visiting: www.povnet.org

- You might able be able to obtain the assistance of a law student. See:

  - The UBC First Nations Legal Clinic (lower mainland): http://www.law.ubc.ca/ils/clinic.html

  - The Law Students' Legal Advice Program (lower mainland): http://www.lslap.bc.ca/main/

  - UVic Law Centre (in Victoria): http://www.thelawcentre.ca

- If you are low-income you can also receive free legal advice from a lawyer who specializes in employment law and / or Aboriginal law through Access Pro Bono http://accessprobono.ca.

- Anyone can obtain low-cost legal advice as well through the Lawyer Referral Service: http://cbabc.org/For-the-Public/Lawyer-Referral-Service

Employment and Human Rights

If you have been sexually harassed or otherwise discriminated against in your employment you may have a human rights claim.

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If your employer is a federal employer (such as your Band Council or school board on reserve), your employment is governed by federal human rights law, the *Canada Human Rights Act*, R.S.C. 1985, c. H-6, available here: http://laws-lois.justice.gc.ca/eng/acts/h-6/

If your employer is a provincial employer (such as private company on reserve or child and family services on reserve), your employment is governed by provincial human rights law. Human rights law in BC is set out in the BC *Human Rights Code*, R.S.B.C. 1996, c. 210 available here: http://www.bclaws.ca/Recon/document/ID/freeside/00_96210_01

Both the *Canada Human Rights Act* and the BC *Human Rights Code* protect an employee from discrimination based on, for example, their race, religion, color age, marital status, disability, sex and sexual orientation.

Both human rights codes also prohibit sexual harassment in the work place. For more information on how sexual harassment is dealt with under the BC *Human Rights Code*, see: http://cbabc.org/For-the-Public/Dial-A-Law/Scripts/Employment-and-Social-Benefits/271

See also the *Canadian Human Rights Act*, available here: http://www.chrc-ccdp.ca/eng/content/what-harassment

You can also contact an advocate or lawyer who deals with human rights claims for more information or advice. See for example:

- The Community Legal Assistance Society: www.clasbc.net
- The BC Human Rights Coalition: www.bchrcoalition.org

Wrongful Dismissal

You may also be able to sue your employer, if you have been wrongfully dismissed from your employment. See for example:

- *Chadee v. Ross*, 1996 CanLII 7297 (Man. CA), http://canlii.ca/t/1pfkv
- *Brougham v. Carrier-Sekani Tribal Council*, 1998 CanLII 6652 (BCSC): http://canlii.ca/t/1f78s

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You can contact an employment lawyer for further advice or assistance in suing your employer. You may be able to access free or low-cost legal advice through a law student program, or programs such as Access Pro Bono and the Law Referral Services. For more information, see the Resources Section of this Tool-kit.

If you cannot afford to pay a lawyer to take your case, you may be able to find a lawyer willing to take your case on a contingency basis. A case taken on a "contingency basis" means a lawyer will only recover his or her fee if they are successful in your case.

WorkSafe BC Benefits

If you are injured at work on reserve you can make a claim for WorkSafe BC benefits. The BC *Workers Compensation Act*, R.S.B.C. 1996, c. 492, applies to all workers whether or not they are Aboriginal, status Indian or working on reserve. The Act is available here: http://www.bclaws.ca/Recon/document/ID/freeside/96492_00

Here is the WorkSafe BC website for more information http://www.worksafebc.com

Advocates and law students can assist with WorkSafeBC claims at no charge. You can also contact the Worker's Advisor's Office for assistance:
http://www.labour.gov.bc.ca/wab/

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CHAPTER 3: SOCIAL ASSISTANCE / WELFARE

Administering Authority

Aboriginal and Northern Affairs Development Canada (AANDC) formerly called Indian and Northern Affairs Canada (INAC), provides monies to Band Councils or other agencies on reserve to provide social assistance on reserve. The Band Council or agency on reserve given the funding is called the "Administering Authority."

Both AANDC and the Administering Authority follow an AANDC policy in determining when and how to provide social assistance. The policy is called the Social Development Policy and Procedure Guide, available here: http://www.fnsds.org/income-assistance/social-assistance-online-manual/

Applying for Social Assistance / Welfare

You can obtain social assistance (welfare or disability benefits) on reserve through a "Social Development Worker". The Social Development Worker works for the Administering Authority. The Administering Authority is usually the Band Council on reserve, but may also work for the Tribal Council or other organization on reserve that has the authority and funds through AANDC to administer social assistance.

If you are unsure where to apply for social assistance on reserve your Band office should be able to point you in the right direction.

Appealing a Decision About Welfare on Reserve

If you are refused social assistance or any other welfare benefits by the Social Development Worker / Administering Authority on reserve, you can request a review. You will need to ask the Social Development Worker for a "Request for Administrative Review Form" and complete it within 20 business days.

AANDC will appoint a person to make a decision on your Request for Administrative Review Form.

You will receive a decision from AANDC which will also include an appeal form to further appeal to an "Appeals Committee" if you don't agree with AANDC's decision on your Request for Administrative Review.

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If you don't agree with the outcome of the Appeals Committee decision you may have a right to appeal that decision by seeking a Judicial Review through the Federal Court of Canada.

Welfare Resources

More specific helpful information about social assistance on reserve can be found in *Social Assistance on Reserve*, by the Legal Services Society, available here: http://resources.lss.bc.ca/pdfs/pubs/socialAssistanceOnReserve.pdf

See also Chapter 16 of *Aboriginal People and the Law in BC*, by the Legal Services Society, available here: http://resources.lss.bc.ca/pdfs/pubs/Aboriginal-People-and-the-Law-in-BC-eng.pdf

You can ask an advocate for assistance with applying for social assistance on reserve or appealing a social assistance decision on reserve. See www.povnet.org and click on "Find An Advocate."

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CHAPTER 4: EDUCATION

Schooling From Kindergarten to Grade 12

Under the *Indian Act* (sections 4 and 114-122) the Canadian federal government has jurisdiction over education of "Indian" children on reserve. Therefore the federal government provides education funding to each province for "Indian children" attending (non-reserve) provincial schools and also provides funding for "Indian Band schools" on reserve.

Some Indian Band schools are registered as "independent schools." When an Indian Band School is also registered as an "independent school" it must meet provincial standards and adhere to the BC *Independent School Act*, R.S.B.C. 1996, c. 216, available here:
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96216_01

The BC Government and First Nations have also entered into an agreement, which is now recognized in the BC *First Nations Education Act*, S.B.C. 2007, c. 40, available here:
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_07040_01

The BC *First Nations Education Act* sets out that a BC education authority must consult with any First Nations Education Authority created, about any education policy changes that could impact Aboriginal students.

If you have a concern about your child's education, it is first important to consider what law applies.

- ***For schools on reserve***, the *Indian Act* applies. The *Indian Act* sets out in section 115 that the minister for AANDC can make regulations to set school standards, but to date does not have any. Instead AANDC leaves the education standards up to each individual Indian Band school.

- ***For provincial schools off reserve***, the BC *School Act*, R.S.B.C. 1996, c. 412, applies. Here is a link to the BC *School Act*:
http://www.bclaws.ca/Recon/document/ID/freeside/96412_00

- ***For independent Indian Band Schools***, the BC *Independent School Act* applies.

For more information about education on reserve, see:

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- Chapter 15 of *Aboriginal People and the Law in BC*, Legal Services Society, available here: http://resources.lss.bc.ca/pdfs/pubs/Aboriginal-People-and-the-Law-in-BC-eng.pdf

Other Resources for Children on Reserve

Aboriginal Head Start on Reserve Program: This program aims to support the well-being of children from birth to age 6 in their physical, developmental, emotional, social, cultural, and spiritual well-being. For more information about the program generally, see: http://www.hc-sc.gc.ca/fniah-spnia/famil/develop/ahsor-papar-eng.php

For more specific information about the program in BC see: http://www.ahsabc.net

Aboriginal Infant Development Programs (AIDP): This program provides support to the families of infants who are at risk of or have been diagnosed with a developmental delay. AIDP is voluntary, focused on children from birth to age 3. An AIDP worker may offer home visits, play groups, family support, and parent to parent links.

For more information about AIDP programs in BC, see: http://aidp.bc.ca/about-us/

Aboriginal Supported Child Development (ASCD): This program provides assistance in finding child care, individual planning, training and support for families and child care providers, assistance accessing other community resources, developmental screening, and assessments if requested by family. For more information, see: http://ascdp.bc.ca/about-us/

Aboriginal Home Instruction for Parents of Preschool Youngsters ("Hippy"): This program supports Aboriginal parents to prepare their 3-5 year olds for school. For more information, see: http://www.hippycanada.ca/aboriginal_hippy.php

BC Aboriginal Child Care Society also provides information and resources on education and development for Aboriginal children. See: http://www.acc-society.bc.ca/.

You can also contact your First Nation or Band to find out what services are available for children in your community.

Post-Secondary Education

There are some funding options and resources for Aboriginal peoples considering post-secondary options.

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AANDC Funding

An eligible status Indian or Inuit may qualify for financial support for post-secondary education through AANDC (formerly INAC).

To be eligible, students must be Registered Status Indians (living on or off reserve) who have lived in Canada for 12 consecutive months before they apply for funding. Students must be enrolled in a certificate, diploma, or degree program in an eligible post-secondary education institution. For funding to continue, students must maintain a satisfactory academic standing within the school.

The actual administration of AANDC funding is generally done through your local Band office or designated First Nation organization on your reserve. Bands have discretion in setting priorities for the funding.

Financial assistance may include coverage or partial coverage for expenses such as: tuition fees, books, supplies, travel support, and living expenses. For more information, see: http://www.aadnc-aandc.gc.ca/eng/1100100033679/1100100033680.

First Nations students who want to pursue post-secondary funding should start by contacting their Band office. If your Band Council says you or your child is not eligible for post-secondary funding, you can request that the Band reconsider its decision. You can also contact AANDC to make sure that the Band is acting in compliance with AANDC's program funding requirements.

If you are still unsuccessful, you can consider appealing the Band Council's decision further by requesting a Judicial Review of the Band's decision. More information on the Judicial Review appeal process is available in Chapter 12.

Provincial Funding

Students may be eligible for bursaries and scholarships through the provincial government as well. In BC, see: http://www.aved.gov.bc.ca/aboriginal/student-resources.htm

Other Resources

Other post-secondary funding resources include:

- Aboriginal Learning Links: http://www.aboriginallearning.ca

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- Aboriginal Multimedia Society, *Aboriginal Scholarship Guide*: http://www.ammsa.com/community-access/scholarships/

- BC Association Aboriginal Friendship Centres, *Bursary Programs*: http://www.bcaafc.com/images/stories/PDFs/Aboriginal_Bursary_Programs.pdf

- Students may also be eligible for bursaries or scholarships through Indspire. Indspire is a national, non-profit organization with an aim to support Canadian Aboriginal students to achieve their post-secondary education goals. For more information, see: https://indspire.ca/programs/building-brighter-futures/

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CHAPTER 5: INDIAN STATUS

Indian Status and Bill C-31

Who has Indian Status and who doesn't is based on a Eurocentric and patriarchal system which has been imposed on Aboriginal peoples through the *Indian Act*.

The *Indian Act* used to say that an Aboriginal woman who married a non-Aboriginal man lost her Indian status. However, an Aboriginal man who married a non-Aboriginal woman got to keep his status, and his non-Aboriginal wife even obtained Indian status.

As a result of this sexist law, any Aboriginal woman who married a non-Aboriginal man not only lost her status, but her children were also not eligible to obtain status. As a result, many Aboriginal women lost their Indian Status and their children never obtained Indian status.

In 1985 the *Indian Act* was changed with the passage of Bill C-31. These changes meant that some women who lost their status before 1985 were able to regain their status under a new section of the *Indian Act* called section 6(1)(c).

In spite of the changes made by Bill C-31, the *Indian Act* continued to be sexist because they still preferred descendants who traced their ancestry through the male line.

Sharon McIvor's Case

Sharon McIvor's family was impacted by this ongoing discrimination in the *Indian Act*. She lost her Indian status after marrying a non-Indian.

With the passage of Bill C-31 in 1985 Sharon McIvor regained her status under section 6(1)(c) of the *Indian Act*, but her status was not the same as others who had never lost their status. Those who had never lost their status were categorized under section 6(1)(a) of the *Indian Act*.

Status Indian parents who were registered under section 6(1)(a) of the *Indian Act* passed on the same 6(1)(a) status to their children, even if the parent married a non-status Indian.

However, in Sharon McIvor's case, she obtained status under section 6(1)(c) of the *Indian Act*. Generally, a 6(1)(c) Status Indian was not able to pass on the same status to her (or his) children, rather her children would be given lesser status, status under

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section 6(2) of the *Indian Act*. A child with only one 6(2) Status Indian parent would not eligible to obtain status.

The effect of the ongoing discrimination of Bill C-31 in Sharon McIvor's case is shown in the following chart:

Sharon McIvor	Sharon McIvor's Brother, Ernie McIvor
Sharon McIvor loses her status because she married a non-status man (before Bill C-31)	Ernie McIvor marries a non-status woman and gets to keep his full status (before Bill C-31).
Under Bill C-31 Sharon McIvor regains her status, but under section 6(1)(c) of the *Indian Act*.	Ernie McIvor maintains his same status under section 6(1)(a) of the *Indian Act*.
Sharon McIvor's son Jacob Grismer obtains Indian Status through his mother Sharon. Because Sharon has section 6(1)(c) status, Jacob obtains only partial status provided under section 6(2) of the *Indian Act*.	Ernie McIvor's child inherits section 6(1)(a) status from Ernie.
As Jacob only has status under section 6(2) of the *Indian Act*, his child is not eligible for status.	As Ernie's child has status under section 6(1)(a), that child will also be eligible to obtain status under section 6(1)(a) of the *Indian Act*.

Sharon McIvor challenged the discrimination that still existed in Bill C-31. The 1985 changes to the *Indian Act* (based on Bill C-31) were declared unconstitutional by the BC Supreme Court in 2007.

The federal government appealed this decision, and the BC Court of Appeal ultimately confirmed that the 1985 *Indian Act* was discriminatory and unconstitutional. The BC Court of Appeal directed the federal government to amend the *Indian Act* to eliminate the discriminatory impact of Bill C-31 on Aboriginal women and their descendants.

In response, the federal government created Bill C-3, which came into force on January 31, 2011. Bill C-3 again changed the law around eligibility for Indian Status. The next section discusses how to obtain Indian Status since the McIvor case and the passage of Bill C-3.

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For a further discussion of the Bill C-31 issues, see: http://briarpatchmagazine.com/articles/view/any-indian-woman-marrying-any-other-than-an-indian-shall-cease-to-be-indian

Obtaining Bill C-3 Status

Sharon McIvor's case and Bill C-3 mean that more Aboriginal peoples are eligible to obtain status. Specifically those women and their children who continued to be impacted by the sexism in the *Indian Act* and Bill C-31 will be eligible to apply.

There is a specific application for those impacted to regain status under Bill C-3, available through Aboriginal Affairs and Northern Development Canada: https://www.aadnc-aandc.gc.ca/eng/1309980394253/1309980447982

Those eligible to apply include:

- Where an applicant's grandmother lost her entitlement to registration as a Status Indian as a result of marrying anyone who was not a status Indian;
- One of the applicant's parents is / was entitled to be registered pursuant to subsection 6(2) of the *Indian Act*; and
- The applicant, or one of his/her siblings of the same parent who was entitled to registered, was born on or after September 4, 1951.

The AANDC provides general information about Bill C-3 applications, including where to send them: http://www.aadnc-aandc.gc.ca/eng/1100100032508/1100100032509

Included in this Tool-kit (in the Templates Section) is a sample letter you can use to ask AANDC about your eligibility to obtain status as a result of Sharon McIvor's case.

Obtaining Regular Indian Status

For Aboriginal peoples who do not fit the criteria used for Bill C-3, they would apply for regular status under the *Indian Act*. The regular or general application to obtain status is also available through AANDC: https://www.aadnc-aandc.gc.ca/eng/1309961406051/1309961679434

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The AANDC website provides general information about regular status: http://www.aadnc-aandc.gc.ca/eng/1100100032472/1100100032473

If you need assistance with applying for status, you may be able to obtain assistance from an advocate or an Aboriginal agency in or around your community, such as an Aboriginal Friendship Centre. Check out the Resources Section of this Tool-kit for possible resources.

Appealing a Decision Denying Indian Status

After applying for Indian Status, an applicant will receive a decision in writing from AANDC's Registrar responsible for assessing Indian Status applications.

A decision by AANDC to deny Indian status can be appealed as set out in section 14.2 of the *Indian Act.* This section provides that an applicant may submit a written appeal or protest of AANDC's decision.

A written protest or appeal of AANDC's decision must be submitted within 3 years of receiving AANDC's written decision to deny you Indian status. When the protest is received by AANDC, the Registrar responsible for assessing Indian Status applications will: "*investigate the matter and may receive such evidence on oath, on affidavit or in any other manner, whether or not admissible in a court of law, as the Registrar, in his discretion, sees fit or deems just*" (see section 14.2(6) of the *Indian Act*).

Based on its review and any further evidence, the AANDC Registrar will make a decision on the appeal / protest, and you will be notified in writing.

If you believe the AANDC Registrar's decision is wrong, you have a further right of appeal in the superior court of the province (in BC that court is called the BC Supreme Court). This right of appeal and procedure for appeal is set out in section 14.3 of the *Indian Act*. The BC Supreme Court will either uphold the Registrar's decision, change it, reverse it, or refer the matter back to AANDC's Registrar for reconsideration or further investigation.

If you are considering appealing an AANDC Registrar's decision it must be submitted within 6 months of receiving the Registrar's decision.

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CHAPTER 6: BAND MEMBERSHIP

Obtaining Band Membership

Sections 8 and 9 of the *Indian Act* require Aboriginal Affairs and Northern Development (AANDC, formerly INAC) to maintain a Band List with the name of every member who is entitled to be on a Band List. The AANDC Department responsible for Band Lists is called the Registrar.

Under section 10 of the *Indian Act*, a Band is entitled to assume control over its Band List instead of the AANDC Registrar if:

- The Band establishes written membership rules or code;
- The Band provides an appeal procedure for reviewing Band membership decision; and
- A majority of voting Band members consent to the membership rules or code.

Even if a Band assumes control over its own Band List, Canadian courts have ruled that a Band cannot deny Band membership to anyone who is entitled to be on the Band List as set out in the *Indian Act*. See for example:

- *Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 F.C. 513, http://canlii.ca/t/464p

A summary of who is entitled to be on the Band List, and can apply for Band membership is as follows:

- Registered status Indians;
- A person who was entitled to obtain Indian status but has had to re-gain status due to discriminatory provisions of the *Indian Act* (such as in Sharon McIvor's case, resulting in Bill C-3);
- A person who was entitled to be entered on the Band List before April 17, 1985;
- Children whose parents who are already Band members may be entitled to apply for Band membership, including adopted children; and
- A child with Indian status who is adopted by non-status Indian parents.

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See the leading court decisions:

- *Moon v. Campbell River Indian Band*, [1996] 3 F.C. 907, http://canlii.ca/t/4g9m, a Federal Court decision, affirmed by the Federal Court of Appeal in 1999 CanLII 820, http://canlii.ca/t/4ls9

- *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, http://canlii.ca/t/1z9x8

If any of the criteria above applies to you or your children, you or your children may be entitled to be on the Band List.

To find out if you are on the Band List the first step would be to contact AANDC or to the Band directly. You should be able to find out if AANDC still maintains your Band List or whether your Band has assumed control of the Band List.

If the Band controls the Band List, you have a right to obtain a copy of the Band Membership Rules or Code, from the Band.

An applicant's right to access the Band membership rules / code are confirmed in:

- The Canadian *Access to Information Act*, R.S.C. 1985, c. A-1, http://laws-lois.justice.gc.ca/eng/acts/a-1/; and

- *Twinn v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 1 C.N.L.R. 159 (FC).

Your right to access information on reserve or held by AANDC is discussed in Chapter 12 of this Tool-kit.

Protesting Denial of Band Membership

If AANDC controls the Band list, decisions are made by AANDC's Registrar in charge of Band Lists. Decisions by the AANDC's Registrar can be appealed as set out in section 14.2 of the *Indian Act.*

The appeal procedure set out in section 14.2 of the *Indian Act* is the same appeal procedure set out for protesting a denial of Indian status. See the section called "Appealing a Decision Denying Indian Status" in Chapter 5 of this Tool-kit.

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As noted in Chapter 5, a Registrar's decision can be appealed to the registrar within 3 years of receiving the Registrar's decision. If you still believe the Registrar's decision related to your eligibility for Band membership is wrong you can further appeal to the BC Supreme Court.

If the Band maintains the Band List and has assumed control of Band membership there will be a different procedure and you will need to follow the appeal procedure that is set out in the membership rules or code.

If after following the Band's appeal procedure you believe the Band's decision is unfair or the Band's membership rules / code were not followed by the Band, you can further appeal the decision to the Federal Court within 30 days of the Band making its decision. Your right to appeal Band decisions to the Federal Court is discussed later in Chapter 12 of this Tool-kit.

Member Distribution Benefits or Royalties

Section 61(1) of the *Indian Act* provides that "Indian" or Band monies shall only be used for the benefit of members and the Band. Section 61 also provides powers to the Canadian Governor in Council who "may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the Band."

Under section 69 of the *Indian Act* the Governor in Council also has the power to "permit a Band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order."

Once a Band Council is granted the authority (by the Governor in Council) to control, manage, and expend its revenue monies, it may use its authority to make "per capital distributions" of monies to Band members. These monies are referred to as royalties.

Although the Band Council has the authority to provide per-capita distribution monies or royalties to members, it does not necessarily have to. There are many factors a Band Council will need to consider in whether to provide distribution / royalty monies or not.

If you are a Band member you can inquire about whether you are eligible to receive per capita distribution or royalty monies by contacting your Band Council. Included in this Tool-kit (in the Templates Section) is a sample letter you can use to ask your Band Council about your eligibility for distribution or royalty monies.

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It is helpful to make your inquiry in writing with a return address so that the Band Council can contact you or send you any distribution or royalty monies you may be entitled to.

If your Band Council is not providing distribution or royalty monies to you, or all other Band members, you can ask for the reasons why. If you have concerns about the way monies are being spent or distributed or believe the Band Council's decision is wrong or unfair you may be able to appeal the decision.

An advocate, law student or lawyer may be able to help you with seeking Band distribution monies, royalties, or benefits. See the Resources Section of this Tool-kit for more information on legal help available.

More information on appealing a Band Council's decision is provided in Chapter 12 of this Tool-kit in the section called "How to Appeal a Band Council Decision."

For further information, see also:

- *Band Councils, Band Moneys and Fiduciary Duties*, John Rich and Nathan Hume (2011), http://www.ratcliff.com/sites/default/files/publications/00513728.PDF

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CHAPTER 7: RESERVE LAND AND HOUSING ISSUES ON RESERVE

Under section 18 of the *Indian Act* the government maintains title of reserve lands "for the use and benefit of the respective Bands."

Certificates of Possession

The closest that an individual member can come to ownership on reserve land is by holding a Certificate of Possession (CP). Certificates of Possession were originally issued by the Canadian government to Indians with a purpose of assimilating Aboriginal peoples by encouraging private land ownership. See for example this link from Indigenous Foundations: http://indigenousfoundations.arts.ubc.ca/?id=8356

Under section 20(2) of the current *Indian Act* the Minister for AANDC "may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein."

Previously, under the *Indian Act* the government also issued "Location Tickets." Location Tickets are still recognized in Canadian law. Any person who still holds a Location Ticket is deemed to also hold a CP.

An individual cannot legally possess land on reserve unless s/he has a CP. A CP provides a status Indian and Band member with both (1) the right to exclusive possession and use of a parcel of reserve land and (2) proof of legal possession. A CP is similar to off reserve home ownership because a CP holder has a right to occupy the CP land without interference.

However, a CP is more limited than home ownership because actual title of the CP land is held by the government. Under the *Indian Act*, CP holders need to seek approval from AANDC to develop their CP parcel for their own personal benefit. A CP holder also needs to seek the consent of AANDC to sell their CP rights to the Band or another Band member. A CP holder cannot sell their CP to a non-Band member.

Also, if a CP holder is no longer eligible to reside on reserve they are required to transfer their CP to another Band member or the Band within 6 months. If the CP holder does not transfer their CP within 6 months, the CP will automatically be transferred to the Band. In the event of an automatic transfer of CP land to the Band,

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the Band is required to compensate the previous CP holder for any improvements made to the land.

Some Bands have chosen over the years to not approve CPs. Instead, Bands have maintained control over land and housing and allocated land and housing under their own policies.

Given the paternalistic policies of the government, Location Tickets and CPs were generally issued to men. In a marriage or family breakdown this would provide men with greater rights than women to possess the family home. This issue is discussed in greater detail later in this chapter and in Chapter 9 on Family Law Issues.

Certificates of Occupation

Section 20(5) of the *Indian Act* allows for individual occupation of reserve land for a period of 2 years, which can be extended to 4 years. Approval from Band Council is needed to obtain a Certificate of Occupation. AANDC can make the final determination about whether to grant an extension.

Under section 81 of the *Indian Act* a Band Council may make bylaws related to housing to regulate the residence of Band members and other persons on the reserve. Band Council bylaws may also provide for the rights of spouses or common law partners and children who reside with members of the Band on the reserve with respect to any matter in relation to which the Band Council may make by-laws in respect of members of the Band.

Band Councils also have the right to obtain overall authority for land and housing management under section 60 of the *Indian Act* or under the *First Nations Land Management Act*, S.C. 1999, c. 24, http://laws-lois.justice.gc.ca/eng/acts/F-11.8/

The *First Nations Land Management Act* is discussed in more detail below.

The Land Claim Process in BC

The *First Nations Land Management Act* permits First Nations to opt out of the land management sections of the *Indian Act* and adopt their own land codes. First Nations or Bands are therefore able to exercise authority for the management of reserve lands. Such codes must include provisions to develop rules and procedures for matrimonial property.

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According to AANDC, as of July 2012, 36 First Nations are operating under their own land codes, twenty of which have enacted laws to address matrimonial rights and interests. See: http://www.aadnc-aandc.gc.ca/eng/1327165048269/1327165134401

Matrimonial property is discussed in Chapter 9 of this Tool-kit.

Housing Conditions on Reserve

It is well-documented that lack of safe and adequate housing remains a serious issue on reserves. See, for example, the following stories and research on overcrowding, mold, leaks, inadequate insulation, and condemned housing on reserves:

- http://www.cbc.ca/news/canada/first-nations-housing-in-dire-need-of-overhaul-1.981227
- http://rabble.ca/news/2012/03/reservations-about-water-canadas-reserves
- http://vancouver.mediacoop.ca/olympics/best-place-earth-not-indigenous-peoples/5989

AANDC recently conducted an evaluation of its On-Reserve Housing Support (available here: http://www.aadnc-aandc.gc.ca/eng/1359662244956/1359662697579) and concluded that it is not meeting the demand for housing on reserve and that greater access to adequate housing on reserve will be needed in the future.

The AANDC evaluation confirms what First Nations already know, and many have called on the government to provide funding to keep pace with on reserve housing needs.

If you have concerns about your housing conditions on reserve such as over-crowding, mold, or condemned housing, there are some housing programs that may be of assistance in your circumstances.

Canada Mortgage Housing Corporation (CMHC)

CMHC is the federal government's national housing program. CMHC provides subsidies and loans to Bands / First Nations in order to build housing to be rented to Band members. A Band Council first must apply for the loan or subsidy, and certain conditions will apply.

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The First Nation will generally be fully responsible to repay the loan, for the maintenance of the property, and for housing. Usually the Band Council will seek rent payments from Band members residing in housing developed with CMHC monies. The Band will generally retain title and right to possession of the housing until any outstanding loans are paid or other obligations to CMHC met.

For more information about CMHC loans and subsidies for reserve housing, see: http://www.cmhc-schl.gc.ca/en/ab/onre/index.cfm

Where a Band Council defaults on loans made by CMHC, AANDC can reclaim or withhold other monies meant to be allocated to the Band, including program monies meant for all members.

In 2008, AANDC and CMHC also established the First Nations Market Housing Fund meant to assist individuals on reserve to obtain loans to buy, build, or renovate houses on reserve. For more information about this Fund and how to qualify, see: http://www.fnmhf.ca/english/about/index.html

It is important to note that while there are federal housing programs for housing on reserve, First Nations across Canada have made clear that these funds are not adequate. See for example: http://www.theglobeandmail.com/news/politics/funding-formula-for-native-housing-will-be-fairly-unreliable-chiefs/article4085436/

For the Attawapiskat First Nation, additional federal funding for housing was provided only after Attawapiskat Chief Theresa Spence declared a State of Emergency on reserve and embarked on a hunger strike. This led to media and public attention on the realities of housing conditions and needs on reserve. See for example: http://www.cbc.ca/news/canada/sudbury/attawapiskat-housing-progress-made-more-work-needed-1.1412786

If you are a tenant with concerns about the condition of the housing you rent on reserve, you may have ways to address your concerns through tenancy law. Legal rights related to tenancy on reserve are discussed next.

Legal Rights of Landlords and Renters on Reserve

When there are landlord and tenant issues off reserve provincial law applies. This is because section 92(13) of the Canadian *Constitution Act*, 1867, sets out that the provinces have jurisdiction over "property and civil rights." The *Constitution Act* can be found here: http://www.canlii.org/en/ca/const/const1867.html

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In BC, the provincial law that deals with landlords and renters is:

- The BC *Residential Tenancy Act*, S.B.C. 2002, c. 78: http://www.bclaws.ca/Recon/document/ID/freeside/00_02078_01; and

- The *Manufactured Home Park Tenancy Act*, S.B.C. 2002, c. 77: http://www.bclaws.ca/Recon/document/ID/freeside/00_03075_01

The BC *Residential Tenancy Act* applies to most tenancies off reserve (such as tenancies in houses, duplexes, condos, and apartments. The *Manufactured Home Park Tenancy Act* applies to manufactured home park tenancies (also known as trailer parks or mobile home parks).

The BC Residential Tenancy Branch has the authority to hear and decide on all tenancy issues that occur off reserve. See: http://www.rto.gov.bc.ca for more info about the Residential Tenancy Branch. Even if a tenant or landlord is Aboriginal, the provincial law will apply to housing off reserve.

On the other hand, section 91(24) of the Canadian *Constitution Act* sets out that "Indians and lands reserved for the Indians" fall under federal jurisdiction. Therefore housing on reserve is under federal jurisdiction, and the provincial laws, such as the BC *Residential Tenancy Act* do not apply to housing on reserve.

This has been a confusing area of law because in the past the BC Residential Tenancy Branch accepted some disputes related to reserve lands, such as monetary claims involving tenancies on reserve. However, the BC Court of Appeal recently ruled that the Residential Tenancy Branch has no jurisdiction regarding any tenancy issues on reserve. See:

- *Sechelt Indian Band v. British Columbia*, 2013 BCCA 262, http://canlii.ca/t/fxscv; and

- *Residential Tenancy Branch Policy Guideline: Jurisdiction,* http://www.rto.gov.bc.ca/documents/GL27.pdf

The one exception to the *Sechelt* case is where the landlord on reserve is not Aboriginal. In that case, there may be limited jurisdiction for the Residential Tenancy Branch to become involved.

It is also important to note that some First Nations in BC have made treaty agreements which mean their lands are no longer categorized as "reserve lands." For example, the Nisga'a and Tsawwassen lands are now categorized as "Treaty Settlement Lands" and

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are no longer reserve lands. In Treaty Settlement Lands, the *Residential Tenancy Act* and Residential Tenancy Branch do apply.

For more information about tenancy on Reserve and Treaty Settlement Lands, see this link by the Tenant's Resource Advisory Centre (TRAC): http://www.tenants.bc.ca/main/?aboriginalreserveland

If You Are a Landlord or Renter on Reserve and a Dispute Arises

There are a couple things to consider if you are a landlord or renter on reserve and a dispute arises:

- Is there a written agreement / contract regarding the tenancy?
- Does the Band have any tenancy policies?

Both the written agreement and Band policies can provide guidelines of how tenancy issues can be dealt with. For example, either may set out how much notice a tenant or landlord should provide to end the tenancy.

Contact your Band Council office to see if your First Nation has policies for tenancies on reserve. If the Band Council provides policies, you can ask the Band Council or delegated Band Committee / Tribunal to make a decision on the dispute.

The Band Council or anyone it delegates to deal with a tenancy dispute has a duty to follow principles of administrative fairness and natural justice. If the Band Council or Band Tribunal / Committee ultimately makes a decision that you feel is unfair, you have the right to appeal that decision to the Federal Court within 30 days.

If your First Nation does not have any policies dealing with tenancy issues on reserve, Canadian court decisions or the common law would apply by default.

If you have a tenancy dispute on reserve that can't be resolved and there are no Band policies setting out a dispute process on reserve, you would have the right to bring the matter to the BC Supreme Court to make a decision.

If you are concerned about your legal rights regarding tenancy on reserve here are a couple of resources to consult in BC:

- The First Nations Legal Clinic (now known as the Indigenous Community Legal Clinic): http://www.law.ubc.ca/ils/clinic.html

- The Tenant's Resource Advisory Centre: http://www.tenants.bc.ca/main/

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CHAPTER 8: WILLS AND ESTATES ISSUES ON RESERVE

In addition to the grief of losing a spouse or family member, a Band member is often burdened with the complicated task of dealing with the home and assets of their deceased loved one.

This is a particularly difficult issue for women on reserve because of the patriarchal way housing on reserve has been allocated in the past.

For surviving spouses on reserve, provincial laws including the BC *Family Law Act* do not apply. Aboriginal women have long expressed concern about the unfairness that results when their spouse has died and they are left with no rights to remain in the family home, and no legal interest in the property.

Concerns arise for example when a woman is not a status Indian (such as someone who may have lost her status), or who is not a Band member.

The following sections explain what happens to surviving spouses both on and off reserve when their deceased spouse left a will and when they did not.

Status Indians On Reserve and Wills

Property or interest in land forms part of the estate of a deceased person. In the case of a Status Indian who ordinarily resides on reserve or Crown lands, the applicable law is the *Indian Act* and the *Indian Estate Regulations* (see section 45 of the *Indian Act*). AANDC must approve a will before the will actually takes legal effect.

It is also important to note that under the *Indian Act* and the *Indian Estate Regulations* the Minister of AANDC has the authority to declare a will void in whole or in part in some circumstances (see Section 46 of the *Indian Act*).

AANDC can declare a will void for example where:

- The will-maker did not have capacity;
- The will-maker made the will under duress;
- The terms of the will impose hardship on people the will-maker had a responsibility to provide for (for example a surviving spouse or dependent children);

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- The will disposes of Indian reserve land in a manner contrary to the interest of the Band or the *Indian Act*;

- The terms of the will are "so vague, uncertain or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out" in accordance with *Indian Act* (see section 46(1)(e) of the *Indian Act*); or

- The terms of the will are against the public interest.

A helpful resource to consult on wills and estates law on reserve is:

- *A Guide to Wills and Estates on Reserve*, Legal Services Society, http://resources.lss.bc.ca/pdfs/pubs/A-Guide-to-Wills-and-Estates-on-Reserve-eng.pdf

It is also important to note that the newly enacted *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20, affects wills and estates law on reserve. The *Family Homes on Reserves and Matrimonial Interests or Rights Act* can be found here: http://laws-lois.justice.gc.ca/eng/acts/F-1.2/page-13.html#h-18

The distribution of an estate under *the Indian Act* (discussed above) may not apply if the *Family Homes on Reserves and Matrimonial Interests or Rights Act* is applicable. The *Family Homes on Reserves and Matrimonial Interests or Rights Act* is discussed in more detail later in this chapter.

Status Indians On Reserve Without a Will

If a status Indian on reserve dies without a will (or the will has been deemed invalid), other sections of the *Indian Act* and the *Indian Estates Regulations* will apply (See sections 48-50 of the *Indian Act*).

Section 48 of the *Indian Act* sets out how an estate will be distributed when there is no will as follows:

- The first $75,000 of the estate is inherited by a surviving spouse if there is one.

- Any amount above $75,000 is divided among the surviving spouse and the deceased's children. For example, if the estate is worth $150,000 and there is a surviving spouse and two children, the spouse receives $100,000 and each child gets $25,000.

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- If there are children but no surviving spouse, the estate is divided equally among the children.

- If there is no surviving spouse or children, the estate is distributed equally among the surviving parents of the deceased.

- If there are no surviving parents, children, or spouse, the estate is distributed among the siblings (brothers and sisters) of the deceased. Where a sibling is deceased, his or her children (the deceased's nieces or nephews) may inherit their parent's share of the deceased's estate.

- If the deceased has no surviving spouse, children, parents, siblings or nieces / nephews, the deceased's estate will be held by AANDC for the benefit of the Band, and the rest of the estate is distributed among the heirs. Only a close relative may inherit on reserve when there is no will (see section 48(8) of the *Indian Act*).

However it is important to note sections 48-50 of the *Indian Act* (discussed above) may not apply if the *Family Homes on Reserves and Matrimonial Interests or Rights Act* is applicable. The *Family Homes on Reserves and Matrimonial Interests or Rights Act* is discussed further below.

The Surviving Spouse and the Estate of a Status Indian On Reserve

Whether or not there is a will, AANDC has jurisdiction over the estate of a status Indian who lived on reserve (or crown land).

If a family member dies on reserve, the first step is to contact the Decedent Estates Office at AANDC. The mandate of this office to assist with the management of Indian Estates on reserve. For more information about this office, see: http://www.aadnc-aandc.gc.ca/eng/1100100032519/1100100032520

The newly enacted federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* has also impacted wills and estates law on reserve. The *Act* provides that:

- A surviving spouse or common law partner of a status Indian on reserve is entitled to one-half of the "matrimonial interests or rights" on the death of their spouse or common law partner (under section 34).

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- Surviving spouses who are non-members of the First Nation are also entitled to one-half of the "matrimonial interests or rights" on the death of their spouse or common law partner (also under section 34).

- When a spouse or common law partner dies, a surviving spouse (who does not hold an interest or right in or to the family home) may occupy that home for a period of 180 days after the day on which the death occurs, whether or not the survivor is a First Nation member or an Indian (under section 14)

- The surviving spouse may also apply to extend the 180-period of exclusive occupation of the matrimonial home.

A court may decide to vary the amount owed to the survivor if the spouses had previously made agreements upon relationship break down, a court order resolved issues related to relationship break down, or if the amount to be paid to the survivor would be "unconscionable, having regard to, among other things, the fact that any children of the deceased individual would not be adequately provided for" (see section 46 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*).

Section 37 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* also provides that if a surviving spouse obtains an interest or right under the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* the survivor may not also benefit from the deceased individual's will or sections 48 to 50.1 of the *Indian Act.*

It is also important to note that the *Family Homes on Reserves and Matrimonial Interests or Rights Act* does not apply to First Nations that have established a Land Code under the *First Nations Land Management Act*.

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* addresses some gaps in both wills and estates law and family law on reserve. However it has also been criticized because of the government's inadequate consultation with Aboriginal groups and dismissal of concerns and issues raised by Aboriginal women and groups. There are also concerns that the *Act* may interfere with self-government rights.

For more general information about the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, see:

- *Frequently Asked Questions: Family Homes on Reserves and Matrimonial Interests or Rights Act*, AADNC (2013): http://www.aadnc-aandc.gc.ca/eng/1371589548934/1371589621100

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For criticisms of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, see:

- http://rabble.ca/blogs/bloggers/pamela-palmater/2012/11/brief-overview-bill-s-2-family-homes-reserve-act

- http://www.theglobeandmail.com/news/politics/new-law-sets-out-rules-for-divorces-on-reserves/article12475285/

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* also affects family law issues on reserve and is discussed further in Chapter 9: Family Law Issues.

When the Surviving Spouse Is not Status Indian and / or a Band Member

A beneficiary who is not status Indian or is not a Band member is not entitled to inherit land on reserve. If a will-maker leaves land to a person without Indian status or Band membership, AANDC must put the land up for sale, with the sale open only to Band members. The money from the sale will go to the beneficiary.

However, if a will-maker wants to prevent land from being sold, there are other options. The will-maker can, for example, lease the home and lands to the surviving spouse to ensure their spouse can continue to live there after the will-maker's death. For more information about wills on reserve and options available, see: http://www.afoabc.org/downloads/writing-your-own-will-kit.pdf

Also, as discussed in the previous section, surviving spouses and common law partners who are non-members of the Band also have new rights under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, including:

- Entitlement to apply for one-half of the "matrimonial interests or rights" on the death of their spouse or common law partner;

- An automatic right to occupy the family home for a minimum of 180 days after the death of their spouse or common law partner; and

- Entitlement to apply for exclusive occupation of the matrimonial home for longer than the 180-day period.

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Making a Will

There are some helpful self-help resources available on making a will on reserve. See for example:

- http://www.afoabc.org/downloads/writing-your-own-will-kit.pdf
- http://www.aadnc-aandc.gc.ca/eng/1100100025002/1100100025004
- http://resources.lss.bc.ca/pdfs/pubs/A-Guide-to-Wills-and-Estates-on-Reserve-eng.pdf

If you rely on self-help resources to draft a will, it is also a good idea to have a lawyer review your will to ensure it is valid, properly expresses your intentions, and complies with the law.

For example, a will that is valid under the *Indian Act* may not be valid under BC provincial law since some provisions may differ. This means that even a status Indian ordinarily resident on reserve should make sure a will meets the requirements set out in BC law as well as requirements of the *Indian Act*. Even if you think that a law doesn't apply to you now, it might apply later if you move off reserve. Also, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* has created new and important changes to wills and estates law on reserve.

Challenging the Will / Estate Distribution of a Status Indian On Reserve

If AANDC declares a will invalid, a person can appeal AANDC'S decision to the Federal Court (see section 47 of the *Indian Act*). The appeal will need to be made within 2 months of AANDC declaring the will invalid and the value of the estate must be at least $500.

Anyone concerned about the way a will is being dealt with either by the Band Council, the Executor, or AANDC may also want to seek legal advice from a lawyer knowledgeable about this area of the law.

One resource available at no cost is the Indigenous Community Legal Clinic (formerly known as the First Nations Legal Clinic). More information about this Vancouver based clinic is available here:
http://www.lss.bc.ca/assets/aboriginal/UBCFirstNationsLegalClinic.pdf

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See also this list of Aboriginal law resources, by region, compiled by the Legal Services Society: http://www.lss.bc.ca/aboriginal/regions.php and the Resources Section of this Tool-Kit.

Challenge a Will / Estate Distribution Off Reserve

Provincial laws will apply when the will-maker is not Aboriginal, is not a Status-Indian or is a Status-Indian living off reserve. In this case, the BC *Wills Act*, R.S.B.C. 1996, c. 489, applies if the deceased person died before March 31, 2014. The *Wills Act* is available here: http://www.bclaws.ca/Recon/document/ID/freeside/00_96489_01

If there is no will and the deceased person was living off reserve then the *Estate Administration Act*, R.S.B.C. 1996, c. 122, will apply. The *Estate Administration Act* is available here: http://www.bclaws.ca/Recon/document/ID/freeside/00_96122_01

In general the *Estate Administration Act* sets out that a surviving spouse and surviving children (natural and adopted) will share the estate. Where there is no surviving spouse or children the *Estate Administration Act* will instead distribute the estate to other next-of-kin.

For more information about wills and estates off reserve, see:
http://www.ag.gov.bc.ca/courts/other/wills_estates.htm

It is also important to note that both the BC *Wills Act* and the *Estate Administration Act* will be replaced in March 2014 by the BC *Wills, Estates and Succession Act* [Bill 4 – 2009], which is available here: http://www.leg.bc.ca/39th1st/3rd_read/gov04-3.htm. Some aspects of the old law will still apply if the person died before March 31, 2014.

If a will-maker lives off reserve and you are concerned about your inheritance rights under the will, you may be able to challenge the will.

Under the BC *Wills Variation Act*, R.S.B.C. 1996, c. 490, people are presumed to have a legal and moral duty to provide for members of their immediate family. The *Wills Variation Act* is available here:
http://www.bclaws.ca/Recon/document/ID/freeside/00_96490_01

Under the *Wills Variation Act* an off reserve surviving spouse and any children of the deceased would be able to challenge a will if any of them had not been adequately provided for in the will. The surviving spouse or children could ask the court to be included in the will and to receive a share or a bigger share of the deceased person's estate.

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A court may also consider the surviving spouse's right to division of assets in family law in determining what is fair and equitable. The court will consider the will-maker's obligations to provide spousal support and child support and whether that support should continue after his or her death.

If you have a concern about a will or estate distribution off reserve it would be helpful to seek legal advice from a wills and estates lawyer, preferably one with family law experience as well. See the Resources Section of this Tool-kit for legal resources available in BC.

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CHAPTER 9: FAMILY LAW ISSUES

Family Law in BC

Family law can be a confusing area of law as there are two different laws in BC that apply to family law problems. The laws are:

- The BC *Family Law Act*, S.B.C. 2011, c. 25 (which came into force on March 18, 2013), available here: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_11025_01; and

- The federal *Divorce Act* R.S.C., 1985 c. 3, available here: http://laws.justice.gc.ca/eng/acts/d-3.4/

Family law can be even more confusing for Aboriginal peoples who face other unique issues such as dealing with the *Indian Act*, property on reserve, and customary laws and traditions.

It can be helpful to keep in mind that, generally, family law will apply the same way for Aboriginal and non-Aboriginal peoples.

The *Family Law Act* and the *Divorce Act* each deal with different issues, although they share a lot of common issues. For some spouses both laws will apply; while for others, only one will apply.

There are also some specific issues that come up for Aboriginal women, especially Aboriginal women on reserve.

This chapter will go through the family law generally, highlighting issues that are specific to Aboriginal women and their families on reserve.

Customary Marriage

Marriage of Aboriginal peoples by traditional custom has been recognized as legal / valid in a number of Canadian court cases. See for example:

- *Manychief v. Poffenroth*, 1994 CanLII 9130 (ABQB), http://canlii.ca/t/2bc8v; and

- *Baker v. Saskatchewan Government Insurance*, [1998] S.J. No. 376 (Q.B.), http://canlii.ca/t/1ntfk

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In order for Canadian courts to recognize a customary marriage as legal / valid certain criteria must be present:

- The marriage must be voluntary;
- The marriage must be intended to last for life;
- The marriage must be monogamous (polygamous marriage is not recognized in Canada); and
- The marriage must be viewed as valid in the eyes of the community where the custom originated.

Couples that marry (either by Canadian law or by custom) become "spouses" in family law. Spouses have certain rights and responsibilities in Canadian and BC law, which will be discussed below.

Who Is a Spouse?

Under the BC *Family Law Act* a spouse is a person who:

- Is married to another person (either by Canadian law or by custom as described above);
- Has lived in a **marriage-like relationship for at least 2 years** (also sometimes called "common law marriage"); or
- For the purpose of **spousal support** (but not property division), has lived in a marriage-like relationship for less than 2 years but has at least 1 child together.

BC and Canadian law recognizes same-sex (lesbian and gay) marriages and unmarried spousal relationships the same as opposite-sex marriages and unmarried spousal relationships.

Unmarried (Common Law) Spouses in Family Law

Under the BC *Family Law Act* unmarried spouses or common law spouses (who have lived in marriage-like relationship for 2 years or more) can seek spousal support and division of property and debt, the same as married spouses.

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Unmarried spouses who have lived together for less than 2 years but have a child together will also be able to now seek spousal support.

Unmarried (Common Law) Spouses, Government, Welfare, and Housing

Also, it is important to keep in mind that some federal and provincial government bodies will consider people to be spouses if they have lived together (in a marriage-like relationship) for 1 year or more. This is the case, for example with Canadian Revenue Agency (for taxation purposes) and the Canada Pension Plan.

For people on income assistance (welfare / disability benefits) the BC Ministry of Social Development and Social Innovation (the welfare ministry) will generally decide people are spouses within 3 months of together in marriage-like relationship. Income assistance / welfare benefits will generally be reduced when 2 people begin to live together in a common law or marriage-like relationship for 3 months.

Sometimes the welfare ministry will even decide you are in a common law relationship or have a spouse based on information or reports, such as Facebook information, that indicates you are living with someone.

Sometimes a housing provider will also decide that you have entered into a spousal relationship. This may happen if, for example, you are dating someone who visits you regularly or spends the night at your home some of the time. Having a partner or spouse in your home may impact your tenancy.

If you have concerns that you have been wrongly determined to have a spouse by the federal government, provincial government or a housing provider, it can be helpful to seek the assistance of an advocate. To find an advocate near you, see: http://www.povnet.org/find-an-advocate/bc

Separation

If one or both spouses decide they want to separate there is no requirement in Canadian law for either or both people to go to court or sign any legal papers to make the separation official.

Spouses automatically become separated when they begin living separate and apart, with an intention to end the marriage-like relationship. Separation occurs, for example,

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when one or both of the spouses decide they want to end the marriage or marriage-like (common law) relationship, and conveys this to the other spouse.

If married or unmarried spouses are physically separated for time periods only because of work, school, or family obligations they will not be considered separated for that reason alone. The spouses must also intend to end their marriage or marriage-like (common law) relationship.

In some cases, spouses may even be considered separated if one or both of them chooses to end the marriage or marriage-like relationship but they still live together in the same home. This may happen if one of the spouses cannot find another place to live right away, but the spouses start sleeping in separate bedrooms and start leading separate lives.

When a spousal relationship starts and when it ends are important dates because these dates will help determine:

- What property will be divided upon separation;
- Issues around spousal support (see below for more information on spousal support); and
- When married spouses can obtain a divorce.

For more information, see:
http://wiki.clicklaw.bc.ca/index.php/Separation_%26_Divorce

Divorce

Divorce in Canada is governed by the federal *Divorce Act.* In BC, married spouses can obtain a divorce at the BC Supreme Court by filling out the necessary court forms. Either spouse can file for a divorce any time after separation, but the court will only grant a divorce if one spouse can prove that the marriage has broken down as a result of separation for at least a year.

Other grounds for divorce include adultery or mental and physical cruelty, but it is easiest to obtain a divorce by simply showing the court that you and your spouse have lived separate and apart for a year.

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Unmarried spouses do not need to obtain a divorce. However, the date unmarried spouses have separated will be important in determining spousal support, if appropriate, and how their property and debt will be divided in family law.

Some Aboriginal communities recognize customary divorce. A customary divorce ceremony may include returning to the fireplace or tent where you were married, or returning to your community, and announcing your intention to be divorced. See as one example: http://moniyawlinguist.wordpress.com/2012/02/07/divorce-and-domestic-violence-in-older-times-mandelbaum-and-dions-accounts/

See also:

- *Conquest by Law*, (1994) Christie Jefferson, http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/cnqst-lw/index-eng.aspx

Unlike Aboriginal customary marriage, Canadian law does not recognize customary divorce. However, if you have obtained a customary divorce, it may have an impact on obtaining a Canadian divorce. For example a customary divorce may form part of your evidence on the date you separated from your spouse.

If you are considering divorce or considering re-marriage it would be a good idea to obtain legal advice from a lawyer familiar with both family law and Aboriginal law.

The United States, unlike Canada, does recognize customary Aboriginal divorce. See:

- *Divorce and Real Property on American Indian Reservations: Lessons for First Nations and Canada*, Joseph Thomas Flies Away, Carrie Garrow, and Miriam Jorgensen (2005), http://journals.msvu.ca/index.php/atlantis/article/viewFile/1053/1010

Spousal Support On and Off Reserve

Spousal support is financial support paid by one spouse to the other spouse after separation or divorce. Spousal support is not provided automatically. A spouse seeking spousal support needs to show why they are entitled to spousal support.

If spouses were married, spousal support can be ordered by the court under either the federal *Divorce Act* or the BC *Family Law Act.* For unmarried spouses a claim for spousal support is made under the BC *Family Law Act* because the *Divorce Act* only applies to married spouses.

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Spousal support amounts are either agreed on by the spouses themselves or decided by a court. Whether spouses are negotiating spousal support or are making an application in court for spousal support, there are several factors to be considered to determine whether spousal support is appropriate in the circumstances. These factors include:

- How long the spouses have lived together;
- Whether one spouse suffered any economic disadvantages because of the relationship or relationship breakdown;
- Whether one spouse gained economic advantages because of the relationship or relationship breakdown; and
- Whether one spouse is in a financial hardship and needs support because of the breakdown of the relationship.

Spousal support may be provided, for example, to a spouse who stayed at home raising the children, enabling the other spouse to go to school and / or earn full-time employment income outside the home.

The *Spousal Support Advisory Guidelines* can be a helpful reference tool to assist in determining the amount of spousal support that may be appropriate in your situation. The *Spousal Support Advisory Guidelines* can be found here: http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/pdf/SSAG_eng.pdf

The website www.mysupportcalculator.ca can also help you with calculating estimate spousal support amounts.

Any spousal support amount you determine using the *Spousal Support Advisory Guidelines* or www.mysupportcalculator.ca is meant to be a general guideline only. Eligibility for spousal support and spousal support amounts depend on various factors.

A lawyer can provide you with more specific advice on spousal support. You may for example be able to obtain free legal advice through Family Duty Counsel in area. See: http://www.familylaw.lss.bc.ca/help/who_FamilyDutyCounsel.php

If Family Duty Counsel is not available in our area you may be able to call the Legal Services Society Family Law Line to obtain legal advice over the phone. See: http://www.lss.bc.ca/legal_aid/FamilyLawLINE.php

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The Resources section of this Tool-kit also provides more info about legal resources available in BC.

Time Limit for Spousal Support

It is very important to be aware that under the BC *Family Law Act*, spousal support must be applied for within **2 years** of:

- Married spouses getting a divorce;
- Married spouses getting an annulment; or
- The date of separation of unmarried spouses.

There is no time limit to seek spousal support under the federal *Divorce Act,* if it applies to your family law situation.

Spousal Support on Reserve

When the person paying spousal support (the "payor") is a status Indian living and working on reserve, they do not have to pay provincial or federal income taxes. In this situation the courts have the discretion to make an upward adjustment of the payor's income. This adjustment is called "grossing up" income. For this reason, it's very important to know for sure whether the payor gets non-taxable income.

If you have difficulty collecting spousal support, you can contact the Family Maintenance Enforcement Program (FMEP) to get assistance with getting spousal support payments.

For more information about FMEP, see: http://www.fmep.gov.bc.ca.

Spouses and Property Division On and Off Reserve

In general, both married and unmarried spouses will share equally all of the family property and all of the family debt.

Family property includes: any property or assets acquired by one or both spouses after the spouses begin living together. Family property would include for example: any land,

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buildings, homes, cars, furniture, businesses, Register Savings Plans, that one or both spouses acquired when they started living together.

Family property is shared equally between spouses unless the spouses agree to something different or a court decides it would be significantly unfair to one party if the family property is divided equally (for example if the spouses agree that one spouse will keep the car because she bought it with her own employment income and maintained it).

Family debt includes: debt that accrues during the spousal relationship that (1) is still owed on the date the spouses separate or (2) debt that is incurred after separation to maintain a family property.

Family debt will also be shared equally unless the spouses agree otherwise or a court decides it would be significantly unfair to one party if the family debt is divided equally (for example if the debt was incurred because one spouse had a serious gambling problem).

Property that is not family property (and therefore will not be divided between the spouses) is called excluded property.

Excluded property is:

- Property that a spouse acquired before the date the spouses starting living together;
- Inheritances; and
- Some court awards and insurance settlements.

A spouse does not have to share excluded property with their spouse upon separation. However, a spouse will usually be required to share any growth in the value of excluded property during the relationship.

For Aboriginal women on reserve, some of the laws / rules around property division will be different. Property division under the BC *Family Law Act* and the federal *Divorce Act* is affected by the *Indian Act* and special considerations around land and property on reserve.

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Property Division on Reserve

The *Indian Act* does not specifically address the issue of family property. Also, laws that conflict with provisions of the *Indian Act* are not applicable to reserves. Therefore, provincial laws relating to the occupation, division, or sale of real property, such as the *Family Law Act*, are not applicable on reserves because they fall within the exclusive federal jurisdiction over "lands reserved for Indians."

In the leading case of *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, http://canlii.ca/t/1ftsn, the Supreme Court of Canada held that provincial family laws could not apply to grant a wife a half interest in the properties her husband held with Certificates of Possession under section 20 of the *Indian Act*. Provincial legislation, therefore, cannot be used to transfer Certificates of Possession.

However, the BC Supreme Court does have jurisdiction under provincial family legislation, such as the BC *Family Law Act* to order compensation based on a division of personal property and the value of the interest in land on the breakdown of a marriage.

Compensation and Valuation of Property on Reserve

As explained by the Supreme Court of Canada in the *Derrickson* case, if the property cannot be divided because the interest in land is on a reserve, a court can award compensation for the purpose of adjusting the division of family assets. Courts can take the value of property situated on reserve into account when calculating the assets held by each spouse.

Valuation of real property on reserves, however, can be difficult, as there is no consistent formula used to determine the value of matrimonial homes on reserves. Since the market for the sale of the interest in land is normally quite limited, it can be difficult to appraise the market value of the property. Courts have used several different methods for calculating the value of real property on reserve.

For example, in the case of *George v. George*, 1996 CanLII 2766, http://canlii.ca/t/1f096, the BC Court of Appeal ordered a husband to pay his former wife compensation in the form of half the rental value of the property.

Moreover, while some courts have attempted to place a value on the interest in land, other courts have refused to make such findings given the lack of evidence and the impractically of forcing a spouse to sell their interest in land when there is no market to

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purchase such an interest. The results of compensation orders, therefore, are difficult to predict.

Enforcement of an Order Related to Property on Reserve

Even if an order for compensation is awarded, enforcement on a reserve can be very difficult. The *Indian Act* in particular states that: "reserve lands are not subject to seizure under legal process."

Therefore, while a court can order a party to pay cash compensation for the value of real property on a reserve, the court cannot force a sale or partition to enforce the award. Provincial laws are inapplicable when they relate to enforcement of an order of compensation. If the payor spouse has no other assets, the recipient spouse has no other means of enforcing the order for compensation.

Furthermore, there is no remedy to protect against a spouse transferring his / her interest in the property to the Band or another Band member. In such a case, the other spouse has no remedy to regain possession of the house and if the spouse is not a Band member they may have to leave the reserve because they do not qualify for housing.

Other Possible Remedies Related to Property Division on Reserve

Other potential court remedies available to spouses include claims of "unjust enrichment" against spouses and claims of a "breach of fiduciary duty" against the Band Council.

If a spouse is interested in making this type of claim it is recommended that they obtain legal representation or at least get legal advice from a lawyer before proceeding. A lawyer can assist the spouse with determining what information needs to be presented in court, and what court forms are needed. The lawyer consulted will need to be familiar with both family law and Aboriginal law.

See the Resources section of this Tool-kit for more information about legal resources, including lawyers available in BC.

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Family Homes on Reserves and Matrimonial Interests or Rights Act

As discussed in Chapter 8, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* changes some aspects of both wills and estates law and family law on reserve.

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* will apply to married spouses and common law partners (also known as unmarried spouses) living on reserve, where at least one of the is a Band member or Status Indian.

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* makes several important changes to family law on reserve. In particular, the Act:

- Protects spouses from having family homes sold without their consent;
- Provides spouses or common law partners with an equal entitlement to occupancy of the family home unless and until they cease to be spouses or common law partners;
- Provides a formula for dividing the value of a home;
- Allows a court to order that a spouse or common law partner be excluded from the family home on an urgent basis (such as in situations of family violence);
- Allows a court to provide short to long-term occupancy of the family home to only one spouse or common law partner;
- Allows a court to make an order that can be used to enforce a validly-written family law agreement between the spouses / common law partners; and
- Permits a surviving spouse to remain in the home 180 days after their spouse dies, even if they have no interest in the home or are not a member of the Band / First Nation.

As noted earlier, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* does not apply to First Nations that have established a Land Code under the *First Nations Land Management Act*.

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Family Law and Children

Where children will live and who takes care of them will often become an issue when spouses separate. This section will look at the issue of guardianship (which used to be called custody) and child support in family law.

Later in this Tool-kit, your rights and your children's rights related to the Ministry of Children and Families Development (MCFD) will also be discussed.

The BC Family Law Act and the Best Interests of the Child

The new BC *Family Law Act* makes the "best interests" of the child the only consideration when decisions about parenting and children are involved.

Under the *Family Law Act* parents, other guardians, and courts are responsible to make decisions that are in the best interests of their children.

The *Family Law Act* sets out certain factors courts must consider when determining what is in a child's best interest. Those factors are set out in section 37 of the *Family Law Act* and are as follows:

(1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

(a) the child's health and emotional well-being;

(b) the child's views, unless it would be inappropriate to consider them;

(c) the nature and strength of the relationships between the child and significant persons in the child's life;

(d) the history of the child's care;

(e) the child's need for stability, given the child's age and stage of development;

(f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

(g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;

(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

(j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

(3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

(4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

The Best Interests of Aboriginal Children

The BC *Family Law Act* does not specifically state that Aboriginal culture or heritage is a factor in determining a child's best interest. However there have been various Canadian court decisions which have found that a child's Aboriginal heritage should be a considered when determining a child's best interests.

For example, in the Supreme Court of Canada case, *D.H. v. D.M.*, [1999] 1 S.C.R. 761, http://canlii.ca/t/1fqnq, the Court stated:

> "the trial judge had given careful attention to the aboriginal ancestry of [the child], together with all the other factors relevant to [the child's] best interests, and that there was no error in his decision ..."

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In another Supreme Court of Canada case, *Van de Perre v. Edwards*, 2001 SCC 60, http://canlii.ca/t/51z8, the Court considered an appeal related to a child custody dispute in BC. The Court noted that the BC family legislation did not specifically mention race, culture, or heritage as related to a child's best interest. Nonetheless the Court recognized that:

> "Race can be a factor in determining the best interests of the child because it is connected to the culture, identity and emotional well-being of the child. (…) It is important that the custodial parent recognize the child's need of cultural identity and foster its development accordingly."

In the Ontario case of *S.(D). v N.(D).*, [1989] 3 C.N.L.R. 190 the Court specifically considered whether culture and heritage should be considered in a child custody dispute. The Court concluded*:* "In a custodial dispute affecting an Indian child, the child's native culture, heritage and tradition is of some importance."

While a child's culture and heritage is not set out explicitly as a factor in a child's best interests under the *Family Law Act*, section 41(e) of the Act does say that a parent has a responsibility to:

> "make decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's identity."

Parents, Stepparents, Adoption, and Guardianship under the *Family Law Act*

Under the BC *Family Law Act* a parent who has lived with a child prior to separation or who has otherwise regularly cared for their child is considered to be the child's guardian.

Under the *Family Law Act* the term "custody" is no longer used. Instead, the people who exercise care and control of children are called guardians.

A guardian will have "parenting responsibilities," which are responsibilities also set out in section 41 of the *Family Law Act* and include:

(a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;

(b) making decisions respecting where the child will reside;

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(c) making decisions respecting with whom the child will live and associate;

(d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;

(e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;

(f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;

(g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;

(h) giving, refusing or withdrawing consent for the child, if consent is required;

(i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;

(j) requesting and receiving from third parties health, education or other information respecting the child;

(k) subject to any applicable provincial legislation,

(i) starting, defending, compromising or settling any proceeding relating to the child, and

(ii) identifying, advancing and protecting the child's legal and financial interests;

(l) exercising any other responsibilities reasonably necessary to nurture the child's development.

Parents will not be considered to be guardians if they never lived with their child or have never regularly cared for their child. Parents who are not guardians will not have input into decisions relating to the child.

Stepparents do not automatically become guardians. However, a step-parent can apply to be appointed as a guardian of his / her step-children upon separation.

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A step-parent may be responsible to pay child support if:

- The stepparent contributed to child's care and financial support for at least 1 year; and
- A child support application is made within 1 year of the stepparent contributing to the child's support.

Also, a step-parent's obligation to pay child support always comes after a parent or guardian's obligation to pay child support. Child support is discussed later in Chapter 9.

Adoptive parents, married spouses, unmarried spouses, and single people can all apply to adopt a child. Your partner can also adopt your child from another relationship if the child's other biological parent agrees.

As an adoptive parent, you have the same obligation as any other parent to pay child support. You can also apply to share parenting responsibilities and parenting time if you separate.

After a child is adopted, the parents who placed the child for adoption have no legal rights or responsibilities for that child.

Aboriginal children who have been adopted into non-Aboriginal homes do not lose their Indian Status and are still eligible for Band membership based on their ancestry and status. Customary adoption is discussed later in this chapter.

Disagreement Between Guardians

Parents who are guardians will continue to be guardians after separation from the other parent. To the extent possible, guardians must come to an agreement about the division of parenting responsibilities and parenting time.

If parents cannot come to an agreement on their own, they can seek the assistance of a trained mediator (such as a Family Justice Counsellor), elder, or other community resource they trust.

If parents still cannot come to an agreement with the assistance of a third-party, they can apply to the court to make a decision.

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It is also important to note that when there has been violence or abuse by one parent, it may not be appropriate or safe to negotiate. Sometimes the abusive parent will use negotiation or mediation as an opportunity to simply further the abuse. The parent who has been abused may feel intimated in a private conversation with the other parent, and feel pressured to agree to anything (such as an unfair agreement).

You may decide you feel safe enough to proceed with mediation or discussions with a third-party present if there are enough safeguards in place (such as negotiations where a mediator or elder speaks with you and the other parent separately).

If you do not feel safe to negotiate with the other parent through mediation or through a mediator, you can also ask the court to make final decision. Under the *Family Law Act* abuse is considered an important factor in looking at safety and a child's best interest in a family law issue.

Violence in relationships is discussed in greater detail in Chapter 11 of this Tool-kit.

Child Support

The same rules apply to Aboriginal parents as apply to non-Aboriginal parents when it comes to paying child support. Child support rates on and of reserve are calculated by using the *Federal Child Support Guidelines*, which are available here: http://laws-lois.justice.gc.ca/eng/regulations/sor-97-175/index.html

There is, however, a difference for the calculation of child support on reserve. Aboriginal people who qualify as "status Indians" under the federal *Indian Act* and who work on reserve may not be required to pay income tax.

Because the *Guidelines* are calculated on the basis of gross (before tax) income (the payor of child support is paying income tax), the standard method of calculating income under the *Guidelines* would give a distorted result. See http://wiki.clicklaw.bc.ca/index.php/Child_Support

Under section 19(1)(b) of the *Guidelines*, a tax-exempt payor may have his or her income "grossed up" to account for this tax advantage. The grossing-up process essentially involves figuring out how much tax a tax-exempt payor would have paid on their income, had they been a taxed payor.

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Here is an example:

A non-exempt payor earns a gross income of $40,000 per year. This is the non-exempt payor's income for the purposes of the Guidelines. The non-exempt payor will pay income tax on that income so their net income might really be about $30,000.

On the other hand, a tax-exempt payor making $40,000 actually keeps the whole $40,000 since no income taxes are paid on the $40,000. This, according to the Guidelines, is unfair, and the exempt payor's income should be re-calculated, or grossed upwards.

Under the Guidelines, the tax-exempt payor must pay child support at a Guidelines income of what he or she would have earned to have an after-tax income of $40,000 (as if taxes were paid on his or her income). If a non-exempt payor would have to earn $55,000 to have a net income of $40,000, the tax-exempt payor's income will be set, for the purposes of child support, at $55,000.

In this example, a tax-exempt payor who earns $40,000 per year free of income tax, might be deemed to earn $55,000 per year for the purposes of child support, and child support will be calculated based on a Guidelines income of $55,000 per year.

Grossing-up a payor's income is intended to ensure that the children benefit from the amount of support available based on an a gross income equivalent to what a non-exempt payor would earn to have the same net income.

Rights of Non-Guardians

A parent without guardianship, or another significant person in a child's life (such as a grandparent), may get an order from the court for contact rights with a child. The *Family Law Act* no longer uses the word "access."

Contact is the time a non-guardian spends with a child. The *Family Law Act* recognizes a child's right to maintain a relationship with both parents even if the parents never lived together, or one of the parents did not regularly care for the child. Parents in these circumstances can have contact with their child.

Grandparents, step-parents, other extended family members, and anyone else significant to your child may also be interested in contact with a child.

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Guardians and non-guardians can agree on how much contact a non-guardian will have with a child. If contact cannot be agreed on, non-guardians can apply to the court for an order setting out contact.

A court order may stipulate contact is to be "reasonable and generous" or set out that contact will occur on specific days and times.

Guardianship and First Nations

Where there is an application for guardianship of a "treaty First Nation child" in a BC, sections 208 and 209 of the *Family Law Act* stipulate that:

- The First Nation government must be served with notice of the application;
- The First Nation government has standing in the court proceeding; and
- The court must consider the laws and customs of the First Nation in making its decision.

Section 208 of the *Family Law Act* applies specifically to Nisga'a children. Section 209 of the *Family Law Act* deals with other treaty First Nation children.

The current treaty First Nations in BC are the Tsawwassen First Nation and the Maa-nulth First Nation. The Yale First Nation also ratified a treaty on March 12, 2011, and is awaiting ratification from Canada. For an update of treaty negotiations in BC, see: http://www.bctreaty.net

Guardianship and the *Indian Act*

In limited circumstances the *Indian Act* can also apply to the guardianship of an Aboriginal child.

Under section 52 of the *Indian Act*, the Minister of AANDC is given the authority to appoint a person to be a guardian of the child for the administration of any property that child is entitled to receive.

AANDC's authority will only be exercised when both parents die without leaving a will that passes guardianship to some other person, or when there are serious concerns about the parents' ability to properly care for the child.

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Custom Adoption

Canadian courts have recognized custom adoptions for many years. In a case called *Re Tagornak*, [1984] 1 C.N.L.R. 185, the Court set out a 4 criteria to determine whether a custom adoption has taken place.

To be recognized as legal and valid in Canadian law, a custom adoption must include:

- The consent of both the natural and adoptive parents;
- The child's placement with the adopting parents must be voluntary;
- The adoptive parents must be Aboriginal or otherwise have a right in the community to rely on Aboriginal custom; and
- There must be a rationale for the specific Aboriginal custom adoption in question.

The BC *Adoption Act* also specifically recognizes custom adoption as having the same legal effect as an adoption under BC law. Therefore a recognized custom adoption will be the same as any other legal adoption with the same rights and responsibilities attached to it.

For more information about custom adoption and adoption of Aboriginal children in general see: http://familiesofaboriginalchildreninbc.blogspot.ca/2009/09/custom-adoption.html

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CHAPTER 10: THE MINISTRY OF CHILDREN AND FAMILIES (MCFD)

MCFD and Delegated Aboriginal Agencies

The BC Ministry of Children and Families Development (MCFD) investigates child protection cases in BC.

The MCFD operates under the BC *Child Family and Community Services Act*, (CFSCA), RSBC 1996, c. 46, http://www.bclaws.ca/Recon/document/ID/freeside/00_96046_01 The CFCSA applies both on and off reserve.

To some extent Canadian law has recognized the inherent Aboriginal right to assume governance over child protection issues. Many BC First Nations have now assumed some level of control over child protection issues in their communities.

BC First Nations who have become involved in managing child protection issues do so through "delegation agreements" as permitted under the CFCSA. In a couple of cases, control over child protection has been set out in treaties (such as the Nisga'a and the Tsawwassen First Nation). The Splatsin First Nation has taken control of child protection issues through an *Indian Act* bylaw.

The delegation agreements provide varying levels of authority to the First Nations who have signed them. First Nations who manage child protection issues are referred to as "Delegated Aboriginal Agencies." Examples of Delegated Aboriginal Agencies include Vancouver Aboriginal Child and Family Services and Carrier Sekani Family Services in Prince George.

To see if a First Nation or Delegated Aboriginal Agency is working with your community, see:
http://www.mcf.gov.bc.ca/about_us/aboriginal/delegated/pdf/agency_list.pdf

If MCFD or a Delegated Aboriginal Agency believes your child's safety is at risk, both MCFD and the Delegated Aboriginal Agency have the authority to investigate.

An investigation begins when someone makes a child protection complaint. A child protection worker (also called a social worker) usually begins an investigation by contacting the parent(s) or requesting to do a home visit to get more information.

If, during the investigation, MCFD or the Delegated Aboriginal Agency believes a child is not safe at home and in need of protection, MCFD or the Delegated Aboriginal Agency has the authority to remove the child from their home.

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Your Rights When MCFD Is Involved With Your Family

If MCFD or a Delegated Aboriginal Agency believes your child may be at risk, the MCFD or Delegated Aboriginal Agency is supposed to try to work with you to see that your child is no longer at risk. This may involve the child protection worker making a care plan that sets out what you can do to provide safe and appropriate care for your child.

If MCFD or a Delegated Aboriginal Agency threatens to remove your child from your care, or does remove your child from your care you can:

- Obtain a lawyer to represent you if you cannot afford to pay for lawyer;
- Explain your situation to the child protection worker;
- Respond to the child protection worker's concerns;
- Request that your child be placed with another Aboriginal family, through the Extended Family Program;
- Ask for an Aboriginal Child Protection Mediator, who is trained to help you reach an agreement with MCFD (or the Delegated Aboriginal Agency);
- Request a Family Group Conference. This is a formal meeting between you, your family, and others involved in your child's care. Everyone at the meeting will discuss how best to care for your child;
- Request a traditional decision making process (which will include your community and extended family members);
- Ask for the "Report to Court" which explains the reasons for the removal;
- Request to participate at court appearances or in meetings by phone if you live in a remote area;
- Ask for visits with your child, if your child has been removed. If you cannot obtain visits in a timely manner, or are denied visits, obtain legal advice from a lawyer; and
- Ask for support services to help you parent. The MCFD (or the Delegated Aboriginal Agency) should help you get that support.

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If you cannot afford to pay for a lawyer, contact the Legal Services Society to apply for a free lawyer. The contact information for the Legal Services Society is in the Resources section at the end of this Tool-kit.

This Tool-kit also includes a template letter that you or your advocate can use to write to MCFD or a Delegated Aboriginal Agency to request visits with your child (see the Template Section).

Complaints

If you are having a problem with a child protection worker that you cannot resolve with him or her directly, you have the right to complaint to their supervisor or team leader.

If your concerns are not resolved by a supervisor or team leader, you also have the right to make a complaint to an MCFD Complaints Specialist. For more information, see: http://www.mcf.gov.bc.ca/complaints/complaints.htm?wt.svl=body

If your complaint is not resolved within MCFD or the Delegated Aboriginal Agency, you can also contact the Representative for Children and Youth. For more information, see: http://www.rcybc.ca/content/home.asp

You can also make a complaint to the BC Ombudsperson. For more information, see: http://www.ombudsman.bc.ca

The Rights of the Aboriginal Community

The MCFD or the Delegated Aboriginal Agency must notify a representative from your child's Aboriginal community if your matter proceeds to court. Your child's Aboriginal representative may be a:

- Band;
- Friendship centre;
- Treaty First Nation; or
- Nisga'a Lisims government.

The Aboriginal representative can:

- Receive all records and information related to your case;

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- Speak at a child protection hearing related to your case;
- Call witnesses and question other witnesses (such as people who may know about your situation and will be able to share information);
- Take part in any mediation process related to your case;
- Suggest supports that might help you;
- Suggest another culturally appropriate plan for your child's care; and
- Ask about ways to get you help.

Important: If you don't want the MCFD or Delegated Aboriginal Agency to involve your child's Aboriginal community, you should let the child protection worker / social worker know as soon as possible.

Your Child's Rights When the MCFD or a Delegated Aboriginal Agency Is Involved

CFCSA Guiding Principles

The CFCSA has a number of guiding principles (see section 2 of the CFCSA) which are meant to ensure that the safety and well-being of children are the "paramount considerations" when decisions are made by the MCFD or a Delegated Aboriginal Agency. Other important principles that must be considered under the CFCSA include:

- Your child's ties to family, including to the extended family, should be kept, if possible;
- Where possible Aboriginal children have a right to stay in their cultural communities; and
- Decisions about your child's care should be made and acted on as quickly as possible.

Rights of Children in Care

Section 70 of the CFCSA sets out the rights of children in care as follows:

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- If your child is 12 or older, they have the right to be notified of court hearings about them. Children 12 and over may qualify for their own legal counsel;
- To be fed, clothed and nurtured according to community standards and to be given the same quality of care as other children;
- To be informed about their plans of care;
- To participate in social and recreational activities if available and appropriate and according to their abilities and interests;
- To be consulted and to express their views, according to their abilities, about significant decisions affecting them;
- To be informed of the standard of behaviour expected by their caregivers and of the consequences of not meeting their caregivers' expectations;
- To be informed about and to be assisted in contacting the Child, Youth and Family Advocate;
- To reasonable privacy and to possession of their personal belongings;
- To receive medical and dental care when required;
- To be free from corporal (physical) punishment;
- To participate in the religious activities of their choice;
- To receive guidance and encouragement to maintain their cultural heritage;
- To be provided with an interpreter if language or disability is a barrier to consulting with them on decisions affecting their custody or care;
- To privacy during discussions with a lawyer, the Child, Youth and Family Advocate, the Ombudsperson, or their Member of Parliament; and
- To privacy during discussions with members of their families, subject only to safety concerns or court order.

Whether you or MCFD is your child's legal guardian, your child has the right to have their guardian make an application on their behalf for Indian Status and Band membership. AANDC can assist you or MCFD with this process.

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Extended Family

When it is not possible for a child to stay in her or his parents' care, the next best option is for a child to stay with someone he or she knows, preferably family where a child's community and cultural ties can be maintained.

The Extended Family Program provides services and financial support to an extended family member providing care of a child.

For more information about the Extended Family Program, including eligibility and supports provided, see:

- http://www.mcf.gov.bc.ca/alternativestofostercare/extended_family.htm
- http://resources.lss.bc.ca/pdfs/pubs/Understanding-the-Extended-Family-Program-eng.pdf

If a child is unable to return to their parent(s), permanent guardianship can also be transferred to an extended family member (or other person with a significant relationship with the child). This is called a "Permanent Transfer of Custody" (sometimes also referred to as a "Transfer of Guardianship" or "Permanent Kinship Care"). This new custody placement option is available under section 54.01 of the CFCSA.

When a permanent transfer of custody or guardianship is made, the guardian becomes responsible for the health and well-being of the child and, generally, must exercise all the responsibilities a parent normally would.

When permanent guardianship is transferred to an extended family member (or other non-parent), the MCFD or Delegated Aboriginal Agency will continue to provide financial support for the child's care.

It is also important to note that a person who may be receiving permanent custody or guardianship of a child (as provided for in section 54.01 of the CFCSA) may be entitled to independent legal advice through the Legal Services Society. The applicant must contact the child's social worker (child protection worker) who will arrange an appointment with a lawyer from the Legal Services Society to provide legal assistance.

For more specific information, see *Factsheet for Proposed Guardians*, MCFD, http://www.mcf.gov.bc.ca/alternativestofostercare/pdf/fs_web_kinship_care_guardians.pdf

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Another option for an extended family member is to become a foster parent. An Aboriginal foster home can help a child maintain ties to her or his culture. An Aboriginal person 19 years or older can apply to become a foster parent. For more information, see:

- *Fostering Aboriginal Children*, MCFD, http://www.mcf.gov.bc.ca/foster/aboriginal.htm?WT.svl=Body

- *The Federation of Aboriginal Foster Parents*, http://www.fafp.ca

See also:

- *Grandparents Raising Grandchildren: Legal Issues and Resources in BC*, Parent Support Services Society of BC (2013), http://www.parentsupportbc.vcn.bc.ca/uploads/11/6a/116a70143d735f30aedcb08b7cdd3b16/GRG-Brochure-Modified-Feb.-2013.pdf

Other Resources

For more information about MCFD and the CFCSA generally, see:

- *Understanding Aboriginal Child Protection Matters*, Legal Services Society, http://www.familylaw.lss.bc.ca/resources/fact_sheets/understandingAboriginalChildProtectionRemovalMatters.php

- *Understanding Aboriginal Delegated Agencies*, Legal Services Society, http://www.familylaw.lss.bc.ca/resources/fact_sheets/understandingAboriginalDelegatedAgencies.php

- *Understanding Child Protection Mediation for Aboriginal Families*, Legal Services Society, http://resources.lss.bc.ca/pdfs/pubs/Understanding-Child-Protection-Mediation-for-Aboriginal-Families-eng.pdf

- *Parents' Rights Kids' Rights: A parent's guide to child protection law*, Legal Services Society, http://www.familylaw.lss.bc.ca/resources/publications/pub.php?pub=77

- Parent Support Services Society of BC: http://www.parentsupportbc.ca/

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CHAPTER 11: RELATIONSHIP VIOLENCE

What Is Relationship Violence (or Abuse)?

Relationship violence is sometimes also referred to as: domestic abuse, family violence, spousal violence, intimate-partner abuse, or violence against women.

Women's organizations and anti-violence groups (such as the BC Transition House Society and Ending Violence Association BC) often look at violence as a dynamic of power and control. A person committing abuse will use various tactics to maintain power and control over the person they are abusing. Those tactics may be physical, mental, emotional, or financial.

Here is a link to a basic Power and Control Wheel showing the signs and cycle of abuse: http://www.theduluthmodel.org/pdf/PowerandControl.pdf

Here is a link to a Power and Control Wheel that was created for Aboriginal communities: http://mshoop.org/wheel-two.htm

Statistically we know that victims of abuse in relationships are overwhelmingly women. While it is difficult to know rates of violence against women (because it is a very under-reported crime,) according to Statistics Canada, across Canada, in 2011 men were responsible for 83% of all police-reported violence against women.

Every year in BC there are over 60,000 physical or sexual assaults against women. Almost all of these assaults are committed by men (See *Statistics on Violence Against Women in British Columbia*, Ending Violence Association http://www.endingviolence.org/files/uploads/Stats_vF.pdf)

Violence can also occur in same-sex relationships whether a lesbian, gay, bisexual, trans, or Two-Spirit relationship. There are resources available that focus on violence or abuse in same-sex relationships. For further information, see:

- *Abuse in Lesbian Relationships*, Health Canada (1998), http://www.phac-aspc.gc.ca/ncfv-cnivf/publications/femlesbi-eng.php

- *Abuse in Same-Sex Relations: Information and Resources*, BC Association of Specialized Victim Assistance & Counseling Programs and The Centre, http://resources.lss.bc.ca/pdfs/pubs/Abuse-in-Same-Sex-Relationships-eng.pdf

- *Domestic Violence in the LGBT Community (Lesbian, Gay, Bisexual and Trans)*, Canadian Women's Health Network (2000), http://www.cwhn.ca/node/39623

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Over 80% of victims of dating violence are women. Women are more likely to be seriously physically injured when there is abuse and more likely to fear for their lives. Women are also 3 to 4 times more likely to be killed by their spouse.

We also know that among women, Aboriginal women and children (under the age of 15) are most vulnerable to violence: 1 in 3 Aboriginal women report being abused by her partner (see: *Indigenous Communities Safety Project*, Ending Violence Association, http://www.endingviolence.org/node/1360).

It is reported that there are more than 582 Aboriginal women known to be either missing or murdered in Canada. Aboriginal women are 8 times more likely than other women to be killed by an intimate partner.

Aboriginal women (between the ages of 25-44) are 5 times more likely than other women of the same age to die as a result of violence (see: *Fact Sheet: Violence Against Aboriginal Women*, Native Women's Association of Canada, http://www.nwac.ca/files/download/NWAC_3E_Toolkit_e_0.pdf).

For more statistics about relationship violence, see:

- *Family Violence in Canada: A Statistical Profile*, Statistics Canada (2009), http://www.uregina.ca/resolve/PDFs/Family%20Violence%20in%20Canada%20A%20Statistical%20Profile%20%202009.pdf

- *Violent Victimization of Aboriginal Women in the Canadian Provinces*, Statistics Canada (2009), http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.htm

- *Statistics on Violence Against Women in BC*, Ending Violence Association, http://www.endingviolence.org/node/1125

- *Measuring Violence Against Women: Statistical Trends – Key Findings*, Status of Women Canada (2013), http://www.swc-cfc.gc.ca/initiatives/vaw-vff/violence-aboriginal-autocthone-eng.pdf

Aboriginal communities also note that colonization, racism, imposed patriarchal structures and laws, the intergenerational effects of Residential School, and associated traumas have played a role in the disproportionate violence committed against Aboriginal women. See for example:

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- *The Indian Act and Aboriginal Women's Empowerment: What Frontline Worker's Need to Know*, Katrina Harry (2009), http://www.bwss.org/wp-content/uploads/2009/01/theindianactaboriginalwomensempowerment.pdf

- *Understanding the Roots of Interpersonal Violence*, The Healing Journey, http://www.thehealingjourney.ca/inside.asp?129

Warning Signs of Abuse and Safety Planning

Research on violence shows that a woman's perception about her own safety is often the best indicator of her safety. If you feel unsafe or fearful at any time in your relationship with a boyfriend, partner, or spouse (or even in a casual dating relationship) trust your instincts.

Research also shows that there are other factors that elevate your risk of harm in relationships. When there is abuse in a relationship, the risk of serious harm and even death are associated with the following warning signs:

- Your partner strangles, chokes, bites you, or forces you to have sex;

- If you and your partner are in a family law dispute about children;

- There is an escalation in frequency or severity of his violence;

- Your partner has a prior criminal history, especially for violence such as assaults (you can search criminal records in BC at Court Service Online at: https://eservice.ag.gov.bc.ca/cso/index.do);

- You are planning to or have already ended the relationship with your partner;

- Your partner was exposed to violence as a child;

- Your partner is struggling with mental health issues (such as depression) or drugs and alcohol;

- Your partner is unemployed or facing financial difficulty;

- Your partner has access to weapons, or has previously used or threatened to use a weapon; and

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- You and your partner are isolated geographically as well as socially (away from friends and family).

If you are concerned about abuse in your relationship, there are some steps you can take to keep yourself safer.

Safety Planning

It can be helpful to create a safety plan. A safety plan is a strategy you develop to keep yourself safer while in abusive relationship and steps to stay safer when leaving an abusive relationship.

You do not have to develop a safety plan on your own. You can do it with the help of advocate, transition house worker, victim support worker, or similar resource available in your community.

You can connect with available supports by calling Victimlink. Victimlink is a toll-free number you can call from anywhere in BC 24 hours a day 7 days a week. You can call Victimlink anonymously and confidentially for:

- Immediate crisis support;
- Information about and referrals to victim services and other resources (such as advocates, Stopping the Violence Counsellors, and Native Courtworkers); and
- Basic legal information.

The number for Victimlink is: 1-800-563-0808.

Some other safety planning measures you can take include:

- Let someone you trust know about the abuse even if you do not report it to the police.
- Create a code word with friends, family, or other supports so that you can let them know you are in danger and to call the police when you are unable to.
- If you have a cell phone keep it charged and carry it with you. Also consider keeping change to call from payphones if needed, or keep a calling card on hand.

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- If you don't have a cell phone ask the police for a "9-1-1-cell phone." Some police stations give out free cell phone to victims of violence or people who fear for their safety. These cell phones will only dial 9-1-1, but can be helpful in an emergency.

- Find out where emergency women's shelters and transition houses are located in your community or nearby.

- If you call women's organizations, shelters, transition houses, or legal services, let them know if or when it is safe to call you back.

- Remember to clear your internet history if you are still with your partner and do not want him to know you are looking into these services.

- Do not tell your partner you are leaving if you have any concerns it will be unsafe to do so.

- Before leaving, and if safe, make sure you have all of your own important documents such as your id, Status Card, health cards, Social Insurance Card, Birth Certificate, debit / credit cards, cash, bus pass, and any other important documents you can think of that you will need.

- If you are leaving with your children make sure to also bring their birth certificates, passports, medical cards, school id, bus passes, and Status Cards as well;

- If safe to do so you may also want to make copies of your partner's financial information (such as banking records, Certificate of Possession papers, and documents showing ownership of assets). If you need to seek spousal support, child support, or division of property later you will at least have some information about your partner's finances.

- Try to keep important documents, keys, cash, and your cell phone all in one place that will be easy for you to grab in case of an emergency.

- Rehearse a physical plan to get you (and your children) out of your house in an emergency and a place to go if needed (such as with a friend, relative, safe home, transition house, or shelter). Rehearse your plan with your children if possible and safe to do so.

- If you have to return to the home to pick up you or your children's belongings, request that the police escort you to ensure your safety.

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- If you have left your partner, make sure that your friends, family, school, work and community supports know you have left and to alert you if your ex shows up or inquires about you. If there is a court order (such as a Peace Bond or Protection order against your partner), let them know that too, and provide a picture of your ex-partner.

- If you move into a new place but do not want your partner to have your address, ask a friend, family member, or women's organization to receive mail for you.

- If you are concerned about your ex-partner finding you, be aware of your privacy settings on social network sites (such as Facebook) and limit the personal information you post.

This is not an exhaustive list of safety planning measures, but some of the common ones recommended by anti-violence groups and women's organizations.

Housing and Shelter Options for You and Your Children

Under the new *Family Homes on Reserves and Matrimonial Interests or Rights Act* you may apply for an emergency protection order to stay in the family home on reserve at the exclusion of your spouse or partner in situations of family violence.

If you have to leave your home, some Bands in BC have transition houses on reserve that help women and children who are victims of abuse. See: http://www.thehealingjourney.ca/inside.asp?279

An Aboriginal Homeless Outreach Worker can also assist you with securing shelter or housing. See http://www.bchousing.org/Options/Emergency_Housing/AHOP

If you have to or want to leave the reserve there are other options for safe houses, shelters, transition houses, and other affordable housing options off reserve. For more information, see:
http://www.bchousing.org/Options/Emergency_Housing/WTHSP/Access

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Relationship Violence and the Law

Family Violence and the Family Law Act

Family violence is addressed in the BC *Family Law Act*. Under the *Family Law Act* family violence includes:

(a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,

(b) sexual abuse of a family member,

(c) attempts to physically or sexually abuse a family member,

(d) psychological or emotional abuse of a family member, including

(i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,

(ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,

(iii) stalking or following of the family member, and

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence.

A person experiencing violence by a family member can obtain a Protection Order under the *Family Law Act*.

If you are low-income and your safety or your children's safety is at risk because of violence by a family member you may be able to get legal aid to obtain a protection order.

To apply for legal aid call: 604-408-2172 (Greater Vancouver) or 1-866-577-2525 (no charge, elsewhere in BC).

You may also be able to get help from Family Duty Counsel at your local courthouse to get a protection order. Contact your local courthouse to get information about the availability of family duty counsel lawyers.

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It is also important to note that Protection Orders will not be helpful to people who are in a dating relationship or otherwise do not fit the "family member" definition in the *Family Law Act*.

For more information about the *Family Law Act* and Protection Orders, see:

- http://www.familylaw.lss.bc.ca/resources/fact_sheets/familyLawProtectionOrders.php
- http://faculty.law.ubc.ca/cfls/centre/newsletters/fla_guide.pdf

Relationship Violence and the Criminal Law

If you have been abused by any person you may be able to obtain a Peace Bond or have criminal charges laid against the person who has abused you, if they have committed a criminal offence.

Some examples of Canada *Criminal Code* [RSC. 1985 c. C-46] offences often related to abuse include: assault, criminal harassment (stalking) or uttering threats. To see all criminal code offences in the *Criminal Code* see: http://laws-lois.justice.gc.ca/eng/acts/c-46/

A Victim Service Worker may be able to support you in making a statement to police. To find a Victim Support Worker near you contact Victimlink at: 1-800-563-0808.

For more information about abuse and the criminal law see:

- http://www.justice.gc.ca/eng/cj-jp/fv-vf/laws-lois.html
- http://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts/Criminal-Law/217
- http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/SPO1-SpousalViolence.pdf

Relationship Violence and the Ministry of Children & Families Development

The Ministry of Children and Families Development (MCFD) also has a Best Practices Manual about violence in relationships. This Manual recognizes that women are more

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likely to experience violence than men and should be supported when there is abuse in a relationship. See:
http://www.mcf.gov.bc.ca/child_protection/pdf/best_practice_approaches_nov2010.pdf

The Ministry of Children and Families Development (MCFD) also has a *Best Practices Manual* about violence in relationships. This Manual recognizes that women are more likely to experience violence than men and should be supported when there is abuse in a relationship. See:
http://www.mcf.gov.bc.ca/child_protection/pdf/best_practice_approaches_nov2010.pdf

Abuse and Aboriginal Law

The new *Family Homes on Reserves and Matrimonial Interests or Rights Act* will also enable you to apply for an emergency protection order to stay in the family home on reserve at the exclusion of your spouse or partner in situations of family violence.

You may also be interested in Aboriginal-centred services in situations of abuse. See:

- Vancouver Aboriginal Transformative Justice: http://www.vatjss.com
- Warriors Against Violence: http://www.wavbc.com/
- Aboriginal Wellness Program: http://www.vch.ca/403/7676/?program_id=461

Many women's organizations and victim services also offer Aboriginal support services, such as an Aboriginal Women's Outreach Worker. See:

- Atira Women's Resource Society: http://www.atira.bc.ca/aboriginal-womens-outreach
- Battered Women's Support Services (BWSS): http://www.bwss.org/services/programs/indigenous-womens-programs/
- Women Against Violence Against Women (WAVAW): http://www.wavaw.ca/aboriginal-womens-services/

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CHAPTER 12: GOVERNANCE ISSUES

Who Speaks for a First Nation?

Colonization and the *Indian Act* have imposed a European governance structure on Aboriginal communities. Under the *Indian Act*, Aboriginal peoples were grouped into "Bands." Some First Nations have opted to follow their own systems of governance through recognized customary laws or through self-government and other settlement agreements.

Chief and Council Elections

Generally, Bands or First Nations select their Chief and Council through 2 methods recognized under the *Indian Act*:

- Chief and Council are elected following the process set out in section 74 the *Indian Act* or;
- Chief and Council are elected following the customary rules established by the Band.

To find out if your First Nation / Band follows *Indian Act* elections or customary elections, see the *Indian Band Councils Elections Order*, available here: http://laws-lois.justice.gc.ca/eng/regulations/SOR-97-138/page-2.html#docCont

Any Bands or First Nations listed in the *Indian Band Councils Election Order* follow the *Indian Act* elections process. Any Bands or First Nations that are not listed follow their own Customary Elections Code.

Indian Act Elections

Under section 74 of the *Indian Act*, Chief and Council are elected by secret ballot every 2 years. Customary elections are discussed further below.

Who Can Vote

To be eligible to vote in Band elections, a person must be at least 18 years old and on the Band List. The Supreme Court of Canada case, *Corbiere v. Canada*, [1999] 2

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S.C.R. 203, http://canlii.ca/t/1fqhc, has also made it clear that off reserve Band members are entitled to vote in Band elections.

The *Indian Band Election Regulations* also requires that a band have an "Elector Officer" who must mail a nomination form and ballot to every eligible band member who does not live on reserve. It is important that all off reserve Band members provide their Band office with an up-to-date address in order receive their nomination form and ballot.

Who Can Run

Both on reserve and off reserve Band members can run for Chief and Council. Section 75(1) of the *Indian Act* states that only members of a Band who reside on reserve are eligible to run for Council, but this requirement was declared unconstitutional by the Federal Court of Appeal in *Esquega v. Canada*, 2008 FCA 182, http://canlii.ca/t/1wzlw. Therefore, Band members who live off reserve can run for Chief and Council.

Section 75(2) of the *Indian Act* provides that a candidate for Chief or Councillor of a Band must be nominated (and seconded) by an eligible voter.

It is also possible for a Chief to be elected even if s/he is not a Band member.

In the case of *Goodswimmer v. Canada*, [1997] 1 S.C.R. 309, http://canlii.ca/t/1fr49, the Sturgeon Lake Indian Band elected a Chief who was not a status Indian, nor a Band member, but was married to a Band member. The Court held that a Chief does not necessarily have to be a Band member and eligible voter. To be nominated for election, it was determined that other Band Councillors do have to be Band members and eligible voters of the Band.

Even where Bands do not hold customary elections, some Bands do create rules or policies stating who can run for election. For example, in some communities, in order for candidates to run for election, they must have obtained their high school diploma or equivalency.

Customary Elections

Under the custom election process, the Band's own Election Code is followed. Many Bands using customary elections have adopted their own election codes which are similar to the *Indian Band Election Regulations*.

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A Custom Election Code may or may not be in a written format, and some Bands still recognize a hereditary Chief and Council without an election if it is the custom.

Whatever is provided for in a Custom Elections Code, Canadian law has set out some factors that must be present in a Custom Elections Code to be valid:

- There must be broad consensus of the membership of the process set out in the Custom Elections Code;
- The Customary Elections Code must follow principles of natural justice and procedural fairness;
- If the Custom Elections Code provides for an election, the election process must be "transparent and fair";
- A Customs Election Code cannot exclude off reserve members from voting or other otherwise violate the equality rights set out in section 15 of the Canadian *Charter of Rights and Freedoms*. See *Clifton v. Benton*, 2005 FC 1030, http://canlii.ca/t/1l7rl; and
- A Customs Election Code cannot exclude re-instated Band members (through Bill C-31) from voting in Band elections. See *Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 F.C. 513, http://canlii.ca/t/464p

How to Appeal a Band Council Decision

If an individual is directly affected by a Band Council decision or resolution, the individual can apply for "Judicial Review" of the decision in the Federal Court of Canada. This is because a Council of a Band is deemed to be a "federal tribunal" under the *Federal Courts Act*, R.S.C. 1985, c. F-7.

This also includes Band Councils elected according to custom rather than pursuant to the *Indian Act*. Virtually every decision made by a Band Council pursuant to the *Indian Act* could be subject to Judicial Review, including Band membership and allotments of land. Similarly, decisions made under other federal Acts, such as the *First Nations Land Management Act*, S.C. 1999, c. 24 could be subject to Judicial Review.

It is important to note, however, that Judicial Review is discretionary, so courts may decline to review a Band Council decision.

There are several important steps before an individual can seek a Judicial Review:

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- ***Decision to be appeal must be a final decision:*** Only final decisions of the Council can be challenged. Therefore, an important first step for anyone seeking to apply for Judicial Review is to make sure that the decision of the Band Council is final. You will be expected to exhaust any internal appeals available, either within the Band or AANDC.

- ***Judicial Review application must be made in 30 day time limit:*** Section 18.1(2) of the *Federal Courts Act* provides that an individual applying for Judicial Review must do so within 30 days of the final decision. However, courts do have discretion to extend this deadline in exceptional circumstances.

- ***The appeal must be based on certain grounds***: A Judicial Review appeal must fit into one of the available grounds for review listed under section 18.1(4) of the *Federal Courts Act*.

Certain decisions of Band Councils cannot be appealed to the Federal Court of Canada. For example, Band Council decisions characterized as "private law matters," such as contractual issues, cannot be appealed through Judicial Review to the Federal Court of Canada.

There are various practical resources available to help you start an application for Judicial Review at the Federal Court of Canada. See for example:

- http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Administrative-Law/The-Steps-in-an-Application-for-Judicial-Review-in-Federal-Court/

- http://pslrb-crtfp.gc.ca/factsheets/judicialreview_e.asp

- http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/SRL_Registry

Standard of Review

When an application for Judicial Review is heard by the court, the court will first consider the appropriate "standard of review" to apply when reviewing the Band Council's decision. There are two standards of review possible: "reasonableness" and "correctness."

"Reasonableness" is a deferential standard that asks whether a decision (such as a Band Council's decision) was made within a range of possible, acceptable outcomes in

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light of the facts and the law involved in the case. So long as the Band Council's decision is within a range of possible, acceptable outcomes, the court will not overturn it.

If the court uses a "correctness standard" it will be less deferential to the tribunal decision it is reviewing (such as a Band Council's decision). Rather, the court will judge the tribunal decision based on of whether the decision is correct in law. A court may substitute its own opinion for that of the tribunal (such as a Band Council).

The trend in court cases has been to use the "reasonableness standard" when reviewing a decision made by a tribunal (such as a Band Council).

Reasonableness is now the default standard and deference to the decision-maker (such as a Band Council) is presumed.

However, some recent cases have continued to use the "correctness" standard to assess jurisdiction questions involving Band Councils. See for example: *Giroux v. Swan River First Nation*, 2006 FC 285, http://canlii.ca/t/1mv9r. Courts in such cases argued that the Band Council did not have any particular expertise to interpret its own legislation on the issue at hand.

Grounds for Judicial Review

In order to apply for Judicial Review, a Band member will need to show that the Band Council acted contrary to section 18.1(4) of the *Federal Courts Act*. A Band Council's decision is reviewable by the Federal Court if the Band Council:

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error is made clear in the Band Council decision.

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

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(f) acted in any other way that was contrary to law.

There have been numerous Federal Court decisions which have considered whether a Band Council's decision should be overturned based on the grounds set out in section 18.1(4) of the *Federal Courts Act*. A fuller explanation of some these Federal Court decisions follow.

Acting Without Jurisdiction

A Band Council cannot act unless it has some authority or jurisdiction set out in law to act, such as a Band Code, Bylaws, or as authorized under the *Indian Act*.

In a Federal Court decision, *Angus v Chipewyan Prairie First Nation*, 2008 FC 932, http://canlii.ca/t/207c8, the Court considered whether a Band Council had jurisdiction to remove Mr. Angus from his role as an Elections Officer. The Federal Court found that the Band's Election Code did not give authority to the Band Council to remove the Band's Elections Officer, stating:

> **"**The Band Council has failed to establish any jurisdiction for its attempt to remove Mr. Angus as Electoral Officer under the Election Code or under any general law or procedure that might be applicable in the present case."

Therefore the Band Council was found to be acting contrary to section 18.1(4)(a) of the *Federal Courts Act*. Mr. Angus was re-instated as the duly appointed Elections Officer as set out in the Band's Elections Code.

By contrast, in the case of *Whitehead v Pelican Lake First Nation*, 2009 FC 1270, http://canlii.ca/t/27c98, the Federal Court found that the Band Council did have the legal authority to suspend a Councillor, based on Band customary law.

Procedural Fairness

If an individual's rights, privileges, or interests are affected by the decision of the Band Council, another possible ground for Judicial Review is a breach of procedural fairness (see section 18.1(4)(b) of the *Federal Courts Act*).

Procedural fairness focuses on the procedure used to reach the decision and whether it was fair considering all relevant circumstances.

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Procedural fairness is owed to all individuals affected by *administrative* or specific decisions of a Band Council, including resolutions. However, when a Band Council properly makes *legislative* decisions (such as by-laws), the Council does not owe a duty of procedural fairness to individuals affected.

It is important to note that if an application for judicial review based on procedural fairness is successful, a court will cancel or "quash" the decision and order it to be made again in accordance with the requirements of natural justice.

However, this does not guarantee the applicant a better outcome. It is possible that the decision maker will modify their procedures and still arrive at the same decision. The remedy, therefore, only guarantees procedural protection, rather than a different outcome.

There are various elements to procedural fairness. The specific level of procedural fairness required will vary in each case. The most basic elements include:

- The right to be heard, and
- The right to an impartial hearing.

In terms of the right to be heard, the key elements include:

- Notice that the decision will be made,
- Disclosure of relevant information to the individual affect, and
- The opportunity for the individual to respond to the case against them.

Oral hearings will seldom be required.

To determine the specific level of procedural fairness required in a given situation, the Supreme Court of Canada explained in *Baker v. Canada*, [1999] 2 S.C.R. 817, http://canlii.ca/t/1fqlk, that five factors should be considered, including:

- Nature of the decision and the process followed;
- Nature of the statutory (legal) framework;
- Importance of the decision to the individual affected;
- Legitimate expectations of the parties; and

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- Procedures chosen by the tribunal.

To assess whether the duty of fairness was met, courts will also consider whether the Band Council followed their own guidelines and principles in passing the resolution or reaching the decision.

In *Sheard v. Chippewas of Rama First Nation Band Council*, [1997] 2 C.N.L.R. 182 (FC), for example, the Federal Court found that the Band Council's resolution banning Sheard from the reserve breached the requirements of procedural fairness. Sheard was a non-Aboriginal spouse of a member of the Band. Sheard did not receive notice before the resolution was passed, did not receive information about the case against him, and had no opportunity to respond. The Court held that even though he was not Aboriginal or a member of the Band, because his rights were being affected by the resolution requiring him to leave, he was entitled to fairness. The Band Council's resolution was cancelled.

Similarly, in *Edgar v. Kitasoo Band Council*, 2003 FCT 815, http://canlii.ca/t/21w8p, the Federal Court found that the Band Council breached procedural fairness by banning a Band member without allowing her to address the decision maker and respond to the case against her.

Again, in *Campbell v. Cowichan*, [1988] 4 C.N.L.R. 45 (FC) a decision of the Band Council was cancelled because the Band member was not given notice of the meeting, was not told the case against him, and was not given a fair opportunity to respond.

On the other hand, the case of *Kwikwetlem Indian Band v. Cunningham*, 2009 BCSC 1032, http://canlii.ca/t/24xrf, provides a good example of a Band Council observing the requirements of procedural fairness. In that case, the BC Supreme Court allowed an application by the Band to order Cunningham to leave his home on the reserve. The Court stated that the Band treated Cunningham with the appropriate level of procedural fairness by giving adequate notice of the case against him, a fair hearing, no reasonable apprehension of bias, and adequate reasons for the eviction decision.

Another procedural fairness concern that applicants can raise is bias, impartiality, or lack of independence. The test is whether an informed person would think it more likely or not that the decision maker would not decide the matter fairly. This includes both actual bias as well as the perception of bias.

Individual bias can take many forms, including the decision maker having a material interest in the matter, personal relationships with the party, or a predisposition towards the outcome (*i.e.* a closed mind).

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The case of *Sparvier v. Cowessess Indian Band*, [1993] 3 F.C. 142, http://canlii.ca/t/4gqf, involved a judicial review of a decision by a Band Appeal Tribunal nullifying a Band election. The Federal Court found that the actions of a Tribunal member in making derogatory comments towards the applicant in the Tribunal hearing clearly gave rise to a reasonable apprehension of bias.

The test for reasonable apprehension, like procedural fairness in general, is based on the specific circumstances of each case. In the *Sparvier* case, the applicant also argued that the Tribunal member was biased because of personal relationships with those involved in the election. However, the Court explained that in Bands of small populations there will inevitably be numerous personal connections, and as a result, a strict application of the bias test could frustrate and undermine the entire election process.

However, in the case of *Balfour v. Norway House Cree Nation*, 2006 FC 266, http://canlii.ca/t/1mr32, the Federal Court did find that there was a "reasonable apprehension of bias" because the actions of a subgroup of the Band Council revealed a closed mind towards the decision they were making. The *Balfour* case involved a subgroup of Councillors making decisions that were later 'rubber stamped' by the Band Council.

The Court in *Balfour* explained that resolutions cannot be the product of pre-determined decisions. Instead, they must be debated and passed in accordance with the Band's own guidelines and the principles of democracy. Since the ratification process of the resolutions was inherently biased, the resolutions were cancelled.

The leading case on independence of the decision maker is *Canadian Pacific v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, http://canlii.ca/t/1frm3. In that case, the applicant argued that the Band's Tax Assessment Appeal Committee lacked independence because members were not paid, lacked security of tenure, and were not sufficiently independent from the Band. The majority of the Supreme Court of Canada held that the test could not be applied in the abstract, but that applicant needed to wait to see how the Band's Tax Assessment Appeal Committee would actually decide.

Did the Band Err in Law?

Individuals can also apply for judicial review to assess whether a Band Council erred in law, contrary to section 18.1(4)(c) of the *Federal Courts Act*.

When considering the decision in a case, the court will consider whether the Band acted have correctly applied the law under the *Indian Act* or other relevant legislation or Band custom.

In *Wilson v. Norway House Cree Nation Election Appeal Committee*, 2008 FC 1173, http://canlii.ca/t/2199n, for example, the Federal Court found that a Band's Appeal Committee erred in its interpretation of what constitutes "corrupt practice in connection with the election" to appeal the election of a candidate or candidates. The Decision of the Band's Appeal Committee was set aside. The matter was remitted to the Appeal Committee for redetermination in accordance with the reasons and the directions of the Court.

Erroneous Findings of Fact

Section 18.1(4)(d) of the *Federal Courts Act* requires a tribunal (such as a Band Council) to give consideration to the facts and evidence before it. In *Giroux v. Swan River First Nation*, 2006 FC 285, http://canlii.ca/t/1mv9r, the Court found that a Band Committee failed to consider significant and relevant evidence. As the Committee failed to consider important evidence, or did not refer to this evidence in its decision, the Court found that the Committee made an error that required court intervention. The Committee's decision was set aside and the Court directed that a new Committee be struck to re-determine the issue.

How to Access Information Related to Your Band / First Nation or AANDC

You have a right to obtain your personal information from your Band Council / First Nation through the Canada *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 25, http://laws-lois.justice.gc.ca/eng/acts/p-8.6/ (PIPEDA).

To gain access to your personal information under PIPEDA, you need to:

- Send a written request to your Band Council / First Nation; and
- Provide enough detail to allow your Band Council / First Nation to identify the information you want (such as dates, account numbers, and / or names or positions of people you may have dealt with).

You have the right to expect the personal information your Band Council holds about you is accurate, complete and up-to-date.

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You have a right to see information about you held by your Band Council / First Nation. Your Band Council / First Nation must provide you the information requested within a reasonable time and at minimal or no cost.

When you receive your information, you have the right to ask for corrections if your Band Council has inaccurate information about you.

If you think your Band Council / First Nation is not following its obligations under PIPEDA you should try to address your concerns directly with your Band Council. If that doesn't work, you have the right to make a complaint to the Privacy Commissioner of Canada.

For more information, see: http://www.priv.gc.ca/information/02_05_d_08_e.asp.

Accessing Information from AANDC

The Canada *Privacy Act*, R.S.C. 1985, c. P-21, deals with all personal information that is collected by the federal government on Canadians. A link to the Canada *Privacy Act* is available here: http://laws-lois.justice.gc.ca/eng/acts/P-21/.

The *Privacy Act* gives any individual the right to access her or his own information held by the government, such as AANDC.

To gain access to your personal information, you will need to:

1. Fill out a Personal Information Request Form, available here: http://www.tbs-sct.gc.ca/tbsf-fsct/350-58-eng.asp

2. Provide a copy of identification (to confirm you are making the request and not someone else asking for your personal information).

3. Specify the personal information you are seeking. The more precise your request, the faster it will be answered.

4. Send your form to the Privacy Coordinator of the agency you think currently has your information.

5. If you have run into a problem with your application, or think that your personal information is being:

    - improperly collected,

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- improperly used, or
- improperly disclosed by the federal government,

You can contact:

The Office of the Privacy Commissioner of Canada by calling:
1-800-282-1376 toll-free, or go to see their website for more information:
http://www.priv.gc.ca/complaint-plainte/pa_e.asp

Human Rights Complaints Against a Band or Aboriginal Organization

Jurisdiction

In 2008 an amendment was made to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, http://laws-lois.justice.gc.ca/eng/acts/h-6/

As a result of the amendment it is now possible to make a human rights complaint against any First Nations government, such as a Band Council. As of June 2011, complaints regarding discriminatory acts or omissions of any First Nation government, including a Band Council can be brought under the *Canadian Human Rights Act.*

The *Canadian Human Rights Act* also applies to other federal government employers and service providers, such as federal government departments, federal Crown Corporations, and other federally regulated industries such as television and radio stations.
The Canadian Human Rights Commission is responsible for adjudicating complaints under the *Canadian Human Rights Act.* See: http://www.chrc-ccdp.gc.ca/

It is important to note however that not every Aboriginal organization is federally regulated. Some Aboriginal organizations may fall under provincial jurisdiction. In those cases provincial human rights legislation would apply.

In BC the *Human Rights Code*, R.S.B.C. 1996, c. 210, applies to all provincially regulated organizations and businesses. The *Human Rights Code* is available here:
http://www.bclaws.ca/Recon/document/ID/freeside/00_96210_01

The BC Human Rights Tribunal is responsible for adjudicating complaints under the *Human Rights Code*, see http://www.bchrt.bc.ca

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Time-Limits

Complaints under the *Canadian Human Rights Act* must be made within **12 months** of the discrimination. Under the BC *Human Rights Code* the time limit is even shorter: a complaint under the *Human Rights Code* must be made within **6 months**.

Resources

To determine if your concern falls under federal or provincial human rights law, and to obtain legal advice generally about your claim, you should consult a lawyer as soon as possible.

See the Resources Section of this Tool-kit for free or lost-cost legal options. See also:

- The Community Legal Assistance Society: http://www.clasbc.net/human_rights_clinic.php
- BC Human Rights Coalition: http://www.bchrcoalition.org

For general legal information, see:

- *Human Rights and Discrimination Protection*, Canadian Bar Association, http://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts/Your-Rights/236
- *Human Rights Handbook for First Nations*, Canadian Human Rights Commission, http://www.doyouknowyourrights.ca/sites/nai-ina/files/pdf/fn_handbook.pdf
- *Now a Matter of Rights: Extending Full Human Rights Protection to First Nations*, Canadian Human Rights Commission, http://www.chrc-ccdp.ca/eng/content/now-matter-rights-extending-full-human-rights-protection-first-nations

Removing a Band Councillor

A Chief or Councillor automatically loses his or her position on Band Council if they are convicted of an indictable offence, die, or resign.

Under section 78(2)(b) of the *Indian Act* the Minister for AANDC also has the power to declare a person "unfit" to be a Chief or Band Councillor because of a summary conviction, provincial offence, corruption related to election practices, or absence from 3 consecutive meetings without authorization.

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Canadian courts have also recognized the right of Band Councils to suspend Band Council members, under certain circumstances. An attempt to remove a Chief or Councillor must comply with either:

- The *Indian Act* and *Indian Band Regulations* (for all Bands who hold their elections under the *Indian Act*), or
- The Band's customary election procedures (for Bands with community or custom election procedures, or as set out in a self-government agreement).

In *Martselos v. Salt River First Nation*, 2008 FC 8, http://canlii.ca/t/1vdjf, the Court found that Band Councillors could not remove the elected Chief of the Band Council. The Court found that there were no grounds to remove the Chief under the Band's customary election code. The Court was also reluctant to remove a Council member who had been elected, stating: "It is best that the voice of the electorate be respected and that the election process be given a chance to take effect."

An attempt to remove a Band Council member must also comply with general rules of procedural fairness. In *Desnomie v. Peepeekisis First Nation*, 2007 FC 426, http://canlii.ca/t/1rb2h, the Court determined that that even when a decision to remove a Chief or Councillor from office would be reasonable and the behaviour of the removed Council member was clearly reprehensible, the decision must be set aside if procedural fairness was not observed. In that case, the Court made it clear that, at a minimum, there was an obligation to provide adequate notice and an opportunity to respond.

Whether or not a Band Councillor can be removed will depend on what law applies and the facts in the particular situation. It is a good idea to obtain legal advice from a lawyer familiar with Aboriginal law if you have concerns about a Band Council member.

Self-Governance for the Future

This Tool-kit has provided information about legal options available to Aboriginal women and their communities with a focus on issues that take place on reserve. Sometimes legal issues can be resolved within Aboriginal communities and sometimes Aboriginal community members will feel their best option is seek resolution in Canadian courts.

While Canadian courts are an option to resolve some legal disputes in Aboriginal communities, there is also a concern in Aboriginal communities that court intervention, in the long-term, must be replaced with a community-initiated governance model.

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In the words of Chief Normal Bone, of the Keeseekoowenin Ojibway First Nation in a Report of the Standing Senate Committee on Aboriginal Peoples:

> "*What we would like to promote this time … is that we re-build First Nations governments … ourselves, rather than it being handed down or instructed by another authority*" (p. 43 of the Report entitled: "First Nations Elections: the Choice is Inherently Theirs").

Chief Bone's vision is shared by many in Aboriginal communities. Aboriginal communities have developed various self-government initiatives to that end. The James Bay and Northern Quebec Agreement Bands, the Westbank First Nation, and the Sechelt Band, for example, operate under their own laws and have opted out of the *Indian Act*.

For a list of self-government agreements, land claim agreements, and ongoing negotiations between the federal government and First Nations on self government, see:

- http://www.aadnc-aandc.gc.ca/eng/1373385502190/1373385561540
- http://www.bctreaty.net/files/issues_selfgovern.php

Whatever form or shape self-government takes in Aboriginal communities it is clear that that self-governance must ultimately reflect the needs and the will of the community. As often said by the late Squamish Elder Velma (aka Maizie) Baker: "*the power must belong to the people*" and "*if you call the people, they will come."*

Maizie is one example of the strong Aboriginal women who have worked tirelessly to improve their communities. Increasingly, and in spite of colonialism and patriarchy, Aboriginal women are reclaiming leadership roles in their communities. See for example:

- http://www.theglobeandmail.com/news/national/how-women-became-leaders-in-aboriginal-politics/article4435084/
- http://business.financialpost.com/2012/12/24/aboriginal-women-entrepreneurs-ready-to-mentor-peers/
- http://www.yesmagazine.org/peace-justice/indigenous-women-take-lead-idle-no-more

Aboriginal women will continue to play a central role in the future of their communities.

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ADDITIONAL RESOURCES AND REFERENCES

Finding Legal Help

Advocates – See: www.povnet.org and click on "Find An Advocate"

Free legal advice - See:

> ***Access Pro Bono:*** http://accessprobono.ca
> or call: 604.878.7400 or 1.877.762.6664
> * Ask to book with a lawyer who assists with Aboriginal law

Low-cost legal advice - See:

> ***Lawyer Referral Services***: http://www.cbabc.org/For-the-Public/Lawyer-Referral-Service or call: 604-687-3221 or 1-800-663-1919
> * Ask to book with a lawyer who assists with Aboriginal law

Legal Aid – To find out if you qualify for legal aid, see the *Legal Services Society* website:

> http://www.lss.bc.ca/legal_aid/legalRepresentation.php
> or call: 604-408-2172 or 1-866-577-2525

Law Students – See:

> ***UBC Law Students' Legal Advice Program (LSLAP),*** in the lower mainland
> Phone: 604-822-5791 to book appointment or find out which clinic is closest to you.
> * Various law student legal advice clinics throughout the lower mainland, at various times (supervised by a lawyer).
>
> ***The Law Centre,*** in Victoria
> Phone: 250-385-1221
> * Law students (under supervision of a lawyer) available to provide advice and assistance on a variety of areas of law.

Aboriginal Legal Services – See:

> ***Native Court Worker and Counselling Association of BC***
> See: http://www.nccabc.ca/
> Or call: 604-985-5355 1-877-811-1190

* Legal support/advocacy, drug and alcohol counselling, and community outreach for aboriginal people. Native court workers cover 70% of courthouses in BC.

UBC Indigenous Legal Clinic (aka First Nations Legal Clinic), in Vancouver
Phone: 604-684-7334 to inquire
* Law student legal advice (supervised by lawyer) and assistance on legal issues for self-identified Aboriginal peoples.

Vancouver Aboriginal Transformative Justice Society
See: www.vafcs.org or call: 604-251-7200
* Provides offenders and victims with a culturally appropriate and non-adversarial alternative to the mainstream criminal justice system .

Family Law Advice – See:

Family Law Line
Phone: 604-408-2172 (select the Family Law Line option)
* Lawyers available through the Legal Services Society to provide free family law advice by phone.

Family Duty Counsel, Available in various cities / towns in BC
For more information, see:
http://www.legalaid.bc.ca/legal_aid/whereProvincialCourtDutyCounsel.php and
http://www.legalaid.bc.ca/legal_aid/whereSupremeCourtDutyCounsel.php
* Up to 3 hours or 3 appointments with a family law lawyer for advice and assistance for those who financially qualify.

Jane Doe Family Law Clinic for Women, in Vancouver
Phone: 604-255-9700 ext. 146
* Lawyer available to provide free legal advice about family law and for parents involved with MCFD.

Resources About Abuse

Crisis Line / Victim Services – See:

Victimlink, call: 1-800-563-0808
* a toll-free, confidential, multilingual telephone service available across BC and Yukon 24 hours a day, 7 days a week at. Provides information and referral services to all victims of crime and immediate crisis support to victims of family

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and sexual violence, including victims of human trafficking exploited for labour or sexual services.

VictimLink BC provides service in more than 110 languages, including 17 North American aboriginal languages.

Shelters and Transition Houses – See:

http://www.bchousing.org/Options/Emergency_Housing/WTHSP/Access

http://www.bchousing.org/Options/Emergency_Housing/AHOP

Canadian Laws

BC laws (also known as 'acts' or 'statutes') can be found here: http://www.bclaws.ca

Federal laws can be found here: http://laws.justice.gc.ca/

Court Cases

Links have been provided where available to court cases referred to in this Tool-kit. To look up cases, see:

1. BC Courthouse: http://www.courts.gov.bc.ca
2. CanLII: http://www.canlii.org
3. Courthouse Libraries BC: http://www.courthouselibrary.ca
4. Westlaw: Westlaw is a commercial legal database available for free at courthouse libraries.
5. Federal Court of Canada Decisions: http://decisions.fct-cf.gc.ca/site/fc-cf/en/nav.do
6. Canadian Human Rights Tribunal Decisions: http://chrt-tcdp.gc.ca/NS/decisions/index-eng.asp

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Legal Websites

At the following websites you can find a variety of resources and publications about the law in BC, including resources on Aboriginal law, the Ministry of Children and Families Development, welfare, wills and estates, family law, and criminal law.

Canadian Bar Association: Provides scripts on a variety of legal issues, including Aboriginal law, see: http://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts/Your-Rights/237.aspx

Clicklaw: http://www.clicklaw.bc.ca

Continuing Legal Education Society of BC: For articles on a variety of Aboriginal legal issues, see: http://www.cle.bc.ca/PracticePoints/ABOR/Aboriginallaw.html

Justice Education Society: http://www.justiceeducation.ca/aboriginal

Legal Services Society: http://www.legalaid.bc.ca/aboriginal/

Aboriginal Law Books and Articles

Aboriginal Law Handbook, John Olthuis, Nancy Kleer, Roger Townshend and Kate Kempton (2012). Available at Law School Libraries or Courthouse Libraries or purchase online through: http://www.carswell.com

Aboriginal Legal Issues, John Borrows and Leonard Rotman (2012). Available at Law School Libraries or Courthouse Libraries or purchase online through: http://www.lexisnexis.ca/

Aboriginal People and the Law in British Columbia, Legal Services Society (2006), http://resources.lss.bc.ca/pdfs/pubs/Aboriginal-People-and-the-Law-in-BC-eng.pdf

Band Councils, Band Moneys and Fiduciary Duties, John Rich and Nathan Hume (2011), http://www.ratcliff.com/publications/band-councils-band-moneys-and-fiduciary-duties

Individual Rights Under the Indian Act, Darwin Hanna and Christine Mingle (2007) http://www.cle.bc.ca/PracticePoints/ABOR/Individual%20Rights%20under%20the%20Indian%20Act.pdf

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Mapping the Gap: Linking Aboriginal Women with Legal Services and Resources, West Coast LEAF (2011), http://www.westcoastleaf.org/userfiles/file/mapping%20the%20gap-aboriginal%20-Final.pdf

Marginalization of Aboriginal Women: A Brief History of the Marginalization of Aboriginal Women in Canada, Erin Hanson, http://indigenousfoundations.arts.ubc.ca/home/community-politics/marginalization-of-aboriginal-women.html

The Indian Act and Aboriginal Women's Empowerment: What Frontline Workers Need to Know, Katrina Harry (2009), http://www.bwss.org/wp-content/uploads/2010/06/theindianactaboriginalwomensempowerment.pdf

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TEMPLATES

Sample template letter from advocate, or law student summarizing your legal issue and requesting legal help for your case. You could also modify the letter and send it on your own behalf (for guidance only, this 1 *should not be relied on as legal advice).*

Reply to: Name, Legal Advocate
Direct:
E:

Date: _____

Attention: [Name], Litigation Projects
Pro Bono Law Ontario
Address
City, Province, Postal Code
Sent Via Fax:

Dear Mr._____,

RE: REQUEST FOR LEGAL HELP FOR [name] _____ ON A CONTINGENCY OR PRO BONO BASIS

I am a legal advocate who has been asked by Ms. _____ to assist her with this request. My role is to assist women of limited means with poverty law issues and to make referrals for issues outside of my jurisdiction such as this one.

Ms. _____ is a 58 year-old Aboriginal woman from the _____ First Nation. She has years of experience as a _____worker specializing in _____. Ms. _____ requires representation for a civil law matter in Ontario. Unfortunately the circumstances of Ms. _____'s legal problem have left her without income to pay lawyer fees, unless lawyer fees could be paid on a contingency basis.

Background of Legal Issue

As a result of Ms. _____'s legal issue she has been rendered disabled. She was recently homeless and has only now been able to find modest accommodations. Ms. _____ currently resides in Vancouver, BC, and has meet with two pro bono lawyers who advise that she has a strong case worth pursuing. Let me briefly explain Ms. _____'s legal issue.

In [date] Ms. _____ accepted an employment offer with an _____ which included written and oral agreements between the parties. Ms. _____ claims that _____ made numerous false representations about the nature and existence of the employment opportunity being offered.

Ms. _____ claims her safety was put at risk in the work place because … [facts of the case].

Sample template letter from advocate, or law student summarizing your legal issue and requesting legal help for your case. You could also modify the letter and send it on your own behalf (for guidance only, this 2 should not be relied on as legal advice).

The Employer's apparent false representations have impacted Ms. _____ to the extent that she was injured at work, became homeless, became disabled and was without the basic necessities of life. Ms. _____ is still unable to attain gainful employment as a result of her work injuries. She has been able to address the work injuries through Ontario's Worker's Insurance and Safety (under appeal). However Ms. _____ claims that her Employer also still owes her for unpaid wages. She is also seeking damages for her losses.

Limitation Issue

Ms. _____ is aware that civil matters generally must be pursued with two years under the Ontario *Limitations Act*. However Ms. _____ is prepared to challenge this general requirement under the basis of s. 7(1) of the *Limitation Act*, which states:

> The limitation period established by section 4 does not run during any time in which the person with the claim,
>
> (a) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition; and
>
> (b) is not represented by a litigation guardian in relation to the claim.

Ms. _____ has been incapable of commencing this proceeding until now because of her physical, mental and psychological condition. She sustained a serious _____ and _____ injuries in the work place, which required surgery. The financial losses Ms. _____ suffered as a result of her above claim only aggravated her physical, mental and psychological conditions. Today Ms. _____ is considered disabled by her physician and has status as a "Person With Disabilities" with the BC Ministry of Social Development and Social innovation.

Applicable Case Law

Ms. _____ would like to pursue this matter in civil court in Ontario but requires the assistance of a lawyer. One lawyer that Ms. _____ consulted in Vancouver is: [lawyer name]. The lawyer advised that Ms. _____'s case is similar to the case *Queen v. Cognos.*, Inc. [1993] 1 S.C.R. 87.

In that case the court held that the employee relied on the employer's representation in deciding to enter into the contract:

Sample template letter from advocate, or law student summarizing your legal issue and requesting legal help for your case. You could also modify the letter and send it on your own behalf (for guidance only, this 3 *should not be relied on as legal advice).*

> "It turned out to have been negligently made and false. It follows that the appellant is entitled to damages for the loss suffered as a result of that representation" (p. 2).

In that case, the appellant employee was awarded $67,224 in damages plus costs. Based on Ms. Bloor's review of Ms. _____'s case, and in light of *Queen v. Cognos*, Ms. Bloor encouraged Ms. _____ and I to write this letter requesting pro bono/contingency assistance in Ontario.

Given _____'s skill set and resourcefulness she has retained a lot of paperwork related to her legal issue. She has also created a very detailed chronology of events for her case with the appropriate documentation to verify the facts indicated in chronology. Should a lawyer be interested in taking on Ms. _____'s case both she and I can are available to provide research, input and general ongoing support to the case (hopefully easing the burden of the lawyer involved).

We look forward to hearing whether Pro Bono Law Ontario is interested in assisting with Ms. _____'s case. I have no doubt that legal assistance for Ms. _____ could make all the difference for her. Please do not hesitate to contact me with any questions or concerns regarding this letter.

Thanks for your time and consideration.

Should you have any questions or concerns about my letter please do not hesitate to contact me.

Sincerely,

Legal Advocate

Cc: Client

Sample template letter regarding eligibility for Indian Status (for guidance only, this template should not be relied on as legal advice).

Name: *(this letter could be written directly from you or your advocate or lawyer)*
Address: *(Provide somewhere you can be contacted, including a safe place to*
Phone: *receive messages and mail*)

Date:

Attention: Registrar
Aboriginal Affairs and Northern Development
[Address]
VIA FAX: *[fax number]* and EMAIL: *[email address] (it may be important to prove this letter was successfully sent and when)*

Dear Registrar:

Re: My eligibility for Indian Status, Your File #: *(give any applicable file #)*

I am responding to your letters dated October 3, 2004 and April 8, 2005 indicating I am not eligible for Indian Status per s. 6(1)(c) and s. 6(2) of the *Indian Act* [*Act*] *(enclose any relevant letters for reference).*

As you are aware, subsequent to your letters, Sharon McIvor challenged these provisions of the *Act* at the BC Supreme Court and BC Court of Appeal. On April 6, 2009, the B.C. Court of Appeal upheld Judge Ross's ruling that the *Act* continues to discriminate against Aboriginal women on the basis of sex with respect to Indian status registration.

I am one of the women discriminated against by s. 6(1)(s) and s. 6(2) of the *Act*. In light of the *McIvor v. Canada (Registrar of Indian and Northern Affairs*) 2009 BCCA 153 decision I am requesting that you remedy this discriminatory situation as soon as possible. I am requesting that I be deemed as entitled to registration as an Indian per the *McIvor v. Canada* decision.

I am also seeking information on the First Nation / Band my birth mother and grandmother are affiliated with. This will assist me in learning more about my Aboriginal roots.

Please advise on the above. I can be reached at the above-mentioned contact information and look forward to hearing from you.

Sincerely,

[Name]

Sample template letter from an advocate, or law student regarding band distribution or royalty monies you may be entitled to. You could also modify the letter and send it on your own behalf (for guidance only, this template should not be relied on as legal advice).

Reply to: Name , Legal Advocate
Direct:
E:

Date: _____

Attention: Attention Band Chief and Council
_____ First Nation
City, Province, Postal Code
Sent Via Fax: 204.684.2069 and Regular Mail

Dear Band Council,

Re: Band Member _____

I am a legal advocate who has been asked by _____ to assist her with this matter. A Release of Information Consent form authorizing my involvement.

Ms. _____ and I understand that the _____ First Nation has been involved in a settlement with the government as a result of a forced relocation by government of the _____ First Nation.

We understand that in addition to land entitlement settlements, band members may be entitled to settlement monies as a form of compensation to band members who were negatively affected by the relocation.

Ms. _____ is an elder from the _____ First Nation who was directly and negatively impacted by the forced government relocation.

She would like to be kept apprised of settlement land or monies she may be entitled to. She can be reached care of my office:

C/o: Name
Organization
Address
City, Province, Postal Code
Phone:
Fax:
Email:

Alternatively Ms. _____ can be reached directly at:
_____ with any further information.

Sample template letter from an advocate, or law student regarding band distribution or royalty monies you may be entitled to. You could also modify the letter and send it on your own behalf (for guidance only, this template should not be relied on as legal advice).

As you may know persons who serve as council members act as fiduciaries to the members of their band. In making a decision that may affect a band member, the council of a band must follow principles of administrative fairness and natural justice.

The council must provide notice to any affected band members of any meeting at which a decision will be made, as well as disclose relevant information and any concerns the council may have, and give the band member an opportunity to be heard.

We look forward to receiving more information from you about the recent settlement or any other information / band decisions that may impact Ms. _____.

Thanks for your time and consideration.

Sincerely,

Name
Legal Advocate

Cc: Client

Sample template letter to MCFD of Delegated Aboriginal Agency (for guidance only, this template should not be relied on as legal advice).

Name: *(this letter could be written directly from you or your advocate or lawyer)*
Address: *(Provide somewhere you can be contacted, including a safe place to receive*
Phone: *messages and mail)*

Date:

Attention: [Social Worker name] (alternatively any other staff able to assist)
Organization
City, Province, Postal Code
Sent Via Fax: 204.684.2069 and Regular Mail *(it may be important to prove this letter was successfully sent and when)*

Dear Ms. _____,

Re: Request for visits with my children

I understand your office is responsible for the care arrangements of my children. _____ and _____ and that you are the social worker involved with my family.

I would like to see my children who are in care. I have worked hard over the past year to make some positive changes in my life. *[List of positive changes such as sobriety, accessing counselling and supports, enrollment in courses].*

I am proposing to have visits with my children on Saturdays, every second weekend. I realize that on some Saturdays the children may be involved in other activities and I do not want to overwhelm them. More long-term, assuming visits go well, I would like to arrange visits on one weekday a week as well.

Can you please contact me as noted above to discuss what would be possible fin terms of spending some time with my children?

Thanks for your time and consideration.

Sincerely,

[Name]