BCCA CIVIL CHAMBERS
PRO BONO DUTY COUNSEL PROJECT

DUTY COUNSEL HANDBOOK

MARCH 2009

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PART I AN OVERVIEW OF PRO BONO LAW OF BC

1. Vision Statement

An innovative and collaborative pro bono system advancing access to justice and serving the legal needs of people and non-profit organizations of limited means throughout British Columbia.

2. Mission Statement

To advance access to justice by developing and facilitating opportunities for the effective provision of high-quality pro bono legal services to people and non-profit organizations of limited means throughout British Columbia, and by supporting potential and existing pro bono legal service providers in British Columbia.

3. Values and Principles

In relation to pro bono legal services, Pro Bono Law of BC abides by the following principles:

- Pro bono legal services are those legal services that are provided to people and non-profit organizations of limited means without expectation of a fee;
- Pro bono legal services should be designed and provided according to the changing social and legal needs of the people and non-profit organizations of limited means for whom they are intended;
- Pro bono legal services should be provided to people and organizations of limited means according to the same standards of dedication, excellence, and professional ethics as paid legal services; and
- Pro bono legal services should serve to complement and not replace government-funded programs advancing access to justice; a collaborative pro bono system should not substitute for a properly funded legal aid system.

In relation to its operations, Pro Bono Law of BC abides by the following principles:

- Pro Bono Law of BC strives to ensure that high-quality pro bono legal services are available to people and non-profit organizations of limited means in all urban and rural regions of British Columbia;
- Pro Bono Law of BC will promote effective links with existing and potential pro bono service providers, all levels of government, community organizations, law firms, legal advocacy groups, bar associations, law foundations, professional organizations, law schools, and law students in order to advance access to justice through effective research, the promotion of a pro bono culture, and the provision of high-quality pro bono legal services;

- Pro Bono Law of BC strives to improve the overall delivery of pro bono legal services by facilitating the integration and coordination of services provided by pro bono organizations and service providers throughout British Columbia;
- Pro Bono Law of BC will assist organizations to establish a pro bono component to their services wherever practicable; and
- Pro Bono Law of BC strives to develop new means of delivering pro bono legal services where the legal needs of people and non-profit organizations of limited means are currently unfulfilled.

4. Strategic Objectives

- Raise the profile of pro bono in the British Columbia legal community, in a demonstrable and concrete fashion;
- Raise the profile of pro bono in all communities throughout British Columbia, in a demonstrable and concrete fashion;
- Provide pro bono assistance and representation to people of limited means without duplicating those services provided by government, other pro bono service providers, and other organizations generally;
- Assist in the establishment of effective partnerships between law firms and non-profit organizations of limited means;
- Work cooperatively with potential and existing pro bono service providers and the Legal Services Society in a manner consistent with promoting a properly funded legal aid system;
- Work closely with community and non-profit organizations of limited means to identify and meet their legal needs and the legal needs of the public whom they serve; and
- Establish a diverse and stable funding base in order to maintain the present standard of operation past March 31, 2010.

5. Directors (as of March 2009)

- **The Hon. Madam Justice Mary Ellen Boyd**
  Madam Justice Mary Ellen Boyd, a former lawyer with Bull, Housser and Tupper, was appointed to the County Court of Vancouver in 1985, and since the Superior Courts' merger in 1990 has been a member of the Supreme Court of British Columbia. Born in Saskatoon, Saskatchewan, on 15 December 1950, Justice Boyd obtained her LL.B. from the University of British Columbia in 1974 and was called to the Bar in 1975. She has been very active in the legal community, serving as Director of the Vancouver Bar

Association from 1980 to 1981, as a Committee member of the Professional Services Committee of the Canadian Bar Association from 1981 to 1982, as Vice-Chairman of the Civil Litigation Section of the Canadian Bar Association, and as a regular contributor to seminars organized by the Continuing Legal Education Society of B.C.

- **Sherman Chan**
  Mr. Chan is Director of Settlement Services, MOSAIC. He has a Master's Degree in Applied Social Studies and is a registered social worker and clinical counsellor with over 26 years of social service experience in Canada, Hong Kong, the United Kingdom, and the United States. Among his many volunteer roles, Mr. Chan is Treasurer of the Canadian Immigrant Settlement Sector Alliance; a co-chair of the Canadian Council for Refugees on Immigration and Settlement Working Group; and he is also a past Board member of the Affiliation of Multicultural Societies and Service Agencies of BC (AMSSA).

- **Angus M. Gunn, Jr.**
  Mr. Gunn is a partner at the Vancouver office of Borden Ladner Gervais LLP. He was admitted to the British Columbia Bar in 1995, after a judicial clerkship with the Court of Appeal for British Columbia. He was also admitted as a Solicitor, Supreme Court of England and Wales, in 1998. Mr. Gunn pursued professional training at both the University of Cambridge (Master of Law, 1998) and the University of Toronto (Bachelor of Laws, 1993). He previously obtained a Bachelor of Arts in History from the University of British Columbia in 1990. Mr. Gunn has also taught as an adjunct professor at the Faculty of Law, University of British Columbia, since 1999.

- **William Jackson, Treasurer**
  Mr. Jackson is Administrative Crown Counsel for Dawson Creek. He is a Bencher of the Law Society and also serves on the Criminal Justice Branch's Policy Revision subcommittee. Mr. Jackson is a founding member of the Peace Energy Co-op which has the license to develop a wind-power generating facility near Dawson Creek; an instructor in Criminology and History at the Northern Lights Community College; a member of the Dawson Creek Violence Against Women in Relationships committee; a member of the Dawson Creek Elder Abuse Committee; and a past director of the BC Crown Counsel Association.

- **Tish Lakes**
  Patricia "Tish" Lakes is the Executive Director of the Okanagan Advocacy and Resources Society in Kelowna. She has extensive lay advocacy and non-profit administration experience and has worked in poverty law advocacy for over twenty years, both managing and providing direct services. Tish has assisted in setting up lay advocacy services in three BC communities and has

joined in several provincial systemic advocacy efforts to improve administrative justice processes.

- **Warren Milman, President and Chair**
  Mr. Milman is a partner with McCarthy Tétrault practising in the Litigation Group and the Class Action Litigation Group. His practice is primarily focused in the areas of civil and criminal litigation. He is a member of his firm's Pro Bono Committee, and is currently on the board of King David High School in Vancouver.

- **Cyndi Stevens**
  Cyndi Stevens is Executive Director of the Port Alberni Friendship Centre. She has been with the Centre since 1986, and prior to becoming Executive Director 11 years ago, worked in the areas of community health, legal advocacy, youth and accounting at the Centre. Ms. Stevens has served on several boards and committees on a community, provincial, and national level, and is currently on the Board of the National Association of Friendship Centres, the Board of the BC Association of Friendship Centres, the Board of the M'Akola Housing Society, is the Vice-Chair of the Port Alberni Non-Profit Housing Association, and serves on the Family Court Committee. She is of Nuu-chah-nulth ancestry from the Ahousaht First Nation and was adopted to the Hesquiat First Nation. She has life experiences with the Foster care system – personally as a foster child, as well as being a foster parent for over 25 years.

- **Kay Vinall, Vice-President**
  Ms. Vinall practices in the areas of wills and estates and family law, in association with another sole practitioner. She has a lengthy history of volunteer work with not-for-profit groups providing assistance to persons with mental illness and their family members, and a keen interest in the provision of pro bono services.

- **Caroline Nevin**
  Caroline Nevin is the Executive Director of the Canadian Bar Association BC Branch, one of the founding partners of Pro Bono Law of BC. Ms. Nevin has more than 22 years of experience in communications, business, and association management in British Columbia and Alberta, and has served on a variety of non-profit boards in both provinces.

- **Charlotte Ensminger, Secretary**
  Ms. Ensminger is Staff Lawyer with the Law Society's Policy and Legal Services Department. She undertakes legal and policy analysis and policy development for the Law Society's Board of Governors (Benchers), and its committees, task forces and departments. Ms. Ensminger has played a key role in special projects such as The Unbundling Legal Services Task Force and the Joint Initiative on Pro Bono. She served as Pro Bono Law of BC's first

Executive Director and is a past member of the CBA (National) Pro Bono Committee. Ms. Ensminger has volunteered with a number of community agencies and boards including Battered Women's Support Services' Pro Bono Pilot Project; the Women's Addiction Foundation; the Aurora Society; Aurora Advisory Council to the Women's Health Centre, BC Women's Hospital; and the Vancouver Food Bank.

6. Staff

- **Jamie Maclaren, Executive Director** (jmaclaren@probononet.bc.ca)
  Mr. Maclaren joined Pro Bono Law of BC in June 2005 after practising in labour and employment law with a downtown Vancouver firm. Throughout his legal career, Mr. Maclaren has been committed to pro bono service. He has served as a Director of the Community Legal Assistance Society, and as Executive Director of the UBC Law Students' Legal Advice Program (LSLAP). He volunteers as a supervising lawyer for LSLAP, conducts legal seminars for the Salvation Army's Break the Cycle Program, provides pro bono legal advice at both Access Justice and Salvation Army clinics in Vancouver's Downtown and Eastside, and provides pro bono representation to several indigent clients each year. He presently serves as a Director of Ten Percent Environmental Society. Mr. Maclaren also maintains a part-time pro bono practice in the areas of human rights and employment law.

- **Annie Baric, Operations Coordinator** (abaric@probononet.bc.ca)
  Ms. Baric completed her Bachelor of Arts degree from Simon Fraser University in 2000. She spent four years in the Culture Resource Management field before returning to school at B.C.I.T. for her Industry Partnership Certificate in Office Administration with Technology. She brings three years of non-profit experience to Pro Bono Law of BC, including particular expertise in fundraising, event planning, and donor relations from The Mel Jr. & Marty Zajac Foundation – a foundation supporting children and seniors with special needs through innovative community projects. Ms. Baric continues to volunteer her time to the Zajac Foundation through various fundraising events.

- **Bonnie Redekop, Roster Programs Manager**
  (bredekop@probononet.bc.ca)
  Bonnie Redekop joined Pro Bono Law of BC in August 2007. She received her Bachelor of Arts degree with majors in Political Science and Sociology in 1994. She subsequently attended law school at Osgoode Hall, York University, receiving her Bachelor of Laws Degree in 1997. During her legal education, Ms. Redekop spent eight months participating in the clinical poverty law program at Parkdale Community Legal Services in Toronto. While at the clinic, she focused her efforts on Workers' Rights matters. She moved to British Columbia in August 2004. Since the completion of her legal training,

Ms. Redekop has utilized her legal and administrative skills in a variety of areas including lawyers' errors and omissions insurance, utility services, and telecommunications.

- **Amina Rai, Civil Chambers Pro Bono Duty Counsel Project Manager** (arai@probononet.bc.ca)
  Amina Rai joined Pro Bono Law of BC in November 2007. She has completed her Bachelor of Arts degree in Psychology, and is currently attending the University of British Columbia (UBC) part-time to receive a minor in Gender Studies. During her time as a student, she committed herself to student advocacy and held various elected positions within Langara College and UBC's student unions. She continues to participate actively in Model United Nations programs, and local and international social justice initiatives.

7. History

1996 The Canadian Bar Association's Task Force on Systems of Civil Justice Report concluded that pro bono legal work is an important component of a plan to increase access to justice.

1998 In September, 1998, at the Annual General Meeting of the Canadian Bar Association in St. John's, Newfoundland, the Law Society of British Columbia and the Canadian Bar Association (BC Branch) resolved to work cooperatively to develop and encourage programs for the delivery of pro bono legal services within the province of British Columbia. Shortly thereafter, the Law Society of British Columbia and the Canadian Bar Association (BC Branch) struck a committee – the Joint Committee on Pro Bono (the "Committee") to implement their resolutions.

1999 In November, 1999, the Committee released an interim report entitled *A Framework for the Delivery of Pro Bono Legal Services in the Province of British Columbia.* The report included recommendations on how to establish a framework for the delivery of pro bono legal services in British Columbia. The main recommendation was that the Committee consult with all stakeholders within the BC justice system – including community, health, social services and advocacy programs – to determine the most effective means for coordinating the delivery of pro bono.

2001 In October, 2001, with a grant provided by the Law Foundation of British Columbia, the Committee hosted the *Pro Bono Forum – for the Public Good* at the Morris J. Wosk Centre for Dialogue in Vancouver. The *Forum* brought representatives of community organizations from across British Columbia together with judges,

lawyers, Legal Services Society staff, law students, pro bono service providers, courthouse library staff, court facilities staff, and others interested in pro bono for an exchange of information, ideas and resources. The *Forum* served as a starting point for further dialogue and collaborations toward ensuring access to justice for all British Columbians.

2002 In February, 2002, the Committee released *A final report on the pro bono forum 2001 – for the public good.*

In June, 2002, the Committee released its report, *Pro Bono Publico – lawyers serving the public good* which recommended the formation of a non-profit organization to facilitate and promote pro bono legal services throughout British Columbia.

Originally incorporated under the name Public Legal Access Society in March, 2002, Pro Bono Law of BC commenced its operations in April, 2002 under the leadership of acting Executive Director Charlotte Ensminger and Chair Carman J. Overholt, QC. Pro Bono Law of BC received a three-year core funding grant from the Law Foundation of British Columbia to carry out the recommendations of the Committee. The grant application was supported by the Law Society of British Columbia and the Canadian Bar Association (BC Branch). Pro Bono Law of BC's initial focus was on five areas: community development; lawyer and law firm recruitment; development and maintenance of a pro bono website; fundraising; and lobbying for a properly funded legal aid system.

Soon after its inception, and with funding provided by the Law Foundation of British Columbia, Pro Bono Law of BC launched ProBonoNet.bc.ca – a website providing the public with a directory of pro bono programs, news and resources, and providing lawyers, non-lawyer legal professionals, and community organizations with access to pro bono opportunities, news, and resources.

In the fall of 2002, Pro Bono Law of BC published its *Best Practices for Pro Bono Delivery Programs in British Columbia*. The *Best Practices* guide coincided with Pro Bono Law of BC's work with the Lawyers Insurance Fund of the Law Society of British Columbia to arrange for insurance coverage for lawyers providing pro bono legal advice through approved programs. The insurance coverage permits retired and non-practicing lawyers to provide approved pro bono services with full insurance coverage. It also offers the benefit of waived deductibles to practicing lawyers. Pro Bono Law of BC continues to work with organizations interested in becoming

approved programs and makes recommendations for approval to the Law Society of British Columbia.

2003 Under the leadership of its first appointed and part-time Executive Director Pat Pitsula, part-time Coordinator Carol Jones, and Chair Carman J. Overholt, QC, Pro Bono Law of BC received funding from the Law Foundation of British Columbia to develop an online poverty law training module. Pro Bono Law of BC contracted with Anne Beveridge and Denice Barrie to work on a pro bono training project beginning in October 2003. The overall objective of the project was to research, develop and implement training resources to support the private bar and advocates in providing pro bono poverty law services in British Columbia. The Online Poverty Law Training Course was launched in March 2005.

In 2003, Pro Bono Law of BC also facilitated the creation of the Supreme Court Pro Bono Civil Duty Counsel Project – designed to address the perceived representational needs of unrepresented litigants appearing before the Supreme Court of British Columbia in Vancouver.

2004 In early 2004, under Chair Kelly Doyle, Pro Bono Law of BC played a vital role in the development of the Supreme Court Self-Help Centre in Vancouver, assisting with the coordination and potential integration of pro bono advice services. The Supreme Court Self-Help Centre opened in April, 2005 and serves to improve access to justice for unrepresented litigants in civil actions.

Pro Bono Law of BC also worked with the Salvation Army BC Pro Bono Program to coordinate assistance from members of the private bar to represent individuals at the Court of Appeal for British Columbia who cannot afford a lawyer and who are not eligible for legal aid. The resulting BC Court of Appeal Program and its three divisions – civil, criminal and family – provides pro bono assistance to eligible low-income individuals appearing before the Court of Appeal.

Throughout 2004, under the continued leadership of Executive Director Pat Pitsula, Pro Bono Law of BC sustained its commitment to the development of a pro bono culture in law firms, designing pro bono policies for firms and government, and developing alternate models for pro bono work such as creative alliances between law firms and non-profit organizations. To facilitate such alliances, Pro Bono Law of BC obtained funding from the Law Foundation of British Columbia to create a manual describing how community organizations can partner with law firms. The Partnership Manual,

written by Adrianne Boothroyd of the Multiple Sclerosis Society of Canada, BC Division, is based on the MS Society's successful partnership with the Vancouver law firm of Davis & Company.

2005 In March 2005, Pro Bono Law of BC received a two-year operating grant from the Law Foundation of British Columbia and the Law Society of British Columbia.

In August 2005, under the leadership of full-time Executive Director Jamie Maclaren and Chair Kelly Doyle, Pro Bono Law of BC conducted a survey of members of the Law Society of British Columbia to determine the challenges and obstacles that BC lawyers encounter in providing pro bono services. The survey results called for pre-screened and more accessible and customized pro bono opportunities for representation that allow for simple addition and removal from the record.

In answer to its survey findings, Pro Bono Law of BC explored ways by which to broaden the scope of existing pro bono services to include prescreened opportunities for representation. In November, 2005, Pro Bono Law of BC launched three Roster Programs – the Family Law Program, the Federal Court of Appeal Program, and the Judicial Review Program. For each program, Pro Bono Law of BC takes screened client referrals from lawyers, advocates, and front-line pro bono organizations such as LawLINE, the Salvation Army BC Pro Bono Program, and the Western Canada Society for Access to Justice, and endeavours to match each client with a volunteer lawyer in his or her area.

In December 2005, with a two-year project grant from the Law Foundation of British Columbia, Pro Bono Law of BC announced disbursement coverage for pro bono representation of poverty law clients through the Roster Programs.

2006 In January, 2006, with funding provided by the Notary Foundation of British Columbia, Pro Bono Law of BC redesigned and launched the ProBonoNet.bc.ca website. The new website manages the Roster Programs and provides streamlined navigation to secured sections, making it easier for lawyers, non-lawyer legal professionals, community groups and members of the public to have access to its expanded training, services, and resources. In the spring of 2006, Pro Bono Law of BC launched new Roster Programs, including a Solicitors' Program, which established a roster of lawyers willing to assist community organizations with discrete tasks such as incorporation, board governance, drafting

bylaws, drafting privacy policies, and human rights and employment matters.

In February 2006, Pro Bono Law of BC held its first Appreciation Breakfast for volunteer lawyers at the Law Courts Inn in Vancouver. The Honourable Chief Justice Lance Finch delivered an inspiring speech on the perpetual need for more lawyers to provide pro bono services to unrepresented litigants, particularly at the Court of Appeal level. Also in February 2006, Pro Bono Law of BC launched its new Solicitors' Program. The Solicitors' Program operates on the basis of a roster of volunteer lawyers willing to assist community organizations with discrete tasks such as incorporation, board governance, drafting bylaws, drafting privacy policies, and human rights and employment matters.

In March 2006, Pro Bono Law of BC launched its new Court of Appeal Program in partnership with the Salvation Army Pro Bono Program. Similar to its other Roster Programs, the Court of Appeal Program endeavours to match volunteer lawyers with unrepresented litigants appearing before the Court of Appeal for British Columbia.

On April 1, 2006, Pro Bono Law of BC received charitable status, thus allowing for tax-deductible donations from organizations and clients.

In May 2006, Pro Bono Law of BC facilitated a Managing Partners Roundtable which brought together partners from Vancouver's largest law firms, the judiciary, representatives from the University of British Columbia and University of Victoria law schools, the Law Society of BC, and the Law Foundation of BC. The Roundtable discussion provided some innovative ideas on how to better engage large law firms in the provision of pro bono legal services in British Columbia, including firm-specific pro bono projects, partnerships between law firms and non-profit organizations, and support of existing pro bono programs including Pro Bono Law of BC's Roster Programs, and clinical programs such as the Salvation Army BC Pro Bono Program and the Western Canada Society to Access Justice.

Pro Bono Law of BC held its first free Non-Profit Law Seminars in October 2006 in each of Kelowna, Vancouver, and Victoria.

In late 2006, Pro Bono Law of BC located the Parkinson Society of British Columbia as a likely community organization partner for Blake, Cassels & Graydon LLP. Following their facilitated

introduction, the two parties announced a pro bono partnership, with Blakes providing pro bono counsel to Parkinsonians and the Society itself.

2007 Pro Bono Law of BC launched the ProBonoMap.bc.ca mapsite in January 2007. The mapsite features an interactive and searchable map of pro bono services located throughout British Columbia, including pro bono clinics, Legal Services Society programs, courthouse programs, and advocacy programs.

In March 2007, Pro Bono Law of BC conducted its second survey of members of the Law Society of British Columbia to gauge the level of pro bono participation among BC lawyers and to assess what could be done to better support their pro bono efforts. The survey showed that pro bono participation was increasingly robust in British Columbia, as 64% of 1080 survey respondents stated that they currently provide pro bono services to persons or non-profit organizations of limited means (a 10 per cent increase over 2005). In all, respondents reported providing over 40,000 hours of pro bono services over 2006, for an average of 37.2 hours per respondent. An overwhelming majority of respondents cited “professional responsibility” as the prime motivation for providing such services.

In April 2007, Pro Bono Law of BC co-hosted the first-ever Pro Bono Practice CLE with the Continuing Legal Education Society of British Columbia. The course was dedicated to the proposition that a body of knowledge and skills is specifically relevant to lawyers in pro bono practice. The course looked at soft skills such as interviewing and problem solving for clients, as well as “nuts and bolts” law and practice in traditional poverty law areas. The course also served as a forum for leading pro bono counsel to share their knowledge, experience, and wisdom on how to survive and thrive in an often challenging area of practice.

In July 2007, Pro Bono Law of BC published the first-ever edition of the BC Law Firm Pro Bono Guide for Students. The Guide described the benefits of pro bono service and provided general information on the nature of pro bono projects and policies. It also provided particular information on pro bono projects and engagements among BC’s 27 largest law firms, such that law students could assess the varying commitment of individual BC law firms to providing pro bono opportunities for their associates, students, and staff.

2008 In January 2008, Pro Bono Law of BC launched the Civil Chambers Pro Bono Duty Counsel Project as a one-year pilot project operating out of the courthouse at 800 Smithe Street in Vancouver. Each Wednesday, volunteer lawyers from several large Vancouver law firms provide pro bono legal assistance and representation to unrepresented low- and modest-income litigants appearing in civil chambers (Supreme Court of British Columbia and Court of Appeal for British Columbia).

In September 2008, Pro Bono Law of BC worked with Pro Bono Law Ontario, Pro Bono Law Alberta, and Pro Bono Law Saskatchewan to host the 2nd National Pro Bono Conference in Vancouver. The Conference brought together legal practitioners, the judiciary, the voluntary sector, and academia from North America and abroad to reinforce the remarkable partnerships between them, to share ideas and best practices concerning pro bono legal services, to forge new pro bono partnerships, and to explore challenging issues that still lie ahead in the pro bono sphere. Featured speakers included Chief Justice Beverley McLachlin, Louise Arbour, Mike Harcourt, Lesra Martin, and Dennis Edney.

Pro Bono Law of BC hosted three open-air free legal advice clinics in downtown Vancouver in September 2008. The clinics facilitated access to justice by providing free legal advice to unrepresented low-income individuals (including homeless people) who often have limited or restricted access to the basic means of booking appointments in traditional clinics.

Pro Bono Law of BC partnered again with the Continuing Legal Education Society of British Columbia to design and host the 2008 Pro Bono Practice CLE in September 2008 in Vancouver. The course featured seminars on skills such as interviewing and problem solving for clients, as well as a free “nuts and bolts” workshop for pro bono managers.

Pro Bono Law of BC launched the Wills & Estates Program in October 2008 to provide free wills and estate assistance and representation to low- and modest-income individuals throughout British Columbia.

8. Funders

Pro Bono Law of BC acknowledges generous annual funding from the Law Foundation of British Columbia and the Law Society of British Columbia. Pro Bono Law of BC also acknowledges generous program and project funding from the Notary Foundation of British Columbia, the Province of British Columbia, and the Vancouver Foundation. Finally, Pro Bono Law of BC expresses its sincere gratitude to the many individual donors who give so selflessly to support Pro Bono Law of BC's mission to advance access to justice.

PART II AN OVERVIEW OF THE BCCA CIVIL CHAMBERS DUTY COUNSEL PROJECT

1. Why Pro Bono?

One need not look very far to see that the challenges of accessing justice are increasing daily. More and more people are appearing in court without a lawyer, largely because they cannot afford one. The gap between rich and poor has widened, the law has become increasingly complex, and severe budget cuts have had a dramatic impact on the availability of legal aid. Social service and community organizations that have traditionally assisted those with limited means are finding their resources stretched to the limit. The challenges of gaining equal access to justice are real.

Lawyers hold a unique place within the justice system and are well positioned to respond to the urgent need that exists in our communities. Canada, Australia, the United States, and Britain are just some of the countries around the world where the legal profession itself has taken a leadership role in finding ways to promote lawyers' participation in pro bono work.

The responsibility to do pro bono work is premised on the proposition that no one should be denied access to justice because of poverty. In a modern democracy that is dedicated to the rule of law, the justice system should be accessible to everyone.

It is Pro Bono Law of BC's strongly held view that government has the primary responsibility to provide adequate legal aid to ensure equal access to justice. The legal profession does, however, play a fundamental role in ensuring the proper administration of justice. Even with a properly funded legal aid system, there have always been those who lack the means to obtain legal advice or assistance. Lawyers who believe they have a moral or professional duty to break down the barriers that prevent full access to justice represent many of these people for free. These pro bono activities in the public interest are an important aspect of professionalism and the practice of law:

> The lawyer's function is grounded in role morality, the idea that special obligations attach to certain roles, in this case, to render justice. Lawyers claim autonomy to perform their functions as a consequence of specialized knowledge and skill. The state grants autonomy, an effective monopoly, in exchange for lawyers, as officers of the court, discharging their duty to further equality before the law. After all, the very reason the state conferred such a monopoly was so that justice could best be served, a notion that surely means that even those unable to pay or those pursuing an unpopular cause can expect legal representation. A lawyer's duty to serve those unable to afford to pay is thus not an act of charity or benevolence, but rather one of professional responsibility, reinforced by

> the terms under which the state has granted to the profession effective control of the legal system.[1]

Although Pro Bono Law of BC does not support mandatory participation in pro bono, there are compelling arguments for a high sense of calling to justice in the role of a legal professional.

2. Project Overview

The Civil Chambers Pro Bono Duty Counsel Project operates at 800 Smithe Street in Vancouver. Each Wednesday, a volunteer lawyer provides pro bono legal assistance and representation to unrepresented low- and modest-income litigants appearing in civil chambers in the Supreme Court of British Columbia and the Court of Appeal for British Columbia. Individuals (not organizations or companies[2]) may call 604-603-5797 to determine their eligibility and to book an appointment with Duty Counsel.

3. Project Services

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

- evaluating the merits of the matter scheduled for chambers;
- advising the client on substantive legal issues and on the client's legal rights and responsibilities;
- reviewing the client's documents;
- drafting and filing documents on behalf of the client;
- exploring the possibility of resolution by agreement or settlement; and
- (if the matter proceeds) representation in chambers.

Duty Counsel services are provided within three distinct tiers of service (in order of priority):

1. In the first tier of service, the unrepresented civil chambers litigant is paired with Duty Counsel several weeks before the scheduled hearing

[1] R. Katzman, ed. *The Law Firm and the Public Good* (Washington DC: Brookings Institution, 2005).
[2] At present, Pro Bono Law of BC's duty counsel services are restricted to individuals. Although Pro Bono Law of BC does provide pro bono services to non-profit organizations of limited means, it does so only for the purpose of building service capacity.

(a Wednesday). This time allows Duty Counsel to consult with the client to assess his or her chambers-related needs, and to provide him or her with any and all assistance deemed appropriate before and during the scheduled hearing.

2. In the second tier of service, Duty Counsel provides ad hoc pro bono legal assistance and/or representation to unrepresented civil chambers litigants on each Wednesday.

3. If neither first tier service nor second tier services are needed, Duty Counsel provides pro bono legal advice on civil chambers matters in the Supreme Court of British Columbia and the Court of Appeal for British Columbia to screened low- and modest-income individuals on each Wednesday.

4. Project Eligibility Criteria

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

- be going (or thinking of going) to chambers on a civil matter in Vancouver;
- be unrepresented because he or she cannot afford a lawyer;
- be an individual (not an organization or a company[3]);
- not present a conflict of interest for the volunteer lawyer serving as Duty Counsel; and
- have a case that shows some legal merit.

There are no financial eligibility criteria for individuals seeking pro bono assistance or representation (or both) for chambers matters in the Court of Appeal for British Columbia. The Project does, however, apply the following financial eligibility criteria for individuals seeking pro bono assistance or representation (or both) for chambers matters in the Supreme Court of British Columbia:

- Gross annual income of $40,000 or less for 1-person household;
- Gross annual income of $54,000 or less for 2-person household;
- Gross annual income of $62,000 or less for 3-person household, including one dependent;

[3] See note 3, *supra*.

- Gross annual income of $70,000 or less for 4-person household, including two dependents; and
- + $8,000 per dependent thereafter

5. Contact Information

Individuals may determine their eligibility, inquire about Project services, and ultimately book an appointment with Duty Counsel by phoning 604-603-5797 at any time (all calls will be answered immediately or messages will be returned within 24 hours). Individuals may also inquire by e-mail at chambers@probononet.bc.ca.

To obtain the full benefit of Project services, individuals are encouraged to call the Project telephone number as soon as possible – preferably before filing any chambers documents. Clients will be better served by calling the Project telephone number several weeks before a scheduled chambers hearing.

6. Pro Bono Duty Counsel FAQ

Q: As Duty Counsel, how much time must I commit to the Project?

A: Each Duty Counsel must commit to providing pro bono legal services for one full day (9:00 am to 4:30 pm) per year at the Civil Chambers Pro Bono Duty Counsel office located in the Courthouse Library at 800 Smithe Street. Your time commitment will otherwise depend on the overall need for assistance within the three tiers of service. You may or may not assist and/or represent more than one client on your scheduled duty counsel day, depending on presented need, your preferences, and your stated capacity. If you are unable to attend on your scheduled service day, it is your responsibility to advise the Project Manager and to locate a substitute Duty Counsel from your law firm or from the Project volunteer list.

You are welcome to volunteer for more than one service day if your schedule permits. You may also choose to serve on a roster of lawyers who are willing to consider providing pro bono representation to BCCA civil chambers litigants on a referral basis.

Q: When and how is the Project administered?

A: Duty Counsel services are available at 800 Smithe Street on every Wednesday. Duty Counsel have full use of the private Project office, which includes a full computer workstation with secure internet access, a dedicated Quicklaw account, a copier/scanner, fax, telephone, and a small library of chambers-related guidebooks and manuals. Duty Counsel are welcome to

work on their own files when client service is not required. The Project Manager provides on-site assistance to Duty Counsel and screens and schedules eligible clients throughout the service day.

Q: What skills do I need to volunteer as Duty Counsel?

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

- creative and open-minded;
- compassionate and aware of barriers to justice experienced by litigants who cannot afford legal representation;
- resourceful and capable of prompt self-education;
- poised while speaking before different judges and masters on a variety of cases in a single day;
- comfortable working in a fast-paced environment; and
- looking for opportunities to give back to the community through pro bono service.

Pro Bono Law of BC maintains a roster of senior practitioners who are willing to serve as on-call mentors to Duty Counsel. Pro Bono Law of BC also offers a limited number of complimentary CLE registrations to Duty Counsel each year, and develops customized training sessions for Duty Counsel as such needs arise.

Q: How are conflicts of interest identified or cleared?

A: The Project Manager will conduct conflict checks at each tier of service by contacting Duty Counsel's law firm before any client appointments or meetings are made. Duty Counsel will not provide any legal services to unrepresented litigants before clearing of conflicts.

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

A: No. For the first two tiers of service, you will sign a standard limited retainer with clients. You will also identify yourself as pro bono Duty Counsel in chambers. The Law Society of British Columbia has confirmed that apart from the duty of confidentiality, Duty Counsel will not be deemed to have residual or ongoing professional responsibilities to Project clients beyond "on-the-day" responsibilities outlined in the standard limited retainer.

Although no retainer is required for the provision of legal advice, Project clients will sign a standard acceptance form showing that they understand

that the service of pro bono legal advice is limited to the time of their appointment.

Q: What are the limitations to my services as Duty Counsel?

A: Unless you choose otherwise, you will not:

- represent or advise Project clients on matters not pertaining to civil actions in the Supreme Court of British Columbia or the Court of Appeal for British Columbia;
- represent or advise Project clients beyond your scheduled service day;
- draft legal documents on your scheduled service day; or
- sign legal documents on your scheduled service day.

Furthermore, you may not:

- accept fees for any services rendered as Duty Counsel; or
- actively solicit for paid service from Project clients.

Q: Are my Duty Counsel services insured?

A: Yes. You are insured through your private practice, but all Pro Bono Law of BC projects and programming also provide pro bono lawyers with comprehensive insurance coverage – including waived deductibles and surcharges – through the Lawyers Insurance Fund.

Q: Does Pro Bono Law of BC provide disbursement coverage for Project clients?

A: Yes. Pro Bono Law of BC will provide disbursement coverage up to $2500 for disbursements relating to the limited aspect of a client's case for which Duty Counsel has appeared in chambers.

7. To Join the BCCA Civil Chambers Duty Counsel Roster

In addition to maintaining a roster of scheduled Duty Counsel for the Project as a whole, Pro Bono Law of BC maintains a roster of lawyers who are willing to consider providing pro bono representation on a referral basis to civil chambers litigants in the Court of Appeal for British Columbia. Lawyers who wish to join the larger Project or just the BCCA Civil Chambers Duty Counsel Roster are encouraged to do so on the Pro Bono Law of BC website at http://probononet.bc.ca/lawyer1.php.

PART III PRACTICE NOTES

1. Procedural Practice Points

A. Considerations When Preparing for Your Chambers Day

- An excellent general resource is H. A. Brinton's *Civil Appeal Handbook*.[4]
- The Court of Appeal's website[5] also has links to the key instruments governing procedure (other than judicial decisions): the *Court of Appeal Act*,[6] the Court of Appeal Rules,[7] practice directives issued by the Chief Justice, practice notes, and notices to the profession issued by the registrar.
- Chambers applications are commenced by notice of motion and affidavit.
- Except as otherwise indicated below, a notice of motion must be filed and served at least two days before the date set for the hearing of the application.[8]
- Justices in chambers do not like getting huge amounts of material the night before the chambers application, so file and serve your materials as early as possible.
- Materials should be delivered to the opposing side (especially in-person opponents) as early as possible. This will help avoid adjournments for late delivery or perceptions of prejudice.
- It is very useful to provide a written argument, which will help show the justice in chambers that you have a plan in mind. This written argument can be very basic and need not be a fancy "factum".
- Think about the remedy that is desired (and available in light of the *Court of Appeal Act* and the Court of Appeal Rules) and work backward so as to arrive at that result.
- Provide the justice in chambers with copies of the authorities on which you will be relying, bound if possible. Authorities may be double-sided.

[4] Vancouver: Continuing Legal Education Society of British Columbia, 2002 and looseleaf.
[5] http://www.courts.gov.bc.ca/Court%5Fof%5FAppeal/practice%5Fand%5Fprocedure/.
[6] R.S.B.C. 1996, c. 77.
[7] B.C. Reg. 297/2001.
[8] Court of Appeal Rules, *supra*, note 7, Rule 33(1)(d).

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

B. Considerations On Your Chambers Day

- No need to gown (although it is not a problem if you need to appear gowned because of something else).
- Chambers are generally held in courtroom 70 and start at 9:30 a.m.
- Check in with court clerk at 9:15 am, review the case list and identify the number of the case on which you are appearing, give the clerk your name and indicate on whose behalf you are appearing, indicate whether any other appearances are expected, and give a time estimate for the hearing.
- Do not underestimate the hearing time just to get a early berth.
- The sequence in which matters are heard in chambers is: release of reserved judgments, then criminal in custody matters in order of time estimates, then civil matters in order of time estimates.
- Do not approach the counsel table until your case is called. Once the case is called, the appellant (and counsel, if represented) sit on the left hand side as you face the bench and the respondent (and counsel, if represented) sit on the right hand side. This is so regardless of which party is the applicant.
- If you are appearing solely as duty counsel and have a limited retainer, then when introducing yourself it is appropriate to indicate that you are pro bono duty counsel and that you have a limited retainer (*e.g.*, appearing only at today's hearing). Normally it is not proper to announce that one is acting pro bono (the fee arrangements between lawyer and client are not the Court's concern), but for pro bono duty counsel it is acceptable to so state because of the limited retainer and the effect on the ability to follow up.
- Justices in chambers should be addressed as "My Lord"/"Your Lordship" or "My Lady"/"Your Ladyship".
- Avoid informalities: do not greet the Court, do not say "Good morning", etc.
- The justice in chambers will generally have been able to prepare and read much or all of the materials filed, but do not assume that the justice has been able to read or know everything.
- Don't dawdle on making submissions. Your argument should be crisp and succinct.

- Adhere to the time estimate you provided.
- Do not ask, as a matter of course, to dispense with approval as to the form of Order by the opposing side (in-person). That request should be made only if the opposing in-person has a history of being difficult about approval as to form.
- It goes without saying, but: act in a manner that is respectful, courteous, helpful, civil, and patient. Do not take "cheap shots", especially when facing an in-person opponent.

C. Considerations After Your Chambers Day

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

2. Substantive Practice Notes

These notes are intended to be a simple introduction to some of the more common issues that arise in Court of Appeal chambers. The principles are general and the statements of law are not exhaustive. It remains counsel's obligation to do any necessary research or other preparation. It is hoped that these notes will be of some assistance to counsel in that regard.

Bear in mind that the Court of Appeal for British Columbia is a statutory court. Accordingly, its jurisdiction is generally limited to those powers given by statute and to matters that are necessary or incidental to the hearing and determination of appeals.[9] The *Court of Appeal Act*[10] deals disjunctively with the jurisdiction of the full court[11] and that of a single justice in chambers.[12] Counsel should ensure that, for all matters in chambers, the relief sought falls within the ambit of a single justice's statutory jurisdiction.

A. Leave to Appeal

See generally chapter 3 of H. A. Brinton's *Civil Appeal Handbook*.[13]

[9] *Kedia International Inc. v. Royal Bank of Canada*, 2007 BCCA 47 at para. 8 (Chambers).
[10] *Supra*, note 6,
[11] Ibid., section 9.
[12] Ibid., section 10.
[13] *Supra*, note 4.

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

(i) an interlocutory Order (which includes an interim Order made under the *Family Relations Act*[14] and an Order made under the Rules of Court of the Supreme Court of British Columbia on a matter of practice or procedure);

(ii) an Order respecting costs only; or

(iii) an Order or determination under Rule 50 of the Rules of Court of the Supreme Court of British Columbia.[15]

The time limit for filing and serving a notice of application for leave to appeal is 30 days, commencing on the day after the Order appealed from is pronounced unless a different period is specified in another enactment.[16] The notice of application for leave to appeal may be amended without leave before the appellant's motion book is filed.[17] A notice of motion for leave to appeal and the appellant's motion book for leave must be filed and served within 30 days after filing a notice of application for leave to appeal.[18] The notice of motion and motion book must be served at least five days before the hearing of the application.[19] A reply book must be filed and served at least one business day before the hearing of an application for leave to appeal.[20]

(a) Motion for Directions

If it is not clear whether leave to appeal is necessary, a party may apply in chambers for directions, pursuant to the Practice Directive on "Notices of Appeal and Notices of Application for Leave to Appeal" issued on May 5, 2008:

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

[14] R.S.B.C. 1996, c. 128.
[15] *Court of Appeal Act*, *supra*, note 6, paragraph 7(2).
[16] See section 14 of the *Court of Appeal Act*, *supra*, note 6, and Rule 3 of the Court of Appeal Rules, *supra*, note 7.
[17] Court of Appeal Rules, *supra*, note 7, Rule 4.
[18] Court of Appeal Rules, *supra*, note 7, Rule 7(1).
[19] Court of Appeal Rules, *supra*, note 7, Rule 7(2).
[20] Court of Appeal Rules, *supra*, note 7, Rule 8.

(b) Interlocutory versus Final Orders

An appeal does not lie to the Court of Appeal from an interlocutory Order without leave of a justice.[21] The long-standing test (called the "order approach") for determining whether an Order is final or interlocutory was reiterated in 2008 as follows:

> Does the judgment or order as made finally dispose of the rights of the parties? If it does then I think it ought to be treated as a final order; but if it does not it is then, in my opinion, an interlocutory order.[22]

Several months later a five-justice division stated as follows with respect to concerning the primary distinction between final and interlocutory Orders:

> … I think the underlying rationale for making the distinction is that a party who suffers an adverse final ruling on a substantive part of the case should have an appeal as of right.[23]

and further:

> The classic formulation of the order approach refers to disposition of all the rights of the parties. It should now be understood to include partial dispositions whereby the order determines a substantive issue in the litigation. The reformulation responds to the fact that it has become increasingly common for parties to seek rulings on substantive issues that only partially dispose of the matter in dispute. …[24]

The distinction between final Orders, which may be appealed as of right, and interlocutory Orders, which may be appealed only with leave, is not always clear and cases can be difficult to understand. Admittedly, there are circumstances where the cases may not be reconcilable, partly because conflicting decisions have been issued given the nature of chambers practice, and partly because older cases are not consistent with later binding decisions. In that respect, care must be taken when considering cases decided before 2008.

[21] *Court of Appeal Act*, *supra*, note 6, paragraph 7(2)(*a*).
[22] *Weyerhauser Company Ltd. v. Hayes Forest Services Limited* (2008), 78 B.C.L.R. (4th) 251 at 257 (para. 15), 291 D.L.R. (4th) 49, [2008] 6 W.W.R. 421, 51 C.P.C. (6th) 221, 2008 BCCA 120.
[23] *Forest Glen Wood Products Ltd. v. British Columbia (Minister of Forests)*, (2008), 85 B.C.L.R. (4th) 330 at 337 (para. 18), 2008 BCCA 480.
[24] Ibid., at 340 (para. 34).

(c) Test for Leave to Appeal From Interlocutory Orders

The criteria for leave to appeal are well known:

(i) whether the point on appeal is of significance to the practice;

(ii) whether the point raised is of significance to the action itself;

(iii) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and

(iv) whether the appeal will unduly hinder the progress of the action.[25]

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

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

(d) Test for leave to appeal discretionary orders

Leave will rarely be granted to appeal from discretionary Orders. Leave to appeal a discretionary Order will be granted only where the Order is clearly wrong, serious injustice will occur, or where discretion was not exercised judicially or was exercised on a wrong principle.[26]

The following illustrative types of Orders are discretionary and attract a high degree of deference:

(i) the decision to adjourn an application.

(ii) an Order for change of venue.

(iii) a refusal to join a new defendant.

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[25] *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 at 397 (para. 3) (C.A. Chambers).
[26] See *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (25 September 1998), Vancouver CA025053 at paras. 11-12 (C.A. Chambers); *Strata Plan LMS 2019 v. Green* (2001), 152 B.C.A.C. 174 at 175-76 (para. 6), 2001 BCCA 286 (Chambers).

(iv) the decision to transfer the proceedings to the trial list.

(v) the refusal to order cross-examination on affidavits.

(vi) costs Orders (including Orders for special costs and Orders for security for costs).

(vii) the trial judge's determination as to whether to proceed under Rule 18A.

(e) Foreclosure Proceedings

A party seeking to appeal an Order made under Rule 50 (Foreclosure and Cancellation) of the Rules of Court in the Supreme Court of British Columbia must seek leave to appeal. The fact that the Order arose within a foreclosure action is not determinative; what matters is the substance of the Order.[27]

An Order for sale is a foreclosure remedy that cannot be said to be incidental to the foreclosure proceedings. It is an interlocutory Order from which leave to appeal is required.[28]

(f) Appeals from Special Tribunals

See generally §3.31 of H. A. Brinton's *Civil Appeal Handbook*.[29]

The test that is relevant on applications for leave to appeal from special tribunals is different from the general test for leave:

(i) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from

(ii) whether the appeal is limited to questions of law involving:

(A) the application of statutory provisions;

(B) a statutory interpretation that was particularly important to the litigant; or

(C) interpretation of standard wording which appears in many statutes;

(iii) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward;

[27] *First Island Financial Services Ltd. v. Marall Homes Ltd.* (2000), 137 B.C.A.C. 140 at 141-42 (paras. 4, 13), 31 R.P.R. (3d) 167, 2000 BCCA 212.
[28] *Valley Mortgage and Investment Co. v. Lakers Golf Club Inc.* (2004), 37 B.C.L.R. (4th) 194 at 199-200 (paras. 13-15), 204 B.C.A.C. 174, 4 C.P.C. (6th) 368, 2004 BCCA 496 (Chambers).
[29] *Supra*, note 4.

(iv) whether there is some prospect of the appeal succeeding on its merits ...; although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;

(v) whether there is any clear benefit to be derived from the appeal; and

(vi) whether the issue on appeal has been considered by a number of appellate bodies.[30]

The Court may more readily grant leave to appeal if the hearing before the Court of Appeal is the first appeal than if there has already been an appeal to a lower decision-making body.[31]

B. Stays of Proceedings

See generally §§5.3 – 5.28 of H. A. Brinton's *Civil Appeal Handbook*.[32]

A single justice in chambers may make an interim Order to prevent prejudice to any person[33] and may, on terms considered appropriate, order that all or part of the proceedings (including execution) in the cause or matter from which the appeal has been taken be stayed in whole or in part.[34]

The general principles are that:

- generally, a successful plaintiff is entitled to the fruits of the judgment but the Court of Appeal may stay proceedings if satisfied that it is in the interests of justice to do so;
- the trial judgment must be assumed to be correct and protection of the successful plaintiff is a pre-condition to granting a stay; and
- the applicant for a stay must satisfy the familiar three-stage test[35] – that is, the applicant must show that there is some merit in the appeal, that the applicant will suffer irreparable harm if the stay

[30] *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, (2000), 91 B.C.L.R. (3d) 74 at 77 (para. 11), 31 Admin. L.R. (3d) 318, 6 C.P.C. (5th) 91, 2000 BCCA 591, citing *Queens Plate Development Ltd. v. British Columbia (Assessor, Area 9 Vancouver)* (1987), 16 B.C.L.R. (2d) 104 at 109, 22 C.P.C. (2d) 265 (C.A. Chambers).
[31] *British Columbia (Minister of Transportation and Highways) v. Reon Management Services Inc.*, 2000 BCCA 522 at para. 14 (Chambers).
[32] *Supra*, note 4.
[33] *Court of Appeal Act*, *supra*, note 6, paragraph 10(2)(*b*).
[34] *Court of Appeal Act*, *supra*, note 6, subsection 18(1).
[35] See *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 333-34, 164 N.R. 1, 11 D.L.R. (4th) 385, 54 C.P.R. (3d) 114, 60 Q.A.C. 241 (Qué.).

> should be refused, and that, on balance, the inconvenience to the applicant if the stay should be refused would be greater than the inconvenience to the respondent if the stay should be granted.[36]

A variation on the "familiar three stage test" uses two elements, combining the irreparable harm and balance of convenience elements.[37] The two tests are functionally identical.

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

A stay of proceedings (including execution) may be granted "on terms the justice considers appropriate".[38] A *Voth* order may be appropriate in certain circumstances. A *Voth* order will be granted only where significant amounts of money are involved or where special circumstances exist. The terms of a *Voth* order are:

> … ordering a stay of execution on payment of the amount of the judgment in to court by the defendant, and ordering payment out to the plaintiff on terms, first, that if the defendant is successful on its appeal it will be entitled to interest on the funds repaid to it and, second, that the plaintiff provide sound security, sufficient to secure the repayment of the amount paid out, together with an amount representing an estimate of the defendant's costs of the appeal on a party and party basis, and an amount representing interest on the funds that would be repaid if the defendant were to be successful in the appeal.[39]

C. Security For Costs

See generally §§5.29-5.32 of H. A. Brinton's *Civil Appeal Handbook*.[40]

(a) Security for Costs of Appeal

A justice may order that an appellant pay to or deposit with the registrar security for costs in an amount and in a form determined by the justice.[41]

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[36] *Gill v. Darbar*, 2003 BCCA 3 at para. 7 (Chambers).
[37] *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 at 345-46, 120 N.R. 212, [1987] 2 W.W.R. 331, [1987] 2 C.N.L.R. 36 (C.A.), aff'd, [1991] 1 S.C.R. 62, 120 N.R. 208, [1991] 2 W.W.R. 568, 53 B.C.L.R. (2d) 189 (B.C.).
[38] *Court of Appeal Act*, *supra*, note 6, subsection 18(1).
[39] *Voth Bros. Construction (1974) Ltd. v. National Bank of Canada* (1987), 12 B.C.L.R. (2d) 43 at 44-45 (C.A. Chambers).
[40] *Supra*, note 4.
[41] *Court of Appeal Act*, *supra*, note 6, subsection 24(1).

The principles that are applied on an application for security for costs of the appeal are not the same as those that apply on an application for security for trial costs. Security for costs of the appeal is ordered more readily than security for costs in the court below.

The appellant against which such an Order is sought bears the onus of showing why security should not be required.

The criteria considered are:

(i) the appellant's financial means;

(ii) the merits of the appeal;

(iii) the timeliness of the application;

(iv) whether the costs will be readily recoverable; and

(v) the ultimate question, whether the Order would be in the interests of justice.[42]

(b) Security for Costs of Trial; Security for Trial Judgment

The applicable principles on an application for security for costs for a trial judgment or for trial costs are:

(i) The onus is on the applicant (respondent to the appeal) to show that it is in the interests of justice to order posting for security of a trial judgment and/or of trial costs;

(ii) The applicant must show prejudice if the order is not made; and

(iii) In determining the interests of justice the chambers judge should consider the merits of the appeal and the effect of such an Order on the appellant's ability to continue the appeal.[43]

D. Applications for Indigent Status

See generally §5.35 of H. A. Brinton's *Civil Appeal Handbook*.[44]

If a justice in chambers, on application before or after the commencement of an appeal or application, finds that the person is indigent, no fee is payable to the government by a

[42] See *Creative Salmon Co. Ltd. v. Staniford* (2007), 242 B.C.A.C. 299 at 302 (para. 9), 2007 BCCA 285 (Chambers), and *Lu v. Mao*, 2006 BCCA 560 at paras. 6-7 (Chambers).
[43] See *Creative Salmon Company Ltd.*, *supra*, note 42, at 302-03 (paras. 10-11).
[44] *Supra*, note 4.

person to commence, defend, or continue an appeal or application. A claim for indigent status may be declined where the justice considers that the position being argued by that person lacks merit, is scandalous, frivolous, or vexatious, or is otherwise an abuse of the Court's process.[45]

The underlying rationale for the granting of indigent status is to ensure that no litigant will be denied access to the courts by reason of impecuniosity. The concern of the court is that no arguably meritorious case should be prevented from getting a hearing merely because a person is without the financial resources to carry on with the litigation.

The two criteria for granting indigent status are:

(i) the likelihood of success of the appeal; and

(ii) the applicant's financial position.

The test for the applicant's financial position is whether the applicant's financial situation is such that requiring the applicant to pay the fees would deprive the applicant of the necessaries of life or effectively deny the applicant access to the courts.[46]

Indigent status will not be granted in appeals that are (on the merits) "bound to fail" or where there is no reasonable basis for an appeal.

If the appeal is "bound to fail" for procedural reasons, again, indigent status will be denied.

Indigent status cannot be granted after the fees for an appeal have been paid.

A declaration of indigent status would relieve the appellant only of the fees payable to the Crown pursuant to Appendix C, Schedule 1. The appellant is still required to prepare and file an appeal record, transcripts, and appeal books.

The general rule is that, upon dismissing an application for indigent status, costs will not be awarded against the applicant.

An Order in respect of indigent status is not "once for all time". A decision whether to grant indigent status on one matter is not determinative of the issue for other matters concerning the same applicant.

[45] Court of Appeal Rules, *supra*, note 7, Rule 56.
[46] *Ancheta v. Ready* (2003), 184 B.C.A.C. 235 at 238 (para. 7), 2003 BCCA 374.

E. Applications For Extensions Of Time

See generally §§4.35 – 4.60 of H. A. Brinton's *Civil Appeal Handbook*.[47]

A justice in chambers may extend or shorten the time within which an appeal to the court or application for leave to appeal may be brought[48] and may extend or shorten the time provided for in the *Court of Appeal Act*, the Court of Appeal Rules, or in an Order extending or shortening time for the doing of an act or taking of a proceeding.[49]

(a) Commencement of Appeal Time Period

The time limit for filing and serving a notice of appeal or a notice of application for leave to appeal is 30 days, commencing on the day after the Order appealed from is pronounced unless a different period is specified in another enactment.[50] This is true whether the Order is pronounced orally from the bench or when written reasons are released, and notwithstanding that there may be incidental matters such as prejudgment interest or costs to be settled before the formal judgment is perfected. Time does not run from the date of entry of the Order.

(b) Test for Extension of Time

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

(i) was there a *bona fide* intention to appeal?

(ii) when were the respondents informed of the intention?

(iii) would the respondents be unduly prejudiced by an extension?

(iv) is there merit in the appeal? and

(v) is it in the interests of justice that an extension be granted? The fifth question is the most important as it encompasses the other four questions and states the decisive question.[51]

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

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[47] *Supra*, note 4.
[48] *Court of Appeal Act*, *supra*, note 6, subsection 10(1).
[49] *Court of Appeal Act*, *supra*, note 6, subsection 10(2).
[50] See section 14 of the *Court of Appeal Act*, *supra*, note 6, and Rule 3 of the Court of Appeal Rules, *supra*, note 7.
[51] *Davies v. Canadian Imperial Bank of Commerce* (1987), 15 B.C.L.R. (2d) 256 at 259-60 (C.A.).

(1) Intention to Appeal

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

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

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

(2) Informing Respondents of Intention to Appeal

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

(3) Undue Prejudice to Other Parties

When there has been inordinate or inexcusable delay on the part of the plaintiff in pursuing an action, the burden falls on the plaintiff to show that the defendant would not be prejudiced by the delay.

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

(4) Merits of the Appeal

An examination of the merits is limited to an examination of whether the appeal is bound to fail. If it is, then that is a good reason for refusing an extension of time.

(5) Interests of Justice

The interests of justice is the decisive factor.[52]

While self-representation is not a basis upon which to depart broadly from the rules that govern litigation, the combination of self representation alongside mental illness and a "guillotine" Order may require an extension of time in the interests of justice.[53]

The erroneous advice of a solicitor regarding the ability to appeal may justify an extension of time in the interests of justice.[54]

[52] *Davies*, *supra*, note 51.
[53] *Hanlon v. Nanaimo (Regional District)*, (2007), 72 B.C.L.R. (4th) 341 at 344 (paras. 16-18), 2007 BCCA 538 (Chambers).

Other relevant considerations include:

(i) the best interests of children;

(ii) dealings between counsel (*e.g.*, if respondent's counsel has placed appellant's counsel on notice requiring strict compliance); and

(iii) where the appeal amounts to an abusive and vexatious proceeding.

(c) Terms and Conditions

A justice in chambers has a broad discretion, when making an Order to extend time, to impose terms and conditions and give any directions as the justice thinks just.[55]

F. Inactive Appeals

See generally §§4.45 and 4.73 – 4.75 of H. A. Brinton's *Civil Appeal Handbook*.[56]

An appeal is placed on the inactive appeal list: (a) if a certificate of readiness is not filed within one year after the filing of the notice of appeal or notice of application for leave to appeal, or (b) if a notice of hearing has not been filed within two months after the filing of the certificate of readiness.[57]

Once on the inactive list, the appeal is under the threat of being dismissed as abandoned. An appeal or application for leave to appeal must be removed from the inactive appeal list when a justice grants leave to appellant or the applicant to proceed.[58] On an application to have an appeal or application for leave to appeal removed from the inactive appeal list, the applicant bears the onus.

There is no rigid test to apply in determining whether an inactive appeal ought to be restored to the active list. The overriding issue is whether it is in the interests of justice to grant the application. The factors considered are:

(i) the extent of the delay;

(ii) the explanation for the delay;

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[54] In *Le Soleil Hospitality Inc. v. Louie* (2008), 82 B.C.L.R. (4th) 260, 254 B.C.A.C. 51, 53 C.P.C. (6th) 9, 2008 BCCA 142, for example, a solicitor wrongly but understandably thought that the Order was a "trial ruling", not an "Order", and therefore that it was not appealable until conclusion of trial.
[55] *Court of Appeal Act*, *supra*, note 6, paragraph 10(2)(*f*).
[56] *Supra*, note 4.
[57] *Court of Appeal Act*, *supra*, note 6, subsection 25(1).
[58] *Court of Appeal Act*, *supra*, note 6, subsection 25(2). On this, see the discussion under the heading "Appeals Dismissed as Abandoned", *infra*. As discussed below, subsection 25(6) deals with the restoration of an appeal that has been dismissed as abandoned.

(iii) the existence of any prejudice arising from the delay; and

(iv) the likelihood of success on appeal.

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

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

G. Appeals Dismissed as Abandoned

See generally §§4.73 – 4.75 of H. A. Brinton's *Civil Appeal Handbook*.[59]

A justice in chambers may dismiss an appeal as abandoned where the appellant has failed to comply with a provision of the *Court of Appeal Act*, the Court of Appeal Rules, or an Order extending or shortening time.[60] In addition, if an appeal or application for leave to appeal remains on the inactive appeal list for 180 consecutive days, on the 181st day it stands dismissed as abandoned.[61] An appeal or application that stands dismissed as abandoned must not be reinstated unless a justice orders otherwise.[62] Different principles, and a more stringent test, apply in respect of an application to reinstate an appeal that stands dismissed as abandoned than in respect of an application to remove an appeal from the inactive appeal list.[63]

(a) Dismissing as Abandoned

The test to determine whether an appeal should be dismissed as abandoned has been articulated in at least two ways. One formulation involves the following five-part test:

(i) was there a bona fide intention to appeal?

(ii) when were the respondents informed of the intention?

(iii) would the respondents be unduly prejudiced by an extension?

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[59] *Supra*, note 4.
[60] *Court of Appeal Act*, *supra*, note 6, paragraph 10(2)(*e*) and paragraph 28(*a*).
[61] *Court of Appeal Act*, *supra*, note 6, subsection 25(5).
[62] *Court of Appeal Act*, *supra*, note 6, subsection 25(6).
[63] See *Haldorson v. Coquitlam (City)* (2000), 149 B.C.A.C. 197 at 199 (para. 3), 3 C.P.C. (5th) 225, 2000 BCCA 672 (Chambers), *Convoy Supply Ltd. v. Drummond* (1996), 78 B.C.A.C. 27 at 30 (para. 14), 6 C.P.C. (4th) 5 (C.A. Chambers), and *Canada (Attorney General) v. No String Enterprises Ltd.*, 2001 BCCA 671 at para. 7 (Chambers).

(iv) is there merit in the appeal?

(v) is it in the interests of justice that an extension be granted? The fifth question is the most important as it encompasses the other four questions and states the decisive question.[64]

Another formulation involves the following three-part test:

(i) there must first be inordinate delay;

(ii) the delay must be unexplained or inexplicable; and

(iii) there must be prejudice.[65]

Usually, an application by the respondent to dismiss an appeal as abandoned will be countered with an application by the appellant seeking the necessary extensions of time. The five-part test identified above has been described as "a compendious guide to both applications".[66]

(b) Reinstating Appeals Standing Dismissed As Abandoned

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

(i) there has been inordinate delay;

(ii) the delay is excusable;

(iii) the respondent has suffered prejudice as a result of the delay;

(iv) there is merit to the appeal; and

(v) the interests of justice are served by reinstatement.[67]

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

[64] *Davies*, *supra*, note 51 at 260.
[65] *Frew v. Roberts* (1990), 44 C.P.C. (2d) 34 at 37 (B.C.C.A.)
[66] *Verlaan v. Von Deichman* (2006), 230 B.C.A.C. 90 at 97 (para. 22), 2006 BCCA 389 (Chambers).
[67] *Hannigan v. Hannigan*, (2006), 226 B.C.A.C. 100 at 104 (para. 12), 33 C.P.C. (6th) 205, 2006 BCCA 167.

H. Appearing as Agent in the Court of Appeal

The *Legal Profession Act*[68] prohibits non-lawyers from engaging in the practice of law, with certain exceptions. A non-lawyer may not appear before the courts as an advocate in the expectation of a "fee, gain or reward".[69]

The Court of Appeal has inherent discretion to permit or to refuse to allow a non-lawyer to appear before it in the capacity of agent for any litigant. Although the Court of Appeal may exercise its discretion to grant an audience to non-lawyers where it considers it "necessary or proper", the discretion is exercised "rarely and with caution".

It is up to the presiding justice or justices to decide whether to hear an agent on behalf of a party. It is doubtful that the Court will grant the indulgence of hearing an agent when the party is not present to explain his or her reasons for requiring assistance.

In deciding whether to grant an audience to an agent, relevant considerations include whether the litigant is capable of expressing himself or herself and whether the proposed agent has his or her own agenda which is inconsistent with the full, fair, and effective representation of the litigant.

Where an agent seeks to appear on behalf of a corporate litigant, the principles are:

(i) no one other than a member in good standing of the Law Society has a right of audience on behalf of a corporate litigant;

(ii) as a matter of indulgence, the Court may permit others to represent a corporation; and

(iii) generally, that indulgence will be granted only to a person who is an officer of the corporation.[70]

I. Standard of Review Generally

See generally chapter 2 of H. A. Brinton's *Civil Appeal Handbook*.[71]

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

[68] S.B.C. 1998, c. 9, section 15.
[69] See the definition of "practice of law" in the *Legal Profession Act*, *supra*, note 68, section 1.
[70] *Fast Trac Bobcat & Excavating Service v. Riverfront Corp. Centre Ltd.* (2004), 28 B.C.L.R. (4th) 306 at 314 (para. 17), 196 B.C.A.C. 308, 241 D.L.R. (4th) 297, 2004 BCCA 279.
[71] *Supra*, note 4.

Different standards of appellate review apply in respect of (1) questions of law; (2) questions of fact; and (3) questions of discretion.[72] An appellate court cannot retry a case, nor can it simply come to a different conclusion on the evidence, unless the requisite error is shown.

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

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

On matters of fact, the question is whether the trial judge is shown to have made a palpable and overriding error. This includes findings of credibility and inferences drawn from the facts. An apportionment of fault is a finding of fact. An assessment of damages by a trial judge is generally a finding of fact. Appellate interference with findings of fact is appropriate only where there is no proper evidentiary foundation for a finding of fact in the sense that evidence has been misapprehended or there is no evidentiary foundation for the finding (a palpable error) and the error is material to the outcome (overriding).[73]

Questions of mixed fact and law fall on a continuum and attract the standard of review applicable to the kind of question truly at stake.

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

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

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

[72] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at 246-47 (para. 7), 286 N.R. 1, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 10 C.C.L.T. (3d) 157, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 2002 SCC 33 (Sask.).
[73] *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 8.

J. Family Matters

See generally §§2.22 and 2.38 of H. A. Brinton's *Civil Appeal Handbook*.[74]

Family law matters may arise under both the federal *Divorce Act*[75] and the provincial *Family Relations Act*.[76] Because of the dual basis for jurisdiction, there can be instances where the statutory basis for the order is unclear.

Leave to appeal is not required for appeals from any Order made under the *Divorce Act*[77] or from final Orders under the *Family Relations Act*.[78]

Leave to appeal is required for an appeal from an interlocutory Order, including an interim Order made under the *Family Relations Act*, and from an order made under the Rules of Court of the Supreme Court of British Columbia on a matter of practice or procedure.[79]

The appeal or application for leave to appeal, as the case may be, must be brought within 30 days of the pronouncement of the Order to be appealed.

Where leave to appeal is required, the same test is used as in other civil cases:

(i) whether the point on appeal is of significance to the practice;

(ii) whether the point raised is of significance to the action itself;

(iii) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and

(iv) whether the appeal will unduly hinder the progress of the action.[80]

Extensions of time to launch an appeal, or for procedural steps in the prosecution of the appeal, may be granted, as in other civil cases.[81]

In family cases as in other civil cases, the applicable standard of review is applied (for questions of law, questions of fact, questions of discretion).[82]

Support Orders (whether support will be awarded or varied, and if so, the amount) are discretionary and are given considerable deference by appellate courts. Appeal courts

[74] *Supra*, note 4.
[75] R.S.C. 1985, c. 3 (2nd Supp.).
[76] *Supra*, note 14.
[77] S*upra*, note 75, subsection 21(1): "Subject to subsections (2) and (3), an appeal lies to the appellate court from any judgment or order, whether final or interim, rendered or made by a court under this Act."
[78] Supra, note 76.
[79] *Court of Appeal Act*, *supra*, note 6, section 7.
[80] See the discussion under the heading "Leave to Appeal", *supra*.
[81] See the discussion under the heading "Applications For Extensions Of Time", *supra*.
[82] See the discussion under the heading "Standard of Review Generally", *supra*.

do not overturn support Orders unless the reasons disclose an error in principle or a significant misapprehension of the evidence or unless the award is clearly wrong.[83] The same standard of review applies to other family law matters, *e.g.*, custody.[84]

The best interests of a child are a factor when considering whether to grant leave to appeal from a continuing custody Order.[85]

If an Order made under the *Family Relations Act* is appealed, it remains in full force and effect until the determination of the appeal unless the Court that made the Order otherwise orders.[86] Accordingly, the Court of Appeal does not have jurisdiction to grant a stay of execution pending appeal of any such Order.

The rule governing the award of costs is the same in matrimonial proceedings as it is in other civil litigation – namely, costs should follow the event unless the court otherwise orders. In the absence of misconduct or a good reason on the facts and relevant to the lis between the parties, the starting point is that costs follow the event.

K. Costs

See generally §§7.21 – 7.56 of H. A. Brinton's *Civil Appeal Handbook*.[87]

Consider in advance what costs Order you seek. The general rule on chambers matters is that costs are in the cause of the appeal.[88] In some circumstances, though, other costs dispositions may be appropriate, including:

- the parties bear their own costs of the application;
- costs (to the applicant or respondent) in any event of the cause; or
- costs to the applicant in the cause of the appeal.

Where a justice in chambers grants costs of an application, he or she may also order that costs be awarded in a lump-sum amount.[89]

[83] *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at 525-26 (paras. 10-12), 240 N.R. 312, 172 D.L.R. (4th) 577, [1999] 8 W.W.R. 485, 46 R.F.L. (4th) 1, 138 Man. R. (2d) 40 (Man.).
[84] *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 at 1022-26 (paras. 11-15), 275 N.R. 52, 204 D.L.R. (4th) 257, [2001] 11 W.W.R. 1, 19 R.F.L. (5th) 396, 94 B.C.L.R. (3d) 199, 156 B.C.A.C. 161, 2001 SCC 60 (B.C.).
[85] *A.M. v. British Columbia (Director, Child, Family and Community Service)*, 2007 BCCA 612 at para. 22 (Chambers).
[86] *Family Relations Act*, *supra*, note 14, section 14.
[87] *Supra*, note 4.
[88] See *Court of Appeal Act*, *supra*, note 6, section 23.
[89] See Court of Appeal Rules, *supra*, note 7, Appendix B, section 4.