



Law Reform Commission
of Saskatchewan

Access to Justice: Needy Person Certificates and Waiver of Fees

Consultation Paper

December 2011

This consultation paper describes Needy Person Certificates and other fee waiver policies in Saskatchewan courts and tribunals. Problems in the present system are identified and discussed. The Law Reform Commission of Saskatchewan hopes that discussion of the questions raised about fee waivers in this paper will provide the foundation for reforms that will contribute to wider access to justice for the less advantaged members of our community.

WE WELCOME YOUR COMMENTS AND OPINIONS.

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission*, proclaimed in force in November, 1973, and began functioning in February of 1974.

The Commission is incorporated by an Act of the Saskatchewan Legislature. Commissioners are appointed by Order-in Council. Its recommendations are independent, and are submitted to the Minister of Justice for consideration.

Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice. After preliminary research, the Commission usually issues background or consultation papers to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister as final Proposals.

At present, the Commission is funded primarily by grants from the Law Foundation of Saskatchewan and the Department of Justice.

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Call for Responses

We are interested in your response to this consultation paper. We welcome your comments and opinions on the topic. Please allow the following questions to guide you in your response:

1. Should Needy Person Certificates be available to self-represented litigants?
2. Should Needy Person Certificates be available to qualified applicants at any stage in a proceeding?
3. What can be done to increase accessibility to Needy Person Certificates, e.g., by changes in the granting process, improved information services or other strategies?
4. Should the Legal Aid Commission continue to be responsible for issuing Needy Person Certificates?
5. Should a fee waiver program be established in Small Claims Court?
6. Should administrative tribunals in Saskatchewan be required to adopt a fee waiver policy?
7. Should the means test for fee waivers be determined by reference to:
 - (a) criteria for determining eligibility for legal aid?
 - (b) receipt of social assistance or similar benefits?
 - (c) the Low Income Cut Off (LICO)?
 - (d) other criteria?

How to Respond

Responses may be sent to us **no later than April 20, 2012**:

By email - director.research@sasklawreform.com

By fax - (306) 966-5900

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All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name in the final report for the project, unless they expressly advise us to keep their names confidential.

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1. Access to justice and court fees

Access to the courts has been described as “one of the foundational pillars protecting the rights and freedoms of our citizens.”¹ In *BCGEU*, Chief Justice Dickson stated: “There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.”² As the costs of litigation and other legal services rise, concern about financial barriers to access to justice is increasing. In 2006, the Canadian Bar Association (CBA) stated that “advocating for access to justice for poor people” had become its “top priority.”³ A report issued by the CBA observed that:

As lawyers, CBA members know that too many people have no access to the rights and protections our laws notionally provide. The poor people who are denied access to justice are the same people who already experience disadvantages of many other kinds, including women, children, people living with disabilities, Aboriginal people, members of racialized minorities, the elderly and refugees.⁴

There are no simple answers to the problem of access. Changes in procedures to assist unrepresented clients, improvements in legal aid programs, support for legal clinics such as Community Legal Assistance Services for Saskatoon Inner City (CLASSIC), and encouragement of private lawyers who are willing to act *pro bono* are among the strategies that have been identified.⁵ This consultation paper discusses another piece of the search for solutions: waivers of fees for individuals who are unable to pay the cost of litigation.

Court fees are charged when a civil case is initiated by filing the proper documents with the court, and sometimes at later stages in a proceeding. Under *The Queen’s Bench Rules*, a potential litigant may be able to obtain a waiver of court fees in some cases by obtaining a

¹ *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at para 26 (available on CanLII), Dickson CJC [*BCGEU*] citing *Re Government Employees’ Union* (1985), 20 DLR (4th) 399 at 409 (available on CanLII) (BCCA).

² *Supra* note 1 at para 31.

³ Canadian Bar Association, “Canada’s Crisis in Access to Justice” (Submission to the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the consideration of its review of Canada’s Fourth and Fifth Reports on the *Implementation of the International Covenant on Economic, Social and Cultural Rights*, April 2006) at 1, online: Canadian Bar Association <<http://www.cba.org>>.

⁴ *Ibid.*

⁵ See Gaylene Schellenburg, “Access to Justice in Canada: Canadian Bar Association Strategies to Make it Happen,” *Clearinghouse Review: Journal of Poverty Law and Policy* (July-August 2006) 281.

Needy Person Certificate.⁶ Much of the discussion below will focus on Needy Person Certificates. A Certificate is granted on application to the Saskatchewan Legal Aid Commission if a means test is met and if the applicant “has reasonable grounds for taking or defending or being a party to proceedings.”⁷ A Certificate also relieves the proposed litigant from responsibility for paying the other party’s court costs if the litigation is unsuccessful.⁸

Needy Person Certificates are useful, but there are problems with their scope and availability under the *QB Rules*. In addition, these certificates are only available to litigants in the Court of Queen’s Bench and Court of Appeal. Individual rights are also adjudicated in the Small Claims Court and by boards and tribunals. Policy varies in regard to fee waivers in these venues.

Court fees can be a bar to access. CLASSIC recently surveyed its clients to determine how frequently tribunal and court fees were a barrier to pursuing legal avenues:

Of the clients who faced fees, 21% were not able to pursue their matter because they could not afford the fee and no mechanism existed to have the fee waived. It is of significant concern that approximately one-fifth of low-income clients are not able to move forward with meritorious claims because they were not able to afford the fee.⁹

It should be noted in this context that legal aid is generally only available for criminal and family law cases. Legal aid is not usually available to an individual who wishes to sue for injury or breach of contract, or who seeks other remedies available only in court. CLASSIC provided the Law Reform Commission with two examples, based on its experience, of situations in which fees were a barrier. The first involved an application in the Court of Queen’s Bench:

Ms. W. is an elderly woman whose only source of income is her pension. Her adult son has a brain injury and lives in a care home. Ms. W.’s daughter-in-law is her son’s Personal and Property Guardian, but she has left the country and been neglecting her duties.

⁶ Saskatchewan, *The Queen’s Bench Rules*, r 570 [QB Rules]; Saskatchewan, *The Queen’s Bench Rules (2011)*, r 13-43 [*new QB Rules*](the *new QB Rules* are expected to be in force, in part, on September 1, 2012).

⁷ *Ibid.*

⁸ *QB Rules*, *supra* note 6, r 574; *new QB Rules*, *supra* note 6, r 13-47.

⁹ Letter from Pamela Kovacs, Executive Director of Pro Bono Law Saskatchewan, to Kathleen Robertson and Mike Finley, Chair and Director of Research of the Law Reform Commission of Saskatchewan (January 13, 2009).

Ms. W. wished to pursue Guardianship for her son, to access the funds in his bank account to pay for his medical needs. Her application had a high probability of success. All of their family members indicated that they would consent to the application and a hearing would not be necessary.

When CLASSIC advised Ms. W of the costs associated with the application (which included a \$200 filing fee at the Court of Queen's Bench), Ms. W instructed us to drop the application. She said she would not be able to find the funds necessary to proceed. Ms. W. was forced to abandon her application because of the costs involved. She advised that she would continue caring for her son on her limited income as she could not afford to become his guardian.¹⁰

Fees can be a problem even in Small Claims Court, which is intended to be less expensive to access:

Ms. F lives on social assistance in Saskatoon. She contacted CLASSIC in 2008 for assistance after she slipped and fell at a chain grocery store. After attempting to settle with the grocery store, the supervising lawyer decided the best course of action would be to file a statement of claim with Small Claims Court for the amount of \$20,000.00. The filing fee for such a claim is \$100.00. Although Ms. F had known about the fee for some time, she was unable to gather the funds to pay it. CLASSIC has now lost contact with this client and, unless she contacts CLASSIC of her own volition, will most likely close the file once the limitation date for filing the claim passes.¹¹

In 2003, the Superior Court of Ontario held that the absence of a statutory mechanism for the waiver or reduction of court fees in the Small Claims Court is unconstitutional.¹² The system for waiving court fees has recently been examined and revised in British Columbia and Ontario.¹³ In Saskatchewan, the Legal Aid Commission has recently made some changes in administration of Needy Person Certificates to make them more accessible.

This consultation paper describes Needy Person Certificates and other fee waiver policies in

¹⁰ Letter from Amanda Dodge, Executive Director of CLASSIC, to Allan Snell, Q.C., Chief Executive Officer of Legal Aid Saskatchewan [nd].

¹¹ Anecdotal information provided by CLASSIC to Law Reform Commission of Saskatchewan [nd].

¹² *Polewsky v Home Hardware Stores Ltd*, [2003] 229 DLR (4th) 308 (available on CanLII) (while the prescribed fees were not unconstitutional and a constitutional right of access to the courts does not preclude reasonable user fees, the absence of a statutory mechanism for the waiver or reduction of such fees (in certain limited circumstances) was unconstitutional).

¹³ See generally Michael McCubbin, *Waiving Filing Fees in BC Small Claims Court*, (Community Legal Assistance Society, February 2011); "Court Fee Waiver Guide and Forms," online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca>>.

Saskatchewan courts and tribunals. Problems in the present system are identified and discussed. The Law Reform Commission hopes that discussion of the questions raised about fee waivers in this paper will provide the foundation for reforms that will contribute to wider access to justice for the less advantaged members of our community.

The Law Reform Commission wishes to thank Pamela Kovacs, whose unpublished paper on fee waivers (prepared for a class in law reform at the University of Saskatchewan College of Law) provided the Commission with a starting point, Stephanie Hodgson, who compiled the research and interviews on which this paper is based, and the representatives of CLASSIC, Pro Bono Law Saskatchewan, and the Legal Aid Commission who shared information and opinions with us.

We invite your responses to this consultation paper. Please see page ii for questions for consideration and contact information.

2. Needy Person Certificates in the Court of Queen’s Bench and Court of Appeal

2.1 Background and history

At common law, a person unable to bring a civil action because of poverty was entitled to sue *in forma pauperis*.¹⁴ Needy Person Certificates were apparently adopted to regulate this ancient protection for indigent litigants. The mechanics for granting Certificates were included in the Rules of the Court of Queen’s Bench in 1942.¹⁵ Order XLVII of the Rules contained provisions relating to “Proceedings by and against needy persons.” These rules were adopted (as marginal notes indicated) from English and Alberta rules. Under this system, Certificates were “issued by the Law Society of Saskatchewan after enquiry by a committee appointed by the Law Society... [and] signed by two members of the committee present at the enquiry.”¹⁶ Applications were received by local legal aid committees composed of volunteer lawyers. The final decision was at the discretion of a committee of Benchers of the Law Society that had to be satisfied that the applicant was indigent and had a reasonable likelihood of success. In other respects, the 1942

¹⁴The *Statute of Henry VII*, 1495 (UK), c 12, established rules for suing *in forma pauperis*, but the practice of waiving fees seems to predate the statute. The purpose of allowing someone to proceed *in forma pauperis* was to allow those that were truly indigent and had meritorious claims or defences a right to justice. To this end, practice under the statute established a “but for” test: if, but for a reduction or waiver of the fees, the prospective litigant would not be able to access the court, the relief was granted by the court.

¹⁵ *The Revised Rules of Court of the Province of Saskatchewan*, (1942).

¹⁶ *Ibid*, r 586.

Rules were similar to those now in force.

The most significant change in the rules occurred when publicly-financed legal aid was introduced in 1974. The Community Legal Services Commission (the precursor to the Legal Aid Commission) was assigned the task of receiving applications and granting Needy Person Certificates that had formerly been the responsibility of the Law Society.¹⁷ It was apparently assumed that legal aid would make the certificates largely unnecessary to assist needy individuals to gain access to court. Rather, once eligibility for legal aid had been determined, the lawyer handling the file would be issued a Needy Person Certificate as a matter of course. This would be used to defray the costs incurred by the legal aid program. Since issue of a certificate was tied in practice to determination of eligibility for legal aid, it appeared to make sense to give the Commission responsibility for issuing Needy Person Certificates.

Since 1974, the scope of legal aid has been significantly reduced. As a result, the Legal Aid Commission now administers applications for Needy Person Certificates made both by individuals eligible for legal aid and by persons who meet the means test, but are not eligible for legal aid.

2.2 The present rules

Needy Person Certificates are now governed by Part 47 of *The Queen's Bench Rules*, entitled "Proceedings by and against needy persons." This encompasses rules 569-582.¹⁸ These rules apply to civil actions initiated in the Court of Queen's Bench, but, under rule 581, with leave of the Court of Appeal a Needy Person Certificate will remain in effect on appeal.

Under rule 570, Certificates are issued by the Saskatchewan Legal Aid Commission. The rule states that a Certificate "certifies":

- (1) that the needy person named therein is in indigent circumstances;
- (2) that such person has reasonable grounds for taking or defending or being a party to proceedings;
- (3) the name and address of the solicitor who has been nominated and has consented to conduct the proceedings on behalf of the needy person (hereinafter called the "conducting solicitor"); and

¹⁷ *Consolidated Rules of Court of the Province of Saskatchewan*, r 570 (1981).

¹⁸ See *new QB Rules*, *supra* note 6, r 13-42 – 13-55. Although the rules discussed in this paper have been reworded in the new rules, they remain the same in content.

(4) that there are reasonable and proper grounds for believing that the applicant may recover under execution, or obtain other substantial benefit or remedy under any judgment or order which may be made in the proceedings.

Under rule 569, the applicant must reside in Saskatchewan.

In summary, the *QB Rules* require a needy person to prove indigence, to demonstrate reasonable grounds for proceeding, and to have a “conducting solicitor” prepared to act on his or her behalf. Although the Legal Aid Commission is given discretion to determine eligibility for a Needy Person Certificate, the court retains a supervisory function. Under rule 575(1):

The court may at any time (and whether or not any application be made by the Law Society or by any person for that purpose) discharge the certificate and direct it to be taken off the file, and the needy person shall not thereafter have the benefit of the certificate

The *QB Rules* appear to assume that a Needy Person Certificate will be obtained before an action is commenced. After the Certificate has been obtained, it is filed in court.¹⁹ Thereafter, when it is produced by the “conducting solicitor,” court fees will be waived. In addition, “the needy person shall not be required to pay costs to any other party, except as provided by these rules,” and the “conducting solicitor” may not charge any fees to his or her needy client.²⁰ However, if the needy person recovers money or costs in the proceedings, costs and fees may become payable and the Certificate may be discharged.²¹

An unusual aspect of the *QB Rules* is the limitations they place on the solicitor-client relationship. Leave of the court or of the Legal Aid Commission is required for the needy person to discharge his or her solicitor, for the solicitor to withdraw, or to discontinue or settle a proceeding.²²

¹⁹ *QB Rules*, *supra* note 6, r 571.

²⁰ *Ibid*, r 574.

²¹ *Ibid*, r 578.

²² *Ibid*, r 576.

2.3 Issues and concerns

2.3.1 Accessibility of Needy Person Certificates

The role assigned to the Legal Aid Commission in respect to Needy Person Certificates made practical sense when legal aid was introduced in 1974. At that time, legal aid covered a wide range of civil matters. Clients who qualified for legal aid were also eligible for Needy Person Certificates: they were represented by counsel who met the criteria of rule 570(3), and qualification for legal aid vouched for their eligibility under rule 570(1). Acceptance of a case by the Legal Aid Commission also satisfied the requirements of rules 570(2) and 570(4). The Commission had no trouble administering Needy Person Certificates for its own clients. Restriction of the scope of legal aid since 1974 has changed the context in which the Commission administers Needy Person Certificates. As the Chair of the Legal Aid Commission pointed out in 1996:

The basic problem is that the rules were amended when the range of service of the Saskatchewan Legal Aid Commission was very broad. When the range of civil legal aid was restricted...to family law matters, this left a large number of individuals who could not receive legal aid, but who would have qualified financially.²³

It appears that many individuals who meet the means test for a Needy Person Certificate but do not qualify for legal aid are unable to obtain assistance.

Part of the problem is probably lack of information. Because legal aid is not available in most civil matters, potential litigants do not attempt to apply for it and are unlikely to discover that Needy Person Certificates are available. It is likely that even the legal profession is not fully aware that eligibility for legal aid and eligibility for Needy Person Certificates are different things. Note also that rule 571 appears to require that the Certificate must be filed in advance of any proceedings. This precludes lawyers from filing Certificates on behalf of *pro bono* clients if they do not become involved with the proceeding until after it is initiated.

Perhaps most significantly, the problem is compounded by the fact that rule 570(3) permits the Commission to issue a Certificate only if there is a “solicitor who has been nominated and has

²³ Letter from Jane Lancaster, Q.C., Chair, Saskatchewan Legal Aid Commission to Jan Kernaghan, Registrar, Court of Queen’s Bench for Saskatchewan (21 February 1996).

consented to conduct the proceedings on behalf of the needy person.” When the scope of legal aid was restricted, the Commission’s practice was initially to provide Needy Person Certificates to individuals representing themselves. In 1995, however, the Commission stopped granting Certificates to self-represented litigants as this practice clearly conflicted with rule 570. Thus, the Legal Aid Commission administers Needy Person Certificates but cannot provide them to unrepresented litigants.

In the result, very few Needy Person Certificates are issued to people who are not legal aid clients:

Currently, 99.9% of such certificates are provided to Legal Aid counsel or private counsel contracted under contract with Legal Aid; the remainder (1-2 per year) are granted to private Bar counsel in other cases...it may be that raising awareness among the profession regarding the certificates may encourage counsel to take on more *pro bono* cases.²⁴

In order to make Certificates more accessible, the Legal Aid Commission and CLASSIC have endeavored to develop a protocol allowing the Commission to issue Certificates to clients of CLASSIC and other *pro bono* counsel.²⁵ But even if Certificates are made more accessible for represented clients, the current system will be adequate only if there are enough lawyers taking on cases *pro bono*. The decision of the Ontario courts in *Polewsky v Home Hardware Stores Ltd* states that the absence of a statutory mechanism for waiver or reduction of court fees is unconstitutional. In Saskatchewan, fee waivers are not available to all needy litigants, inviting a constitutional challenge.

Both British Columbia and Ontario have recently made changes in their fee waiver systems as part of an access to justice strategy. In British Columbia, an “indigence order” may be made on summary application to the court by or on behalf of any person, whether represented or not:

20-5 (1) If the court, on application made in accordance with subrule (3) before or after the start of a proceeding, finds that a person receives benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise indigent, the court may order that no fee is payable by the person to the government under Schedule 1 of Appendix C in

²⁴ Tania Sarkar, *Access to Justice in Saskatchewan: report presented to the Access to Justice Committee of the Law Society of Saskatchewan* (Regina: Law Society of Saskatchewan, 2001) at 107.

²⁵ Letter from Amanda Dodge, Executive Director, CLASSIC to Gerald Tegart, Deputy Minister of Justice, Saskatchewan Ministry of Justice (7 December 2009).

relation to the proceeding unless the court considers that the claim or defence
(a) discloses no reasonable claim or defence, as the case may be,
(b) is scandalous, frivolous or vexatious, or
(c) is otherwise an abuse of the process of the court.²⁶

Note that the application is made directly to the court and an order may be made at any time during the proceedings. British Columbia has also made an effort to improve access by providing information about fee waivers. The Legal Services Society of British Columbia, with funding from the Law Foundation of British Columbia, makes available a self-help kit that includes forms and instructions for applying for an indigence order.²⁷

In Ontario, the *Administration of Justice Act* and regulations were amended in response to *Polewsky v Home Hardware Stores Ltd.*²⁸ The amendments provide for fee waivers in all courts for litigants who cannot afford to pay, whether represented by counsel or not. An applicant may apply to the clerk or registrar of the court in which the proceeding is taking place or to the judge hearing the case.²⁹

The role of the Saskatchewan Legal Aid Commission under the Needy Person Certificate rules creates other problems. In 1998, the Chair of the Legal Aid Commission stated that:

The Legal Aid commission would like to get out of the position as gatekeeper for Needy Person's Certificates. It has become onerous, requiring the Commission to obtain legal advice, defend its decision to grant Needy Person's Certificates in court, and in appeal to the Court of Appeal, and also obtain counsel to defend its decision not to grant Needy Person's Certificates. One of the last ironies is that when we determine that a client is no longer indigent, and so not entitled to a Needy Person's Certificate, under the Rules, we have to make an application to the Court to have the Certificate removed.³⁰

In addition, rule 576 involves the Commission when an action by a needy person is settled or discontinued and when a lawyer is discharged or seeks to withdraw as the "conducting solicitor" named in a Certificate. Rule 578 involves the Commission in issues of judgment recovery. These rules place the Commission in the unusual position of deciding issues involving

²⁶British Columbia, *Supreme Court Civil Rules*, r 20-5.

²⁷ Legal Services Society, *How to get an indigency order in Supreme Court*, online: Family Law in British Columbia <<http://www.familylaw.lss.bc.ca>>.

²⁸ *Administration of Justice Act*, RSO 1990, c A-6.

²⁹ *Fee Waiver*, O Reg 671/05, amending O Reg 2/05.

³⁰ Letter from Jane Lancaster, Q.C., Chair, Saskatchewan Legal Aid Commission (21 May 1998).

solicitors and clients in cases where they do not represent either party.

The Legal Aid Commission is placed in the role of gatekeeper of Certificates. Whether it is any longer the appropriate body to play this role should be given careful consideration.

2.3.2 Determination of need

In practice, when the Legal Aid Commission considers an application for a Certificate, it applies the means test for legal aid. Eligibility is usually limited to persons in receipt of social assistance or who qualify for social assistance.³¹ In addition, the Commission has discretion in cases of “undue hardship.”³² An applicant not in receipt of social assistance will usually qualify if net family income is at or below the level set out in an income grid adopted by the Commission. The cut-off income presumably reflects social assistance eligibility.

While this approach makes qualification for legal aid and qualification for Certificates consistent, it has been suggested that it is not entirely appropriate. As the costs of legal services rise, the number of low income individuals who must represent themselves can also be expected to rise. The eligibility requirement for legal aid may not be broad enough to meet the need. Fee waivers are perhaps a relatively inexpensive way to make the courts more accessible. In addition, simplification of the application process might help make Certificates more accessible. A straightforward means test would further this goal.

In 2009, CLASSIC recommended to the Ministry of Justice that all courts and tribunals should waive fees if the applicant was on social assistance or had an income below the low income cut-off (LICO) level set by Statistics Canada.³³ CLASSIC also recommended avoiding policies requiring an applicant to prove “undue hardship.” This formula would cover a larger number of people than the legal aid means test. For example, the LICO in Saskatoon is currently \$17,895 per annum for an individual without dependants.³⁴ The cut-off set by the Legal Aid Commission

³¹ Defined as financial assistance received from the Government of Saskatchewan's Social Assistance Program (SAP), or through a Band from the Indian & Northern Affairs Canada Income Assistance program: *Am I Eligible?*, online: Legal Aid Saskatchewan <<http://69.27.116.234/index.php>>.

³² *The Legal Aid Regulations, 1995*, RRS, c L-9.1, Reg 2, s 3(2)(b)(ii).

³³ Statistics Canada, *Table 18: Low income before tax cut-offs (1992 base) for economic families and persons not in economic families, 2005* (modified 11 December 2007), online: Statistics Canada <<http://www.statcan.gc.ca>>.

³⁴ *Ibid.*

in this case is \$11,820.³⁵

The Ontario fee waiver rules adopt an approach similar to the Saskatchewan Legal Aid Commission. They qualify individuals whose income is restricted to Ontario social assistance (Family Benefits Program, Disability Supports Program), government pensions (Old Age Security, Guaranteed Income Supplement, Canada Pension Plan, Veterans Allowance) or whose family income falls below a cut-off set out in a table in the regulations. However, the cut-off set in Ontario is closer to the LICO than its Saskatchewan counterpart.³⁶

3. Fee waivers in other courts and tribunals

Needy Person Certificates are available only in the Court of Queen's Bench and the Court of Appeal. This no doubt reflects the fact that the Certificates evolved from the ancient *in forma pauperis* proceedings in the English High Courts. In Saskatchewan today, justice is also administered in the Provincial Court and by a wide range of tribunals. As the Law Reform Commission has noted:

Boards, commissions, and review panels have become an important part of the administration of justice in Saskatchewan. These "administrative tribunals" make decisions in a wide range of cases affecting Saskatchewan residents and businesses. Nearly fifty tribunals adjudicate disputes between citizens and government agencies.³⁷

Fee waiver policies analogous to those in place in the courts would be appropriate in many of these tribunals and particularly in those that deal frequently with needy applicants. However, a survey of Saskatchewan tribunals undertaken by the Law Reform Commission shows that there is no consistency in their fee waiver policies.

Some tribunals do not charge fees. These include several that often receive applications from individuals with scant financial resources, such as the Labour Standards Board, the Workers' Compensation Board and Social Services appeal tribunals. However, even in these cases there

³⁵ *Am I Eligible?*, *supra* note 30.

³⁶ *Supra* note 29. The cut-off for a person without dependants is set by the regulation at \$18,000 per annum. This is slightly above LICO in smaller communities but below LICO in cities with populations of 500,000 or more.

³⁷ Law Reform Commission of Saskatchewan, *Model Code of Administrative Procedure for Saskatchewan Administrative Tribunals* (October 2005) at i.

may be fees related to appeals to the courts.

Some tribunals, such as the Office of Residential Tenancies, waive fees for applicants on social assistance. Availability of the fee waiver is noted on the forms provided by the Office.³⁸ Others, such as the Automobile Injury Appeal Commission (AIAC), will waive fees on grounds of “substantial hardship” or similar criteria. Although “substantial hardship” is not defined, the AIAC requires applicants for a fee waiver to make extensive financial disclosure of benefits received, income, assets and living expenses.³⁹ Many Saskatchewan tribunals, including some that frequently deal with needy applicants, have no fee waiver policy.

Some tribunals that frequently receive applications from needy persons

Tribunal/Appeal Board	Fees Associated with Claim	Information
Automobile Injury Appeal Commission	\$75	This fee can be waived if it will cause undue hardship for the claimant. The Commission will refund the fee if the appeal is successful.
Highway Traffic Board	\$25	The fee can be refunded if the appeal is successful.
Labour Relations Board	No fee	While there is no fee, the application form must be commissioned or notarized. The average fee for this is \$25 to \$50.
Office of Residential Tenancies	\$50	There is no fee for a tenant to apply for a return of security deposit. A \$50 fee is charged for any other application. Fees are waived for recipients of social assistance or Old Age Security Income Supplement.

There is no fee waiver policy in the Provincial Court. When the jurisdiction of the Provincial

³⁸ *The Residential Tenancies Regulations, 2007*, RRS, c R-22.0001, Reg 1. The Office’s website notes that “the fee is waived for anyone who is on social assistance or receives an Old Age Security Income Supplement”. In addition, there is “no fee for a tenant to apply for a return of security deposit”. See Office of Residential Tenancies < <http://www.justice.gov.sk.ca/ORT>>.

³⁹ See *Certificate of Substantial Hardship*, online: Automobile Injury Appeal Commission <<http://www.autoinjuryappeal.sk.ca/subhardship>>.

Court was confined largely to criminal cases, this was not a significant issue. However, the Small Claims Court now handles claims of up to \$20,000. Since the Small Claims Court was created as a less expensive, more accessible alternative to the Court of Queen's Bench, the absence of a fee waiver policy is particularly problematic. The minimum fee for filing a claim in the court is \$20. As CLASSIC notes:

While these fees may not be considered significant to a middle income earner, to those living in poverty even a \$20 fee can be insurmountable. Many of our clients living on social assistance or other forms of income support (e.g. pension) can earn less than \$1,000 per month. Their income is quickly consumed by their basic necessities. After paying rent, utilities and groceries, our clients often have no disposable income that can be put towards legal fees.⁴⁰

In Ontario, a revision of the fee waiver rules followed the decision in *Polewsky v Home Hardware Stores Ltd* which held that the absence of a statutory mechanism for waiver or reduction of fees in the Ontario Small Claims Court was unconstitutional. The Ontario fee waiver system now extends to the Provincial Courts and tribunals.

In a submission to the Ministry of Justice in 2009, CLASSIC recommended that fee waivers be available in all tribunals and courts and that a uniform policy be adopted in place of the variety of approaches now in place. It suggested that tribunals and courts should waive fees if the claimant is on social assistance or has an income that is below the LICO. CLASSIC also recommended avoiding policies where the claimant must demonstrate "undue hardship."⁴¹

4. Invitation to Respond

Given the above information on the issues and concerns with respect to the current state of Needy Person Certificates and fee waivers in Saskatchewan, as well as the information on what has been done in other provinces, what changes, if any, do you think need to be made? Please refer to our Call to Respond on page ii for suggestions to guide your thinking and information on how to submit your response.

⁴⁰ *Supra* note 25.

⁴¹ *Ibid.*

Appendix – The Queen’s Bench Rules

PART FORTY-SEVEN - PROCEEDINGS BY AND AGAINST NEEDY PERSONS

Definition

569 Any person resident in the province obtaining a certificate under these rules (hereinafter called the “needy person”) shall be admitted to take or defend or be a party to any legal proceedings in the court as a needy person on the terms and conditions mentioned in these rules.

Certificate

570 A certificate under these rules means a certificate issued by The Saskatchewan Legal Aid Commission certifying:

- (1) that the needy person named therein is in indigent circumstances;
- (2) that such person has reasonable grounds for taking or defending or being a party to proceedings;
- (3) the name and address of the solicitor who has been nominated and has consented to conduct the proceedings on behalf of the needy person (hereinafter called the “conducting solicitor”); and
- (4) that there are reasonable and proper grounds for believing that the applicant may recover under execution, or obtain other substantial benefit or remedy under any judgment or order which may be made in the proceedings.

Filing certificate

571 Before taking any other step in the proceedings the conducting solicitor shall file the certificate in the office of the local registrar at the judicial centre at which the matter is proceeding or intended to proceed.

Acceptance for filing

572 Every certificate under these rules complying on the face of it with the requirements thereof and purporting to be signed as provided therein shall be accepted by the local registrar for the purpose of filing.

Memo of filing

573 On the filing of the certificate there shall be issued to the conducting solicitor a memorandum of such filing bearing the stamp of the office where the certificate is filed, and in all subsequent proceedings the production of the memorandum shall be sufficient evidence that a certificate in accordance with these rules has been duly filed.

Solicitor not to accept fees

574(1) Unless the court shall otherwise order the needy person shall not be required to pay costs to any other party and, except as provided by these rules, no solicitor or counsel shall take or agree to take or seek to obtain any payment, fee, profit or reward for the conduct of the proceedings or for out-of-pocket or office expenses and any solicitor or counsel so doing shall be guilty of contempt of court.

Payment, effect of

(2) If any such payment, fee, profit or award shall be made, given or promised, the certificate may be ordered to be taken off the file in which case the needy person shall not thereafter have

the benefit of the certificate, unless otherwise ordered.

Disbursements

(3) The Commission may from time to time allow such payments of money to be made by the needy person to the conducting solicitor in respect of out-of-pocket expenses (not including office expenses) as they may consider just.

Matrimonial causes

(4) The Commission may require a needy person in a matrimonial cause or in any other proceedings where in the opinion of the Commission the special circumstances so require to deposit with them, or as they shall direct, in order to cover the out-of-pocket expenses of the conducting solicitor any sum of money and if such deposit shall in relation to the proceedings be found insufficient such further sum as the Commission may direct. Every sum deposited shall be utilized by the Commission only for the payment to the conducting solicitor of any out-of-pocket expenses (not including office expenses) properly incurred in relation to the proceedings and any surplus shall be repaid to the needy person.

Discharge of certificate

575(1) The court may at any time (and whether or not any application be made by the Law Society or by any person for that purpose) discharge the certificate and direct it to be taken off the file, and the needy person shall not thereafter have the benefit of the certificate, unless otherwise ordered.

(2) The Commission may discharge the certificate any time before it has been filed, whether or not any application be made for its discharge.

Discontinuance or settlement

576(1) No needy person nor any solicitor conducting the proceedings for him shall discontinue, settle or compromise such proceedings without the leave of the court or of the Commission.

(2) No needy person shall discharge any solicitor or counsel without the leave of the court or the Commission.

Solicitor withdrawing

(3) No solicitor or counsel acting for a needy person shall be at liberty to discontinue his assistance unless he satisfies the court or the Commission that there is a reasonable ground for so discontinuing.

Increased means to be reported

577(1) If and whenever the needy person (or in matrimonial causes when the wife is the needy person, she or her husband) becomes possessed of means beyond those stated in the application for a certificate, the needy person shall at once report the matter to the conducting solicitor or to the Commission.

Solicitor to report

(2) When such fact comes to the notice of the conducting solicitor, whether by means of such report or otherwise, he shall forthwith report it in writing to the Commission.

Recovery of costs by judgment

578(1) In any case where a needy person recovers judgment:

- (a) the court may order costs to be paid by the opposite party;
 - (b) the costs under clause (a) shall be assessed as in an ordinary action;
 - (c) the assessment officer shall assess and allow all customary disbursements for court fees, court reporter's fees, sheriff's fees or any other fee or charge under any statute in force in Saskatchewan that would be necessarily incurred in the conduct of the proceedings, otherwise than under this part, as if those costs had been disbursed; and
 - (d) in the event of recovery of the amounts referred to in clause (c) under such judgment the amounts or *pro rata* shares of the amounts shall, on the judgment being made, be paid to the persons entitled to them.
- (2) In the event of a needy person recovering on a judgment against any other party or parties to the proceedings:
- (a) the conducting solicitor is entitled to his or her assessed solicitor's fees and disbursements out of the moneys so recovered; and
 - (b) where the needy person recovers any real or personal property, the court may grant a charging order in favour of the conducting solicitor for the assessed amount.

Allowance to solicitor following settlement

(3) In the event of the recovery of money or property by the conducting solicitor on behalf of such needy person without proceedings or on the settlement of any proceedings before trial or other final disposition the Commission or the court may, on the application of the conducting solicitor, allow him out of such money or property such collection or other fees as may seem proper.

Solicitor to sign proceedings

579 Every notice of motion, summons or petition on behalf of a needy person (except an application for the discharge of the conducting solicitor) shall be signed by the conducting solicitor, and it shall be the duty of the conducting solicitor to take care that no application be made without reasonable cause.

Security for costs; issue of certificate following order

580 In any case where an order for security for costs has been made against a person applying for a certificate as a needy person, such certificate shall not be granted until after two days' notice to the party who has obtained the order for security for costs or his solicitor, and such party or his solicitor shall have the right to be heard on the application for such certificate. If such certificate is then granted the filing of the certificate shall supersede any previous order obtained by any other party for security for costs as against the needy person, and no order for security for costs shall thereafter issue against the needy person unless with the leave of the court.

Appeal

581 There shall be no appeal as a needy person by anyone admitted to take, or defend, or be a party to any legal proceedings under these rules without leave of the court or of the judge before whom the matter is heard, or of the court or judge to whom the appeal is taken.

Stay of proceedings

582 Nothing in these rules shall operate as a stay of any proceedings unless so ordered by the court.