

# BRING A FRIEND TO COURT : A GUIDE

(MCKENZIE FRIEND AND B.C. SUPREME COURT CHAMBERS)

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## **READ ME FIRST**

This guide will provide information on how a friend [McKenzie Friend] can assist a self-representing person in contested chambers.

Please read the warning and wavier of responsibility on the next page.

It is recommended that self-representing persons and their McKenzie Friend obtain legal advice.

## WAIVER AND WARNING

### **Seek Legal Advice**

This guide is produced for educational purposes. Users of the guide should not rely on the guide for legal advice or as a substitute for legal advice. Instead, persons with legal problems including those who plan to represent themselves in court should consult a lawyer. Those who cannot afford a lawyer should seek out legal aid.

This guide is a general guide and cannot contemplate all eventualities. This is another reason for you to consult a lawyer.

The law, including Acts, Regulations, Rules of Court, Court Practices and Court Precedents can change without warning. The users of this guide should check to see if this guide is up to date. This is another reason to consult a lawyer.

### **Waiver**

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- for the completeness or accuracy of the information contained in this guide; or
- for any form of damages or monetary loss caused by or attributed to the use of this guide and without limiting the foregoing including claims based on negligence or breach of contract.

### **Limited Nature of the Guide**

This a general guide and cannot contemplate all eventualities dealing with friend in court. It covers the role of a friend to court in a general way. We have other guides available for other topics. Check our web site at: <http://www2.povnet.org/clas>

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## **PART 1 - NATURE OF A MCKENZIE FRIEND**

This guide will explore how a friend can help you in your contested chambers in BC Supreme Court. Sometimes, this person is called a McKenzie Friend.

### **What is a McKenzie Friend?**

A McKenzie Friend assists a person who is representing himself or herself in court. The McKenzie Friend:

1. provides moral support to the self representing person,
2. sits at the counsel table with the self representing person,
3. assists with paper work including the taking of notes as the court proceedings go on,
4. whispers quiet advice to the self representing person,
5. generally assist the self representing person.

The McKenzie Friend cannot speak in court for the self-representing person except in special circumstances. Special circumstances may include having a language problem, having a disability or being of old age to name a few. The decision to allow this to happen lies in the discretion of the judge hearing the case. Some judges are more accommodating than others. For that reason it is best to have a self-representing person prepared to go ahead alone in case special permission is not given by the judge. For some sample court cases regarding the role of a McKenzie Friend, see appendix "A."

### **Who can be a McKenzie Friend?**

Anyone can be a McKenzie Friend. There are no specific qualifications. The following qualities make a good Mackenzie Friend:

1. trusting;
2. common sense;
3. well organized;
4. a "big picture" person;
5. a person good at reading and writing English;
6. knowledgeable about computers.

It is not necessary for your "McKenzie Friend" to have all these characteristics.

Persons who are show offs do not make good McKenzie Friends. Also, persons who are confident that they know what the law is, do not make good McKenzie Friends. If you want someone knowledgeable about the law, you might as well get a lawyer. The function of the McKenzie Friend is different. He or she exists to assist you, not to act as your lawyer. Finally, a person who may give evidence in front of the court should not be a McKenzie Friend.

A level handed, reasonably educated relative makes an excellent McKenzie Friend. In addition, there is nothing stopping you from having “more than one” or “two” McKenzie Friends. One who is a good writer could help you with all the paper work. Another could actually accompany you to court. The bottom line is you need someone to help you. Please note you can have only one McKenzie Friend sit with you during the court hearing. Other friends can sit in the main body of the court room.

## **PART 2 – INSTRUCTIONS FOR MCKENZIE FRIEND**

### **Just Being There**

The most important contribution a McKenzie Friend can make is support. Going to court can be intimidating. The self representing person needs someone by his or her side. Beyond support, here are some ways a McKenzie Friend can help. Remember a McKenzie Friend may not be able to do all of these things.

### **Attending Legal Aid or Pro Bono Clinics**

Self representing persons will need legal advice. The McKenzie Friend can attend legal clinics with the self representing person. A second pair of eyes and ears can be useful. Many people are nervous when they see lawyer. Ask the lawyer if a McKenzie Friend can sit in. Some lawyers' interviews are not appropriate to have a friend sit in with you.

### **Reading Self Help Material**

Written material exists to help self representing persons. A McKenzie Friend can read and explain it to a self representing person. Some people have literacy problems. Even those with no literacy problems can benefit from having someone else read over the material. Written self help material can be quite extensive.

### **Preparing Court Documents**

An important element of the court hearing is the preparation of court documents including affidavits. Here too, the McKenzie friend can help. A self-representing person may not be good at writing. A McKenzie Friend who is a good writer can help. At least, the McKenzie Friend can proofread the material.

### **Attending Sample Court Hearings**

Attend a court hearing on a day before your case is actually heard. The self

representing person can do this along with the McKenzie Friend. This can give you an idea of what to expect. During this time, it might be a good idea to check out the local eating establishments for the day of the court hearing. On the day of the hearing you do not want to be spending a lot of time looking for place to eat. You want something quick, light and nearby. The McKenzie Friend and self representing person may be discussing the case over lunch depending on the court schedule that day.

### **Preparing for the Court Hearing**

A McKenzie Friend can help the self representing person prepare for the court hearing. This friend can read over all the court documents and help the self-representing prepare the presentation to the court. Are the important points being covered? Is the presentation clear and simple?

### **The Court Hearing**

The day of the hearing is where the “McKenzie Friend” shines. Here are some of the ways a McKenzie Friend can help:

1. The McKenzie Friend can help locate the courtroom.
2. The McKenzie Friend can ensure you keep to your notes or time schedule during your presentation. The best way to do this is to pass a note or quietly whisper in the person’s ear.
3. The judge may ask where certain material is in the Chambers Record (court documents). The self representing person may not be able to find it. The self representing person can always say to the court “my lord I can’t find it right away. I will ask my friend to find it.” The self representing person can always point out the material to the judge later. [A McKenzie Friend should have copy of the chambers record.]
4. The McKenzie Friend can monitor the body language of the judge. Judges sometimes telegraph their views of the case by body language. A McKenzie Friend can monitor this better than a self-representing person. For example, the self-representing person may be hammering a point in his argument too much. The judge may become frustrated because the self-representing person is not moving along to the next point. A McKenzie Friend can draw this to the attention of the self-representing person.
5. A McKenzie Friend can keep notes as the matter proceeds in court.
6. The court hearing for your case may have a break. There are breaks in the morning or afternoon sessions. During the break, the McKenzie Friend can reassure the self representing person. In addition, the McKenzie Friend can go over the presentation so far pointing out matters that have been left out or things

that should be clarified.

7. At the end of the self representing person's presentation, the self representing person should always turn to the McKenzie Friend to see if there is any final comments that should be made.

The "McKenzie Friend" must be careful not to overdo it. A little bit of note passing and whispering in the ear is okay. However, if it becomes persistent, the McKenzie Friend will annoy the judge and go outside of the role of the McKenzie Friend.



## APPENDIX “A”

### McKenzie Friend (England)

The case of *Pelling v Bow County Court* [1999] E.W.J. No. 4027 (see enclosed) explains what a McKenzie Friend is. Lord Woolf, MR states at paragraphs 5-7, the following:

“5     5. *The title ‘McKenzie Friend’ draws its name from the decision of the Court of Appeal in McKenzie v McKenzie [1971] P 33. The role of a McKenzie Friend was first recognised in Collier v Hicks [1831] 2 B & Ad.663. Lord Tenterden CJ in that case said (at p.669):*

*‘Any person, whether he be of a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no-one can demand to take part in the proceedings as an advocate, contrary to the regulations of the Court as settled by the discretion of the Justices’.*

6     6. *McKenzie v McKenzie was a contested divorce case. The husband had been legally aided but his legal aid was terminated. At the commencement of the hearing there was sitting beside him an Australian barrister, who was working for one of the firms of solicitors who had been acting for the husband. According to the report he was there ‘voluntarily in order to assist the husband in conducting his case’. The young man could have been of great value to the husband at the hearing of the case which was complicated and lasted some ten days or so. However the judge at first instance did not allow him to remain after he found out that his firm was no longer on the record. The three members of this court (Davies, Sachs and Karminski LJJ) considered that this was a wrong decision. In that case the court was of the opinion that the husband was entitled to the assistance of the McKenzie friend. Sachs LJ in his judgment stated that the error made by the judge did not render the trial a nullity. However he added ‘that where such an error takes place the onus rests on the opposite party to show that it did not cause prejudice’. Sachs LJ also stated:*

*‘All the assistance a litigant in person gets from a judge and from opposing counsel is not really the same thing as having skilled assistance at his elbow during the whole of a lengthy trial. In those circumstances it has not been shown that there was no prejudice to the husband on the adultery issue through lack of the assistance which he ought to have had. It is moreover always, to my mind, in the public interest that a litigant should be seen to have all available aid on conducting cases in court surroundings, which must of their nature to them seem both difficult and strange.’”*

An additional case is called *Paragon Finance plc. V Noueiri* [2001] EWCA Civ 1402. In that case, the court said the following:

“56     *Although Mr Alexander did not purport to act as a McKenzie friend, it is worth mentioning some important principles governing McKenzie friends. The development of*

*this jurisprudence is set out in the judgment of Otton LJ in the Divisional Court in R v Bow County Court ex parte Pelling [1999] 1 WLR 1807, 1811B-1813, [page30] in a passage approved by the Court of Appeal at p. 1826B. Three principles are worth noting from the judgments in this case:*

- i) A McKenzie friend has no right to act as such: the only right is that of the litigant to have reasonable assistance (see p. 1824G).*
- ii) A McKenzie friend is not entitled to address the court (see pp. 1823E, 1824G.) If he does so, he becomes an advocate and requires the grant of a right of audience under s 27.*
- iii) Generally, a litigant in person who wishes to have a McKenzie friend should be allowed to do so unless the judge is satisfied that fairness and the interests of justice do not so require (see pp. 1827D and 1823G). However, the court can prevent a McKenzie friend from continuing to act as such where the assistance given is inimical to the efficient administration of justice, for example where the friend is indirectly running the case or using the litigant as a puppet (see pp. 1823G-1824A, 1824E, 1825D-F).*

*57 In R v Leicester City Justices ex parte Barrow [1991] 2 QB 260 Staughton LJ described the court's power to control the activities of a McKenzie friend in these terms:*

*'An assistant can be ordered to stay away from the litigant or to leave the court if he is disorderly, just as any member of the public can be removed. If he wastes time unnecessarily, as by prompting the litigant to ask irrelevant questions, or causing delay by long consultations, he should be warned; and if this conduct persists his assistance should be terminated. Courts already have, on occasion, the task of controlling professional advocates and litigants and persons who cause unnecessary delay...'*

McKenzie Friend has been recognized in Australia. See *Watson v Watson* [2001] FamCA 1470 (20 December 2001) at paragraph 18 the following is stated:

*"18. The first point which I think it important to make is that the application here is for the appointment of a 'next friend', not for the leave of the Court to employ the services of an assistant of the kind which has become known, throughout the Common Law world, as a 'McKenzie friend', following the decision of the English Court of Appeal in McKenzie v McKenzie [1970] 3 All E.R. 1034. That decision was to the effect that a litigant who appears before a Court in person is ordinarily entitled, if he or she so wishes, to have the assistance, in the court, of a friend or assistant who may sit beside the litigant at the bar table for the purpose of taking notes, handling or cataloguing documents or exhibits, making quiet suggestions to the litigant as to how best to conduct the case, and generally being of assistance to the litigant in presenting his or her case to the Court, provided that that person does not disrupt the proper conduct of the proceedings. However, an important limitation upon the role and functions of a 'McKenzie friend' is that he or she*

*may not (except, perhaps, in the most exceptional cases, and with the express leave of the Court) act as an advocate for the litigant in the proceedings. That limitation has been recognized at least since a statement was made to that effect by Lord Tenterden CJ in Collier v Hicks [1831] 2 B & Ad. 663, 109 E.R. 1290 at 1292, and has recently been reaffirmed by the Full Court of this Court (Kay J, with whom Holden and Mullane JJ agreed) in KT v KJ & TH (2000) FLC 93-032 at 87,509.”*

**Inherent Jurisdiction of the Court (Canada)**

Madam Justice Joyce in *Law Society of British Columbia v Hanlon* [2002] B.C.J. No. 262 states the following at paragraph 14:

*“14 The respondent argued that the court has inherent jurisdiction to allow non-lawyers to appear before it and cited O’Toole v Scott [1965] 2 All E.R. 240 (H.L.) in support. As I pointed out to the respondent during the hearing, the jurisdiction of the court to permit another person to appear as agent for a litigant in any particular matter is not the issue. The court may permit a litigant to be represented by an agent without a fee but the court cannot authorize the ‘practice of law’, i.e. the provision of legal services for a fee, gain or reward.”*