

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	N A	L	L A	DATE DUE	DATE DONE
<p style="text-align: center;"><b>INTRODUCTION</b></p> <p><b>Purpose and currency of checklist.</b> This checklist is designed to be used with the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1) and CLIENT FILE OPENING AND CLOSING (A-2) checklists. This is a general procedural checklist for use by defence counsel in criminal cases heard by a judge alone. It should also be used, where appropriate, with the checklists for JUDICIAL INTERIM RELEASE PROCEDURE (C-2), SENTENCING PROCEDURE (C-3), and IMPAIRED/OVER-80 TRIAL EXAMINATION OF WITNESSES (C-4). It does not include procedure for appeals. This checklist is current to September 1, 2023.</p> <p><b>New developments:</b></p> <ul style="list-style-type: none"> <li>• <b>Appearances by counsel.</b> Check the BC Courts website (<a href="http://bccourts.ca">bccourts.ca</a>) to obtain up-to-date Practice Directions, Notices to the Profession, guides to remote proceedings, and announcements from all levels of court for methods of appearance by counsel and accused persons.</li> <li>• <b>Forms of address.</b> The Supreme Court of British Columbia provided direction on how parties and counsel are to address a justice in a courtroom (see Supreme Court Civil <a href="#">Practice Direction PD-60</a>) and provided clarification on how to introduce themselves in proceedings (see <a href="#">Supreme Court Civil Practice Direction PD-59</a>).</li> <li>• <b>Calculation of delay.</b> The Supreme Court of Canada clarified that the presumptive ceilings set out in <i>R. v. Jordan</i>, 2016 SCC 27 do not include verdict deliberation time and apply from the date of the charge to the actual (or anticipated) trial end date (i.e., when evidence and argument has concluded and the case is given to the trier of fact (<i>R. v. K. (K.G.)</i>, 2020 SCC 7)). The court considered the characterization and attribution of delay in: <i>R. v. Hanan</i>, 2023 SCC 12 (transitional exceptional circumstance); <i>R. v. Boulanger</i>, 2022 SCC 2 (timing of a defence application); <i>R. v. J.F.</i>, 2022 SCC 17 (calculation of delay in re-trials and timing of s. 11(b) applications); and <i>R. v. Lai</i>, 2021 SCC 52 (delay involved with the timing of a re-election). In British Columbia, the court considered the calculation of delay in <i>R. v. Shlyk</i>, 2021 BCCA 472 (discrete events-third party disclosure); <i>R. v. Eheler</i>, 2021 BCCA 316 (discrete events); <i>R. v. Pugh</i>, 2021 BCCA 293 (discrete events); and <i>R. v. Kanda</i>, 2021 BCCA 267 (gap period).</li> <li>• <b>Self-defence.</b> The Supreme Court of Canada in <i>R. v. Khill</i>, 2021 SCC 37 provides guidance on the application and interpretation of the self-defence provisions in s. 34 of the <i>Criminal Code</i>, R.S.C. 1985, c. C-46.</li> <li>• <b>Self-induced extreme intoxication.</b> In response to the decisions in <i>R. v. Brown</i>, 2022 SCC 18 and the companion cases of <i>R. v. Sullivan</i> and <i>R. v. Chan</i>, 2022 SCC 19, s. 33.1 of the <i>Criminal Code</i> was amended effective June 23, 2022 (see Bill C-28).</li> <li>• <b>Stare decisis.</b> For discussion on the principles of judicial comity, horizontal <i>stare decisis</i>, vertical <i>stare decisis</i>, and the application of <i>Re Hansard Spruce Mills</i>, 1954 CanLII 253 (BC SC), see <i>R. v. Sullivan</i>, 2022 SCC 19.</li> <li>• <b>Sexual offences.</b> The Supreme Court of Canada considered the meaning of consent in <i>R. v. A.E.</i>, 2022 SCC 4 and <i>R. v. Kirkpatrick</i>, 2022 SCC 33. In <i>R. v. D.R.</i>, 2022 SCC 50, the court considered impermissible stereotypical reasoning. See also <i>R. v. Tsang</i>, 2022 BCCA 345, leave to appeal granted 2023 CanLII 6098 (SCC).</li> <li>• <b>Voyeurism.</b> The Supreme Court of Canada clarified the elements of the voyeurism offence (s. 162(1)(a) of the <i>Criminal Code</i>) in <i>R. v. Downes</i>, 2023 SCC 6.</li> </ul>					

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<ul style="list-style-type: none"> <li>• <b>Admissibility of records relating to the complainant in the possession of the accused.</b> The Supreme Court of Canada upheld the constitutionality of ss. 278.92 to 278.94 of the <i>Criminal Code</i> and discussed when the scheme is engaged, the timing of applications (generally pre-trial), and the procedure to be followed in <i>R. v. J.J.</i>, 2022 SCC 28.</li> <li>• <b>United Nations Declaration on the Rights of Indigenous Peoples.</b> <i>An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples</i>, S.C. 2021, c. 14 came into force on June 21, 2021. Section 5 of the <i>Act</i> provides that the Government of Canada must, in consultation and cooperation with Indigenous Peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration. The <a href="#">Action Plan</a> was released on June 21, 2023.</li> <li>• <b>Official language rights.</b> For a review of official language rights (s. 530 of the <i>Criminal Code</i>), see <i>R. v. Tayo Tompouba</i>, 2022 BCCA 177, leave to appeal granted 2023 CanLII 568 (SCC).</li> <li>• <b>Vukelich hearings.</b> The Supreme Court of Canada outlined the threshold required for the summary dismissal of applications in a criminal context in <i>R. v. Haevischer</i>, 2023 SCC 11.</li> <li>• <b>Amicus.</b> The appointment and role of amicus was recently considered in <i>R. v. Kahsai</i>, 2023 SCC 20.</li> </ul> <p><b>Of note:</b></p> <ul style="list-style-type: none"> <li>• <b>Additional resources.</b> For further information on criminal law practice and procedure, see: <i>Introducing Evidence at Trial: A British Columbia Handbook</i>, 4th ed. (CLEBC, 2020); <i>Canadian Criminal Jury Instructions</i>, 4th ed. (CLEBC, 2005–); annual editions of the <i>Annual Review of Law and Practice</i> (CLEBC); and the course presentation and materials from <i>Criminal Law: Special Issues</i> (CLEBC, 2011); <i>Search Warrants and Wiretap</i> (CLEBC, 2010); and <i>Controlled Drugs—2012</i> (CLEBC, 2012) available through CLEBC Courses on Demand.</li> <li>• <b>Law Society of British Columbia.</b> For changes to the Law Society Rules and other Law Society updates and issues “of note”, see LAW SOCIETY NOTABLE UPDATES LIST (A-3).</li> </ul> <p style="text-align: center;"><b>CONTENTS</b></p> <ol style="list-style-type: none"> <li>1. Initial Matters</li> <li>2. Bail Hearing</li> <li>3. Initial Appearance, Election, and Fixing a Date</li> <li>4. Preliminary Hearing</li> <li>5. Preparation for Trial</li> <li>6. Trial</li> <li>7. Sentencing</li> <li>8. Follow-up</li> </ol> <p style="text-align: center;"><b>CHECKLIST</b></p> <ol style="list-style-type: none"> <li><b>1. INITIAL MATTERS</b> <ol style="list-style-type: none"> <li>1.1 Conduct a conflicts of interest check. Complete the CLIENT FILE OPENING AND CLOSING (A-2) checklist.</li> <li>1.2 Initial contact by the client or client’s representative:</li> </ol> </li> </ol>					

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<p>.1 Confirm compliance with Law Society Rules 3-98 to 3-110 for client identification and verification and the source of money for financial transactions, and complete the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1) checklist. Consider periodic monitoring requirements (Law Society Rule 3-110).</p> <p>Gather additional information:</p> <p>(a) Caller:</p> <p>(i) Name, home address and telephone number, business address and telephone number (if any), occupation(s).</p> <p>(ii) Relationship to the client.</p> <p>(b) Client:</p> <p>(i) Full name and aliases, home address and telephone number, business address and telephone number (if any), occupation(s).</p> <p>(ii) Present location, including telephone number and number at which messages can be left.</p> <p>(iii) Date of birth. (If the client was 12 to 17 years old at the time of the offence, refer also to the <i>Youth Criminal Justice Act</i>, S.C. 2002, c. 1 (the “YCJA”).)</p> <p>(iv) Indigenous clients. Consider the principles set out in <i>R. v. Gladue</i>, [1999] 1 S.C.R. 688; <i>R. v. Ipeelee</i>, 2012 SCC 13; and <i>R. v. Kehoe</i>, 2023 BCCA 2. Section 718.2(e) of the <i>Criminal Code</i> sets out factors a judge must consider when setting bail for, or sentencing, an Indigenous person (youth or adult). Judges must consider that Indigenous offenders face special circumstances (e.g., ongoing impacts of colonization, intergenerational trauma associated with the residential school system, poverty in communities, FASD), and should consider all options other than jail.</p> <p>At different stages in the process, a Native court worker might be able to support the client or act as a useful liaison.</p> <p>Further information on Aboriginal law issues is available on the “Aboriginal Law” page in the “Practice Areas” section of the Continuing Legal Education Society of British Columbia website (<a href="http://www.cle.bc.ca">www.cle.bc.ca</a>) and in other CLEBC publications.</p> <p>(c) Charge(s).</p> <p>(d) Information number and police file number.</p> <p>(e) Date, time, and location of next court appearance.</p> <p>.2 Decide whether to accept the case, considering:</p> <p>(a) The nature of the charge.</p> <p>(b) Your duty to provide legal services and your duties as an advocate. See s. 2.1 (especially rules 2.1-1(c) and 2.1-3(e) and (f)), and Chapter 5 (Relationship to the Administration of Justice) of the <i>Code of Professional Conduct for British Columbia</i> (the “BC Code”), as well as rule 6.3-5, stipulating that a lawyer must not discriminate against any person.</p> <p>(c) Human rights laws (see <i>BC Code</i>, s. 6.3).</p> <p>(d) The complexity of the case and your experience in that area of law. See <i>BC Code</i>, s. 3.1 (Competence) and s. 3.2 (Quality of Service).</p>					

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<p>(e) Amount of the fee and whether it will be paid; and whether the client is eligible for legal aid (see <i>BC Code</i>, s. 3.6 regarding fees and disbursements).</p> <p>(f) If the client is ineligible for legal aid, whether it is an appropriate case for a <i>Rowbotham</i> application.</p> <p>.3 If you are not in a position to act, advise the client. Make a record of the advice given, and file your notes. Send a non-engagement letter (for samples, see the Law Society resources available at <a href="http://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/Ltrs-NonEngagement.pdf">www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/Ltrs-NonEngagement.pdf</a>).</p> <p>.4 If you agree to act:</p> <p>(a) Discuss the terms of your retainer and the calculation of your fee. Refer to the CLIENT FILE OPENING AND CLOSING (A-2) checklist.</p> <p>(b) Promptly disclose, to the court and to those concerned, the scope of any limited retainer, if failure to disclose would be misleading. See <i>BC Code</i> rule 3.2-1.1, commentaries [2] to [4], rule 7.2-6, and rule 7.2-6.1.</p> <p>(c) Be alert to cultural considerations. Be aware of cultural differences in communication and become familiar with the client’s background and community. Assess resources that might assist the client to be an appropriate candidate for release pending disposition or for a community disposition at sentencing.</p> <p>1.3 Contact the client by telephone, if possible:</p> <p>.1 If you were contacted initially by someone other than the client:</p> <p>(a) Introduce yourself as a lawyer, tell the client who it was that contacted you, and that they asked you to provide representation.</p> <p>(b) Confirm that the client wishes to retain you.</p> <p>(c) If contact is by telephone, advise the client when you will be able to meet.</p> <p>(d) Advise the client that all your discussions are strictly confidential.</p> <p>.2 Advise the client not to discuss the case with anyone before meeting with you; advise that anything said could be used as evidence in court; do not discuss the offence with the client over the telephone; advise the client not to submit to blood, hair, or saliva tests before your meeting.</p> <p>.3 Confirm the client’s present location.</p> <p>.4 Ask if the client is injured or under any disability. See <i>BC Code</i> rule 3.2-9 as to professional duties to a client under a disability.</p> <p>.5 Spell your name, and give your telephone number and address.</p> <p>.6 Ask whether the client waives privilege, so that you can discuss the case with that client’s family member or designated representative.</p> <p>.7 If the client is in jail, advise that client not to discard any item that might contain DNA evidence (e.g., tissues, comb, bandages, menstrual sanitary products).</p> <p>1.4 If the client is in jail, consider contacting the officer in charge of the jail. If you do so:</p> <p>.1 Identify yourself as that client’s lawyer.</p>					

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<p>.2 Get the officer's name, rank, and number.</p> <p>.3 Confirm the client's location and whether there are any plans to move that client.</p> <p>.4 Ask why that client was not released immediately.</p> <p>.5 Ask what charges have been or are expected to be laid.</p> <p>.6 Ask about other outstanding charges or warrants.</p> <p>.7 Ask whether the police will be applying by telephone to the Judicial Justice of the Peace Centre for a remand in custody. If so, consider whether you wish to attend at the police station and participate in the application.</p> <p>.8 For Indigenous clients, consider whether a Native court worker or support worker from the client's First Nation community could attend at the police detachment to assist them.</p> <p>.9 Request medical treatment, if appropriate.</p> <p>.10 Tell the officer that you have advised your client not to discuss the case (or any other case) with anyone, and ask that your client not be interviewed until you have met with that client.</p> <p>.11 Note the time of your call.</p> <p>1.5 Gather information, if possible, including:</p> <p>.1 From the Crown:</p> <p>(a) A copy of the information.</p> <p>(b) Circumstances of the offence as alleged by the Crown and witnesses.</p> <p>(c) The client's criminal record.</p> <p>(d) Statements made by the client.</p> <p>(e) Statements made by anyone else, including accomplices and police witnesses. Get the names and addresses of all witnesses, including those the Crown does not intend to call.</p> <p>(f) The Crown's position on judicial interim release.</p> <p>(g) Determine the Crown's initial sentencing position if the client were to plead guilty early.</p> <p>.2 If a search warrant, production order, or DNA warrant was used, get:</p> <p>(a) A copy of the warrant or order; and</p> <p>(b) Information used to obtain the warrant or order (if the information is unsealed, get the details from the Crown or apply to a justice of the peace; if the information is sealed, apply to a Provincial Court judge).</p> <p>.3 Wiretap authorizations and particulars.</p> <p>.4 Request copies of all photographs, video recordings, and audio recordings made by, or in the possession of, police or Crown counsel, along with any related transcripts. Review this material for any transcript inaccuracies. Ensure any recorded material has been provided in a format that you are able to play or access. (Crown counsel may ask that you provide an undertaking governing how you deal with sensitive material and requiring its return upon completion of the case.)</p>					

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<p>1.6 Discuss with the client and obtain instructions as to whether you will be appearing as designated counsel on future appearances pursuant to <i>Criminal Code</i>, s. 650.01.</p> <p>.1 If so instructed, prepare a counsel designation form and obtain the client's signature, in preparation for filing the designation with the court.</p> <p>1.7 Carefully analyze the information, noting whether it has been sworn, and note applicable limitation periods (summary conviction = 12 months (<i>Criminal Code</i>, s. 786(2)); MVA = 12 months (<i>Motor Vehicle Act</i>, R.S.B.C. 1996, c. 318, s. 78); indictable = none).</p> <p>1.8 Analyze the materials collected; look for defects in the Crown's case (e.g., technical defects in the information).</p> <p>1.9 Interview the client (take your Law Society card and photo identification to gain entry to the jail):</p> <p>.1 Insist on privacy.</p> <p>.2 Confirm information:</p> <p>(a) The client's full name and aliases, address, telephone number, date of birth, occupation (confirm compliance with Law Society Rules 3-98 to 3-110 on client identification and verification, and complete the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1) checklist).</p> <p>(b) Ask the client if they are Indigenous.</p> <p>(c) Charge.</p> <p>(d) Outstanding charges in other jurisdictions.</p> <p>(e) Court appearances.</p> <p>.3 Explain the lawyer-client relationship, including:</p> <p>(a) Privilege.</p> <p>(b) Your role and duty to protect the client as far as possible from being convicted. Notwithstanding your private opinion on credibility or the merits of the defence, you may rely on any evidence of defences, including so-called technicalities, not known to be false or fraudulent. See <i>BC Code</i> rule 5.1-1, commentary [9].</p> <p>(c) How the client must decide how to plead, the mode of trial, whether to plead immediately, and whether to give evidence. The client should be made aware that admissions made by the client may impose strict limitations on the conduct of the defence by the lawyer. See <i>BC Code</i> rule 5.1-1, commentary [10].</p> <p>(d) Confirm that the client can read or write, or both.</p> <p>.4 Advise the client how your account is calculated, the method and timing of payment, and conditions under which you undertake to act as counsel.</p> <p>.5 Discuss and make notes on:</p> <p>(a) The basic facts of the alleged offence(s) (consider whether to discuss this in detail in jail). Review the Crown's case, as contained in the particulars. Ask whether the client agrees or disagrees with any statement of fact in the particulars.</p> <p>(b) Arrest, warnings, statements, inducements, threats, including:</p>					

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<p>(i) Whether the client was informed promptly of the reasons for arrest (<i>Canadian Charter of Rights and Freedoms, Schedule B to the Canada Act 1982 (UK), 1982, c. 11</i> (the “<i>Charter</i>”), s. 10(a)).</p> <p>(ii) Whether the client was informed of the right to retain and instruct counsel, given the opportunity to do so without delay, and able to contact counsel of their choice (<i>Charter</i>, s. 10(b), and <i>YCJA</i>, s. 25).</p> <p>(iii) Whether the client was searched and whether anything was seized (<i>Charter</i>, s. 8). What was the basis for the search, seizure and/or detention of things seized? Determine whether the search was by warrant. If so, was the address where the warrant was executed the same as the address on the warrant? The warrant will be filed at the court registry nearest to the location of the place that was searched. If things were seized, was s. 489.1 and 490 of the <i>Criminal Code</i> complied with?</p> <p>(iv) Whether the client was arbitrarily detained or imprisoned (<i>Charter</i>, s. 9).</p> <p>(v) Whether the client has made a statement to the police (<i>YCJA</i>, s. 146).</p> <p>(vi) Ask client the time of the arrest. See the 24-hour time limit in <i>Criminal Code</i>, s. 503(1)(a).</p> <p>(vii) Consider other defences or <i>Charter</i> arguments available.</p> <p>(c) Witnesses.</p> <p>(d) Obtain information about any relevant environmental or cultural considerations. For example, consider the client’s level of understanding and education, the amount of family or community support available, the client’s level of motivation or initiative, whether Fetal Alcohol Syndrome or Fetal Alcohol Effect has been diagnosed, the physical environment of the youth, and for a young Indigenous client, the non-custodial restorative justice alternatives that relate to Indigenous offenders.</p> <p>.6 Repeat advice regarding making statements. (See item 1.3.2.)</p> <p>.7 Obtain instructions on the client’s plea (review factors in item 4.1.12).</p> <p>.8 If client decides to plead guilty, determine whether the plea should be immediate or delayed:</p> <p>(a) If immediate, see the SENTENCING PROCEDURE (C-3) checklist; and</p> <p>(b) If delayed, seek bail and fix sentencing or trial date.</p> <p>.9 Determine custody status (outstanding warrants, escaped, serving a sentence, on bail for another offence, on parole or mandatory supervision).</p> <p>.10 Gather information for the bail hearing. (See item 1 of the JUDICIAL INTERIM RELEASE PROCEDURE (C-2) checklist.)</p> <p>.11 Discuss the process and what you will be doing. If representing an accused on a guilty plea, consider <i>BC Code</i> rules 5.1-7 and 5.1-8.</p> <p>1.10 Follow-up from initial interview:</p> <p>.1 Open the file and diarize relevant dates, including the next court appearance.</p>					

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<p>.2 Confirm your retainer. Refer to the CLIENT FILE OPENING AND CLOSING (A-2) checklist.</p> <p>.3 Gather any outstanding information (see item 1.4), such as further particulars, medical and psychiatric reports.</p> <p>.4 If there is a co-accused, contact his or her counsel. Consider the ethical issues about acting jointly for co-accused. See the joint retainer rules at <i>BC Code</i>, s. 3.4-5 and the Ethical Committee opinion about joint retainer by police officers under investigation (<i>Benchers' Bulletin</i>, Fall 2014, p.12).</p> <p>.5 If any professional responsibility issues arise, contact the <a href="#">Practice Coaches Program</a> (Canadian Bar Association, B.C. Branch), a Law Society of British Columbia practice advisor, or a Bencher.</p> <p>.6 Discuss the impact of the present charge on any outstanding or pending charges. Consider whether to have charges grouped together or to deal with them separately. Consider waiving charges from other jurisdictions.</p> <p>.7 If you have not already done so, confirm compliance with the Law Society Rules on client identification and verification (see item 1.2.1).</p>					
<p><b>2. BAIL HEARING</b></p> <p>2.1 See the JUDICIAL INTERIM RELEASE PROCEDURE (C-2) checklist.</p> <p>2.2 Note that the bail hearing takes place in remand court, or, in some jurisdictions, via video link to a court in another location. For <i>Criminal Code</i>, s. 469 offences, the bail hearing takes place in Supreme Court.</p>					
<p><b>3. INITIAL APPEARANCE, ELECTION, AND FIXING A DATE</b></p> <p>3.1 Check whether the offence is summary or indictable. If it is indictable, check whether it is within the absolute jurisdiction of a Provincial Court Judge (<i>Criminal Code</i>, s. 553) or whether it must be tried in Supreme Court (<i>Criminal Code</i>, s. 469). If the offence is hybrid, find out how the Crown intends to proceed. If the matter is to be heard in Supreme Court and the accused is eligible for a preliminary hearing, a preliminary hearing will not be held unless requested by the client or by the Crown.</p> <p>3.2 If an election is available:</p> <p>.1 Between lower and higher court, consider:</p> <p>(a) The client's viewpoint.</p> <p>(b) The availability of a preliminary hearing.</p> <p>(c) If available, the desirability of a preliminary hearing, and if a preliminary hearing is to be requested, what issues should be addressed.</p> <p>(d) Expense.</p> <p>(e) Delay.</p> <p>(f) Judges available.</p> <p>(g) Possible sentence.</p> <p>.2 Between jury and non-jury trial, consider:</p>					



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<p>(a) Whether the client is going to give evidence.                      (b) Credibility of the client and defence witnesses.                      (c) Nature of the defence (e.g., emotional or technical).                      (d) Client’s criminal record.                      (e) Type of offence charged.                      (f) Complainant (e.g., age, credibility).</p> <p>3.3 Decide how long the preliminary hearing and trial will take.</p> <p>3.4 Determine whether there are any admissions that the Crown or the client will make.</p> <p>.1 For the purposes of the preliminary hearing, if one is requested.                      .2 For the purposes of trial.</p> <p>3.5 Decide whether to agree, pursuant to <i>Criminal Code</i>, s. 536.5, to limit the scope of the preliminary hearing (if one is requested).</p> <p>3.6 Find out when the client would like the trial to take place.</p> <p>3.7 Initial appearance, election, and fix date:</p> <p>.1 If your client is eligible and you request a preliminary hearing, prepare the statement of issues and witnesses required by <i>Criminal Code</i>, s. 536.3, identifying the issues you want the evidence to cover and the witnesses you want to hear from at the preliminary hearing.                      .2 Attend court with the client, or send designated counsel to appear on your behalf.                      .3 Advise the client in advance of the correct words to say when making an election.                      .4 If a preliminary hearing is wanted, request that it be held.</p> <p>3.8 Advise the client of the date of the preliminary hearing or trial, and of the consequences of failing to appear.</p> <p>3.9 Confirm the date for preliminary hearing or trial with the client in writing.</p> <p>3.10 Diarize at least 60 days prior to the trial or preliminary hearing date to prepare or to remove yourself as counsel if you have not been properly retained or instructed.</p> <p>3.11 Prepare and deliver a notice of intention to call any expert witnesses. If calling an expert witness for trial, deliver notice to the Crown at least 30 days before trial, pursuant to <i>Criminal Code</i>, s. 657.3(3).</p>					
<p><b>4. PRELIMINARY HEARING</b></p> <p>The <i>Criminal Code</i> narrows the focus and limits the evidence that must be called on a preliminary hearing. However, if a preliminary inquiry is available, a client retains the right to request that a preliminary inquiry be held and that evidence be called on all matters that are in issue.</p> <p>4.1 Prepare for preliminary hearing:</p> <p>.1 Collect a fee for the preliminary hearing and deposit it in your trust account.</p>					

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<p>.2 If a focusing hearing is ordered pursuant to <i>Criminal Code</i>, s. 536.4(1), and prior to the preliminary hearing, prepare for and attend the hearing.</p> <p>.3 Consider whether to visit the scene of the alleged offence.</p> <p>.4 Read relevant <i>Criminal Code</i> provisions and key cases regarding the offence, the particulars, the information, etc., and consider whether:</p> <p>(a) There are any defects in the information that would justify a motion to have the information quashed.</p> <p>(b) To move for severance or joinder of counts.</p> <p>(c) Any defences or evidentiary issues are apparent from the particulars. (Note: a preliminary inquiry is not a court of competent jurisdiction for the purposes of remedies under s. 24 of the <i>Charter</i>. See <i>R. v. Hynes</i>, 2001 SCC 82; <i>R. v. Seaboyer</i>, [1991] 2 S.C.R. 577; and <i>R. v. Moore</i>, [1992] 1 S.C.R. 619.)</p> <p>.5 Obtain any documents you think would be helpful, including copies of all documents the Crown will be relying on and any other documents in Crown or police possession that they do not intend to rely on but may be relevant.</p> <p>.6 If the Crown gives notice that evidence will be tendered in written form under <i>Criminal Code</i>, s. 540(7), consider making an application pursuant to s. 540(9) that witness(es) be required to appear for cross-examination.</p> <p>.7 Interview the client regarding witnesses and further details regarding the offence.</p> <p>.8 For witnesses:</p> <p>(a) Arrange witness interviews and obtain statements. If possible, have another person conduct the interviews. Have witnesses sign notes of their statements. Determine whether the witness wishes to testify under oath or under solemn affirmation. Note <i>BC Code</i> rule 3.2-6 and commentaries [2] to [4] regarding a prohibition against inducement for withdrawal of criminal or regulatory proceedings. In particular, see commentary [4] with regard to when the complainant is unrepresented; as well, see rule 7.2-9, the general rule about with an unrepresented person.</p> <p>(b) If any witness interviewed wishes to recant evidence or statements given previously, consider whether the witness should be referred for independent legal advice on the potential consequences.</p> <p>(c) Consider whether to notify the Crown of any alibi witnesses. Where the accused fails to give notice of an alibi to the Crown in advance of trial, the trier of fact may draw an adverse inference if the late alibi notice does not allow for a meaningful investigation by the Crown and police.</p> <p>.9 Research defences and evidentiary issues, and decide whether to raise them at the preliminary hearing or wait until trial.</p> <p>.10 Review relevant provisions of the <i>Canada Evidence Act</i>, R.S.C. 1985, c. C-5.</p> <p>.11 If applying for an adjournment, ensure that proper notice of the application is given.</p>					

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<p>.12 If the client wishes to plead guilty:</p> <ul style="list-style-type: none"> <li>(a) Advise the client of the possibility of an acquittal.</li> <li>(b) Advise the client of the likely sentence range if they plead or are found guilty.</li> <li>(c) Advise the client if the offence is a designated offence that could result in a mandatory or discretionary order to provide a DNA sample to the national DNA databank.</li> <li>(d) Advise the client if the offence is a designated offence that could result in a mandatory or discretionary order prohibiting the client from possessing firearms, ammunition, and several other items listed in <i>Criminal Code</i>, ss. 109 and 110.</li> <li>(e) Advise the client if the offence is a designated offence that could result in an order to comply with provisions of the <i>Sex Offender Information Registration Act</i>, S.C. 2004, c. 10 (the “SOIRA”).</li> <li>(f) Advise the client about the applicability of a victim fine surcharge pursuant to s. 737 of the <i>Criminal Code</i>.</li> <li>(g) Ensure that the client understands and wants to enter a plea in accordance with the requirements of <i>Criminal Code</i>, s. 606(1.1) and is prepared to respond to any inquiries that the court may make under the section.</li> <li>(h) Obtain instructions that the client committed the offence and had the necessary mental element. Confirm these instructions in writing, signed by the client.</li> <li>(i) Contact the Crown to discuss reaching an agreement on plea and sentencing (recognizing that the court will not be bound by any such agreement). Consider <i>BC Code</i> rules 5.1-7 and 5.1-8.</li> <li>(j) Discuss the Crown’s position with the client: <ul style="list-style-type: none"> <li>(i) If the client wishes to plead guilty, fix a date and prepare for a sentencing hearing (see the SENTENCING PROCEDURE (C-3) checklist).</li> <li>(ii) If the client does not wish to plead guilty, proceed with preparations for a preliminary hearing.</li> </ul> </li> </ul> <p>.13 Prepare the client, discussing what will happen and what to do and say (e.g., how to make elections, <i>Criminal Code</i>, s. 536(2)-536(2.1)).</p> <p>.14 Prepare a “trial brief” for the preliminary hearing:</p> <ul style="list-style-type: none"> <li>(a) Write out the essential elements of the offence that the Crown must prove.</li> <li>(b) Prepare cross-examination, considering: <ul style="list-style-type: none"> <li>(i) Witnesses for the Crown.</li> <li>(ii) What each witness will say (i.e., prove).</li> <li>(iii) The weaknesses of each witness.</li> <li>(iv) What testimony each can give that might help the client.</li> <li>(v) How to frame questions to emphasize evidence that assists the client and minimize the impact of evidence that does not.</li> </ul> </li> </ul>					

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<p>(c) Arguments on <i>Charter</i> or evidentiary issues. Consider whether the arguments can be made at the preliminary inquiry or whether they should be made at trial. Consider what foundation must be laid for potential future <i>Charter</i> applications.</p> <p>(d) Determine from the Crown whether they will seek committal on any charges other than those on the information.</p> <p>(e) Arguments on committal.</p> <p>(f) Consider asking for a ban on publication of evidence (<i>Criminal Code</i>, s. 539), an exclusion order (<i>Criminal Code</i>, s. 486), and a complainant or witness identity ban (<i>Criminal Code</i>, ss. 486.4 and 486.5).</p> <p>4.2 Preliminary hearing:</p> <p>.1 When the case is called, introduce yourself, advise whether your client is present and you are ready to make any pre-trial arguments (e.g., defective information) or to proceed to a preliminary hearing.</p> <p>.2 If the Crown stays or withdraws the charge:</p> <p>(a) Explain this outcome to client.</p> <p>(b) Send a reporting letter and statement of account.</p> <p>(c) Close the file.</p> <p>.3 When the charge is read, the client makes an election (<i>Criminal Code</i>, s. 536(2) and (2.1)). Note that in some jurisdictions the election is made at the arraignment hearing.</p> <p>.4 When Crown witnesses testify:</p> <p>(a) Take notes.</p> <p>(b) Be alert to irrelevant, hearsay, or other objectionable evidence.</p> <p>(c) Decide whether to cross-examine.</p> <p>(d) Request a <i>voir dire</i> on any evidence (statement) that can be excluded at a preliminary hearing before the evidence (statement) is led by the Crown.</p> <p>.5 If there is a <i>voir dire</i>:</p> <p>(a) Decide whether to waive it.</p> <p>(b) Decide whether to cross-examine.</p> <p>(c) Decide whether to call evidence.</p> <p>(d) Decide whether to make submissions.</p> <p>(e) If evidence (statement) is found to be admissible, decide whether to consent to that evidence on the <i>voir dire</i> being admitted into evidence in the preliminary hearing.</p> <p>.6 Decide whether to re-elect trial by a Provincial Court judge.</p> <p>(a) Consider the requirements for re-election (see s. 561 of the <i>Criminal Code</i>).</p> <p>(b) If re-election is not permitted, proceed to item 4.2.7 in this checklist.</p> <p>(c) If re-election is permitted:</p> <p>(i) Enter a plea of not guilty.</p>					

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<p>(ii) Apply for the evidence of the preliminary hearing to be the evidence at trial.</p> <p>(iii) Consider calling defence evidence.</p> <p>(iv) Argue for acquittal.</p> <p>(d) If the judge acquits the client:</p> <p>(i) Explain the outcome to the client.</p> <p>(ii) Send a reporting letter and statement of account.</p> <p>(iii) Comply with any undertaking to return evidence to the Crown.</p> <p>(iv) Close the file.</p> <p>(e) If the judge convicts the client, see the SENTENCING PROCEDURE (C-3) checklist.</p> <p>.7 Decide whether the client should say anything when questioned by the judge (e.g., alibi defence) or whether you should advise the court instead (notify the Crown in advance).</p> <p>.8 Decide whether to make submissions on committal.</p> <p>.9 If the client is discharged:</p> <p>(a) Explain the outcome to the client.</p> <p>(b) Send a reporting letter and statement of account.</p> <p>(c) Comply with any undertaking to return evidence to the Crown.</p> <p>(d) Close the file.</p> <p>.10 If the client is committed:</p> <p>(a) Obtain the date and place of the next court appearance.</p> <p>(b) Diarize the date.</p> <p>(c) Explain the situation to the client and ensure that the client notes the date and place.</p> <p>4.3 Follow-up:</p> <p>.1 Order a transcript (obtain Legal Services Society authorization if the client is on legal aid) and diarize when you expect to receive it.</p> <p>.2 Decide whether to re-elect the mode of trial pursuant to the requirements of s. 561 of the <i>Criminal Code</i>. Note that re-election is available as of right before the 60th day following completion of the preliminary inquiry. Once 60 days have passed following the end of the preliminary inquiry, the Crown's written consent will be required for any re-election.</p> <p>.3 Trial date:</p> <p>(a) Fix the date of trial and the mandatory pre-trial conference, and diarize.</p> <p>(b) Advise the client and ensure that the client has noted the date and place.</p> <p>(c) Confirm the trial date with the client in writing.</p> <p>(d) Attend the pre-trial conference. Review the Crown Synopsis in advance. Be prepared to address the court at the pre-trial conference regarding the anticipated trial issues, including <i>Charter</i> applications, <i>voir dire</i>s, <i>Constitutional Question Act</i> notice (if required), and other</p>					

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<p>evidentiary issues. Diarize the file for some significant period of time prior to the pre-trial conference, to remove yourself from the record if you have not yet been fully instructed or retained. If you are considering withdrawing as counsel, see <i>BC Code</i>, s. 3.7, and <i>R. v. Cunningham</i>, 2010 SCC 10. See also <i>R. v. Montgomery</i>, 2013 BCSC 1007, where the court refused defence counsel leave to withdraw, due to the timing of the application and the impact that allowing withdrawal would have on the case. Note rule 3.7-9 of the <i>BC Code</i>, which requires a lawyer to promptly notify the client, other counsel, and the court or tribunal of the lawyer’s withdrawal from a file.</p> <p><b>5. PREPARATION FOR TRIAL</b></p> <p>5.1 Study the transcript, note important evidence, and ask the client to review the transcript.</p> <p>5.2 Interview the client in light of evidence obtained at the preliminary hearing.</p> <p>5.3 If the client wishes to plead guilty:</p> <ol style="list-style-type: none"> <li>.1 Advise the client of the possibility of acquittal. Review <i>BC Code</i> rule 5.1-1, commentaries [9] and [10].</li> <li>.2 Advise the client of the likely sentence range if they plead or are found guilty.</li> <li>.3 Advise the client if the offence is a designated offence that could result in a mandatory or discretionary order to provide a DNA sample for inclusion in the national DNA databank.</li> <li>.4 Advise the client if the offence is a designated offence that could result in a mandatory or discretionary order prohibiting the client from possessing firearms, ammunition, and several other items listed in <i>Criminal Code</i>, ss. 109 and 110.</li> <li>.5 Advise the client if the offence is a designated offence that could result in an order to comply with provisions of the <i>SOIRA</i>.</li> <li>.6 Advise the client about the applicability of a victim fine surcharge pursuant to s. 737 of the <i>Criminal Code</i>.</li> <li>.7 Obtain instructions that the client committed the offence and had the necessary mental element. Confirm these instructions in writing, signed by the client. Consider <i>BC Code</i> rules 5.1-7 and 5.1-8.</li> <li>.8 Contact the Crown to discuss reaching an agreement on plea and sentencing (recognizing that the court will not be bound by any such agreement).</li> <li>.9 Discuss the Crown’s position with the client.</li> <li>.10 Determine the client’s wishes:             <ol style="list-style-type: none"> <li>(a) If the client wishes to plead guilty, fix a date and prepare for a sentencing hearing (see the SENTENCING PROCEDURE (C-3) checklist). Consider calling the matter ahead for a guilty plea.</li> <li>(b) If the client does not wish to plead guilty, proceed with preparations for trial.</li> </ol> </li> </ol> <p>5.4 Obtain a copy of the indictment and examine it for defects.</p>					

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<p>5.5 Research:</p> <ul style="list-style-type: none"> <li>.1 Research issues and defences (in light of the evidence disclosed at the preliminary hearing).</li> <li>.2 Consider whether any special pleas are appropriate.</li> <li>.3 Factual investigations (e.g., visit scene, expert examination).</li> <li>.4 Consider whether to retain and consult an expert.</li> </ul> <p>5.6 Witnesses:</p> <ul style="list-style-type: none"> <li>.1 Arrange for interviews and statements (see item 4.1.8 in this checklist).</li> <li>.2 Decide whom to call, including any expert witnesses.</li> <li>.3 Prepare witnesses for trial.</li> <li>.4 Subpoenas: <ul style="list-style-type: none"> <li>(a) Prepare them, and have them signed by the justice of the peace in the appropriate court registry.</li> <li>(b) Deliver them to a sheriff for service, or arrange other service through a peace officer or authorized process server.</li> <li>(c) Obtain verification of service or an affidavit of attempted service.</li> </ul> </li> </ul> <p>5.7 Prepare a trial plan.</p> <p>5.8 Decide whether you require an adjournment; if so:</p> <ul style="list-style-type: none"> <li>.1 Discuss it with the client.</li> <li>.2 Notify the Crown and see whether they will consent.</li> <li>.3 Call the case ahead in the court clerk’s office or court registry.</li> <li>.4 Appear in court with the client, and explain the reasons for seeking an adjournment.</li> <li>.5 If an adjournment is granted: <ul style="list-style-type: none"> <li>(a) Fix a date and diarize it.</li> <li>(b) Explain to the client and ensure that the client has noted the date. Confirm the date with the client in writing.</li> <li>(c) Notify witnesses.</li> </ul> </li> </ul> <p>5.9 Prepare a trial brief, including:</p> <ul style="list-style-type: none"> <li>.1 Written summary of the essential elements of the offence that the Crown must prove.</li> <li>.2 Opinion on whether the client should testify. Consider <i>BC Code</i> rules 2.1-2(c) and 5.1-1 (including commentaries [9] and [10]).</li> <li>.3 Opening address.</li> <li>.4 Direct examination.</li> <li>.5 Cross-examination, considering: <ul style="list-style-type: none"> <li>(a) Witnesses the Crown will call.</li> <li>(b) What each witness will say (i.e., prove).</li> <li>(c) The weaknesses of each witness.</li> </ul> </li> </ul>					

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<p>(d) What testimony each can give that might assist the client.</p> <p>(e) How to frame questions to emphasize evidence that assists the client and minimize the impact of evidence that does not.</p> <p>(f) If client is charged under ss. 320.14 or 320.15 of the <i>Criminal Code</i>, see the IMPAIRED/OVER-80 TRIAL EXAMINATION OF WITNESSES (C-4) checklist.</p> <p>.6 Evidentiary arguments; arguments regarding admissibility of statements for <i>voir dire</i>s.</p> <p>.7 Obtain a copy of the report of any defence experts, or prepare a summary of the expert’s opinion, for disclosure to the Crown pursuant to <i>Criminal Code</i>, s. 657.3(3)(c). Notice of any defence expert must be given to the Crown at least 30 days before the trial starts, while the expert report or summary must be given to the Crown no later than the close of the Crown’s case.</p> <p>.8 <i>Charter</i> arguments, remedy sought, and provide appropriate notice of such applications. Note that applications for relief under s. 24(1) of the <i>Charter</i> require a minimum of 14 days’ notice to the Attorneys General of British Columbia and Canada (<i>Constitutional Question Act</i>, R.S.B.C. 1996, c. 68, s. 8), while applications for remedies under s. 24(2) of the <i>Charter</i> require “reasonable notice”, with particulars (see <i>R. v. Bhandar</i>, 2010 BCSC 1980 (Chambers)).</p> <p>.9 Closing argument.</p> <p>5.10 Prepare submissions on sentence (see the SENTENCING PROCEDURE (C-3) checklist).</p> <p>5.11 Prepare the client for trial, including: dress, manner, testifying and being cross-examined, possible sentences and client’s preference with regard to sentence.</p> <p>5.12 See <i>BC Code</i> rule 5.6-3 and commentaries [1], [2], and [3], regarding a lawyer’s duties with respect to the security of court facilities, as well as rule 3.3-3 with respect to the lawyer’s duty of confidentiality to their client.</p> <p>5.13 If any professional responsibility issues arise, contact the <a href="#">Practice Coaches Program</a> (Canadian Bar Association, B.C. Branch), a Law Society of British Columbia practice advisor, or a Benchler.</p> <p>5.14 If you are considering withdrawing as counsel, see <i>BC Code</i>, s. 3.7 and <i>R. v. Cunningham</i>, 2010 SCC 10, as well as <i>R. v. Montgomery</i>, 2013 BCSC 1007, where the court refused counsel leave to withdraw, due to the timing of the application and the impact that allowing withdrawal would have on the case.</p> <p>5.15 Consider whether notice is required under the <i>Constitutional Question Act</i>, R.S.B.C. 1996, c. 68.</p> <p>5.16 Consider whether an application for production of records is required. Any such application should be made in advance of trial, and will require notice to all third-party record-holders and persons whose privacy may be affected; see <i>Criminal Code</i>, ss. 278.1 to 278.91; <i>R. v. O’Connor</i>, 1995 CanLII 51 (SCC); <i>R. v. Mills</i>, 1999 CanLII 637 (SCC), <i>R. v. McNeil</i>, 2009 SCC 3.</p> <p>5.17 Consider whether an application is required to determine the admissibility of records pursuant to the provisions of ss. 278.92 to 278.94 of the <i>Criminal Code</i> (<i>R. v. J.J.</i>, 2022 SCC 28).</p>					



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<p><b>6. TRIAL</b></p> <p>6.1 When the case is called, introduce yourself, say that your client is present, and that you are ready to proceed.</p> <p>6.2 Consider any preliminary motions, such as:</p> <ul style="list-style-type: none"> <li>.1 A stay of proceedings based on a violation of the <i>Charter</i>, s. 11(a) or (b).</li> <li>.2 Whether to advance any <i>Charter</i> applications and seek the exclusion of evidence (e.g., challenge search warrants or detention of things seized (<i>Criminal Code</i>, s. 490) under the <i>Charter</i>, s. 24(2)) or other evidentiary challenges. Provide appropriate notice and schedule court time for such applications. See item 5.9.8 for information regarding notice requirements.</li> <li>.3 Severance.</li> </ul> <p>6.3 If the Crown seeks an adjournment:</p> <ul style="list-style-type: none"> <li>.1 Decide whether to object or consent, based on the client’s instructions.</li> <li>.2 If the adjournment is granted: <ul style="list-style-type: none"> <li>(a) Fix a date and diarize it.</li> <li>(b) Explain to the client and ensure that the client notes the new date. Confirm the date in writing.</li> </ul> </li> </ul> <p>6.4 Tell the client how to respond when the charge is read.</p> <p>6.5 If the Crown calls no evidence:</p> <ul style="list-style-type: none"> <li>.1 Apply for dismissal.</li> <li>.2 Explain the outcome to the client.</li> <li>.3 Send a reporting letter and a statement of account.</li> <li>.4 Comply with any undertaking to return evidence to the Crown.</li> <li>.5 Close the file.</li> </ul> <p>6.6 When Crown witnesses testify:</p> <ul style="list-style-type: none"> <li>.1 Take notes.</li> <li>.2 Be alert to irrelevant, hearsay, or other objectionable evidence (e.g., evidence obtained in violation of the <i>Charter</i>).</li> <li>.3 Decide whether to cross-examine.</li> </ul> <p>6.7 If there is a <i>voir dire</i> (statement):</p> <ul style="list-style-type: none"> <li>.1 Decide whether to waive it/make admissions.</li> <li>.2 Decide whether to cross-examine; confine to voluntariness and circumstances of the statement.</li> <li>.3 Decide whether to call evidence.</li> <li>.4 Decide whether to make submissions.</li> <li>.5 If the statement is found to be admissible, decide whether to consent that evidence on the <i>voir dire</i> should form part of the trial.</li> </ul>					

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<p>6.8 When the Crown concludes its case, decide whether to make a no-evidence motion; if so:</p> <ul style="list-style-type: none"> <li>.1 Make the motion.</li> <li>.2 If the client is acquitted:               <ul style="list-style-type: none"> <li>(a) Explain the outcome to the client.</li> <li>(b) Send a reporting letter and statement of account.</li> <li>(c) Comply with any undertaking to return evidence to the Crown.</li> <li>(d) Close the file.</li> </ul> </li> </ul> <p>6.9 Decide whether to call evidence:</p> <ul style="list-style-type: none"> <li>.1 If you call no evidence, argue for acquittal on the grounds of insufficient evidence.</li> <li>.2 If you call evidence:               <ul style="list-style-type: none"> <li>(a) Decide whether to make an opening statement.</li> <li>(b) Call witnesses.</li> <li>(c) Consider getting written instructions that the client does or does not wish to testify.</li> <li>(d) Consider whether to re-examine on new matters raised in cross-examination after the Crown has cross-examined.</li> </ul> </li> </ul> <p>6.10 If the Crown calls rebuttal evidence:</p> <ul style="list-style-type: none"> <li>.1 Decide whether to object.</li> <li>.2 If rebuttal is allowed, decide whether to cross-examine.</li> </ul> <p>6.11 Make final argument.</p> <p>6.12 If the client is acquitted:</p> <ul style="list-style-type: none"> <li>.1 Explain the outcome to the client.</li> <li>.2 Send a reporting letter and statement of account.</li> <li>.3 Comply with any undertaking to return evidence to the Crown.</li> <li>.4 Close the file.</li> </ul> <p>6.13 If the client is convicted, see the SENTENCING PROCEDURE (C-3) checklist.</p> <p><b>7. SENTENCING</b> (See the SENTENCING PROCEDURE (C-3) checklist.)</p> <p><b>8. FOLLOW-UP</b></p> <ul style="list-style-type: none"> <li>8.1 Discuss with the client the advisability of an appeal.</li> <li>8.2 Notify the client of limitation periods for appeal; diarize.</li> <li>8.3 Send a reporting letter and statement of account.</li> <li>8.4 Comply with any undertaking to return evidence to the Crown.</li> <li>8.5 Close the file. See the CLIENT FILE OPENING AND CLOSING (A-2) checklist.</li> </ul>					