

**Practice Resource**

# **Solicitors' Liens and Charging Orders – Your Fees and Your Clients**

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# Solicitors' Liens and Charging Orders – Your Fees and Your Clients

When your retainer comes to an end, you may encounter challenges in obtaining payment from your clients for your outstanding bills. One method of trying to secure payment of these bills is to claim a solicitor's lien. For centuries, the courts have recognized that the doctrine of the lien benefits clients as well as lawyers. This is because legal work is often done for needy clients merely on the prospect of being paid.<sup>1</sup>

There are two types of solicitors' liens that may be available to you. The first is a possessory or **retaining lien**, which allows you to retain your client's property, with a few exceptions, until you have been paid. The second is a common law or **charging lien**, which entitles you to a charge against property that has been recovered or preserved for your client through a litigation proceeding.<sup>2</sup>

This resource will outline when these types of solicitors' liens may be available, indicate what costs may be recovered, and provide an overview of the types of property which may be subject to a lien. In addition, there is a checklist at the end of this resource to assist you in obtaining payment of your bills through the use of a solicitor's lien.

## Retaining Liens (or Possessory Liens)

### When might you claim a retaining lien?

Under the common law, a retaining lien allows you to keep, as security for payment of your bill, a client's files, documents, funds, and property that have come into your possession. The right to retain your client's documents is available from the moment your client or former client resists payment until your bill has been paid.<sup>3</sup>

As a possessory lien, a retaining lien does not allow you to take any action against the property and is strictly the right to hold on to the property until your bill has been paid.<sup>4</sup> Once the fee dispute has been resolved, you must return the files or other property to your client or you may be guilty of professional misconduct.<sup>5</sup>

#### 1. What costs are recoverable?

Retaining liens are classified as "general liens" because the lien secures payment for all outstanding fees owed by the client for any matter on which you are retained, including the costs that you incur in recovering payment of these fees.<sup>6</sup> Recoverable amounts include fees, charges

and disbursements, but do not include loans you may have made to the client in a personal capacity.<sup>7</sup>

## 2. What type of property can be retained?

Typically, a retaining lien extends to all of the client's property that has lawfully come into your possession in your professional capacity as a lawyer and is not limited to the property to which the outstanding bill relates.<sup>8</sup>

The value of the property that is being retained may exceed the amount of the outstanding bill, except for funds held under a retaining lien which must not exceed the amount of the bill owed.<sup>9</sup>

Some types of property cannot be retained under a lien:

- **Corporate records.** If your firm is no longer the official records office of a company, then you must deliver all corporate records and minute books to the new records office as required under the applicable legislation.<sup>10</sup>
- **Mortgage documents.** If you were acting for both the lender and the borrower in a mortgage agreement, you cannot enforce a lien against the mortgagee for a bill owed by the mortgagor.<sup>11</sup>
- **Original court records.**<sup>12</sup>
- **Documents delivered to you without authorization.** A lien cannot be enforced against property that came into your possession if you did not have authorization from the client to accept that property.<sup>13</sup>
- **Property held for a specific purpose.** A lien does not apply to property held for a specific purpose, such as property held 'in trust' for a third party, but it does apply to other funds held in your trust account such as a retainer which the client demands be returned without payment of the account.<sup>14</sup>
- **Original wills.** In England, it has long been held that a solicitor's lien does not apply to a client's will.<sup>15</sup> However, the Ontario Superior Court of Justice has determined that a solicitor's retaining lien can apply to an original will and has held that a will is comparable to any other type of document that may be retained by a lawyer.<sup>16</sup> At the time of writing, no British Columbia decisions have been discovered that address this issue.

The obligation to deliver papers and property to a client is subject to a lawyer's right of lien under commentary [3] of rule 3.7-9 of the *Code of Professional Conduct for British Columbia* ("BC Code").<sup>17</sup> More information on what is considered client property is

available in the article "Ownership of Documents in a Client's File" on the Law Society website under "Client Files" portion of the Practice Support and Resources page.<sup>18</sup>

### 3. Exceptions to retaining liens

There are also certain circumstances under which a court may choose not to recognise a retaining lien:

- **Where there is lawful demand by a third party.** While imposing a possessory lien over a client's property, a lawyer has no greater right to retain the property than the client would have if it were in the client's possession. Therefore, in circumstances where your client would be obligated to produce the documents to a third party, such as to a court appointed receiver or a trustee in bankruptcy, you must also comply.<sup>19</sup> A lawyer also is not able to assert a lien on property that the client did not have a lawful right to possess.<sup>20</sup> In the event of conflicting claims to property, a lawyer should make every effort to have the claimants settle the dispute as stipulated under commentary [3] of rule 3.7-9 of the *BC Code*.
- **Where the court orders delivery of the documents.** Under sections 77 and 78 of the *Legal Profession Act* ("Act"),<sup>21</sup> the courts have a discretionary power to order the return of property to your client or to your client's subsequent lawyer. The court might order you to provide the property to the client if maintaining the retaining lien will materially prejudice your client's position in a matter or proceeding.
- **Where the lien may prejudice or delay proceedings involving third parties.** For example, the court in *Re Gladstone* ordered the delivery of documents held under a retaining lien in order to prevent prejudice to the children affected by a divorce proceeding.<sup>22</sup>

### 4. Losing a retaining lien

Your right to a retaining lien may be waived or deemed waived in certain situations. Firstly, a lien will be lost if you voluntarily part with retained documents without reserving your lien.<sup>23</sup> Secondly, a lien may be waived if you take security that is inconsistent with the lien, including accepting an undertaking.<sup>24</sup> Ensure the wording of an undertaking that secures payment of your fees in return for the transfer of documents protects your interests, despite loss of the retaining lien. Appendix A includes some sample language to consider for an undertaking. Lastly, your entitlement to a lien may also be lost if your client has begun an action and can prove a *prima facie* case of negligence against you.<sup>25</sup>

In order to further secure payment of your fees, you should consider whether to pursue a review of your bill (formerly known as “taxation”) by the registrar under section 70 of the *Act* in conjunction with a retaining lien.

## Charging Liens (or Liens at Common Law)

### 1. When does a charging lien apply?

A charging lien may be used to secure your fees and disbursements where property has been recovered or preserved as a result of a litigation proceeding in which you have been involved as solicitor or counsel. As observed in *Wilson King & Co v. Lyall (Trustees of)*, the purpose of a charging lien is to protect a lawyer from the unjust result of recovering or protecting property and not receiving full payment for services rendered.<sup>26</sup>

A charging lien does not fall under the traditional definition of a “lien” as it does not apply to property in your possession. Rather, it is your right to request the equitable interference of the court and claim a charge against the property that has been recovered or preserved through your efforts.<sup>27</sup> In British Columbia, this right at common law has been recognized in section 79 of the *Act*, allowing the court to pronounce a charging order in respect of recovered or preserved property, in order to secure payment of your bill. The language of section 79 of the *Act* is not to be construed narrowly.<sup>28</sup>

A lien does not cease in the event of your death; rather, the claim will pass to your personal representative.<sup>29</sup>

### 2. Statutory charging order

By the terms of section 79(1) of the *Act*, the lawyer who is retained to prosecute or defend a proceeding in a court “has a charge against any property that is recovered.” The nature of the charge arising has been described as an “inchoate right” by the British Columbia Court of Appeal<sup>30</sup>: it exists from the moment that the lawyer has done some work on behalf of a client in pursuit of a claim that has resulted in some recovery or preservation of property. While the charge exists upon the recovery or preservation of the property, “the charge only becomes enforceable upon the declaration of the Court under section 79(3)” of the *Act*.<sup>31</sup>

The court has discretion to grant or not to grant a charging order for enforcement of a charging lien. To obtain this court order, the lawyer will generally have to make at least a *prima facie* case of the following elements:

- **A lawyer retained to prosecute or defend**

As outlined by the British Columbia Court of Appeal in *Hosseini v. Oreck Chernoff*, if you are prosecuting a claim, you are seeking to recover property, whereas if you are defending a claim, you are attempting to preserve the property for your client.<sup>32</sup> The lawyer seeking the order must have been retained in one of either capacity.

- **Prosecute or defend in a proceeding**

A charging order may only be pronounced in respect of property recovered or preserved in a proceeding before a court or a tribunal. Thus, property recovered or preserved through mediation or a settlement negotiation that is not held in conjunction with a proceeding would not be subject to a charging lien. However, a charging lien can apply to property recovered through a settlement agreement reached once a proceeding has commenced, as well as to funds obtained through arbitration as part of a proceeding.<sup>33</sup>

- **Property recovered or preserved**

You may only obtain a charging order against property that has been recovered or preserved for your client.<sup>34</sup> Previously, there was some uncertainty as to whose property the order could charge. In *Amirkia v. Fiddes*, the court interpreted the former version of section 79 of the *Act* to allow a lawyer to obtain an order charging property involved in the proceeding, regardless of whether it had been successfully recovered or preserved for the lawyer's particular client.<sup>35</sup> This interpretation was arguably overruled by the British Columbia Court of Appeal in *Hosseini v. Oreck Chernoff*, although it may have been *obiter dictum* when the court said that a statutory charging order only applies to property recovered or preserved by a lawyer for the client and not to property recovered or preserved for other people.<sup>36</sup> However, this reasoning appears to have been carried over to apply similarly to orders under the current *Act*, with the result that "any solicitors' liens that the claimant's solicitor may have is only against the net property of her client. It has no application to the fruits of the judgment received by the respondent, including entitlement to costs."<sup>37</sup>

"Property" has been liberally interpreted to include any property recovered or preserved through the lawyer's litigation efforts.<sup>38</sup> This definition includes personal property as well as real property; common law charging liens do not apply to real property.<sup>39</sup> Furthermore, property may include a chose in action and any identifiable property that may become available to the client as a result of the future judgment.<sup>40</sup>

A charging order may be valid even if the property that it applies to has not been specifically identified at the time of the order. The court in *Doyle v. Keats*,<sup>41</sup> cited with approval in *FitzGibbon v. Pifers*,<sup>42</sup> held that a charging order attaches to the client's interest in the property and the exact extent of the interest may be determined at a time subsequent to the making of the lien claim.

- **Prima facie case that the lawyer will not be paid**

Although not expressly outlined in the statutory provision, there is a longstanding common law requirement for you to prove to the court that you will not be paid unless the statutory charging order is granted.<sup>43</sup>

- **Discretion of the court**

Once the above listed criteria have been met, the court has further discretion to determine whether the statutory charging order should be granted under the particular circumstances of the case.<sup>44</sup> Primarily, the court will determine whether it would be “just and proper” to grant the order against the property recovered or preserved. Factors considered by the court may include a review of the reasons for withdrawal from the retainer agreement, the likelihood that the lawyer will be paid, and the significance of the lawyer’s work in recovering or preserving the property at issue.<sup>45</sup> The court may also consider whether the lien is unreasonable, unnecessary, scandalous, frivolous, vexatious, or otherwise an abuse of process.<sup>46</sup>

In cases where the recovery or preservation is merely technical, it is unlikely that the court will pronounce a charging order on the basis that it would not be just and proper to do so. For instance, in *Wilson King & Co v. Lyall (Trustees of)*,<sup>47</sup> the court did not charge property preserved for a client in a matrimonial property dispute in which the overall result of the proceeding had not gone in favour of the lawyer’s client. The court held that the insignificant preservation of assets for the client did not justify granting the extraordinary privilege of a charging order.<sup>48</sup> Further, since the “starting point” in family cases is that each spouse is entitled to 50% of the family assets, property is neither recovered nor preserved where it is determined that the lawyer’s client should have less than 50%.<sup>49</sup>

### **3. What costs are recoverable? When recoverable if on contingency?**

Charging liens may be used to recover all fees, charges and disbursements for services related to the recovery or preservation of the property for which your bills remain unpaid as well as any costs associated with obtaining the charging order.<sup>50</sup> The word “charges” in s. 79 of the *Act* can be properly interpreted to include the costs of the lawyer awarded to him or her in respect of the collection of the lawyer’s unpaid bill.<sup>51</sup>

If you have entered into a contingency agreement with a client, you may still obtain a charging order against property recovered or preserved.<sup>52</sup> However, the amount and recovery of the funds needed to cover your bill will depend on the outcome of the judgment.<sup>53</sup> Therefore, if you are dismissed from a contingency fee agreement before the end of the proceeding, you must await



judgment before collecting your fees, subject to a possible argument that you are entitled to payment sooner if the terms of your retainer agreement so stipulate.

#### **4. Scope of Charge**

A charging order is “specific”. It only applies to secure the payment of money owed for the work the lawyer has done concerning the property sought to be attached.<sup>54</sup>

#### **5. Losing a charging lien**

A charging order may be granted by the court to protect you from an attempt by your client to avoid paying you by the devices of collusion or conspiracy. If you suspect collusion, you must prove to the court that the client and the other party conspired to deprive you of your fees.<sup>55</sup> Negligence on the part of the opposing party may also be sufficient proof to allow for the enforcement of the lien. For instance, if a defendant negligently pays settlement costs to your client without ensuring that you have been paid, the defendant may be jointly liable for payment of your outstanding bill.<sup>56</sup>

Additionally, a charging order may also have a retrospective effect. In *FitzGibbon v. Pifers*, the court charged settlement proceeds notwithstanding that the funds had already been paid out to the client. Therefore, if a subsequent lawyer were to pay settlement funds to a client without verifying that the previous lawyer has been paid, the new lawyer may be jointly and severally liable to pay the former lawyer's fees.<sup>57</sup>

#### **6. Priority of a charging order**

Generally, subject to specific legislation otherwise, as long as the charged property is in the hands of a person over whom the courts have jurisdiction, a charge will be effective against everyone except for a *bona fide* purchaser for value without notice.<sup>58</sup> A statutory charging order obtained against real property may be registered with the Land Title Office if so authorized by a court order.<sup>59</sup>

A charging order granted under section 79 of the *Act* will generally take priority over all other creditors.<sup>60</sup> This may include priority over:

- Trustees of estates in bankruptcy<sup>61</sup>
- Unsecured creditors in bankruptcy<sup>62</sup>
- Garnishing orders by judgment creditors<sup>63</sup>

- Writs of seizure and sale by judgment creditors<sup>64</sup>
- Creditors with unregistered personal property security agreements<sup>65</sup>
- Secured creditors under the *Companies' Creditors Arrangement Act*<sup>66</sup>
- Insurance benefits claimed by your client's mortgagees<sup>67</sup>
- Beneficiaries of the property, if held in trust<sup>68</sup>
- Perfected and unperfected security interests under the *Personal Property Security Act*<sup>69</sup>

There are exceptions to the general rule regarding priority. A charging order does not have priority over:

- **Registered charges with the Land Title Office.** Since a lien holder can have no greater interest in the property than the client, any previous encumbrances take priority over the charging lien. Nonetheless, you are entitled to register a charging order granted under section 79 of the *Act* against the property.<sup>70</sup>
- **Current arrears of child support and spousal maintenance.** A charging order against property that was recovered or preserved in a family law proceeding does not take priority over payments for child or spousal support.<sup>71</sup>
- **A lien of the director of employment standards under the *Employment Standards Act*,**<sup>72</sup> section 87(3)
- **CPP benefits,** pursuant to section 65(1) of the *Canada Pension Plan*.<sup>73</sup>

If you and another lawyer were employed in succession in a proceeding and you are both claiming liens or both have charging orders over the property, the lawyer who was acting at the time that the judgment was rendered or settlement was made will have first priority for the recovery of his or her unpaid bills. The former lawyer will then be able to assert a claim on the remaining funds.<sup>74</sup>

## The Effect of Withdrawal or Discharge on Liens and Charging Orders

### 1. When a lawyer is discharged by the client or withdraws with good cause

The reason for your withdrawal from a retainer agreement will also affect your entitlement to a solicitor's lien. If you are discharged by your client without cause, if you withdraw because of a

serious loss of confidence under rule 3.7-2 of the *BC Code*, if you are obliged to withdraw under rule 3.7-7 of the *BC Code*, or if you withdraw with good cause and on reasonable notice, you may claim a retaining lien.<sup>75</sup> Information on what constitutes good cause and reasonable notice may be found in the commentary under rules 3.7-1 of the *BC Code*.

Rule 3.7-3 of the *BC Code* and commentary specifies that withdrawal for non-payment of fees is permitted “if, after reasonable notice, the client fails to provide a retainer or funds” and so long as “there is sufficient time for the client to obtain the services of another lawyer”. However, if the fee arrangement is by contingency agreement, you have impliedly undertaken the risk of not being paid if the outcome of the proceeding is unsuccessful. Accordingly as the commentary to rule 3.6-2 indicates, unless your contingency fee agreement says otherwise, you may only withdraw from a contingency fee agreement for the reasons as set out in the obligatory withdrawal rule 3.7-7 of the *BC Code*. See also the commentary in 2. below.

Generally the manner of withdrawal is set out in rules 3.7-8 and 3.7-9 of the *BC Code*. If you plan to withdraw from a civil litigation proceeding, unless you are obliged to withdraw or there is a serious loss of confidence, you must provide your client with sufficient time to retain replacement counsel and allow that lawyer to adequately prepare for trial; advice on what is sufficient time in a particular proceeding can be sought from a Practice Advisor at the Law Society. You must also comply with the applicable court rules when withdrawing as counsel in a civil matter. Rules 3.7-4 to 3.7-6 of the *BC Code* relate to withdrawal in a criminal proceeding. It should be noted that a court has the discretion to refuse counsel’s withdrawal for non-payment of fees from a criminal matter if the withdrawal would cause serious harm to the administration of justice.<sup>76</sup> And in any circumstance the court has discretion to impose terms on withdrawal if an issue is raised relating to it.

## **2. When a lawyer withdraws without good cause**

Courts have generally held that a solicitor’s lien will not apply if a lawyer withdraws from an employment relationship with a client without good cause.

In addition to losing the right to a lien, if you withdraw from the relationship without cause, you may in some instances also lose any right you had to claim payment for any of the outstanding fees.<sup>77</sup> For example, an entire contract will generally exist when you agree to represent a client in a proceeding through to its conclusion.<sup>78</sup> Unless otherwise outlined in a retainer agreement, an entire contract does not permit a lawyer to demand payment for services rendered until all services contracted for are complete. Therefore, if you withdraw without cause before you have completed the contracted services, you are not entitled to recover payment of your outstanding fees,<sup>79</sup> regardless of whether the client has obtained some benefit from the work previously completed on the file.<sup>80</sup> Further, a lawyer who has agreed to act for a contingent fee, and who withdraws without cause before completing the work called for by the retainer, cannot deliver a bill on a *quantum meruit* basis for the services performed before withdrawal.<sup>81</sup>

The entire contract doctrine applies to both fee-for-service retainer agreements and contingency fee agreements.<sup>82</sup> The courts have allowed compensation for disbursements,<sup>83</sup> and have upheld previous accounts paid on an interim billing schedule in cases of unjustified withdrawal.<sup>84</sup>

### **3. When a lawyer departs from a law firm**

When you do work at a firm, normally the contract for legal services exists between the client and the firm, not between yourself and the client. As a result, if you leave the firm and continue to work on your client's file, the firm may assert a lien on the documents if the client's bill with the firm remains unpaid. If the firm has claimed a lien on the file, you may not interfere with the lien and you cannot remove the documents from the firm,<sup>85</sup> subject to the '*Exceptions to retaining liens*' noted above. Additionally, both you and the firm must comply with the procedures for notifying your client about your departure, as outlined in the commentary [4] to [10] under rule 3.7-1 of the *BC Code*.

If a firm is purchased by another firm, the original firm's lien will be lost. The purchaser cannot claim a lien on the files since the purchaser was never retained by the client to work on the file. Conversely, you cannot continue to assert the lien after your firm has been bought as the outstanding bill would have indirectly been paid through the purchase agreement.<sup>86</sup>

### **4. Transferring documents to another lawyer**

When your client changes lawyers before the completion of the file, the subsequent lawyer may pay your disbursements upon billing and provide an undertaking for payment of your fees upon resolution of the proceeding. Often, an undertaking between you and the subsequent lawyer will be sufficient to secure payment of your bill; however, you are not obligated to accept such an undertaking or rely on it as the sole means of securing payment.<sup>87</sup> Even where a successor lawyer will not agree to give an undertaking to protect your charges, you are entitled to some details of the resolution of the claim and the terms of your client's retainer with the successor.<sup>88</sup> In addition, you cannot enforce an undertaking given by a self-represented client unless by chance you are successful on a breach of contract action. In situations where an undertaking is not given or no other security is in place, you may wish to hold onto the files until an order for the transfer of the documents is rendered under the *Act*, or you have had your bill reviewed, obtained a certificate, and been paid or otherwise obtained security.<sup>89</sup>

Your client or your client's subsequent lawyer may apply to the court for the return of property or transfer of the documents pursuant to sections 77 and 78 of the *Act*. Under these provisions, the court has the discretion to order that you return the documents that are being withheld. In doing so, the court may also order the complete payment of your bill or payment of security for those fees and a review of your final bill by the registrar.<sup>90</sup>

If the matter involves a proceeding and no undertaking is put in place, and no application under sections 77 or 78 of the *Act* is anticipated, then you should give notice to the successor firm and to your former client through the successor firm, or directly if the client is self-represented, that you are maintaining a lien, and you may apply for a charging order under section 79 of the *Act* if property has been preserved or recovered. See Appendix B for some sample language for such a notice. You will need to follow up from time to time to track the progress of the proceeding. Conversely, if you are the subsequent lawyer and you are given such notice, be careful not to pay out judgment or settlement proceeds without first addressing the issue of the former lawyer's lien. In *FitzGibbon v. Pifers*, the court held that the subsequent lawyer and the client both having notice that the former lawyer was maintaining a lien were jointly and severally liable to that lawyer for an amount to be assessed by the registrar.<sup>91</sup>

## **Asserting a retaining lien and a charging lien – A checklist<sup>92</sup>**

This checklist provides some suggested steps to help you assert a lien as security for payment of your outstanding bill:

1. Send your client a final bill that outlines your fees, charges and disbursements, and details regarding the work completed.<sup>93</sup>
2. You may then assert a retaining lien by withholding delivery of the client's property, including files, unless the client or the subsequent lawyer agrees to pay or secure payment of your bill. At this point, you may also request that your client or your client's subsequent lawyer pay your disbursements immediately.

Your client's new lawyer may request the transfer of the retained property or documents on (i.) terms to be agreed, or (ii.) may apply for a document production order:

- i. An agreement might include one or more of the following terms:
  - Immediate payment of your disbursements;
  - Immediate payment of your fees, or payment of a certain percentage of the final settlement amount pending resolution or judgment;
  - An agreement that, upon resolution of the proceeding, you will both submit bills to the registrar for review, with the new lawyer holding the funds in trust until the review is settled;
  - Other security for the payment of your bill; or

- An undertaking by your successor not to disburse settlement or judgment funds until your entitlement has been determined.

In deciding whether to accept an undertaking, you should consider what might happen if your former client discharges your successor. Sample wording for a basic undertaking is found at Appendix A. You may wish to add other aspects to the undertaking such as immediate payment of disbursements.

Keep in mind that you are under no obligation to accept an undertaking or security in exchange for the property and files.

- ii. Your client or your client's subsequent lawyer may apply to court for a document production order under section 78 of the *Act*. This order may be obtained by way of notice of application within a pending proceeding or by way of petition.<sup>94</sup> Note, in Part 8 of the *Act*, 'court' is defined to mean the Supreme Court. In exchange for the transfer of files, a court may order a review of your final bill by the registrar and require the client to:
  - Pay your disbursements immediately;
  - Make complete payment of your outstanding bill; or
  - Provide security for the payment of an amount designated by the court.
3. If the matter involves a litigation proceeding, you may apply for a charging order under section 79(3) of the *Act* by petition, or by filing a notice of application to the court that heard the proceeding in which property was recovered or preserved or in which the proceeding is pending; the second method may save costs.<sup>95</sup> In the case of real property, identify in the order that this parcel of land (use the proper legal description) was recovered or preserved as a result of a proceeding as set out in section 79 of the *Act*. Note, in Part 8 of the *Act*, 'court' is defined to mean the Supreme Court. You should give your former client written notice of your intention to enforce your charging lien. If your former client is represented by a subsequent firm, notice to the client should be through that subsequent firm.<sup>96</sup> Sample wording for a notice is found at Appendix B.

While awaiting a charging order in relation to real property, you may:

- Apply to register a certificate of pending litigation against your client's property; or
- Seek the approval of the registrar to lodge a caveat.<sup>97</sup>

4. Once a statutory charging order is granted by the court, you can apply for a payment order under section 79(3) of the *Act*.<sup>98</sup>

If you wish to charge real property, you should do so in the Land Title Office by submitting electronic Form 17, along with a copy of the judicial order granting the charging order.<sup>99</sup>

5. Since you cannot transfer fees from your trust account to your general account if you know your client disputes your right to receive payment,<sup>100</sup> you may want to apply for a review of your bill by the registrar in accordance with section 70 of the *Act*. The registrar will review your bill in order to determine whether your fees are reasonable and order a certificate for payment of fees, charges, disbursements and costs as determined to be appropriate.

The court may also order a review of the bills by the registrar as a result of an application under sections 77, 78 or 79 of the *Act*.

**ENDNOTES**

- <sup>1</sup> *Bryant, Ex parte*, (1815) 1 Madd. 49; 56 E.R. 609.
- <sup>2</sup> *Hama v Werbes*, 2004 BCSC 463, [2004] BCJ No 657.
- <sup>3</sup> *Barratt v Gough-Thomas*, [1951] Ch 242, [1950] 2 All ER 1048 referred to in *National Hav-Info Communications Inc v Poznanski*, [1995] BCJ No 1174, 6 BCLR (3d) 46 (BCSC) and *DeCottis v Owen Bird*, [1998] BCJ No 274, 51 BCLR (3d) 272 (BCSC).
- <sup>4</sup> *Re Alberta Western Wholesale Lumber Ltd*, [1961] BCJ No 115, 27 DLR (2d) 598 (BCSC).
- <sup>5</sup> Law Society of British Columbia, Discipline Case Digest – 1992: No 5 May (Pierce).
- <sup>6</sup> *Lambert v Buckmaster* (1824), 2 B&C 616, 107 ER 513.
- <sup>7</sup> *In re Taylor, Stileman & Underwood*, [1891] 1 Ch 590 (CA) referred to in *Paulson et al v Murray*, [1922] MJ No 33, 68 DLR 643 (MBQB) and Gordon Turriff Q.C., *Annotated Legal Profession Act*, loose-leaf (consulted on May 15, 2012), (Toronto, ON: Thomson Reuters, 2012) at 8-83. Note: the *Annotated Legal Profession Act* is updated twice annually and is a good source for finding current law.
- <sup>8</sup> *Cochrane v Phillips*, [1924] BCJ No 71, [1924] 3 DLR 996 (BCCoCt).
- <sup>9</sup> Judith Ayling et al, eds, *Cordery on Legal Services*, loose-leaf (consulted on 14 May 2012), (London, UK: LexisNexis, April 2012), Volume 1, Division F at 1515.
- <sup>10</sup> *Kingswood Explorations 1985 v Elkind*, [1988] OJ No 955 (Ont HCJ). *Business Corporations Act*, SBC 2002, c. 57, s. 42; *Canada Business Corporations Act*, RSC 1985, c. C-44, s. 20.
- <sup>11</sup> *Wakefield v Newbon* (1844), 6 QB 276 referred to in *Knutson v The Bourkes Syndicate*, [1941] SCR 419.
- <sup>12</sup> *Bird v Heath* (1848), 6 Hare 236.
- <sup>13</sup> *Gibson v May* (1853), 4 De GM & G 512 referred to in *Taylor v Ginter* (1979), 108 DLR (3d) 223, 19 BCLR 15.
- <sup>14</sup> *Canadian Commercial Bank v Parlee McLaws*, 95 AR 321, [1989] AJ No 59 (Alta QB) and *Nesmont Precious Metals Corp. (Re)*, 2001 BCSC 1240, [2001] BCJ No 1768; *MacDonald v. Arenson*, [1981] 1 W.W.R. 573 (Man. C.A.), 37 C.B.R. (NS) 30. Consider also Law Society Rules, Rule 3-65(5): “A lawyer must not take fees from trust funds when the lawyer knows that the client disputes the right of the lawyer to receive payment from trust funds, unless ...”. Seemingly a lien may prevail over the funds but they cannot be “taken”.
- <sup>15</sup> *Balch v Symes*, (1823) Turn & R 87, 37 ER 1028.
- <sup>16</sup> *Szabo Estate v Adelson* (2007), OJ No 636, 39 CPC 6th 147 (ONSC).
- <sup>17</sup> *Code of Professional Conduct for British Columbia (“BC Code”)*, Vancouver: Law Society of British Columbia, 2013.
- <sup>18</sup> This article was authored in June 2015 by Barbara Buchanan, Practice Advisor, and Chris Canning, Summer Law Student, relying in part on Jacqueline Morris, Felicia Folk, and John Vamplew’s article “Whose File is it Anyway?,” published in *The Advocate* 87 (Vol 52 Part I January 1994)
- <sup>19</sup> *Re Alberta Western Wholesale Lumber Ltd*, *supra* note 3; *Re Moriseau*, [1982] BCJ No 1777, 6 WWR 523 (BCSC); *Northland Bank v LG Lands Ltd*, [1983] 4 WWR 86, 44 BCLR 237 (SC); and *Imperial Developments (Can) Ltd (Receiver of) v Field & Field*, [1988] AJ No 429, 59 Alta LR (2d) 193 (CA).
- <sup>20</sup> *Young Estate (Re)*, 2013 ABQB 171, [2013] AJ No 295.
- <sup>21</sup> *Legal Profession Act*, SBC 1998, c 9.
- <sup>22</sup> *Re Gladstone*, [1972] 2 OR 127, 25 DLR (3d) 43 (CA) and “Whose File Is It Anyway?” *supra* note 18.
- <sup>23</sup> *Dicas v Stockley* (1836), 7 Car & P 587, 173 ER 258 and “Whose File Is It Anyway?” *supra* note 18.
- <sup>24</sup> *Re Alberta Western Wholesale Lumber Ltd*, *supra* note 4; *Waters (Guardian ad litem of) v Baird*, [1999] BCJ No 1231, 69 BCLR (3d) 365 (BCSC); and “Whose File Is It Anyway?” *supra* note 18.
- <sup>25</sup> *National Hav-Info Communications Inc v Poznanski*, *supra* note 3.
- <sup>26</sup> *Wilson King & Co v Lyall (Trustees of)*, [1987] BCJ No 709, 12 BCLR (2d) 353 (BCCA) and Adam M Dodek & Jeffrey G Hoskins, *Canadian Legal Practice: A Guide for the 21<sup>st</sup> Century*, loose-leaf (consulted on May 14, 2012), (Markham, ON: LexisNexis Canada, April 2012), section 10.41.
- <sup>27</sup> *Cliffs Over Maple Bay Investments Ltd. (Re)*, 2011 BCCA 346, [2011] BCJ No 1150; *Hama v Werbes*, *supra* note 2; and *Re Tots and Teens Sault Ste Marie Ltd*, [1975] OJ No 2549, 65 DLR (3d) 53 (Ont HCJ).
- <sup>28</sup> *Gundersen v Volrich* 1986 BCJ No 1390.
- <sup>29</sup> *Kellett v Kelly* (1842), 5 Ir Eq R 34, cited in *Clark v Eccles*, [1871] OJ No 316; see also “Whose File Is It Anyway?” *supra* note 18.
- <sup>30</sup> *FitzGibbon v Piters*, 2012 BCCA 269, [2013] BCJ No 1237.
- <sup>31</sup> *Ibid.*
- <sup>32</sup> *Hosseini v Oreck Chernoff*, 1999 BCCA 386, 174 DLR (4th) 685.
- <sup>33</sup> *Chouinard v ICBC et al*, 2002 BCSC 655, [2002] BCJ No 926 and *Hubbard v Everyman’s Saving and Mortgage Ltd*, 59 CBR (NS) 251, 1985 CanLII 1317 (Alta QB). 16



- <sup>34</sup> *Walker v Saunders, Mortimer, Vance and Howell*, 58 BCLR 387, [1985] 1 WWR 743 (BCCA); *Wilson King & Co v Lyall (Trustees of)*, *supra* note 26; *Hosseini v Oreck Chernoff*, *supra* note 32; and *Chouinard v ICBC et al*, *supra* note 33.
- <sup>35</sup> *Amirkia v Fiddes*, [1998] BCJ No 1802, 56 BCLR (3d) 193 (BCSC).
- <sup>36</sup> *Hosseini v Oreck Chernoff*, *supra* note 32. For a contrasting view which is difficult to reconcile with *Hosseini* especially since it is a later Court of Appeal decision, see *Cliffs Over Maple Bay Investments Ltd. (Re)*, note 27 at para 26 “the lien is generally said to attach to the preserved or recovered property itself and not only the client’s interest therein”.
- <sup>37</sup> *Salminen v Garvie*, 2012 BCSC 1777, [2012] BCJ No 553.
- <sup>38</sup> *Canadian Legal Practice*, *supra* note 26 at section 10.42.
- <sup>39</sup> *Albion Securities v Nathanson, Schachter & Thompson, a Law Partnership*, 2003 BCSC 232, [2003] BCJ No 352. and *Cliffs Over Maple Bay Investments Ltd. (Re)*, *supra* note 27.
- <sup>40</sup> *Birchall v Pugin* (1875), LR 10 CP 397 and *Doyle v Keats*, 46 BCLR (2d) 54, [1990] BCJ No 1191. *supra* note 37.
- <sup>41</sup> *Doyle v Keats*, *ibid*.
- <sup>42</sup> *FitzGibbon v Piters*, *supra* note 30.
- <sup>43</sup> *Chouinard v ICBC et al*, *supra* note 33; *Nor-Lite Sea Farms Ltd v Ellingsen*, [1991] BCJ No 259, 1991 CanLII 1975 (BCSC); Stephen Antle, “Solicitors’ Charging Liens” (1990) 48:5 *The Advocate* 673.
- <sup>44</sup> *Henry v Columbia Securities*, 58 BCR 193, [1942] 4 DLR (CA); *Wilson King & Co v Lyall (Trustees of)*, *supra* note 26; *Hama v Werbes*, *supra* note 2; *Patten v Jajcaj* (1994), 97 BCLR (2d) 195, 29 CPC (3d) 142 (BCSC); and *Re Tots and Teens Sault Ste Marie Ltd*, *supra* note 27.
- <sup>45</sup> *Medici v Roy*, [2004] OJ No 2789, 5 CPC (6th) 94 (Ont SCJ).
- <sup>46</sup> *Albion Securities Co v Nathanson*, *supra* note 39.
- <sup>47</sup> *Wilson King & Co v Lyall (Trustees of)*, *supra* note 26.
- <sup>48</sup> *Ibid* and *Henry v Columbia Securities*, *supra* note 44.
- <sup>49</sup> *Thompson v Thompson*, (2000), 43 CPC (4<sup>th</sup>) 364 (BCSC).
- <sup>50</sup> *Walker v Saunders et al* (1984), 58 BCLR 387 (BCCA); *Re Exner*, 2003 BCSC 260, [2003] BCJ No 369; *Shandro Dixon Edgson v Kedia*, 2006 BCSC 1986, [2006] BCJ No 3420; and *Legal Profession Act*, *supra* note 21, section 79(1).
- <sup>51</sup> *Shandro Dixon Edgson v Kedia*, *ibid*.
- <sup>52</sup> “Solicitors’ Charging Liens”, *supra* note 43.
- <sup>53</sup> *McQuarrie Hunter v Foote*, [1983] 2 WWR 283, 143 DLR (3d) 354 (BCCA); *Cotugno v Kingsway General Insurance Company*, 2011 ONSC 1904; and *Doyle v Keats*, [1990] BCJ No 1191, 46 BCLR (2d) 54 (BCSC).
- <sup>54</sup> F T Horne, *Cordery on Solicitors*, 8th ed (London, UK: Butterworths, 1988) at 250.
- <sup>55</sup> *Carla Courtenay Law Corp v Lalani*, [2001] BCJ No 292, 86 BCLR (3d) 51 (BCCA).
- <sup>56</sup> *Jenik v Fearn*, [1995] BCJ No 2568, 16 BCLR (3d) 22 (BCSC); *FitzGibbon v Piters*, *supra* note 30; and *Annotated Legal Profession Act*, *supra* note 7 at 8-94.
- <sup>57</sup> *FitzGibbon v Piters*, *supra* note 30; see also *Jenik v Fearn*, *ibid*.
- <sup>58</sup> *Suffield and Watts (Re)*; *Brown, Ex parte* (1888), 20 Q.B.D. 693. *Legal Profession Act*, *supra* note 21 at section 79(6).
- <sup>59</sup> Law Society of British Columbia, *Bencher’s Bulletin*, No 2, March - April 2000, “Legal Profession Act changes sought”; Wendi J Mackay et al, eds, *Land Title Practice Manual*, (The Continuing Legal Education Society of British Columbia, 2011) at 62.5; User Guides and Publications, “Electronic Form 17 Help Guide”, online: BC Land Title and Survey <lsa.ca/cms/>.
- <sup>60</sup> *Cliffs Over Maple Bay Investments Ltd. (Re)*, *supra* note 27; *Davidson & Co v MacAdam*, 2001 BCSC 1393, [2002] BCJ No 2211 (BCSC); and *Patten v Jajcaj*, *supra* note 44.
- <sup>61</sup> *Walker v Saunders, Mortimer, Vance and Howell* (1984), 58 BCLR 387, [1985] 1 WWR 743 (BCCA).
- <sup>62</sup> *Hama v Werbes*, *supra* note 2; *King Insurance Finance (Wines) Inc v 1557359 Ontario Inc (cob Willowdale Autobody Inc)*, 2012 ONSC 4263, [2012] OJ No 3544; *Re Moriseau*, *supra* note 19; *Patten v Jajcaj*, *supra* note 44; and *Re Tots and Teens Sault Ste Marie Ltd*, *supra* note 27.
- <sup>63</sup> *Neepawa Gladstone Co-Operative Ltd v Colin Campbell Farms Ltd* (1982), 24 Man R (2d) 173, [1982] 4 WWR 744 (Man QB).
- <sup>64</sup> *Patten v Jajcaj*, *supra* note 44.
- <sup>65</sup> *Griff Building Supplies v Lucas Anderson Development et al*, [1995] BCJ No 1511, New Westminster Registry No SO24806 (BCSC).
- <sup>66</sup> *Triton Tubular Components Corp v Steelcase Inc*, [2006] OJ No 1435 (Ont SCJ) referred to in *Cliffs Over Maple Bay Investments Ltd. (Re)*, *supra* note 27; *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36
- <sup>67</sup> *Arlington Investments Ltd v Commonwealth Insurance Company*, [1986] BCJ No 3024, 15 CCLI 167 (BCCA).

- <sup>68</sup> *Cliffs Over Maple Bay Investments Ltd. (Re)*, *supra* note 27.
- <sup>69</sup> *Personal Property Security Act*, R.S.B.C. 1996, c. 359. Under section 32 of the *Personal Property Security Act*, a lien on “goods”, as defined in section 1, has priority over perfected and unperfected security interests unless the legislative authority for the lien specifies otherwise. The *Legal Profession Act*, *supra* note 21 does not specify a different priority for solicitors' liens.
- <sup>70</sup> *Marzara v Marzara*, 2011 BCSC 1142 and *Vukelic v Vukelic* [1993] BCJ 2206, 43 ACWS (3d) 614 (BCSC).
- <sup>71</sup> *Kuznecov v Kuznecov*, 2006 BCSC 1926, [2006] BCJ No 3313; *Canadian Legal Practice*, *supra* note 26 at section 10.44.
- <sup>72</sup> *Employment Standards Act*, R.S.B.C. 1996, c. 113 and *Dunhill Construction Ltd. v Ledcor Industries Ltd.* (1993), 85 BCLR (2<sup>nd</sup>) 112 (SC).
- <sup>73</sup> *Davidson & Co v MacAdam*, 2001 BCSC 1393, [2002] BCJ No 2211 (BCSC) and *Hislop v Canada (Attorney General)*, 2009 ONCA 354, [2009] OJ No 1756(CA); *Canada Pension Plan*, R.S.C. 1985, c. C-8.
- <sup>74</sup> *Re Wadsworth, Rhodes v Sugden* (1886), 34 Ch D 155; *Hama v Werbes*, *supra* note 2; *Canadian Legal Practice*, *supra* note 26 at section 10.45.
- <sup>75</sup> *Linauskas v Linauskas (No 2)*, 38 OR (3d) 113, 1998 CanLII 14657 (ONSC). See also *BC Code*, *supra* note 17 at rule 3.7-9(b) and commentary [3].
- <sup>76</sup> *R v Cunningham*, 2010 SCC 10.
- <sup>77</sup> *Pushor Mitchell v McDougall*, 2008 BCSC 150, [2008] BCJ No 194.
- <sup>78</sup> *Slater Vecchio LLP v Cashman*, 2014 BCCA 6.
- <sup>79</sup> *Ladner Downs v Crowley* (1987), 14 BCLR 357, CanLII 161 (SC); *Thompson Valley Law Corporation v Childs*, 2012 BCSC 15, [2012] BCJ No 23; *Conkie & Company v Free Quincy Productions Ltd*, 2012 BCSC 33, [2012] BCJ No 51; and *Davis & Company v Jiwan et al*, 2006 BCSC 658, [2006] BCJ No 1009; *Abel v Burke* (1999), 90 ACWS (3d) 147 (BCSC) appeal allowed on other grounds [2000] 6 WWR 120 (BCCA).
- <sup>80</sup> *Pierce Van Loon v Edwards*, [1998] BCJ No 2212 (SC) referred to in *Maillot v Murray Lott Law Corporation*, 2002 BCSC 343, 99 BCLR (3d) 170.
- <sup>81</sup> *Trainor v Deverell Harrop* (1980), 111 DLR (3d) 171 (BCSC); *Edwards v Barwell-Clarke* (1980), 22 BCLR 6 (BCSC).
- <sup>82</sup> *Pushor Mitchell v McDougall*, *supra* note 78 and *Maillot v Murray Lott Law Corporation*, *ibid.* For a discussion of what constitutes reasonable grounds for terminating a contingency agreement see the decisions of *Voss v Smith* 2007 BCCA 296 and *MacIsaac v Frayne* 2007 BCSC 1620.
- <sup>83</sup> *Pierce Law Group v Chirita*, 2004 BCSC 67, [2004] BCJ No 75.
- <sup>84</sup> *Thompson Valley Law Corporation v Childs*, 2012 BCSC 15, [2012] BCJ No 23.
- <sup>85</sup> *Vertlieb-Anderson v Nelford*, [1992] BCJ No 1229, [1992] 5 WWR 97 (BCCA) and “Whose File Is It Anyway?” *supra* note 18.
- <sup>86</sup> *Commonwealth Construction Company v Defazio Bulldozing* (1988), BCJ No 530, 25 BCLR (2d) 140 (BCSC); “Solicitors' Charging Liens”, *supra* note 52.
- <sup>87</sup> *Ashurst v Wilson*, [2000] BCJ 1247, 46 CPC (4th) 384 (BCSC) and *Foisy v Zak*, 2001 BCSC 100.
- <sup>88</sup> *Herman v Ian Sisett Law Corp.* (2012) BCSC 605.
- <sup>89</sup> *Re Neylan* (1986), 8 BCLR (2d) 314 (SC).
- <sup>90</sup> *Legal Profession Act*, *supra* note 21 at sections 77 and 78.
- <sup>91</sup> *FitzGibbon v Piters*, *supra* note 30.
- <sup>92</sup> “Whose File Is It Anyway?” *supra* note 18.
- <sup>93</sup> *Legal Profession Act*, *supra* note 21 at section 69(1); Law Society Rules, Rule 3-65; *BC Code*, *supra* note 17 at rules 3.7-9(e).
- <sup>94</sup> Supreme Court Civil Rules, Rule 2-1(2)(b).
- <sup>95</sup> *Henry v Columbia Securities*, *supra* note 44; *Walker v Saunders et al*, *supra* note 34; *Re Exner*, *supra* note 50; and *Nor-Lite Sea Farms Ltd v Ellingsen*, *supra* note 43.
- <sup>96</sup> *Dallow v Garrold* (1884), 13 QBD 543 at 546, affd (1884), 14 QBD 543 (CA) cited in *Davidson & Co v MacAdam*, [2001] BCJ No 2211, 2001 BCSC 1393; *Jenik v Fearn*, *supra* note 56; and *FitzGibbon v Piters*, *supra* note 30.
- <sup>97</sup> See note 59.
- <sup>98</sup> *Lidder v Lidder* (2001) 91 BCLR (3d) 192, 4 CPC (5th) 363 (SC) and *Ray v Hou*, [1928] BCJ No 115, 40 BCR 438 (CA) followed in *Henry v Columbia Securities*, *supra* note 44.
- <sup>99</sup> See note 59.
- <sup>100</sup> Law Society Rules, Rule 3-65(5).

**APPENDIX A**

“I am now counsel for your former client, [name]. So that I can discharge the terms of my retainer, I will need the files you compiled on [client name]’s behalf before you ceased to act for [him or her or it]. I understand your claimed charges for your work for [client name] have not been paid in full and that you claim a possessory lien over the files.

In consideration of your delivering to me all of the property of [client name] in your possession or under your control relating to my retainer, I undertake to pay so much of your proper fees, charges and disbursements, for the work you performed for [client name] as my predecessor, from any settlement or judgment fund that might be realised for [client name] while I am retained by [him or her or it], to the extent the fund is sufficient to bear your proper fees, charges and disbursements.”

**APPENDIX B**

“As you know, I acted for [name of former client] in that proceeding in the [location of court] Registry of the [name of court] numbered [court registry number]. I claim a lien at common law (otherwise known as a charging lien), for my proper fees, charges and disbursements pertaining to my work, including counsel work, of or in relation to that proceeding, against any property, including any settlement or judgment fund, recovered or preserved as a result of the proceeding.

As you may know, any person who, without regard for my lien claim, participates in the transfer of any recovered or preserved property, or in the disbursement of any recovered or preserved settlement or judgment fund, may be personally liable to satisfy my proper fees, charges and disbursements, including any expense I incur to recover the fees, charges and disbursements.

If you are not able to confirm by [name a date that is two to three business days] at noon that my lien will be recognised, I will apply to court for a charging order under section 79 of the *Legal Profession Act* and will add to my claim the expense I incur in respect of the application.”