



Please note that this article, published in 1997, must be read in conjunction with “Charging Liens – 2005 update” an update to this piece.

Getting Paid: Asserting and Defending a Solicitor’s Lien^{*}

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Introduction

In January 1994, *The Advocate* published an article entitled “**Whose File is it Anyway? Who Owns Client File Documents When the Retainer Ends.**”¹ The discussion in the article about solicitor’s liens prompted a number of reader questions to the authors, such as the priority of a solicitor’s lien, how to assert a lien, and whether a lien can be imposed when a lawyer retained under a contingency fee agreement is dismissed. Because the term “solicitor’s lien” encompasses two very distinct concepts, this article will separately address these questions for retaining liens and charging liens.

Retaining Lien

The first type of lien, usually referred to as a **retaining lien** (sometimes called a possessory lien), comes into existence when a lawyer exercises the common law right to retain files, documents, funds or other personal property of the client in the possession of the lawyer until the client has paid all outstanding accounts owing to the lawyer.² Because the right is only to retain property until accounts are paid,³ the lien cannot be actively enforced by the lawyer. While “property” does not include money held in trust for a third party,⁴ it does include money given to the lawyer as a retainer in trust which the client demands be returned without payment of the account.⁵

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Priority

The retaining lien gives a lawyer priority against all other parties having no better right than the client to the property in question.⁶ Thus, where a client could not by law refuse production and delivery of a file or property, the lawyer also cannot refuse. In this context, courts have required lawyers to deliver up files to a receiver-manager⁷ and a trustee in bankruptcy.⁸ As well, a retaining lien will not give a lawyer secured creditor status in a bankruptcy.⁹

A lawyer's ability to maintain a lien over a file in the face of an allegation of negligence was recently discussed in *National Hav-Info v. Poznanski*.¹⁰ The B.C. Supreme Court held that a retaining lien will be defeated where the client has commenced a negligence action against the lawyer and has requested an order for production of documents, if the client can establish a "simple" prima facie case of negligence which has resulted in some damage to the client. This requirement for damage is a new development, and it will be interesting to see how this case is applied.

Finally, the retaining lien can only apply to certain types of property and under certain circumstances connected to the solicitor-client relationship (please see "*Whose File is it Anyway?*"¹¹ for a broader discussion of these points and relevant references).

Procedure

There are no rules that dictate what procedure should be followed by lawyers when a client moves a file from one lawyer to another, and there is considerable uncertainty about what is appropriate or acceptable when the first lawyer's account is unpaid. We suggest the following procedure when Lawyer B takes over a client's case from Lawyer A:

1. Lawyer B should first ask Lawyer A to deliver the client's file (see "*Whose File is it Anyway?*" for a discussion of what constitutes the client's file).
2. If Lawyer A has not been paid, he or she may assert a retaining lien by refusing to hand over the file unless arrangements can be made with the client or Lawyer B to pay or secure the account.
3. If Lawyer A has not already sent the client an account, he or she should do so as soon as possible.
4. Lawyer A should consider footnote 2 of Chapter 10, Rule 8 of the *Professional Conduct Handbook*:

When, upon severance or withdrawal, the question of a right to a lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce such a lien if the result would be to prejudice materially the client's position in any uncompleted matter.

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Lawyer A may be in a conflict between a legal right to a lien and an ethical obligation not to “prejudice materially” the client’s position . The Law Society of British Columbia has not disciplined a lawyer under the provisions of that footnote.

5. Outstanding accounts can often be secured by (a) the client granting a mortgage¹² or providing other security for the account,¹³ or (b) the new lawyer providing an undertaking to pay the account.¹⁴ However, where there is a valid solicitor’s lien, there is no obligation on Lawyer A to accept an undertaking or security instead of payment before giving up the file.
6. If Lawyer A and Lawyer B can agree that the file will be provided “on undertakings,” those undertakings should be very carefully written. An undertaking might be worded:

I, Lawyer B, upon receiving from Lawyer A the legal file and documents of client John Smith in the case of *Smith v. Jones*, undertake to apply any proceeds which I receive of any judgment or settlement of the claim first to Lawyer A’s outstanding account, provided that Lawyer A has obtained a Registrar’s review of the account or John Smith has consented to the amount of the account.

I, Lawyer B, also undertake to inform Lawyer A if my retainer with John Smith is terminated by Mr. Smith or by me and to return the file and documents originally received from Lawyer A to Lawyer A upon demand, provided that demand is received by me within one week of Lawyer A being so informed. If no demand is received by me within one week or if the file and documents are returned to Lawyer A, my undertaking in the preceding paragraph is extinguished.

The wording of the undertaking will vary according to the circumstances and to what is agreed between the client, Lawyer A and Lawyer B. The arrangements made should also be reflected in an agreement between Lawyer B and the client. Lawyer B should also realise that the arrangements made with Lawyer A may affect any retaining lien he or she may wish to exercise against the client.

7. If there are outstanding disbursements in addition to outstanding fees, Lawyer A may insist these be paid. Otherwise, Lawyer A would continue to finance the case by agreeing to wait for payment until the file is completed.
8. If the client will not consent to Lawyer A’s account, Lawyer A should have the Registrar review the account.
9. If satisfactory arrangements cannot be made to secure the outstanding reviewed account, the client may apply under s.86(1) of the *Legal Profession Act* R.S.B.C. 1996 c. 255 to the Supreme Court for an order directing that Lawyer A deliver the file to Lawyer B.¹⁵ If an action is pending, the lawyer could file a Notice of Motion in the proceeding requesting:

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Pursuant to s.86 of the *Legal Profession Act*, an Order directing Lawyer A, of the law firm X, to deliver to Lawyer B the Plaintiff's file contents without conditions.

If no action is pending, an application should be brought by way of Petition with the lawyer as Petitioner and the client as Respondent. Whether brought by Notice of Motion or Petition, the accompanying affidavit should explain any urgency or prejudice that would be suffered by the client if the file were not produced, as well as the efforts made to obtain the file, including any undertakings or security offered and refused.

Subsection 86(2) allows the Court to impose conditions in any order made under this section:

The court may, in an order under subsection (1), make the direction conditional on the client (a) paying all amounts due to the former solicitor by the client, or (b) giving security for the payment of an amount and manner satisfactory to the court, and the court may order a review before the registrar.

Re Neylan indicates that "proper security" may depend, *inter alia*, on "whether or not the client's new solicitor is prepared to give a suitable undertaking with respect to payment of the former solicitor's account."¹⁶ It is important to note that the court has discretion whether to make any order.¹⁷

10. If Lawyer A refuses to release the file or if the court refuses to order delivery pursuant to s.86(1), it does not appear to be improper for Lawyer B to reconstruct the file and proceed with the case.

Charging Liens

The second type of solicitor's lien is a lien on property recovered, often referred to as a **charging lien**. A lawyer who has not been paid has a right at common law to actively enforce a lien over a fund or other property (excluding real property) which has been recovered or maintained as a result of litigation. In contrast to a retaining lien, the property does not have to be in the possession of the lawyer.¹⁸

This common law lien has been codified and expanded in British Columbia in s.88 of the *Legal Profession Act*:

s.88 (1) A member who, whether he has acted as counsel or not, is employed to prosecute or defend a proceeding in a court or tribunal has a charge against any property that is recovered or preserved as a result of the proceeding for the proper costs, charges and expenses of or in relation to the proceeding, including counsel fees.

Stephen Antle's excellent article "**Solicitor's Charging Liens**"¹⁹ contains a detailed discussion of issues and relevant case references for charging liens.

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The following are some salient points to keep in mind when determining how to proceed to assert and enforce a charging lien under s.88:

1. the lawyer must be retained to act in a “proceeding”;
2. “property” includes real property as well as personal property and money;
3. the property must be “recovered or preserved” as a result of the lawyer’s efforts;²⁰
4. the charging lien does not apply to all fees owed to the lawyer but only to the lawyer’s fees and disbursements for services related to the recovery or preservation of the property;²¹
5. the lawyer must show, *prima facie*, that he or she will not be paid if the lien is not granted; and
6. a charging lien has no priority until the lawyer has obtained a court order, but after the order it usually ranks ahead of all other creditors (an exception may be real property—see the discussion below).

Enforcement and Priority

Although s.88(1) of the *Legal Profession Act* gives a lawyer a charge against any property recovered or preserved, the prevailing judicial view is that s.88(2) grants the court the discretion whether to enforce it.²² This reasoning, coupled with s.88(4) of the *Legal Profession Act* which stipulates that “no proceeding for the purpose of realising or enforcing a charge or right arising under this section shall be taken until after application has been made to a court for directions for the realisation,” would appear to indicate that charging liens are unenforceable prior to court order.

The B.C. Supreme Court did, however, in *Louie v. Jensen*,²³ dismiss an application for a charging order under s.79 on the grounds that the statute created the charge and that an order was therefore “superfluous.” Antle says that this case appears to imply a return to the thinking of the older cases,²⁴ that the charging lien is absolute rather than discretionary. *Louie v. Jensen* does not appear, however, to have been followed. It is probably advisable to obtain a court order when asserting a charging lien to ensure priority and enforcement.

Where the court grants an order, a charging lien generally takes precedence over other creditors.²⁵ The lien has been held to have priority over the following competing claims, even if they have been asserted prior to the order for a charging lien:

- A garnishing order issued by a judgment creditor of the lawyer’s client.²⁶
- A writ of seizure and sale by a judgment creditor of the client.²⁷
- Unsecured creditors in a bankruptcy—a solicitor’s charging lien is a secured claim under the *Bankruptcy Act*.²⁸

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- Assignees of the proceeds of an insurance policy.²⁹
- An unregistered personal property security agreement.³⁰

In *Andronyk v. Williams*,³¹ the Manitoba Court of Queen's Bench examined the issue of priority between the defendant's lawyer's claim and the plaintiff's lawyer's claim on the same fund (the plaintiff had been successful in the preceding action). Although both lawyers were granted liens, the plaintiff's lawyer's lien was given priority on the basis that it would be inequitable if the only funds available went to the losing litigant's lawyer.

Statutory provisions may also affect the enforcement or priority of a charging lien. In *Dunhill Construction Ltd. v. Ledcor Industries Ltd.*,³² the Court held that pursuant to s.15(2) of the *Employment Standards Act*,³³ the Director of Employment Standards had a lien which took precedence over a solicitor's charging lien.

Once a court order is obtained, s.79(4) assists the lawyer to enforce the order by making any acts or conveyances void as against the lien if they defeat or tend to defeat the lien, unless the conveyance is made to a bona fide purchaser for value without notice. Recently, in *Jenik v. Fearn*,³⁴ ICBC and a client were found jointly and severally liable to the client's lawyer for the amount of the charge after ICBC negligently paid out settlement proceeds to the client's common-law husband.

Procedure in the Land Titles Office

Interestingly, the Land Titles Office allows registration of a charging lien against real property without an order. The *Land Titles Practice Manual*³⁵ describes the procedure. The lien can presumably take priority over subsequently registered charges, and may also act as "notice" to subsequent charge holders and bona fide purchasers for value.

In *Vukelic v. Vukelic*,³⁶ the court gave existing registered charges priority over a solicitor's charging lien on the grounds that s.29(1) of the *Land Title Act*³⁷ stipulates that no person with a registered charge will be affected by notice of a charge pending registration. However, there is no case as yet on whether a registered charging lien or even its priority can be enforced without a court order.

Procedure

We suggest the following procedure to enforce a solicitor's charging lien:

1. If an account has not already been sent to the client, the lawyer should send the account immediately.
2. If the property preserved is real property, the lawyer should send a letter with *Land Titles Act* Form 17 to register the charge against title. Attached as Appendix A is a form of letter.³⁸

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3. The lawyer should apply by Notice of Motion in the court proceeding in which the property was recovered or preserved.³⁹ The relief sought may be worded as follows:
 - (i) a Declaration, pursuant to section 79(1) of the *Legal Profession Act*, S.B.C. 1987, c. 25, that Lawyer A has a charge against [the property] recovered or preserved by her on behalf of the Plaintiff in this action, as a result of this action, for her proper costs, charges and expenses, including counsel fees, for the professional legal services she rendered on behalf of the Plaintiff in relation to the recovery or preservation of [the property];⁴⁰
 - (ii) an Order that [the property] be listed for sale; and
 - (iii) an Order for the payment to Lawyer A of the sum of X out of the sale of [the property].

The wording of the relief will vary depending on the type of property and circumstances of the case.

The parties to be served with the Notice of Motion are the client, the owner of the property to be charged (if different from the client), and anyone else with interests which may be affected by the charge.⁴¹

Contingency Fee Arrangements

If a lawyer retained under a contingency fee arrangement is dismissed before the end of the litigation, is he or she able to assert a retaining or charging lien, and if so, for how much? The Court in *Alberta Treasury Branches v. Invictus Financial Corporation Ltd. et al.* held that the type of fee arrangement between lawyer and client does not affect the lawyer's right to a **retaining** lien, but the amount secured will depend on the contingency occurring.⁴²

In *Doyle v. Keats*, a case in which a lawyer was dismissed from a contingency arrangement, the B.C. Supreme Court held that even if litigation has not been concluded, a **charging** lien can still be recognised because property "recovered or preserved as a result of the proceeding" described in s.79 of the *Legal Profession Act* can include a *chose in action* (in other words, the plaintiff's cause of action).⁴³ This extension of the definition of property is apparently yet to be considered by a higher court, and it remains to be seen whether *Doyle* will be followed or whether the courts will stay with the traditional view that property must be tangible in order to be charged.

Determination of Amount Owing and Time for Payment

As to the amount owed and timing of payment, the B.C. Court of Appeal held in *McQuarrie Hunter v. Foote* that a lawyer discharged from a contingency fee contract containing no provisions for termination before the end of litigation must await completion of the lawsuit.⁴⁴ If the contingency occurs, the result obtained will be one of the factors considered by the Court in determining how much the lawyer is to be paid.

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In *Doyle*, Master Wilson followed the reasoning in *McQuarrie* and held that even where a provision in the contingency agreement purported to arrange a formula for payment on termination, the lawyer still had to wait until the contingency occurred for payment.⁴⁵

Once the litigation has concluded, the lawyer claiming a lien can prepare and submit a bill for review by a Registrar. At that point, the Registrar will review the bill and the contingency fee agreement (including any termination provisions) and determine what is “reasonable” under ss.78(3.3) and 71.1 of the *Legal Profession Act*.

There appears to be no case law determining whether the maximum percentages established under s.78(3)(a) of the *Legal Profession Act* and Rule 1065 of the *Law Society Rules* apply to each lawyer individually or to the accounts of all lawyers who may work on a particular file for a client.

It is also not yet determined whether termination clauses which provide for a *quantum meruit* fee or a fee based on an hourly rate are valid if the resulting amount exceeds the maximum percentages determined under Rule 1065.

Procedure

How can a contingency fee file be transferred and at the same time the first lawyer's common law right to a retaining lien be preserved and his or her fee be protected?

We suggest that the file should be handed to new counsel upon one of the following occurring:

1. payment of the first lawyer's account;
2. the new lawyer's undertaking as set out earlier in this article to protect a set fee or percentage on settlement or judgment;
3. an agreement between lawyers that, upon settlement or judgment, both lawyers will prepare bills and submit them to the Registrar for review to determine a reasonable fee for each, with the new lawyer undertaking to hold in trust sufficient funds to cover both bills until the issue is determined;
4. other security provided to secure an agreed bill or an amount to be determined after the contingency occurs; or
5. a court order under s.77 of the *Legal Profession Act*.

Conclusion

Questions arising from the non-payment of accounts by clients are difficult questions for lawyers. It is hoped that a better understanding of the two types of solicitor's liens and how to use them will be useful in relieving one of the anxieties of practice.

Appendix A

Firm Letterhead

[Date]

The Registrar
Land Title Office
88 - 6th Street
New Westminster, B.C.
V3L 5B3

[Salutation]

Re: John Doe (the Petitioner) v. Jane Doe (the Respondent)
B.C.S.C. Action No. X

Civic:

Legal:

I wish to register a charge against the Property pursuant to Section 79(1) of the *Legal Profession Act*.

The grounds on which the claim is founded are as follows:

1. I have acted as counsel for the Petitioner in the above-captioned proceeding for the purpose of prosecuting the action against the Respondent.
2. As a result of my representation of the Petitioner, the Petitioner's interest in the Property has been preserved.
3. I have an outstanding account for services rendered to the Petitioner in the amount of \$_____ for the proper costs, charges and expenses of or in relation to the proceeding, which includes counsel fees.
4. My address in the Province for service of notices on me is:
5. I wish to register the charge against the interest of John Doe in the above property.

Yours very truly,

[Lawyer]

¹ Jacqueline Morris, Felicia S. Folk, and John Vamplew, (1994) 52:1 The Advocate 87.

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- ² *Halsbury's Laws of England*, 4th ed. by Lord Hailsham of St. Marlebone (London: Butterworths, 1973 -) at 170 [hereinafter *Halsbury's*].
- ³ *Barratt v. Gough-Thomas* [1950] 2 All E.R. 1048 (C.A.).
- ⁴ *MacDonald v. Arenson*, [1981] 1 W.W.R. 573 (Man. C.A.), 37 C.B.R. (NS) 30.
- ⁵ Consider also Rule 835(3) of the *Law Society Rules*: "A member must not take fees and related taxes from trust funds where the member knows or ought to know that the client disputes the right of the member to receive payment from trust funds."
- ⁶ *Halsbury's*, *supra* note 2 at 173.
- ⁷ *Imperial Developments (Can.) Ltd. (Receiver of) v. Field & Field* (1988), 28 C.P.C. (2d) 257 (Alta. C.A.); *Alberta Treasury Branches v. Invictus Financial Corporation Ltd. et al.* (1985), 56 C.B.R. 239 (Alta. Q.B.) [hereinafter *Invictus*].
- ⁸ *In Re Motherwell, Limited* (1921), 2 C.B.R. 128 (Ont. S.C.), 21 O.W.N. 108; *Lapointe v. Racine and Tremblay* (1979), 33 C.B.R. (N.S.) 19 (C.S. Que.).
- ⁹ *Re Alberta Western Wholesale Lumber Ltd.* (1961), 2 C.B.R. (N.S.) 318 (B.C.S.C.); *Re Moriseau*, [1982] 6 W.W.R. 523 at 526 (B.C.S.C.).
- ¹⁰ 29 May 1995, Victoria 93/4436 (B.C.S.C.).
- ¹¹ *Supra* note 1.
- ¹² If security for fees is provided by way of a mortgage, whether by a client changing lawyers or by an existing client, the client must be represented in arranging this security by someone other than the lawyer who will benefit from it.
- ¹³ *Re Neylan* (1986), 8 B.C.L.R. (2d) 314 (B.C.S.C.).
- ¹⁴ *Re Gladstone*, [1972] 2 O.R. 127 (C.A.), 25 D.L.R. (3d) 43.
- ¹⁵ S.B.C. 1987, c. 25. Note that a Registrar does not have jurisdiction to dispose of or impair a retaining lien, and therefore may not make this order. See *Harbottle v. Kearn* (1995) 16 B.C.L.R. (3d) 87.
- ¹⁶ *Re Neylan*, *supra* note 13 at 317.
- ¹⁷ *Ibid.*
- ¹⁸ *Re Tots and Teens Sault Ste. Marie Ltd. et al.* (1975), 11 O.R. (2d) 103 at 106 (Ont. S.C.) [hereinafter *Tots and Teens*].
- ¹⁹ (1990) 48:5 *The Advocate* 673.
- ²⁰ The statutory provision uses the words "recovered or preserved as a result of the *proceeding*" (emphasis added). Antle states, *ibid* at 677, that this may broaden the circumstances in which a lien will be granted.
- ²¹ *Walker v. Saunders et al.* (1984), 58 B.C.L.R. 387 (B.C.C.A.), at p.394.
- ²² *Patten v. Jajcaj* (1994), 97 B.C.L.R. (2d) 195 (B.C.S.C.) [hereinafter *Patten*].
- ²³ [1989] B.C.J. No. 55, Vancouver Registry No. B842876 (B.C.S.C.), Drost, J.
- ²⁴ such as *Miller v. Wollaston* (1929), 41 B.C.R. 145 (C.A.).
- ²⁵ *Neepawa-Gladstone Co-Operative Ltd. v. Colin Campbell Farms Ltd.* [1982] 4 W.W.R. 744 at 749 (Man. Q.B.), 24 Man. R. (2d) 173 [hereinafter *Neepawa* cited to W.W.R.]. See the Antle article, *supra* note 19 starting at p. 682 for more case references.
- ²⁶ *Neepawa*, *ibid.*
- ²⁷ *Patten*, *supra* note 22 at 200, Leggatt J. disagreeing with Boyle J.'s judgment in *Gill v. Dhaliwal* (14 October 1993) Van. Reg. C892 (B.C.S.C.). These two judgments are contradictory.
- ²⁸ *Tots and Teens*, *supra* note 18 at 111, 112; *Re Moriseau* [1982] 6 W.W.R. 523 (B.C.S.C.); *Walker v. Saunders*, *supra*, note 18, at p.395.
- ²⁹ *Arlington Investments Ltd. v. Commonwealth Insurance Company* (1986) 15 C.C.L.I. 167.
- ³⁰ *Griff Building Supplies v. Lucas Anderson Development et al.* [1995] New Westminster Registry No. SO24806, (B.C.S.C.), MacKinnon, J.

31 [1987] 2 W.W.R 148 (Man. Q.B.).
32 (1994) 85 B.C.L.R. (2d) 112, 108 D.L.R. (4th) 334.
33 S.B.C. 1980, c. 10.
34 *Jenik v. Fearn* [1995] B.C.J. No. 2568, Vancouver Registry No. B921993 (B.C.S.C.), Allan, J.
35 *Land Title Practice Manual*, V. 3, Continuing Legal Education Society of British Columbia, Chapter
17, p. 58.
36 [1993] B.C.J. 2206 (B.C.S.C.), Saunders, J.
37 R.S.B.C. 1979, c. 219.
38 The letter attached as an Appendix was provided by Jeffrey A. Rose.
39 *Vertlieb Anderson v. Nelford* (1989), 40 B.C.L.R. (2d) 379 at 385 (Co. Ct.).
40 This suggestion for form of declaratory relief in the Notice of Motion was provided by Gordon
Turriff.
41 According to Antle, *supra* note 19 at 684, “the weight of authority” supports the principle that all
parties should be served. As Antle points out, this contradicts McDonald C.J.B.C.’s statement in
Henry v. Columbia Securities Limited [1943] 3 W.W.R. 422 (B.C.C.A.), that serving notice on other
creditors may not be necessary.
42 *Invictus*, *supra* note 7 at 240-241.
43 (1990), 46 B.C.L.R. (2d) 54 [hereinafter *Doyle*]; *Fairfold Properties Ltd. v. Exmouth Docks Co. Ltd.*
(No. 2) [1992] 4 All E.R. 289 (Ch.) also gave a wide interpretation to the British equivalent of s.79
and included an order for costs where costs had not been reserved by a Registrar.
44 [1983] 2 W.W.R. 283 (B.C.C.A) [hereinafter *McQuarrie*]. The *McQuarrie* principle has been
followed in *Renneberg v. Normandeau* (3 September 1985), Vancouver No. J880687; *Doyle, ibid.*;
Richea v. Noble, [1994] 2 W.W.R. 246 (Sask. Q.B.), [1994] 6 W.W.R. 411 (Sask. C.A.); and *Pierce,*
van Loon v. Russell (1994), 1 B.C.L.R. (3d) 183.
45 *Doyle, supra* note 43 at 60-61.