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<p style="text-align: center;">INTRODUCTION</p> <p>Purpose and currency of checklist. This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A1) and SHARE PURCHASE AGREEMENT DRAFTING (B4) checklists. It is primarily intended for use by the purchaser’s solicitor, but may serve as a guide to the vendor’s solicitor. The checklist is also primarily intended for use in the acquisition of shares in a British Columbia company that is not a reporting company. The checklist is current to March 1, 2010.</p> <p>New developments:</p> <ul style="list-style-type: none"> • Harmonized sales tax (“HST”). Most lawyers are obliged to collect goods and services tax (“GST”) in accordance with Part IX of the <i>Excise Tax Act</i>, R.S.C. 1985, c. E-15, and provincial sales tax (“PST”) in accordance with the <i>Social Service Tax Act</i>, R.S.B.C. 1996, c. 431. Effective July 1, 2010, PST will be eliminated and lawyers will instead be required to collect HST, also imposed under the <i>Excise Tax Act</i>. However, collection of PST will continue under rules established for the transition to HST. When billing for legal services provided before and after July 1, lawyers must charge PST and GST (but not HST) if 90% or more of the services are performed before July 1. If less than 90% of the legal services are performed before July 1, lawyers must charge PST, GST, and HST based on the proportion of services performed before and after July 1. PST collection requirements under the transitional rules continue until December 31, 2010. Further information about the PST, GST, HST, and transitional rules can be found at www.cra-arc.gc.ca/harmonization and www.gov.bc.ca/hst. <p>Deadline for transition under the Business Corporations Act. Under the British Columbia <i>Business Corporations Act</i> and the Business Corporations Regulation, B.C. Reg. 65/2004, all active companies incorporated in B.C. before March 29, 2004 had two years from that date to file a transition application. This is a mandatory electronic filing that involves a review of company records and the electronic filing of a transition application. Companies that did not meet the deadline are no longer considered to be up-to-date with their company’s filings. This may affect the company’s ability to transact business with its financial institution or licensing and regulating authorities. In addition, if a company has not met this deadline, the registrar may take action to dissolve the company. Further information on the Act, the Business Corporations Regulation, and forms is available at the Corporate Registry website (www.fin.gov.bc.ca/registries/corppg/default.htm).</p> <p>Client identification and verification. Law Society Rules 3-91 to 3-102 require lawyers to follow client identification and verification procedures when retained by a client to provide legal services, subject to various exceptions. See the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A1) checklist for further details.</p> <p>Cash transactions. Law Society Rule 3-51.1 places restrictions on all cash transactions and regulates the circumstances in which a lawyer can accept \$7,500 or more in respect of any one client matter or transaction. On November 13, 2009, the Law Society amended this Rule to clarify its application in cases where cash retainers are received incrementally, and to indicate what procedure to follow where cash is received contrary to the Rule, but in a situation beyond the lawyer’s control.</p> <p>Aboriginal law. Special considerations apply to businesses involving “Indians” and “Indian reserves” (both as defined in the <i>Indian Act</i>, R.S.C. 1985, c. I-5). While significant tax and other advantages may be available under the <i>Indian Act</i>, these are affected by the type of business, transaction nature, business entity (sole proprietorship, partnership, joint venture, trust, or incorporated company), location of</p>					

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<p>business activity on or off reserve land, and the specific reserve and its governance. In addition to <i>Indian Act</i> considerations, some Indian bands or First Nation entities have entered into treaties that may have governance, taxation, and other business-related implications. The Crown’s duty to consult and seek accommodation with respect to activities potentially affecting Aboriginal title or rights may also have implications for businesses with government agreements or government-issued tenures.</p> <p>Businesses that engage in activities on reserve lands and on lands subject to treaty or claims of Aboriginal rights on title are strongly encouraged to familiarize themselves with applicable laws and governmental policies. Consider seeking advice from a lawyer with experience in Aboriginal law matters. Further information on Aboriginal law issues is available on the “Aboriginal Law” page in the “Practice Points” section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications.</p> <p>Additional resources. For further information about share purchase procedures, see <i>Advising British Columbia Businesses</i>, looseleaf and online (CLEBC, 2006); <i>Buying and Selling a Business: Annotated Precedents</i>, looseleaf (CLEBC, 2000); <i>Due Diligence Deskbook</i>, looseleaf and online (CLEBC, 1994); <i>Advising Businesses in the Information Age</i> (CLEBC, 2001); and <i>Solicitors’ Legal Opinions—2001</i> (CLEBC, 2001).</p> <p style="text-align: center;">CONTENTS</p> <ol style="list-style-type: none"> 1. Initial Contact 2. Initial Interview 3. After the Initial Interview 4. Drafting the Agreement 5. Prior to Closing 6. Closing 7. Post Closing <p style="text-align: center;">CHECKLIST</p> <ol style="list-style-type: none"> 1. INITIAL CONTACT <ol style="list-style-type: none"> 1.1 Arrange the initial interview. 1.2 Ask client to bring to the initial interview all available financial and operational information on the target company and vendor, particularly financial statements, annual reports, prospectuses, press releases, list of assets, contracts, leases, government permits, etc. Consider requesting client information if target is to be combined with or complementary to an existing investment of the client. 1.3 Consider Law Society of British Columbia Rules on client identification and verification, and complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A1) checklist. 1.4 Determine and assess actual and potential conflicts of interest. 2. INITIAL INTERVIEW <ol style="list-style-type: none"> 2.1 Advise client regarding calculation of your account, the method and timing of payment, and conditions upon which you undertake to act as solicitor. Clarify your role in the transaction and that of other advisors to the client. 					

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<p>one buyer, make it clear for whom you are working. Advise other(s) in writing to get independent legal advice. If your retainer will be limited to (for example) confidential drafting advice, ensure client understands the limited scope of the retainer and confirm the understanding, where reasonably possible, in writing,</p> <p>2.2 Determine whether client has already reached an agreement with the vendor concerning the general terms of the transaction. If not, advise client regarding the possibility of structuring the transaction as an asset purchase (if appropriate in the circumstances). Consider the tax consequences of purchasing shares versus purchasing assets.</p> <p>2.3 Determine client’s objectives and why client wants to complete this transaction. Will it be integrated in an existing business? Confirm any areas of risk relating to the transaction. Assess impact on client’s existing business if relevant.</p> <p>2.4 Consider name under which the business will be conducted post-closing to determine due diligence of trademarks and other intellectual property.</p> <p>2.5 Review financial statements and other information with the client’s accountant and client. Review transaction with client’s tax advisor to identify tax implications.</p> <p>2.6 Determine the principal elements of the transaction, that is, who is buying what from whom and for how much. How does client intend to finance the transaction? Are there any conditions to be met before the deal can proceed (e.g., regulatory approvals)? Are there any unusual restrictions, covenants or conditions that are important to client? Does the business being conducted by the company involve any particular risks (e.g., environmental), and how are these risks to be allocated between the purchaser and the vendor? Are there any special or unusual procedures that need to be followed (e.g., governmental consultation with Aboriginal groups)?</p> <p>2.7 Consider signing a confidentiality agreement to allow formal negotiations to open. If client and vendor are competitors, consider nature and method of sharing information. The sharing of competitively sensitive information can be problematic, particularly if the transaction fails to close. Consider the implications of the <i>Competition Act</i>, R.S.C. 1985, c. C-34.</p>					
<p>3. AFTER THE INITIAL INTERVIEW</p>					
<p>3.1 Confirm your retainer and the instructions you have received in a letter to client. Confirm in the letter the scope of your responsibilities and the roles of other advisors to client.</p>					
<p>3.2 Ensure that you will not act for more than one party to the transaction unless you comply with the <i>Professional Conduct Handbook</i>. Where purchaser is a company, verify who has the authority to give instructions. Consider getting a directors’ resolution confirming your retainer and giving one director or officer the authority to instruct you.</p>					
<p>3.3 If client has not reached a tentative agreement with the vendor, draft a letter of intent outlining the transaction in clear terms. Consider whether client wishes the letter of intent (all or part of it) to be binding. Review the letter with client to ensure that it reflects his or her intentions. Forward the letter to the vendor. Negotiate, if so instructed.</p>					
<p>3.4 Participate in or finalize the arrangements regarding financing, if applicable and if so instructed.</p>					

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<p>3.5 Initiate the necessary searches to complete the due diligence for the transaction, and where necessary, obtain written authorization from the vendor and the target company for release of the information. Consider which, if any, of these searches should be conducted in relation to the vendor (e.g., to confirm its right, and any limitations on its ability, to sell to your client) or the target, or both. In some instances, searches of both the vendor and the target will be appropriate. Consider the fact that, in a share purchase, the purchaser will inherit all of the obligations and liabilities of the target.</p> <p>.1 Registrar of Companies to obtain (depending on the date of incorporation) available certified copies of constating documents such as memorandum (if applicable), notice of articles, articles, and any amendments or other applicable search depending on the jurisdiction of incorporation of the vendor or the target or both. Determine whether the company has ever been struck off the register and subsequently re-stored.</p> <p>.2 Records office search and review minute book. Examine all registers and determine any deficiencies with respect to directors, members, transfers and allotments of shares, mortgages, debentures and debentureholders, and other indebtedness. Examine share registers, share certificates, waivers of pre-emptive rights and resolutions authorizing issuance, transfer and buy-back of shares to determine if the shares are validly allotted, issued, fully paid, transferred, and redeemed. Examine cancelled share certificates. Determine if directors and shareholders meetings have been properly constituted and if the directors have been validly appointed. Determine if the proper authorization of every transaction and material contract has been obtained. Review for appropriate disclosures of interest. Determine if the minutes disclose any further contracts or commitments (including, in particular, any outstanding shareholders' agreements or options to acquire shares). Review articles to determine whether restrictions on transfer of shares exist and the procedure for executing documents.</p> <p>.3 Personal Property Registry.</p> <p>.4 ICBC Vehicle Records Department.</p> <p>.5 Land title offices.</p> <p>.6 Canadian Securities Registration Systems re: assignment under s. 427 of the <i>Bank Act</i>, S.C. 1991, c. 46.</p> <p>.7 Office of the Superintendent of Bankruptcy (Industry Canada).</p> <p>.8 Labour Relations Board (for pending certifications, collective agreements, or any disputes before the Board in which the target company for acquisition may be involved).</p> <p>.9 Other searches as required, depending on the nature of the business of the company (e.g., Gold Commissioner, Ships Registry, Ministry of Forests, hotel/motel tax).</p> <p>.10 Municipal offices re: taxes, utilities, building, fire, zoning, licensing, and other requirements.</p> <p>.11 Court registry in each area where the target company (and, in some instances, the vendor) has substantial business dealings.</p> <p>.12 Sheriff's offices for writs of execution.</p>					

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<p>.13 Social Service Tax (“PST”).</p> <p>.14 Corporation capital tax.</p> <p>.15 Mining tax.</p> <p>.16 Logging tax.</p> <p>.17 Motor fuel tax.</p> <p>.18 Insurance premium tax.</p> <p>.19 Canada Revenue Agency:</p> <p> (a) GST/HST.</p> <p> (b) Taxation re corporate tax, payroll.</p> <p>.20 Consider credit searches and other search services for background on the target, the vendor, and the principals, as applicable.</p> <p>.21 Insurance carried by the target company.</p> <p>.22 Workers’ Compensation Board.</p> <p>.23 Employment Standards Branch.</p> <p>.24 Environment ministries (federal and provincial) and Department of Fisheries and Oceans, if target company has any permits.</p> <p>.25 Securities searches for public company vendor, target company, or both, including through SEDAR.</p> <p>.26 Intellectual property searches such as trademarks.</p> <p>3.6 Review all leases, government permits, and contracts to determine if any consents to the purchase are required.</p> <p>3.7 Consider environmental risks associated with property of the company. Assess need for a Ministry of Environment, Environment Canada, or Department of Fisheries search (see item 3.5.24), a search of other applicable environmental authorities (e.g., municipal and federal), or an environmental compliance review. Consider having an environmental audit conducted on property owned by the company. Consider the impact of contaminated sites legislation.</p> <p>3.8 Consider reviewing GST/HST returns filed.</p> <p>3.9 Consider consulting a tax expert.</p> <p>3.10 Consider the impact on the transaction of the <i>Family Relations Act</i>, R.S.B.C. 1996, c. 128; the <i>Investment Canada Act</i>, R.S.C. 1985, c. 28 (1st Supp.); the <i>Competition Act</i>, and other relevant legislation.</p> <p>3.11 Open a document file and retain successive drafts of the agreement. Open a separate file for each major document required in the transaction.</p>					
<p>4. DRAFTING THE AGREEMENT</p> <p>4.1 Before drafting the agreement, prepare a timetable and a draft of the closing memorandum that will act as a reminder of what is required in the transaction and when.</p> <p>4.2 Prepare an outline of the document. The SHARE PURCHASE AGREEMENT DRAFTING (B4) checklist may serve as a basis for the document.</p> <p>4.3 Prepare the first draft.</p>					

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<p>4.4 Review the first draft for coherence and continuity. Review the first draft with client to ensure that it expresses client’s intentions.</p> <p>4.5 When you and client are satisfied with the agreement, send it to the vendor or his or her solicitor for comment and changes.</p> <p>4.6 Note changes to the agreement during the course of negotiation in some readily discernible manner.</p> <p>4.7 Do not alter the document without indicating the changes to the vendor’s solicitor.</p> <p>4.8 When negotiations are concluded, prepare the final agreement and check to ensure that the document incorporates the transaction as it has been formulated and agreed.</p> <p>4.9 Arrange for signing the agreement.</p>					
<p>5. PRIOR TO CLOSING</p>					
<p>5.1 Prepare or obtain all the necessary documentation (consult the SHARE PURCHASE AGREEMENT DRAFTING (B4) checklist for additional considerations), including:</p> <p>.1 Notices, applications for review, or rulings pursuant to the <i>Investment Canada Act</i>, the <i>Competition Act</i>, and any other relevant regulating legislation. Consider applying for advance ruling certificate under the <i>Competition Act</i>.</p> <p>.2 A directors’ resolution of the target company authorizing the transfer of shares.</p> <p>.3 A certificate pursuant to s. 116 of the <i>Income Tax Act</i>, R.S.C. 1985, c. 1 (5th Supp.), if the vendor is a non-resident.</p> <p>.4 A directors’ resolution of the purchaser (if a company) authorizing the transaction.</p> <p>.5 If the vendor is a company, a director’s resolution of the vendor authorizing the transaction. If the shares of the target company represent substantially all of the assets of the vendor, a special resolution of the shareholders of the vendor authorizing the transaction.</p> <p>.6 Recording the transfer in the share register of the target company, issuance of new shares, and cancellation of old shares.</p> <p>.7 Waivers of any pre-emptive rights or rights of first refusal.</p> <p>.8 Officer’s certificate of vendor, dated on closing date, attesting to the accuracy of representations and warranties contained in the share purchase agreement, the fulfillment of vendor’s pre-closing covenants, and the waiver or fulfillment of vendor’s conditions precedent.</p> <p>.9 Opinion of vendor’s solicitor making proper qualifications and assumptions, with respect to the vendor or the target or both and asserting among other things:</p> <p>(a) Valid incorporation of company and vendor.</p> <p>(b) The company and vendor are in good standing.</p> <p>(c) All necessary steps and proceedings have been taken to effect share transfer and transaction.</p>					

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<p>(d) Capital structure and vendor’s interest are as represented.</p> <p>(e) Outstanding shares are validly issued, fully paid, and non-assessable.</p> <p>(f) Company has good and marketable title to assets in schedule subject only to specified encumbrances.</p> <p>(g) No legal actions against company or vendor are threatened or in progress; vendor’s solicitor could consider qualifying this with reference to searches or officers’ certificates relied upon.</p> <p>(h) To best of knowledge, there is no cause for legal action against company.</p> <p>(i) Agreement fully enforceable against vendor; vendor’s solicitor consider whether to grant this opinion.</p> <p>(j) In reliance on officer’s certificate and without independent investigation, the representations and warranties are true.</p> <p>(k) Consider above opinions where necessary regarding a corporate vendor.</p> <p>(Note: Many of the preceding items may be resisted by vendor’s counsel and may not be appropriate.) Consider review of CLEBC’s <i>Solicitors’ Legal Opinions—2001</i>.</p> <p>.10 Resignations of directors and officers and releases from them in favour of the target company. (Note vendor may request releases in favour of directors and officers.)</p> <p>.11 Shareholders’ resolution appointing new directors.</p> <p>.12 Directors’ resolution appointing new officers.</p> <p>.13 Third party consents as necessary.</p> <p>.14 Non-competition agreements.</p> <p>.15 Documentation transferring the registered and records office.</p> <p>.16 Discharges of loans/charges to be discharged on closing.</p> <p>5.2 Ensure that the conditions of client’s obligation to close have been or will be satisfied.</p> <p>5.3 Complete the financial arrangements.</p> <p>5.4 Prepare the final draft of the closing agenda.</p> <p>5.5 Have the parties sign the necessary documentation prior to closing (to be held in escrow pending closing if tabled) and marshall the documents for each party.</p> <p>5.6 Update searches for closing.</p> <p>5.7 Obtain cheques or receipts for cheques as necessary.</p> <p>5.8 Consider application of <i>Proceeds of Crime (Money Laundering) and Terrorist Financing Act</i>, S.C. 2000, c. 17.</p> <p>6. CLOSING</p> <p>6.1 Ensure that all the conditions of closing are satisfied or waived.</p> <p>6.2 Obtain acknowledgment in writing that all conditions of closing have been satisfied or waived.</p>					

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<p>6.3 Ensure that each party receives the appropriate documents and funds.</p> <p>6.4 Obtain books and records of company.</p> <p>6.5 Obtain company seal.</p>					
<p>7. POST CLOSING</p>					
<p>7.1 Prepare a reporting letter and account as soon as practical after closing. Forward the documents to client and indicate those matters requiring further action. Alternatively, advise client to review the documents to determine what further action is required. Additionally, consider including a “post closing” section in the closing agenda, setting out all post closing matters (e.g., filings, registrations, deferred payments, press releases), and the party responsible for each matter.</p>					