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Practice Material
Real Estate

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Chapter 1

Introduction

Each year, lawyers in British Columbia help buyers and sellers with many thousands of transfers of real property, commonly known as conveyances.

Lawyers who have a conveyancing practice often rely on non-lawyers, including paralegals and legal assistants, to assist with some stages or parts of a transaction. As well, lawyers are often consulted by clients who have already been working with a “licensee” (a person providing real estate services under the Real Estate Services Act, S.B.C. 2004, and licensed by the Real Estate Council of BC, often referred to as a “realtor”).

To build a healthy and sustainable conveyancing practice, a lawyer must understand the context of a residential real estate transaction, the parties involved, each party’s role and obligations, and the laws that govern them.

This chapter looks briefly at the parties, their roles, and the statutes that govern the transfer of ownership and interests in land. Subsequent chapters look at the stages of the transaction.

[$1.01] Role of the Lawyer

In a conveyancing practice the lawyer’s essential role is to complete the transaction. This role includes fixing any issues left to the lawyer by the realtor or by the parties themselves (where the deal is private).

It is important for a conveyancing lawyer to build a positive reputation early. Becoming known as a deal-wrecker will not result in repeat referrals from realtors—the life-blood of a healthy conveyancing practice. Building a practice requires developing a good inventory of practical solutions and understanding the classic motivations of buyers and sellers while balancing the lawyer’s ethical and legal responsibilities.

In a stable market, where the price of real estate is neither climbing nor falling sharply, it is usually a relatively easy process to complete transactions. In a volatile market a lawyer’s lack of understanding of what needs attention and when can expose the lawyer to insurance claims and can damage the lawyer’s reputation in the real estate community.

It is important that a lawyer have a fully developed knowledge of the law governing real estate transactions, especially during periods of volatility. However, clients or realtors do not hire you to show your knowledge of all the rights and remedies, but to execute the actual transaction. The lawyer should adopt a practical approach to conveyancing and develop knowledge of the soft spots (where deals are their weakest) and a repertoire of fixes.

A lawyer will have a successful practice when the lawyer’s knowledge of the law governing real estate transactions and of the lawyer’s professional responsibilities serves as the box containing a practical toolkit.

Lawyers should keep current with the publications and programs of the Continuing Legal Education Society of BC (CLEBC). As well, officials in the three Land Title Offices are extremely helpful in assisting practitioners to resolve problems. In addition, attending the monthly meetings of the Real Property sections of the Canadian Bar Association is a useful way of staying current on law and practice changes. It can be helpful to maintain relationships with surveyors, municipal planners, appraisers, insurance underwriters and fellow practitioners.

For an effective and economic conveyance to proceed to completion, there must be efficient management procedures and proper file administration in place. The lawyer must be very well organized and have a system to approach the steps of the conveyance. Of utmost importance is a checklist where each of the steps in a conveyance can be reviewed to ensure that no essential matter is neglected. Refer to the practice manuals published by CLEBC and the Law Society of British Columbia’s Practice Checklists Manual (www.lawsociety.bc.ca/support-and-resources-for-lawyers/practice-checklists/).

1. Buyer’s Lawyer

The role of the buyer’s lawyer is to deliver what the client is expecting, without surprises. Generally this means delivering title clear of financial encumbrances of the seller and any avoidable negative charges.

The buyer’s lawyer will do the heavy lifting in a real estate transaction, including drafting or reviewing the contract (unless the contract is delivered to the lawyer completed by the licensee); reviewing title; preparing most of the transaction documents; and coordinating signatures, registration and money exchanges.

The buyer’s lawyer must be alert to many practical considerations in order to carry out these responsibilities in a timely manner. The lawyer must know
how long it takes for money to move from the client to the lawyer. This depends on where funds originate, how they are sent, and what form they take. For example, certified cheques from foreign jurisdictions can take more than a month to clear in the lawyer’s trust account. Locally drawn cheques deposited to trust account can also take a week or two to clear, and require time-consuming follow up with banks to confirm clearance. Deposits (even of certified funds) over certain thresholds for certain banks also require clearance time. Wire transfers may present a solution to most money moving issues encountered when receiving closing proceeds from the buyer, but the cutoff times for such transfers should be carefully noted. Where there is a very short timeline for closing, it is even more important for the lawyer to understand how funds will be transmitted and to anticipate timing issues.

Early on, the buyer’s lawyer must evaluate all the timing factors. If the existing transaction timeline does not look feasible, the lawyer should ask for an extension of the completion date (or give an early warning that an extension might be needed) while avoiding anticipatory breach of the contract. Creating a list of “critical dates” at the outset is recommended to assist in making this determination, particularly if the lawyer did not prepare the purchase agreement. It is easier to obtain an extension from a seller if the request is made early so as to minimize surprise and the chance of the seller compounding the problem by having entered into new commitments based on assuming timely completion.

On receipt of registrable transfers, the buyer’s lawyer must provide the fundamental undertaking to the seller’s lawyer to not file the transfer until the buyer’s lawyer has sufficient funds in trust to complete the transaction. Where there is a mortgage, this undertaking is modified to provide that the buyer’s lawyer must hold funds in trust that, when combined with the amount to be advanced by the mortgage lender, are sufficient to complete the transaction, and that the buyer’s lawyer must know of no reason why the new mortgage would not be registered and funds disbursed in the ordinary course of business.

2. Seller’s Lawyer

The primary role of the seller’s lawyer is to vet the documentation produced by the buyer’s lawyer and pay out the seller’s financial encumbrances prior to paying net sale proceeds to the seller. The buyer’s lawyer’s letter enclosing the documents will generally identify what will have to be paid out, but both sides should obtain a current copy of the title to verify. The seller’s lawyer must find out the amounts due and confirm that there will be enough money to go around, especially if there are holdbacks for builders’ liens, deficiencies or non-resident tax security.

The seller’s lawyer must also be mindful of practical issues caused by client travel, location and residency, particularly because the seller must execute certain closing documents in the presence of a lawyer or notary. The lawyer will have to manage client expectations early about receiving sale proceeds so that the client does not make impossible commitments based on unrealistic expectations.

The seller’s lawyer provides the fundamental undertaking to clear title. In practice this means not paying the seller without having paid out the financial encumbrances first. Most financial institutions are obligated to provide a registrable discharge in due course after payment. However, where an encumbrance is private or exceptional, the seller’s lawyer will often have to obtain the registrable discharges before allowing the transaction to complete. Complications can arise when the encumbrance is an old private mortgage, long paid off, but the mortgage lender has died or otherwise disappeared. If a private mortgage is registered on title, the seller’s lawyer should consider the steps involved in the discharge process as early as possible.

[§1.02] Role of Non-lawyers

In many law offices, someone other than a lawyer carries out many of the early steps in a real estate transaction. For example, often the initial information and instructions will come from a non-lawyer conveyancer such as a notary, licensee, lender/mortgage officer, or insurance agent. Additionally, a paralegal or legal assistant will often prepare the majority of the documents necessary to complete the real estate transaction.

Despite the number of people involved, there should be one person in charge of the conveyance: the lawyer who has taken, or been given, conduct of the transaction. It is the lawyer who must always keep sight of the client’s interests. A real estate transaction does not just happen; it moves to completion because of the considered efforts of the responsible lawyer. These efforts are for the benefit, and on the instructions, of the client.

Chapter 6, section 6.1, rule 6.1-1 of the Code of Professional Conduct for British Columbia (the “BC Code”) contains the guiding principle as to the division of responsibility between the lawyer, the legal assistant, and other staff:

Direct supervision required

6.1-1 A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.
The Practice Material: Real Estate has been prepared on the assumption that the lawyer has a direct hand in each of the transactions discussed, and on the further assumption that the lawyer has direct contact with the client throughout. In reality, this is often not the case. An effective conveyancing real estate practice is often a matter of effective administration, communication and assignment. In other words, it is not economical for a lawyer to attend to each individual step and most lawyers who handle conveyances rely on their legal assistants and paralegals to perform important elements of the transaction.

Section 6.1 of the BC Code sets out limits on the roles of non-lawyer staff in a law firm. For example, under rule 6.1-3, a non-lawyer may not give legal advice (rule 6.1-3(b)) or act finally and without reference to the lawyer in matters involving professional legal judgment (rule 6.1-3(d)). In real estate transactions, examples of tasks a legal assistant or paralegal may take on include attending to routine matters and drafting correspondence and documents, provided the lawyer attends on the client to advise and take instructions on all substantive matters, and meets other criteria under section 6.1. Paralegals, as non-lawyers with legal training, can perform an expanded range of tasks under the supervision of a lawyer (see rule 6.1-3 for criteria with respect to employing a paralegal). A paralegal who is a “designated paralegal” may be permitted to give legal advice if the paralegal has the necessary skill and experience (rule 6.1-3.3). There is current discussion as to whether “licensed paralegals” might be permitted an increased scope of practice.

Certain tasks cannot under any circumstances be delegated. For instance, a lawyer must sign any letter imposing an undertaking (see Ethics Committee opinion May 1996, item 6). As well, as discussed further in Chapter 5, both the BC Code and Law Society Rules prohibit a lawyer from permitting anyone else (including assistants) to use the lawyer’s electronic Juricert password to sign documents for filing in the Land Title Office.

The Law Society has censured lawyers heavily for failure to comply with these rules. Consequently, delegating tasks to paralegals and legal assistants should be considered carefully.

See also the Practice Material: Professionalism: Practice Management, Chapter 1, §1.03, with respect to lawyer’s responsibilities and support systems.

[§1.03] Statutes Governing Land Ownership in British Columbia

Real estate law involves a large body of common law and a great deal of legislation, including many (often obscure) regulations, some of which are described in these materials. It is difficult for any person to be familiar with more than a small part of this body of knowledge. It is perhaps most useful to be aware of the breadth and specialized nature of the field and to keep current in terms of the many resources available, both inside and outside the profession. A list of resources is at §1.06.

1. Land Title Act

In British Columbia, the Land Title Act (the “Act”) is the key statute for conveyancing transactions. Some of the more significant provisions of the Act will be touched on briefly here.

Section 1 of the Act defines words and phrases for the purposes of the Act and regulations made under it. Section 4 provides for the division of land in British Columbia into seven land title districts.

The boundaries of each land title district are set out in s. 3 and Schedule A of the Land Title Act (Board of Directors) Regulation, B.C. Reg. 332/2010. Responsibility for the seven land title districts is divided among the three Land Title Offices (New Westminster, Victoria and Kamloops).

The Land Title and Survey Authority of British Columbia manages the land title and survey systems in British Columbia.

Part 3 of the Act (ss. 20 to 38) contains the provisions that form the foundation of the British Columbia Torrens system. Under the Torrens system, security of title is based on the principles of indefeasibility (s. 23), registration (ss. 20 to 22) and abolition of notice (s. 24). Section 25(3) provides that a state of title certificate is conclusive evidence of title (assurance).

In effect, ownership of, and charges both against and for the benefit of land, are construed by a registered indefeasible title and evidenced by a title issued by the Land Title Office which includes the name of the owner and the names of any others that have interests in the property. Other interests include, for example, mortgages, leases, easements, covenants, rights-of-way and certificates of pending litigation. Registration has the effect of passing the estate or interest in land.

Some exceptions exist to the principle of indefeasibility. These are set out in s. 23(2) of the Act.

With the adoption of the Torrens system, the principle of notice was abolished. In British Columbia it is not necessary to make an exhaustive inquiry into the validity of a title or an interest. Rather, a person who deals with land is entitled to rely on the Land Title Office register. Some exceptions to this principle are set out in s. 29 of the Act.

Except where a contrary intention appears in the instrument, or subject to the other qualifications concerning a caveat or certificate of pending litigation as set out in s. 28, registered interests in land take priority according to the date and time at which the
registrar receives the application for registration. However, because of these qualifications, it is important to note that the order that charges appear on the title may not signify their priority.

Forms of instruments that are registrable in the Land Title Office are dealt with in Part 4 of the Land Title Act and in the Director’s Requirements (online: ltsa.ca/practice-information/director-land-titles-requirements). The key prescribed forms are the Form A Freehold Transfer (to pass or create an estate or interest in land); Form B Mortgage (to record a charge of mortgage on title); and Form C General Instrument (used for various purposes including the registration and discharge of different types of charges on land).

The Land Title Electronic Filing System (“EFS”) requires users (typically lawyers, notaries and Land Title agents) to use an electronic format of the forms to submit many types of Land Title filings online. As of March 31, 2014, e-filing of virtually all documents is mandatory. For more information on EFS and other Land Title forms, see Chapter 5.

Requirements for preparing, executing and filing Land Title documents are technical. Lawyers should review any amendments to the legislation and the practice guides before drafting documents or submitting them for registration in the Land Title Office (see the Land Title Electronic Forms Guidebook and the EFS User’s Guide). A trained real estate paralegal can be invaluable in helping a lawyer prepare forms and avoid delays in registrations due to defects with their Land Title filings.

The provisions highlighted here, and other significant provisions of the Act, will be reviewed further in the subsequent chapters.

2. Land Act

The Land Act governs the disposition of provincial Crown land in British Columbia. Section 50 sets out the reservations and exceptions in every disposition from the Crown. For example, a Crown land grant does not include rights to minerals, coal, geothermal resources or oil and gas, nor does it include rights to water bodies, unless the Crown grant contains an express provision to the contrary. There is an application process for obtaining a grant of Crown land which is set out in the Land Act. If you are the lawyer for a party seeking to acquire this type of property, you should ensure that your client understands that the client will purchase the property subject to the reservations and exceptions set out in the Land Act unless the Crown grant states otherwise.

3. Strata Property Act

The Strata Property Act provides for the creation of legally described parcels of land called “strata lots.”

The Strata Property Act came into force on July 1, 2000, replacing the Condominium Act. Certain provisions of the Strata Property Act require that additional steps be taken when completing a conveyance of a strata lot. For example, s. 256 prohibits the registration of a transfer of a strata lot in a Land Title Office, unless accompanied by a Form F, “Certificate of Payment.”

The easiest way to approach a transaction involving a strata lot is to consider it to be both an interest in land and a share in a corporation. Some of the more important provisions of the Strata Property Act are summarized as follows:

s. 2(1)(b) The owners of the strata lots in the strata plan are members of the strata corporation under the name “The Owners, Strata Plan No. . . . [the number of the plan].”

s. 3 The strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.

s. 54(c) If an owner’s interest is subject to a registered mortgage, the mortgage may provide that the power of voting conferred on an owner may be exercised by the mortgagee only in respect of any matter relating to insurance, maintenance, finance, or other matters affecting the security for the mortgage.

s. 59 The strata corporation is required to supply to an owner, a buyer or the buyer’s authorized licensee an Information Certificate (Form B). This certificate must include certain financial items (such as the monthly strata fees and whether or not the strata corporation is in good standing), the amount of the contingency reserve fund, any amendments to the bylaws not yet filed in the Land Title Office, and the details of any lawsuits or arbitration against the strata corporation. This is an important disclosure section for a buyer.

s. 67 For the purposes of assessment and taxation, each strata lot, together with its share in the common property, is deemed to be a separate parcel of land.

s. 79 The strata corporation must pass a resolution by a ¾ vote at an annual or special general meeting to sell, lease, mortgage, grant an easement over, grant a restrictive covenant affecting or otherwise dispose of land that is a common asset.
s. 81 The strata corporation must not mortgage common property.

s. 88 There are special builders lien provisions for the sale of strata lots by an owner developer. Except for the provisions of ss. 87 to 90, the Builders Lien Act applies. Under s. 88(1):

Despite any other Act or agreement to the contrary, if an owner developer [i.e. the first owner of the strata lot upon filing of the strata plan] conveys a strata lot to a purchaser, a claim of lien under the Builders Lien Act filed against the strata lot, or against the strata lot’s share in the common property, must be filed before the earlier of

(a) the date on which the time for filing a claim of lien under the Builders Lien Act expires, and

(b) the date which is 45 days after the strata lot is conveyed to the purchaser.

s. 88(2) The buyer is required to maintain a holdback until the earlier of the date on which the time for filing a claim of lien under the Builders Lien Act expires and the date which is 55 days after the strata lot is conveyed to the buyer.

s. 5.2 For the purpose of s. 88(2) of the Strata Property Act, the holdback for the purchase of a strata lot from an owner developer is prescribed as 7% of the gross purchase price.

s. 92 The strata corporation must establish an operating fund for common expenses that usually occur once a year, or more often than once a year, and a contingency reserve fund for common expenses that usually occur less than once a year.

s. 115 The strata corporation must, within one week of the request of an owner or purchaser, or a person authorized by an owner or purchaser, give the person making the request a Certificate of Payment in the prescribed form, provided the owner doesn’t owe money. The Certificate is current for 60 days from the date it was issued for the purpose of s. 256.

s. 256 The registrar must not accept a lease, an assignment of a lease, an agreement for sale, or a conveyance of title to a strata lot, unless the document is accompanied by a current Certificate of Payment in the prescribed form referred to in s. 115 or, in the case of an electronic application for registration, unless the document is accompanied by an electronic declaration under s. 168.41 of the Land Title Act.

[§1.04] Other Statutes and Rules Relevant to Ownership

1. Property Law Act

The Property Law Act contains substantive law relating to the rights and obligations of parties to a real estate transaction. Of particular interest are the following sections:

- ss. 4 to 6;
- ss. 11 to 12;
- ss. 16, 18, 20 to 24; and
- ss. 33, 36 to 37 and s. 39.

Section 5(1) provides that a person transferring land in fee simple must deliver to the transferee a transfer registrable under the Land Title Act. Section 5(2) also requires that a landlord who makes a lease for a term of more than 3 years deliver a registrable instrument or agreement with respect to the lease to the tenant, unless there is an agreement to the contrary. However, generally a commercial lease will prohibit registration or put the cost of registration on the tenant.

Also note that ss. 11 and 12 suggest that persons who buy an interest in land together do not automatically take title as joint tenants: the persons will be deemed to be tenants in common unless a contrary intention appears in the instrument. As there are pros and cons to each form of joint ownership, it is important to determine what a client is seeking to do with the property in order to properly advise the client.

Section 18 allows a person to transfer land to him or herself. This is a method of severing a joint tenancy. Section 18 is also useful for other purposes, such as allowing a person to register an easement to him or herself over adjoining properties.

The issues that arise from s. 22—the personal covenant aspect of a mortgage—are discussed in greater detail in Chapter 7.
2. **Family Law Act**

The *Family Law Act* is important to conveyancing lawyers because a spouse who is not registered as an owner of real estate is, in certain instances, given rights to real estate registered to his or her spouse. Conveyancing lawyers should ask their clients about personal relationships. If there is any indication that a seller and the seller’s spouse have separated, lawyers should consider the points below.

Some of the more important provisions of the *Family Law Act* are ss. 81, 99 and 103.

Section 81 of the *Family Law Act* provides that on separation a spouse has a right to an undivided half interest in all family property as a tenant in common. This provision would apply to an interest in real property. Section 103 of the *Family Law Act* provides that s. 29 of the *Land Title Act*, which protects innocent buyers who have notice of unregistered interests, also applies to an interest of a spouse in land under the *Family Law Act*.

However, s. 29 of the *Land Title Act* has not always been strictly applied by the courts, so notice of an interest arising from a separation could later cause problems for the buyer. Often a licensee knows that a property is on the market because of a marriage breakdown. Accordingly, it is important to advise a purchasing client about the effect of a separation, in case the client has had some notice.

Another concern arises when a spouse who is involved in a marital dispute attempts to obtain mortgage financing. When acting for a lender in such a case, be sure to review your instructions carefully, and if you are aware of any potential difficulty, consider raising the marital status of the borrower with the lender.

Be aware of potential conflicts when acting for more than one party in any transfer of property where there is any potential for a marital dispute.

Section 99 provides that a party to a marriage or separation agreement may file a notice of agreement in a Land Title Office as a charge against the land described in the notice. The registrar will then not allow the registration of a transfer or any other dealings with the land unless each party to the agreement signs and files a cancellation or postponement notice.

Be aware of any special requirements when you are acting for a spouse of a member of a treaty First Nation. Some treaty First Nations have specific provisions regarding marriage or common law breakdown in relation to land or property holdings.

3. **Fraudulent Conveyance Act, Fraudulent Preference Act, and the BC Code**

Clients must understand the legal consequences if the purpose of a conveyance or other transaction is to delay, hinder or defraud creditors of their just and lawful remedies. The *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, and the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164 contain provisions rendering such conveyances void or capable of being set aside.

If you are acting for a party to a transaction and become aware that the purpose of the transaction is to avoid creditors, you must not continue to act. If you become aware that your client is transferring property to avoid creditors, even if your client has no current creditors but is simply anticipating potential future creditors, you are likely unable to continue to act for the client.

The *BC Code* prohibits lawyers from assisting or encouraging any dishonesty, crime or fraud. Rule 3.2-7 of the *BC Code* states (in part):

A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.

Commentary

[1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

[2] A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: [. . .] purchasing and selling real estate.

[3] Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in any dishonesty, crime or fraud, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature and purpose are not clear.
[3.1] The lawyer should also make inquiries of a client who:

(a) seeks the use of the lawyer’s trust account without requiring any substantial legal services from the lawyer in connection with the trust matter, or

(b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.

[3.2] The lawyer should make a record of the results of these inquiries.

[§1.05] Indigenous Land Claims and Interests in Reserve Lands

A thorough treatment of the field of Indigenous rights to land (also called Aboriginal title in many decisions) is beyond the scope of the Practice Material: Real Estate. This material aims only to flag certain issues of potential significance to conveyancers and to highlight some ways that dealing with land that is subject to Indigenous claims involves special considerations. General background information can be obtained from the Continuing Legal Education Society of BC’s Indigenous law materials and by looking to authoritative secondary texts and manuals, of which there are many.

As a starting point it is important to understand that there are legal systems in place that govern and manage interests in Indian reserve lands located in British Columbia. These are specific, varied and complex. The laws concerning the conveyancing and management of reserve lands are distinct from the laws concerning lands situated outside a reserve but to which Indigenous people claim title. The laws for interests in reserve lands are distinct also from the laws and procedures that apply to conveyances of fee simple lands or transactions or lease agreements respecting lands owned by an Indigenous Band but located outside the reserve lands of that Nation (off-reserve land transactions).

In this section, we provide only a general background to land claims by Indigenous people. We then present a brief overview of the systems in place in British Columbia for managing and registering interests in reserve lands.

NOTE: In August 2017, the federal government announced plans to dissolve Indigenous and Northern Affairs Canada (INAC) and create two new departments led by different ministers: 1) Crown-Indigenous Relations and Northern Affairs (CIRNA), and 2) Indigenous Services Canada (ISC). The split is in progress. Generally, CIRNA deals with land claims, treaty negotiations and agreements on land rights, while ISC deals with housing, leasing reserve land, and services under the Indian Act.

1. Background to Indigenous Land Claims

Indigenous people claim title (often called “Aboriginal title”) to lands they occupied before British sovereignty was asserted in what is now Canada. Aboriginal title is known legally as a “burden” on Crown title to land. In brief, the burden arises from the prior use and occupation of lands by Indigenous peoples, which was recognized by the British King George III in the Royal Proclamation of 1763. The Royal Proclamation set out guidelines for the British settlement of what is now North America. It confirms that Indigenous people have had title to their lands and continue to have title. It forbids settlers from buying land directly from Indigenous people, and says that only the Crown can buy land from Indigenous people. Although the Royal Proclamation was written from the perspective of British settlers without input by Indigenous people, it affirms that Indigenous people have title to land. The Royal Proclamation has not been overruled, and is consistent with s. 35 of the Constitution Act, 1982, which also affirms pre-existing Indigenous rights.

Indigenous people claiming title claim a common law interest in land that is held collectively by the members of the First Nation or Indigenous group, which can be alienated by that Band or group only to the Crown in right of Canada.

In much of Canada, the Government of Canada negotiated treaties with Indigenous peoples, under which those peoples surrendered rights and title in exchange for treaty rights and land entitlements. Historically, except on southern Vancouver Island and in northeastern British Columbia, treaties were not negotiated with Indigenous peoples in British Columbia. As a result, many Indigenous peoples in British Columbia assert that they continue to have rights on and title to lands that they have traditionally occupied.

Assertions of Indigenous rights to land or Aboriginal title frequently occur in response to a decision by the provincial or federal government to grant an interest in a parcel of Crown land to a third party. They also emerge as part of treaty negotiations, or as a challenge to the validity of an existing interest in land.

The leading case in Canada on Indigenous claims of land title is Tsilhqot’in Nation v. British Columbia, 2014 SCC 44. In this judgment, the Court found for the first time that Aboriginal title had been established to a particular area of land. In doing so, the Court applied the test in Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (S.C.C.) (formerly the leading British Columbia case on land claims by Indigenous people), which states that to establish
title to a parcel of land, an Indigenous group must meet the following criteria:

1. the land must have been **occupied** by the Indigenous group prior to British sovereignty;
2. if present occupation is relied upon as proof of pre-sovereignty occupation, there must be **continuity** in occupation between the present and the pre-sovereignty occupation; and
3. at the time of sovereignty the occupation must have been **exclusive**.

The Court clarified that sufficient “occupation” for the purposes of this test means occupation in the sense of regular and exclusive use of the land, which can be established in a number of ways and is a question of fact dependent on all the circumstances. As well, this decision reiterated a number of key existing principles of law with respect to Indigenous land claims, a number of which are set out here.

Where an Indigenous group establishes title based on a claim of Aboriginal title, it confers the right to the exclusive use and occupation of the land and to reap the benefits flowing from the land. This right is subject to the restriction that the use cannot be inconsistent with the group nature of the interest and the enjoyment of the land by future generations. Lands held under this form of title cannot be sold, transferred, or surrendered to anyone other than the Crown. A Band or Indigenous group therefore cannot convey land held under Aboriginal title to third parties.

Since Indigenous peoples’ title to land is protected under s. 35 of the *Constitution Act, 1982*, it enjoys constitutional protections against unjustifiable extinguishment or infringement by government. As confirmed in *Tsilhqot'in*, where such title is asserted but not yet established, governments have a duty to consult with the relevant Indigenous group and, where necessary, accommodate the asserted interest. For instance, the BC Court of Appeal suspended the sale of land affected by assertions of Aboriginal title for two years, finding that the government had failed to meet its duty to accommodate a strong title claim by the Indigenous group. In that case the government entered into an agreement with a third party to transfer title to the affected land before the Indigenous land claim had been determined or otherwise resolved through treaty settlement (*Musqueam Indian Band v. British Columbia* (Minister of Sustainable Resource Management), 2005 BCCA 128).

Where an Indigenous group establishes a claim of Aboriginal title, a government may infringe on that title only if the government has the consent of the Indigenous group or if the government can show that the infringement is justified. The justification test requires considering if the action is justified by a compelling and substantial government objective and is consistent with the Crown’s fiduciary duty to the Indigenous group. As stated in *Tsilhqot'in*, provincial laws apply on lands over which Aboriginal title is claimed or proven, subject to the justification test. The Court also stated that if Aboriginal title is later established, prior Crown decisions and legislation may need to be reassessed if they would result in unjustifiable infringement of title. The potential effect of these comments remains to be seen.

Most of the province of British Columbia is subject to claims of unextinguished Indigenous rights or title. However, unless one receives notice of a claim by the Indigenous group making the claim, it remains difficult to determine whether a given parcel of land is subject to such claims. Aboriginal title cannot be registered in the Land Title Office, as it lacks the element of marketability necessary to establish a “good safe holding and marketable title” as required under the *Land Title Act* (*Uukw v. British Columbia* (1987), 16 B.C.L.R. (2d) 145 (C.A.)). As such, the BC Court of Appeal confirmed the registrar’s refusal to register a certificate of pending litigation and a caveat arising out of a challenge to a transaction involving fee simple land, on the basis that Aboriginal title is not a registrable interest (*Skeetchestn Indian Band and Secwepemc Aboriginal Nation v. Registrar of Land Titles, Kamloops*, 2000 BCCA 525). Thus, a prospective buyer cannot determine by a search of the land title records if a given parcel of land is subject to unresolved claims of rights or title by Indigenous people.

To date, with the exception of the parcel of land identified in *Tsilhqot'in*, Aboriginal title to specific land has not been recognized by the courts in British Columbia. Therefore, most practitioners who encounter claims of title by an Indigenous group will find that the claim to the particular land in issue has not been confirmed by the courts.

For the conveyancer, Aboriginal title creates legal uncertainty of a magnitude that is currently difficult to predict. The prudent practitioner will monitor developments in the field and be aware of the potential for questions of title by Indigenous people to arise in any transaction. Lawyers who encounter such title issues in conveyancing transactions are urged to consult specialists in the field. They also may be wise to consider title insurance for purchases of these lands.

2. **Indian Act** and Indian Land Registry

Indian reserve lands are not governed by the provincial Torrens system under the *Land Title Act*. Most transactions regarding interests in Indian
reserve lands located in British Columbia are governed by the federal Indian Act, R.S.C. 1985, c. I-5, unless the Indigenous group develops its own agreement with the federal government. See §1.05(3), §1.05(4) and §1.05(5) below regarding some of these arrangements. The rules and procedures for dealing with reserve lands can vary considerably depending on whether the Indigenous group claiming rights or title has entered into an agreement with the federal government regarding the reserve lands. Those Indigenous people whose reserve lands are governed by the Indian Act do not have the power to develop and manage reserve lands.

If the lands are governed by the Indian Act, the first thing to determine is whether the land in question is locatee land or Band land.

(a) Locatee land

“Locatee land” (also called “Certificate of Possession lands” or “CP lands”) refers to land within a reserve to which a member of an Indigenous group (the “locatee”) has acquired lawful possession pursuant to s. 20 of the Indian Act. Evidence of this right of possession is usually contained in a Certificate of Possession issued in the name of the locatee. The holder of such a certificate has rights similar to those of a private owner but with the limitation that the land can only be alienated to another member of the same Indigenous group.

Under s. 58(3) of the Indian Act, the Minister (formerly of INAC, presently of Indigenous Services Canada) has the power to lease land for the benefit of the locatee. Although the Indian Act does not require it, the federal government has a policy that any proposed lease of locatee land for more than 49 years must be approved by a vote of members of the Indigenous group involved. If the proposed lease is for less than 49 years, a vote by the members is not required but a resolution from the group or Band will be required to confirm that council does not object to the lease.

(b) Band land

“Band land” refers to land within a reserve that is not subject to the rights of an individual member of the First Nation or Indigenous group. Band land may be leased after it has been designated under s. 38(2) of the Indian Act.

Land can be designated through a referendum of the relevant Indigenous group’s electors (persons registered on a Band List or membership list who are 18 years of age or older and not otherwise disqualified from voting at Band elections). Approval requires that a majority of the Indigenous group’s electors cast a vote and that a majority of those voting approve the designation.

If the quorum is not met on the referendum, but a majority of those voting approve the designation, then a second referendum is required. On this second vote there is no quorum required for approval but a majority of those voting must still approve the designation. Therefore, it is best to work closely with the governing council before holding the first referendum to ensure that the quorum is met on the first vote.

In British Columbia the Minister of Indigenous Services Canada (formerly INAC) is the primary administrator of all transactions involving designated lands, except for those belonging to First Nations that have specific land management powers (see §1.05(3)).

Transactions involving interests in reserve lands are managed under the Indian Act by the federal government (formerly INAC). The Indian Land Registry (ILR) is one tool for registering interests in reserve lands. Currently the ILR is managed by Indigenous Services Canada: services.aadnc-aandc.gc.ca/ilrs_public. The ILR is accessible by the public (users set up an account). It provides records relevant to ownership, leases, permits, and other interests that may apply to land: www.aadnc-aandc.gc.ca/eng/1100100034803/1100100034804.

Unlike the provincial registry, the ILR is not based on a Torrens system—it is based on a root of title system. This means that a person who is searching entitlements must trace the history of the interest back to the original designation (in the case of designated lands) and to the original grant of the Certificate of Possession (in the case of locatee or CP lands).

It is important to note some key differences in the transactions involving reserve lands. The standard forms and documents used under the Land Title Act are not appropriate to transactions involving reserve lands since the Land Title Act does not apply. The Indian Lands Registration Manual (www.aadnc-aandc.gc.ca/eng/1100100034806/1100100034808) provides information about documents and procedures for registration in the ILR. In addition, provincial statutes affecting land, such as the Real

Real Estate
4. Self-Governing Band-Adopted Registry System

Some Indigenous groups in British Columbia are self-governing. Under the legislation applicable to those Nations they have powers over some or all of the land that formerly constituted their reserves.

Two self-governing Nations are the Sechelt Indian Band (under the Sechelt Indian Band Self-Government Act, S.C. 1986, c. 27) and the Westbank First Nation (under the Westbank First Nation Self-Government Act, S.C. 2004, c. 17).

(a) Sechelt Indian Band

Title to the former reserve land has been transferred to the Sechelt Indian Band in fee simple. The Band is authorized, but not required, to use the provincial land title system for registration of dealings with its land. Titles that are not registered under the provincial system will still be registered under the Indian Act.

Practitioners should note that both the Sechelt Indian Band and the Sechelt Indian Government District have powers to regulate the use of Sechelt lands.

(b) Westbank First Nation

Title to the Westbank reserve lands remains with the Crown but the Westbank First Nation has all the rights and powers of an owner of the land. Transactions dealing with Westbank lands are registered in the Westbank Lands Register and not the provincial land title system. Under the Westbank registry system, registered interests in land have priority over unregistered interests. Priority between registered interests is based on the time and date of registration.

5. Fee Simple by Treaty

Four treaties have been signed by which Indigenous groups have powers over some or all of the land that formerly constituted their reserves. When Indigenous groups enter into treaties, they are no longer governed by the Indian Act. Treaties are self-government arrangements, as distinct from the “Recognition of Rights” (ROR) negotiations between Indigenous people and the Crown that deal with narrower issues such as rights to harvest timber or fish. Lawyers dealing with an Indigenous group who has executed a treaty should refer to the terms of that treaty and any applicable constitution and other governing documents of the Indigenous group.

The Indigenous groups that have signed treaties are the Nisga’a Nation, Tsawwassen Nation, the five Maa-nulth First Nations and Tla’amin Nation.

3 The Land Title and Survey Authority of British Columbia contributed comments regarding the Maa-nulth First Nations in September 2011 and updated this content in December 2016.
(a) Nisga’a Nation

By a treaty known as the Nisga’a Final Agreement, the Nisga’a Nation has fee simple title in two types of land:

1. Nisga’a Lands, which are core lands held by the Nisga’a Nation with no reservations or exceptions. These core lands include four villages and much of the lower Nass River valley. The Nisga’a Lisims Government has jurisdiction over the Nisga’a Lands and no change in their ownership can affect their legal status as Nisga’a Lands.

2. Nisga’a Fee Simple Lands (“NFSL”) are lands over which the Nisga’a Lisims Government does not have jurisdiction. There are two types of NFSL:

   Category A: These are former reserve and adjacent lands held by the Nisga’a Nation in fee simple including surface and sub-surface water rights but subject to Crown water rights. These lands cease to be Category A land if they are sold to a non-Nisga’a village, corporation or citizen.

   Category B: These are former Crown lands held by the Nisga’a Nation in fee simple subject to mineral, water and other rights reserved to the Crown. These will cease to be Category B land if sold to a non-Nisga’a village, corporation or citizen.

Under the Nisga’a Final Agreement, former locatees were given Certificates of Possession by the Nisga’a Nation and continue to have the same rights as if they held a Certificate of Possession under the Indian Act.

The Nisga’a Final Agreement authorized the Nisga’a Nation to use the provincial land title system to register dealings with its lands but it has opted to set up its own land title system.

The Nisga’a Lisim Government has enacted new land laws, including the Nisga’a Landholding Transition Act, which permits individual Nisga’a citizens to obtain fee simple title to certain residentially-zoned parcels of land in Nisga’a villages.

(b) Tsawwassen First Nation

By a treaty known as the Tsawwassen Final Agreement, the Tsawwassen First Nation has fee simple title in two types of land:

1. Tsawwassen Lands, which are former reserve and Crown lands with no reservations or exceptions, are subject to all pre-existing rights and interests. Under the Tsawwassen Final Agreement, former locatees acquired a Tsawwassen Fee Simple Interest in their lands and retained all their former rights. The Tsawwassen First Nation is empowered to dispose of any or all of the Tsawwassen Lands without federal or provincial consent. However, the Land Act enacted by the Tsawwassen First Nation limits transfers of any Tsawwassen Fee Simple Interests to other Tsawwassen First Nation members or entities.

2. Other Tsawwassen Lands are Boundary Bay and Fraser River land parcels. Under the Tsawwassen Final Agreement the Tsawwassen First Nation has fee simple title in these lands subject to all reservations, exceptions and pre-existing interests. Tsawwassen First Nation laws do not normally apply to Other Tsawwassen Lands.

All transactions involving Tsawwassen Lands or Other Tsawwassen Lands must be filed in the provincial land title system.

(c) Maa-nulth First Nations

Maa-nulth First Nations consist of five nations on the west coast of Vancouver Island.

Unlike the Tsawwassen Final Agreement, the Maa-nulth Final Agreement is a multi-First Nation Final Agreement. As a multi-First Nation Final Agreement, the Maa-nulth Final Agreement sets out some elements that are specific to each First Nation, such as each First Nation having its own constitution, its own government, and its own land base.

Under the Maa-nulth Final Agreement, each Maa-nulth First Nation has fee simple title in lands that are former reserve and former Crown lands, with no reservations or exceptions. Treaty settlement lands were transferred to the Maa-nulth First Nations as of the effective date of the Maa-nulth Final Agreement. Each Maa-nulth First Nation may apply to have its lands registered in the Land Title Office.

Each Maa-nulth First Nation government has law-making authority over its land, although federal and provincial laws will apply concurrently with Maa-nulth First Nation laws to the extent they do not conflict. The Maa-nulth Final Agreement and the laws of each of the individual First Nations contained in that agreement limit transfers of any fee simple interest to other members or entities of the individual nations.
Each Maa-nulth First Nation has also identified parcels of fee-simple land it may acquire after the effective date of the Maa-nulth Final Agreement. The Maa-nulth Final Agreement includes provisions that will allow for these parcels to be declared Maa-nulth First Nation lands if they are purchased within 15 years of the effective date of the Maa-nulth Final Agreement.

(d) Tla’amin Nation

By a treaty effective April 5, 2016 known as the Tla’amin Final Agreement, Tla’amin Nation has fee simple title to approximately 8,323 hectares of treaty settlement land (known as “Tla’amin Lands”), which includes 1,917 hectares of former Tla’amin reserves and 6,405 hectares of former provincial Crown land. An additional 0.97 hectares known as the “Lund Hotel Parcels” have also become treaty settlement land. Tla’amin Nation has law-making authority over Tla’amin Lands, though provincial and federal laws continue to apply. The Tla’amin Final Agreement sets out which law prevails if the laws conflict.

Tla’amin Nation also owns two small parcels of land located on Savary Island and in Powell River, but does not have law-making authority over these parcels. A further 1,212 hectares of Crown land could become Tla’amin Lands if acquired by Tla’amin Nation under the terms of the Tla’amin Final Agreement.

[§1.06] Further Reading

1. Practice Manuals


British Columbia Real Estate Development Practice Manual. Vancouver: Continuing Legal Education Society of BC (updateable with online access).

British Columbia Real Estate Practice Manual. Vancouver: Continuing Legal Education Society of BC (updateable with online access).

British Columbia Real Property Assessment Manual. Vancouver: Continuing Legal Education Society of BC (updateable with online access).


Collected Real Estate Precedents. Vancouver: Continuing Legal Education Society of BC.


Conveyancing Deskbook. Vancouver: Continuing Legal Education Society of BC (updateable with online access).


Land Title Electronic Forms Guidebook. Vancouver: Continuing Legal Education Society of BC.


Land Title and Survey Authority of British Columbia, Practice Information, online: ltsa.ca/practice-information.

2. Texts


Cadesky, Michael I. Taxation of Real Estate in Canada. Toronto: Carswell (loose-leaf).


DiCastri, V. Registration of Title to Land. Toronto: Carswell (loose-leaf).

McCarthy Tétrault. Annotated British Columbia Strata Property Act (loose-leaf).


Chapter 2

Purchase Agreements

[§2.01] Introduction

1. Nature and Origin of the Purchase Contract

The purchase contract is the key document in a real estate transaction. It governs the rights and obligations of the parties with respect to the transaction. Also, it is an executory contract: it is an exchange of promises to do something in the future, but as soon as those promises are made, in writing, they bind the promisors. Unfortunately, in most residential transactions, the parties sign a purchase contract (often prepared by a real estate licensee) before consulting with lawyers.

Often a standard purchase contract is used for residential real estate transactions in British Columbia—the “Contract of Purchase and Sale” published jointly by the Canadian Bar Association, British Columbia Branch, and the British Columbia Real Estate Association. The current form of the Contract of Purchase and Sale is at Appendix 1.

The basic promises of a real estate purchase contract include the seller’s promise to the buyer that, on a certain date in the future (often called the “completion date”), the seller will deliver to the buyer title to the subject property “free and clear” of all encumbrances, except those agreed upon in the purchase contract. The seller may also agree to do certain things, such as carry out improvements to the property or remove an encumbrance on title to the property by the completion date.

In exchange, the buyer promises to pay to the seller a sum of money (often called the “purchase price”) on the completion date. The buyer may also promise to assume some or all of the seller’s existing obligations in respect of the property. For example, the buyer may assume the seller’s mortgage, or promise to pay the purchase price over a period of time before taking title (usually by registering a “right to purchase” that is commonly referred to as an “agreement for sale” against title to the land). For more on this topic, refer to Chapter 7.

The seller’s obligation to deliver clear title and the buyer’s obligation to pay the purchase price are mutually dependent covenants (Campbell v. Frolok, 1995 CanLII 161 (B.C.S.C.), affirmed 1997 CanLII 3761 (B.C.C.A.)).

Frequently, sellers or buyers face practical obstacles to fulfilling their respective promises. For example, a seller might be unable to provide clear title on closing because the seller requires the sale proceeds from the buyer to pay out an existing mortgage registered against the title to the lands being sold. Alternatively, a buyer who is relying on mortgage proceeds to pay part of the purchase price is in the odd position of not being able to access the mortgage proceeds until the title in the lands being purchased has transferred from the seller to the buyer. Absent a way of dealing with this situation, the buyer (borrower) does not own the property over which the buyer proposes to grant a lender a mortgage in order to secure the loan that the buyer intends to use to purchase the property.

To overcome these difficulties, clauses 13 and 14 of the Contract of Purchase and Sale incorporate the requirement that when a buyer wants to use the proceeds from a new mortgage charging the property being purchased to finance the purchase, or a seller wants to use the sale proceeds to clear title, the parties must complete the transaction on the basis of the Canadian Bar Association (BC Branch) (Real Property Section) March 31, 2003 Standard Undertakings (the “CBA Standard Undertakings”).

The CBA Standard Undertakings attempt to incorporate into the Contract of Purchase and Sale arrangements to obtain and pay off mortgages, which are now handled by standardized undertaking letters. In this way, the contract establishes a protocol for the parties to follow in completing the transaction. However, if a purchase agreement is silent on the use of undertakings, the courts have been clear that the practice of giving undertakings is only a practice and cannot be imposed by one party upon another. See §2.03(11) for more on the CBA Standard Undertakings and see §5.28.

2. Initial Review of the Purchase Contract

Some lawyers rely too heavily on their paralegals or conveyancers to read, appreciate and manage the unique terms that accompany every purchase contract. Ultimately, the lawyer is responsible for ensuring the conveyance is properly managed.

The first obligation of a lawyer is to become familiar with the terms of the agreement between the parties. When the agreement is in writing, this can

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only be done by studying the relevant documents (Kwok v. Griffiths, 1996 CanLII 2768 (B.C.S.C.)).

When the lawyer has completed the initial review of the purchase contract, the lawyer needs to confer with the client to ensure that, in general, the written contract embodies the client’s understanding for the transaction. At a minimum, during this review a lawyer should:

- confirm whether or not the purchase contract is a binding contract and whether there are any errors contained within the contract;
- confirm that any representations or other promises or guarantees upon which the buyer is relying are in the purchase contract or in a collateral agreement;
- discuss the subject clauses with the client and confirm the timing of their removal, particularly in relation to any financing the client may be seeking and any conditions to account for failure to obtain financing; and
- advise the client as to relevant dates and the importance of observing the strict timetable imposed upon the parties, especially when the purchase contract contains a “time is of the essence” clause.

§2.02 Is the Purchase Contract Binding?

1. Offer and Acceptance

An offer is made when a potential buyer presents a purchase contract to a seller. If the seller signs the purchase contract without alteration, and communicates acceptance to the buyer in the manner stipulated and within the time limited for acceptance, the offer is accepted.

Any alteration to the purchase contract before acceptance constitutes a counteroffer that requires acceptance, either within the original time limit for acceptance, or within a newly specified time for acceptance of the counteroffer. A counteroffer, before acceptance of any prior offers, automatically terminates the prior unaccepted offer or counter-offer.

If an offer or counteroffer is not accepted within the time set for acceptance, a binding contract is not formed. Consequently, in cases where the parties have exchanged several offers and counteroffers, it may not be possible for the lawyer to determine whether a binding contract has been formed in law simply by examining the purchase contract and without reviewing the addendums.

The answer to whether there has been proper acceptance of the purchase contract must be found in the wording of the purchase contract. Most purchase contracts, including the Contract of Purchase and Sale, provide that there will be a binding contract of purchase and sale upon acceptance of the offer or counteroffer in writing, and upon notifying the other party of such acceptance.

2. Amendments

It may be necessary to amend a purchase contract after it has been signed. If the parties agree to an amendment, the amendment to the agreement should be in writing and signed by all the parties. Sometimes one party wants to amend the purchase contract. For example, if a client has agreed to complete the sale of their property and purchase a second property on the same day, using the sale proceeds, this may turn out not to be possible. In such a case the lawyer should consider moving the sale ahead one day or moving the purchase back one day, and assessing how an amendment to the purchase contract can be arranged. Another situation is when a buyer becomes concerned about having the funds by the completion date, and wants to extend the completion date. While a change to a purchase contract might only directly benefit one party, the opposite party is often willing to cooperate, especially if the transaction has been friendly up to that time. There may also be leverage if the opposite party needs to close at all costs. Often, a client’s real estate licensee is a useful intermediary and can help push amendments through.

It is important to remember that a request by one party to clarify essential terms or to rectify discrepancies in the purchase contract may cause the transaction to collapse. Accordingly, a lawyer should consult with the client before suggesting any amendments to a purchase contract. Additionally, when a lawyer communicates a client’s request for an amendment, the lawyer should be careful not to indicate that the client is unwilling to fulfill its obligations under the existing purchase contract, as this might be construed as an anticipatory breach. Depending on the circumstances, rather than amending the purchase contract, it may be more appropriate to allow the transaction to complete without alerting the other party to any defects in the contract. In such a situation, the lawyer would advise the client of the risk but take no steps to amend the purchase contract. If one party cannot complete unless the contract is amended, great care must be taken to avoid breaching the contract in advance. In such a case, the lawyer for the party seeking the amendment should consider whether the other party has any contractual difficulties on their part, and clear instructions must be obtained before attempting to concoct a legal position to justify an amendment.
3. Certainty on Essential Terms

(a) Minimum Requirements—Law and Equity Act, s. 59

A purchase agreement must be certain as to its essential terms, otherwise it will not be enforceable.

A contract respecting land or disposition of land is only enforceable if:

- the contract is in writing, contains a reasonable indication of the subject matter, and is signed by the party against whom it is sought to be enforced;
- there has been partial performance of the contract; or
- the party seeking to enforce the contract has reasonably relied on the contract, such that non-enforcement would create an unequitable result.

(See s. 59 of the Law and Equity Act)

When interpreting the Statute of Frauds (the predecessor of s. 59), courts have held that the written evidence can be minimal and can be in the form of an exchange of letters. The minimum written information necessary to make an enforceable purchase agreement for the sale of land is the parties, property and price (“the three Ps”). Therefore, while the majority of residential purchase agreements in British Columbia are drawn using the standard Contract of Purchase and Sale, no particular form is required. It is recommended that a written agreement be used for all transactions, to avoid asking a court to enforce an oral agreement.

(b) Conditions Precedent/Subject Removal

It is common for purchase agreements to contain subject clauses that are, in fact, conditions precedent, normally for the benefit of the buyer, and that must either be fulfilled or waived before the buyer is bound to complete the contract. The fulfillment or waiver of the condition precedents, or subject clauses, is normally referred to as “subject removal.” A common example of a condition precedent is: “the Buyer’s obligation to complete the purchase of the Property is subject to the Buyer being satisfied with the results of a physical inspection of the Property on or before [month, day, year].”

Section 54 of the Law and Equity Act allows one party to unilaterally waive the performance of a condition precedent where:

- the contract can be completed without fulfillment of the condition; and
- the waiver is made before the time stipulated for fulfilling the condition, or within a reasonable time.

As a result of s. 54, when a subject or condition is for the benefit of a party to the purchase agreement, that party can waive or remove the subject within the specified time without requiring the other party to agree to the subject removal or waiver.

Clause 3 of the standard Contract of Purchase and Sale reads:

Each condition, if so indicated, is for the sole benefit of the party indicated. Unless each condition is waived or declared fulfilled by written notice given by the benefiting party to the other party on or before the date specified for each condition, this Contract will be terminated thereupon and the Deposit returnable in accordance with the Real Estate Services Act.

This clause requires the benefiting party to perform the positive act of giving written notice in order for the contract to survive beyond the condition or subject removal date. If no written notice is given—that is, if there is silence on the condition or subject removal date—according to clause 3 of the standard Contract of Purchase and Sale, the contract is terminated, the Buyer is not bound to complete, and the deposit is returnable in accordance with the Real Estate Services Act. However, it is important to review the provisions of each purchase agreement since not all agreements contain a requirement that the benefiting party perform the positive action of removing or waiving the condition precedent.

When a lawyer receives a purchase agreement containing a subject clause, before taking any steps on the conveyance, the lawyer should be satisfied that each subject clause that has come due has been removed or waived. Pursuant to clause 3 of the Contract of Purchase and Sale, the removal must be in writing, signed by the benefiting party. Ideally (but not necessarily) the party receiving the notice should sign it as well, to indicate that the receiving party acknowledges that the subject has been removed. When a real estate licensee is involved, it is common for a subject removal to take the form of an amendment, even though it is not an amendment but a notice. During the “subject removal” phase, the party having conditions in its favour will often request that certain amendments be made to the purchase contract.
before it will waive or declare satisfied its conditions. Thus, the subject removal notice is also commonly included as a part of a separate purchase contract amendment.

Any work that a lawyer does on a file before the subject removal may be unnecessary if the buyer backs out. The difficulty for the lawyer arises when the subject removal date is very close to the completion date. In this situation, the lawyer should discuss the issue with the client and ask the client to weigh the cost of proceeding against the risk of waiting.

Where lawyers are involved prior to the removal of subject clauses, they sometimes have to deal with a client who does not want to remove a subject condition, but for a reason unrelated to what the subject clause says. For example, the clause might specify subject to obtaining financing, but the buyer has found a better property to buy. The buyer may have made no efforts yet to comply with the financing clause, or may even have been approved for financing.

The buyer cannot rely on a subject clause to not proceed for reasons that are unrelated to the subject matter of the subject clause. But, as a practical matter, the buyer does not need to give a reason for not removing a subject clause. This leaves the suspicious seller in the position of accepting the situation and continuing to try to sell to another buyer, or starting an action to take advantage of the discovery process to learn the facts. Most will choose to avoid litigation without hard facts to support a claim. However, buyers often inadvertently provide evidence of their lack of intent to use real efforts to remove subjects by buying another property right after.

Because of the risks identified above, lawyers acting for buyers will often want to word subject clauses in favour of a buyer as broadly as possible, giving the buyer as much discretion as possible. Lawyers for sellers will want to seek the converse. The practice of writing subject clauses subjectively or vaguely has, however, invited a host of problems. These issues are disclosed in the following case law:

(i) Removal of Subject Clauses

In *Sky Ranches Ltd. v. Nelson*, 1980 CanLII 477 (B.C.C.A.), the clause read “subject to your obtaining financing, provided that this subject clause shall be removed on November 30, 1975.” The agreement was silent as to whether notice was required that financing had not been arranged prior to the subject clause removal date. Mr. Justice Hutcheon said:

In my view no notice was necessary. The interpretation which I put on the clause is that unless the buyer gave notice before November 30th that he was unable to arrange financing, the clause was removed from the agreement and the buyer was bound to complete.

*McNabb v. Smith*, 1981 CanLII 771 (B.C.S.C.), affirmed 1982 CanLII 645 (B.C.C.A.), was to the same effect on slightly different wording—“(s)ubject to buyer arranging a first mortgage . . . by September 22nd, 1980.” Mr. Justice Bouck said:

Unless Mrs. McNabb gave notice to the Smiths by September 22, 1980, that she was unable to arrange financing, the clause was no longer a means for her to escape the bargain, and she was bound to complete.

However, subsequent decisions of the BC Supreme Court have not followed *McNabb* and have distinguished *Sky Ranches* based on the wording of the subject clause in that case. The Supreme Court held in *Sun-Kahn Investments Ltd. v. Dalton*, 1982 CanLII 526 (B.C.S.C.) and *First Canadian Land Corporation Ltd. v. Rosinante Holdings Ltd. and Fane*, 1985 CanLII 431 (B.C.C.A.) that the buyer’s silence did not constitute a waiver of the condition precedent. *First Canadian* was applied in *G.J.V. Investments Ltd. v. Katz*, 1993 CanLII 2450 (B.C.S.C.), but distinguished in *Mark 7 Development Ltd. v. Peace Holdings Ltd.*, 1991 CanLII 604 (B.C.S.C.) and *Peterson v. 446690 B.C. Ltd.*, 2016 BCSC 158.

This issue is not settled. Lawyers should consider the case law when confronted with the problem of an agreement that creates ambiguity about what constitutes waiver or satisfaction of a subject clause.

(ii) Uncertain Subject Clauses

In *Chan v. Hayward* (1983), 44 B.C.L.R. 251 (S.C.), the court considered a clause that the “buyer obtain suitable financing” and struck it down because the clause was so vague that the court could not hold that a bargain had been struck. This decision was followed in *Pietrobon v. McIntyre*, 1987 CanLII 2612 (B.C.S.C.), where the subject clause read “this offer subject to the buyers obtaining satisfactory personal financing.” The Court of Appeal took a different approach where the buyer was unsuccessful
in suing for the return of a deposit based on an unfulfilled subject clause stipulating that the buyer was to obtain “satisfactory financing” (Griffin v. Martens, 1988 CanLII 2852 (B.C.C.A.)). The Court held that the contract was not void for uncertainty and that the buyer must use reasonable efforts to fulfill a subject clause. Although the case did not expressly overrule the Chan and Pietrobon cases, the court did say, “as long as an agreement is not being construed by the court to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves” (Salama Enterprises (1988) Inc. v. Grewal, 1992 CanLII 4035 (B.C.C.A.)). See also Flack v. Sutherland, 1995 CanLII 560 (B.C.C.A.), where the court found that “subject to satisfactory financing” means “satisfactory to a reasonable person with all the subjective but reasonable standards of the particular buyer,” and Empress Towers Ltd. v. Bank of Nova Scotia, 1990 CanLII 2207 (B.C.C.A.).

Finally, in Head v. Scott-Bathgate Ltd., 1994 CanLII 1817 (B.C.C.A.), the plaintiff buyer signed an interim agreement “subject to the buyer satisfying himself that a parking area will likely be allowed by the City in the basement area of the building.” The condition was not removed, the seller refused to return the deposit, and the buyer sued to recover the deposit.

The Court of Appeal in Head, supra, held that the condition was not void for uncertainty, referring to the well-established principle that if an agreement is not being construed to the surprise of the parties, or at least one of them, the court should try to give effect to the agreement that the parties have reached, but that they may have phrased incompletely or imprecisely (see Hillas v. Arcos (1932) 147 L.T. 503 (H.L.) and Griffins, supra). Moreover, the court implied a term that the construction of the parking must be reasonably economically feasible in the circumstances, and a term that the amount of parking must be appropriate for the proposed development.

(iii) Subjective Subject Clauses

A subject clause that allows the benefiting party the opportunity to “indulge a whim, fancy, like or dislike in deciding whether or not to complete the transaction” is subjective and will prevent a binding contract from forming until the conditions are waived (V. DiCastri, The Law of Vendor and Purchaser, 3d ed., Vol. 1 at p. 190).

If the purchase agreement contains a purely subjective clause, such as “subject to the president’s approval,” the subject clause imposes no obligation on the buyer until the president gives approval (Murray McDermid Holdings Ltd. v. Thater, 1982 CanLII 686 (B.C.S.C.)). The effect of such a subjective clause is to create a bare offer to purchase on the part of the buyer, the final acceptance of which depends upon the removal of the clause by the buyer. If it is necessary to include a wholly subjective clause in a purchase agreement, the solution is to create an option to purchase exercisable by the buyer, rather than a purchase agreement with a subject clause. Separate consideration is required for this option.

In Kitsilano Enterprises Ltd. v. G & A Developments Ltd. (1990), 48 B.C.L.R. (2d) 70 (S.C.), the Court held that a subject clause relating to the buyer’s “review of all leases, etc., to its sole satisfaction” and other rather vague subject clauses indicated that the agreement was only an offer, and therefore not binding on the seller. The court found that the language of the clauses required only that the buyer act honestly. Kitsilano was followed by Cox v. Alley (1991), 17 R.P.R. (2d) 283 (B.C.S.C.), where, again, the Court found that the buyer had acted honestly. See also Mark 7 v. Peace Holdings, 1991 CanLII 252 (B.C.C.A.), where a clause allowing the buyer to be “arbitrary in his acceptance” in his review of leases created only an offer instead of a binding agreement.

Although a subjective subject clause may prevent an agreement from coming into effect, other cases show the courts attempting to give effect to the obvious intentions of the parties and to find an agreement. See e.g. Tau Holdings Ltd. v. Alderbridge Development Corporation (1991), 60 B.C.L.R. (2d) 161 (C.A.), where completion was subject to the buyer obtaining financing and approving engineering and other reports. The Court of Appeal held that the clauses required the buyer to consider the reports, not reject them arbitrarily, and to seek and not unreasonably reject financing.

This area of the law is not settled. The wording of each subject clause must be scrutinized carefully to determine whether it has the effect of rendering the agreement
void or unenforceable, or in some way affects what appears to be an attempt by the parties to enter into a binding contract.

In practice, some buyers include in the subject clause wording to the effect that the clause creates an option for which the buyer has provided separate and sufficient consideration, the receipt and sufficiency of which is acknowledged by the seller.

(c) Additional Representations or Warranties

In addition to subject clauses, many contracts contain commitments for the seller to perform various repairs or make changes to the property prior to completion or within a period of time following completion. These will typically appear in addendums to the standard Contract of Purchase and Sale. They are typically poorly drafted.

Where the seller fails to perform these commitments, the buyer cannot refuse to complete unless the failure constitutes a “fundamental breach” of the contract. The buyer’s remedy is to complete and sue for damages or abatement of the purchase price. The buyer is not entitled to demand a holdback pending the seller’s performance. The buyer also does not have a right of inspection, pre-completion, to check if promised work has been done.

If consulted early enough, the buyer’s lawyer should advise on the wording of such a clause. Failing that, the buyer’s lawyer should try through the seller’s lawyer to amend it to provide the right of inspection, right to a holdback, or express classification of the commitment as a fundamental term constituting seller repudiation of the contract if not done. If a holdback is agreed to, the amount should sufficiently exceed the estimated cost so as to motivate the seller to do the work as soon as possible. Also, the holdback clause should include a clear mechanism for determining when and how the holdback will be paid out on third party evidence of compliance.

Alternatively, the buyer can negotiate an abatement. While negotiating, the lawyer will need to be clear about the client’s intention to complete on the existing agreement to prevent triggering an anticipatory breach.

Another common additional commitment by the parties is a clause that deals with the prospect of special assessments by strata corporations. These paragraphs are added by most real estate licensees along with a subject clause for review of strata minutes and bylaws. These reviews are the real estate industry’s practical substitute for a building inspection in the context of strata properties. This is because an inspection that does not inspect an entire strata complex is of limited value, as owners of pristine units will still share in the expense of fixing issues with the building. The clauses dealing with special assessments might make them the responsibility of the seller, make them the responsibility of the buyer, or split the responsibility between buyer and seller, depending on what portions of the special assessment are payable before and after the completion date. Note that pending special assessments might not have been quantified before the completion date. (See Strata Property Act s. 109 which provides rules where a levy is approved before a strata lot is conveyed to a purchaser.)

[§2.03] The Main Elements of the Standard Contract of Purchase and Sale

The standard Contract of Purchase and Sale, together with the sales record sheet (containing information obtained by the real estate licensee), provides important initial information about a conveyance. These documents give the lawyer some details about the parties, the property, the price and the completion date. Unfortunately this information is often inadequate for the purpose of preparing the Form A Freehold Transfer, Form B Mortgage (if the buyer is obtaining financing), statement of adjustments and other conveyancing documents. The information in the contract must always be verified.

While non-lawyer staff can alert the lawyer to issues in the contract and other documents, managing the conveyance and appreciating the issues and consequences is the lawyer’s responsibility. The lawyer is the one who needs to deal with the issues that arise. Consequently, at a minimum, the lawyer should review the contract of purchase and sale, correspondence, title search and statement of adjustments to ensure that all of this is accurate.

1. Description of Parties
   (a) Correctly Describing the Buyer

   The buyers are described in the contract at the very top, at the bottom where they sign, and possibly in the sales record sheet. The purchase contract should contain an accurate, complete description of the buyer. Usually, the description of the buyer in the purchase contract is insufficient for preparing the conveyancing documents and needs to be discussed with the client. In no case should the lawyer rely upon this description of the buyers for the transfer documents.

   It is the lawyer’s responsibility to determine the correct legal names of the buyers to appear on title to the property (initials are not acceptable.
to the Land Title Office). If there is more than one buyer, the lawyer must also determine whether the buyers intend to hold their interest in the property as joint tenants or tenants in common.

The buyer may be a corporation. Section 165(1) of the Land Title Act provides that, for the purposes of the Act, a corporation has the same powers of acquiring and disposing of land as a natural person. When a corporation is a party to a purchase contract, it is important to do a corporate search with the Registrar of Companies to ensure that the corporate name is correctly recorded in the instrument and that the company existed when it executed the instrument.

In a purchase contract prepared by a real estate licensee, it is common to see the buyer listed as “Corporation ABC and/or its nominee.” While courts have found that such language does not, on its own, render the contract void for uncertainty, a prudent lawyer will not use such language and will instead insert a clause that clearly sets out the circumstances in which the buyer may either assign the purchase agreement to a third party or an affiliated entity, or authorize the transfer to be made in the name of another person other than the original buyer.

(b) Correctly Describing the Seller

A title search of the property will verify that the registered owner of the property is the party who has signed the purchase contract. If the party who has signed the purchase contract is not the registered owner, appropriate inquiries should be made to ensure that the signing party had the authority to bind the registered owner under, for example, a trust, agency or other relationship. If the property is registered in the name of more than one party and only one of the parties has signed the purchase contract as seller, the lawyer or the buyer should either have all the parties sign the contract, or confirm that the signing party was authorized to sign the purchase contract on behalf of all the owners.

For example, the sellers may be buyers under a contract for sale; the sellers may be the principals of a limited company that is the actual registered owner; or there may be multiple registered owners on title, only some of whom have signed the contract of purchase and sale. The lawyer must take some care in these situations.

If spouses or common law partners are joint owners, and only one of them has signed the contract, the lawyer must be sure, at an early stage, that the other party has authorized the signing party to act as an agent and will join in signing the conveyance documents.

In short, the lawyer must always establish the line of authority between the sellers identified in the contract and the registered owners appearing on title.

2. Description of Property

Generally, the property is described in the standard Contract of Purchase and Sale in two ways: by the civic address (unless it is a vacant lot or new subdivision), and by some attempt at a legal description. The lawyer should not rely upon the legal description contained in the contract for the purpose of preparing the conveyancing documents. A proper legal description is based on Land Title Office records and refers in no way to civic address. As a first step, the lawyer should check to ensure that both descriptions in the contract refer to the same property by obtaining an assessment report from BC Assessment that contains both the civic address and a form of legal description for every parcel. The legal description can also be obtained by searching in ParcelMap BC, or from various title search companies. The lawyer must then obtain a Land Title Office search of the property for the purposes of preparing the conveyancing documents, as the precise legal description set out in the Land Title Office search should be used in such documents. Obtaining a legal description is reviewed more in Chapter 4.

The lawyer must be particularly careful with the purchase and sale of more than one parcel. The buyer may be buying two adjacent lots with only one house. There may only be one street address in this situation and one tax roll number. However, the conveyance documents must pick up both lots. How does the lawyer verify exactly what the parties have agreed to buy and sell? Remember that legal descriptions are technical abstractions and meaningful only to those who must deal with the land title system. By contrast, buyers are concerned with the street address, what the house looks like, the lot size, and its relationship to neighbouring streets and houses: buyers are not usually concerned with the lot number. In some cases, they may not even be aware that there are two legal lots involved.

Obviously, the first step is to discuss directly with the buyers their understanding of what they have agreed to purchase. Always order a plan from the Land Title Office as part of ordering a search, and allow the buyers to see the plan as soon as possible. Initial on the plan what property the clients are purchasing. This bird’s-eye visual check means far more to most buyers than any discussion of legal descriptions. Give special attention to legal descriptions that contain exceptions, or begin the description of land with “That part of lot…” Ensure that
the parcel defined in the legal description comprises the entire land that the buyers believe they have agreed to purchase. The lawyer should review the assessment report (which typically lists any associated parcels), and should take additional steps such as searching for the subject property on internet mapping or imaging sites. The more information a lawyer has, the easier it is to spot problems.

3. Price

In the standard Contract of Purchase and Sale, the purchase price is inserted in clause 1.

It is important, at an early stage, to quickly review the figures on the purchase contract to ensure that the transaction makes sense from a financial point of view. For instance, if the purchase price is $800,000 then the various components of the transaction must be subtracted from $800,000 (for example, the amount to be assumed under an existing mortgage and the amount to be covered by a new mortgage), and any property transfer taxes payable by the buyer must be added, to arrive at the cash required to close. This initial check will reveal any fundamental financial misconceptions that may have crept into the deal. The sooner the buyer can be advised of the amount required from him or her to complete the conveyance, the better. (See also Chapter 5, §5.12 to §5.15 for more on calculating adjustments to the purchase price and §5.05 for more on the property transfer tax.)

At a later stage in the conveyance, the lawyer will have obtained payout figures for any mortgages that the seller needs to clear from title before closing. It is possible that the total of those mortgages exceeds the purchase price, in which case the seller will have to raise money in order to close the transaction or reach arrangements with the lenders or judgment holders to accept less than the full amounts in return for a registrable discharge.

4. Deposit

The deposit is the part of the purchase price that the buyer has agreed to put at risk after the subject clauses to provide for a two-stage deposit. The first deposit—placed at the time of the making of the offer—is relatively small, with a substantially larger deposit after the subject clause has been removed. It is important to remember that the real deposit contemplated by the purchase agreement is the larger total, not just the first deposit. It is important when checking the subject removal to ensure that the full amount of the deposit has in fact been paid. A brokerage is required to hold the deposit in a brokerage trust account as a stakeholder (s. 28 of the Real Estate Services Act). The importance of holding the deposit as a stakeholder lies in the stakeholder’s ability to pay the deposit into court if there is a dispute between the parties (s. 33 of the Real Estate Services Act).

If the transaction does not complete and the seller forfeits the deposit, GST remains payable on the deposit amount if the transaction originally attracted GST. Also note that the seller may be liable to pay real estate commissions even if the buyer fails to complete because commission is often triggered by the execution of a binding listing agreement. Consequently, the seller should consider two things: first, whether he or she will be responsible for commission if faced with a defaulting buyer; and second, what compensation (for the default) he or she will seek in the event of default. Many real estate licensees will waive their entitlement to the commission if they continue to have the listing of the property, but this cannot be assumed.

5. Completion Date

The completion date determines the timetable for the particular file. The Contract of Purchase and Sale refers to the completion date as follows:

4. COMPLETION: The sale will be completed on _____. yr.____ (Completion Date) at the appropriate Land Title Office.
6. Possession Date

The possession date is the date upon which actual physical change of possession occurs. In the case of a residence or other property, it is the date upon which the buyer may actually move in. In the case of rental property, the possession date means the date when the new landlord takes charge of the building. Possession is subject only to those tenancies, if any, as may be set out in clause 5 of the Contract of Purchase and Sale. If tenants are to remain, the buyer should satisfy himself or herself about the legality of suites and the status of the tenants (that is, rent, deposit and other responsibilities of the landlord). If there are tenants in possession of the property, even though clause 5 reads as if there are no tenants, the buyer may not be able to evict the tenants except as provided in the Residential Tenancy Act. Whether the buyer in this case can undo the contract or can sue for damages will depend on the facts.

While the possession date may not be an important date to a conveyancer, it is a critical date for the parties from a practical point of view. The parties should make arrangements around keys and moving directly, usually with the real estate licensee’s help. The possession date is usually one or two days after the completion date. Most sellers are reluctant to give up possession until they have been paid.

7. Adjustment Date

Items to be adjusted between the parties (such as real property taxes) are adjusted as of the adjustment date (see §5.15 and following). That is, some costs such as property taxes are payable annually and the parties must allocate the cost of these items between themselves even though one party must pay to the appropriate authority the full amount due for not only the time that party owns the land, but the time the other party owns the land as well. This date is used to prepare the statement of adjustments. Reference to the adjustment date occurs in the Contract of Purchase and Sale as follows:

6. ADJUSTMENTS: The Buyer will assume and pay all taxes . . . from, and including, the date set for adjustments, and all adjustments both incoming and outgoing of whatsoever nature will be made as of _____, yr.______(Adjustment Date).

This language clarifies that the buyer’s responsibility for the property commences on and includes the adjustment date itself.

8. Included Items and Viewed

Clauses 7 and 8 of the Contract of Purchase and Sale read:

7. INCLUDED ITEMS: The Purchase Price includes any buildings, improvements, fixtures, appurtenances and attachments thereto, and all blinds, awnings, screen doors and windows, curtain rods, tracks and valances, fixed mirrors, fixed carpeting, electric, plumbing, heating and air conditioning fixtures and all appurtenances and attachments thereto as viewed by the Buyer at the date of inspection, INCLUDING: ______, BUT EXCLUDING: _______.

8. VIEWED: The Property and all included items will be in substantially the same condition at the Possession Date as when viewed by the Buyer on _____, yr._____.

By clause 7, all buildings and other improvements that the buyer inspected on the date set out in clause 8 must be included in the transfer and the seller has an obligation to preserve the property and included items so that they will be in substantially the same condition at the possession date as when viewed. Without clause 7, anything described in law as a fixture must remain with the property and be included in the sale, while the seller would be entitled to remove anything described as a chattel. Clause 7 attempts to ensure that the buyer receives all the items in the list and those others specifically written in, and the seller can name items, whether chattels or fixtures, which he or she wants to remove. If a seller wrongfully takes something covered by this clause, the buyer’s remedy would be an action in damages or specific performance.

The clause 8 warranty is the basis for the buyer seeking damages to rectify the situation where vandals, the moving process, disgruntled tenants or an act of nature has inflicted damage. Lawyers should note that the standard “Addendum A” used by financial institutions in foreclosures specifically overrides clause 8 and stipulates that the buyer accepts the condition of the property “as is” at completion. Insurance brokers rarely understand that the contract creates an insurable interest in the property and refuse to provide pre-completion insurance to the buyer in foreclosures. The buyer needs to pursue insurance aggressively. As the lawyer usually is not involved until the contract is settled, the lawyer can help convince front line insurance brokers of the insurable interest. There are many stories of foreclosed owners dismantling their home in the process, including the removal of doors, windows, cabinetry and the furnace. Banks will refuse to alter their Addendum A.
9. Title Free and Clear

Unless the Contract of Purchase and Sale is amended, the interest being sold is an estate in fee simple, free from encumbrances except those set out in clause 9, which reads:

9. TITLE: Free and clear of all encumbrances except subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown, registered or pending restrictive covenants and rights-of-way in favour of utilities and public authorities, existing tenancies set out in Section 5, if any, and except as otherwise set out herein.

If the seller is unable to provide the title that has been agreed to, the buyer, depending on the materiality of the title defect, may be entitled to accept the seller’s repudiation of the contract and terminate the contract. Alternatively, the buyer may complete the purchase with the right to demand abatement of the purchase price.

This clause can cause difficulties in some cases. Remember that the Contract of Purchase and Sale is essentially a seller’s document. It protects the seller unless the buyer has deleted parts of this clause. Most buyers assume they are entitled to clear title (apart from any mortgages they may be assuming by agreement). However, the exceptions to title set out in clause 9 include restrictive covenants (charges which prevent something from being done to or with the property), and statutory rights-of-way (for example, in favour of a utility provider such as BC Hydro), as well as any surviving conditions, provisos, restrictions, exceptions and reservations contained in the original grant from the Crown. Therefore, when as the buyer’s lawyer you see, for instance a restrictive covenant or a right of way on the title, you must advise the buyer that because of clause 9 the buyer must purchase the property subject to these encumbrances if they are in favour of a utility or public authority.

Among the exceptions to an indefeasible title are those set out under s. 23(2) of the Land Title Act. A person named as owner on title is indefeasibly entitled to an estate in fee simple to the land subject to the exceptions specified in s. 23(2). A Crown grant search is necessary as part of the process to determine whether rights to resources such as timber, minerals and water are included in the title to land. In the normal circumstance, a Crown grant search would not be needed for a residential conveyance occurring in a municipality. To understand completely about any of these rights to resources, review the applicable related legislation (e.g. Mineral Tenure Act, Petroleum and Natural Gas Act, Water Sustainability Act). See also Appendix 8 of this Chapter.

Another difficulty with this clause arises if the buyer’s mortgage lender will not agree to advance funds on a mortgage that is subject to certain existing encumbrances, such as an offensive right of way (see Information Item 5 on the back of the Contract of Purchase and Sale). If you are retained to carry out both the conveyance and to prepare the mortgage, you will need to take great care with your reports on title. The report to the mortgage lender will need to conform to your instructions from the mortgage lender, and your report to the buyer should refer to this clause in the contract.

Clause 9 does not cover private encumbrances like easements with neighbours and building schemes governing what a neighbourhood will look like. Therefore, in signing the Contract of the Purchase and Sale, the seller agrees to deliver the title free and clear of such encumbrances. If the seller fails to remove these encumbrances from the title, the buyer may rely on that failure to back out of the transaction (especially in volatile falling markets). Many real estate licensees have therefore adopted the practice of attaching title to the Contract of Purchase and Sale and having the buyer agree to accept all non-financial encumbrances listed on it; this practice is fine provided the buyer understands the nature and impact of all title registrations.

Where land being purchased is vacant (i.e. has no buildings) or is located in a rural area, it becomes especially important to locate all rights of way or easements to ensure that the buyer will be able to build where he or she wants to or at all. With the changes made to setback requirements for septic fields from wells and water sources, many properties have been rendered practically unbuildable without exorbitantly priced engineered solutions to septic issues. Rural properties can also be officially water-access only properties and the road in place may be at the pleasure of a neighbor or forestry service without a right of usage. Even in urban settings, access to certain aspects of the subject property may require the cooperation or permission of a neighbour. Any agreements between the seller and a neighbour will generally not be enforceable by the buyer, unless access has been granted via an easement registered against the neighbour’s property, so care should be taken to have all access arrangements documented in writing or make the delivery of such documents a condition to closing.

The various encumbrances allowed by clause 9 are dealt with in further detail in other chapters.
10. Closing Procedure

Clauses 10, 11 and 12 set out how payment of the purchase price is to be paid, the terms on which documents are to be delivered, and the requirement that time will be of the essence.

Note that the standard Contract of Purchase and Sale was amended, effective June 2018, to include clauses 11A and 11B, which specify documents to be exchanged between the parties, in addition to the general documentary requirements in clause 11:

11. DOCUMENTS: All documents required to give effect to this Contract will be delivered in registrable form where necessary and will be lodged for registration in the appropriate Land Title Office by 4 pm on the Completion Date.

Clause 11A now requires the seller to deliver to the buyer a statutory declaration of residence. If the seller is a non-resident, the buyer holds back (from the purchase price payable) the amount provided for section 116 of the Income Tax Act. The buyer needs these particulars to complete the Property Transfer Tax form.

Clause 11B concerns GST. GST is customarily borne by the buyer. Unless the parties have dealt with GST in an amendment, the lawyer should confirm with the client whether the sale attracts GST and, if so, whether GST is included in the sale price or is in addition to the sale price. Lawyers who have conveyancing practices should encourage real estate licensees that they deal with to always have a GST clause in an addendum. Whether a transaction is subject to GST or not is determined first by the seller’s usage and status (see §5.08). Clause 11B says that if the transaction is exempt from GST, the seller delivers to the buyer a GST exemption certificate. If the transaction attracts GST, the parties deliver appropriate GST certificates to each other in respect of the transaction.

Clause 12 specifies that time is of the essence:

12. TIME: Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreement[t] to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller’s option, terminate this Contract, and, in such event, the amount paid by the Buyer will be non-refundable and absolutely forfeited to the Seller, subject to the provisions of Section 28 of the Real Estate Services Act, on account of damages, without prejudice to the Seller’s other remedies.

“Time will be of the essence hereof” means the parties have agreed that the time when the transaction closes is an essential element of the transaction. These words create very specific rights for the parties if any of the dates in the agreement are not met. For example, if the buyer fails to pay the balance of the purchase price precisely on the completion date, the seller may immediately have the right to cancel the agreement. If the reason for this failure is simply delay due to the conduct of the buyer’s law firm, that law firm may be liable to the buyer in a negligence action.

In every transaction it is important to determine whether time is of the essence. If it is unclear whether time is of the essence, it is difficult to determine whether failure to perform amounts to a breach or repudiation of the agreement and it may be necessary to allow a “reasonable” period of time for performance before commencing an action. Casual discussions about time should be avoided. Careful notes should be kept of any statements made in connection with extensions of time and all extensions should be made in writing, restating that time is of the essence (see §6.03(2)).

11. Completion

Clause 13 and 14 of the Contract of Purchase and Sale provide for completion of the conveyance on the basis of the CBA Standard Undertakings. These clauses were introduced in response to the Court of Appeal’s decision in Norfolk v. Aikens (1989), 41 B.C.L.R. (2d) 145, 1989 CanLII 245. Norfolk considered lawyer’s closing procedures under the previous standard form Contract of Purchase and Sale, which at the time did not include clauses comparable to 13 and 14, or provide for closings based on undertakings. A summary of Norfolk follows. Anyone intending to practice in the area of real estate should read the judgment and subsequent cases considering the issues raised by it.

In Norfolk, the interim agreement between the buyer and seller required the buyer to pay cash and the seller to deliver clear title, all by the completion date. This created the following common problems:

(a) the buyer not having mortgage funds necessary to pay the purchase price until after application for registration; and

(b) the seller being unable to clear title until after receiving the funds from the buyer.

The agreement in Norfolk reflected the standard contract at the time, which provided only for the very limited situations in which neither the buyer nor seller had mortgage financing.

The buyer’s solicitor attempted to resolve these problems by tendering documents to the seller’s
solicitor upon the “usual undertakings.” The Court of Appeal held the seller was under no obligation to agree to any method of completion different from the method set out in the interim agreement. The court pointed out that solicitors who intend to complete conveyances using any method which departs from the interim agreement must first obtain:

(a) authority from their client to complete by a method other than that in the interim agreement, otherwise, the solicitor may be liable to the client if the client insists upon strict performance of the interim agreement or if the client does not understand the risks of completing using a different method; and

(b) the agreement of the other side to the different method of completion, well in advance of the completion date. The other side is entitled to insist upon strict compliance with the purchase agreement.

Many BC decisions applied Norfolk in examining whether the seller’s or buyer’s tender at closing—that is, the delivery of all money, documents and other items required by the purchase agreement to the applicable party or parties in the manner required by the purchase agreement—was adequate. Refer to “Norfolk v. Aikens Jurisprudence” [§3.68] in the BC Real Estate Practice Manual.

To overcome the problems arising from Norfolk, the BC Real Estate Association and the CBA Real Property Section included clauses 13 and 14 in the standard Contract of Purchase and Sale.

Clause 13 reads:

13. BUYER FINANCING: If the Buyer is relying upon a new mortgage to finance the Purchase Price, the Buyer, while still required to pay the Purchase Price on the Completion Date, may wait to pay the Purchase Price to the Seller until after the transfer and new mortgage documents have been lodged for registration in the appropriate Land Title Office, but only if, before such lodging, the Buyer has:

(a) made available for tender to the Seller that portion of the Purchase Price not secured by the new mortgage, and

(b) fulfilled all the new mortgagee’s conditions for funding except lodging the mortgage for registration, and (c) made available to the Seller, a Lawyer’s or Notary’s undertaking to pay the Purchase Price upon the lodging of the transfer and new mortgage documents and the advance by the mortgagee of the mortgage proceeds pursuant to the Canadian Bar Association (BC Branch) (Real Property Section) standard undertakings (the “CBA Standard Undertakings”).

Clause 14 reads:

14. CLEARING TITLE: If the Seller has existing financial charges to be cleared from title, the Seller, while still required to clear such charges, may wait to pay and discharge existing financial charges until immediately after receipt of the Purchase Price, but in this event, the Seller agrees that payment of the Purchase Price shall be made by the Buyer’s Lawyer or Notary to the Seller’s Lawyer or Notary, on the CBA Standard Undertakings to pay out and discharge the financial charges, and remit the balance, if any, to the Seller.

Clauses 13 and 14 of the standard Contract of Purchase and Sale incorporate the CBA Standard Undertakings. Under the CBA Standard Undertakings, the buyer agrees that the seller, although still required to clear financial charges from title, may wait until the purchase funds are received before paying and discharging the charges. By using undertakings, the seller does not need to arrange for interim financing to be in a position to pay out any existing financial charges before closing.

As noted earlier, without clauses 13 and 14, the Contract of Purchase and Sale does not provide for the common circumstance in conveyancing where the buyer requires a mortgage and the seller has a mortgage on title. The recommended wording is an attempt to include in the Contract of Purchase and Sale the normal arrangements to obtain and pay off mortgages, which are now handled by undertaking letters. In this way, normal closings no longer depart from the contract wording.

Concerns about the wording in the clauses and in the CBA Standard Undertakings include the following:

(a) Under clause 13, there is no specific requirement that the buyer’s lawyer receive a satisfactory post-registration search of title before funds are released. The lender probably will not advance funds before receiving a satisfactory post-registration search. The contract does not address the issue of what will happen if the mortgage lender refuses to pay funds to the buyer’s lawyers after the documents have been registered but before a satisfactory post-registration search has been received.

(b) Clause 8.2 of the Standard Undertakings applies when the mortgage holder (the “Existing Chargeholder”) is a person or private corporate lender, as opposed to an institutional lender. Under Clause 8.2, the seller’s solicitor
mortgage lenders should be aware of the decision in Lin v. CIBC Mortgage Inc., 2015 BCCA 518. In this decision, CIBC advanced mortgage funds to its own notary, who in turn forwarded the funds to the borrowers’ notary on the borrowers’ undertaking to pay off the existing mortgage. The borrowers’ notary advised that she had paid out the funds required to discharge the existing mortgage, and paid the remaining funds to the borrowers. However, the borrowers’ notary subsequently disappeared, and it was discovered that no funds were actually paid to the existing first mortgage holder. The Court of Appeal upheld the trial judge’s decision that the CIBC mortgage should be struck from the borrowers’ title. This decision was based on the Court of Appeal’s finding that the funds remained the property of CIBC, and not the borrowers, as the conditions controlling release of the funds were never satisfied, and thus the borrowers never had any control over the funds advanced to their notary. Because of this decision, a lawyer acting for a mortgage lender should consider imposing a condition that the lender’s lawyer must receive a copy of the relevant payout statement and be authorized to complete the payout of the existing mortgage on behalf of the property owner (whether the owner is the borrower or the seller of the property). It can be difficult to obtain a payout statement and authority to pay from an unrelated party such as a seller in a purchase financing transaction, so when deciding how to proceed, a lender’s lawyer is encouraged to consider the nature of all parties and agents involved in a transaction and the level of potential risk involved. Additionally, a lender’s lawyer may consider recommending that the lender obtain a lender’s title insurance policy, which covers losses arising from the invalidity or unenforceability of the insured mortgage.

The point of the “COSTS” clause is to set out the duties of the respective parties concerning legal and registration costs in contractual terms. If a party is wondering why they have to pay your bill, you can refer them to this clause. See Information Item 6 on the back of the Contract of Purchase and Sale, and go over it with clients who are not clear about costs.

Clause 15 of the Contract of Purchase and Sale obliges the buyer to pay the costs of the conveyance and any financing. Clause 15 reads:

15. COSTS: The Buyer will bear all costs of the conveyance and, if applicable, any costs related to arranging a mortgage and the Seller will bear all costs of clearing title.

The CBA Standard Undertakings were amended in March 2003 to address problems arising from developments in British Columbia real estate practice. Specifically, they incorporated transparency provisions that put the seller’s lawyer on an undertaking to provide the buyer’s lawyer with:

- a copy of the payout statement;
- the cheque paying out the mortgage;
- the letter transmitting the cheque to the lender being paid out; and
- evidence of delivery of the cheque.

The seller’s lawyer is to provide the buyer’s lawyer with the above documents within five business days of the completion date, on the undertaking of the buyer’s lawyer not to release the seller’s financial information disclosed by the documentation to the buyer unless the seller’s lawyer fails to provide satisfactory evidence of discharge of the mortgage within 60 days of the completion date.

The current CBA Standard Undertakings are posted on the CBA website at www.cbabc.org/Home.

As an alternative to relying on clauses 13 and 14 in the standard Contract of Purchase and Sale and the CBA Standard Undertakings, you can obtain instructions from your client about closing procedures and then agree with the other lawyer on appropriate undertakings.

Note that in any case where a buyer or seller indicates a reluctance to complete, or any reluctance to complete on undertakings is suspected, the lawyer should be extremely cautious and have a thorough knowledge of the current case law.

With respect to clearing title, lawyers acting for mortgage lenders should be aware of the decision in Lin v. CIBC Mortgage Inc., 2015 BCCA 518. In Lin, CIBC advanced mortgage funds in the amount of approximately $520,000 to its own notary, who in turn forwarded the funds to the borrowers’ notary on the borrowers’ undertaking to pay off the existing mortgage. The borrowers’ notary advised that she had paid out the funds required to discharge the existing mortgage, and paid the remaining funds to the borrowers. However, the borrowers’ notary subsequently disappeared, and it was discovered that no funds were actually paid to the existing first mortgage holder. The Court of Appeal upheld the trial judge’s decision that the CIBC mortgage should be struck from the borrowers’ title. This decision was based on the Court of Appeal’s finding that the funds remained the property of CIBC, and not the borrowers, as the conditions controlling release of the funds were never satisfied, and thus the borrowers never had any control over the funds advanced to their notary. Because of this decision, a lawyer acting for a mortgage lender should consider imposing a condition that the lender’s lawyer must receive a copy of the relevant payout statement and be authorized to complete the payout of the existing mortgage on behalf of the property owner (whether the owner is the borrower or the seller of the property). It can be difficult to obtain a payout statement and authority to pay from an unrelated party such as a seller in a purchase financing transaction, so when deciding how to proceed, a lender’s lawyer is encouraged to consider the nature of all parties and agents involved in a transaction and the level of potential risk involved. Additionally, a lender’s lawyer may consider recommending that the lender obtain a lender’s title insurance policy, which covers losses arising from the invalidity or unenforceability of the insured mortgage.

See Chapter 7, §7.14, for more on clearing title, and Chapter 5 for more on closing procedures (§5.02(8)) and undertakings (§5.28).

12. Costs

Clause 15 of the Contract of Purchase and Sale obliges the buyer to pay the costs of the conveyance and any financing. Clause 15 reads:

15. COSTS: The Buyer will bear all costs of the conveyance and, if applicable, any costs related to arranging a mortgage and the Seller will bear all costs of clearing title.

The point of the “COSTS” clause is to set out the duties of the respective parties concerning legal and registration costs in contractual terms. If a party is wondering why they have to pay your bill, you can refer them to this clause. See Information Item 6 on the back of the Contract of Purchase and Sale, and go over it with clients who are not clear about costs.
In some other provinces and jurisdictions, it is common for the seller to pay the costs relating conveying the property. In British Columbia, the practice is that the buyer assumes responsibility for the conveyance, except where clearing title is involved. See Shaw Industries Ltd. v. Greenland Enterprises Ltd., 1991 CanLII 3955 (B.C.C.A.), additional reasons at (1991), 79 D.L.R. (4th) 641 at 649, where the Court of Appeal held that if the purchase contract states that the buyer bears all costs of the conveyance, the buyer has the obligation to prepare the transfer, unless title to the land is not registered in the name of the seller, in which case the seller prepares the documents.

13. Risk

The risk transfer provision (clause 16) of the Contract of Purchase and Sale addresses the need for the buyer to obtain insurance against fire and other perils before paying the seller, and the need for the seller to keep the house insured until after receiving payment:

16. RISK: All buildings on the Property and all other items included in the purchase and sale will be, and remain, at the risk of the Seller until 12:01 am on the Completion Date. After that time, the Property and all included items will be at the risk of the Buyer.

As soon as the buyer and seller have entered into a binding agreement, the buyer has acquired a beneficial interest in the property. Without a clause such as clause 16, the risk of loss in the event of fire or any of the other causes set out in this clause could be on the buyer. If you have a transaction that does not use the Contract of Purchase and Sale, there is a good chance that a passage of risk clause has not been included. In that situation, the buyer should be advised to take out all risks insurance immediately.

The passage of risk clause has the effect of making the seller responsible for a loss up to but not including the completion date. Based on clause 16, the buyer must ensure that he or she has insurance in place by no later than 12:01 am on the date of completion. Regardless of the particular wording, insurance should always be in place in the name of the buyer before the seller is paid his or her money.

What happens if there is a fire or other damage during the period between the signing of the purchase agreement and completion date? Assume that fire destroys the home. The buyer now wants to cancel, get the deposit back, and buy another house. The clause may allow the buyer to do so, if the seller is unable to provide the building in the condition required by the agreement. Note, however, that the clause does not require the seller to have insurance or to pay insurance proceeds to the buyer. There is some case law that indicates a buyer has no right to receive insurance proceeds from a seller’s policy of insurance unless the buyer has been assigned an interest in those proceeds in the agreement (Wile v. Cook, 1986 CanLII 27 (S.C.C.)).

Most fires only partially damage a house. If the buyer is anxious to complete the purchase on that particular home, and has a cooperative seller who has properly insured the house, then, by a further agreement, the seller’s insurance proceeds can be made available to the buyer to complete the home. If, however, the seller is either uninsured, or, being insured, is unwilling to cooperate with the buyer, the buyer is left with only two choices: complete the purchase of a partially burnt home; or, if it is a condition of the contract that the building be transferred undamaged, cancel the agreement.

14. Representations and Warranties

Clause 18 of the Contract of Purchase and Sale reads:

18. REPRESENTATIONS AND WARRANTIES: There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.

Part of this clause helps the seller, and part helps the buyer. The first part states that anything that may have been said about the state of the house or property but which is not written in the document will have no effect on the transaction. Accordingly, unless there is fraud (or possibly recklessness) involved, comments by the real estate licensee or the seller about, for example, the state of the roof or the state of the electric wiring, will not be binding upon the seller. On the other hand, representations and warranties which do appear in the purchase contract, such as a representation concerning urea formaldehyde insulation, will bind the seller, and will continue to bind the seller after closing.

The second part of clause 18 confirms that the doctrine of merger does not apply to this contract. This means that the representations made in the contract continue to apply even after the sale completes.

It is important to remember that in most cases representations and warranties by the seller, if unfulfilled, only allow the buyer to sue for damages. Unless they go to the root of the contract, these unfulfilled representations or warranties do not allow the buyer to cancel the agreement, nor do they allow the buyer to hold back a certain amount from the
purchase price unless permitted by a specific amendment to the contract. A unilateral request from a buyer to “hold back $1,500 until the black top is finished” cannot be complied with in the face of insistence by the seller on full payment. Your buyer must be advised that the only recourse is a lawsuit after completion.

15. Personal Information

Clause 19 has been added to address issues around consenting to the disclosure of personal information, which can now arise under the Personal Information Protection Act, S.B.C. 2003, c. 63.

16. Restriction on Assignment of Contract

Clause 20A now recognizes the duty of licensees to require the written consent of the seller to an assignment by the buyer. The clause reads:

20A. RESTRICTION ON ASSIGNMENT OF CONTRACT: The Buyer and the Seller agree that this Contract: (a) must not be assigned without the written consent of the Seller; and (b) the Seller is entitled to any profit resulting from an assignment of the Contract by the Buyer or any subsequent assignee.

“Assignment” is the practice of a party to a contract transferring rights in the contract to a third party before the transaction completes. Previously, the standard Contract of Purchase and Sale was silent as to the right of assignment. If the right to assign was not expressly dealt with by the parties, buyers could assign their interests to a third party without the sellers’ consent provided the buyer gave the seller written notice of the assignment.

New regulations came into force May 16, 2016 that require contracts that involve licensees to include the term that the contract cannot be assigned without the written consent of the seller, and that the seller is entitled to any profit resulting from the assignment of the contract. These regulations were imposed, in part, to protect sellers against “shadow flipping”: a buyer assigning a sales contract to another buyer (often for a higher price than the original purchase price) in the period before the deal with the original seller closes. When shadow flipping occurs, the original seller receives less than what the property ends up being worth, the buyer in the middle receives the difference in value, and the licensee earns an additional commission on the flip. See s. 8.2 of the Real Estate Services Regulation, B.C. Reg. 506/2004.

17. Agency Disclosure

Clause 21 provides for the seller and buyer to acknowledge the agency relationship that each may have with a real estate licensee. The various options for agency are set out in the brochure prepared by the BC Real Estate Association entitled Working with a Real Estate Agent. This brochure must now be delivered by the licensee(s) to each of the seller and buyer by the time an offer is made. Every real estate licensee must disclose his or her agency relationship to the parties to a real estate transaction (Part 5, ss. 5–10 of the Real Estate Services Act Rules, Ministerial Order: M417).

Note that as of June 15, 2018, dual agency, where one licensee represents both the buyer and seller, is quite limited. It is only possible in rare circumstances where the trade is in a remote location underserved by licensees and there is no practical alternative to dual agency.

18. Real Estate Commission

Clause 25 reads:

25. ACCEPTANCE: The Seller (a) hereby accepts the above offer and agrees to complete the sale upon the terms and conditions set out above, (b) agrees to pay a commission as per the Listing Contract, and (c) authorizes and instructs the Buyer and anyone acting on behalf of the Buyer or Seller to pay the commission out of the proceeds of sale and forward copies of the Seller’s Statement of Adjustments to the Cooperating/Listing Brokerage, as requested, forthwith after completion.

In British Columbia, the seller usually pays the commission. The amount of the commission does not appear in the Contract of Purchase and Sale either in dollar or percentage terms. This information is in the listing contract. If there is no letter from the listing broker setting out the commission, it may be necessary to request a copy of the listing contract in order to determine how much commission to put in the statement of adjustments. Note that the seller pays the commission to its licensee but the buyer may also have a licensee who is entitled by arrangement between the buyer’s and seller’s licensees to a share of that commission.

Clause 25 also authorizes the buyer’s lawyer to forward copies of the seller’s (not the buyer’s) statement of adjustments to the listing licensee.

On multiple listing sales (“MLS”) properties, the pattern outside Vancouver (and increasingly within Vancouver) is for the buyer’s lawyer to be asked to follow the “two cheque system” of commission...
dishoarse. The system follows Rule 7.7 of the Rules of Cooperation from the Real Estate Board (formerly known as the MLS Rules). Under this system, when the deposit is an amount less than the selling commission owing, the buyer’s lawyer will be asked, in writing, to prepare a commission cheque payable to the listing brokerage (which acts for the seller), and a second commission cheque for the selling brokerage (which acts for the buyer and customarily holds the deposit in trust), for the individual balances owing to each. When the deposit is an amount greater than the commission owing, the listing brokerage deducts from the deposit it is holding in trust the portion owing it on completion, and forwards the balance to the buyer’s lawyer in trust, to then be paid to the selling brokerage.

19. Information on the Back of the Form

The information on the back of the form is included to inform parties about their transaction, rather than to affect their legal rights. Lawyers and conveyancers should refer clients to the information on the back as much as possible to emphasize points that might otherwise be missed.

[§2.04] Property Condition Disclosure Statement

The BC Real Estate Association introduced a “Property Condition Disclosure Statement” (the “Disclosure Statement”) that is now in use throughout the province (see Appendix 2). All real estate boards have resolved to make use of the form mandatory in connection with multiple listing service transactions. Although there is no statutory requirement to do so, real estate licensees usually request that sellers complete the form. The form provides information that is not included in the Contract of Purchase and Sale but is of interest to buyers. The form also purports to limit the liability of real estate licensees by clarifying the representations upon which the buyer is relying. By clause 18, the Disclosure Statement may not form a part of the standard Contract of Purchase and Sale without an additional written term to that effect.

As the Supreme Court of British Columbia found in Malenfant v. Janzen, 1994 CanLII 285 (B.C.S.C.), there is no authority holding that answers given to the questions set out in the Disclosure Statement constitute representations in the form of warranties as to the condition of the property. However, the questions and answers in the Disclosure Statement form part of the contract if the parties agree in writing that they do.

Where the parties do incorporate the Disclosure Statement into the Contract of Purchase and Sale, representations made on the Disclosure Statement may provide the basis for a claim of breach of contract. In Doan v. Killins (1996), 5 R.P.R. (3d) 282 (B.C.S.C.), the defendants owned a residential property, the backyard of which a previous owner had enlarged by developing a lawn onto land owned by the municipality. The defendants listed the property for sale and answered “no” to the following question on the Disclosure Statement: “Are you aware of any encroachments, unregistered easements or unregistered rights of way?” The defendants subsequently entered into a contract with the plaintiffs for the purchase and sale of the property. The contract incorporated the Disclosure Statement. After completion, the plaintiffs commissioned a survey in anticipation of installing a swimming pool and discovered that a substantial portion of their backyard was on municipal property. The plaintiffs sued for breach of contract and for fraudulent or negligent misrepresentation.

The Court held that the defendants were clearly in breach of the Contract of Purchase and Sale, which incorporated the representations in the Disclosure Statement. The evidence showed that the defendants were well aware of the encroachment problem and did not communicate to the plaintiffs before making the contract. The Court concluded that the defendants deliberately and fraudulently withheld from the plaintiffs the extent of the problem.

As the BC Courts have repeatedly held, a Disclosure Statement obligates vendors to honestly disclose their knowledge, not to warrant that it is actually correct. In Arsenault v. Pedersen, 1996 CanLII 3519 (B.C.S.C.) the plaintiff purchased the defendants’ residential property. The defendants signed a Disclosure Statement in which they denied, among other things, being aware of any structural problems, water damage or roof leakage. The plaintiff later discovered structural problems and a severely leaking roof and sued for damages for fraudulent misrepresentation. The Supreme Court dismissed the action. The Court held that the Disclosure Statement did not require the sellers to warrant a certain state of affairs; rather, it required the sellers to say no more than that they were not aware of problems. Barring proof of fraud in real estate matters, “buyer beware” applies.

In Nixon v. MacIver, 2016 BCCA 8, the BC Court of Appeal followed Arsenault with respect to the obligations imposed on a vendor by the Disclosure Statement:

[48] Information contained in a disclosure statement that is incorporated into a contract of purchase and sale may be a representation upon which a purchaser can rely: Ward v. Smith, 2001 BCSC 1366 at para. 31. However, a vendor is only obliged to disclose his or her current actual knowledge of the state of affairs of the property to the extent promised in the disclosure statement and need say “no more than that he or she is or is not aware of problems”: Arsenault at para. 12. In other words, the vendor must correctly and honestly disclose his or her actual knowledge, but that knowledge does not have to be correct. A vendor is not required to warrant a certain state of affairs but only to put
prospective purchasers on notice of any current known problems. The purpose of a disclosure statement is to identify any problems or concerns with the property, not to give detailed comments in answer to the questions posed.

In Hamilton v. Callaway, 2016 BCCA 189, the Court of Appeal confirmed that Nixon is the governing authority in BC. The plaintiff buyer in that case had argued that the defendant seller was liable for breach of contract because the Disclosure Statement representation—that the seller was not aware of any problems with the plumbing system—was incorporated into the Contract of Purchase and Sale, and the representation was false. However, the trial judge had found that the seller had an honest belief in the truth of what she said in her Disclosure Statement. The Court of Appeal rejected the buyer’s suggestion that accuracy is the criteria by which to measure the seller’s statement.

Even when the Disclosure Statement is not incorporated into the Contract of Purchase and Sale, dishonest answers on the Disclosure Statement may form the basis for an action in negligent misrepresentation. See e.g. Dirksen v. Au, [1996] B.C.J. No. 2738 (Prov. Ct.), where despite having had considerable difficulty selling their property previously due to water damage, the sellers had answered “no” when asked on the Disclosure Statement whether they were aware of roof leakage or damage due to wind, fire, or water.

A buyer of a strata lot must review the strata corporation meeting minutes carefully, despite the contents of the “Strata Title Property Condition Disclosure Statement.” In Sask v. Brook, 2000 BCSC 1745, the sellers indicated that they were not aware of any water damage or roof leakage in the condominium building. The defendant, who completed the Disclosure Statement, was the chair of the strata council and was aware of water leakage problems in the building generally. However, he honestly believed that the questions related to the seller’s unit and not the building generally. For this reason, the plaintiff could only rely on negligent misrepresentation to bind the defendant. However, given the fact that the strata corporation meeting minutes disclosed the leaks in the building, it was not reasonable for the plaintiff to rely on the Disclosure Statement. As such, the claim in negligent misrepresentation failed.
Chapter 3

Client Instructions

[§3.01] Receiving Instructions From the Buyer

Instructions to a lawyer come in a variety of ways and from different parties to a transaction:

(a) directly from a buyer, before or after the contract is firm, or is subject free;
(b) from the buyer’s real estate licensee before or after the contract is firm;
(c) from a bank or mortgage broker working on the transaction, before or after the contract is firm;
(d) from a friend or relative of the buyer or seller before or after the contract is firm;
(e) directly from the seller before or after the contract is firm; or
(f) from one of the real estate companies having sent the contract and deal sheet after the transaction is firm.

Contact may be by phone, fax, email or in person, in the office or outside the office. The buyer and seller might also happen to contact different lawyers in the same office at the same time. Law firms that do a lot of conveyancing need systems to keep track of who has contacted them and when, to avoid conflicts of interest.

As the contacted lawyer, the first order of business is to sort out who you will represent. It is recommended that lawyers act only for either the buyer or seller and not both. Although permitted in certain circumstances, if any dispute arises between the buyer and seller on any issue, the lawyer who started out acting for both will end up acting for neither because the lawyer must refer both out. Such an event is extremely inconvenient for all involved and will not be good for the lawyer’s practice. For more on conflicts of interest see §3.02.

In some circumstances a lawyer will act for the buyer and have the unrepresented seller acknowledge two things: that they have been advised to obtain independent counsel, and that when taking the seller’s signatures and clearing title the lawyer is acting only for the buyer by doing things that facilitate the transaction. Classic circumstances in which this practice may arise are short-fuse deals, deals in rural areas where there are no reasonable alternatives, and where both buyer and seller have long-standing relationships with the lawyer and do not want to go to outside counsel.

After settling who you are acting for, review the purchase contract. If the client came in person with the documents, and your experience level allows it, you may review the contract with the client then; otherwise, ask for time to review and consider it.

At this stage you need to advise the client on all aspects of the transaction, including the purchase contract. You should discuss the procedure and timing for completing the conveyance. You should also give your client a picture of what you propose to do and what timeframe you propose to do it in.

You must consider your client’s knowledge level when advising. If your client is a first-time buyer, you will have to explain things in great detail and provide assistance in many ways. This is one of the most stressful times in your client’s life, and your client may not be sure of what is involved. However, if your client is an experienced owner of real estate, you can approach the initial interview differently.

Assuming that you are acting for a first-time home buyer and you have received and reviewed the purchase agreement, you should discuss the following with your client during the initial telephone interview or in a preliminary reporting letter (for a discussion of preliminary and interim reporting letters, see §5.18):

1. Discuss fees, disbursements and applicable taxes fully and fairly with the buyer at this time. You will find that many buyers are embarrassed to ask you directly about your fees and disbursements and will appreciate a direct approach.
2. Advise what steps you propose to take to search title, after confirming your instructions to act. You can also explain what you will be looking for and how you will communicate the results of that search.
3. State clearly that obtaining insurance is the buyer’s responsibility. Recommend that the client contact his or her insurance agent well in advance of the completion date to ensure that proper coverage is obtained. The buyer’s coverage should be effective before the completion, rather than by the possession date.

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4. Ascertain whether your client is concerned about the location of improvements on the lot. If so, explain to the client the nature of a surveyor’s certificate and the cost. Discuss the cost of title insurance as an alternative to the survey. The financing may require the title insurance in any event, so this will be the preferred solution unless a survey is needed for a pending addition.

5. Discuss municipal zoning bylaws and building bylaws and their general effect. Clients who are concerned with these matters should be given the responsibility to make their own enquiries.

6. If your client is concerned about the legality of suites on the property, advise the client to make enquiries of the appropriate regulatory authorities, usually the local municipality.

7. Discuss moving expenses and how the client will obtain the keys. Responsibility for these matters should be given to the client. If a realtor is involved, the realtor typically deals with keys.

8. Discuss opening accounts such as hydro, telephone, etc., with your client. Make it clear that these matters are the client’s responsibility.

9. Ask if the purchase price reflects the fair market value of the property. In an arm’s-length transaction, it usually does. Occasionally a buyer will fall for a seller wanting to write the deal at a lower amount and have cash move on the side. The seller wants to save capital gains tax and tells the buyer that the buyer can save some property transfer tax. Once you explain that this scheme is a criminal offence and that you cannot be a party to it, the deal will either collapse or be written properly.

10. Identify the name of the buyer, how the buyer wants to be described in terms of both occupation and address, and whether, if there are two buyers, they are to hold the property as joint tenants or as tenants in common. You may need to explain the difference.

11. Ask whether any recent work has been done on or about the property, which might raise concerns of a potential lien claim under the *Builders Lien Act*.

12. Ask at this stage whether or not your client is aware of any marital difficulties between the seller and his or her spouse, which might attract the provisions of the *Family Law Act*.

13. If the seller is a developer who is required to deliver a disclosure statement under the *Real Estate Development Marketing Act*, find out if the buyer has received the disclosure statement. Suggest that the disclosure statement be forwarded to you for your review. If the seller is not a developer, find out if the buyer has received a Property Condition Disclosure Statement (see §2.04). You should attempt to verify any information contained in a disclosure statement or a Property Condition Disclosure Statement upon which the buyer is relying is accurate.

14. Discuss with your client the proposed method of funding the purchase. Explain that you will require funds in your trust account before the completion date. If a mortgage is to be obtained, outline the steps that will be required to complete the mortgage transaction and the documents that must be signed by your client.

15. Advise your client that property transfer tax will be payable, if applicable. There is an exemption available in some cases if the buyer is a first-time home buyer or the home is newly built.

Also advise your client if an additional property transfer tax applies. The additional property transfer tax applies to transfers of residential property to foreign entities (foreign nationals or foreign corporations) or taxable trustees, if the property is within specified areas of BC.

Most transactions between unrelated parties are subject to property transfer tax. The tax may be a significant expense for which your client has not budgeted. Keep in mind that property transfer tax is payable upon registration of the Property Transfer Tax Return, which must be registered with the transfer. These registrations will occur before you, as the buyer’s lawyer, will have access to any mortgage funds, so you must ensure that you receive the amount of the property transfer tax from your client before advancing funds.

See §5.05 (Property Transfer Tax Return and Additional Property Transfer Tax Return) for more on this topic.

16. If the seller is a non-resident of Canada, you should hold back (or place the seller’s lawyer on undertakings to hold back) a percentage of the sale proceeds until the seller obtains a clearance certificate from the Canada Revenue Agency stating that no taxes are owed by the seller on the sale of the property. See §5.10 for more information on the buyer’s obligations when the seller is a non-resident.
17. Determine from your client whether GST is payable. If GST is not dealt with in the contract, you should consider at least the following factors:

(a) whether the seller is a builder or renovator, if the seller is an individual;
(b) whether the property is a new, substantially renovated or converted commercial property;
(c) whether the property is the seller’s residence or personal recreational property; and
(d) whether the buyer is entitled to a GST rebate either directly from the builder or from the Government.

Depending on the information provided on the contract or otherwise, the buyer or seller may have obligations under the Excise Tax Act to collect and remit GST. If so, you should consider obtaining instructions to negotiate further agreements with the other party, or obtain representations and warranties to clarify GST issues. New housing may also attract GST. GST is discussed in more detail in §5.08.

Once you have verbally received all of the information from the buyer, you should confirm your instructions in writing. This is discussed in detail in §5.18.

[§3.02] Conflict of Interest

Frequently, a real estate lawyer is asked to act for more than one party, particularly in residential transactions. The parties will perceive this as being in their interest, with a view to minimizing costs, and often have no idea as to the extent of the lawyer’s function in a conveyancing transaction or how any conflict of interest could arise. The lawyer’s function is often seen as merely filling in blanks in standard form documents. Parties often are not fully aware of the extent to which legal rights and obligations are affected by a transaction. If you are asked to act for more than one party in a real estate transaction, you must carefully consider for whom you are being asked to act and what potential there is for a conflict of interest. Even when a transaction appears to be straightforward, with little potential for a conflict of interest, bear in mind that parties frequently have a change of heart about completing a transaction and “whatever can go wrong, will.”

You must in any event strictly adhere to the rules in the BC Code. Be aware of the rules in section 3.4 and Appendix C of the BC Code regarding acting for more than one party in any matter where there is a conflict of interest between any of the parties. Under rule 3.4-1, “A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.” Appendix C sets out the circumstances in which a lawyer is permitted to act for more than one party with different interests in a real property transaction (see Commentary [0.1] to 3.4-1).

Section 2 of Appendix C sets out the guidelines with respect to acting for parties with different interests in a real property transaction. A lawyer must not act for parties with different interests in a real property transaction unless the transaction is a “simple conveyance” or falls within the other exceptions set out in the section.

Section 4 of Appendix C sets out factors in determining whether a transaction is a “simple conveyance.” Commentary [1] to Appendix C gives examples of transactions that may be treated as simple conveyances:

[1] The following are examples of transactions that may be treated as simple conveyances when this commentary does not apply to exclude them:

(a) the payment of all cash for clear title,
(b) the discharge of one or more encumbrances and payment of the balance, if any, in cash,
(c) the assumption of one or more existing mortgages or agreements for sale and the payment of the balance, if any, in cash,
(d) a mortgage that does not contain any commercial element, given by a mortgagor to an institutional lender to be registered against the mortgagor’s residence, including a mortgage that is

(i) a revolving mortgage that can be advanced and re-advanced,
(ii) to be advanced in stages, or
(iii) given to secure a line of credit,
(e) transfer of a leasehold interest if there are no changes to the terms of the lease,
(f) the sale by a developer of a completed residential building lot at any time after the statutory time period for filing claims of builders’ liens has expired, or
(g) any combination of the foregoing.

Commentary [2] to Appendix C gives examples of transactions that must not be treated as simple conveyances:

[2] The following are examples of transactions that must not be treated as simple conveyances:

(h) a transaction in which there is any commercial element, such as

(i) a conveyance included in a sale and purchase of a business,
(ii) a transaction involving a building containing more than three residential units, or
(iii) a transaction for a commercial purpose involving either a revolving mortgage that can be advanced and re-advanced or a mortgage given to secure a line of credit,

(i) a lease or transfer of a lease, other than as set out in subparagraph (e),

(j) a transaction in which there is a mortgage back from the purchaser to the vendor,

(k) an agreement for sale,

(l) a transaction in which the lawyer’s client is a vendor who:

   (i) advertises or holds out directly or by inference through representations of sales staff or otherwise as an inducement to purchasers that a registered transfer or other legal services are included in the purchase price of the property,

   (ii) is or was the developer of property being sold, unless subparagraph (f) applies, or

(m) a conveyance of residential property with substantial improvements under construction at the time the agreement for purchase and sale was signed, unless the lawyer’s clients are a purchaser and a mortgagee and construction is completed before funds are advanced under the mortgage, or

(n) the drafting of a contract of purchase and sale.

Commentary [3] to Appendix C states:

[3] A transaction is not considered to have a commercial element merely because one of the parties is a corporation.

A number of cases have imposed liability on lawyers who acted for more than one party in a real estate transaction. You should be familiar with those cases. There are also discipline cases published in the Law Society’s Discipline Digest. See, for example, the December 1992, No. 10 case, where the lawyer professionally misconducted himself by representing parties to real estate transactions in breach of the Professional Conduct Handbook (replaced by the BC Code on January 1, 2013). The hearing panel found that the lawyer demonstrated a disturbing attitude to real estate practice, that he was unable to recognize conflicts of interest, and that he did not see himself as the protector of anyone’s interests but simply as the mechanical facilitator of transactions.

Most often you will be asked to act for a buyer and a lending institution in a residential conveyance. Sample conflict letters to the buyer and the lender are at the end of this chapter as Appendices 3 and 4.

There is a discussion of conflicts of interest generally in Practice Material: Professionalism: Ethics, Chapter 6, §6.14.
Chapter 4

Searches

[§4.01] Searching for Titles, Documents and Plans From the Land Title Office

A lawyer normally delegates the task of obtaining a title search to an employee of the law firm or a title search company. Nonetheless, it is the lawyer’s responsibility to take charge of managing the issues arising from title searches.

Obtaining and carefully reviewing a land title search is a critical obligation of the buyer’s lawyer and the seller’s lawyer. A buyer’s lawyer should prepare a report on title for their client’s review. A seller’s lawyer will want to review the nature of the charges that the lawyer will likely have to undertake to discharge from title.

A significant cause of real estate claims in British Columbia is the failure of lawyers to manage the title search and review process. Practice errors include the title search being done, but the lawyer:

(1) assuming, without reading the search, that it doesn’t raise any issue for the client (missing for example, a judgment registered on title or bylaw contravention);

(2) failing to read the title search carefully and missing a flag such as a notation of “miscellaneous notes” that indicates further searching is required;

(3) not paying special attention to legal descriptions in the title search that contain exceptions or describe the land as “That part of lot…” to ensure the parcel defined in the legal description comprises the entirety of the lands that the buyers understand they have agreed to purchase;

(4) reviewing the search but failing to report the results to the client, assuming that the items recorded on title will not be an issue for the client; or

(5) delaying the delivery of the lawyer’s report to the client, thus leaving the client with insufficient time to react to any issue that might arise.

The Land Title Office has transferred most active title records into electronic format. Accordingly, it is rare for lawyers to encounter any title registered under the old system of “index books”; in that system, titles and charges were marked manually in large books stored on counters throughout the Land Title Offices. If the title is not yet recorded electronically, the lawyer must request an index search. Among other data, the index shows all pending charges that have not yet been registered and which do not yet show on title.

The New Westminster Land Title Office, which is responsible for the Vancouver and New Westminster Land Title Districts, is located at 500-11 Eighth Street, New Westminster, BC. The Kamloops Land Title Office, which is responsible for the Kamloops and Nelson Land Title Districts, is located at 114-455 Columbia Street, Kamloops, BC. The Victoria Land Title Office, which is responsible for the Victoria, Prince George and Prince Rupert Land Title Districts, is located at 200-1321 Blanshard Street, Victoria, BC.

Normally, there are a number of distinct steps that need to be taken when conducting a title search.

1. Obtaining the Legal Description

A parcel of land is identified by its legal description. It is not possible to search a title if you have only the civic address. Therefore, it is necessary to find the legal description corresponding to the civic address. A legal description can be obtained by searching BC Assessment’s website or ParcelMapBC. Title search companies, such as “Instant Legal” (604.585.1108), can also quickly ascertain the corresponding legal description once they know the civic address.

The legal description will include a parcel identifier number (“PID”), to allow easier access to an electronic record of title. The PID is a nine-digit number assigned to every electronic title record. It is located just above the remainder of the legal description on all documents affecting title. The PID is unique to the parcel of land represented by the title, and will not change unless the parcel is subdivided or consolidated.

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2. Searching the Title

Once you have obtained the PID, a title search can be obtained through myLTSA (an official point of access to the LTSA’s Electronic Services and information), registry agents, or by going to one of the three Land Title Offices. You will note that the last item on the title is the heading “Pending Applications.” All pending registrations appear here by registration number. However, the pending registrations do not always appear in order of priority, so the only safe way to determine pending priority is to look at the pending documents themselves and note the time and date of each application.

Landcor Data Corporation is a real estate database company that has an online service that allows an inquirer to search for certain details regarding many properties in the Lower Mainland. In addition to some of the legal information provided by Search Services in myLTSA (e.g. PID, legal description, etc.), Landcor provides the searcher with supporting information, such as lot width/depth, finished floor area, number of bathrooms, and previous and current land value, for example. Unlike myLTSA, Landcor does not provide the searcher with title and registered charges particulars; therefore, Landcor should be used as a supplement, not an alternative.

3. Obtaining Particulars of Charges (If Requested)

Most documents received in the Land Title Office after 1990 and all documents registered from 1993 onwards, except those that exceed 100 pages and those that are unsuitable for imaging, will have been scanned and are available through myLTSA. You can use the “Scan on Demand” service in myLTSA to order copies of documents that are not yet available electronically.

Only people who have been issued a pass are allowed behind the counters at the Land Title Office. The following people may obtain passes (permanent or daily passes are available):

(a) title search company employees;
(b) lawyers and law firm agents;
(c) surveyors; and
(d) articled students (after they have been introduced to the registrar, either personally or by a letter from their principal).

Those individuals have access to a number of documents behind the counters, including index books, original titles and cabinets with microfilm cartridges. Only Land Title Office personnel and designated people from each title search company are permitted to go into the vault and pull out documents. All others, including lawyers and articled students, must request that Land Title Office personnel pull out the required documents. The documents can be photocopied in the vaults, but they cannot be removed. A buyer must pay fixed fees for Land Title Office services (see the “Fees” page of the LTSA website for current fees (ltsa.ca/fees)).

4. Obtaining Plans

As part of your search, you should obtain a copy of the survey plan or strata plan, both of which show the location and dimensions of the property. On older strata plans, the strata plan will include schedules of unit entitlement and destruction for the strata lot.

Unit entitlement divides the strata corporation’s assets and liabilities proportionately among the strata units. It sets what proportion of expenses relating to common property must be borne by each strata lot, as well as the strata lot’s share of the common expenses, special assessments and other liabilities of the strata corporation.

Interest upon destruction is used to determine each owner’s share as tenants in common of the property, and assets of the strata corporation in the event of the destruction of the building. Under the Strata Property Act there is no longer a schedule of interest on destruction. Section 273 of the Strata Property Act creates a schedule that is to be used to determine each owner’s share of the common property and assets as of the date of the dissolution or winding up of the strata corporation. However, under s. 273(3) if a strata corporation has a schedule of interest on destruction created under the former Condominium Act, the schedule determines the owner’s interest in the land and personal property upon the winding up of the strata corporation, and replaces the formula in s. 273(1).

Lawyers with a myLTSA account can download many of the survey plans and strata plans directly onto their personal computers. You can use the “Scan on Demand” service in myLTSA to order copies of plans that are not yet available electronically.

You should also obtain any other plans that affect the property, such as those that show the locations of relevant rights of way, easements and other relevant interests. In circumstances such as when property is being purchased for development, redevelopment, mineral or timber rights, it is necessary to obtain a copy of the Crown grant in order to ensure that rights of way, timber and minerals were not reserved to the Crown.
5. Land Title Office Search Checklist

(a) A full search should include the following.

(i) A printout of the title record that combines:
   - the title search, which gives particulars of ownership and a complete list of all encumbrances recorded on the title (i.e. registered and pending charges); and
   - the location of the duplicate certificate of title if one has been issued. If the duplicate certificate is not in the Land Title Office, it must be returned there before the conveyance can be completed.

(ii) Copies of all charges against that title, including copies of all pending charges, if available, and if copies are not available, particulars of the pending charges. However, certain charges that encumber large numbers of properties, such as mortgages of public rights of way, certain bylaws and Aeronautic Act filings, are recurrent and very bulky. You should determine whether it makes sense in the circumstances to obtain full copies of these notations or charges (for more information see Chapter 5 of the Real Estate Practice Manual (Vancouver: CLEBC));

(iii) A copy of the survey plan or strata plan of the property;

(iv) Copies of all other plans affecting the property (such as right of way plans); and

(v) Anything else affecting title.

(b) When reviewing the title, consider the following:

(i) Charges may not appear in order of priority. Charges do not necessarily appear in the same order in which they were registered. Therefore, in order to read the title properly, you need to pay attention to the time and date of registration of each document. Priority is determined by the time and date of registration subject to s. 28 of the Land Title Act;

(ii) Read the headings at the end of the title search carefully:
   - “Pending Applications”
     Registrations that have been accepted but not processed show as pending applications on the title itself. A document is given a number when it is presented to the cashier or e-filed.

   • “Duplicate Indefeasible Title”
     This entry indicates whether a duplicate certificate of has been issued. The Land Title Act provides that the registrar may at the request of the registered owner of a property issue a duplicate certificate of title. Until that duplicate is returned to the Land Title Office, no transfer, mortgage or Agreement for Sale (registered as a “Right to Purchase”) may be registered regarding that property. Obtaining duplicates is the most common way to create an equitable mortgage. A duplicate title will not be issued if the title is subject to a registered mortgage or an agreement for sale (see Chapter 7).

   • “Transfers”
     If any portion of the parcel of land included in the legal description has been transferred it will be indicated here.

   • “Corrections”
     Corrections made to the title to rectify errors are indicated here. This includes a reference to the application number used to apply the correction. Obtaining a copy of the correction application provides a brief description of the error that was corrected, and a copy of the title as it existed prior to the correction being applied (pursuant to s. 383(2) of the Land Title Act).

(iii) Miscellaneous notes must be checked separately. Always request the electronic record of those notes and review miscellaneous notes that incorporate what would formerly have been noted on the index but would not have appeared as a charge on title. Various miscellaneous filings affecting a parcel are registered under “MN”: posting plans, statutory right of way plans (that is, the plans alone without any accompanying right of In accordance with Director’s Requirements DR 06-11, with only limited exceptions all applications and plans must be submitted electronically.
way agreement), references to public official plans, and Agricultural Land Reserve determinations. As a result of enhancements made to the search functionality in myLTSA, much of the information for parcels that was previously accessed via a miscellaneous notes search is now accessed via the “associated plan” functionality in myLTSA. See Practice Note PN 03-16 at www.ltsa.ca in this regard.

(iv) The General Index and common property record must also be searched when searching strata titles. Pending applications affecting the common property are noted as pending applications on all of the strata lot titles.

(c) Consider signing on to the Parcel Activity Notifier Service. This service allows myLTSA customers to receive, automatically, an email advising of any activity relating to the subject property between the date of the request for the service and the expiration of the notice period (usually 90 days). Once the service is requested for a particular parcel of land, the customer is notified, via email, of any activity (such as the filing of a Transfer, Mortgage, Claim of Builders Lien or Certificate of Pending Litigation) affecting that property. The customer can then use the Document Retrieval Service to obtain a copy of the document.

§4.02 Index Searches

If a record of title is not in electronic form, you must request or conduct an index search. Very few titles, usually only those applying to certain apartments in Vancouver and very old subdivisions, are not in electronic form. If you encounter such a title, your land title agent or the Land Title Office staff will usually help to interpret the documents.

§4.03 Strata Title Searches

Strata title searches are more complicated than standard residential searches. You need to take the following additional steps:

(a) obtain an electronic record of the common property for charges against the common property or judgments against the strata corporation; and

(b) obtain an electronic record of the Strata Plan General Index. For stratas created under the *Strata Property Act*, the Land Title Office will have a general index for each strata corporation. The schedules of unit entitlement, voting rights, any bylaw amendments, resolutions and other documents required to be filed in the Land Title Office under the *Strata Property Act* and not noted or endorsed elsewhere in the records of the Land Title Office will be noted on the General Index.

In addition to these searches from the Land Title Office, obtain the following from the strata corporation:

(a) a copy of the strata corporation balance sheet and income statement;

(b) a Certificate of Payment under s. 115(1) of the *Strata Property Act* (Form F) that no money is owing to the strata corporation by the seller (registration of the transfer cannot proceed without this certificate (s. 256(1));

(c) a Form B Information Certificate under s. 59 of the *Strata Property Act*; and

(d) the name and phone number of the insurance agent that has arranged insurance for the strata corporation.

§4.04 Real Property Taxes

A lawyer must find out if real property taxes (which in some municipalities include separate utilities, dyking or other charges) are paid to date. You obtain this information from the local taxing authority, usually the city or municipality. The responsibility for paying real property taxes follows the property rather than the owner of the property. Unpaid taxes constitute a charge on the property. If taxes are unpaid, delinquent or in arrears and the seller is to be responsible for payment, it is critical that you ensure that these taxes are paid, ideally by showing a holdback on the seller’s statement of adjustments in an amount sufficient for the buyer’s lawyer to fully pay any outstanding property taxes, inclusive of any interest and penalties.

Note that most municipal tax statements are issued subject to s. 249(3) of the *Community Charter*, S.B.C. 2003, c. 26. The issuing municipality is not liable in damages for an error in that statement. As well, if a special area debt levy, local improvement charge, or other extraordinary municipal charge has been incurred but not assessed, the tax statement could be misleading. You may want to investigate further if your client is purchasing a property in a relatively new subdivision, or if municipal improvements have been undertaken in the area.

§4.05 Corporate Searches

If the seller is a company, a solicitor must search in the office of the Registrar of Companies to ensure that the company has not been struck from the Corporate Registry. Check that the names you have been given as the directors and officers of the company acting in the sale
of the property correspond with the names of directors and officers filed in the registry.

If the company has been struck from the Registrar of Companies, the property may have become the property of (escheated to) the Provincial Crown under the Escheat Act. Land that has become the property of the Provincial Crown is not reflected in the records of the Land Title Office. Consequently, escheats often go undiscovered until an application to transfer land is submitted to a Land Title Office, and rejected on the basis that the land has escheated to the Crown.

The land owned by a company becomes the property of the Provincial Crown if the company remains struck from the register of companies for more than two years (Escheat Act, s. 4). If the company is restored to the corporate register by court order within two years from the date the corporation was struck, the land reverts to the company. After two years, a company must apply to the Supreme Court for an order that the escheated company. After two years, a company must apply to the Supreme Court for an order that the escheated land vests in the company pursuant to s. 4(5) of the Escheat Act. If the company was restored to the register before November 27, 1992, an order-in-council transferring the land from the Provincial Crown to the company under s. 5 of the Act is required.

[§4.06] Encumbrances

The most common financial charges you will come across in your search are mortgages and leases, which are discussed in Chapter 7. What follows is a selection of non-financial charges that you might have to advise your client about.

1. Easements

An easement is an interest in land in which the owner of one parcel (the “dominant tenement”) is granted certain rights over an adjacent parcel (the “servient tenement”). Easements can include rights of encroachment, access and passage from one parcel of land to an adjacent parcel.

The easement area may be described in the instrument, although more usually it is described by reference to a plan filed with the instrument.

For your client’s protection, you must ensure that you carefully identify the precise location of the easement area and that your client understands how the rights of the owner of the dominant tenement may impair your client’s use of the property. For example, many easement instruments contain restrictive covenants (promises) of the owner of the servient tenement not to improve or build within the easement area. This would therefore limit your client’s ability to build a previously contemplated structure such as a garage. For an example of an easement, see Appendix 5.

2. Statutory Rights of Way and Statutory Covenants

A statutory right of way is an easement without a dominant tenement. Only certain parties, named in ss. 218 or 219 of the Land Title Act, qualify to hold statutory rights of way or statutory covenants. These include public bodies, utilities, municipal corporations, or persons designated by the minister.

It is common to find a statutory right of way on title. Usually it presents no problem. However, each must be examined to see precisely what powers have been granted to the holder of the right of way. You must discuss this with your client. As with an easement, you must review how your client’s use of the portion of the property covered by the right of way area may be impaired by it. For an example of a statutory right of way, see Appendix 6.

Statutory covenants do not require a servient tenant. They may be positive in nature, including “conservation covenants” for preserving land.

3. Certificate of Pending Litigation

A certificate of pending litigation is a certificate issued by the court and filed in the Land Title Office. If a proceeding has been commenced that claims an estate or interest in land, or a right of action in respect of land is given by an Act other than the Land Title Act, the effect of a certificate of pending litigation is to freeze immediately all or some part of the title so as to prevent subsequent applications from being registered, unless the instrument supporting the application is expressed to be subject to the final outcome of the proceeding (s. 216).

In addition, some interests can be registered as of right after the certificate of pending litigation. These include a caveat, a sublease, an involuntary charge (such as a judgment), a builders lien claim, and a subsequent certificate of pending litigation.

Where an intervening certificate of pending litigation is registered (that is, intervening between a pending application for registration and actual registration), the prior applicant will take title free of the claim, if he or she is not a party to the action. If the prior applicant is named in the action, he or she will take title subject to the claim (s. 217). If the certificate of pending litigation relates to a registered charge, Family Law Act proceedings, or Wills, Estates and Succession Act proceedings, the registrar will register prior applications subject to the claim, whether or not the prior applicants are parties to the action.

A prior applicant whose interest is registered subject to a claim may use a summary procedure to cancel the claim on the grounds that no steps have been
taken for one year in the proceedings, or on the grounds of hardship and inconvenience (s. 252 and s. 256). Section 256 is not available if the certificate relates to either foreclosure or Wills, Estates and Succession Act proceedings.

4. Caveat

A caveat is a temporary instrument that may be filed with the Land Title Office. Essentially, it is a request made to the registrar to prevent the registration of any instrument dealing with the property described in the caveat, until the caveat is withdrawn or discharged. The caveat must allege an estate or interest in land, and it is discretionary. The registrar will not grant a caveat unless he or she is satisfied that a claim for an estate or interest in the land has been set out properly.

Most caveats expire after 2 months, or earlier if notice is given to the caveator to commence an action or remove the caveat. A caveat lodged by a commit-tee of the Public Guardian and Trustee acting under the Patients Property Act, R.S.B.C. 1996, c. 349, does not expire after 2 months, but the registrar may withdraw the caveat.

From a conveyancer’s point of view, the caveat has the same effect as a certificate of pending litigation in that it freezes the title and will have to be re-solved before the conveyance is completed.

§4.07 Investigating Title

This section describes a number of statutes that may affect the title to or use of a property. A few of the key ones affecting title were introduced in Chapter 1—the Land Title Act, Land Act, Strata Property Act, Family Law Act, Property Law Act, Fraudulent Conveyances Act and Fraudulent Preferences Act. In addition, this section discusses, in a limited way, Aboriginal title (a non-statutory form of title), which was introduced in Chapter 1.

These brief descriptions highlight that when searching title the lawyer must always be alert to the possibility that further investigation may be required.

There are a number of other statutes that may affect the title and permitted use of more particular types of land: a selection of these is listed in Appendix 8 to this chapter. Volumes 2 and 3 of the Land Title Practice Manual (CLEBC) provide extensive commentary on these and other statutes.

1. Aboriginal Title

As noted in Chapter 1, §1.05, unextinguished Abor-ginal title presents a potential challenge to the va-lidity of third-party interests in land granted by the Crown. However, Aboriginal title, or caveats based on asserted but not yet proven claims by Indigenous people, will not be found in the land title registry. In Delgamuukw (Uukw) v. British Columbia, 1987 CanLII 2630 (B.C.C.A.) the Court of Appeal held that Aboriginal title itself is not registrable under the Land Title Act because the fact that it is inalien-able except to the Crown means that it lacks the marketability needed to establish a “good safe holding and marketable title” as required under the Land Title Act. As a result, a certificate of pending litiga-tion based on that non-registrable interest was similarly not registrable.

The Court of Appeal confirmed its decision in Del-gamuukw (Uukw) in Skeetchestn Indian Band v. British Columbia, 2000 BCCA 525. In Skeetchestn, the Court held that a certificate of pending litigation could not be registered against lands held by a pri-vate party under a certificate of indefeasible title.

As claims based on Indigenous custom cannot be registered under the Land Title Act, a real estate practitioner will not be able to rely on land title records to indicate whether a given parcel of land is subject to a claim by Indigenous people. There is currently no reliable way for a practitioner to determine whether a parcel of land is subject to such a claim, short of a court decision to that effect. Practitioners should keep this uncertainty in mind when advising clients as to the validity of title being acquired. See also the leading case on Indigenous title, Tsilhqot’in Nation v. British Columbia, 2014 SCC 44, and the discussion in Chapter 1, §1.05.

2. Builders Lien Act

A detailed discussion of the Builders Lien Act is contained in Practice Material: Real Estate, Chapter 8. Note that mortgages registered before the lien claim take priority to the extent of the advances under the mortgage before filing the lien (s. 32(1)). Also, when a lien is filed, it is back-dated in priority to the date of commencement of the work or the first supplying of materials so as to give priority over judgments, executions, attachments and receiving orders made after that back-dating (s. 21).

A builders lien cannot be filed against the federal Crown, but can be filed against the provincial Crown (Interpretation Act, s. 14). If the lien is to be filed against a Crown agency, consider the statute creating that agency.

Lawyers should consider the Shimco Metals Erectors Ltd. v. District of North Vancouver, 2003 BCCA 193 decision. The Court of Appeal, upholding the BC Supreme Court’s interpretation of the Builders Lien Act, found that a lien may be created on a holdback, separate from the lien on the property.
3. **Environmental Management Act**

Most of the attention under the predecessor to the *Environmental Management Act*—the *Waste Management Act*—was on commercial rather than residential transactions. However, it was and continues to be possible for lawyers, sellers, buyers, landlords, tenants, licensees, local governments and lenders to attract liability for environmental matters in any type of land transaction. The liability may be contractual, civil or statutory under legislation such as the *Environmental Management Act*, S.B.C. 2003, c. 53, s. 45, the *Canadian Environmental Protection Act* 1999, S.C. 1999, c. 33 and the *Fisheries Act*, R.S.C. 1985, c. F-14, ss. 34 to 46. For example, maximum fines under the *Environmental Management Act* range up to $3,000,000 or imprisonment if a person intentionally causes damage to the environment or shows reckless disregard for the lives or safety of other persons. The *Environmental Management Act* should be read with the regulations corresponding to that Act—the primary one being the Contaminated Sites Regulation.

If a potential toxic waste or other environmental problem is suspected, the buyer should probably insist on an appropriate subject clause allowing site investigation in the contract and, depending on the size of the transaction and the circumstances, conduct special searches.

It is unlikely that circumstances will require a search on residential property. However, it is up to each lawyer and the informed client to determine if an environmental search is required on a particular transaction. Generally, you may not want to perform a search on a residential transaction unless you are alerted to a potential risk of contamination as a result of a former industrial use or otherwise, for example, if your client becomes aware the property was constructed on an underground oil tank. Pursuant to s. 392 of the *Land Title Act*, the director as defined in the *Environmental Management Act* may file in the land title office a notice of contaminated land. The notice must include the legal description of the land affected, and specify the nature of the contamination and state the estimated period that the danger will persist. This notice is registered as a legal notation on title.

The most important searches may be to the Ministry of the Environment and the subject local government, although several other governmental agencies and departments may have information.

The *Waste Management Act* created “absolute, retroactive, and joint and several liability” for past and present owners of real property. The *Environmental Management Act* retains these principles. This group of people (defined as “responsible persons”) may be held responsible for remediation costs by means of a government order or as a result of being joined to a party to a cost recovery action. A statutory lien mechanism facilitates recovery for clean-up costs.

Section 46 sets out several exemptions from liability. For example, buyers are exempt if they acquired the land already contaminated, had no reason to suspect that the land was contaminated, made all appropriate inquiries to discover any contamination, did not contribute to contamination, and did not subsequently transfer contaminated land knowing it to be so without disclosing this fact (s. 46(1)(d)). Moreover, a seller can also be exempt if the seller can prove that the site was not contaminated at the time of purchase or while the seller owned the site (s. 46(1)(d)). Finally, a seller who remediates the site and obtains certification as to the remediation will be exempt if a subsequent individual dealing with the site proposes to or undertakes to make a different use of the site and provides additional remediation (s. 46(1)(m)).

Secure creditors are another group who are exempt if they act primarily to protect their security interests (s. 45(4)). However, they will be responsible if they “at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements, in whole or in part, caused the site to become a contaminated site, of” become the owner (s. 45(3)).

For specific types of current or past land use, sellers must disclose a *site profile* to prospective buyers, unless the prospective buyers waive this right.

Site profiles provide a mechanism to assist in identifying potentially contaminated sites. A site profile is based on the owner’s knowledge of the property and the owner should not require a consultant’s assistance to complete the profile. Specific industrial or commercial land uses trigger site profiles and are listed in the regulations.

See Chapter 5 of the *British Columbia Real Estate Practice Manual* (Vancouver: CLEBC) for more on this.

4. **Family Law Act**

Under the *Family Law Act*, a spouse who is a party to a property agreement may file a notice in the Land Title Office (s. 99). If a notice is filed under s. 99(3), the registrar will not allow registration of a transfer, mortgage, agreement for sale, or conveyance, unless a cancellation or postponement notice is filed.
The interest of a spouse in land, under a property agreement or under s. 81 of the Act, is made subject to s. 29 of the Land Title Act (s. 103(2)). Even if there is notice of an unregistered interest affecting land, that fact will not affect the transfer or charge except to the extent provided in s. 29.

The exception in s. 29 is fraud. This raises the question of what steps you should take to protect title on the acquisition of an interest in land if the person from whom that interest is being obtained is divorced or separated.

5. Heritage Conservation Act

In the sale and purchase of a home, the Heritage Conservation Act, R.S.B.C. 1996, c. 187, can affect what changes can be made to that home if it has been designated a heritage object, site or Provincial heritage object or site (s. 9):

s. 13(1) Except as authorized by a permit issued under section 12 or 14, a person must not remove, or attempt to remove, from British Columbia a heritage object that is protected under subsection (2) or which has been removed from a site protected under subsection (2).

(2) Except as authorized by a permit issued under section 2 or 14, or an order issued under section 14, a person must not do any of the following:

(a) damage, desecrate or alter a Provincial heritage site or a Provincial heritage object or remove from a Provincial heritage site or Provincial heritage object any heritage object or material that constitutes part of the site or object;

(b) damage, desecrate or alter a burial place that has historical or archaeological value;

(c) damage, alter, cover or move an Indigenous rock painting or rock carving that has historical or archaeological value;

(d) damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features, materials or other physical evidence of human habitation or use before 1846;

(e) damage or alter a heritage wreck or remove any heritage object from a heritage wreck;

(f) damage, excavate, dig in or alter, or remove any heritage object from, an archaeological site not otherwise protected under this section for which identification standards have been established by regulation;

(g) damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features, materials or other physical evidence of unknown origin if the site may be protected under paras. (b) to (f);

(h) damage, desecrate or alter a site or object that is identified in a schedule under section 4(4)(a);

(i) damage, excavate or alter, or remove any heritage object from, a property that is subject to an order under section 14(4) or 16.

The Act also provides for registering a notice of designated heritage sites in the Land Title Office:

s. 32(1) The minister must file a written notice in the land title office with respect to land that is designated [as a heritage site] under section 9.

(3) On receipt of a notice under subsection (1) or (2) in which the affected land is described sufficiently to be identified in the records of the land title office, the registrar must make a note of the filing on the title of the land . . .

6. Land Act

The definition of a “disposition” in the Land Act is sufficiently wide to include a transfer:

s. 1 . . . the act of disposal or an instrument by which the act of disposal is effected or evidenced, or by which an interest in Crown land is disposed of or effected, or by which the government divests itself of or creates an interest in Crown land.
The right to cancel a disposition of Crown land is set out in s. 43(1) and (2). It includes the failure to perform any covenant required by the minister. The covenant need not be set out in the disposition.

Once the necessary procedural steps have been complied with under s. 43, the minister may then cancel a disposition. Once cancelled, any right of the holder of that disposition and all persons claiming through or under him is forfeited (s. 43).

s. 43(5) If a disposition, registered in a land title office, is cancelled, the minister may, by a certificate signed and sealed by the minister and setting out the reason for cancellation, require the registrar to cancel registration.

The certificate is the authority for the registrar of the land title office to cancel the registration.

Note that the “land that comprises the bed or shore” of water cannot vest in any person, no matter what the title documents say:

s. 55(2) Nothing in any Act or rule of law to the contrary is to be construed to vest or to have vested in any person the land that comprises the bed or shore of the body of water below the natural boundary, and despite an indefeasible or absolute title to land, the title must be construed accordingly.

7. Land (Spouse Protection) Act

Section 3 of the Land (Spouse Protection) Act allows a spouse to file an entry in the register of land titles that will prevent the sale of the family home:

s. 3(1) If an entry has been made on the register under s. 2, a disposition of the homestead by a spouse during the life of that spouse if the interest of that spouse must or may vest in any other person at any time during the life of that spouse, or during the life of the husband or wife of that spouse living at the date of the disposition, is void for all purposes unless made with the written consent of the spouse on whose behalf the entry is made.

s. 3(2) A conveyance designed to avoid the right given by this Act has no effect.

8. Land Title Act

Section 23(2) of the Land Title Act provides that the person named in the certificate is indefeasibly entitled to an estate in fee simple of the lands described. An estate in fee simple is the greatest interest or estate that one can have in land.

Section 23(2) also provides that a certificate of indefeasible title is conclusive evidence that the registered owner holds an estate in fee simple subject to certain exceptions. Refer to the Land Title Act while reviewing the discussion that follows.

Note that “any other grant or disposition from the Crown” encompasses the situation where the Crown reacquires title to lands and subsequently disposes of it (s. 23(2)(a)).

If there are any specific reservations, there may be a note on the title. However, your best approach is to ascertain the use to which the property will be put. If it is an area where the use could be affected by a Crown reservation, you should check the original Crown grant as well as advise your client as to the statutory reservations in the Land Act.

Many provincial and federal statutes allow for the creation of liens that may have priority, even if not filed in the Land Title Office (s. 23(2)(b)).

You must check municipal taxes before preparing the statement of adjustments. However, the title is also subject to local improvement taxes, which may result in a 20 year payment of taxes for improvements, such as street lights (s. 23(2)(c)).

The Contract of Purchase and Sale specifically addresses the issue of leases for terms of less than three years if there is actual occupation (s. 23(2)(d)). Review the definition of such leases and agreements to lease under s. 1 of the Land Title Act.

If there are leases for more than three years that are not registered, remember that, depending on the circumstances, they may still affect the title. It is basically a question of knowledge on the part of the buyer. If there are leases and the buyer knows of them, those leases could affect the title.

Highways, public rights of way, watercourses and other public easements do not have to be endorsed on the certificate to affect the title (s. 23(2)(e)). See the Transportation Act.

The rights of expropriation and to escheat are explicitly exempted by s. 23(2)(f). Expropriation is authorized under a number of statutes and can include rights of expropriation given to the province, municipalities and utilities.
The Escheat Act provides that the land of individuals dying intestate without lawful heirs escheats to the Crown, as does land of companies which are dissolved (Escheat Act, ss. 1 and 4). However, there are provisions that enable the corporation to recover the land. If the company is restored within two years from the date the corporation was struck, the land reverts to the company. After two years, a company must apply to the Supreme Court for an order that the escheated land vests in the company pursuant to s. 5(5) of the Escheat Act.

9. Land Transfer Form Act

Unless otherwise stated, every transfer of an estate in fee simple shall be deemed to be made in pursuance of the Land Transfer Form Act, and to contain the forms of words set out in column 1 of Schedule 2 of the Act (s. 186 of the Land Title Act). The Act imports archaic language to these transfers, as well as to certain leases and mortgages.

10. Personal Property Security Act

Section 49 of the Personal Property Security Act provides for the filing of a notice in the Land Title Office of a security interest in fixtures. Although not defined except as excluding building materials (s. 1(1)), fixtures may include manufactured homes (s. 36) or crops (s. 37).

Sections 37 and 38 of the Personal Property Security Regulation, B.C. Reg. 227/2002 prescribe Form 1, Notice of a Security Interest in Fixtures or Grains Crops and Form 2, Notice Affecting a Notice of a Security Interest in Fixtures or Grains Crops for the purpose of s. 49 of the Act. Upon the filing of these forms in the Land Title Office and following payment of the prescribed fee, the registrar makes an entry in the proper register for the title to the land. The date of filing the s. 49 notice fixes one’s priority to claim fixtures as against subsequent claims to interests in the land, further advances on existing mortgages, and registered judgment creditors. Therefore, it is crucial that you file the notice as soon as possible, notwithstanding certain grace periods that might otherwise apply under the PPSA in relation to other interests. There is no statutory time limit in which the s. 49 notice must be filed. A s. 49 notice may have a fixed expiry date or be an infinite registration. The s. 49 filing remains effective for its stated term, except in the case of future crops, for which a new security agreement must be entered into each year (s. 13(2)(a)).

The security interest in fixtures or crops for which a s. 49 notice has been filed has priority over existing interests in the land. At the same time, any person subsequently dealing with the land (including an owner, buyer, lessee, or other person encumbering the land), whether or not the person acquired the interest in the land before or after the fixtures or crops became attached, need not be concerned with any security interests in fixtures or crops that are not filed under s. 49, unless the person has participated in a fraud.

11. Power of Attorney Act

The Power of Attorney Act is divided between regular and enduring powers of attorney. The enduring powers of attorney continue to be effective when the adult loses capacity whereas the regular powers of attorney do not. The Power of Attorney Act also codifies the duties of an attorney, which include the requirement for the attorney to act honestly and in good faith (s. 19(1)).

In dealing with a power of attorney, be aware of s. 56 of the Land Title Act, which puts a three-year limitation period on that power, unless the power expressly excludes the application of s. 56 or it is an enduring power of attorney which has been filed in the Land Title registry.

For more information on enduring powers of attorney, see Practice Bulletin 02-11 at www.ltsa.ca.

12. Property Law Act

Under the Property Law Act, the merging of ownership of what was the dominant and servient tenements does not extinguish either an easement or a restrictive covenant (s. 18(7) and (8)).

Sections 20 through 24 deal with the situation where an original mortgagor of residential property (or the original buyer under an agreement for sale of residential property) may be released from his or her liability to the original mortgagee/seller. Sections 20, 21, 22 and 23 are very important to a seller of residential property where the buyer is assuming an existing mortgage. Those sections provide a mechanism by which the seller can be released from his or her personal covenant on the assumed mortgage.

Sections 28, 29 and 30 concern priorities of mortgages. In particular, s. 28(2) covers advances made under a mortgage after registration of subsequent mortgages. If you act for a second mortgagee, note in particular the notice requirement under s. 28(2)(b).

Section 34 permits an owner of a residence to apply for a court order permitting him or her to enter on adjoining land for the purposes of carrying out repairs on his or her own house. Section 35 goes even further to permit a court to modify or cancel an easement, a land use contract, a statutory right of way, a restrictive or other covenant burdening the
land or the owner, the right to take the produce of or part of the soil, or an instrument by which minerals or timber or minerals and timber being part of the land are granted, transferred, reserved or excepted.

Section 36 gives the court power where there is an encroachment on adjoining land or a fence encloses adjoining land to permit that encroachment or enclosure by way of an easement.

Although ss. 34, 35 and 36 are helpful to persons applying for relief, they represent a statutory interference with the title to the adjoining land.

For lawyers who have non-Canadian clients concerned about their status in a real estate transaction, see s. 39 of the Property Law Act.

13. **Resort Municipality of Whistler Act**

Many properties located in Whistler, BC will have a notation on title stating that title may be subject to ss. 14 to 22 of the Resort Municipality of Whistler Act. This notation means that the property is “resort land” and subject to assessments by the Whistler Resort Association, which trades as Tourism Whistler. Arrears of assessments will run with the land because of this notation.

**[§4.08] Site Registry**

A Contaminated Site Registry was created under s. 26.3 of Part 4 of the Waste Management Act, to provide easy public access to reported information on contaminated sites, including basic characteristics of a site, legal events and milestones in the site cleanup process. The Site Registry continues under the Environmental Management Act (s. 43).

The registry also contains information on sites that have been investigated and required little, if any, cleanup, and sites that have already been cleaned up. Thus, the registry is a registry of existing contaminated sites and of sites that are no longer contaminated. The registry is, in effect, a registry of decisions about sites that have been evaluated, whether or not they are clean or contaminated.

The Site Registry contains both electronic and paper records. It summarizes the history of investigation and cleanup for each site. The paper Site Registry contains detailed information in documents from which the electronic Site Registry information is created.

The electronic Site Registry contains information generally grouped under seven categories.

1. **General**—information concerning a site’s location, fee category, overall cleanup status and most current site profile.

2. **Notations**—information concerning legal events such as issuance of pollution abatement, prevention and remediation orders, or issuing Certificates of Compliance and Approvals in Principle. Also, administrative notations such as site investigation and remediation report submissions are included.

3. **Participants**—information concerning people and/or their roles in the investigation or cleanup process.

4. **Documents**—information regarding the existence of reports concerning a site.

5. **Land Use**—information concerning the land use considered related to a site.

6. **Assessments**—general information related to the main substances found at a site.

7. **Remediation Plans**—general information relating to different cleanup plans used and the target cleanup standards.

The public may access the Site Registry through BC OnLine. The electronic Site Registry provides different levels of access depending on the user’s needs. Fees for accessing this information vary with the method of search and level of detail required. Generally, the less detail required, the lower the fee. In addition, it allows the user to search three ways for information.

1. **Numeric Search**—by PID, Crown Land Parcel Identification Number (“PIN”) or file number, and Site Identification Number (“SID”).

2. **Civic Address Search**—by specific or general address.

3. **Area-based search**—by the latitude and longitude coordinates of a property to search within a 0.5 km or 5 km radius of a property for sites in the vicinity.

The user is presented with a search results list of sites. The user can then select a site, request a synopsis or detailed report for that site, print it, and then return to the search results list to repeat the process. If more detailed information is required after accessing the electronic Site Registry, the paper Site Registry may be accessed by contacting the appropriate regional Ministry of Environment office.

For properties that have archaeological sites on them, the British Columbia Archeological Site Inventory provides information pertaining to the restrictions on development and alteration of these properties. Information from the British Columbia Archeological Site Inventory is provided on a need to know basis and may be accessed by submitting an Archaeological Site Data Request Form or in person at the Archaeology Branch Office in Victoria.
Transactions Involving Indigenous Peoples’ Lands

Land transactions involving Indigenous peoples’ lands are usually outside of the provincial land title system and are subject to different legislative regimes and conveyancing requirements. The most commonly encountered Indigenous peoples’ lands are reserve lands managed under the Indian Act, R.S.C. 1985, c. I-5, and the First Nations Land Management Act, S.C. 1999, c. 24.

As mentioned in Chapter 1, §1.05, some interests in reserve lands under the Indian Act are obtained by grant from the federal Minister under powers set out in the Indian Act.2 The Indian Act prescribes the nature of the consents required from Band members or council as a prerequisite to the grant. Failure to comply with the requirements of the Indian Act can result in the grant of interest being invalid. Consequently, practitioners must consider whether due diligence requires confirmation that the interest in question has been granted in accordance with the requirements of the Indian Act.

Most interests in reserve lands are not accepted for registration in the provincial Land Title Office (Cranbrook (City) v. British Columbia (Registrar of Land Titles), 1999 CanLII 5461 (B.C.S.C.). An Indian Land Registry is established under the Indian Act, and transactions involving interests in reserve land are to be registered in that registry. Remember that the Indian Land Registry is a registry only, and registration of a transaction or a charge against land does not necessarily confer a priority or confirm the validity of the transaction. Searches in the Indian Land Registry can be performed online (you must create an account): services.aadnc-aandc.gc.ca/ilrs_public/.

Conveyancing under the Indian Act involves very different processes and requirements than conveyancing under the provincial land title system. Although leases, permits and easements can be granted under the Indian Act, it is important to realize that these are statutory, not common law interests in land, and therefore, common law principles will not necessarily apply to their interpretation.

The Government of Canada owes a fiduciary duty to Indigenous people in carrying out transactions involving reserve lands (Guerin v. The Queen, [1984] 2 S.C.R. 335). In addition, because of the Crown’s fiduciary duty and the sui generis nature of Aboriginal title or the interest of Indigenous people in their lands, the courts have developed an intention-based approach to interpreting transactions involving reserve lands to ensure that the intentions and interests of Bands are respected and protected in those transactions (St. Mary’s Indian Band v. Cranbrook (City), [1997] 2 S.C.R. 657; Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344; Osoyoos Indian Band v. Oliver (Town), 2001 SCC 85). These principles must be kept in mind when advising clients on real estate transactions involving reserve lands.

Some reserve lands are governed by the First Nations Land Management Act. Under this Act, land management responsibilities for reserve lands are transferred from the federal government to those Indigenous people that have entered into land management agreements with the federal Crown. In British Columbia, several First Nations are currently part of the First Nations Land Management Act regime.

Once a First Nation establishes a land code that is ratified in accordance with the Act’s requirements, the First Nation assumes responsibility for land disposition and management on its reserves. The reserves continue to be reserves as defined in the Indian Act, and land transactions are registered in the First Nations Land Registry administered by Indigenous Services Canada (formerly INAC).


It is also important to note that lands held by the Sechelt Indian Band and the Nisga’a Nation are subject to self-government legislative regimes, which are implemented by the Sechelt Indian Band Self-Government Act, S.C. 1986, c. 27, and the Nisga’a Final Agreement Act, S.C. 2000, c. 7, respectively. Those regimes are again distinct from the Indian Act and the First Nations Land Management Act regimes, and the applicable legislation and agreements must be consulted directly.

Finally, the Nisga’a Nation, the Tsawwassen First Nation, the Maa-nulth First Nations and Tla’amin Nation have treaties that govern the entitlements to those Nations’ lands. Those treaties must be consulted in the case of these Indigenous peoples.

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2 Note that in August 2017, the federal government announced plans to dissolve INAC and create two new departments: 1) Crown-Indigenous Relations and Northern Affairs Canada (CIRNA), and 2) Indigenous Services Canada (ISC). Generally, CIRNA deals with treaty rights and agreements to land and resources, while ISC deals with leasing and managing reserve land, housing, and other services on reserves under the Indian Act.
Chapter 5

Steps and Documents in a Conveyance

§5.01 Introduction

In British Columbia the buyer’s lawyer prepares almost all closing documents and forwards them to the seller’s lawyer for review and signature. In a residential conveyance, the buyer’s lawyer will often act for both the buyer, regarding the conveyance, and for the buyer’s lender, regarding preparation of the mortgage. This is discussed in §3.02. Usually, the seller lawyer’s role is limited to reviewing and arranging for the execution (signature) of documents prepared by the buyer’s lawyer; receiving and distributing funds; and arranging the payout and discharge of any mortgages and other financial charges for the seller. Accordingly, this chapter will focus on the role of the buyer’s lawyer. (In other jurisdictions, such as Alberta, the roles of the lawyers are reversed.)

There are three basic stages when acting for a buyer in a residential conveyance:

(a) gathering information;
(b) preparing and executing documents on the basis of the information gathered; and
(c) receiving funds, tendering documents for registration, and paying out funds.

§5.02 Steps in a Residential Conveyance

Refer to the “Residential Conveyance Procedure” Checklist in the Law Society of British Columbia’s Practice Checklists Manual (www.lawsociety.bc.ca). See also the Checklists in the Conveyancing Deskbook (Vancouver: CLEBC).

Remember that Law Society Rules 3-98 to 3-109 require lawyers to identify and verify a client’s identity when the lawyer provides legal services in respect of a financial transaction. Since land transactions have historically attracted impersonators and fraudsters, conveyancing lawyers need to be especially careful when verifying a client’s identity. (Consult the Practice Material: Professionalism: Ethics and Practice Material: Professionalism: Practice Management for more on these requirements.)

1. Initial Contact

(a) Obtain a copy of the purchase agreement and all addendums executed by the seller and the buyer.
(b) Examine your instructions and the purchase agreement.
(c) Review the purchase agreement as to form, parties, dates, description of property, deposit, price, conditions precedent, representations and warranties, encumbrances, tenancies and execution.
(d) Consider any problems as to the type of conveyance, file management, and control.
(e) Consider any conflict of interest and ensure that you will not be acting for more than one party in the transaction or, if you are acting for more than one party as permitted by the BC Code, that you follow the steps set out in the BC Code.
(f) Consider all relevant legislation.
(g) Open a file and note critical dates in your office diary and bring-forward system.

2. Client Interview

Contact the client to confirm instructions, to obtain any further information you require, and to discuss particulars of the purchase agreement, including:

(a) full name, address and occupation of the client, and whether multiple buyers intend to be joint tenants or tenants in common. Under s. 10(2) of the Wills, Estates and Succession Act, owners registered as joint tenants will be treated as tenants in common for estate purposes if they die within 5 days of each other;
(b) method of payment of the purchase price, such as:
   (i) paying all cash;
   (ii) obtaining a new mortgage; or
   (iii) assuming the seller’s existing mortgage;
(c) requirements for the chosen method of financing;
(d) status of conditions precedent/subject clauses (obtain a copy of the confirmation of removal of any conditions precedent/subjects);
(e) whether there are any unwritten representations or warranties;

1 Dick Chan of Spagnuolo & Company Real Estate Lawyers kindly revised this chapter in February 2019. The Land Title and Survey Authority reviewed this chapter for content relating to the BC land title and survey system in December 2018, and previously in 2017 and 2016. Previously revised by Randy Klarenbach and Aneez Devji, Richards Buell Sutton LLP (2012); Ian Davis, Race & Company (2010); Joel Camley, Gowling Lafleur Henderson LLP (2005–2008); and Lawson Lundell LLP, Real Estate Department (annually until 2004).
whether there are existing tenants, and details of the rent rate and security deposit;

any deficiencies in the agreement;

if the premises are newly constructed premises, provisions of the Builders Lien Act and the advisability of deficiency holdbacks, warranties and inspection before completion;

the necessity for insurance, both from your client’s standpoint and the mortgagee’s standpoint, and who is to arrange it;

whether zoning is a concern and whose responsibility it is to check it;

whether a survey certificate is necessary from your client’s or the lender’s standpoint and who is to obtain it;

the potential for problems under the Family Law Act;

whether a disclosure statement under the Real Estate Development Marketing Act needed to be delivered and, if so, whether it has been delivered and if your client wants you to review it;

arrangements for physical possession and obtaining the keys;

any possible environmental implications;

property transfer tax and GST implications of the transaction;

generally, the obligations of your client to complete the transaction;

the method that will be used to effect the transaction at closing;

the calculation of your account, and the method and timing of payment;

whether the clients are first time home buyers;

whether the clients are Canadian citizens, permanent residents, or foreign entities; and

whether any other potential claims may affect the land, such as heritage claims.

3. Title Search

(a) Order a full title search in the Land Title Office:

(i) search title to the property;

(ii) order copies of all encumbrances, miscellaneous notes, pending registrations, plans on title and, if a strata property, bylaws, common property charges, strata plan; and

(iii) obtain copies of any other documents affecting title that are not located in the Land Title Office, such as municipal charges shown as notations.

(b) Order searches in other appropriate registries:

(i) if a corporation is involved, order a corporate search and determine whether the corporation has ever been struck from the register;

(ii) order tax information and utility information;

(iii) if any chattels are being purchased, order a Personal Property Registry search; and

(iv) if a mobile home is being purchased, consult the Manufactured Homes Act and Manufactured Home Registry.

(c) Order a surveyor’s certificate, if so instructed by the client or the buyer’s lender.

(d) If a strata lot is being purchased, obtain a Form F Certificate of Payment (s. 115) and a Form B Information Certificate (s. 59) from the strata corporation.

(e) Make zoning inquiries or inquiries in any other registry or office, if so instructed.

(f) Request confirmation from the real estate licensee as to commission, deposit and balance of commission.

4. Follow-Up From Interview and Title Search

(a) Review title documents in detail, considering the terms of the purchase agreement. During this review:

(i) examine the title to see if there are any irregularities;

(ii) pay special attention when the legal description in the title search contains exceptions, or begins with “That part of lot…” to ensure that the parcel defined in the legal description comprises the entire land that the buyers believe they have agreed to purchase;

(iii) check the status of the duplicate indefeasible title. If the duplicate indefeasible title is not in the Land Title Office, take steps to ensure that it is returned there;

(iv) check for any pending applications on title. If there are any pending applications, determine the nature of the instrument and how it will affect title to the property;

(v) check for other notations on title, such as PPSA registrations;

(vi) examine rights of way and plans for locations;
(vii) review any land use contracts, statutory building schemes, and restrictive covenants for unusual provisions; and

(viii) examine any appurtenant easements or other charges.

(b) If mortgages are on title, and the buyer intends to assume the mortgages, ensure they are assumable. Order assumption statements.

c) If the buyer is not assuming the mortgages and you act for the seller, order payout statements. You should state in your letter that the information requested is for discharge purposes. Beware of payout statements that purport to exclude errors and omissions.

(d) If the buyer is granting a new mortgage, determine who is acting for the lender and coordinate the amounts, the concurrent registration of the transfer and mortgage documents, and any particular mortgage requirements, such as proof of insurance coverage and survey certificate.

e) Contact the seller (or the seller’s lawyer, if known to you) to find out who will be responsible for clearing title and for preparing discharge documents.

(f) If you are instructed to clear existing encumbrances from the title on behalf of the seller, confirm these instructions along with the amount of your account, in writing, with the seller. Also confirm that you can only act for the seller on that limited basis.

(g) If there are restrictive covenants, statutory building schemes, or land use contracts on title, obtain confirmation of compliance with the terms, if possible. Often the holder of these charges no longer exists, and this should be reported to your client.

(h) If the premises are newly constructed, contact the builder to confirm the date for substantial completion, and the municipality to see if it has issued an occupancy certificate.

(i) Send the buyer written confirmation of your instructions to act (an “initial report letter” or “interim report letter”) and an interim report on title.

(j) Enclose a copy of the survey plan from the Land Title Office and have the buyer verify it is the correct property. It is strongly recommended to have the buyer initial and return a copy of the plan.

(k) Enclose, for your client’s review, copies of any encumbrances that will remain on title and the plans relating to those encumbrances, if any. These include rights of way, easements and mortgages that are being assumed. Depending on the nature of the encumbrances, you may also need to explain them to your client.

(l) The initial report letter is also an opportunity to set out matters the client will be responsible for. Confirm with your client in writing:

(i) the responsibility for checking zoning and obtaining a surveyor’s certificate;

(ii) the responsibility for instituting insurance;

(iii) your client’s understanding of any potential for problems under the Builders Lien Act or Family Law Act and other legislation;

(iv) the responsibility for opening any accounts such as hydro and telephone;

(v) your respective responsibilities for determining whether the transaction attracts GST and which party will absorb the tax;

(vi) the amount of money in excess of anticipated net proceeds of mortgage needed to complete the transaction; and

(vii) your fees and disbursements.

5. Document Preparation

When acting for a buyer, prepare the following documents, as required, with those marked by an “*” being the most common documents in a residential conveyance (assuming the documentation would be permitted by the terms of the contract):

(a)* Form A Freehold Transfer (or Right to Purchase);

(b)* Form B Mortgage, based on the lender’s instructions to the lawyer together with acknowledgement of receipt of the lender’s standard mortgage terms, if any;

(c)* Property Transfer Tax Return;

(d)* statement of adjustments. Include confirmation of the residency of the seller and a direction to pay funds pursuant to the statement of adjustments by the seller and buyer;

(e)* in/out analysis;

(f)* non-resident declaration of the seller under s. 116 of the Income Tax Act, to include the seller’s address and telephone number for the Property Transfer Tax Return;

(g)* irrevocable direction to pay from buyer to buyer’s lawyer;

(h) GST rebate if the property is a new construction;

(i) GST declarations;
(j) builders lien declaration;
(k) bill of sale if any chattels are being purchased; and
(l) power of attorney of the buyer in registrable form, if required. Confirm with the buyer’s lender that the mortgage is permitted to be signed by attorney.

When acting for a seller, prepare the following documents, as required, with those marked by an “*” being the most common documents in a residential conveyance:

(a)* letter to those parties that hold a registered financial charge against the property (e.g. a mortgage), if any, requesting a written payout statement detailing the amount to pay out the financial charge and obtain a registrable discharge;
(b)* irrevocable direction to pay from the seller to the seller’s lawyer, with details as to how the sale proceeds are to be distributed;
(c)* discharge of mortgage, if applicable;
(d) seller (vendor) take-back mortgage;
(e) special resolution of a corporation;
(f) power of attorney; and
(g) assumption of mortgage.

6. Matters Before Closing

(a) Ensure that all searches that you have made have been received back, have been reviewed and are satisfactory.
(b) Obtain any mortgagee’s consent to assume the mortgage.
(c) Meet with your client to discuss your letter in detail, to confirm that the lot outlined in red in the accompanying letter is the lot intended to be purchased, to review the statement of adjustments and mortgage documents, to execute all documents (see 5 above), and to receive the funds necessary to complete.
(d) Buyer’s funds for completion, based on the buyer’s statement of adjustments, should be in the form of a certified cheque or banker’s draft. Consider the implications under rules 7.2-12 and 7.2-13 of the BC Code if uncertified funds are deposited into a lawyer’s trust account and shortly thereafter the lawyer is required to remit the same by way of their trust cheque to complete a purchase.
(e) Deposit funds in the trust account.
(f) If the buyer’s solicitor has not prepared the mortgage—for example, in a commercial transaction—obtain the mortgage documents for review and execution and confirm that all prerequisites to funding have been met. Return the mortgage documents to the mortgagee’s solicitors on appropriate undertakings.
(g) Ensure that all documentation received from the seller’s solicitor is dated, and is duly executed in registrable form.

7. Registration

Arrange for electronic registration of the land title documents. Steps are as follows:

(a) conduct a pre-registration search to ensure that no additional encumbrances have been tendered for registration or registered since your initial search;
(b) tender the conveyancing documents electronically and ensure that the mortgage document is tendered concurrently; and
(c) the Land Title Office will email confirmation of acceptance of filing.

8. Closing Procedures

(a) Conduct a post-registration title search to ensure that there are no intervening encumbrances.
(b) If the buyer’s solicitor has not prepared the mortgage, request and obtain funds from the mortgagee’s solicitor.
(c) Be prepared to hold back a portion of funds for deficiencies, if permitted under the contract of purchase and sale.
(d) Hold back or obtain an undertaking from the seller’s lawyer to hold back the required amount under the Builders Lien Act. Note s. 88 of the Strata Property Act regarding when a purchaser must retain a holdback of 7% of the purchase price. Conversely, there is no right to a holdback for a non-strata property unless provided for in the contract of purchase and sale.
(e) Pay out the balance of the funds. It is common practice in the Lower Mainland to pay out funds immediately. In some other land title districts, the practice is to await confirmation of actual registration before paying out. Pay out funds to:
   (i) the seller (with undertakings to clear the mortgage, if appropriate; see Rules 3-95 and 3-96 below);
   (ii) the real estate licensee;
   (iii) the mortgagees, if appropriate;
   (iv) taxing authorities; and
other parties to whom the seller is to pay part of the sale proceeds, such as a strata corporation that is owed money for maintenance costs.

Obtain and register all discharges of mortgage which have not already been registered. Generally, it is the practice to pay out an institutional mortgage before receiving a discharge. However, in the case of a private mortgage, it is prudent practice to obtain the discharge of mortgage before paying out, even if you must hold it in trust until the mortgagee has received his or her funds.

When registering the discharge of mortgage, you may wish to order a state of title certificate. If you order it before this stage, it will come back to your client showing mortgages that are to be discharged. If no mortgages are being discharged, a state of title certificate may be ordered at the same time that the transfer is tendered for registration.

Report to your client on registration, advising that a final report will follow on receipt of the state of title certificate if requested. It is appropriate to render your account at this stage or, if you wish, you can render the account with your final report.

As a result of problems arising in real estate practice in British Columbia, two conduct rules were introduced effective March 1, 2003.

Rules 3-95 and 3-96 require a lawyer to report to the Law Society the failure of another lawyer or notary to provide satisfactory evidence that he or she has filed a registrable discharge of mortgage at the Land Title Office within 60 days of the closing date for the mortgage transaction. In each case, a lawyer has five business days to make this report (in the form prescribed by the Law Society and available on the Law Society website) under these rules.

Reports filed under these sections are intended to provide the Law Society with information only and are not meant to draw adverse inferences against a lawyer for failing to obtain a discharge of a repaid mortgage from a financial institution, without evidence of a breach of undertaking.

9. Land Title Office Electronic Filing

The electronic filing system (“EFS”) in the Land Title Office allows users to electronically submit documents and plans. Virtually all documents and plans are now required to be filed electronically.

E-filing is limited to the electronic submission of documents and does not allow the registration or the making of any entry in the register by any user external to the land title system. Except for a digital signature field, the electronic forms are practically unchanged from the manual equivalents.

When e-filing, land title forms are still printed out for the parties to execute and their signatures still require officer certification. Once satisfied that a document has been appropriately executed, a lawyer or notary public applies that lawyer or notary’s digital signature (acquired from the Law Society, see later) to the electronic form. The completed form, with the digital signature, is then submitted electronically to the Land Title Office through myLTSA. When the form is submitted, land title fees are deducted from the user’s myLTSA deposit account and property transfer tax (if applicable) is collected from the user’s bank account via an electronic funds transfer. The Land Title Office then assigns a document number(s) and date and time of receipt, and then sends a notice to the submitting lawyer or notary that includes this information and all pertinent financial information.

The conceptual framework of e-filing is best understood by examining how a simple transfer of a parcel of land from a seller to a buyer is effected. In British Columbia, the essence of a real estate transaction is found in s. 5(1) of the Property Law Act, which states that “a person transferring land in fee simple must deliver to the transferee a transfer registrable under the Land Title Act.”

This simply means that the seller must deliver to the buyer a Form A Freehold Transfer. In practice, the buyer’s lawyer usually prepares the Form A for the seller to execute. E-filing does not change this practice. The changes are functional in nature only. Here is an example of the process:

(1) The usual first step in any real estate transaction is for the buyer’s lawyer to conduct an initial search of the seller’s title.

(2) The next step is to draw down a Form A and a Property Transfer Tax Return through myLTSA and complete them.

(3) The buyer’s lawyer then transmits the electronic Form A to the seller’s lawyer.

(4) The seller’s lawyer then prints a copy of the Form A and attends on the seller’s execution in the usual manner (i.e. officer certification).
The paper copy is evidence of the seller’s intention to be bound, has the effect of delivery, and is the seller’s authorization that the electronic Form A can be submitted to the Land Title Office for registration. The electronic Form A is “trued up” to incorporate the execution details. See Practice Note 02-16—Truing up an Original Electronic Instrument, on the Land Title and Survey Authority of British Columbia (LTSA) website (ltsa.ca).

(5) At this point, the seller’s lawyer may incorporate his or her electronic signature or the lawyer can fax or email a copy of the printed and executed Form A to the buyer’s lawyer, who may incorporate his or her own electronic signature into the electronic Form A. The electronic signature is a certification by the lawyer that a true copy of the electronic instrument has been executed and witnessed in accordance with Part 5 of the Land Title Act, and that a true copy is in his or her possession.

(6) The practice that has developed is for the seller’s lawyer to forward either the originally signed copy or a faxed copy of the Form A to the buyer’s lawyer, who then retains it.

(7) The appropriate undertakings can be imposed using secure email or regular mail.

(8) Once an electronic signature is incorporated into the Form A and Property Transfer Tax Return, they can be submitted by any party who has access to myLTSA. Thus, the Form A, Property Transfer Tax Return, and Form B Mortgage can be submitted by the buyer’s lawyer, the lawyer for the mortgagee or by the licensee of either. It is possible to set up electronic “meets” to allow second parties to file documents in order. For example, the buyer’s lawyer may file a Form A followed by a lender’s lawyer filing a mortgage. The documents may be submitted on a date before the closing date and they will be held in a queue with submission deferred until a date specified by the submitting party (for example, the last day of the month), when they are formally submitted for registration.

(9) When the Land Title Office receives the documents, the electronic signature is verified, the submitter’s myLTSA account is debited for registration fees and property transfer tax is paid by an electronic funds transfer from either a general or trust account.

(10) The application is then electronically marked up. After markup, the buyer’s lawyer is automatically notified electronically that the application is marked up and is given the pending number.

The electronic Form A is converted to an image, examined by an examiner, and registered. If anyone wants to get a copy of the document they will receive an image that is an exact copy of the electronic Form A that was submitted.

It is possible to submit documents any time the myLTSA system is available, which is currently between 6:00 a.m. and 11:00 p.m., Monday to Saturday. The lawyer identifies the electronic forms to be submitted and the order in which they are to be registered. When two or more documents are submitted they will be received as a “package” so that they will be examined together. If one document is defective (i.e. a Defect Notice is issued), all documents will be held pending.

The submitting lawyer can pick a submission option of “submit immediately” or “defer until.”

- The “submit immediately” option is used if the documents are to be submitted immediately. If this option is used, the lawyer receives electronic notification within minutes of the pending numbers and confirmation of financial details such as land title fees and property transfer tax.

- The “defer until” option is used when the documents are ready but the lawyer does not want them submitted until a future date such as mid-month or month end. The advantage of using this option is that the lawyer would receive their pending numbers at 6:10 a.m. on the submission date specified. (It is hoped that this will allow practitioners more time to complete the financial end of the transaction on busy days.)

At any time before the document is received and given a number, the lawyer can change the submission option or delete the submission entirely.

The electronic document received by the Land Title Office is deemed to be the original for all purposes.

The Land Title Office has different options for notifying the lawyer:

- Document Receipt: Notifies the lawyer that the documents have been received and includes the pending numbers, date and time and financial details.

- Defect Notice: If an electronic document had defects, the examiner issues a Defect Notice electronically.

- Notice of Registration: If requested by the lawyer submitting the documents, the automated system sends the lawyer a notice when final registration occurs.

Notices are sent to the lawyer who submitted the documents. The user can decide whether to receive
Electronic Signatures

To electronically sign forms for e-filing, lawyers must apply for a digital signature certificate from Juricert. Juricert is operated by the Law Society and is the “certification authority” recognized by the Land Title Office to issue digital signature certificates for the purpose of electronic filing. The Law Society maintains a copy of each subscriber’s certificate in a register. When an electronic form is submitted to the Land Title Office with an electronic signature, the Juricert system automatically ensures that the electronic signature matches the copy of the certificate on file with the Law Society. So long as the certificate was not revoked, this authenticates the electronic signature of the lawyer and verifies that the lawyer is a member in good standing with the Law Society.

Lawyers must personally affix their electronic signatures to documents being filed with the Land Title Office, and must not disclose their Juricert password to anyone, including assistants. Disclosure of the Juricert password is a breach of the Juricert agreement, Part 10.1 of the Land Title Act, and rule 6.1-5 of the BC Code. If a lawyer permits an assistant to use that lawyer’s Juricert password to affix the lawyer’s electronic signature to a Property Transfer Tax Return, the lawyer is also in breach of Law Society Rule 3-64(8).

Quality Verification Program

The LTSA has introduced a Quality Verification Program with lawyers and notaries to ensure that electronic filing subscribers comply with Part 10.1 of the Land Title Act. Electronically submitted instruments will be randomly selected. Under s. 168.51 of the Land Title Act, while an application is in pending state, the registrar may verify whether subscribers who electronically signed submitted forms had in their possession a true copy, a copy of a true copy or, where applicable, the original of the supporting document (all referred to here as the “true copy”). Subscribers must provide the true copy they relied upon when applying their digital signature to the electronic instrument. Examiners will review both the instrument and the true copy to ensure compliance with Part 10.1 of the Land Title Act.

10. Post-Closing Procedures

(a) Transfer funds from the trust account to pay fees and disbursements.

(b) Pay out any holdback amounts after appropriate confirmation.

(c) Ensure that the lender of a repaid mortgage has discharged the mortgage within 60 days of the closing date of the transaction. If not, report within five days pursuant to Law Society Rule 3-96.

(d) Present a final report to your client, enclosing the state of title certificate and giving your title opinion. Make sure that the certificate is exactly as you had anticipated it would be. At this time, forward any unused funds in trust, with a trust reconciliation statement. If you have not already done so, render your account.

(e) Close the file and store for 10 years.

[§5.03] Witnessing and Executing Documents

Part 5 of the Land Title Act governs the execution and witnessing of documents, and applies to all land title instruments. Sections 41 to 50 provide that, generally, execution in registrable form by individuals and corporations requires an instrument to be witnessed by an “officer” who is not party to the instrument. An “officer” is defined in ss. 41 and 42 of the Land Title Act as a person who can take an affidavit under the British Columbia Evidence Act. The Evidence Act lists persons who can take affidavits in BC, including solicitors and notary publics, at s. 60, and lists persons authorized to take affidavits outside British Columbia at s. 63.

When an instrument is not witnessed in accordance with the Land Title Act, the registrar may accept it for registration upon receiving affidavit evidence that complies with s. 49 of the Land Title Act.

Under s. 42(4) of the Land Title Act, the signature of an executing party is evidence that the party:

(a) knows the contents of the instrument and has signed it voluntarily; and

(b) has the legal capacity to execute the instrument and intends to be bound by it.

Under s. 43 of the Land Title Act, the signature of the officer witnessing the execution of an instrument by an individual is a certification by the officer that:

(a) the individual appeared before and acknowledged to the officer that he or she is the person named in the instrument as transferee; and

(b) the signature witnessed by the officer is the signature of the individual who made the acknowledgement.

(See also BC Code, Appendix A, paragraph 2.)

Part 5 of the Act also deals with executions under power of attorney. See especially ss. 45 and 46.

A corporation executes instruments by the signature of its authorized signatory, who signs on its behalf. A seal is not required. An instrument executed by a corporation...
in accordance with the Land Title Act is deemed conclusively to be properly executed as against all persons dealing in good faith with the corporation, and takes effect accordingly. See s. 165(4) of the Land Title Act with respect to deemed proper execution by a corporation.

**[§5.04]** Form A Freehold Transfer

The use of a Form A Transfer to effect a transfer of a fee simple interest in the Land Title Office is mandatory. The form contains the name of the seller, the legal description of the land to be transferred, the market value of the property, the consideration, the names and occupations of the buyers and the signature of the seller and the witness.

The description of the seller should be taken from the copy of the certificate of indefeasible title obtained in your search. Make inquiries if the name of the registered owner on title is significantly different from the seller named on the contract of purchase and sale. If an attorney has signed the contract, review the power of attorney for registrability. If the contract has been signed by a newly-appointed executor, review the grant and confirm that the Wills, Estates and Succession Act has been complied with.

The names and occupations of the buyers should come directly from their instructions, rather than from other information such as the sales record sheet, the purchase agreement or the mortgage instructions. The Land Title Office requires the buyers’ full legal names. It is important to consider what address you give for the buyers. If they are moving into their newly-purchased home, the new address would be appropriate. The address given on the transfer form is where mail relating to the property will be sent. There have been situations where property has been forfeited to the Crown because tax notices were delivered to a former address (the one shown on the title) and were never received.

Be aware of the implied covenants contained in the transfer as set out in s. 186 of the Land Title Act. Note that these covenants will be implied unless expressly excepted or qualified.

If the property is being transferred subject to certain encumbrances, such as rights of way, easements, restrictive covenants or mortgages, this information may be stated on the transfer.

**[§5.05]** Property Transfer Tax Return and Additional Property Transfer Tax Return

The Property Transfer Tax Act imposes a tax on land transfers (including agreements for sale). The tax rate is as follows:

- 1% on the first $200,000 of the fair market value;
- 2% on the portion of the fair market value greater than $200,000 and up to and including $2,000,000;
- 3% on the portion of the fair market value greater than $2,000,000; and
- if the property is residential, a further 2% on the portion of the fair market value greater than $3,000,000 (effective February 21, 2018).

If GST is payable on the purchase price of a house, property transfer tax is normally paid on the net amount paid (purchase price less GST). The Contract of Purchase and Sale will usually say whether GST is in addition to or included in the price. If it does not, then the parties should confirm the provisions for GST before closing. The statement of adjustments should always show the purchase price and GST separately.

The Property Transfer Tax Act contains a number of exemptions from the property transfer tax, two of which are described here.

First-time home buyers who are purchasing a principal residence for the first time may be exempt from the property transfer tax. The fair market value threshold for eligible residential property is $500,000 and the property must be 1.24 acres or less. In addition, each buyer applying for the exemption must be a Canadian citizen or a permanent resident of Canada and have resided in British Columbia for 12 consecutive months immediately before the application to register the purchase, or have filed a return under the Income Tax Act (British Columbia) for at least two of the six taxation years immediately preceding the purchase. The buyer must move into the property within 92 days of the registration date and must live in the property for one year following the registration date. A partial exemption may be available if the property has another building on the property other than the principal residence, is larger than 1.24 acres, or has a fair market value of less than $525,000. Some first-time home buying couples register their first property in the name of one spouse only to save the exemption of the other spouse for their second purchase. This works but it foregoes the estate planning benefits of joint tenancy.

There is also an exemption in some cases if the home is a newly built home. To qualify for the exemption, the transfer must be registered at the Land Title Office after February 16, 2016, and the property must have a fair market value of $750,000 or less, be 1.24 acres or...
smaller, and be used only as the buyer’s principal residence. As well, the buyer must be an individual and a Canadian citizen or permanent resident, must move into the home within 92 days after the property is registered at the Land Title Office, and must continue to live in the property for a year following the purchase. The buyer may qualify for a partial exemption if the property has a fair market value of greater than $750,000 but less than $800,000, is larger than 1.24 acres, or has another building on the property other than the principal residence.

An updated version of the Property Transfer Tax Return FIN 530 (version 31) for electronic filing is in effect as of September 17, 2018. It is recommended that the buyer, not the buyer’s solicitor, sign the form. If a person who is not a legal professional will be filing the return, a Manual Property Transfer Tax Return (FIN 579) is available and replaces the previous paper returns (General Return, Special Return, and First Time Home Buyer’s Return). Buyers required to pay the further 2% tax on residential property with a fair market value over $3,000,000 must also complete a Property Transfer Tax Calculator for Residential Properties over $3,000,000 and submit it with the Property Transfer Tax Return. See the online Property Transfer Tax Return Guide for guidance on completing the forms (www2.gov.bc.ca/gov/content/taxes/property-taxes/property-transfer-tax/file/tax-return-guide).

An additional property transfer tax applies to transfers of residential property to foreign entities or taxable trustees if the property is within specified areas of British Columbia. In such cases, an Additional Property Transfer Tax Return (FIN 532) must be completed and filed with the Property Transfer Tax Return, even if exemptions apply. A “foreign entity” is a foreign national or foreign corporation, and a “taxable trustee” is a foreign entity holding title in trust for beneficiaries or a Canadian citizen holding title in trust for beneficiaries who are foreign entities (Property Transfer Act, s. 2.01). The additional property transfer tax applies only to the proportionate share transferred to the foreign entity. The tax rate for property transfers registered on or after February 21, 2018, is 20% of the fair market value of the property, and applies if the property is within the Capital Regional District, Fraser Valley Regional District, Greater Vancouver Regional District, Regional District of Central Okanagan, or Regional District of Nanaimo. More information on this tax, including exemptions, is available online: (www2.gov.bc.ca/gov/content/taxes/property-taxes/property-transfer-tax/understand/additional-property-transfer-tax).

British Columbia lawyers may make property transfer tax payments directly from their trust accounts via electronic funds transfer (instead of by trust cheque) at the time that they submit electronic filings to the Land Title Office (Law Society Rule 3-64.1(6)). A law firm must first arrange for electronic payment of the property transfer tax by authorizing the Ministry of Provincial Revenue and the financial institutions at which the firm holds accounts to process debits in specified trust accounts to pay the property transfer tax.

See also Chapter 3 of the BC Real Estate Practice Manual for further discussion of the Property Purchase Tax Act (Vancouver: CLEBC).

[§5.06] Form C General Instrument

Form C General Instrument is a two-part document similar to Form B Mortgage. Part 1 of Form C is a prescribed single page, and Part 2 consists of the terms of the instrument, which may be either incorporated by reference to filed standard charge terms or attached to Part 1. It is possible, though not necessary, to file those standard charge terms in the same manner as standard mortgage terms. Form C is also used for releases and discharges. For more information, see the Land Title Electronic Forms Guidebook (Vancouver: CLEBC).

[§5.07] Survey Certificate

When instructed, order a survey certificate and examine it for encroachments or bylaw violations. It is prudent practice in almost all cases to recommend that such a certificate be obtained and to clearly confirm your instructions if your client decides not to obtain one. When there is a non-compliance that a certificate would show, you may be liable to your client for any resultant loss, unless you can demonstrate that your client understood the consequences of failure to obtain a survey certificate and instructed you not to obtain one. Note that while all survey certificates show encroachments, not all survey certificates show bylaw violations unless you specifically request this. Look on the right-hand side of the sample survey certificate, Appendix 10. Number 2 sets out that the buildings comply with front yard, rear yard and side yard requirements. Note that many older properties do not comply with current bylaws. In most such cases, a letter may be obtained from the appropriate municipality that the non-compliance will not require rectification, but these letters can take weeks to obtain. Consequently, you should advise your client, and any lender, of the non-compliance and inform them that you are attempting to confirm that the non-compliance is not a problem. You should not give an opinion that the non-compliance is acceptable to the municipality until that confirmation is received.

In theory, the absence of a survey should not result in liability to the buyer’s solicitor if there was a binding contract of purchase and sale when the solicitor was retained. In theory, the buyer is buying the land without any warranty that the structures on it do not encroach on adjoining land or on a registered easement or right-of-way. In theory, the buyer is not legally entitled to terminate the transaction upon receiving a survey certificate indicating that an encroachment exists (although the
mortgagee may be entitled to refuse to advance funds). In theory, it should be the licensee’s duty to recommend that the deal be “subject to” a satisfactory survey, particularly when there is a structure that appears to be close to a lot line or an easement or right-of-way. In reality, however, buyers are usually reluctant to incur the extra expense of a survey but, when they later encounter problems, are inclined to state with certainty that if they had been properly advised by their solicitor they would have ordered one and would have successfully backed out of the transaction.

To date, the courts in this province have not said that a buyer’s solicitor has a duty to recommend a survey. However, during the last decade it has become standard practice to recommend a survey, at least where the possibility of an encroachment exists.

To protect yourself, you should consider the following:

(a) use a standard retainer letter or interim reporting letter which advises about the importance of a survey and requests the client’s instruction in that regard;

(b) make legible file notes confirming that the importance of a survey was fully explained to the buyer and instructions to the contrary were received;

(c) consider including confirmation in the Buyer’s statement of adjustments confirming the advice was given and instructions to the contrary were received; and

(d) confirm the advice was given and instructions to the contrary were received in your final reporting letter.

The lawyer should also discuss title insurance as an alternative to a survey certificate. While it will not identify survey issues prior to completion like a survey will, insurance will provide compensation and insure the buyer against a variety of additional issues such as latent defects, which a survey will not help with. Title insurance may also be less expensive than a survey. Lastly, many financial institutions are making title insurance mandatory.

[§5.08] Goods and Services Tax

All real estate practitioners must become familiar with the provisions of the Excise Tax Act that affect residential conveyances, and with the standard practices for dealing with those provisions.

Clarify your respective responsibilities for determining if the transaction attracts GST and, if applicable, set out your advice to your client regarding GST.

Be particularly aware of transactions in which the property is being purchased from a builder or renovator; the property is new, substantially renovated or a converted commercial property; or the property is not owned by the seller as a residence or personal recreational property. If GST is payable, consider how to deal with the seller regarding collection and payment of GST.

1. What Is Taxable

Generally, a buyer must pay GST on new residential housing and substantially renovated residential housing (where only the supporting walls, roof, floors, foundation, and some minor components are left from the original building).

The buyer must pay GST on the full purchase price of new residential housing, including land and the costs of related services, including legal fees incurred in connection with the acquisition.

GST is also payable when:

(a) a builder constructs a residential building and leases the building or units in the building to tenants;

(b) a business converts capital real property from commercial use to residential or some other exempt use;

(c) a business converts capital real property from non-residential exempt uses to residential uses;

(d) there has been a partial increase or decrease in the proportion of the property used for commercial as opposed to residential or other purposes; or

(e) when GST input tax credits have been claimed by the seller, on the portion of the property affected by the input tax credits claimed, unless the seller made a deemed self-supply of the property after claiming the input tax credits.

GST is not payable on:

(a) other taxes such as the property transfer tax;

(b) property situated outside Canada; or

(c) “used” residential housing, provided it has not been “substantially renovated” and the seller has not claimed any GST input tax credits with respect to the property. However, GST and in some cases Provincial Sales Tax is still payable on legal services, certain disbursements, and real estate commissions.
2. Representations and Warranties

Before signing a purchase contract, a buyer should determine whether GST will be payable and whether the negotiated price includes GST. Any representations or warranties given by the seller about whether GST will be payable and who will pay in the event of improper calculation should be included in the purchase contract.

It is the seller’s status and use of a property that will determine if GST is payable. The common warranty, “GST, if payable shall be the responsibility of the seller,” while better than a silent contract, leaves the buyer’s lawyer still needing to determine if the property is subject to GST so that it can be backed out of the purchase price. Where a property is new or substantially renovated and unoccupied or available for nightly rentals, it has a commercial status and will be taxable.

Many lawyers obtain representations, warranties and covenants from sellers and buyers by obtaining statutory declarations or signatures on notes to statements of adjustments well after the purchase contract has been finalized. The delivery of a statement of adjustments with terms that have not been accepted by the other party, such as the addition of warranties and covenants, may constitute an improper tender that the other party is not obliged to accept.

In any event, if GST is not dealt with in the contract, you must clarify who will determine if the transaction attracts GST. As mentioned earlier, watch for transactions in which the property is being purchased from a builder or renovator, or if the property is new, substantially renovated or a converted commercial property, or if the property is not owned by the seller as a residence or personal recreational property. Watch also for properties in resort communities which may be commercially rented to tourists. Some of the clauses in the initial report letter to the client at Appendix 15 indicate some methods a lawyer can use to respond to the issue of whether GST is payable.

An oral assurance by the seller’s licensee that a land transaction will not attract GST can lead to the seller being held responsible for indemnifying the buyer for GST payable. In Sainsbury v. Nanaimo Realty Co., [1993] G.S.T.C. 30 (B.C.S.C.), the buyer successfully sued the seller’s licensee to recover $19,600. This amount represented the GST that was payable at the conclusion of a land deal. The licensee had repeatedly and incorrectly assured the buyer that GST would not arise from the transaction. The court reasoned that the plaintiff could reasonably expect that the licensee was aware of the views of the Real Estate Board, as well as the relevant provisions of the Excise Act. Any reasonable person would know that the plaintiff relied on the information provided by the seller. If the seller did not want the buyer to rely on his or her advice, the licensee should have made that clear.

3. Who Collects the Tax

When GST is payable, it must then be determined whether the seller or buyer is required to remit the GST to the Canada Revenue Agency (the “CRA”). If it is the seller’s responsibility, then the buyer should pay the tax as part of the closing procedure. If it is the buyer’s responsibility, the buyer’s solicitor should ensure that the buyer is aware of this requirement.

The general rule is that the seller collects and remits the GST. A lawyer advising a buyer before signing a purchase contract should obtain the seller’s GST registration number, properly verified with the appropriate government office. If the seller is registered for GST purposes, the buyer need not obtain a contractual promise from the seller that the seller will remit the tax. This is because a registered seller is a licensee of the federal government, and under the Act, once the buyer has remitted the tax to a licensee, the buyer’s liability is discharged as long as the full amount of GST owing has been paid to the seller.

Exceptions to the general rule that the seller collects the GST are:

(a) sales by a seller who is a non-resident of Canada or a resident of Canada only to carry on activities through a permanent establishment in Canada;

(b) sales of non-residential properties to buyers registered for GST purposes; and

(c) sales of residential properties to buyers registered for GST purposes who are not individuals.

In these cases the buyer must remit the tax directly to the CRA—the buyer is still liable if the buyer remits the GST to the seller, even if the seller is a GST registrant.

4. GST Certificates

If the seller asserts that the sale is exempt from GST and the buyer has no information to the contrary, the buyer should still obtain a written statement from the seller that the supply is exempt under one of the provisions referred to in s. 194 of the Excise Tax Act. The statement should be a certificate. The certificate should be obtained on the earlier of the completion date of the transfer of the real property or the possession date. This way, if the statement is incorrect and the transaction isn’t exempt, the seller and not the buyer will be liable for the GST.
While it may not be possible to insist that the seller complete certificates if there is no right to require them in the contract of purchase and sale, many sellers will sign GST certificates to facilitate the smooth completion of the transaction. Each certificate has an addendum attached which sets out when and how the certificate is to be used. These certificates may be incorporated into the purchase contract as a schedule or by using clauses.

5. Rebates

Various GST rebates are available to individuals who renovate or build their own homes, who purchase new homes from a builder, or who purchase shares in a co-operative.

Sections 254 to 256 of the *Excise Tax Act* deal with the circumstances in which the GST rebate is available. The situation most commonly encountered involves the purchase of a new home from a builder. In these transactions, a rebate on the GST paid on the purchase price of the home of up to 36% or $6,300, whichever is less, is available if certain conditions are met:

- The buyer must purchase from a builder a new or substantially renovated “single unit residential complex or a residential condominium unit,” meaning in most cases a condominium unit or single family home, for the buyer or a “relation” of a “buyer.”
  - A “builder” includes a person who buys unoccupied new houses or condominiums for retail purposes but does not actually build them.
  - “Related persons” is defined in s. 251 of the *Income Tax Act*, and includes blood relatives, spouses, former spouses and individuals related by adoption. (Consult the *Excise Tax Act* and *Income Tax Act* for the precise definitions.)
- The purchase price must be less than $450,000.
- Ownership must be transferred after construction.
- The property must be unoccupied except in the case of a condominium, where the buyer may occupy the unit before transfer as part of an agreement to purchase.
- GST must be paid on the purchase and the rebate must be claimed within four years of the date ownership is transferred.

The rebate is somewhat reduced when the value of the home is greater than $350,000. A GST form must be completed and remitted to claim the rebate.

Calculations around the GST are premised on the fact that the CRA will pay the rebate to the buyer after closing. The effect is that the buyer pays the full GST and then claims a rebate, which will not be received by the buyer for some months after closing. In order to avoid this delay, s. 254(4) of the *Excise Tax Act* provides that the seller may pay the buyer, or credit the buyer with, the amount of the rebate. In this case, the buyer pays only the net GST payable after the rebate is deducted. The seller then remits the net GST amount to the CRA, together with the GST Form. The buyer receives an immediate benefit equal to the amount of the rebate, while the seller may claim a credit against the GST remitted on the sale equal to the rebate.

If the seller agrees to pay to the buyer or credit the buyer with the GST rebate, the other conditions for the rebate must be met. For example, the buyer or a relative must use the property as a residence. If those conditions are not met, the seller may be liable for the return to the CRA of the amount rebated, if the seller “knows or ought to know” that the buyer does not qualify for the rebate. Accordingly, the seller should require that the buyer provide information sufficient to satisfy a reasonable person that the buyer qualifies for the rebate.

Where the buyer intends to rent the property to unrelated tenants, they will have to pay the GST and submit their rebate claim directly once they know the identity of their tenant.

[§5.09] In/Out Analysis

An “in/out analysis” is an informal, internal memorandum that the conveyancing lawyer prepares for himself or herself. It constitutes a simple financial dry run of the conveyance. In the left-hand column, list the sources of funds in the transaction. For example, one source may be mortgage funds, another the balance of proceeds to be supplied by the buyer. In the right-hand column, list the application of the funds you will receive in trust so that there is a precise match between the two totals. Examples of applications of funds are as follows:

(a) balance of real estate commission (if the commission is greater than the deposit);
(b) pay-out of any discharged mortgages; and
(c) lawyer’s fees and disbursements.

[§5.10] Holdbacks for Non-Resident Sellers

Section 116 of the *Income Tax Act* is intended to ensure the CRA will receive the tax payable by the seller on a non-resident sale. Accordingly, the buyer is obliged to make reasonable inquiries as to the residency of the seller (see e.g. *Mao v. Lui*, 2017 BCSC 226, where a notary,
acting for a purchaser, was found liable for failing to make reasonable inquiries regarding an owner’s residency status). The requirement to make reasonable inquiries is usually satisfied by having the seller sign a statutory declaration that the seller is a resident of Canada. The standard Contract of Purchase and Sale now requires the seller to deliver a statutory declaration of residence (see §2.03(10)).

If the seller is not a resident of Canada, the buyer must either deduct the required withholding tax from the seller’s sale proceeds and remit it directly to the CRA, or ensure that the seller has obtained a clearance certificate.

The amount of the withholding tax is 25% for non-depreciable property and 50% for depreciable property and property held as inventory. Some buyer’s lawyers take the position that the holdback should be based on 50% of the entire purchase price because the buyer cannot and should not be required to determine on a risk-free basis what property is and is not depreciable or held as inventory by the seller (Epp v. Yung (1993), 35 R.P.R. (2d) 1 (B.C.S.C.)).

Since a clearance certificate will only be issued by the CRA when the seller has calculated the actual tax payable on the sale to the satisfaction of the CRA, and has actually remitted that amount, a real hardship may result to the seller if the seller is attempting to obtain a clearance certificate and needs sale proceeds for that purpose. This is true particularly if the seller must pay out a substantial mortgage and a substantial tax in order to obtain the clearance certificate. A buyer may be persuaded to accept a statutory declaration from the seller that the property was never held to sell at a profit and is capital in nature (that is, not inventory). Commonly, the parties undertake a somewhat complex calculation that pro-rates the purchase price based on the assessed values of land (non-depreciable) and buildings (depreciable), and the holdback is based on those values.

In most cases, there is a real incentive for the seller to obtain a clearance certificate before closing by paying the actual tax owing, which is usually significantly less than the amount the buyer is entitled to hold back. If sale proceeds are required to pay the tax due by the seller in order to obtain the clearance certificate, the seller needs the buyer to cooperate. If the buyer agrees, proceeds may be paid to the seller’s lawyer without deduction (other than usual adjustments). In this situation the seller’s lawyer must give undertakings to hold back the entire holdback amount required by statute (as calculated above) and to pay that holdback to the CRA if no clearance certificate is obtained by the seller by the time the holdback must be remitted. The holdback must be remitted 30 days from the last day of the month in which the transaction completes. The seller’s lawyer is then free to use the proceeds in excess of the amount of the holdback (and any amount required to pay out seller’s mortgages) to obtain the clearance certificate. There is an obvious problem in arranging such holdbacks if there is no excess. In this situation the seller may need to pay the tax due without the benefit of the sale proceeds, or the buyer may be asked to allow proceeds that should be technically subject to a holdback to be paid to obtain the clearance certificate. This may cause difficulties if the certificate is not issued for some reason: the buyer’s liability will continue unless the holdback is paid from some other source.

In practice, clearance certificates are rarely available prior to the completion date because clearance certificates cannot be applied for before there is a firm contract and the buyer’s identity is known. Since licensees have been writing deals with less and less time between subject removal and closing there often isn’t adequate time for processing the applications. It is not unusual for CRA clearance applications to take 16 weeks or more to process. Where there will not be sufficient sale proceeds to fund both a mortgage payout and tax clearance holdback, a request to the CRA to process on a “hardship” basis may be made, which will shorten the time frame to under two weeks and quite often to only a few days. Needing sale proceeds to buy another property is not a recognized hardship criteria, except in the very narrow circumstances of a trade of properties by the same buyer and seller.

The clearance application must be filed within 10 days following the completion date or penalties will accrue at a rate of $100 per day. As the clearance certificates are rarely available within the time frame that requires payment of the gross holdback to CRA, the seller’s lawyer should make sure the undertaking to remit the holdback allows for the exception where CRA agrees to an extension of the time. The lawyer should always request a letter from CRA acknowledging receipt of the application and waiving the payment in of the holdback. CRA routinely issue these letters.

Note as well the impact of tax treaties and conventions with other countries when acting for non-resident sellers. For example, if you act for an American non-resident seller who has held Canadian property since 1980 and who otherwise qualifies under Article 13 of the Canada—U.S. Income Tax Convention (1980), the amount of the gain that is taxable in Canada, and which must be paid to obtain a clearance certificate, may be reduced. The appropriate tax treaty must be scrutinized for a possible exemption, particularly if an indirect interest in real property is sold, such as shares held in a corporation that owns real property.
§5.11  Loss Prevention Summary

A common cause of claims in real estate matters is the lawyer’s failure to record correctly, interpret or follow-up on the client’s instructions. Some examples are the failure to:

(a) draw a priority agreement;
(b) obtain an easement over property sold;
(c) register a strata plan;
(d) reserve mineral rights;
(e) register a lease;
(f) register a transfer;
(g) register transfer before registering mortgages;
(h) ensure clear title;
(i) search a strata plan;
(j) advise regarding road dedication;
(k) explain restrictive covenants; and
(l) advise on title.

The examples are simple errors of omission and can easily be avoided with a formalized instruction sheet. If nothing else, using an instruction sheet removes the recurring uncertainty as to whether or not such instructions were received from the client.

When discussing procedures and pitfalls in real estate transactions, the legal process can be categorized into three main functional areas:

(a) client instructions;
(b) implementation; and
(c) completion.

1. Client Instructions

Due to the unique nature of real estate transactions, proper instructions are usually not taken from the client before the matter is commenced. This may result in the transaction being completed in a way that is not truly in accordance with the client’s wishes.

There are three main ways in which breakdown in communication comes about.

(a) Instructions Not Received Directly From Client

The lawyer may be instructed directly by another party to the transaction, for example, a real estate licensee, a banker, etc. Accordingly, the transaction may proceed to closing without proper direct verification of the instructions with the actual clients. This problem is compounded where the lawyer’s advice or requests for additional information are transmitted using the licensee as an intermediary. There is a real danger that information will become garbled in this process.

(b) Instructions Not Taken by the Responsible Lawyer

Often, a staff person receives the initial instruction document and the transaction is commenced and well underway before being referred to the responsible lawyer. By that stage, the need to clarify or seek additional instructions may be overlooked.

(c) Instructions Incomplete

Because of the strict time constraints that govern real estate transactions, the processing and documenting are often commenced on the basis of partial or incomplete instructions. Often there is no follow-up to ensure that the outstanding data required to complete the instructions is actually received. The lawyer’s final review is too often concerned only with whether the documentation is technically correct and in order, and not with whether it is in accord with the client’s wishes or instructions. More particularly, the documentation may not be consistent with the facts. This would have been apparent had complete instructions been obtained in the first place, or had the instructions that were available been compared with the final documentation.

2. Implementation

(a) Precedent Problems

Even though the vast majority of law office transactions are based on precedents, those precedents are frequently poorly reviewed or updated. You must establish proper procedures for using precedents.

Drafting errors frequently show up where the precedent used was not purged of variable data before being used for other transactions. As a result, incorrect data is transcribed to the new document. Such errors have included:

(i) an option to renew a lease was prepared instead of an option to purchase;
(ii) the interest rate was not revised; and
(iii) the new mortgage principal amount was inserted, but the monthly repayments

Based on Conveyancing: Avoiding Complaints (Vancouver: CLE, 1992).
from the previous precedent were not changed.

Statements of adjustments frequently show arithmetic errors that could have been detected had the numbers been added again instead of being proofread only.

(b) Deficiencies in Follow-Up Procedures

These are the main areas where deficiencies in follow-up procedures have led to grief:

- searches;
- confirmation of data with third parties, such as outstanding mortgage balances; and
- return of documents sent out for signature.

Most firms are successful in starting these procedures, but can fall down in the follow-up.

(c) Communications Breakdown

Law firms adopt techniques to expedite the workflow, but unless the techniques are properly organized and supervised, they can lead to breakdown in communications.

For example, continuity is lost and errors may occur in a system in which one lawyer works on the file and returns it to a “pool” where it may be taken over by another available lawyer.

When work is delegated to legal assistants, incomplete information may be exchanged between lawyer and assistant at the time the lawyer inherits the file for completion.

A serious problem arises over the failure to have the seller or buyer complete by the closing date. Often, time extensions are arranged between the legal assistants acting for the lawyers on either side of the transaction. The lawyer may not even know about the actual completion dates until it is too late.

3. Completion

It is necessary to have proper control over registration. Many claims have arisen because follow-up ceased after the documents were executed.

Serious problems have arisen because the lawyer left on vacation, or permanently. Because the file was deemed to be closed after execution, the lawyer may not have left instructions in the event that the documents were rejected for not being in registrable form. Accordingly, rejected documents were not attended to when received back by the firm and security was lost or charges not cleared.

As with reporting to the client, the file closing procedures should be carried out promptly to facilitate early detection of errors.

Two examples of mistakes that were detected early as a result of proper post-closing file review procedures are:

- payment of trust funds to the wrong person (that is, the owner instead of the trustee); and
- disbursement of mortgage proceeds to the buyer instead of the lienholders.

Even though, in both cases, claims materialized, the ability to remedy the mistake promptly through early detection reduced the amount of the claim substantially.

4. Specific Deficiencies

In many cases, using comprehensive checklists could have helped prevent the error or omission that gave rise to a claim.

The following are some of the specific procedures which were not properly and completely carried out and have resulted in claims being made:

- ascertaining all the facts and instructions from the client;
- confirming all the instructions in writing;
- searching the property properly and thoroughly;
- clarifying with the client what he or she has to do in the procedure;
- disclosing the implications of all the documents to the client;
- explaining to the client the consequences of everything he or she signs;
- calculating the proper amount owing on the mortgage;
- preparing all documents properly and accurately; reviewing and checking all documents; and
- keeping the client apprised of the situation at all times.

[§5.12] Introduction to Statements of Adjustments

Statements of adjustments calculate the adjustments to the purchase price that the buyer and seller have agreed to make under the purchase agreement. Payments made or to be made by either of the parties in relation to the use and enjoyment of the property are adjusted, and the
adjusted amount is the actual amount to be paid or received by each of the parties on the adjustment date.

The need to adjust arises because amounts payable in relation to the ownership of land, such as taxes, and amounts receivable in relation to the ownership of land, such as rental income, are payable in a calendar year or calendar month. However a purchase and sale of property, usually closes sometime during a calendar year or calendar month.

Refer to Chapter 8 of *Real Estate Practice Manual* (Vancouver: CLEBC) and Chapter 6 of the *Conveyancing Deskbook*, for guidance when preparing or reviewing statements of adjustments.

### [§5.13] Purpose of Statements of Adjustments

Statements of adjustments have three main purposes:

(a) to define the financial matters to be adjusted as well as the calculation of those items;

(b) to confirm the method of payment of the purchase price; and

(c) to provide for disbursement of the sale proceeds.


If you are dealing with an item that will appear on both the seller’s and buyer’s statement of adjustments, the items are mirror images of one another. A debit to the buyer will be a credit to the seller, and vice versa. In both cases, the amount will remain constant.

A “debit” is something the buyer must pay for or buy at closing from the seller, or from someone else. For example, at closing the buyer must pay the purchase price to the seller and the legal fees to the conveyancing lawyers. Therefore, these items are debits to the buyer.

A “credit” is money that the buyer has already paid to the seller (for example, a deposit) or that the buyer has paid or will pay to a third party on behalf of the seller. Taxes owed by the seller but paid by the buyer and the outstanding balance of an existing mortgage assumed by the buyer, are two examples of credits to the buyer.

Funds obtained by the buyer in the course of a conveyance through an agreement independent of the contract of purchase and sale (for example, a new mortgage) also constitute a credit to the buyer.

The notes following the calculations in the statements of adjustments have been used by lawyers to obtain the parties’ agreement to various matters not set out in sufficient detail in the purchase agreement, and to provide a framework for further adjustments should the need arise.

The buyer’s lawyer can be very tempted to try to correct all of the perceived ills of the purchase agreement by inserting any number of representations, warranties and additional covenants in the seller’s statement of adjustments, in the hope that the client’s position will be better protected. This is dangerous. The statement of adjustments should reflect the agreement that the buyer and seller have made and should not be used to amend the deal by adding warrantees, covenants and agreements unless the seller and buyer have expressly agreed to such amendments.

In past years, the length and complexity of the notes to the statement of adjustments grew to the extent that judges expressed concern about what effect extensive notes had on the binding nature of the purchase agreement. If the statement of adjustments did not closely follow the purchase agreement and instead contained a number of additional covenants for the benefit of the buyer, the courts ruled that the mere presentation of the statement of adjustments to the seller may be fatal to whatever validity the purchase agreement may have had. Given this, the new standard practice is to have brief, non-contentious notes only.

Some of the court rulings on notes to the statements of adjustments are as follows:

- Notes that required many further acts by the seller were really counter-offers. The parties were no longer *ad idem*, the buyer could not establish that tender had properly taken place, and the seller was successful in defending an action for specific performance after having refused to complete a purchase under the purchase agreement (*Fraser v. Gill* (1981), 32 B.C.L.R. 132 (S.C.)).

- The buyer had wrongfully repudiated a contract by adding a new covenant to the statement of adjustments (*Lane v. Saunders* (1991), 18 R.P.R. (2d) 301 (B.C.S.C.)).

- The terms in the statement of adjustments had no legal effect because they were different from the terms of the contract of purchase and sale (*Kirsh v. MacPherson*, supra).

- A statement of adjustments should not include undertakings with respect to closing procedures unless the parties have agreed to the procedures (*Forrest v. M.C.K. Properties Ltd.* (1990), 42 C.P.C. 2nd 158 (C.A.)).

- A seller is entitled to refuse to sign a statement of adjustments that contains additional covenants but if the buyer subsequently waives the requirement to sign the statement, the seller is not entitled to refuse to complete (*Mahil v. Johal*, 1991 CanLII 1523 (B.C.S.C.)).

Take great care when you insert provisions in the seller’s statement of adjustments that have not been specifically agreed to in the purchase agreement or approved by both parties.
If you are preparing the statements be careful when deciding on both the scope of notes to the statement of adjustments, and how the statements are to be executed.

Generally, the notes should relate exclusively to the adjustments made and should only involve matters relating to the following:

(a) the methods used in calculating specific adjustments;
(b) explanations regarding verification of specific adjustments;
(c) the methods to be used in arranging subsequent readjustments in connection with calculations in the statement of adjustments based on estimates available on the adjustment date;
(d) arrangements for agreed holdback money; and
(e) payments to third parties and each lawyer’s responsibility for those payments.

For more information, see §5.16.

[§5.14] The Number of Statements

The current practice is for the buyer’s lawyer to prepare two statements of adjustments—one for the buyer and one for the seller. The following discussion assumes that two statements will be prepared.

[§5.15] Methodology for Statements of Adjustments

1. General

When preparing statements, remember that the main objective is to ensure each party bears the expense of the maintenance and operation of the property during that time in which that party is enjoying the use and occupation of the property. In accordance with this objective, most purchase agreements provide that the possession date and the adjustment date are the same. However, it is also common to have possession dates after completion dates.

Most financial obligations or benefits accruing to the property (e.g. taxes, utilities, and rents) are billed or received monthly, or possibly even less frequently. Accordingly, unless the adjustment date coincides with the end of that period, an adjustment must be made to ensure that the benefits and burdens of these items are allocated properly between the parties even though the actual payment is made either at the beginning or the end of the applicable period.

The error most frequently made is placing the adjustment on the wrong side of the balance sheet. The key to avoiding such an error is first to determine who paid or will pay for the item being adjusted, and then to ensure that party is credited for that part of the period during which he or she will not have the benefit of the item. Once you determine this, it is a simple matter to ensure the adjustment is reciprocal. Consider also whether a specific item is GST-exempt or whether GST should be included in the adjustment.

2. Calculation

As to the arithmetical calculation of the adjustment itself, a useful rule to remember is that with both loans and deposits, interest accrues from and including the date the loan or deposit was made, but excluding the date it was repaid or withdrawn (paid to the depositor). For example, when applied to the calculation of the tax adjustment, it means that the seller’s share of the taxes will be for the number of days from and including January 1 up to but excluding the date of adjustment for the year in which completion occurs (City of Toronto v. Toronto Railway Co. (1926), 59 O.L.R. 73 (Ont. C.A.)).

3. Payout Statements

You should obtain a written statement from each of the various sources that are providing information for the statement of adjustments. It is absolutely essential to obtain written payout statements or assumption statements from financial institutions when preparing the adjustments necessary to pay out a mortgage for a seller or assume a mortgage for a buyer. The seller’s lawyer almost invariably gives undertakings with respect to either the discharge or assumption of existing financial encumbrances, so it is essential to have written confirmation of the status of these encumbrances and, in the case of private lenders, discharges in hand. The lawyer must rely on this confirmation in order to fulfill the undertakings.

The lawyer should make every effort to obtain these statements as far in advance of completion as possible. In Williams Lake Realty (1978) Ltd. v. Symynuk (1982), 39 B.C.L.R. 313 (C.A.), the buyer failed to produce the necessary documents and the purchase money on the closing date and was suing for specific performance after the seller refused to complete at a later time. The trial judge allowed the buyer’s action because the buyer’s obligations had been delayed by the tardiness of a mortgagee providing a payout statement on the seller’s mortgage. However, the Court of Appeal held that because the agreement stated that time was of the essence, and the provision had not been waived, the buyer lost the right to seek specific performance. See also Shaw v. Greenland Enterprises Ltd. (1991), 54 B.C.L.R. (2d) 264 (C.A.), where neither party was ready to complete, but in the circumstances the buyer was entitled to specific performance.
4. Specific Adjustments

(a) Property Taxes

For several reasons, adjustments for taxes are usually more complicated than other adjustments. For one thing, until the tax notice comes out, the actual amount of the taxes is unknown. In this situation it has become common practice to determine the base figure for taxes for the previous year and to inflate that figure by 5% before calculating the adjustment. The seller may resist this practice in a year in which taxes on some properties are actually being reduced. Nevertheless, the practice is still acceptable because it gives the buyer better protection if there is an increase, and you can provide for further adjustment when the actual figure is known, giving the seller recourse if any surplus is not credited to him or her.

Whatever the estimate for taxes, you must provide for readjustment to be made when the taxes are known. No further adjustment is possible unless called for in the statement of adjustments or otherwise between the parties (Wu v. Campbell (1977), 4 Alta. L.R. (2d) 392 (Dist. Ct.)).

If completion and possession dates are scheduled for shortly before the annual or biannual tax payment is due, and you are acting for the buyers, you should inform your clients that the due date for the payment is imminent so that they can budget for the payment adequately. Take special care with completions occurring immediately after the due date for the payment of taxes to ensure either that the seller has made payment on or before the due date, or that an additional adjustment is made for the tax penalty in the statement of adjustments.

Some interest charges and penalties for late payment of taxes are assessed on a lump-sum basis, while others accrue on a day-to-day basis or other periodic basis. Interest and penalties should be debited in full to the seller and should not be adjusted between the seller and the buyer.

Home Owner Grant

Most disputes arise over the issue as to whether the tax adjustment should be made on the basis of the gross taxes payable (or estimated) or on a net basis after application of the provincial Home Owner Grant.

The Home Owner Grant is a provincial program that reduces the burden of residential property taxes on homeowners who occupy eligible residences. The grant entitles the owner to a maximum reduction in residential property taxes of $570 for the Greater Vancouver Regional District, Fraser Valley Regional District, and Capital Regional District, and $770 for the rest of the province. (An additional grant of up to $275 is also available if the owner is over 65, permanently disabled, or receives certain war veterans allowances.) The grant is reduced on higher valued properties by $5 for each $1,000 of assessed value over $1,650,000 and is eliminated on homes assessed at $1,764,000 or more ($1,804,000 in northern and rural areas).

The Vancouver Real Property Section of the Canadian Bar Association made recommendations for the adjustment on taxes in the statement (see Appendix 14). The recommendations are different if the adjustment date is before the due date for payment of taxes as opposed to after the due date.

• Before the Due Date for Payment of Taxes

Before the due date for payment, property taxes should be adjusted net of the anticipated Home Owner Grant if both the seller and the buyer would be eligible to claim the grant in the year of sale.

For example, if the anticipated taxes were $3,000 and both parties were eligible, the adjustment would be done as follows: $3,000 – $570 = $2,430. If one of the parties is not eligible to claim the grant in that year, the adjustment should be done on the full amount of the property taxes (For example, the full $3,000).

• After the Due Date for Payment of Taxes

If the adjustment date falls after the due date for payment, taxes should be adjusted on the amount actually paid.

For example, if the seller paid $2,430, then that is the amount that would be adjusted regardless of whether the buyer qualifies for the Home Owner Grant.

(b) Assumption of Mortgages

It is critical to obtain written statements from financial institutions as to the status of their charges. This is particularly the case if the buyer is assuming an existing mortgage on title. The assumption statement should confirm the balance of the mortgage as at the last payment date and a per diem amount. This will
permit the solicitor to calculate the amount outstanding as at the date payments under the assumed mortgage become the responsibility of the buyer. Note that the Vancouver Real Property Section of the Canadian Bar Association resolved that in the absence of specific instruction from the client or specific provisions in the contract, where the buyer assumes a mortgage, mortgage payments should be adjusted as at the completion date rather than the adjustment date, and the buyer should assume payments commencing on the completion date.

The assumption statement also should confirm the following:

(i) the completion of the sale will not cause the mortgage balance to be accelerated (that is, the mortgage is, in fact, assumable);

(ii) the mortgage document on file in the appropriate Land Title Office constitutes the whole of the agreement between the seller and the mortgagee being assumed by the buyer; and

(iii) the mortgage is in good standing and, if possible, an assurance that if the mortgage falls into default before the completion date, the mortgagee will so advise.

In connection with the assumption of mortgages, note ss. 20, 21, and 22 to 24 of the Property Law Act, which are discussed in Chapter 7.

(c) Utilities and Licences

Obtaining the required information from the municipality or other appropriate body is usually straightforward. However, ensure that you obtain statements for all applicable charges. For example, while the City of Vancouver includes most of the charges for the services it provides in the tax notice, many municipalities send out separate invoices for water rates, sewer rates, garbage collection and, in low-lying areas, diking charges. You will need to make the appropriate adjustments and/or holdbacks (if the closing occurs during a billing period) between the seller and the buyer. Water bills are either a fixed amount for a specified period or are based on metered use.

(d) Electricity and Gas

As these items are metered and billed by the supplier, it should be simple to arrange for BC Hydro and Power Authority to read the meter as at the adjustment date. The account for service to that date will then go to the seller. As a result, no adjustment is normally made for these items, although it is prudent to advise the buyer to open a new account in the buyer’s name for service rendered after the adjustment date.

(e) Oil

Oil tanks are not common. However, if there is one, it is simple to have the supplier of the oil “dip the tank” and provide a written statement of the value of the oil in the tank. Again, as this is usually done on the adjustment date, it is impossible to include the amount on the statements of adjustments prepared before that date. In this situation readjustments after the completion and adjustment date will be necessary, so provide for how this is to be done in the statements of adjustments.

Note that in older established residential areas, many oil tanks installed below ground are approaching the end of their useful life. Accordingly, the buyer would do well to ask the oil supplier to determine whether there is a significant amount of water present in the tank. If water is present this fact may indicate that the tank is deteriorating and that the buyer may face substantial repair costs or environmental issues. In many cases, the municipal authorities may require the buyer to remove the tank if it is no longer used.

(f) Rents

Unless the date on which rent is payable is the same as the adjustment date, an adjustment will need to be made between the parties.

Ensure that any prepaid rent and security deposits, together with any interest accrued as required by the Residential Tenancy Act, are accounted for. The simplest way to do this is to request that the seller prepare and forward a rent-roll for each unit. The rent-roll should show the following:

(i) the monthly rent applicable;

(ii) the due date for the rent;

(iii) the last date rent was increased;

(iv) the amount of any prepaid rent or security deposit; and

(v) the amount of interest held in respect of any prepaid rent or deposit.

The buyer should not be debited for any rent arrears because it is not known whether such arrears can be collected; normally the parties agree that rent arrears for the periods before the adjustment date will be paid to the seller.
(g) Insurance Premiums

If the buyer is taking over the seller’s policy of insurance on the property, an adjustment can be made on the basis set out above. However, unless there is a significant rate advantage for assuming the seller’s policy, the buyer should arrange for his or her own insurance on the premises. Thus no adjustment should be required. Placing new insurance forces the buyer to satisfy himself or herself that the coverage is adequate. Also, the lending institution will require verification that the loss payee clauses have been inserted in the correct priority. By placing his or her own policy, the buyer also will avoid any problems that may arise as a result of representations made by the seller in the original application for insurance, or actions by the seller voiding the policy.

(h) Deposit and Real Estate Commission

The deposit is shown as a credit on the buyer’s statement of adjustments, but is not necessarily included in the seller’s statement of adjustments unless the deposit has been paid directly to the seller.

When real estate commission is payable, the amount is usually shown as a debit on the seller’s statement of adjustments. The payment of commission is not adjusted on the buyer’s statement of adjustments. Real estate commissions are subject to GST.

Under the one cheque system, the real estate licensee who is earning the commission holds the deposits. Commonly, the commission is larger than the deposit and an additional balance will be due to the real estate licensee. In this situation, the buyer’s solicitor usually pays the balance of commission owing directly to the licensee from the fund available to the seller on completion. However, take care to ensure that the statement of adjustments properly authorizes this payment, in case a dispute develops between the seller and licensee as to the commission entitlement.

When the commission is less than the deposit, the seller is entitled to a sum back from the real estate licensee. In this situation, the licensee holds the balance of the deposit until the completion date. Under the Real Estate Services Act, the licensee will require the written authority of both seller and buyer before releasing the balance of the deposit (presumably to the seller). The buyer’s lawyer is frequently asked to prepare and forward the authorization along to the seller with remaining documents so that the seller can execute the documents, and if the balance of the deposit is required to discharge existing financial encumbrances, to obtain the funds from the licensee on completion. Unfortunately, this frequently delays when funds are received because the authority to pay cannot be forwarded to the licensee until a satisfactory post-registration index search has been done. As a result, the funds are often not received from the licensee until after close of business on the completion date. It should be made clear to the seller that he or she will pay any expense caused by a delay in receiving these funds.

When the buyer’s lawyer is asked, in writing, to follow the “two cheque system” for commission, then if the deposit is an amount less than the selling commission owing, the buyer’s lawyer will make one commission cheque payable to the listing brokerage company (who has been holding the deposit in trust) for the balance of commission owing and the other cheque in full payment of the selling brokerage’s commission. When the deposit is a greater amount than the commission owing, the listing company will deduct from the deposit it is holding in trust the portion owing it on completion, and will then forward the balance (or excess deposit) to the buyer’s lawyer in trust, to then be paid to the selling brokerage. In both instances, upon completion of the conveyance, the buyer’s lawyer will deduct the commission owing to any brokerage company from the proceeds of the sale and forward the same together with the registration particulars.

When the two-cheque system is being followed, the commission particulars are recorded in the statement of adjustments in a manner that is different from when the one cheque system is being used.

(i) Legal Fees and Disbursements

Although they are not strictly adjustments, the legal fees and disbursements incurred in completing the transaction are common entries on the buyer’s statement of adjustments.

When fees and estimated disbursements are included, a separate GST component should also be included.

(j) Property Transfer Tax

When this tax is payable, the amount should be included in the buyer’s statement of adjustments and obtained before closing, or a separate cheque should be obtained for this purpose.

(k) GST on Property

When GST must be paid on the property (e.g. on new or substantially renovated residential
complexes), it should be shown as a separate
item on the statement of adjustments and any
rebates may be shown as well.

(l) Holdbacks

Generally, holdbacks are used to secure obli-
gations of the seller either to the buyer or to
third parties. If not already dealt with in law-
ners’ correspondence, the notes to the state-
ment of adjustments should clarify the ar-
rangements respecting holdback money be-
tween the seller and the buyer. The buyer’s
lawyer may try to obtain a holdback in many
circumstances, including when:

(i) the mortgagee’s statement for assump-
tion purposes is based on the assumption
that the last monthly payment has
“cleared”;

(ii) the seller is obligated to complete work
before closing, but is unable to do so;

(iii) the seller’s share of any utility payments
needs to be secured; and

(iv) the buyer has reason to believe that the
seller is a non-resident, for the purposes

(m) Reconciling Cash Balance

It is important for the buyer’s lawyer to pre-
pare a cash in/out statement to reconcile the
funds received by and disbursed from the law
office. The purpose behind preparing this
statement is to ensure that sufficient cash will
be available to complete the transaction. The
importance of preparing these statements can-
not be overemphasized. It is not safe to rely on
the statement of adjustments because it can
balance when the cash in/out statement shows
a shortfall. The in/out statement also serves as
a quick, accurate reference that cheques are is-
sued in the proper amounts, and is a good
checklist of financial receipts and payments on
the closing date.

(n) Conflicts

The buyer’s solicitor may be asked to attend to
the payment out and discharge of existing
financial encumbrances on behalf of the seller.
Before agreeing to do so, the buyer’s solicitor
should consider carefully section 3.4 and Ap-
pendix C of the BC Code, which governs the
conduct of the solicitor when acting for more
than one party to a conveyancing transaction.

The buyer’s lawyer should insist that the seller
be separately represented, on the basis of the
conflicts rule. While this approach may be
resisted by clients, and especially those of
practitioners located outside of metropolitan
areas, the potential risks of acting for both
seller and buyer may far outweigh the benefit
of any additional fees that would be realized.

When a buyer’s lawyer must accept these
additional risks, it is absolutely essential that
he or she obtain the written consent of both the
seller and the buyer. In addition, it is essential
for the lawyer to obtain written payout state-
ments for the encumbrances. The fees and
disbursements for attending to the payment out
and discharge (including preparing the dischare) should be shown on the seller’s
statement of adjustments.

(o) Disbursement and Delivery of Funds

Obtain the irrevocable authorization of the
seller and the buyer regarding the disburse-
ment of funds and include it in the statements
of adjustments. The statement of adjustments
should also provide the authority to pay mort-
gagees, real estate licensees and the mortgage
discharge fees, and to assign funds to third
parties.

There has been some dispute as to whether the
seller is responsible to pick up sales proceeds
or whether the buyer is to deliver sales pro-
ceeds. The Vancouver Real Property Section
of the Canadian Bar Association passed a
resolution on this subject (see Appendix 13),
stating that in the absence of specific instruc-
tions from the client or specific provisions in
the contract, provided the parties are reasona-
ably proximate, it is the seller’s responsibility
to pick up the sale proceeds from the buyer’s
solicitor, or bear the cost of transmission. If
possible, determine these matters before pre-
paring the documents so that an appropriate
amount for these expenses can be included in
the seller’s statement of adjustments.

[§5.16] Notes to Statements of Adjustments

Notes to the statements of adjustments are often de-
signed to serve all of the following purposes:

(a) to clarify the method used in making the more
complicated adjustments, such as taxes;

(b) to clarify the duties and responsibilities of the
conveyancing solicitor, including authority for
the disbursement of funds;

(c) to set out various representations and warran-
ties or agreements between seller and buyer
which do not merge on completion;

(d) to document agreements reached between sell-
er and buyer after acceptance of the purchase
agreement or not incorporated in the purchase
Real Estate
agreement, or to set out how certain statutory provisions affecting the conveyance will be administered; and

(e) to attempt to create new contractual agreements between the parties which were not contemplated by the original purchase agreement or any subsequent amendments.

Statements of adjustments often include the following items relating to the first two purposes:

(a) a general agreement to make all required adjustments whether or not they have been included in the statement of adjustments and notwithstanding any errors contained in the statement of adjustments;

(b) explanations for any adjustment methods that are not readily apparent;

(c) a statement that adjustments are made on the basis of the best available information obtained from primary sources and that the lawyer makes no representations as to the accuracy of the information and that if the figures are in error, further adjustments will be made between the parties;

(d) an express agreement that all terms, conditions, warranties, covenants, and agreements contained in the statement of adjustments are to survive the completion of the transaction (but only if the notes do not repeat or add to the warranties and covenants set out in the purchase agreement, i.e. the parties should first agree to its inclusion); and

(e) the expression “errors and omissions excepted” or “E. & O.E.”, which is frequently appended to accounts in order to excuse slight mistakes or oversights, to allow for their correction, and to prevent parties from arguing that the statement of adjustments is the final basis for the closing adjustments. The “E. & O.E.” qualification will not allow a lawyer to escape from liability for negligence in preparing a statement of adjustments.

The statements may be long and more complex because lawyers have been attempting to fulfill the last three purposes.

If representations and warranties are not contained in the original purchase agreement, the seller may reasonably argue that he or she is under no obligation to give these representations and warranties and that he or she is at liberty to delete them before executing the statement of adjustments containing them or even to consider that a counter offer has been made which may allow the recipient to avoid the contract.

Agreements between seller and buyer reached after the purchase agreement should already be set out in an amendment to the purchase agreement signed by both seller and buyer. As a result, including them in the statement of adjustments is redundant, though it may still be useful to reiterate the obligations of the parties.

The most common statutory provision affecting the conveyance is the provision for a holdback under the **Builders Lien Act** and, in the case of strata titles, under the **Strata Property Act**. If the buyer is acquiring property on which improvements are in progress or were recently completed, it is not clear that a holdback under the **Builders Lien Act** will protect a buyer (who may not be an “owner” within the meaning of the **Builders Lien Act**) against liens filed after the purchase has closed.

If the seller asserts that the time limit for liens has expired, the buyer’s solicitor should request both a certificate of substantial completion and an occupancy permit as additional evidence of when the time period for liens expired.

Section 88(1) of the **Strata Property Act** states:

Despite any other Act or agreement to the contrary, if an owner developer conveys a strata lot to a purchaser, a claim of lien under the **Builders Lien Act** filed against the strata lot, or against the strata lot’s share in the common property, must be filed before the earlier of

(a) the date on which the time for filing a claim of lien under the **Builders Lien Act** expires, and

(b) the date which is 45 days after the date the strata lot is conveyed to the buyer.

Section 88(2) of the **Strata Property Act** states:

Despite any other Act or agreement to the contrary, a purchaser of a strata lot from an owner developer must retain a holdback of an amount set out in the regulations until the earlier of

(a) the date on which the time for filing a claim of lien under the **Builders Lien Act** expires, and

(b) the date which is 55 days after the date the strata lot is conveyed to the buyer.

Sections 88(1) and 88(2) of the **Strata Property Act** must be read with the Strata Property Regulation, B.C. Reg. 43/2000, which prescribes the amount of the lien holdback. The regulation states that the amount of the holdback is 7% of the gross purchase price (s. 5.2).

Obtain clear instructions from the client before inserting anything in the statements of adjustments that creates new contractual arrangements between the parties. An attempt to create new contractual relations may provide the seller with sufficient grounds to avoid the original agreement between the parties (**Fraser v. Gill**, supra).
Sometimes, a lawyer may be obliged to advise the client to attempt to negotiate. In *Halliday v. Underdahl*, 1992 CanLII 1890 (B.C.S.C.), the plaintiffs signed an interim agreement. After they signed they learned they might not be able to build a home because they might not get permission to install a septic system due to inadequate percolation. Three days before completion, they consulted a lawyer about their problem and asked if they were bound to complete. The lawyer did not present negotiation as an option. The court concluded that a reasonably competent, ordinarily prudent solicitor would have advised the plaintiffs not to complete without at least attempting to negotiate. This ruling was on a summary trial application brought by the lawyer to have the client’s negligence claim dismissed. The court did not decide that the lawyer was negligent but did find there was a triable issue.

Assuming that the seller is amenable to the additional covenants, the enforceability of these covenants may still be in question unless there is clear consideration flowing to the seller for these additional covenants, or at the very least, the statement is executed under seal. Accordingly, the simplest method of dealing with this issue is to have the statements of adjustments executed under seal, thus precluding any question of their enforceability for lack of consideration.

However there is a problem with this approach as a result of *Fraser v. Gill*, supra. By having the seller execute the statement of adjustments under seal, the buyer’s solicitor supports the seller’s argument he or she is being asked to commit “many further acts” other than those required by the purchase agreement and the statement is an extensive counter-offer.

If the buyer’s solicitor is aware that the seller is reluctant to complete, the solicitor should consider carefully whether any notes to the statements of adjustments should be presented to the seller. In this situation the buyer’s solicitor must advise the client fully of the situation and the potential risks involved, and obtain specific instructions before proceeding.

In sum, use caution as to the nature and extent of the notes to be included in the statements and as to how the statements are to be executed.

### [§5.17] Initial/Interim Report to Client

Many practitioners have modified their conveyancing practice to incorporate an interim report to the client. This modification is largely in response to successful negligence actions against conveyancing solicitors.

An interim report enables the conveyancer to:

(a) confirm receipt of instructions;
(b) provide the client with a title opinion premised on completion of registration of all required documents;
(c) confirm the parameters of the instructions;
(d) advise as to a possible conflict situation; and
(e) advise as to the fees and disbursements to be charged with respect to the transaction.

All of these areas have either led to negligence claims against conveyancers or have been the subject matter of general complaints against lawyers. The following discussion deals with each of the areas.

1. Receiving Instructions

If you are acting for the buyer, you will receive your instructions most often by way of the purchase agreement or “transaction record sheet” sent by the licensee. Once you receive a purchase agreement, you should immediately telephone the prospective client to acknowledge receiving it.

Provided that your instructions are ratified, use this telephone conversation to advise the client of any potential problems with the purchase agreement. Also obtain instructions as to the full names, addresses, and occupations of the buyers, together with instructions as to whether multiple buyers intend to joint tenants or tenants in common. Next, confirm all of this information in an interim report to the client.

The initial telephone conversation can sometimes save you time and money: for example, if the licensee has issued the instructions by way of the “transaction record sheet” to the wrong solicitor.

2. Title Opinion

Once you have the tax information and a full search of the subject property, including copies of all relevant plans, you are in a position to prepare the interim report to the client. The interim report includes your preliminary opinion on title.

An opinion on title is two-fold; it deals with the present status of the title, and the status of the title when all contemplated registrations have been completed. When advising as to the present status of the title, you should deal specifically with the encumbrances to be discharged out of the sale proceeds and also the encumbrances that are to remain on title. If the seller has agreed to clear title on his or her own behalf or through his or her solicitor, you should confirm this in order to minimize possible difficulties that may arise on closing if the seller defaults on that obligation. You should also examine the encumbrances to remain on title in detail, including the plans relating to those encumbrances (if applicable).

You cannot assume that because an easement, right of way, etc., has been on the property for years, it does not materially affect the property. By providing your client with copies of the relevant encumbrances and related plans, together with a copy of
the land title plan of the property, you enable your client, before the completion of the purchase, to review the plan, and, if concerned, to contact or instruct the relevant parties or authorities. If you do not raise these matters with the buyer until after completion of the purchase, and if they are then found to adversely affect the property materially, you will likely be liable for the loss.

The final segment of your title opinion deals with its qualifications—statutory and otherwise. Most clients believe that once they have paid their money and the documents are registered, they will get good title, free and clear of everything. Providing your client with these qualifications before closing again allows the client, if concerned, to raise them with you and clarify any questions they may have.

3. Parameters of Instructions

From the solicitor’s perspective, outlining the parameters of the client’s instruction may be the most important part of the interim report letter. In this part of the report, the solicitor can clarify what the solicitor is undertaking for his or her fee, enabling the client to attend to those matters placed within his or her control and to fully instruct the solicitor as to potential problems before completion. It allows the solicitor to shift the onus to the client for several matters.

In most instances, the solicitor has no personal knowledge of the property or the sellers and the agreement makes no reference to potential problems. This has led to situations in which the solicitor does not find out until the buyer attends to execute documents the day before closing that the house has recently been constructed, or that tenants are in possession of property that the buyer wants to inhabit. This type of confusion leads to difficulties with the closing, increased time commitments for the solicitor, and dissatisfied clients.

Note the following passage from Murray Patterson, “Real Estate” in the materials for the Law Society/CLEBC seminar, Loss Prevention—1992 (June 1992):

We get many claims where, after closing, the buyer discovers that something with respect to the property is not as they expected it to be. Zoning bylaws preventing them from using the property in the manner they would like, an improvement encroaching on adjacent property and false representations by the seller are common examples. The client says that his understanding is that the lawyer would investigate and advise him of any such problems. The lawyer says such services were not part of what she was paid to do. Again, in the absence of corroborative evidence, the Courts often find in favour of the client … The easy answer is to, as soon as possible, send the client a comprehensive interim reporting letter.

In this part of the interim report, advise the client also as to those potential problems about which he or she is already aware, for example, deficiencies in or the invalidity of the agreement.

4. Conflicts

If the solicitor also has received instructions from the mortgage company to prepare the security for its loan to the buyer, the solicitor should also advise the client in writing and confirm his or her agreement (see section 3.4 and Appendix C of the BC Code).

Within this part of the report, also advise the client as to any particular requirements of the mortgagee; that is, survey certificate, insurance, and so on. This practice eliminates the possibility of the buyer claiming against you if the relationship between the mortgagee and the buyer is prejudiced or severed before funding due to, among other things, misrepresentations by the buyer or problems with the property.

5. Fees

In an interim report, indicate to the client what the estimated fees and disbursements are and also that, if the client wants you to attend to any of those matters placed within the control of the client, the additional fees will be subject to adjustment on a time value basis.

6. Conclusion

You should sign the interim report to the client only after carefully reviewing all the relevant documents; that is, the purchase agreement, search results, tax information, etc.

Send the interim report as soon after receiving the instructions as possible so that the client has ample opportunity to attend to those matters raised in the report. If the circumstances permit, you can modify the report and enclose copies of the buyer’s statement of adjustments and mortgage, if applicable.

You will find that the effort required to prepare and send an interim report to client will result in more satisfied clients and a reduction in the risks associated with a conveyancing practice.

The letters in Appendices 15 and 16 are intentionally comprehensive—the paragraphs and particular language to be used are a matter for the lawyer’s personal judgement and the circumstances of the transaction. In particular, you will need to modify the letter if the purchase involves a property that is
not a single-family residence, such as a strata lot, a co-operative, or a lease.

### [§5.18] Interim Report Letter Checklist

The following is a list of the topics typically covered in an interim report letter for a simple residential conveyance. This is not an exhaustive list. Review the Law Society’s *Practice Checklists Manual*, “Residential Conveyance Procedure,” in order to discover further items that may be of consequence (www.lawsociety.bc.ca).

(a) Confirm that you received instructions.

(b) Provide the client with a title opinion premised on completion of registration of all required documents.

(c) Review all encumbrances and related plans, which are to remain on title.

(d) Confirm location of the property on the plan with client and ask the client to initial the lot being purchased.

(e) Confirm with client that environmental hazards are not a concern.

(f) Outline statutory exceptions to title including, but not necessarily limited to, s. 23(2) of the *Land Title Act*.

(g) Confirm the client’s instructions on how title is to be taken (e.g. in whose name, as joint tenants or tenants in common, etc.).

(h) Confirm the closing date, purchase price, deposit paid and GST status of the purchase.

(i) Discuss the proposed method of financing and warn the client of standard deductions from the gross amount of the mortgage before funds are advanced.

(j) Request the name of the mortgage lender or its solicitors if not already done.

(k) Confirm the parameters of your instructions and define and limit the extent of your responsibility for the following matters:

(i) placing insurance (typically the client’s responsibility);

(ii) obtaining a survey (institutional lenders generally require up-to-date surveys, otherwise it is up to the client to decide if a survey is necessary, but note that many lenders are now accepting a title insurance policy in lieu of a survey; the lawyer should make it clear that the risk of an encroachment or illegal setback lies with the buyer and not the lawyer and that unless otherwise instructed the lawyer will not obtain a survey);

(iii) arranging utilities (the client should be told to open accounts such as hydro, telephone, etc.);

(iv) checking zoning, heritage, archeological, environmental and other matters (generally the client is advised to check with the municipality regarding zoning, building bylaws and other outstanding orders);

(v) confirming existing tenancies (the client should be satisfied that there are no existing tenancies and if there are, of the notice requirements for terminating tenancy agreements: see Part 4, Division 1 of the *Residential Tenancy Act*);

(vi) inquiring about builders liens (ask if the home is a new building or if recent renovations have been done; leave the responsibility for investigating to the buyer);

(vii) making closing arrangements (normally the client’s responsibility, e.g. the transfer of keys, etc.);

(viii) remitting taxes—e.g. (a) in a residential conveyance there may be social services tax on any personal property of value being conveyed, and although a lawyer does not usually remit the tax on behalf of the client, the client should be advised of the obligation to pay the tax, (b) non-resident seller requirements under s. 116 of the *Income Tax Act*, and (c) whether GST is payable on the purchase price;

(ix) clarifying the representations and warranties clause in the contract of purchase and sale and asking the client to advise if there are any representations or warranties that were made and do not appear in the contract;

(x) obtaining the client’s agreement in writing with respect to any conflicts (e.g. where the same lawyer acts for buyer and mortgagee, or buyer and seller—see Appendix C, section 5 of the *BC Code*);

(xi) obtaining the client’s written agreement to any departure from the method of completion in the Contract of Purchase and Sale; and

(xii) discussing fees and disbursements (including property transfer tax which can be substantial and is borne by the buyer) and also that if the client wants the lawyer to do any of the matters that are normally left up to the client, those fees will be on a time value basis.
If circumstances permit, the letter can be modified to enclose the following documents for the client to execute:

(a) the original and two copies of the buyer’s statement of adjustments; and
(b) the Property Transfer Tax Return.

When there is a mortgage to be executed, the mortgage must be executed in the presence of a lawyer or of a person before whom an affidavit may be sworn under the British Columbia Evidence Act.

§5.19 Insurance

At common law, the beneficial interest in the land passes from the seller to the buyer once a contract for the purchase and sale of land has been executed and any conditions precedent have been removed.

Under s. 29 of the Insurance Act, a number of “statutory conditions” are deemed to form part of every contract of insurance in British Columbia. Statutory Condition No. 2, as set out in s. 29, provides as follows:

The insurer is not liable for loss or damage to property owned by a person other than the insured unless

(a) otherwise specifically stated in the contract, or
(b) the interest of the insured in that property is stated in the contract.

Thus, unless the contract provides otherwise, once a contract of purchase and sale has been executed and all conditions precedent have been removed, the seller’s insurance coverage will no longer be effective. Generally this is not a problem in residential conveyancing transactions, because clause 16 of the standard form Contract of Purchase and Sale addresses the matter of the passage of risk as follows:

RISK: All buildings on the Property and all other items included in the Purchase and Sale will be and remain at the risk of the Seller until 12:01 a.m. on the Completion Date. After that time, the Property and all included items will be at the risk of the Buyer.

If this contractual provision remains unaltered, the buyer must ensure that he or she has insurance in place by no later than 12:01 a.m. on the date of completion. Even if the contract of purchase and sale provides for transferring risk on another date, such as the adjustment date, the buyer should have insurance in place by 12:01 a.m. on the date of completion, in case the seller does not maintain coverage beyond the completion date. In addition, while most insurance policies provide for coverage to be in place as of 12:01 a.m., this is not always the case, and coverage may not be effective until 12:00 p.m. on the specified date. Accordingly, it is good practice to advise a buyer to insure the property from the day before the date of completion.

A fire insurance policy is a personal contract and does not run with the land. Although a seller may assign the policy of insurance to the buyer, this is not recommended. Unless the assignee can establish that a novation of the initial contract has occurred, any claim he or she may make under the assigned policy will remain subject to any claims or defences that existed on behalf of the insurer at the time of the assignment. The assignee will, accordingly, run the risk of coverage being cancelled as result of a misrepresentation or other breach of the policy committed by the seller prior to the assignment.

Because insurance is a highly specialized field, when you act for a buyer, do not assume responsibility for placing insurance on the property. Leave this responsibility to the client to handle with the insurance agent. These responsibilities should be confirmed in a retainer letter.

If you are acting also for a mortgage lender in a conveyancing transaction, you cannot avoid assuming responsibilities with respect to the placement of insurance coverage. The mortgage lender will specifically instruct you to ensure that adequate insurance coverage is in place before funding the mortgage. See §5.26 for more on this topic.

§5.20 Types of Insurance Coverage Related to Real Property

Historically, property insurance covered only damage caused by fire, but fire policies were gradually extended over time to cover various other perils. The Insurance Act specifically provides that a contract that includes coverage for loss or damage by fire is deemed to also cover damage caused by lightning and gas explosions (s. 34). These policies, commonly referred to as “fire and extended peril” policies, extend coverage only to those perils named in the policy; the insured under such a policy must establish that any loss suffered was in fact caused by one of the named perils.

Fire and extended perils coverage has now been largely superseded by “all risk” insurance. “All risk” policies are inclusive, so that once an insured establishes a loss, the insurer is bound to pay unless it can establish that the loss suffered falls under one of the exclusions specifically named in the policy. When acting for a buyer in a residential conveyancing transaction and/or a mortgage lender in a residential financing transaction, it is generally appropriate and has become standard practice to request insurance covering “all risks, including earthquake and flood.” Such policies provide extremely broad coverage with quite limited exclusions. Earthquake and flood damage may well be specifically excluded from an “all risk” policy and such coverage should, therefore, be specifically requested if so desired.
[§5.21] Extent of Indemnity

When obtaining insurance against a building or home, consider the basis upon which an insurer will evaluate a claim. Most commonly, fire insurance policies will specify that a claim be evaluated in accordance with the “actual cash value” of the property lost. Actual cash value is generally interpreted to mean the cost of replacement, less depreciation, unless the circumstances of loss indicate a more appropriate measure. See Canada National Fire Insurance Co. v. Colonsay Hotel, [1923] S.C.R. 688, for an example of just how dramatically the method of evaluation can affect the amount recovered under an insurance claim.

To avoid the hardship that can result from valuation on an actual cash value basis, the insured should request that a policy contain a “replacement cost endorsement.” A replacement cost endorsement will provide the insured with sufficient insurance proceeds to replace any lost assets. However, the insured must be careful, particularly when insuring older buildings, to ensure that the policy covers any costs associated with upgrading the building to conform with current code requirements. This may necessitate using different and more expensive building materials, installing expensive sprinkler systems and increasing parking, all of which costs would not be covered under a “replacement cost” policy unless specified.

[§5.22] Co-Insurance Clauses

Since the vast majority of insurance claims involve only partial damage to the insured property, insureds may be tempted to insure assets to less than their full value. In order to remove this temptation to under-insure, the insurer will often include a “co-insurance clause” in a policy. Co-insurance clauses stipulate that the insured must maintain coverage to a particular level, usually expressed as a percentage of the actual cash or replacement value of the asset valued as at the time of loss, and that if the insured fails to do so he or she will only be entitled to recover the proportion of any loss that the amount of insurance actually in place at the time of the loss bears to the amount of insurance required to be maintained under the clause. Where the policy contains a replacement cost endorsement, the agreed percentage (usually 80% for buildings without a sprinkler system and 90% for buildings with sprinklers) will apply to such replacement cost value; see §5.26 regarding the “stated amount” co-insurance clause.

[§5.23] Severability of Interest and Cross-Liability Clauses

As a general rule, if there are two insureds named in a policy, one insured cannot recover under the policy for any damage caused by the other insured, and a default by one named insured will generally void the policy as against both insureds. In order to avoid these problems, an insured should require that a severability of interest and cross-liability clause be added to the policy. Such a clause enables one insured to enjoy the benefits of the policy notwithstanding that the damage in question is caused by the other insured party. Similarly, a default by one insured under the policy that would otherwise void the policy entirely would apply only to the party in default and would not affect the coverage of the other named insured.

[§5.24] Non-Occupancy and Vacancy Clauses

Vacancy or non-occupancy clauses are commonly included in property insurance policies, because of the hidden risk of damage to property that remains vacant or unoccupied. Generally, vacant property means property that is completely unfurnished or abandoned, and unoccupied property means property in which no person regularly resides. Insurance policies commonly provide that coverage will be terminated or suspended upon 30 consecutive days of vacancy or non-occupancy. In the event of a loss in such a case, courts will generally deny coverage even if there is no causal connection between the vacancy or non-occupancy and the loss suffered. This problem may arise in the case of a non-resident buyer who buys but does not occupy a property.

[§5.25] Insuring Strata Property

A strata corporation must obtain and maintain insurance for the buildings, common facilities and any insurable improvements owned by the strata corporation to their replacement value against fire and other perils usually the subject of insurance (s. 149 of the Strata Property Act). Section 153 of the Strata Property Act further provides that, for this purpose, the strata corporation has an insurable interest in the buildings, common property and other assets of the corporation. Notwithstanding the terms of the insurance policy, the strata corporation, the owners, tenants, and all persons normally occupying the strata lots are deemed to be included as named insureds on the policy of insurance. If the proceeds of a policy of insurance are insufficient to satisfy a claim made against the policy, the individual owners are liable to contribute towards that deficiency in proportion to their unit entitlement as shown on the strata plan.

The standard packages for strata unit owners offered by most insurers provide the policyholders with coverage in respect of contributions they may be required to make.
Towards any shortfall in coverage under the policy placed by the strata corporation. However, most of the basic home-owners policies obtained by the owners of bare land strata units will not contain this protection. As the exposure to the individual owner in this situation is potentially very significant, it likely would be in the best interests of such an owner’s mortgagee to ensure that the owner is protected against such loss.

Section 157 of the Strata Property Act provides that a strata corporation must, subject to s. 159 of the Act, immediately use the proceeds paid under any insurance policy to repair or replace damaged buildings, common property, common facilities and assets of the strata corporation. If a strata corporation decides not to repair or replace damaged property, s. 160 of the Act permits interested parties to apply to the Supreme Court for various orders about the payment of insurance monies and other matters.

**[§5.26] Insurance and the Lender**

The solicitor who acts only for the buyer may leave the matter of insurance entirely to the client. This is not possible, however, when acting for a lender who takes mortgage security over the property to be insured. The mortgage lender will instruct the solicitor to ensure that adequate insurance coverage is in place before funds will be advanced. In this situation you will obtain a “cover note” or “insurance binder” in respect of the property to be mortgaged from the borrower’s insurance agent. An insurance binder is simply an acknowledgment of insurance coverage issued by the insurance company pending the preparation of the formal policy document. Review the binder to confirm that the legal description of the property is correct, that the appropriate party is named as an insured, that the coverage is effective as of the appropriate date, and that the proper type of insurance coverage has been placed to the value requested.

If acting for a lender, review the insurance binder to ensure that, at the time the mortgage monies are advanced, the property to be charged by the mortgage is insured to the proper value, and to ensure that all of the lender’s other requirements with respect to insurance have been met.

A lender will invariably demand that coverage be set at the property’s full insurable value, that the policy have attached a “standard” mortgage clause, and that the lender be designated the first or second loss payee under the borrower’s policy. This last stipulation effectively makes the lender the assignee of any proceeds that may become payable under the policy. Even though the lender is shown as a loss payee under the policy, the lender’s right to receive the insurance proceeds may be impaired since the loss payee can have no greater right to those proceeds than the insured/borrower. The lender’s rights to receive insurance proceeds may be impaired if the insured misrepresents or breaches the policy.

To overcome this problem, lenders will invariably request that the policy of insurance contain a “standard mortgage clause.” Institutional mortgage lenders commonly accept and insist upon the clause sanctioned by the Insurance Bureau of Canada. The Insurance Bureau of Canada mortgage clause provides that insurance coverage shall remain in force despite any act, neglect, omission or misrepresentation attributed to the mortgagor, owner or occupant of the property insured. The lender must, however, notify the insurer of any vacancy or non-occupancy beyond 30 consecutive days, or of any transfer of interest or increased hazard that comes to the lender’s knowledge. The clause also provides that the insurer must, in the event that the lender is awarded loss under the policy, be subrogated to all of the rights of the lender against the insured to the extent of such payment, such right of subrogation being subject to the basic right of the lender to first recover the full amount secured by its mortgage. The standard mortgage clause also says that the lender may give notice of loss to the insurer in the event that the insured refuses or fails to do so, and that the insurer cannot terminate or alter the policy to the prejudice of the lender without first providing the lender with the notice stipulated under the Insurance Act.

Especially when acting for a lender, you should also insist that any co-insurance clause attached to the policy be expressed to be to a “stated amount” rather than as a percentage of actual cash value or replacement cost. If the latter form of co-insurance clause is used, the lender cannot be certain that its loan is fully insured. The “stated amount” co-insurance clause requires that insurance be maintained to a particular dollar figure rather than a percentage of actual cash value or replacement cost, and the lender can therefore be certain that its loan is insured to that amount. Section 31 of the Insurance Act requires that any insurance policy containing a co-insurance clause have printed or stamped on its first page in “conspicuous bold type the words ‘This policy contains a clause which may limit the amount payable’” or the clause will not be binding on the insured.

**[§5.27] Insuring Strata Lots—Acting for the Lender**

Occasionally, a solicitor acting for a lender taking mortgage security over a strata lot will be faced with an additional problem. Some insurance agents, as a matter of practice, refuse to name a lender as a loss payee and may refuse to include a “standard mortgage clause” in the general insurance policies placed on strata developments. As explained above, the strata corporation is required to maintain insurance over the entire building and common facilities. If the insurer refuses to name the lender as a loss payee under the policy, as solicitor for the lender you should obtain from the individual borrower an absolute assignment of all sums that may become payable under the policy. You should review the
requirements for a valid legal assignment specified in s. 36 of the Law and Equity Act, the principal requirements being that the assignment be absolute, that it be in writing, and that the debtor (here the insurer) be given express notice of the assignment in writing.

While obtaining an assignment of proceeds that may become payable under the insurance policy may overcome the problem raised by an insurer’s refusal to name a lender as a loss payee, the insurer is still vulnerable in the event of a breach or misrepresentation under the policy, if the insurer refuses to attach a standard mortgage clause to that policy. In this situation, you should advise the lender, as early in the transaction as possible, of the risks involved in funding a mortgage in this situation, so that the lender can make an informed decision whether or not to advance funds in the face of these risks.

[§5.28] Undertakings

1. Introduction

In large commercial real estate transactions, the conditions of closing are often agreed to, in detail, weeks before the closing.

Historically, solicitors closed residential conveyances on undertakings that permitted the parties to complete in spite of the terms of their contract. The decision in Norfolk v. Aikens (1989), 41 B.C.L.R. (2d) 145, 1989 CanLII 245, clarified that undertakings must be used with caution and only with instructions from the client (refer to §2.03). If the parties are unable to agree on alternate procedures, completion will have to be strictly set out in the purchase and sale agreement. Lawyers and notaries can give undertakings. Articled students are also allowed to give or accept undertakings if a supervising lawyer has also signed or accepted the undertaking (see Law Society Rule 2-60 and Practice Material: Professionalism: Practice Management, §1.03).

2. What Is an Undertaking?

(a) Nature of an Undertaking

An undertaking is a promise or commitment made by a solicitor to another person, whereby the solicitor assumes a personal obligation to act, or refrain from acting, in a certain manner. Generally an undertaking is given expressly; however, it may also be implied in special cases, as discussed later.

The ingredients of an enforceable undertaking have been described as follows:

(i) the undertaking must be made by a solicitor in a professional capacity;

(ii) the undertaking must be clear on its face. The words “undertaking” need not be used so long as its existence may be inferred from circumstances in which all of the elements of an enforceable undertaking are otherwise present;

(iii) the undertaking must be made by the solicitor, not as a licensee for the client, but rather as a principal with the understanding that the solicitor will be personally bound by it. For a lawyer to escape liability on this basis, it must be abundantly clear from the wording of the undertaking that the lawyer is not assuming personal liability. For example, an undertaking “on behalf of my client” may not be sufficient to release a lawyer from liability (Re Solicitors, [1917] 1 W.W.R. 529 (B.C.C.A.), affirmed in Domfab Ltd. v. Ross (1976), 22 N.S.R. (2nd) 185 (N.S.T.D.) and in Wescana Carpets v. Bennett (1967), 59 W.W.R. 422 (Sask. Q.B.)); and

(iv) if the promise is conditional, the conditions must have been fulfilled.

An undertaking is not a contractual obligation. Accordingly, no consideration is necessary for an undertaking to be enforceable. It is not a defence to an action to compel performance of an undertaking, or to obtain damages in lieu of performance, that the solicitor acted in good faith or without authority in the giving of the undertaking.

An undertaking will be enforceable, in nearly all circumstances:

... the word of a solicitor is viewed by another solicitor as virtually sacred. The solicitor can rely on it because it will be kept ... lawyers generally have always done what they have said they would do in undertakings ... when a solicitor undertakes to do something, he must do it, unless, there is an express direction to him that he need no longer comply. There is an assumption, well founded, that solicitors’ undertakings will be met and the courts should do whatever is necessary to continue this practice (Valleyfield Construction Ltd. v. Argo Construction, (1978) 20 O.R. (2d) 245 (H.C.)).

Generally, subsequent client instructions will not override an undertaking previously given by the client’s lawyer, and an undertaking will take precedence over any dispute that has
developed between the lawyers’ clients (McCarthy Tetrault v. Lawson Lundell Lawson & McIntosh (1991), 58 B.C.L.R. (2d) 310 (S.C.)).

(b) Common Types of Undertakings

In practice, undertakings commonly fall within one of two broad categories:

(i) an undertaking to pay money, held in trust, upon the happening of an event or the occurrence of specified set of circumstances, for example:
   - the execution and delivery of consent orders;
   - the tendering of documents effecting a legal, equitable or possessory interest in real or personal property; and
   - the filing or registration of documents at an appropriate registry;

(ii) an undertaking to do, or refrain from doing, an act upon the happening of an event or the occurrence of a specified set of circumstances, such as those described in the first category.

The different forms of undertakings that may arise are limited only by the circumstances in respect of which they are given and the ingenuity of the practitioner.

Although undertakings are frequently given and received when dealing with real property transactions, they are not restricted to these transactions.

(c) Undertakings—Lawyer’s Liability

The lawyer’s responsibility for breach of a professional undertaking may arise in the following ways:

(i) the court may enforce the undertaking on a summary application. The court’s jurisdiction is based upon its inherent right to govern the conduct of its officers and the observance of their high standard of conduct;

(ii) an injured party may bring a civil action for damages resulting from a breach of undertaking; or

(iii) professional discipline proceedings may be instituted under the Legal Profession Act. Usually, breach of an undertaking will support a finding of professional misconduct.

Liability based upon professional undertakings given by a solicitor is discussed in 36 Halsbury, paras. 266-268, as follows:

[It] is immaterial that no misconduct on the part of the solicitor is suggested. The solicitor cannot, therefore, defend himself on the ground that his undertaking is not enforceable as a contract against him, or on the ground that the application has been delayed, nor will an undertaking given under a mistaken belief of having authority to fulfil it be set aside . . .

The undertaking must be one which is not impossible ab initio for the solicitor to perform. An undertaking will, however, be enforced against the solicitor although after it is given, the client dies or instructs the solicitor not to perform it, or changes his solicitor.

(d) Undertakings—Professional Responsibilities

Chapter 7, rule 7.2-11 of the BC Code provides that a lawyer must:

(a) not give an undertaking that cannot be fulfilled;

(b) fulfill every undertaking given; and

(c) honour every trust condition once accepted.

Commentary [1] states:

[1] Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as “on behalf of my client” or “on behalf of the vendor” does not relieve the lawyer giving the undertaking of personal responsibility.

See also rule 7.2-11, commentary [2]-[4].

Similarly, rule 2.1-4(b) of the BC Code states, in part:

A lawyer should neither give nor request an undertaking that cannot be fulfilled and should fulfill every undertaking given.
A lawyer must report to the Law Society another lawyer’s breach of undertaking which has not been consented to or waived by the recipient of the undertaking (See Chapter 7, rule 7.1-3(a.1) of the BC Code).

If a solicitor breaches an undertaking, the solicitor’s professional reputation in the legal community may be seriously impaired. Thus, if a plaintiff’s solicitor breaches an undertaking not to seek default judgment and obtains a default judgment on the first available day, the defendant might ultimately suffer no damage, since the judgment in the circumstances would almost certainly be set aside, but the solicitor’s reputation for trustworthiness and fair dealing might suffer irrevocably. The rest of the legal community may decide that his or her word cannot be trusted.

Mr. Justice Hollinrake confirmed that undertakings are critical to public confidence in professionals and that delay in complying can amount to a breach of undertaking: The Law Society of British Columbia v. Heringa, 2004 BCCA 97. Mr. Justice Hollinrake quoted with approval the Law Society hearing panel decision as follows:

The heart of the panel’s reasoning is, in my opinion, found in these words:

[37] Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.

[38] The trust and confidence vested in lawyer’s undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

3. Deemed Undertakings

Chapter 7, rules 7.2-12 and 7.2-13 of the BC Code provide for two types of deemed undertakings:

(a) when a lawyer gives a trust cheque, a deemed undertaking arises that the lawyer’s cheque will be honoured (except in “the most unusual and unforeseen circumstances, which the lawyer must justify”); and

(b) if a lawyer acting for a purchaser of real property accepts the purchase money in trust and receives a registrable conveyance from the vendor in favour of purchaser, then the lawyer is deemed to have undertaken to pay the purchase money to or as directed by the vendor on completion of registration.

4. Basic Practical Rules for Undertakings

(a) Never give an undertaking when some lesser form of communication or assurance will suffice.

(b) Never give any undertaking with which you cannot comply. Only give an undertaking, for example, to deliver funds or documents if you have the funds or documents in hand and also have irrevocable instructions from your client with respect to the disposition of those documents or funds.

(c) Draft your undertakings precisely. Avoid using broad phrases such as “the usual undertakings.”

(d) Understand the mechanics of the transaction around which you are drafting the undertaking and draft it in such a way as to make it self-determining if some part of the transaction does not proceed according to plan. For example, if you are dealing with a real estate transaction and the purchase price depends, in part, upon mortgage money coming from another source, always make the undertaking to pay conditional upon your receiving that money. If you do not, remember that the only person that can release you from an undertaking is the person to whom you gave it.

(e) If you do not intend to accept personal responsibility for an undertaking and you intend that your client should be responsible for the performance of the undertaking, make this absolutely clear.

(f) Never give an undertaking based on performance by some third party.

(g) If another lawyer or a third party drafts and puts you on an undertaking, read it very carefully and be quick to indicate that you disapprove if you do. You may otherwise be bound.
5. Undertakings in Real Estate Transactions

In real estate transactions, undertakings are a very specific, formal type of communication. Most undertakings in real estate transactions have two distinct parts. First, you are undertaking that you have or will have a particular amount of money in trust. Second, you are promising to do something very specific with that sum of money once certain events occur. These events must be clearly spelled out.

In order to give undertakings you can comply with, you must know when an application for registration can be withdrawn and by whom. Note s. 167 of the *Land Title Act* and, in particular, that:

(a) The registrar has discretion whether or not to allow an application for registration to be withdrawn, and may impose terms. The Land Title Office will issue a Defect Notice that allows the application to be withdrawn for 30 days so that appropriate corrections may be made. The Defect Notice ensures that the application doesn’t lose priority within those 30 days.

(b) There must be no other pending application affected by the application you wish to withdraw. For example, you cannot withdraw an application to register a transfer if there is an application for registration of a mortgage following, unless the application to register the mortgage is also withdrawn. Bear in mind that you are not in control of applications affecting the land you are dealing with and a third party may apply to register an unanticipated instrument following your application.

(c) The registrar may refuse to allow an applicant to withdraw an application for registration until the written consent of the applicant’s principal is produced, if the person making the application is a licensee who is not a solicitor or notary under the *Notaries Act*. For this reason, the solicitor or notary in charge of the transaction should always sign the application for registration.

Lawyers should not undertake to discharge an existing mortgage or undertake to pay to the institutional lender sufficient money to discharge the mortgage. Instead, you should obtain a payout statement from the institutional lender and undertake to pay to the institutional lender the amount calculated in accordance with the payout statement on condition that the institutional lender provide a registrable discharge. This practice will prevent a lawyer from being in breach of his or her undertaking if the payout statement is subsequently found to be in error and the institutional lender refuses to deliver the discharge of mortgage until further money is paid.

These issues are at least partially dealt with in the standard form Contract of Purchase and Sale, which is discussed in §2.03. Note that the standard form Contract of Purchase and Sale provides that the buyer and seller will complete in accordance with CBA Standard Undertakings. While the parties may have agreed to this, a lawyer should confirm that in fact the undertakings can be fulfilled. For example, it is quite common for non-institutional lenders to refuse to provide a registrable discharge prior to being paid the balance owing under the mortgage, even though this is a requirement under the CBA Standard Undertakings. In such a case, the seller’s lawyer cannot give the undertaking and must obtain instructions to negotiate an amendment to the contract with respect to completing pursuant to the CBA Standard Undertakings.

Lawyers in British Columbia who carry on a residential conveyancing practice are almost routinely asked to accept risks that they should not accept.

In December 2002, former Vancouver lawyer Martin Wirick was disbarred for professional misconduct. Mr. Wirick breached his undertakings and misappropriated trust funds by failing to apply the funds to payout and discharge certain mortgages. He paid out the funds contrary to his undertakings. As of December 2005, the Law Society had approved payment in the amount $32.5 million for 347 claims arising from Mr. Wirick’s law practice.

As a result of the Wirick case, the Law Society’s Conveyancing Practices Task Force implemented reforms in conveyancing practice to reduce the opportunity for fraud.

First, the Real Property Section of the Canadian Bar Association revised the CBA Standard Undertakings by imposing a responsibility on the seller’s lawyer who is undertaking to discharge the seller’s mortgage after closing to promptly provide the buyer’s lawyer evidence that the seller’s lawyer has paid out the mortgage (see Appendix 9). These “transparency provisions” respecting mortgage discharges specifically require that the seller’s lawyer provide to the buyer’s lawyer, within 5 business
days of the completion date, copies of specified
documents that demonstrate that the seller’s lawyer
has made payments to existing chargeholders (see
clause 8.4). Copies of the mortgage payout state-
ment, the letter from the seller’s lawyer that accom-
panies the payout, payout cheque and evidence of
delivery of the payor cheque are all required. The
buyer’s lawyer is not to release those documents to
his or her client unless the mortgage discharge is
still not received 60 days after completion.

Second, the Benchers approved Rules 3-95 and
3-96, known as the “60 day” reporting rules. As
noted earlier, these Rules require a lawyer to report
to the Law Society the failure of a mortgagee to
provide a registrable discharge of mortgage within
60 days of any real property transaction. They also
oblige a lawyer to report to the Law Society the
failure of another lawyer or notary to provide satis-
factory evidence that he or she has filed a registra-
ble discharge of mortgage as a pending application
at the Land Title Office within that 60-day period.
Chapter 6

Remedies

[§6.01] Introduction

This chapter provides some basic guidelines about the remedies available to a seller and a buyer when a real estate transaction collapses. It also suggests various steps that a real estate practitioner may take at an early stage to preserve and enhance the client’s position if the transaction collapses and litigation follows.

The repeal of the Statute of Frauds and its replacement with s. 59 of the Law and Equity Act created a host of new possibilities for litigation and new pitfalls for practitioners.

No other area of solicitors’ practice has greater potential for culminating in litigation than the practice of real property law. Consequently, anticipating and avoiding potential difficulties is an important part of the service provided by real estate practitioners.

In addition to the client’s need for protection, solicitors must also protect themselves and practise defensively. Increased competition and demand for lower cost legal services create a temptation to cut corners. However, solicitors are now, more than ever, potential defendants at the instance of clients and third parties.

Practitioners must strike a balance between the exigencies of practice and the need for precision and caution.

[§6.02] The Solicitor as Witness

When an action is commenced as a result of a collapsed real estate transaction, the solicitors involved will often be key witnesses. Your discussions and the documents will be evidence in your client’s case. The paper produced by a solicitor can be the key to success in litigation between the seller and buyer.

Some of the precautions that a solicitor should take are as follows:

(a) Make good notes. Every time you have a telephone discussion or a conference with anyone involved in the transaction, make a contemporaneous note of what was discussed, date it, and put it in your file. Instruct paralegals or secretaries to do the same. Ideally, a note will be made even of attempted but unsuccessful communications. In some instances, the precise words spoken by you or someone else ought to be noted.

(b) Confirm all important communications by letter and keep careful records of the dates, and perhaps even the times that all letters are delivered or received. Clarify what you will do and what risks, if any, your client is exposed to.

(c) Don’t talk too much. The other solicitor will be making notes at the other end of the telephone. An ill-considered remark might constitute a repudiation of your client’s contract. Chatter about the advice you have given your client may waive privilege.

(d) If a dispute develops and you are trying to negotiate a resolution, communicate “without prejudice.”

If litigation ensues, you may be an important witness. Consider whether it is appropriate for you or a member of your firm to act as counsel. See section 5.2 of the BC Code. Commentary [1] to rule 5.2-1 states:

A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer’s own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate’s right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

[§6.03] Relevant Legal Principles

This section addresses some of the issues that arise regularly in real estate litigation.

1. Enforceability of the Purchase Agreement

An enforceable purchase agreement is essential. If there is no agreement, there is generally no foundation for an action to enforce it. Agreements may be unenforceable for lack of certainty, for failure to comply with a relevant statute, or for other reasons.
(a) Certainty of Terms

Although the courts were at one time receptive to technical arguments concerning uncertainty in purchase agreements, this is no longer the case. The courts of British Columbia make every effort to determine the intention of the parties and to enforce the bargain (Fraser v. Van Nus (1985), 67 B.C.L.R. 285 (C.A.) and Boulk Enterprises Ltd. v. Bissett (1985), 67 B.C.L.R. 273 (C.A.)). This does not absolve the lawyer from ensuring that the provisions in the agreement are clearly and simply set out.

(b) Law and Equity Act, s. 59(3)

This section provides that a contract respecting land is not enforceable unless

(i) it is written;

(ii) the party to be charged has acted in accordance with the contract; or

(iii) the party to be charged is estopped from denying the contract.

In other words, there must be written or other evidence of the agreement.

(c) Real Estate Development Marketing Act (“REDMA”)

The Real Estate Development Marketing Act requires a developer selling “development property” (defined in s. 1 as including, but not limited to, 5 or more strata lots in a stratified building) 5 or more subdivision lots in a subdivision, unless each lot is 64.7 ha., 2 or more cooperative interests in a cooperative association or 5 or more time share interests in a time share plan, to fulfill many requirements, including the filing and delivery of a disclosure statement to any buyer. Part 2 of REDMA provides that a developer (seller) may not market any portion of the development property until it has complied with REDMA. Section 21 sets out the rights of a buyer to rescind an agreement. Subsection (2) provides for a 7-day right of rescission under certain circumstances. Subsection (3), confers a general right to a purchaser to rescind an agreement at any time when a purchaser is entitled to a disclosure statement in respect of a development property but never received the disclosure statement. These rights of rescission remain effective regardless of whether title (or the other interest for which a purchaser has contracted) to a development unit has been transferred.

2. Essentiality of Time

A properly drawn purchase agreement will state that time is of the essence. If time is of the essence, the failure of a party to perform on time will constitute a breach, giving the other party the right to pursue his or her remedies immediately. Where, by words or conduct, a party waives strict compliance with time limits, time will no longer be of the essence, and the other party will have a “reasonable time” to perform (Whittal v. Kour (1969), 71 W.W.R. 733 (B.C.C.A.).

An extension of time that merely substitutes a new date for an old one does not amount to a waiver of time of the essence (Salama Enterprises (1988) Inc. v. Grewal (1992), 66 B.C.L.R. (2d) 39 (C.A.), followed in Takhar v. P.K.S. Investments (1992), 94 D.L.R. (4th) 139 (B.C.C.A.). However, in some cases the court may give equitable relief and refuse to enforce the time of the essence clause (Salama Enterprises, supra).

In addition, note the decision of Ambassador Industries Ltd. v. Kastens, 2001 BCSC 484. In this case, the parties signed an amendment agreement varying the completion date after signing the initial agreement of purchase and sale. All other terms of the agreement remained the same. The seller’s documents arrived the day after the new completion date and the buyer sought to rescind the contract arguing that “time was of the essence.” The court disagreed, instead finding that the parties had waived the time of essence provision. Essentially, the parties would have had to reiterate the time of essence clause for it to have the effect argued by the buyer.

There are a number of similarities between Ambassador and Salama. First, in both cases the original agreement contained a “time of the essence” provision. Second, both parties agreed to extend the original closing date. Third, the new closing date had to be extended despite the due diligence of the party seeking to enforce the transaction. However, the Ambassador decision can be distinguished from Salama because the parties did not agree to the continued enforcement of the time of the essence provision, and the buyer (the party seeking to rely on the time of the essence provision) did not give notice that he intended to unilaterally enforce the time of the essence provision. In Salama, there was no argument as to whether the party in default was notified about the other party’s intention to continue to rely on the time of the essence provision. The time of the essence provision was included in the part of the contract that was amended to reflect the original change in the closing date. In Salama, the court found it to be unjust or inequitable for the seller to insist on time being of the essence because there was a common intention; that was, before the purchase could complete, subdivision approval was
required. When the buyer could not get subdivision approval, through no fault of his own, it became inequitable to allow the seller to rely on the time of the essence provision because such strict reliance would make performance of the condition impossible in any practical sense, despite all due diligence by the buyer.

Mere discussions by the parties relating to further accommodations for the buyer do not amount to a waiver of the time of the essence provision. Where the buyer agreed to an extension of the completion date and took possession, the court held that there had been no waiver of time of the essence (Sorensen v. Carriage Lane Fine Homes Ltd. (1998), 21 R.P.R. (3d) 301 (B.C.S.C.)). The buyer was entitled to a return of the deposit and other compensation when the seller was unable to clear title by the extended date for completion.

If time is of the essence and both sides fail to perform, then time ceases to be of the essence unless and until one side gives reasonable notice to the other to perform at a rescheduled time (Shaw Industries Ltd. v. Greenland Enterprises Ltd., 1991 CanLII 3955 (B.C.C.A.); followed in Kiousis v. Coil (1992), 71 B.C.L.R. (2d) 78 (B.C.C.A.); applied in Abramovich v. Azima Developments Ltd. (1993), 86 B.C.L.R. (2d) 129 (B.C.C.A.) and Basra v. Carhoun, 1993 CanLII 1435 (B.C.C.A.).

In “Putting Together the Puzzle of Time of the Essence” (September 1990), 69:3 Canadian Bar Review 417, Paul M. Perell examined Canadian decisions to date and concluded, in part, that,

(a) where time is of the essence, the time stipulation operates as a condition. If a party fails to perform within the time specified, and if the innocent party has not waived the time stipulation, the innocent party may “elect” to treat the breach as ending the contract and to claim damages or a return of its deposit, or to keep the contract alive and to sue for specific performance;

(b) where time is not of the essence, the innocent party may sue only for damages, because the time stipulation operates as a warranty;

(c) where the parties do not expressly make time of the essence, the essentiality of time involves interpreting the particular contract. Certain types of contract are usually interpreted as needing time to be essential; for example, options to purchase land or to renew leases, or where the subject matter of the transaction is an income property or is of a speculative nature;

(d) time of the essence may be restored or initiated by a party giving notice and specifying a date for performance that is reasonable in the circumstances (Shaw Industries, supra). When deciding whether the specified time is reasonable, the court will consider all the circumstances, including the prior history and conduct, what remains to be done, the need for performance and whether time was previously of the essence;

(e) waiver of time of the essence involves one party leading the other to understand that the strict rights of the contract will not be insisted upon; and

(f) a party who is in default and not ready to perform or who is the cause of the delay or default may not rely on time of the essence.

The significance of these principles is that your client must meet the completion dates. When an extension of time is sought or granted by your client, deal with the issue of whether or not time is to remain of the essence expressly and in writing. Beware of casual statements to the opposite party that may waive the essentiality of time. When the opposite party makes such statements to you, make good notes and confirm the statement in writing so as to later be able to rely on any potential waiver.

3. Conditions Precedent (Subject Clauses)

Historically, if a contract contained a condition that required a stranger to the contract to do something before the contract could be fulfilled, that provision would be treated as a “true condition precedent”, even if inserted for the benefit of one party only. That condition could not be waived by either party and, until the condition was satisfied, the contract was unenforceable by or against either of them. See Turney v. Zhilka, 1959 CanLII 12 (S.C.C.).

Section 54 of the Law and Equity Act allows one party unilaterally to waive the performance of a true condition precedent if:

(a) the condition was included solely for that party’s benefit;

(b) the contract can be completed without fulfillment of the condition; and

(c) the waiver is made before the time stipulated for fulfilling the condition precedent, or within a reasonable time.

If a condition precedent is included in an agreement for the benefit of one party, that party is under an implied obligation to use its best efforts to fulfill the condition, and may be found liable for damages if it fails to do so. See §2.02(3) for a discussion of

4. **Anticipatory Breach**

If one party to a purchase agreement, before the completion date, clearly indicates an intention not to complete, the other party is entitled to treat him or her as being in default. Thus, a statement made to the opposite party that might be construed as an expression of inability to complete or intention to not complete may severely prejudice the client. However, to be a *repudiation* a statement must be consistent only with repudiation. Note that it is doubtful that you can cloak a statement repudiating a contract with privilege merely by stating that it is “without prejudice.” However, it may be protected if it is contained in an offer to settle a matter made in good faith and if the court does not construe the offer as a mere device to prevent the repudiation being led in evidence.

A seller who fails to notify the buyer that the seller has accepted the buyer’s anticipatory breach is bound to perform its obligations under the contract *(Norfolk v. Aikens* (1989), 64 D.L.R. (4th) 1 and *Homestar Industrial Properties Ltd. v. Philps* (1992), 72 B.C.L.R. (2d) 69 (C.A.)).

### §6.04 Remedies of Seller and Buyer

1. **First Election: Affirm or Disaffirm**

If one party is in breach of a condition, the other must affirm or disaffirm the contract. Generally the choice between ending or enforcing the contract is irrevocable and certain remedies are no longer available after that election has been made.

The innocent party’s election ought to be communicated to the other party before you commence a legal proceeding. This is most necessary in the case of an anticipatory breach. If your client is unable to decide between affirmation and disaffirmation, and the repudiation has occurred before the closing date, write to the other side telling them that you regard their conduct as amounting to a repudiation and that your client will pursue all available remedies. You are not truly making an election in doing this, but you are probably relieving your client of the need to tender performance (*Roy v. Kloepfer Wholesale*, [1952] 2 S.C.R. 465).

In some cases, the purchase agreement may be rescinded if a party receives the property in a form that is completely different from what was expected and the property cannot be used for the purpose for which it was intended. In *Cherris Estate v. Bosa Development Corp.*, 2001 BCSC 228, the plaintiff purchased a penthouse where the temperature was consistently between thirty and forty degrees Celsius. The court held that as the home was uninhabitable the plaintiff received something completely different from what the property was represented to be, and rescission was allowed. However, in *Lam v. Ernest and Twins Ventures Ltd.*, 2001 BCSC 710, the plaintiff sought to rescind a contract of purchase and sale for the purchase of two adjacent strata lots. The plaintiff requested that the dividing wall between the two units not be built so that he could use the two lots as one space. The project manager agreed and the plaintiff purchased the two strata lots. A duct was installed in the centre of the space, that would have been installed in the dividing wall had it been built in the first place. The court refused the plaintiff’s request to rescind the contract, finding that the basic purpose for the purchase had not been prohibited.

The Supreme Court of Canada has ruled that due diligence is not a condition precedent to rectification of a contract. In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, the Court affirmed a trial judge’s decision to apply the equitable remedy to rectify a contract that did not accurately reflect the oral agreement on which it was based. In this case, the parties agreed verbally to enter into a joint venture to purchase a golf and tennis club. The agreement included an option on the 18th fairway for the respondent to develop a specific residential development. When the agreement was put into writing, the option clause misstated the agreed width of the proposed development as 110 feet rather than 110 yards. The Court held that the respondent knew the written term was incorrect and fraudulently insisted on enforcing it. Justice Binnie stated:

> . . . due diligence on the part of the plaintiff is not a condition precedent to rectification. However, it should be added at once that rectification is an equitable remedy and its award is in the discretion of the court. The conduct of the plaintiff is relevant to the exercise of that discretion. In a case where the court concludes that it would be unjust to impose on a defendant a liability that ought more properly to be attributed to the plaintiff’s negligence, the court may deny rectification.

2. **Seller’s Remedies**

(a) **Claiming the Deposit**

If a buyer repudiates the agreement, the seller may simply accept the repudiation, treat the agreement as being at an end, and return the deposit to the buyer. In practice, this alternative is seldom considered. Generally, the seller
wishes, at the very least, to claim forfeiture of the deposit.

Most purchase contracts will include a term providing for the forfeiture of the deposit to the seller if the buyer repudiates.

The June 2018 Contract of Purchase and Sale published by the BC Real Estate Association and the Canadian Bar Association (see Appendix 1) states:

In the event the Buyer fails to pay the Deposit as required by this Contract, the Seller may, at the Seller’s option, terminate this Contract. The party who receives the Deposit is authorized to pay all or any portion of the Deposit to the Buyer’s or Seller’s conveyancer (the “Conveyancer”) without further written direction of the Buyer or Seller, provided that:

(a) the Conveyancer is a Lawyer or Notary;

(b) such money is to be held in trust by the Conveyancer as stakeholder pursuant to the provisions of the Real Estate Services Act pending the completion of the transaction and not on behalf of any of the principals to the transaction; and

(c) if the sale does not complete, the money should be returned to such party as stakeholder or paid into Court.

In some circumstances, the seller will be content to take the deposit in full satisfaction of his or her claims. In other cases, the seller will want to receive the deposit and to pursue additional remedies, such as specific performance and damages.

There is a risk that if the seller claims forfeiture of the deposit he or she will be precluded from pursuing other remedies. In the absence of an indication to the contrary, the parties will generally be taken to have intended that the stipulated sum operates as a limit on the damages recoverable. (For cases considering this issue, see: Gisvold v. Hill (1963), 37 D.L.R. (2d) 606 (B.C.S.C.); Clandening v. Cedarhurst Properties Ltd. (1977), 31 B.C.L.R. 153 (C.A.); and Fraser v. Van Nus (1987), 14 B.C.L.R. (2d) 111 (C.A.).)

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although it is usually better to maintain options if you can.

If the property is resold by the seller, or if he or she doubts the buyer’s ability to specifically perform, or wishes to keep the property while seeking compensation for diminution in value, the seller may elect to recover damages. Otherwise, an election in favour of an order for specific performance is generally preferable. The relief sought should include one of the following:

(i) specific performance and damages;
(ii) damages in lieu of specific performance; or
(iii) common law damages.

Damages for breaching a purchase contract will be assessed as of the completion date and not the trial date (Mavretic v. Bowman (1993), 76 B.C.L.R. (2d) 61 (C.A.)).

Sample letters electing or declining to elect from among these remedies in the event of an anticipatory breach by the buyer appear as Appendix 19. Sample wording for Parts 1 and 2 of the seller’s notice of civil claim appear as Appendices 20 and 21.

3. Buyer’s Remedies

(a) Claiming the Return of the Deposit

If the seller repudiates, the buyer may demand the return of the deposit, and, failing payment, may sue for its return. This clearly constitutes a disaffirmation of the contract so that the buyer’s remedy may be confined to the return of the deposit.

As noted in the context of the seller’s remedies, the seller may claim entitlement to retain the deposit, but in appropriate circumstances the buyer may seek relief from forfeiture.

(b) Specific Performance or Damages

Like the seller, the buyer may be able to claim one of the following, depending on the circumstances:

(i) specific performance and damages;
(ii) damages in lieu of specific performance; or
(iii) common law damages.

The buyer who seeks specific performance should also claim and file a certificate of pending litigation, which gives notice of litigation affecting title. This filing effectively prevents the seller from selling the property to anyone else.

Historically, courts have held that specific performance was automatically available as a remedy for a buyer because the courts viewed all real property as unique. However, the Supreme Court of Canada decision Semelhago v. Parmadevan, 1996 CanLII 209 (S.C.C.) altered this approach. The court suggested in Semelhago that specific performance should not be granted without some evidence that the property is unique to the extent that its substitute would not be readily available. The term “readily available” was not defined, and the Court did not specify the evidence needed to establish uniqueness. However, property purchased for a development will generally not be considered unique (Rostrum Development Corp. v. Wafler, 1996 CanLII 3129 (B.C.S.C.)). By contrast, in Cormack v. Harwardt, 1998 CanLII 5278 (B.C.S.C), a piece of property that accommodated the buyer’s desire to raise horses was found to be sufficiently unique for the court to award the remedy of specific performance.

In Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd., 2014 BCCA 388, the BC Court of Appeal decided that “uniqueness” does not mean singularity, and that the plaintiff buyer need not show that the property is incomparable. Madam Justice Newbury emphasized that in Semelhago and a subsequent case, Southcott Estates Inc. v. Toronto Catholic District School Board, 2012 SCC 51, “the Supreme Court [had] not signalled that specific performance is ‘on the way out’ or that contracting parties should no longer expect to be held to their bargains” but had “merely recognized … that in light of the advent of condominiums and other forms of interest in land, the uniqueness of real estate should no longer be presumed” (at para. 52).

Sample wording for Parts 1 and 2 of a buyer’s notice of civil claim are included in the material as well as sample letters electing or declining to elect from among the various remedies available to the buyer in the event of the seller’s anticipatory breach. See Appendices 22, 23, 24 and 25.

4. Damages

(a) Damages in Addition to Specific Performance

These are equitable damages, discretionary in nature, recoverable in only limited circumstances. Generally, they relate to out-of-pocket expenses incurred by the plaintiff and for which he or she has received no benefit. These
expenses also must have been incurred as a result of the defendant’s delayed performance (Wade v. Chilco Ranches Ltd. and Mayfield (1949), 1 W.W.R. 239 (B.C.S.C.) and Tanu v. Ray (1981), 20 R.P.R. 22 (B.C.S.C.)).

(b) Damages in Lieu of Specific Performance

Given the liberal and flexible approach of the courts in British Columbia to awarding common law damages, there may no longer be any significant distinction between quantum of damages recoverable “in lieu of specific performance” and that recoverable as “damages for breach of contract.” In legal theory, however, there is a distinction. Damages in lieu of specific performance are awarded

(i) to a plaintiff who would otherwise be entitled to an award of specific performance but who cannot perform, because of circumstances beyond his or her control; or

(ii) if the court in its discretion deems an award of damages to be more appropriate than the order for specific performance that the plaintiff seeks.


(c) Common Law Damages

In Ansdell v. Crowther (1984), 55 B.C.L.R. 216 (C.A.), the Court of Appeal rejected the notion that rigid rules apply to the assessment of common law damages for breach of a purchase agreement that do not apply to awards of equitable damages. Lambert J.A. stated:

[T]here is no distinction between damages at common law and so-called “equitable damages”, no fixed rule as to the date as to when damages ought to be assessed and, in order to do justice, the courts are empowered to fix damages as of the date found to be appropriate in the circumstances.

Ansdell v. Crowther, supra, illustrates the exercise of judicial discretion in assessing damages, even though only common law damages may have been pleaded.

(d) Statutory Damages

A buyer may recover damages for loss of bargain from a seller who cannot perform due to a defect in title (s. 37 of the Property Law Act).

(e) Liability of Licensees and Others

For information about the liability of real estate licensees and other salespeople, appraisers and valuators, about the duty to disclose latent defects and environmental concerns, and about disciplinary proceedings before the Real Estate Council of British Columbia, see Real Estate Litigation—1992 (Vancouver: CLE, December 1992).

(f) Liability of Municipalities

In Strata Plan NW 3341 v. Canlan Ice Sports Corp., 2001 BCSC 1214, the project developer, designer, general contractor and municipality of Delta were held jointly liable to the owners of a Strata Corporation for over three million dollars in repair costs resulting from extensive water damage to the building. In this case, the owners noticed water leaks at balconies and windows shortly after moving in. The municipality conducted inspections during construction but these did not include the building envelope. The Strata Corporation sued to recover the costs from the water damage. Delta was named as a defendant for negligent inspection of the construction of the building and for issuing an occupancy permit. Delta did not demand that a project architect provide letters of assurance indicating that the buildings had been designed and constructed in compliance with the BC Building Code. The judge noted that water leaks were foreseeable in the Lower Mainland of BC and a history of envelope failures should not have been needed to convince Delta to enforce the relevant sections of the Building Code. Delta could have demanded that the architect provide the necessary assurances regarding Building Code compliance. Accordingly, the court held that municipalities who adopt the entire BC Building Code are responsible for taking reasonable steps to enforce all of it, unless they make valid policy decisions to limit that responsibility. Delta unsuccessfully appealed certain aspects of this judgment, including the finding that Delta was defendant jointly and severally liable with other defendants for the damages (2002 BCCA 526).
[§6.05] Tender as an Evidentiary Tool

There can be no doubt that tender is an important consideration but it is not as important as often believed. The basic rule of closing procedure is that to sue successfully for specific performance, the plaintiff must show that he or she was “ready, willing and able” to complete the transaction at the appropriate time. Tender merely provides cogent evidence that the party tendering was, in fact, ready, willing and able to complete. In Whittal v. Kour, supra, Bull J.A. said:

Tender is not a *sina qua non* for a claim by a person to force a defaulting party to complete his bargain.

Tender is good evidence, perhaps the best evidence available, to show readiness to perform, but the failure to tender properly is not necessarily fatal (*Hobart Investments Corp. Ltd. v. Walker et al* (1977), 1 R.P.R. 187 (B.C.C.A.)). Tender is equally important to illustrate that the other party was not ready or able to complete.

Appendices 26 and 27 are sample tender letters to be used by the solicitor for the seller and buyer. These letters may provide a useful model if you are obliged to make a formal tender.
Chapter 7

Mortgages and Rights to Purchase

§7.01 Introduction

Most buyers borrow money when they buy their homes. A mortgage is the security that a borrower (mortgagor) gives to a lender to secure the loan made by the lender (mortgagee) to the borrower. The mortgage security is registered as a charge against the title to the land.

At common law, a mortgage consisted of two things:

(a) a contract for a debt; and
(b) a conveyance of land as security for a debt, subject to a proviso for redemption.

In British Columbia, common law mortgage rights and remedies are expressly retained by s. 231(1) and (2) of the Land Title Act:

s. 231(1) Subject to other applicable provisions of this Act being complied with, a mortgage that complies with this Division operates to charge the estate or interest of the mortgagor to secure payment of the debt or performance of the obligation expressed in it, whether or not the mortgage contains words of transfer or charge subject to a proviso for redemption.

s. 231(2) Whether or not a mortgage referred to in section 225 contains words of transfer or charge subject to a proviso for redemption, the mortgagor and mortgagee are entitled to all the legal and equitable rights and remedies that would be available to them if the mortgagor had transferred his interest in the land to the mortgagee, subject to a proviso for redemption.

1. Contractual Aspect of a Mortgage

A mortgage is a contract. One of the essential elements of a contract is that there be privity between the parties. At common law, once privity is established with a contracting party, that party remains bound under the contract until it is specifically released or until the contract is otherwise determined.

At common law, the original borrower (and, where applicable, a guarantor) under a mortgage, being in privity of contract with the lender, remains bound by the contractual provisions under a mortgage even though the original borrower may no longer be the owner of the land. Similarly, at common law, a subsequent buyer of the land is not in privity of contract with the lender, even though the buyer has bought the land charged by the mortgage, unless the subsequent buyer enters into a mortgage assumption agreement or other agreement with the lender that specifically creates privity of contract.

A seller may be released from liability under a personal covenant by operation of law. There are two methods by which a seller may be released:

- under the common law doctrine of novation; or
- under ss. 20 to 24 of the Property Law Act.

Sections 20, 21, and 22 to 24 of the Property Law Act significantly changed the common law position. These sections are discussed in §7.16(4).

2. Conveyance and Security Aspect of a Mortgage

This aspect of a mortgage can be complicated. In the process of evolution over many centuries, common law, equitable principles and statutory provisions have been applied to mortgages. As a result, a mortgage represents many things that are not apparent upon a simple reading of the document.

All real property mortgages contain a “grant” of land from the borrower to the lender. Before the Land Title Amendment Act, 1989 came into effect, it was clear that the grant operated as a legal conveyance that was subject to a proviso for redemption. The proviso permitted the borrower to require a reconveyance of the land by paying off the debt owing under the mortgage,

Initially at common law, the borrower had to repay the debt owing under the mortgage on the exact date specified in the mortgage or the conveyance to the lender became absolute and the borrower lost all rights to the land. The courts of equity modified this harsh result by allowing the borrower the right to redeem the property after the contractual date for redemption had expired. Eventually, this equitable

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right to redemption evolved into an equitable estate known as the equity of redemption. Because there is only one legal estate in land, only the first lender received a conveyance of the legal estate. Any subsequent mortgage given by a borrower could not then transfer the legal estate to the subsequent lender. Therefore, all subsequent mortgages were equitable mortgages conveying an equitable estate or interest in the equity of redemption. A second mortgage conveyed the first right to redeem the first mortgage and, in effect, created a new second right of redemption in favour of the borrower to redeem the first mortgage.

Although a mortgage may operate only as a charge and not as transfer of the legal estate, the redemption system survives. If the borrower fails to redeem the mortgage, the lender may foreclose on the borrower's interest (s. 231(2) of the Land Title Act). A second mortgage still grants the first right to redeem the first mortgage.

3. Mortgages Under the Land Title Act (Division 5)

Form B must be used to register mortgages (Director’s Requirements 03-11—Electronic Land Title Forms and Supporting Documents).

Subsection 225(2) of the Land Title Act provides that a mortgage “must be in 2 parts.”

Part 1 of the mortgage must be in the form approved by the Director of Land Titles (that is, in Form B), and contain the information required under ss. 225(3), including the parties to the mortgage, the legal description of the mortgaged land, and the signatures of the mortgagor and witness. Section 225(4) provides that the Director may apply other requirements in approving the form.

Part 2 of the mortgage must consist of all other terms of the mortgage and take one of the following forms:

- the set of standard mortgage terms prescribed under section 227 and the Regulations of the Land Title Act at the time the mortgage was executed (s. 225(5)(a));
- the set of standard mortgage terms filed in the Land Title Office by the lender (225(5)(b)); or
- a set of mortgage terms that is expressly set out in Part 2 of the mortgage (225(5)(c)).

If a set of standard mortgage terms referred to under s. 225(a) or (b) is used in a mortgage, the lender must give the borrower a true copy of the set of standard mortgage terms, together with a statement of any modifications to those terms, at or before the time the mortgage is executed (s. 229). The lender must obtain an acknowledgement from the borrower that the borrower has received both a copy of the set of standard mortgage terms and a statement of any modifications. If the borrower does not receive and acknowledge receiving the documents from the lender, the set of standard mortgage terms prescribed by regulation will apply to the mortgage (s. 229(2)).

[§7.02] Conflicts

Conflict problems can arise at any time in a conveyancing transaction; however, it most frequently occurs when a lawyer is asked to act for both a buyer and a lender on the same transaction. The first thing a lawyer should do when deciding whether or not to act for a party in any matter is to consider whether or not there is a conflict. If there is, the Law Society requires lawyers to follow those rules set out in section 3.4 and Appendix C of the BC Code. See §3.02 for a full discussion of this topic.

[§7.03] Capacity of Borrowers

Given that a mortgage is a contract and operates as if it were a transfer of land, it is essential that the borrower has the appropriate estate in the lands to be transferred, the capacity to transfer the lands, and the capacity to contract.

In lending situations, issues of capacity most often relate to infants, persons who because of mental infirmity are incapable of managing their affairs, and the exercise of an individual’s right by a trustee or personal representative.

1. Infants Act

An individual who is less than 19 years old is an infant under the Age of Majority Act, R.S.B.C. 1996, c. 7. At 19, a person has full capacity to contract for the purchase of land or to secure repayment of money lent.

Infants are limited in their capacity to contract by Parts 3 and 4 of the Infants Act, R.S.B.C. 1996, c. 223.

2. Powers of Trustees or Personal Representatives

Page 32 of Falconbridge on Mortgages, 4th ed. (1977) provides as follows:

It is sometimes said that a trustee cannot sell or mortgage the trust property except under a direction or authority in the trust instrument or under some statutory authority. This is, however, misleading language. A trustee who holds the legal estate has the same power to convey that estate at law as is possessed by any other owner of the legal estate who has capacity.
to dispose of property, and that power is not affected by the fact that the conveyance is in breach of trust, even if this fact is known to the grantee...

As a rule, a cestui que trust under a trust of land cannot make a legal mortgage without the concurrence of the trustee or other person having the legal estate.

A contrary view was expressed in Montreal Trust v. Victoria Registrar of Titles (1993), 2 E.T.R. (2d) 64 (B.C.S.C.) where a mortgage which was granted by a registered owner subject to a registered declaration of trust was invalid because the power to mortgage had not been signed by the settlors of the trust.

All trust declarations should be reviewed in detail to ensure that the appropriate powers have been granted to the trustee/owner. If you become aware of an undisclosed trust, you should review the trust document, if any, and obtain the consent of the beneficiaries, if applicable.

3. Patients Property Act

Section 2 provides, in part, that on the proper evidence, a court may, by order, declare a person incapable of managing himself or his affairs (or both) as the case may be. In such a case, a personal representative known as the Committee is appointed. Failing such an appointment, the Public Guardian and Trustee is the Committee.

Section 17 provides:

The rights, powers and privileges vested in the committee include all the rights, powers and privileges that would be exercisable by the patient as a trustee, as the guardian of a person, as the holder of a power of appointment and as the personal representative of a person, if the person were of full age and of sound and disposing mind.

Section 19 provides:

On a person becoming a patient as defined in paragraph (b) of the definition of “patient” in section 1,

(a) every power of attorney given by the person is terminated, and

(b) unless the court orders otherwise every representation agreement made by the person is terminated.

4. Power of Attorney Act

In dealing with a power of attorney, be aware of s. 56 of the Land Title Act. It provides that a power of attorney filed in the Land Title Office on or after October 31, 1979, is not valid for land title purposes three years after the date of its execution (which is not the filing date). Subsections 56(2) and (3) provide exceptions to this rule. One exception is where the power of attorney expressly excludes the application of the three-year limitation on the effectiveness of the power of attorney (s. 56(1)). Another exception is found in subsection 56(3), which permits enduring powers of attorney made under Part II of the Power of Attorney Act to continue to be valid after the expiry of the three-year period referred to in s. 56(1). See Practice Bulletin No. 02-11—Enduring Powers of Attorney.

A third party who deals with a licensee who is acting under a terminated power of attorney can rely on the acts of the licensee provided that the third party did not know of the termination (s. 4(1) of the Power of Attorney Act).

5. Adult Guardian Legislation


The purpose of the Representation Agreement Act is to allow adults to arrange in advance how, when, and by whom decisions about their financial affairs (among other things) will be made.

The Adult Guardianship Act sets out a new procedure that leads to the court appointing someone to make decisions for a person who is unable to make decisions, including decisions affecting land.

6. Other Considerations

Depending on the parties, legislation in other jurisdictions may be relevant. An example is the Guarantees Acknowledgement Act, R.S.A. 2000, c. G-11. A guarantee signed by a person affected by this Alberta Act has no effect unless the person entering into the obligation has had his or her signature duly authorized as provided by s. 3 of the Act.

[§7.04] Capacity of Corporate Borrowers

1. Generally

If the borrower is a corporation, the solicitor for the lender must investigate, among other things, whether the borrower has the capacity to grant the mortgage and whether by corporate resolution, the corporation has authorized the execution and delivery to the lender of the applicable loan and the mortgage documents.

If you act for the lender, you must obtain a copy (preferably certified by the solicitor for the borrower) of the borrower’s incorporation certificate and incorporating documents or, if a British Columbia
company, the “charter” documents, as that word is defined in the British Columbia Business Corporations Act (which include the company’s articles and notice of articles or memorandum), from the records office, or other applicable office. You should also obtain a solicitor-certified copy of the corporation’s register of directors. Confirm that a corporate borrower is in good standing under the laws of its jurisdiction, and that it has never been struck from the register of companies. Such evidence usually consists of a certificate of good standing issued by the applicable registry. If struck, consider the effect of the Escheat Act.

In determining the capacity of a company to borrow, refer to incorporating documents, particularly the memorandum (articles if a British Columbia company), which may contain limits on its corporate powers.

Section 165 of the Land Title Act deems a corporation to have the same powers of acquiring and disposing of land as a natural person. The section also states that a document executed by a corporation by an individual represented as an authorized signatory in accordance with Part 5 of the Act is conclusively deemed to be properly executed in favour of all persons dealing in good faith with the corporation.

2. British Columbia Companies

Lack of capacity to borrow arises rarely.

The Business Corporations Act (“BCA”) provides in s. 30 that “a company has the capacity and the rights, powers and privileges of an individual of full capacity.” Under the BCA, a company may give financial assistance to any person, for any purpose, by means of a loan, guarantee, provision of security or otherwise. However, s. 195 of the BCA requires written disclosure of financial assistance when it is given to persons related to the company or to an affiliated company, and of any financial assistance after the purchase of shares of the company or an affiliated company.

3. Extraprovincial Companies in British Columbia

If a company carries on business in British Columbia it must be registered with the Registrar of Companies under s. 375(5) of the BCA.

The borrower must satisfy the lender on the obvious question of whether or not it is carrying on business in the province.

4. Canada Business Corporations Act

There are provisions in the Canada Business Corporations Act similar to the BCA relating to the powers of companies generally and relating to borrowing and giving of loans and guarantees by companies under its jurisdiction. Refer to the company’s documents to determine any restrictions or limitations on the company’s powers and capacity to carry out land transactions. See also the Practice Material: Business: Company, Chapter 15.

[§7.05] Corporate Procedures

Assuming that the review of all documents filed with the Registrar of Companies contain no problems with respect to the capacity of the company to borrow and to grant security, you must then determine who has the right to make corporate decisions.

The borrowing power is usually exercised by means of a resolution passed by the board of directors under their general power to manage the business (BCA, s. 136(1)). Also, the general power is usually specified in the articles. The lender will usually require adequate evidence that the directors and officers, purporting to act on behalf of the company, have the authority to do so. This evidence usually takes the form of certified copies of those documents and should be supported by a certified copy of the relevant resolution or resolutions of the directors. Assuming that the lender has no cause to doubt the accuracy of such certificates, it may rely upon them as evidence that the necessary formalities have been observed by the company.

The articles or memorandum will disclose who has the right to exercise the power to borrow and grant security, and the resolutions usually provide for specific authorized signatories. Note again s. 165 of the Land Title Act regarding land title documents.

[§7.06] Restrictions on Lenders

1. 80% Loan-to-Value Ratio

Restrictions imposed on lenders taking mortgage security on real property are functionally of two different types: internal restrictions prescribed by the lender’s enabling statutes and designed for the protection of the lenders’ depositors, investors, beneficiaries or members; and external restrictions imposed for the protection of borrowers.

The most significant internal restriction on residential real property loans is the restriction that the total indebtedness charged against residential property securing the loan must not exceed 80% of the value of the property at the time the loan was made (s. 418(1) of the Bank Act, S.C. 1991, c. 46). Similar provisions are found in legislation regulating trust companies and insurance companies.

The most common exception to the 80% limit are loans made under the National Housing Act, which allow a different loan to value ratio (s. 418(2)(a) of the Bank Act). Another exception to the 80% limit exists if the part of the loan over 80% is guaranteed.
or insured by a government agency or an approved private insurer. Insured loans may be loans insured under a policy issued by Canada Mortgage and Housing Corporation or under a policy issued by a private insurer.

One other exception arises where the real property security was taken as additional security for an existing debt (Rennie v. Quebec Bank (1902), 3 O.L.R. 541).

2. Loans to Prohibited Individuals

Loans to directors, officers, shareholders, employees, or companies related to those individuals are regulated and are often prohibited. Examples are found in the British Columbia Business Corporations Act (s.195), the Bank Act and in legislation regulating trust companies and insurance companies, such as the Financial Institutions Act.

3. Effect of Non–Compliance on Security—Doctrine of Illegality

Generally, the regulatory statutes provide that a lender who fails to comply with the statutory restrictions is guilty of a summary conviction offence punishable by fine.

Although violating statutory restrictions is a serious matter, of more significant concern is the effect on the security taken in a restricted transaction. This question was raised in the case of Royal Bank of Canada v. Grobman (1977), 2 B.L.R. 145 (Ont. S.C.), which concerned an equitable mortgage that on the facts was clearly in contravention of s. 75(3) of the Bank Act, R.S.C. 1970. At that time, the section prohibited loans on the security of real property that exceeded 75% of the value of the property. The court was concerned that if the breach of the section rendered the mortgage invalid, the very persons the statute intended to protect would be prejudiced. At pp. 165 and 166, Kriver J. said (citations are to R.S.C. 1970):

Finally, s. 75 of the Act is found as the first of a number of sections dealing with the powers of the bank and which, I should have thought, were intended to ensure the solvency of the bank in the interests of and for the protection of, its depositors and shareholders. Although there is, in s. 159, a general provision respecting the punishment of any person who commits an offence against the Act, the penalty-creating provisions of ss. 145(1) and (2) are specifically directed to ss. 75(2)(b), (c), (d), (e) and (f) of the Act but not to s. 75(3). The omission may be significant in any consideration of the question whether Parliament intended a contravention of the qualification expressed in s. 75(3) to be treated as illegal in the sense of invalidating a mortgage and thus prejudicing the bank’s solvency and the interests of its depositors and shareholders.

It is the last comment that touches upon what I consider to be the modern judicial view of illegality in the contracts field and the consequences the courts are prepared to visit upon a contract entered into a contravention of a statute. The serious consequences of invalidating the contract, the social utility of those consequences and a determination of the class of persons for whom the prohibition was enacted are all factors which the court will weigh. I have indicated my view that the purpose of s. 75(3) of the Bank Act is the protection of the bank’s depositors and shareholders by a measure that would support the solvency or the soundness of the investing policies of the bank. It would be entirely inconsistent with and, indeed, inimical to that purpose if the collateral security which the bank took by way of protection were to be held unenforceable because the extension of credit exceeded in value 75% of the borrower’s equity in the real property secured.

Although the court in Grobman, supra, specifically referred to the absence of a penalty section in reaching its decision, a mortgage that violates lenders’ internal regulations is unlikely to be found void and unenforceable by a court applying the doctrine of illegality cited in Grobman, supra.

Section 347 of the Criminal Code makes it an offence to enter into an agreement to receive interest at a criminal rate. The term “criminal rate” is defined to mean an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60% on the credit advanced under the agreement. “Interest” is broadly defined and may include application fees, standby fees, legal fees, brokerage fees and other non-refundable charges. However, it is possible to violate this provision of the Criminal Code unintentionally; for example, where a loan with a large front-end fee is called in early in its term. This is a very complex area. Take into account the criminal rate of interest when considering the term and exceptional payments that could create an effective rate of over 60%. Prudent lawyers may include a severance clause stating that if any provision of the mortgage is found to be unenforceable, the balance of the mortgage terms will still be operative and binding upon the borrower.

For detailed information on any of the following topics, consult the BC Mortgages Practice Manual (Vancouver: CLEBC).
[§7.07] Checklists

The first document that should be attached or inserted in a file relating to a real estate transaction—whether it is a conveyance, a residential mortgage or a commercial mortgage—is a checklist. The steps should be followed before the mortgage is registered initially; as well, many of the steps must be followed before each advance.

[§7.08] Instructions (Commitment Letter)

A lawyer must review the lender’s instructions carefully alongside the mortgage checklist. In residential mortgage transactions, the lender often forwards the form of the final report that it requires with its initial instructions and documents. It is useful to review this final report at the beginning of the transaction to see precisely those matters on which the lender will require your opinion. For example, some residential mortgage lenders require an opinion on zoning and some do not. Some of the opinions or certificates a lender requires are impossible to give. The time to discuss these with the lender is at the beginning of the transaction and not on the closing date.

In a commercial mortgage transaction and in any complex residential transaction, you should prepare a list of closing documents early on. This list serves as a useful further checklist as the transaction proceeds and can also form the basis of an index to the binder of closing documents that should be sent to the client at the close of the transaction.

[§7.09] Searches

1. Land Title Office

A land title search will typically reveal two types of encumbrances: those that will stay on the title after the closing, and those that must be discharged before or at the closing. Among the former are such things as easements, land use contracts, and statutory building schemes. A lawyer should review these encumbrances carefully. The lawyer should determine the exact location of any easement on the title and determine, either from the plan on file at the Land Title Office or from a survey, whether or not it affects the present or proposed buildings on the land. Ask those parties who are holders of land use contracts and statutory building schemes whether or not their provisions have been observed and performed.

As soon as possible, the lawyer responsible for discharging financial encumbrances on title should write to the holders of those financial encumbrances that are to be discharged from title to request payout statements. The payout statement will detail the total amount, including penalties and services costs, that is required to be delivered to the lender in order to legally oblige the lender to provide to the appropriate lawyer a registrable discharge of the mortgage.

In the case of a non-institutional mortgage lender, in addition to a payout statement, the lawyer should obtain a discharge of the mortgage on suitable undertakings.

2. Company Searches

If the borrower is a company, the lawyer should conduct a search in the Corporate Registry to confirm that the company is in good standing in respect of the company’s annual filings and for particulars of its officers and directors. The Notice of Articles will also provide you with the address for the company’s records office. It is important to review the corporate borrower’s articles to confirm the company has the corporate power and capacity to borrow, to confirm the scope of the company’s borrowing powers, to verify who has the authority to execute the loan and mortgage documents, and to determine whether it is necessary to affix the seal of the company to the mortgage documents (despite the infrequency of this last requirement).

3. Zoning and Bylaw Compliance

Whether or not any searches or investigations are made of municipal and other governmental authorities with respect to zoning and bylaw compliance will depend on the instructions received from the lender. Check whether the lender requires any confirmation on these matters in the final report.

4. Environmental Enquiries

The lender may ask that you confirm that the property is not affected by any hazardous waste. Search the Sites Registry for any information registered against the property. Consider whether enquiries have to be made under the Environmental Management Act or other provincial legislation and under the federal Canadian Environmental Protection Act, as well as from the municipality in which the property is located. These requirements are becoming more commonplace as environmental issues become more significant.

[§7.10] Report to Client

A lawyer should give the lender a report on the results of the searches as early as possible. The lawyer should send the lender a copy of the plan of the property on file at the Land Title Office and ask the lender to confirm that this is the property that it intends to have a mortgage registered against as security for the loan.

Frequently a lender will have to make business decisions as to whether or not a particular charge can remain on
the title in priority to the mortgage or whether a particular requirement in the commitment letter can be waived. It may be, for instance, that your search reveals a blanket right of way in favour of a utility. Such a document, by forbidding the erection of any buildings within the area of the right of way, effectively prevents all development on the lands. The best solution to this problem is for the utility to remove its blanket right of way and replace it with one specifically shown on a right of way plan. For many reasons, not the least of which is time, such a solution is often impracticable. In these circumstances, the answer may be to get a comfort letter from the utility that it will consider a modification of the right of way area; though not the perfect solution, it may be acceptable to your client.

Often an up-to-date building location survey isn’t available and you are asked for an opinion. As lawyer for the institutional lender you would normally recommend that the client not advance funds without an up-to-date survey. The institutional lender would then insist that a borrower obtain a survey before it would advance funds. However, lawyers representing institutional lenders may now have an alternative in mortgage transactions by way of obtaining a title insurance policy.

[§7.11]  Survey

In most lending transactions, your client will and should require a survey certificate showing, at a minimum, the boundaries and dimensions of the property and the location of all buildings on the property and preferably showing the location of all registered easements and rights of way encumbering the title to the property, or in some cases take out a title insurance policy. The certificate will indicate that the buildings do not encroach on adjoining lands and that the buildings on adjoining lands do not encroach on the surveyed lands. If there is an encroachment, unless it is so small that your client feels that it can be ignored, an encroachment agreement must be obtained from the neighbouring owner. The encroachment agreement will have to be registered against the neighbour’s title, in priority to all financial encumbrances. If the neighbouring owner does not cooperate, an application for an encroachment agreement may be made to the court under s. 36 of the Property Law Act.

Until recently, most lenders would allow a title insurance policy to be placed in lieu of a survey certificate. With the decisions in Re Oehlerking Estate, 2009 BCCA 138 and Gill v. Bucholtz, 2009 BCCA 137, many lenders are now requiring a title insurance policy for the additional coverage against fraud.

For further discussion of surveys, see §7.28(3) in Practice Material: Real Estate.

[§7.12]  Insurance

The lender will require that adequate insurance be in place before funds are advanced. Insurance policies are often extremely complicated and highly technical. If at all possible, urge your clients to have insurance policies reviewed by professional insurance agents or brokers. Three matters mentioned in typical insurance instructions are of particular note.

For further discussion of insurance, see §7.28(2) and §5.20 to §5.27 in Practice Material: Real Estate.

1. Standard Mortgage Clause

Normally a lender will insist that it be named as a “loss payee” in the borrower’s insurance policy. The effect of this clause is that if a loss occurs, the lender is an assignee of the proceeds payable under the policy.

If the lender merely stands in the position of a loss payee, it will face certain problems if a loss occurs. First, since the lender’s only claim is under a policy to which it is not a party the lender’s rights to indemnity can be no higher than those of the insured owner. The insurance company may have valid defences against the owner/borrower because of a material misrepresentation in the application for the insurance or some act (for example, arson) barring the borrower’s right of recovery. Since the lender/loss payee has rights no better than the insured borrower, the lender will be prevented from recovery under the policy even though it was in no way responsible for, nor a party to, the conduct that gave the insurance company a defence. Second, at least some of the older cases raise the question of whether the lender/loss payee has any right to sue under the owner’s policy.

The problems facing the lender named as a mere loss payee can be minimized using the standard mortgage clause. For example, regarding the interest of the lender, typically, the insurance will remain in force, notwithstanding “any act, neglect, omission or misrepresentation attributable to the mortgagor . . .”

2. Co-Insurance

The concept of co-insurance is perhaps best understood if you bear in mind that most insurance claims are for a partial loss only. Thus, if a building was worth $1,000,000, chances are that most losses would be far less than this amount. Therefore, if the insured carried insurance for only $500,000 and paid a premium for that amount only, in all likelihood the insurance company would still have to pay in full for most losses, even though it received only half of the premium.
By inserting a co-insurance clause, the insurance company encourages the insured to buy insurance up to a percentage (usually 80%) of the full value of the property. If the insured chooses not to do so, the insured is said to become a co-insurer, that is, he or she is penalized for the failure to insure up to the required percentage by having to bear a portion of the loss himself or herself. For example, if a building is worth $1,000,000 at the time a loss occurs and the insurance policy has an 80% co-insurance clause, this means that the owner must carry insurance for at least $800,000. If, in fact, he or she has only insured for $500,000 and there is a loss of $200,000, he or she will only recover a proportion of the loss from the insurance company. In this example, the insurance company’s liability is limited to:

\[
\frac{\text{(200,000 x 500,000)}}{\text{800,000}} = \text{125,000}
\]

The owner will be responsible for the balance.

Lenders should insist that insurance policies be written either without co-insurance or for a stated amount co-insurance. The stated amount co-insurance clause is a clause that stipulates the precise amount of insurance that the insured must maintain. If satisfactory insurance is in fact obtained, then the owner will have fulfilled his or her obligation. The problem with a percentage of value endorsement is that it requires an insurance appraisal to be done on the building and to be updated from time to time, which is an additional cost.

3. Replacement Cost Endorsement

The principle of indemnity has long been one of the cornerstones of insurance law. In practice, this meant that the insured, upon the happening of a loss, could only recover the actual cash value of the property destroyed at the time of the loss, that is, its depreciated value. If the insured chose to replace the damaged article with a new article, he or she would have to reach into his or her own pocket to make up the difference in the price between old and new. In theory, the insured would not be any worse off than before, but in practice, the rule worked a great hardship upon the insured who would have to come up with money at a time when he or she could probably least afford it. The insurance industry met this unsatisfactory situation by providing coverage that allows the insured to recover new for old. To protect themselves against abuse, however, the insurance companies insist that they pay the full cost of replacement or repair only if replacement or repair actually took place. The insured is given a choice: he or she can take the cash, in which case he or she will suffer the penalty of depreciation, or the insured could repair or replace, in which case the actual cost will be reimbursed in full. To protect themselves further, the insurance companies insert a co-insurance clause which penalizes the insured if he or she fails to pay the premium of the full insurable value of the property.

The most important features of replacement cost coverage are the following:

(a) it is not contained in all policies by any means—many policies on commercial buildings do not contain it or provide it only if an additional premium is paid;

(b) it comes into play only if the insured chooses;

(c) if the insured exercises the option, he or she must actually repair or replace the property;

(d) the property must be repaired or replaced promptly and unless the policy permits otherwise, replacement must be on the same site; and

(e) unless the insured has purchased coverage to at least the percentage of the replacement value required by the co-insurance clause, he or she may still be asked to bear a portion of the cost, even if loss is only a partial one.

[§7.13] Registration and Advances

Registration is essential to perfect the lender’s security. A pre-registration title search is advisable and a post-registration title search is imperative. The lawyer’s obligation is to certify title. To do so properly, he or she must be in a position to specify prior charges and to certify the nature of the security obtained by the lender.

It is common practice among lenders’ solicitors to pay out mortgage funds after the filing of an application for registration of the mortgage and before the completed (or perfected) registration on the basis of a satisfactory post-registration search. There are a number of pitfalls to this practice, the primary one being the possibility that a subsequent application to register a charge or notice may be made, which either delays completion of prior pending registrations, or worse yet, affects the priorities of previously filed documents. The following are examples of subsequent applications that may have this effect:

(a) a notice under s. 99 of the Family Law Act of a spouse claiming an interest in a family property;

(b) a caveat;

(c) a certificate of pending litigation;

(d) a builders lien; or

(e) various statutory liens.

 Occasionally, delay or omission by registry staff may result in an intervening application not showing up on the index. These omissions are usually corrected before actual registration. Little can be done in this situation,
except to advise the lender that you will be relying on the state of the title at the time of the advance.

It is the practice of some solicitors to advise their lending clients that the public is not apprised of these potential hazards and ask them to decide for themselves whether they are willing to bear the risk of paying out before actual registration. Most lenders will consent to this in order to remain competitive.

It is very important to note that **priorities as between registered mortgage holders do not arise simply on the basis of the time of registration**. As between registered mortgages, and notwithstanding the respective dates of registration, priority may be based on the time the money is secured or advanced. For example, see s. 28 of the *Property Law Act*. If the mortgage is to be advanced in stages, it is very important that you search at the Land Title Office to ensure that there are no intervening mortgages which, being either fully or partially advanced or secured, will take priority over the next advance under your client’s mortgage. Likewise, the time of advance may be the time that the borrower received the funds or the benefit, not the time funds are delivered to the lender's lawyer. Consequently, you should ensure that funds are paid out as soon as possible after registration. Section 28(2) of the *Property Law Act* provides that, in certain circumstances, further advances made by a lender that are made in accordance with its mortgage provisions rank in priority to advances made under subsequent mortgages.

Sometimes on the closing of a residential sale, the registration of the Form A Freehold Transfer will be followed by a Form B Mortgage in favour of an institutional lender and then, immediately afterwards, by a second mortgage back to the seller (commonly referred to as a vendor take-back mortgage). The face amount of the second mortgage will be secured from the moment that the document is accepted for registration. However, the face amount of the first mortgage, will not be secured until it is actually advanced by the lender, which will be after the time at which the second mortgage monies become secured and, therefore, ranks in priority behind them. Therefore, it is essential that the second mortgage contains an appropriate clause giving priority to advances under the first mortgage, notwithstanding the dates or times of advances under the first mortgage.

Finally, note that under s. 197 of the *Land Title Act*, the registrar may refuse to register a charge where he or she is of the opinion that:

(a) a good, safeholding and marketable title to it has not been established; or

(b) the charge claimed is not an estate or interest in land that is registrable under the Act.

The registrar has a duty to keep the title register confined to entries of real interests. Registry staff will examine mortgages and other instruments that purport to create charges to ensure that they have been completed and executed in accordance with the *Land Title Act* and the regulations. The registrar does not assure the enforceability or underlying legal validity of charges (s. 26(2)). Such an in-depth review would be impracticable.

### [§7.14] Clearing Title

Obviously, one of the most important functions of the lawyer for a lender is to make sure that the lender gets the priority it expects. The question often arises as to who should clear title.

If a transaction is one in which the buyer is getting a new first mortgage, in theory there should be no complication because the seller will have agreed in the purchase agreement to clear title. In reality, of course, the seller does not have the money to clear title until after the net purchase price is delivered by the buyer’s lawyer to the seller’s lawyer. In residential transactions, the buyer’s lawyer will often be acting also for the buyer’s lender. In such transactions, it is not uncommon for the buyer’s lawyer to be asked to arrange to clear title on the seller’s behalf, using the lender’s money. Following clause 14 of the standard Contract of Purchase and Sale most often, the buyer’s lawyer will deliver to the seller’s lawyer the net purchase price on the CBA Standard Undertakings that require the seller’s lawyer to pay out and discharge any financial charges on title and remit the balance, if any, to the seller.

If the lender is separately represented, there are three alternative methods for clearing title:

1. The lender’s lawyer forwards the mortgage proceeds to the buyer’s lawyer on his or her undertaking to clear title.

2. The lender’s lawyer pays out the amount owing on prior encumbrances (for example, the seller’s mortgage) and sends only the balance to the buyer’s lawyer acting for the buyer/borrower. The difficulty with this method is that the lender’s lawyer is now purporting to effect a payout on behalf of the seller.

3. If the buyer’s lawyer will not have enough time to deposit a cheque from the lender’s lawyer and issue a new one to pay out the encumbrance, the lender’s lawyer delivers his or her separate trust cheque to the buyer’s lawyer for the amount of the loan payout but payable to the prior encumbrance holder (for example, the seller’s lender).

Before selecting a particular method for clearing title, the lender’s lawyer must ensure that his or her chosen method complies with the lender’s instructions. Also, the lender’s lawyer should always be alert to the possibility that the buyer’s lawyer may not be able to fulfill his or her undertakings. Accordingly, the lender’s lawyer should be cautious when structuring the terms on which funds will be advanced to the borrower’s solicitor.
Lawyers acting for lenders should also be aware of the recent decision in *Lin v. CIBC Mortgage Inc.*, 2015 BCCA 518, discussed at §2.03(11).

Sometimes a prior lender will have instituted foreclosure proceedings and a certificate of pending litigation will be filed against the title. The *Land Title Act* allows a registration with a certificate of pending litigation on title, subject to certain conditions. Nevertheless, the preferable course is to obtain a letter from the lawyer who acts for the lender, releasing the certificate of pending litigation, which you can file at the same time as your mortgage. You will only be able to obtain such a letter on stringent undertakings as to payment of the amount owing to the prior mortgagee.

Law Society Rules 3-95 and 3-96 apply to transactions involving a payout of a mortgage registered on title to property in British Columbia and obtaining a discharge of the mortgage. Under these Rules a lender whose mortgage is paid out must provide a registrable discharge of that mortgage within 60 days of payout. This reflects the expectation that a financial institution would typically have 30 days after a mortgage repayment in which to issue a discharge, and the lawyer responsible for the discharge (usually the seller’s lawyer) would have a further 30 days to register the discharge.

Section 72 of Part 5 of the *Business Practices and Consumer Protection Act* requires lenders to provide a registrable discharge of mortgage for non-business purpose loans within 30 days after the borrower has paid the whole amount of principal and interest owing under the mortgage loan.

If the other lawyer involved in the transaction (usually the buyer’s lawyer) has not received confirmation from the lawyer responsible for discharging the mortgage that the discharge has been so obtained and filed, the lawyer is required to report the lawyer who has not satisfied the requirement, and the paid-out lender, to the Law Society.

### [§7.15] Final Steps

Having paid off the prior encumbrances, a lawyer should file the discharges and request a state of title certificate. When this is received, the lawyer should check it carefully and forward it to the client. Finally, the lawyer should enclose the firm’s opinion, along with the certificate of title (if it has not already been provided).

### [§7.16] Problems, Pitfalls, New Developments and Disclosure Requirements

1. **Interest Act, s. 6**

   If the mortgage amount is repayable by blended payments of principal and interest, then the mortgage must contain a statement showing the amount of such principal money and the rate of interest chargeable, calculated yearly or half-yearly, not in advance (s. 6 of the *Interest Act*). If this is not done:

   ... no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced ...

2. **Interest Act, s. 8**

   Section 8(1) of the *Interest Act* prohibits a lender from charging a higher rate of interest on arrears than the rate of interest payable on the principal that is not in arrears. If the lending document stipulates interest at a given rate, but also provides that a lower rate will be accepted if paid punctually, the lender has contravened s. 8(1) (*Re Weirdale Investments Ltd. v. Canadian Imperial Bank of Commerce* (1981), 121 D.L.R. (3d) 150 (Ont. H.C.), applied in *Vohra Enterprises Ltd. v. Creative Industrial Corp.* (1988), 48 R.P.R. 272 (B.C.S.C.)).

   The *Weirdale* mortgage set out that interest would accrue at the rate of 10% per annum on the principal balance but provided that:

   ... in the event the mortgagor or its successors or assigns shall have paid the full amount of the principal sum secured hereunder on or before the 30th day of March, 1980, any requirements for the payment of interest hereunder shall be waived by the mortgagee ...

   The court held that to determine whether such a clause contravenes s. 8(1) of the *Interest Act*, one must look to its effect. The court held that the effect was to make the mortgage interest free unless the mortgagor defaulted and then to provide for an interest rate thereafter. Since this was precisely what s. 8 prohibited, the provision was, therefore, unenforceable.

   On the other hand, if a mortgage provided for payments of principal during the term, and for interest to accrue only after maturity and default, such a provision does not contravene s. 8(1) (*Dillingham Construction Ltd. v. Patrician Land Corp. Ltd.* (1985), 34 Alta. L.R. (2d) 309 (C.A.)).

   A clause that provides for a significant increase in the interest rate shortly before the term of the mortgage expires might not contravene s. 8 (*Raintree Financial Ltd. v. Bell* (1993), 85 B.C.L.R. (2d) 82 (B.C.S.C.), explained in *Langley Lo-Cost Builders Ltd. v. 474835 BC Ltd.*, 2000 BCCA 365).

3. **Interest Act, s. 10**

   If a real estate mortgage provides that it cannot be redeemed until more than five years after its date, then at any time after the five-year period expires the borrower may pay off the full amount owing,
together with three months’ further interest (s. 10(1) of the Interest Act). Note that:

(a) the section is only applicable to mortgages of real estate;

(b) the section does not apply to mortgages given by corporations and joint stock companies (s. 10(2)(a)).

Further to s. 10(2)(b) and the Prescribed Entities and Classes of Mortgages and Hypothecs Regulations, s. 10(1) also does not apply to mortgages given after January 1, 2012 by partnerships, trusts settled for business or commercial purposes, Alberta unlimited liability corporations, BC unlimited liability companies and Nova Scotia unlimited companies.

Note that an individual mortgagor who assumes a mortgage originally given by a corporation may not be entitled to the benefit of the prepayment provision in s. 10(1). For instance, Reich v. Royal Trust Co. (1983), 47 B.C.L.R. 224 (S.C.) concerned individual buyers who assumed a mortgage from a construction company. The court held that because the original mortgagor was a corporation, the buyers were not entitled to exercise the prepayment right in s. 10(1) of the Interest Act. Whether the reasoning in Reich applies appears to depend on the terms of the particular agreement, including whether the agreement is a simple assumption agreement or one that alters the mortgage in any way, and on the parties involved. See the discussion in Wall v. Maritime Life Assurance Co. (1992), 64 B.C.L.R. (2d) 358 (B.C.S.C.).

(c) the right to repay arises if any individual term of the mortgage, either the original term or a renewal term, is longer than five years. Caution should be exercised in drafting 5-year mortgages because the interest adjustment period of even a few days can extend the term, which will often be stated as 5 years from the interest adjustment date, beyond 5 years. Wilson J. summarized the conclusions reached by the Supreme Court of Canada in Royal Trust v. Potash (1986), 31 D.L.R. (4th) 321 (S.C.C.) as follows:

(i) the purpose of s. 10(1) of the Interest Act is to ensure that mortgagors have the right to pay off their mortgages at the end of each five year period. They cannot be locked in for more than five years,

(ii) where the original term of a mortgage exceeds five years, the mortgagor has the right to pay it off at the end of five years in compliance with the section,

(iii) where the original term of the mortgage is for five years or less and the term is extended by agreement beyond the five-year period (the date of the mortgage remaining unchanged), the mortgagor has the right to pay it off at the end of five years,

(iv) when a mortgagor elects not to exercise his or her right under s. 10(1) but instead enters into an otherwise valid and enforceable renewal agreement which deems the date of the original mortgage to be the date of maturity of the existing loan, and the term of the renewal agreement does not itself exceed five years, the mortgagor cannot pay off the mortgage until the end of the five-year renewal period, and

(v) when a mortgagor makes a conscious decision on the basis of full knowledge of his or her statutory right to repay at the end of a five-year period not to do so, he or she does not contract out of or waive the statutory right. He or she simply decides not to exercise it. If, however, he or she purports in a mortgage or renewal agreement to relinquish the right to pay off the mortgage at the end of any given five-year period, such a provision could not be enforced against him or her at the instance of the mortgagee. He or she would still be free to pay off the mortgage in compliance with the statute.

4. Assumption and Novation

At common law, the new buyer of a property against which a mortgage has been registered does not assume a contractual obligation for the mortgage debt unless the buyer enters into some form of assumption agreement with the lender. As well, the original borrower is not relieved of liability for the mortgage debt, even though the property has been sold, unless the lender releases the original borrower from the borrower’s covenant or a novation has occurred.

Under s. 22(3) of the Property Law Act, a new buyer of property, against which a mortgage (residential or non-residential) is registered, is generally bound to the covenants in the mortgage. The meaning of this section has not been tested in the courts. Consequently, lenders should continue to
obtain assumption agreements as the statutory right of action may prove to be no substitute for contractual liability.

Under s. 24 of the *Property Law Act*, the original borrower of a residential property will be relieved from liability to the lender upon transfer of the land in the following situations:

(a) if within three months of the transfer the original borrower asks the lender to approve the person buying the land, subject to the existing mortgage, and the lender so approves (this approval cannot be unreasonably refused (s. 24)); and

(b) if the lender does not approve the buyer within three months of the transfer, then the original borrower is released within three months after the expiration of the existing term unless the lender demands payment within that time (s. 23(1)), and see section 23(3) for stipulations relating to demand mortgages).

In considering a request for approval, the mortgagee may require the person buying the land to provide financial information and pay requisite fees.

For all non-residential mortgages and any residential mortgages not covered by the *Property Law Act*, the common law will continue to be applicable to keep the original borrower liable upon the sale of the property, subject to express release or novation.

The case law on when novation will occur is far from clear; most of the reported cases do not fully explain the individual circumstances that surrounded each, which makes it difficult to extract any positive rule. However, the BC Court of Appeal in *Prospect Mortgage Investment Corporation v. Van 5 Developments Ltd.* (1985), 68 B.C.L.R. 12 went a long way to providing positive direction. The Court affirmed its earlier decision in *Bank of BC v. Firm Holdings Ltd.* (1984), 57 B.C.L.R. 1 by stating that four facts must be established to constitute novation:

(a) the new debtor must assume complete liability;

(b) the creditor must accept the new debtor as a principal debtor, and not merely as a licensee or guarantor;

(c) the creditor must accept the new contract in full satisfaction and substitution for the old contract; and

(d) the new contract must be given with the consent of the old debtor.

The Court of Appeal went on to add the following at p. 26:

Whether in a given case there has been a novation is essentially an issue of fact. Because novation is essentially an issue of fact it would be wrong in principle to say as a generalization that assumption agreements or extension agreements or other particular classes of documents do or do not create a novation. The question must be decided in each case having regard to all of the circumstances of which the language of the new contract is only one.

In *Canada Permanent Trust Co. v. Neumann and Neumann* (1986), 8 B.C.L.R. (2d) 318 (C.A.), the Court held that the consent of the old debtors (the final principle in the *Prospect Mortgage case*) was not necessary in order to have a novation in straightforward mortgage cases.

5. **Criminal Code**

Section 347 of the *Criminal Code* creates an offence of agreeing to receive or actually receiving interest in excess of 60% per annum on credit advanced. The definition of interest includes:

... the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit.

Since s. 347 is found in the criminal statute one expects that violators will be prosecuted. However, a prosecution requires the consent of the Attorney General of Canada and the Attorney General rarely becomes involved in these disputes. Consequently, most reported cases involving s. 347 are brought in civil court and involve allegations by borrowers that, because the lending transactions that they entered into violate s. 347, they are illegal and, therefore, void and unenforceable.

Judges called upon to decide these cases understand that in many cases the borrowers are sophisticated and have had sophisticated legal advice. They cannot ignore the provisions of s. 347 but understand that the avoidance of the whole lending transaction would give the borrower a windfall. To reconcile the sanctity of contract with the consequences of illegality, the courts will typically permit a lender to recover only its principal and sever the “interest” provisions of the loan contract.

In only one reported civil decision has a court held the entire loan transaction to be unenforceable, but in so doing it found the lender’s solicitors liable to reimburse the lender for the loss it had suffered (Croll v. Kelly (1983), 48 B.C.L.R. 306 (S.C.)).

6. **Mortgage Brokers Act**

This Act regulates mortgage brokers. A mortgage broker includes, for example, a person “who during any one year, lends money on the security of ten or more mortgages” (s. 1).

Sections 17.1(1) to 17.1(3), together with the regulations, require a broker to provide some lenders with an Investor/Lender Information Statement before funds are released or advanced. In general, these lenders do not include commercial lenders who are considered under the Act to be “sophisticated persons.”

Section 17.4 of the Act requires the broker to provide written disclosure to a lender whenever they or a party related to them has an interest in the mortgage transaction. Lenders who meet the definition of “mortgage broker” in s. 1 of the Mortgage Brokers Act must also deliver this Conflict of Interest Disclosure Statement (Form 10) to borrowers (s. 17.3). Exceptions to this disclosure are found in s. 17 of the regulations.

Disclosure requirements under Part 2 of the Mortgage Brokers Act and regulations should be read with Part 5 of the Business Practices & Consumer Protection Act.

7. **Bank Act**

Section 450(1) of the Bank Act, S.C. 1991, c. 46 requires chartered banks to disclose the cost of borrowing when making loans in the manner prescribed by the Act. Section 450(2) refers to classes of loans to which s. 450(1) does not apply: these classes are prescribed by the regulations. Broadly speaking, exceptions to disclosure are made for large loans in excess of a prescribed dollar amount and very generally to loans made in a business context. The specific form and timing of disclosure is set out in the Cost of Borrowing (Banks) Regulations, SOR 2001-101, ss. 6, 7, 8, 9 and 14.

Section 451 requires the bank to express the cost of borrowing as a rate per annum.

Section 452(1) requires that loans to individuals that are to be repaid at a fixed future date, or by instalments, must contain a disclosure of the right of the borrower to repay the loan before maturity and particulars of that right. In addition, the bank must disclose particulars of any penalties or charges that will be paid by the borrower on failure to repay in accordance with the loan contract.

8. **Property Law Act**

If the borrower asks the lender, in writing, to supply a statement, then pursuant to s. 33 of the Property Law Act, the lender must supply a statement setting out:

(a) the amount payable under the mortgage to obtain its discharge;

(b) the balance payable on the mortgage on the date stated in the request; and

(c) if applicable, a statement of the terms on which a discharge will be granted.


Part 5 of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 (“BPCPA”) contains important initial and ongoing disclosure requirements with which lenders must comply. Lawyers who act for lenders should pay close attention to the obligations under the BPCPA and particularly Part 5.

Section 58 outlines the application of Part 5 to different loan transactions. Generally, Part 5 applies to credit agreements if the borrower is an individual and the borrower enters into a credit agreement for primarily personal, family or household purposes. Among other exemptions, Part 5 does not apply to a credit agreement when the credit grantor is provided with a statement (in the credit agreement or other document) to the effect that the borrower has entered into the credit agreement for business purposes primarily, the statement has been signed by the borrower, and the credit grantor believes in good faith that the statement is true.

When a lender must provide a disclosure statement to a borrower, the lender must do so before the earlier of:

- two business days before the borrower incurs any obligation, or
- the date on which the borrower makes any payment in connection with the loan.

The time period for providing disclosure can be waived by the borrower pursuant to s. 66(4). BPCPA Regulation B.C. 273/2004, s. 16 (Disclosure of the Cost of Consumer Credit Regulation) prescribes that a financial institution may not charge more than $75.00 for a discharge of a non-commercial mortgage.

10. **Priority of Statutory Liens**

Subsections 87(1) and (5) of the Employment Standards Act provide that unpaid wages constitute a lien that takes priority over a mortgage or, of debenture charging, land that was registered in the
land titles office before the registration of a certificate of judgment for nonpayment of wages. However, the priority is limited to money advanced under the mortgage or debenture after the judgment for nonpayment of wages was registered.

The Workers Compensation Act, s. 52 gives priority to the lien for unpaid assessments created by this Act over all liens, charges or mortgages of every kind, whenever created or to be created (except a lien for wages). The lien attaches to all the property and not just the employer’s equity in it (Northwest Life Association Company of Canada v. Westridge Construction Ltd. (1980), 21 B.C.L.R. 235 (S.C.)). In River Road Marine v. Greenwich Shipyard Ltd. (1980), 22 B.C.L.R. 101 (S.C.) the Court held that an unpaid seller under an agreement for sale was not the holder of a lien, charge or mortgage, but rather was a registered owner and the s. 52 lien did not have priority. In Crown Trust Company v. Martin & Gamble Builders Ltd. (1983), 47 B.C.L.R. 169 (S.C.), a lender who had obtained an order for sale in foreclosure proceedings was given priority over the s. 52 lien because the board had made no effort to appear at the time of the order for sale, although it could have done so.

The federal Bankruptcy and Insolvency Act, R.S.C. 1985, c. B–3, s.70 neutralizes provincial legislation that purports to give different priorities to certain creditors. For the purposes of the federal Act, the Workers’ Compensation Board is not a secured creditor and is not entitled to priority over the interest of a lender of a bankrupt borrower (Workers Compensation Board v. Kinross Mortgage Corporation (1982), 127 D.L.R. (3d) 740 (B.C.C.A.), reversing in part (sub nom. Re Kinross Mortgage Corporation and Bushnell) (1981), 109 D.L.R. (3d) 394 (B.C.S.C.)).

In Roadburg v. R. (1980), 110 D.L.R. (3d) 433 (B.C.C.A.), supplementary reasons (1981), 29 B.C.L.R. 186 (C.A.), the court held that the lien for unpaid tax created by the Corporation Capital Tax Act had priority over subsequently registered mortgages from the date the lien arose, that is, at the end of the corporation’s fiscal year, even though the lien was unregistered.

Section 116(5) of the Strata Property Act gives a strata corporation priority over every other lien or charge of whatever kind, except builders liens, and Crown liens other than mortgages in favour of the Crown, for a certificate filed against a strata lot owner’s title for that owner’s unpaid share of common expenses.

Many other statutory liens with varying priority positions can apply. For more information, see Volume 3 of the Land Title Practice Manual (Vancouver: CLEBC).

[§7.17] Modifications of Mortgages

A modification of a charge does not affect the holder of a subsequent charge registered before the registration of the modification, unless he or she is a party to the modification (s. 206(2) of the Land Title Act). In other words, subsequent charge holders should join in modification agreements to give their consent. In appropriate circumstances, the consent should extend to and include an acknowledgment that the prior charge as modified will continue to have priority over the subsequent charge.

[§7.18] Builders Liens (See also Chapter 8)

If a building has been newly constructed or has recently had work done to it, a lawyer should consider the implications of the Builders Lien Act and, where appropriate, obtain statutory declarations from builders concerning completion and payment of subtrades and material suppliers. The lawyer should also find out the intentions of any lender with respect to holding back under the Builders Lien Act. The buyer may have no right to hold back from the seller, and yet the lender may want to hold back from the buyer. This can cause serious problems at closing, and the buyer may have to provide additional funds to cover the amount the lender will be holding back. If you find yourself in the unfortunate position of acting both for the lender and buyer in such a circumstance, you must consider the obvious conflict problems.

Section 32(1) of the Builders Lien Act provides that a registered mortgage has priority over a lien to the extent the mortgage money was secured or advanced in good faith before the claim of lien was filed. If a mortgage is being advanced in stages, for example a construction mortgage, this is one of the principal reasons why you do a title search before each advance. What do you do if your search reveals a lien on the title? Is it enough, for instance, to hold back the amount of the lien and advance the balance? It may not be. An unregistered lien claimant may argue that the advance has not been made in good faith on the grounds that, since one lien was registered against the property, the lender should have been alerted to the possibility that others might be pending. See for example, Ron Miller v. Honeywell (1991), 4 O.R. (3d) 492 (Gen. Div.). In considering such an argument (referred to as “sheltering”), the court might weigh the following matters:

(a) Did the lender obtain a certificate or statutory declaration from the borrower that it knew of no other claims?

(b) Was there a history of other lien claims being filed against the project?

The safer course to follow is to allow no advances by the lender until arrangements are made to discharge the lien by way of a registrable discharge or an order under s. 23 of the Act.
[§7.19] Acting for a Second Mortgage Lender

When acting for a lender whose security will be a second mortgage, you should take the following additional steps to ensure that the position of the second mortgagee is recognized and protected:

(a) the first mortgage should be carefully read, particularly to confirm that it does not prohibit the granting of a subsequent charge by the borrower;

(b) a certificate should be obtained from the first mortgagee confirming the balance owing and that the first mortgage is in good standing;

(c) the borrower should covenant that he or she will keep the first mortgage in good standing and the mortgage should incorporate a right on the part of the lender to keep the prior charge in good standing and to add the cost of this to the mortgage debt;

(d) the second mortgage should include a provision that any default under the prior mortgage will constitute a default under the second mortgage; and

(e) under s. 31 of the Property Law Act, the doctrine of consolidation has been abolished unless the parties have contracted otherwise in the mortgage document. The first mortgage should be checked to see if it states that the doctrine of consolidation applies. This doctrine provides that where a mortgagee holds two or more distinct mortgages made by the same mortgagor on different parcels of land, and the mortgagor has defaulted on all the mortgages, the mortgagee may consolidate the mortgages. In other words, the mortgagee may treat the mortgages as one and refuse to be redeemed as to one unless he or she is redeemed as to all. In a foreclosure situation, this could have very serious consequences for a second mortgagee. If the first mortgagee is foreclosing, the second mortgagee must either pay the full amount owing to the first mortgagee or be foreclosed off. Your client, the second mortgagee, may be more than a little surprised if the prior mortgagee insists not only that he or she redeem the first mortgage on the lands covered by the second mortgage but also on a number of other lots as well.

[§7.20] Mortgage of a Strata Lot

If a strata lot is being mortgaged, you should include special provisions in the mortgage document. You should consider the special protections that the Strata Property Act gives to the lender:

- the strata corporation must make any bylaws that are in force available to the lender (s. 59(3)(g));

- a lender may file a lender’s Request for Notification (Form C) if the lender wants to receive notices under ss. 45 and 113 (s. 60);

- the lender has the right to apply to court for an injunction if the strata corporation is not fulfilling any of its duties and obligations (s. 165);

- a lender may apply to court for a winding-up of the affairs of the strata corporation (s. 284); and

- a lender may apply to court for the appointment of an administrator under s. 174.

The most significant power a lender has is the right to vote (if this right is contained in the mortgage) in the place of a strata lot owner on matters relating to insurance, maintenance, finance, or other matters affecting his or her security (s. 54(c)). In order to exercise these voting rights, the lender must follow the procedure set out in s. 54(c) of the Act, which requires the lender to give written notice of his or her mortgage to the strata corporation. A lender must give the owner at least three days’ notice before the meeting of its intention to exercise its power to vote on the permissible matters.

As strata title ownership includes title to an individual strata lot, as well as an interest in the assets and liabilities of the strata corporation, a mortgage of a strata lot requires a more detailed investigation than a standard mortgage. The following is a list of items to be completed in addition to the investigations in a standard mortgage transaction.

1. Land Title Search

A standard strata title search consists of the following:

- a search of the title to the strata lot together with copies of all charges registered against the lot;

- a search of the common property together with copies of all charges registered against the common property;

- a copy of the strata plan, which shows the location and dimensions of the strata lots and buildings in the strata plan.

Note that an additional search in the strata “General Index” would show whether there are additional documents of note, which might include unit entitlemenand bylaw amendments.

2. Review Disclosure Statement

If the borrower is buying the strata lot from an owner-developer, a disclosure statement will have been filed with the Superintendent of Real Estate and a copy delivered to the mortgagor. The lawyer should obtain and review a copy of the prospectus.
3. Strata Property Certificates

The Strata Property Act requires the strata corporation to provide a Form B Certificate of Information certifying various financial and management matters about the strata lot. If you are lender’s counsel, you should obtain these certificates and review them. If possible, and in addition to these certificates, you should obtain a copy of the most recent balance sheet and projected revenues and expenses for the strata corporation.

4. Copy of Management Agreement

If a property management company has been retained, some lenders require their lawyers to obtain a copy of the management agreement. In some situations, the management company may consider the agreement confidential and it will be unavailable. If you are unsuccessful in obtaining the agreement, you should advise the lender and seek further instructions.

5. Insurance Certificate

Section 149 of the Strata Property Act requires the strata corporation to maintain insurance for the buildings and common facilities. You should obtain a certified copy of the policy or a certificate of insurance with the interest of the borrower and lender endorsed on it. The insurance obtained by the strata corporation is only for the replacement value of the buildings as sold to the borrower. Therefore, if the borrower has made substantial improvements to the unit that have increased its value as security to the lender, then the borrower should obtain excess insurance and provide a copy to the lender.

6. Survey Certificate Not Required

The strata plan filed in the Land Title Office includes a plan of the location and dimensions of the lot prepared by a British Columbia land surveyor. Therefore, survey certificates are not required by lenders on mortgages of strata lots.

§7.21 Mortgage of a Lease

The same considerations apply when a lawyer prepares a leasehold mortgage, a mortgage of an agreement for sale, or a mortgage of a mortgage. There must be covenants in the mortgage that permit the lender to remedy defaults under the prior document and to put it back into, or keep it, in good standing, so that the security does not disappear. The lender must have control of every contingency that could result in termination of the interest in land upon which his or her security depends.

The worst possible position for a lender of a lease is to have the lease terminate before the repayment of the mortgage debt. The mortgage of lease will be defeated if the lease disappears. This could happen in several ways: by breach of covenant requiring an expenditure of money, such as the covenant to pay rent; by the breach of the covenant to do certain work, such as a covenant to repair; by the breach of other collateral covenants, such as covenants not to assign without leave; by circumstances over which the lessee may have little control, such as the seizure of the balance of the term by a creditor on the bankruptcy of the lessee, or the expropriation of the property that comprises the demised premises.

The lender must have the right to put the lease into good standing and keep it there. He or she can do this in two ways. First, the lender can ensure that the lease itself contains sufficient safeguards so that either the tenant or the lender can remedy the various defaults before the lease terminates. Second, the lender’s right to remedy defaults should be obtained directly from the landlord. Certain defaults, such as those that require the expenditure of money, are easy for the lender to cure; others, however, that require the performance of work may be more difficult to cure and may require sufficient notice and adequate time for the lender to commence and complete. The lease usually has default provisions that neither the tenant nor the lender can cure, for example, termination in the event of bankruptcy or seizure by creditors. From the lender’s point of view, these provisions have no place in the lease. If the landlord insists upon these provisions, they should be dealt with in the agreement between the landlord and the lender, and in the event of a default the landlord should agree to give the lender a new lease for the remainder of the term.

The agreement with the landlord should confirm other things, specifically that:

- the landlord consents to the mortgage;
- there are no defaults under the lease of which the landlord has knowledge;
- the lease has not been modified;
- the landlord will not modify the lease without the lender’s consent; and
- there are no unfulfilled conditions precedent to the lease taking effect.

The tenant may mortgage a leasehold interest in land either by assigning the unexpired portion of the term of the lease, or by granting a sublease. Each of these alternatives has advantages and disadvantages. If a leasehold mortgage is made by way of an assignment of the remaining interest in the term, the leaseholder lender is liable to the landlord for the rent and for the performance of the covenants in the lease, unless the landlord and the lender agree to the contrary. If such an agreement can be worked out, a mortgage by way of assignment may be preferable. However, without such an agreement a mortgage by way of sublease should be considered, as the lender will not be liable to the landlord for the payment.
of rent or for the performance of covenants as there is no
privity of estate between the two. If a mortgage by way
of sublease is used, the lender may have certain addi-
tional protections against surrender of the lease under
s. 38 of the Property Law Act.

Section 1 of the Land Transfer Form Act provides that
the short forms apply to freehold mortgages only and do
not apply without more to a leasehold mortgage. It
should be possible to incorporate the short form clauses
by express reference to the Land Transfer Form Act
coupled with a statement to the effect that the short
forms as used in the leasehold mortgage are to have the
same meaning and to receive the same interpretation as
they do in the Land Transfer Form Act.

For more information, see Chapter 7 of the BC Mort-
gages Practice Manual (Vancouver: CLEBC).

§7.22 Mortgage of a Mortgage

The holder of a registered mortgage may grant a mort-
gage of that mortgage. This is generally accomplished
by way of a submortgage or an assignment of the mort-
gage. The lender under the mortgage of mortgage is sub-
ject to the equities and state of accounts between the
original mortgagor and mortgagee and accordingly writ-
ten confirmation in the form of an estoppel certificate
should be obtained from the original mortgagor. This
form of financing is often used by a seller who takes
back a mortgage to secure a portion of the purchase price
of a property and wishes to borrow against that security.
For more information, see Chapter 7 of the BC Mort-
gages Practice Manual.

§7.23 Equitable Mortgages

An equitable mortgage can be created in one of four
ways:

1. the pledge of a duplicate certificate of title;
2. the mortgaging by the holder of an equitable in-
terest, such as a subsequent mortgage or a mort-
gage by a buyer under an agreement for sale;
3. by an instrument which was intended to create a
legal mortgage but which is defective; or
4. by an agreement, perhaps just a letter, to provide
a mortgage.

Some financial institutions accept the pledge of a dupli-
cate certificate of title as security for a loan, to accom-
modate their customers and to avoid the expense of pre-
paring and registering a formal mortgage document. This
is particularly common where a subdivision has a large
number of lots, each of which is to be used as security
for the loan, but they will only be available as security
for a short period of time because the owner plans to sell
the lots to individual buyers. There is less incentive to
use the duplicate certificate of title to save expense under

the current land title registration fee schedule because
the new schedule has substantially reduced the cost of
registering a mortgage.

Only the second type of equitable mortgage listed above
can be registered and receive the protection of the land
title system (Land Title Act, s. 33). The removal of a
duplicate certificate of title affords some protection to a
lender because it prevents the owner of the land from
transferring the land or registering further mortgages
against the title (Land Title Act, ss. 189 and 195). The
duplicate certificate should always be delivered directly
to the lender by the Land Title Office. This puts on
record where the duplicate has been delivered and on an
application for a replacement, will create an impediment
to the owner’s claim that the duplicate certificate has
been lost. Note, however, Royal Bank of Canada v.
Mesa Estates Ltd. (1985), 70 B.C.L.R. 7 (B.C.C.A.), in
which the court stipulated that in order to create an
equitable mortgage by pledging a duplicate certificate of
title, there must be an intention by the parties to create
a mortgage. It is not sufficient for the parties to intend
only to afford the lender some security. From a strict
security perspective, lenders should nearly always insist
that their customers grant them legal, as opposed to
equitable, mortgages.

§7.24 Special Considerations Relating to
Right to Purchase

In order to facilitate the sale of real property, a seller
may be prepared to provide financing to the buyer and
retain a security interest in the real property being sold.
This can be accomplished either by taking back a mort-
gage from the buyer or by way of a right to purchase
between the seller and the buyer whereby the seller re-
tains registered title to the lands and the buyer obtains an
equitable interest in the lands under the right of pur-
chase, which is registered under the title. The only real
advantage in using a right to purchase rather than a
mortgage take-back is the avoidance of certain sections
of the Interest Act.

Under a right to purchase, the seller covenants to convey
the property to the buyer once the buyer makes all of the
payments under the right to purchase. One of the prob-
lems with financing by way of right to purchase is that
by this time the seller may either be dead or missing and
the buyer may have to make an expensive court applica-
tion to get title transferred into his or her name. Worse
still, the delay may cause the buyer to lose the chance of
a sale to a third party.

The Property Transfer Tax Act provides that property
transfer tax is to be paid on the value of the property at
the time the right to purchase is registered.
[§7.25] Mortgages of Right to Purchase

1. Mortgage of Buyer’s Interest

A mortgage of a buyer’s interest under right to purchase is akin to a second mortgage as the interest of the lender will be subject to the interest of the borrower as buyer under the right to purchase. As a result, you should do the following:

(a) Review the right to purchase to confirm that there is authority for the buyer to mortgage his or her interest;

(b) Contact the seller under the right to purchase to confirm in writing the outstanding balance owing and that the buyer is not in default; and

(c) Review the charges that the seller’s interest in the property may be subject to. Advise the lender that its mortgage will be subject to such charges unless priority agreements or non-disturbance agreements can be obtained.

2. Mortgage of Seller’s Interest

It is possible to take a mortgage over the seller’s interest in a right to purchase. However, you should make it clear to the lender that the seller’s interest is a diminishing one because the mortgage will be subject to the right of the buyer to call for a conveyance of title in fee simple from the seller, upon satisfaction of the terms and conditions of the right to purchase. Further, the security should be structured as a mortgage of the seller’s interest, rather than an absolute assignment, because an assignment will create privity of estate between the lender and the buyer and will oblige the lender to perform the seller’s covenants under the right to purchase. In addition, the Land Title Office is likely to reject the registration of an assignment of the seller’s interest unless it is in the form of a transfer of an estate in fee simple, whether or not the assignment is intended as collateral security only and as between the seller and the lender is to be subject to a right to redeem on behalf of the seller.

Section 29 of the Property Law Act allows a seller, after having entered into an agreement for sale, to mortgage its interest in the land without the consent of the buyer, unless he or she is expressly forbidden from doing so by the agreement itself.

You should consider inserting a provision in the right to purchase prohibiting the seller from mortgaging his or her interest, because of s. 242 of the Land Title Act. If a seller has registered a mortgage against the land after the right to purchase, and the buyer attends at the Land Title Office with a transfer of the property into his or her name while the mortgage is still registered against the title, then the registrar may give notice to the lender of his or her intention to register the transfer free of the mortgage (s. 242). This section provides for the resolution of an objection from the lender by a hearing before the registrar with a right to appeal from the registrar’s decision to the Supreme Court. If a buyer has to go through these hearings, he or she may be severely prejudiced by the delay in obtaining title.

It is arguable, however, that a total restriction on the seller’s right to mortgage may unfairly prejudice his or her ability to raise finance on the security of the right to purchase. One solution is to insert a clause in the right to purchase that prohibits the seller from mortgaging his or her interest in the right to purchase without the express written consent of the buyer. Add that this consent is not to be withheld if the mortgage is granted to a reputable financial institution, such as a bank, credit union or trust company. The clause also should stipulate that the financial institution agrees with the buyer to discharge its mortgage on payment of the full amount due under the right to purchase.

[§7.26] Mortgage Remedies

The following is an outline of the remedies available to a lender for default under a typical mortgage. You can only determine what remedies will be available in each situation by considering the specific terms of the mortgage and the current law of mortgages.

1. Action on the Personal Covenant

(a) Bringing Action on the Covenant

As soon as there has been default of payment, the lender can commence an action based on the covenant alone, or join it with an action for foreclosure. Normally, if the lender obtains an order nisi in a foreclosure proceeding, the lender must ask for judgment on the covenant at that time. The judgment may be enforced during the redemption period, but usually is not.

(b) Acceleration Clause

Upon default in any of the mortgage terms the lender may usually enforce an acceleration clause which makes the outstanding principal amount of the mortgage interest and costs due and owing on default. Most acceleration clauses are exercisable at the lender’s option. If the mortgage is made under the Land Transfer Form Act and Clause 15 of Schedule 6 of this Act has not been excluded by the terms of the mortgage, the borrower can be relieved from the consequences of acceleration upon paying the amount in arrears, together with costs.
Section 25 of the *Law and Equity Act* also provides for relief from acceleration upon application by the borrower to court. Briefly, the relief will usually only be granted in circumstances in which the borrower’s equity in the property is substantial, the security is intact, and the borrower’s default was not willful.

(c) Enforcement of Personal Covenant after Order Absolute

Section 32 of the *Property Law Act* provides that after obtaining an order absolute for foreclosure, a lender may not enforce the personal covenant of the borrower to pay. A lender may therefore not issue execution on a judgment obtained on the covenant to pay at order nisi, unless the order absolute is set aside or reopened by process of law. If a lender wants to preserve the judgment obtained at order nisi, then after the redemption period expires, the lender must usually proceed by way of judicial sale rather than order absolute.

2. Action for Foreclosure (Supreme Court Civil Rule 21-7)

In BC, an action for foreclosure is a lender’s summary remedy. The effect of foreclosure is that the borrower’s equity of redemption is extinguished. Generally, a foreclosure proceeding is brought concurrently with an action on the personal covenants, a claim for a sale, a claim for possession or for the appointment of a receiver, and for costs.

3. Judicial Sale

Only in the context of a foreclosure or other proceeding will the court order the sale of real property.

4. Contractual Power of Sale

For historical reasons, most mortgages in British Columbia give the lender the power to sell the property if default occurs under the mortgage. That remedy has not been used in British Columbia in recent times. The contractual power of sale is unenforceable before the redemption period expires (*South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (C.A.)). A judicial sale remains the more attractive remedy.

5. Possession

Every mortgage provides that, so long as the borrower is not in default, the borrower will have quiet possession of the property secured, but in the case of default, the lender may enforce an assignment of the rents or profits generated by the property. The lender may thereby become a mortgagee in possession and liable to account to the mortgagor for money received.

(a) Mortgagee in Possession

A mortgagee in possession has the rights of an owner, subject to the mortgagor’s right of redemption and right to an accounting. A mortgagee in possession must manage the property as a person of ordinary prudence would manage the property if it were his or her own. The mortgagee in possession will be liable to account for the management so long as the mortgagor has a right to redeem. Before a mortgagee will be considered to be in possession and liable as such, it must be shown that the possession deprived the mortgagor of the control and management of the property.

(b) Appointment of a Receiver

All mortgages should provide for the appointment by the mortgagee of a receiver. This remedy is rarely, if ever, used because the majority of mortgagees (and receivers) prefer the protection of court appointment. Section 39 of the *Law and Equity Act* and Supreme Court Civil Rule 10-2 provide for the court appointment of a receiver. Under s. 64(1) of the *Law and Equity Act*, the provisions of the *Personal Property Security Act* relating to the appointment and duties of receivers apply also to instruments that charge land.

6. Distress

Distress is the seizure of the goods and chattels of a borrower who is in default. In order for the lender to distrain the borrower’s goods, the right must be given to the lender by the terms of the mortgage. Many mortgages limit the right of the lender to distrain for arrears of interest only, however, a mortgage may also give a lender the right to distrain for principal as well. Distress by a lender is highly unusual in BC.

[§7.27] Title Insurance

Many lenders in British Columbia now use title insurance for mortgage refinancing.

The Law Society and the CBA continue to review the existing title insurance programs offered by lenders in British Columbia to determine how they will affect the public, the profession and the existing land title system.
1. Introduction

The purpose of this section is to alert the practitioner to potential problems in preparing residential mortgages for institutional lenders and in ultimately providing the lenders with a legal opinion on the transaction.

The instructions provided by the lender, and the solicitor’s opinion requested by the lender, are the essence of the transaction. There are many pitfalls along the way. Two trends in particular should cause solicitors acting for mortgagees to take note. First, solicitors acting in real estate transactions have a high rate of insurance claims in British Columbia. Second, the trend in actions against solicitors suggests that solicitors will be treated as insurers of their clients, in the broadest sense.

2. Instructions and Opinions Generally

(a) Instructions and Ancillary Documents

Mortgage transactions do not always involve an institutional lender. If the solicitor receives instructions in written form from an institutional lender who requires a solicitor’s opinion regarding the transaction, the lawyer should carefully read not only the instructions and transaction documents but also any collateral documents. Watch for appendices, amendments, added clauses, inserts and schedules provided or referenced.

Many mortgage opinions require the solicitor “to certify” that the transaction has been completed “in accordance with the mortgagee’s instructions” or “pursuant to its instructions.” However, many more do not trigger appropriate wariness by these phrases but merely include in the instructions a list of the responsibilities which the solicitor impliedly undertakes by agreeing to act for the mortgagee. These range from specifying the responsibilities in great detail, to a broad directive to the solicitor to complete all necessary documentation, obtain all necessary searches and take all precautions to ensure that the mortgagee acquires what it terms “good security.” Some of the items to look for, in no particular order, include the following:

Form

Although the lender will probably provide its own standard mortgage terms, those terms should be reviewed before proceeding and you should satisfy yourself as to the applicable format with regard to, for example:

(i) CMHC form;
(ii) guarantee clauses;
(iii) collateral mortgages; and
(iv) strata clauses.

If there is any doubt, confirm your concerns and the instructions of the mortgagee in writing. Do not modify the standard terms provided unless authorized to do so in writing. Your opinion should indicate that if you have been instructed to use the lender’s standard terms regardless of your concerns, you opine only that the mortgage has been prepared on the form provided.

Prepayment

Clauses providing for prepayment terms are often added as schedules to the mortgage. Read them carefully. You may have an opportunity to cross-check the prepayment terms with those contained in the statement of disclosure required by the Bank Act if one is included with your instructions. If a clause is to be added or inserted is there also a clause to be deleted? Ensure that your instructions are complete or you have written authority to change the documentation.

Commitment Letter/Loan Agreements

Often these are expressed to be part of the instructions to the solicitor. Check to see that there are no discrepancies between the instructions and agreement, that you are aware of any further security document required to be prepared by you, and that you have had an opportunity to review any other documents on which you will impliedly base your opinion.

Insertions/Deletions

Generally the mortgagee will provide instructions about which clauses to insert or delete. The usual terms and changes are dealt with in specific sub-clauses, but beware of insertions/deletions that are assumed or are buried in the wording of the mortgage. For...
example, look for references to the “guarantee attached” or to “promissory notes, copies of which are enclosed” and the like.

Guarantors

You will often be instructed to have a guarantor of the mortgage, yet some standard mortgage terms do not contain guarantee clauses in the body of the mortgage. When inserting a clause, obtain approval from the mortgagee for the wording of the specific clause used. Ensure that the mortgage clause and the face page correspond, especially in description of the covenantor or guarantor. The terms “Covenantor” and “Guarantor” have been held to incur different liabilities, so a drafting error in using these terms could result in a release of the “guarantor/covenantor” from liability. Review the preamble and the guarantor clause for an expression of the existence of consideration, and consider the need for independent legal advice. Note that under the Land Title Act, a guarantor need not sign the Form B, in accordance with Part 5 of the Act.

Interest Rates and Adjustment

Lenders are entitled to “calculate” or “compound” the interest charged monthly, quarterly, half-yearly, or yearly. In any case, the interest is usually calculated “not in advance” and is expressed as “x% per annum.” Two important points to remember are that calculation of interest accrued and balance outstanding from time to time are rarely on a straight-line basis and that frequency of payments is another factor which may further complicate the calculation.

It is not enough to know the rate of interest. For full disclosure of the cost of the borrowing the method of calculation of interest must be known. Since the most common way of calculating interest is “half-yearly” on first mortgages, to satisfy s. 6 of the Interest Act and to satisfy the budget-conscious borrower, the lender should be asked to restate the “per cent per annum” as “calculated half-yearly” to permit true comparisons. This is a simple calculation for the lender.

A caveat: those rates quoted initially as “half-yearly” will not necessarily be cheaper than those calculated over a shorter period of time; the comparison based on the converted rates will tell the tale.

Also, be aware that the interest rate in the instructions may have been changed in a side letter. Ensure that you have instructions on which rate to insert in the mortgage and that any changes from your instructions are confirmed in writing.

Interest adjustment dates are usually inserted in the mortgage and interest accrued before that date must be paid by the mortgagor. With the recent popularity of payment periods of less than a month, the interest adjustment due in the instructions, in the standard mortgage terms, and in side agreements may all vary. Watch carefully as to the date to be used. Beware also of the problems associated with s.10 of the Interest Act (see §7.16, para. 3). Review the mortgagee’s instructions to determine:

- whether the solicitor or institution is responsible for holding back the interest accrued and to be deducted from advances (the institution, not the solicitor, should do the calculations); or
- if the institution deals with interest accrued separately and this amount is not reflected in the advance of mortgage monies or shown on the order to pay.

Commitment Expiry Date

Consider the expiry date associated with the commitment immediately upon receiving instructions. The commitment expiry date may represent the date funds are actually needed, or it may just limit the commitment time period. If dealing with a real estate sale closing, the institution’s commitment to advance will normally fall on or after the closing date. Even in these situations, however, buyers may extend closing dates but fail to advise their lender. If the borrower defaults before funds are advanced and before the expiry of the commitment date or last date for advance, the mortgagee will:

(i) cancel the mortgage and retain all appraisal and commitment fees;

(ii) charge the mortgagor a penalty or fee for extension of time to advance; or

(iii) alter the interest rate to the new, if higher, rate and extend the date for advancement of funds.

Each institution has its own procedure for advancing funds which range from a phone call request to requirement of a three-day advance reservation for funding. Review the requirements of each institution carefully as failure to do so could result in not only the embarrassing situation of being unable to fund a mortgage on time but perhaps collapse of the entire transaction and potential liability for a higher interest rate.
Consents

The mortgagee may enclose a standard form consenting to your acting for the buyer/borrower as well as the lender pursuant to section 3.4 and Appendix C of the BC Code. If not, make sure you have written consent from both parties if acting for them.

The mortgagee may require that the solicitor certify:

(i) that the mortgagor has been advised to read the mortgage;

(ii) that the mortgagor has had an opportunity to do so; and

(iii) that the solicitor has explained the nature and effect of the mortgage to the mortgagor before execution.

It is impractical to allow a mortgagor to read the mortgage word by word while he or she sits in your office. You also risk a potential conflict of interest if the mortgagor has his or her own solicitor, and has neither executed a consent nor is capable of complying with consent requirements.

Order to Pay

Determine from the instructions and the form used to requisition funds the mechanism for advance of funds by the lender. Having provided you with instructions, most lenders will provide the solicitor’s firm with funds, but note:

(i) most institutions require a separate direction to pay authorizing specific disbursements of the mortgage advances signed by the borrowers in order to advance funds; and

(ii) some institutions require you to collect your fees separately from the borrowers and not deduct them from the mortgage advance; make sure you are aware of this and collect your fees and disbursements before registration.

(b) Investigation and Searches

While lawyers are required to obtain public searches to investigate title, lenders may not require copies of these searches, and instead may rely solely on the opinion given in the lawyer’s report on title.

However, your opinion is just that, a legal opinion, based on the assumption that information obtained is accurate. It must be stated to be based on specified assumptions, facts discovered, and documents obtained from other sources. It is incumbent upon the solicitor to review the information obtained because the law does not presently hold municipalities liable for the negligence of their employees in providing this type of information and blind reliance on information, which a cursory look could have revealed as in error, will not protect the solicitor.

Taxes

Most institutions require proof of the payment of the current year’s taxes. Generally, taxes are paid in the summer and accordingly from payment due date until December 31, a tax certificate obtainable in writing from the appropriate taxing authority will suffice. However, review the lender’s specific requirement carefully as to payment of current “billed” or “due taxes” or just “current taxes.” The latter clause creates the problem. During the months of January through to the tax billing date, a solicitor cannot determine the amount which will be due and has no way of ensuring that these taxes will be paid. If this is required, the most you can do is either:

(i) estimate the taxes and hold this amount back from the mortgage proceeds to be paid when due; or

(ii) pay an estimated sum to the municipality for the future credit of the mortgagor and ensure that you have a system in force to complete documentation when taxes are actually due.

Most of the major institutional lenders require a portion of the upcoming taxes to be paid monthly, and if less than 12 months of payments will be paid before the tax due date, a tax holdback to ensure that there are sufficient funds on hand at tax billing date to pay the taxes owing. Ensure you are aware of the amount of the holdback and that the holdback is deducted from the available advance or determine whether the lender will deduct from its customer’s account separately.

Insurance (See also § 7.12)

Check your instructions pertaining to the lender’s requirements for insurance carefully. In most cases the solicitor will not receive or review the actual policy but only the binder letter or cover note. Consider the need to modify your opinion accordingly, especially where the solicitor’s responsibility includes determining that the insurance company is a “reputable and financially responsible company” and asks for certification regarding optional loss settlement clauses and co-insurance clauses.
Although the information contained in the binder letter is minimal, it must be checked very carefully. For example, it must show the appropriate name and address for loss purposes for the lenders.

Additional practice tips follow.

(i) Duplexes

Although these are regulated by the *Strata Property Act*, many owners treat them as independent holdings and do not bother with a strata corporation. Since it is possible that, if Side A has no insurance coverage, the insurance of Side B could be responsible for replacing only three sides of Side B, it is advisable that the building be covered under one policy. An alternative is for each side to require the insurer of the other side to advise it of any changes to or cancellation of the policy on that other side.

(ii) Manufactured ("Mobile") Homes

These are considered a specialty item because of the likelihood of greater damage being done. Allow the licensee more time to arrange coverage.

(iii) Change of Status

The coverage provided by most "homeowner" policies will be in jeopardy if the premises are rented out or vacant for more than 30 days. The licensee should be notified immediately of any changes in status.

(iv) *Law and Equity Act*, s. 23

This section refers to covenants to insure against fire and may be of protection to mortgagees for fire loss where insurance is in place.

(v) *Law and Equity Act*, s. 26

This section provides relief against forfeiture for breach of covenant to insure.

(vi) Full Value of Loan/Full Insurable Value of Improvements

It is impossible to insure for the full value of the loan if the improvements are worth much less than the loan. The lender relies partly or mainly on land value; but it is equally impossible for a solicitor to give an opinion as to the full insurable value of the improvements unless the lawyer relies on outside information (and so specifies).

(vii) Mortgage Clauses

Some institutions want their own mortgage clauses included in the policy but usually a standard mortgage clause approved by the Insurance Bureau of Canada will suffice. The general purpose of this clause is to provide for payment of insurance moneys to the mortgagee notwithstanding the negligence of the mortgagor.

(viii) Cancellation/Termination Notice

Section 106 of the *Insurance Act* covers termination. Section 106 provides that the loss payee gets equivalent notice as the insured, being 15 days if by registered mail or five days if in person prior to cancellation. Note that the insurer only need give notice to the loss payee if the insurer cancels the policy (J.W. Arden Logging Company v. Fireman’s Fund Insurance Company (1964), 46 W.W.R. 620 (B.C.C.A.), followed in *Stone Creek Hotel Ltd. v. Symons General Insurance Co.* (1986), 24 C.C.L.I. 131 (B.C.S.C.)). There is no such requirement if the insured cancels the policy (i.e. to obtain a refund of premiums). As such, the lender may wish to take an assignment of the insured’s right to a refund of premiums, as contemplated by s. 16 of the *Insurance Act*.

3. Survey

For further discussion of surveys, see §7.11 in *Practice Material: Real Estate*.

(a) What Is a Survey?

A “site survey” is a vague term usually referring to a drawing of the subject property, usually prepared by a licensed surveyor, showing topographic contours, elevation, underground services, etc., but not usually showing existing buildings.

A “survey certificate,” on the other hand, is a drawing of the subject property, again usually prepared by a licensed surveyor, showing the siting of the improvements on the property in relation to the lot lines. The survey certificate will show whether the improvements encroach on adjoining roads and/or properties or whether the buildings on adjoining properties encroach on the subject lot. If encroachments are significant, the buyer’s willingness to complete or ability to finance the transaction may be affected.
Since the term “survey” is used loosely, you should clarify what your client requires: in most cases it is a “survey certificate.” We will assume that and refer to it simply as a “survey.”

A survey is often required when a buyer is obtaining institutional financing. Whether a survey will be required when financing is being obtained from non-institutional sources, such as family, will depend on your instructions. Your client should be advised of the risks involved in not obtaining a survey, including the hampering of ability to sell or finance in the event of an encroachment or other defect discovered subsequently. If the relevant party decides not to obtain a survey, the instructions should be confirmed in writing. If you have an extra concern, this confirmation should be acknowledged in writing by the client.

(b) Obtaining a Survey

A survey may be obtained through any licensed surveyor, although recently some firms of survey technicians have entered the field. If the seller or lender presently has granted a mortgage to an institutional lender, there may already be a survey. It may be possible to obtain a copy of that survey and update it with a Statutory Declaration. Any such alternative arrangements should be approved by the financial institution for whom you are acting as each lender has its own requirements as to how old a survey may be before a new one is required and there may not have been continuity of ownership since the last survey. Generally, at least in urban areas, a survey can be obtained within a few days.

(c) Reviewing the Survey—Encroachments and Municipal Requirements

To be acceptable to a lender, a survey must be taken at least at the footings stage of construction. A survey of “forms” is not acceptable.

Usually, when reviewing a survey for a lender, you will be required to satisfy yourself that, not only are there no encroachments either by adjoining improvements or by the subject property onto adjoining properties and roads, but that the building complies with all local set-back and site coverage requirements. As each local government’s requirements are different, you will need to contact the appropriate office of the local government to determine what their requirements are and whether the property complies.

Some surveyors are willing to do this research and certify the results. Appendix 10 is an example of this type of survey. It shows that the building does not conform with the stated municipal requirements.

If, as in the example, your client’s property does not comply with the requisite set-backs, you will be required to obtain a “comfort letter” from the local government in which they acknowledge the non-compliance and confirm their intention, at the present time, not to take any action to require compliance. A sample letter requesting such a determination and a typical comfort letter are attached as Appendices 28 and 29. Many governments require a fee to provide a comfort letter. Usually your request will not be processed until the fee is paid, which can sometimes create timing problems for your completion.

If your survey shows an encroachment on adjoining properties, you will be required to obtain the necessary right to allow the encroachment to remain, depending on the instructions from your client.

(d) The Opinion

You should state that your opinion as to the location of the improvements, existence of encroachments and other survey matters is based on the survey and such other information obtained from the surveyor or municipal officials. In circumstances where no survey has been requested, your opinion should include a qualification to the effect that the title opinion is subject to any defects an up-to-date survey might disclose.

(e) Western Law Societies Conveyancing Protocol

The Western Law Societies Conveyancing Protocol took effect on February 15, 2001. The Law Societies of BC, Alberta, Saskatchewan and Manitoba have all endorsed the Protocol. The primary purpose of the Protocol is to allow a lawyer to advise an institutional lender client in a residential mortgage transaction that the lender need not obtain an up-to-date building location survey before the lender funds a loan secured by a mortgage, provided no known building location defects exist. If the loan transaction qualifies, the lawyer may give a Western Law Societies Conveyancing Protocol Solicitor’s Opinion (a “protocol opinion”). For sample wording of a protocol opinion and other related documents, visit the Law Society’s website (www.lawsociety.bc.ca).

In effect a lawyer who provides a protocol opinion is advising the lender that a current building location survey need not be obtained. If building location defects are discovered later and those defects would have been disclosed if
a standard building location survey had been done before the funds were released, then the advice to the client was wrong advice. The Lawyer’s Insurance Fund will accept liability and pay the cost or repair or any actual loss suffered.

It is important to remember that the Protocol does not offer protection to the borrower. When acting for the borrower, the lawyer must still advise the client that the only protection against building location defects is a building survey. A lawyer representing the borrower and lender in a residential mortgage transaction must give the borrower this advice.

This protocol helps streamline process and costs for mortgage lenders. Although some additional practice standards are set for BC lawyers in issuing protocol opinions, nothing in the protocol otherwise diminishes or changes the usual practices of prudent law firms or the standard of care for lawyers acting on mortgage transactions.

Many national lenders accept opinions from lawyers in BC in the conveyance or refinancing of residential properties in accordance with the Western Law Societies Conveyancing Protocol. Note that most practitioners, however, do not use the Protocol.

Look to the Law Society’s website for revisions and news.

Note that title insurance is commonly placed, and is preferred by some lenders.

4. Zoning and Use

(a) Zoning

All municipalities and many rural areas outside municipalities have zoning bylaws regulating the use of land. For example, legality of basement suites is a matter of zoning. It is important, particularly in respect of commercial transactions, to obtain a zoning report from the municipality in order to determine that the construction on the property and the use to which the property is to be put are permitted. Even in the case of residential property it is important that an owner, potential owner and lender know that the construction meets municipal requirements and the permitted uses within the zone.

If the property has been bought and is being used as security based on it being revenue property with one or more possibly illegal suites, the lender could be at risk if the municipality discovers this improper use and requires the tenants to vacate.

It is not normally or necessarily within the scope of the solicitor’s retainer to investigate the zoning and use of the property for a residential transaction, the lender should be advised that you are not assuming responsibility for this, and that you can either be specially retained to do so or the lender should investigate the matter itself.

Since the matter of zoning may be part of the lender’s standard instructions, you may be required to investigate and give an opinion on the matter, in which case you should obtain a letter from the appropriate authority in the municipality. Since many municipalities charge a fee for this service and will not act until the fee is received, check local requirements in advance.

(b) The Opinion

A typical request for an opinion on zoning includes that:

The building and any ancillary building or structure does not, with respect to its location or use, violate any registered restrictions, provincial statutes and regulations therefor, municipal zoning or building bylaws and regulations of any competent authority.

Even if you have a zoning letter from the municipality, you will probably not be in a position to render the opinion requested. The following tips may explain and assist:

(i) Registered Restrictions—obtain copies and if possible have the registered owner complete a statutory declaration with regard to compliance of the property to restrictions such as restrictive covenants, statutory building schemes, easements and rights of way.

(ii) Provincial Statutes and Regulations—some of the more common unregistered statutory liens are dealt with later in this paper. You would have to have an exceptional knowledge of all laws and regulations to provide an opinion as to location or use and it would be foolhardy to do so.

(iii) Building Bylaws—it is not usual practice for the lender’s solicitor to obtain a final occupancy certificate (except perhaps in the case of new construction). Some homes have never had the final inspection because of oversight, labour strike, or other reasons. There may be a substantial defect in the property by failure to comply with the building bylaws, so do not render an opinion as to building bylaws that include a building code without basing
your opinion on municipal documents and being careful to state what your opinion is based on.

(iv) Non-Conforming Uses—properties for which you have obtained a municipal “comfort letter” or which are non-conforming may not seriously affect use of the property for the mortgagor’s purposes if you are fully aware of the mortgagor’s intentions for the property. However, renovations may not be allowed on non-conforming properties. There is also a danger that on destruction by fire the insurance, even at replacement value, will not be sufficient to upgrade the property to comply with the more onerous requirement of a newer bylaw. Specific insurance purchased to cover this eventuality is necessary.

If you can expressly rely on a sufficient survey and zoning information and on a statutory declaration of the mortgagor, you may choose to provide an opinion as to the property “not violating registered restrictions regarding use” and any specific opinion rendered with respect to other items.

5. Marketability

You may be asked to provide an opinion indicating, for example, that:

(a) easements, encroachments, reservations and restrictions do not affect marketability;

(b) any title defects, encumbrances and easements . . . to which the lands are subject must be referred to (us) with your opinion as to the effect of such discrepancies on the marketable title;

(c) existing easements, encroachments, reservations or restrictions do not, in your opinion, materially affect the marketability of the lands and premises or unduly restrict their reasonable use for the purpose intended;

(d) . . . are neither detrimental to your security nor to the marketability of title.

It is prudent to obtain copies of all encumbrances against title and copies of reference or explanatory plans where appropriate. Where this is impractical, e.g. Aeronautics Act Regulations, Agricultural Land Reserve, Dyking Authorities, Waterworks District (separate from taxes), a phone call followed by a letter to the appropriate authority will usually provide the required information.

Any opinion, whether based on searches, detailed reviews of the encumbrances and surveys or on personal knowledge should not exceed commenting that the “effect of the encumbrance does not seriously or materially affect marketability.”

6. Miscellaneous

Each lender requires different information. Even within an institution, instructions and practices may change, each transaction should be reviewed individually. Less frequently requested are the following items which the solicitor should consider in any event:

(a) Prior Charge—determine the amount outstanding and request the institution to provide a letter confirming this amount.

(b) Identity—Law Society Rules 3-98 to 3-109 outline the client identification and verification procedures for lawyers. It is imperative that the appropriate policies and procedures have been followed as there have been “scams” where the person executing the mortgage was not the mortgagor or where the persons executing the mortgage were not the registered owners but instead one registered owner and an accommodating “friend” who was not a registered owner.

(c) Purchase Price—confirm the purchase price of the land if the mortgage funds are being used to buy property. A letter from the conveying solicitor or copy of statements of adjustments should suffice. Sometimes inflated prices are shown on agreements for the purchase of land to obtain a larger mortgage when in fact the actual agreement between buyer and seller may be several thousand dollars less, enabling the mortgagor to buy with a much smaller down payment. The mortgagee may also want to ensure that the buyer is in fact making the down payment and is not obtaining secondary financing from another source. This would indicate a potentially less secure loan repayment by the mortgagor because of the higher debt: income ratio.

(d) Delivery of Mortgage—the borrower should receive a copy of the registered document. Many institutions require a receipt from the borrower, but these are almost impossible to obtain after completion of the transaction. Ensure that the borrowers have been sent a copy of the mortgage and if necessary, that a receipt for a duplicate copy of the mortgage has been obtained.

Real Estate
Chapter 8

The Builders Lien Act

[§8.01] Introduction

The object of this chapter is to provide a basic working knowledge of the law and practice relating to builders liens. This field can be very complex and the law is constantly evolving. This chapter is limited in order to give a simplified overview. It should not be relied on as complete or authoritative when practising in this area.

There are several helpful texts that should be consulted when considering builders lien matters. Construction Builders’ and Mechanics’ Liens in Canada, by Bristow et al., deals with builders lien legislation across Canada. While lien legislation differs among provinces, judicial decisions from other jurisdictions on similarly worded provisions can be useful. The Guide to Builders’ Liens in British Columbia, by David A. Coulson and Dirk Laudan, focuses on the British Columbia legislation with reference to other jurisdictions only where comparison may be helpful. The British Columbia Builders Liens Practice Manual, published by CLE, contains many useful precedents and helpful, practical tips from leading practitioners in this area.

The Builders Lien Act, S.B.C. 1997, c. 45, as amended (the “Act”), is structured around three basic concepts. They are:

1. the right to liens against both property to which labour or material is provided (s. 2) and the holdback retained from a contractor or subcontractor under the Act (s. 4(9));
2. the capacity of an owner to limit its liability for those liens (the holdback defence) (s. 4); and
3. the right of unpaid workers and subcontractors (including material suppliers) to a trust interest in money paid on account of construction contracts or subcontracts (s. 10).

As noted, lien rights apply in respect of both the subject property and the holdback. The decision of the British Columbia Court of Appeal in Shimco Metal Contractors Ltd. v. North Vancouver (District), 2003 BCCA 193 confirmed that certain persons have an independent lien on amounts held back from contractors and subcontractors under the Act, even if they have lost their lien rights against the property to which their work or material was provided. This lien is commonly referred to as a “lien on the holdback” or a “Shimco lien.”

The Act does not guarantee payment for a lien claimant but seeks to balance competing interests. It creates a form of security (and a corresponding right to claim some form of priority over others) for lien claimants and trust beneficiaries.

Conceptually, liens arise when the work or material is provided. Filing a claim of lien and commencing an enforcement action within the times prescribed by the Act preserves the lien against the property. If these things are not done, the lien against the property is extinguished.

It should be noted that the current Act replaced the Builders Lien Act, R.S.B.C. 1996, c. 41 in 1998. The old Act is referred to in this chapter as “the former Act.”

[§8.02] Lien Claimants and Lien Rights—Section 2

Lien rights against property are created under s. 2 of the Act. Section 2 provides that:

... a contractor, subcontractor or worker who, in relation to an improvement,

(a) performs or provides work,

(b) supplies material, or

(c) does any combination of the things referred to in paragraphs (a) and (b);

has a lien for the price of the work and material to the extent that the price remains unpaid, on all of the following:

(d) the interest of the owner in the improvement;

(e) the improvement itself;

(f) the land in or under which the improvement is located;

(g) the material delivered to the land.

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1 Tyler Galbraith, Jenkins Marzban Logan LLP, revised this chapter in April 2019. Previously revised by Don Thompson and Tyler Galbraith (July 2016 and April 2012); the Land Title and Survey Authority, for content relating to the BC land title and survey system (December 2018, 2017 and 2016); Mike Demers and Don Thompson (2010); Don Thompson and Scott L. Booth (2003, 2004 and 2006); Brent D. Jordan (2001); and Patrick G. Guy, with comments from Don Thompson (1999). Prepared for PLTC by Patrick G. Guy in April 1998, with the assistance of Robert W. Cameron and publications entitled New Builders Lien Act (British Columbia Law Institute and Ministry of Employment and Investment) and Builders Liens-1997 (Continuing Legal Education Society of British Columbia).
1. The Improvement

“Improvement” is defined in s. 1 of the Act:

“improvement” includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading, or ditching of, in, on or under land."

This broad definition requires one to consider carefully, on the particular facts of each case, whether something constitutes an “improvement.” For example, something can constitute an “improvement” under the Act even if it does not actually improve the land in the sense of making it better.

Since the definition of “improvement” under the Act is substantially the same as that under the former Act, cases considering the former Act remain helpful. Some significant decisions with respect to the meaning of “improvement” are as follows:

(a) There is no improvement, and therefore no lien, if no physical work takes place (Chaston Construction Corp. v. Henderson Land Holdings (Canada) Ltd., 2002 BCCA 257).

(b) Things that are attached to or intended to become a part of the land in question will usually constitute an improvement, although the test for determining whether something is a fixture is not necessarily the test for determining whether something constitutes an improvement (Levan Millwork Ltd. v. Larken Industries Ltd. (1989), 37 C.L.R. 78 (B.C.S.C.) and Deal S.r.l. v. Cherubini Metal Works Ltd., 2000 BCCA 49).

(c) Demolition in preparation for construction may constitute an improvement (Rupert Reinforcing Ltd. v. Worldwide Connections Inc. (1980), 24 BCLR 78 (C.A.)).

(d) The work need not be entirely performed within the boundaries of the property being “liened” (Pedre Contractors Ltd. v. 2725312 Canada Inc. and 360 Fibre Ltd., 2004 BCSC 1112).

Note that not all land is “lienable.” Highways (including municipal streets), federal Crown interests in land, certain interests in land owned by federally regulated enterprises, and reserve land (with the possible exception of some leasehold interests and some lands which are subject to recent treaties) are not “lienable.”

2. Classes of Lien Claimants

Classes of lien claimants are defined in s. 1 of the Act. There are three main classes of lien claimants: (1) contractors; (2) subcontractors; and (3) workers. The subclasses architects, engineers and material suppliers are either contractors or subcontractors under the Act.

(a) Contractor

“Contractor” means a person engaged by an owner to do one or more of the following in relation to an improvement:

(a) perform or provide work;
(b) supply material;

but does not include a worker.

A lien claimant must have a direct contractual relationship with an owner in order to be a contractor. In most cases a contractor will be a general or “head” contractor. However, where an owner builds a project without hiring a general or “head” contractor and directly employs the persons traditionally thought of as subcontractors (e.g. the electrical trade, the plumbing trade, etc.), those persons become “contractors” because they are engaged directly by the owner.

(b) Subcontractor

“Subcontractor” means a person engaged by a contractor or another subcontractor to do one or more of the following in relation to an improvement:

(a) perform or provide work;
(b) supply material;

but does not include a worker or a person engaged by an architect, an engineer or a material supplier.

A “subcontractor” as defined in the Act includes a sub-subcontractor.

In some circumstances a person may qualify as a contractor or subcontractor, and therefore have lien rights, as a result of performing work off-site if the work is an integral part of the construction process (Kettle Valley Contractors Ltd. v. Caribou Paving Ltd. (1986), 1 B.C.L.R. (2d) 236 (C.A.), decided under the former Act).

The Court of Appeal has ruled that truckers who merely transport material to a project are not entitled to liens (Cam Cement Contractors v. Royal Bank (1973), 38 D.L.R. (3d) 427 (B.C.C.A.)). Similarly, a claimant who provided air transport of workers and supplies to a remote mining camp was not entitled to a lien (Northern Thunderbird Air v. Royal Oak & Kemess Mines, 2002 BCCA 58).
(c) Worker

“[W]orker” means an individual engaged by an owner, contractor, or subcontractor for wages in any kind of work, whether engaged under a contract of service or not, but does not include an architect or engineer or a person engaged by an architect or engineer.

It is relatively uncommon for workers to file claims of lien. However, it is common for a certificate to be issued under Part 2 of the Employment Standards Act on behalf of a worker. Such certificates do not have priority over a lien; see Ocean Air Conditioning v. Dan, [1977] 3 W.W.R. 456 (B.C.C.A.), and Westmin Resources Ltd. v. Haste Mine Development Ltd. (1984), 58 B.C.L.R. 235 (S.C.).

The definition of wages in the Act is broad and includes any money required to be paid under a collective agreement.

(d) Architects and Engineers

Architects and engineers engaged by an owner will be “contractors” and entitled to a lien. Similarly, an architect or engineer engaged by a “contractor” will be a “subcontractor” and entitled to a lien. Architects and engineers provide “services” as defined, which are part of the definition of “work” and so are the proper subject of a lien. It is important to note, however, that a person engaged by an architect or engineer has no right to a lien.

The definitions of “services”, “work”, “contractor” and “subcontractor” have been interpreted so as to entitle an architect or engineer to lien rights for design services, whether performed before or after construction begins, and whether performed on- or off-site, as long as some physical work based on the design takes place (Chaston Construction Corp. v. Henderson Land Holdings (Canada) Ltd., 2002 BCCA 257). It is important to note, however, that if no physical construction takes place, there are no lien rights for anyone.

(e) Material Supplier

Material supplier is a defined term: “material supplier” means a contractor or subcontractor who supplies only material in relation to an improvement.” Material suppliers are similar to architects and engineers in that no lien or trust rights accrue to a person engaged by or under a material supplier.

The Court of Appeal held in G.E. Shnier Co. v. Hewlett Homes (1978), 8 B.C.L.R. 361 that the claimant must prove two facts in order to be classified as a material supplier:

- The claimant must prove that it supplied material for the improvement. Invoices or purchase orders describing the property or naming the project, or oral evidence to the effect that the material was ordered by the contractor, subcontractor, or owner for the improvement, can be used to prove this.
- The claimant must prove that the material was delivered to the land upon which the improvement is situated. Delivery slips endorsed by the contractor or subcontractor can be used to prove this. Often, however, a material supplier will supply material to a contractor or subcontractor’s yard or warehouse, even though it was ordered for a specific project, or material will be picked up at the supplier’s premises. This can result in a problem proving that the material was actually delivered to the land upon which the improvement is situated. Section 29 of the Act addresses the issue of proof of delivery. Under s. 29, if a contractor or subcontractor to whom material is supplied signs an acknowledgement of receipt stating that the material was received for inclusion at an identified address, that acknowledgement is prima facie proof that the material was delivered there.

In some segments of the industry, material is delivered to a contractor or subcontractor, combined with other material to manufacture a finished product, and then delivered to the job site. Such “transformation” is not a bar to a lien in favour of the material supplier (HBG Enterprises Ltd. v. Lamarche Window Manufacturing Ltd., [1998] Civ. L.D. 650 (B.C.C.A.)). Note, however, that persons who supply materials to other material suppliers do not have lien rights.

Persons who rent equipment without an operator are entitled to liens as material suppliers.

[§8.03] Completing the Claim of Lien Form

Section 15 of the Act requires that a claim of lien be made by filing the prescribed form in the appropriate Land Title Office. See Builders Lien Appendix 3 for the prescribed form (Form 5) and for a completed example of the electronic version. Lawyers must file builders liens claims electronically.
The following numbered comments correspond to the numbered paragraphs in Form 5:

1. The claimant or an agent may complete Form 5. A corporate claimant can only make a claim through an agent. An individual can make a claim personally or through an agent. A lawyer may act as an agent. The information in the first sentence and that in the first paragraph are identical where an individual completes the form on his or her own behalf.

(a) Identify the Lien Claimant

If an agent completes the form, the agent’s name and address are inserted in the first sentence and the lien claimant’s name and address are inserted at paragraph #1. The lien claimant must be identified correctly. A failure to do so will be fatal to the lien claim (Framing Aces Inc. v. 0733961 B.C. Ltd. dba Omni Pacific, 2009 BCSC 389). It is good practice to obtain a corporate search even of your own client, to confirm the name.

(b) Identify the Property

Form 5 requires the PID and the correct and complete legal description of the land.

Often problems occur when trying to identify the correct property and legal description.

Once you have sufficient information, obtain a land title search and, if in any doubt, obtain a copy of the survey plan referred to in the legal description. If there is still doubt, have the client/claimant review and initial the plan. Do not rely on a claim of lien filed by another claimant, because that claim of lien may not have been correctly prepared, or the legal description(s) may have changed (as often happens when construction is taking place).

If a number of legal descriptions are to be charged, attach a schedule listing them all, including the PIDs.

2. A short description of the work done or material supplied or to be done or supplied.

3. The name of the party with whom the lien claimant contracted, or to whom the claimant supplied material, and who is or will become indebted to the lien claimant. Like misnaming the lien claimant, any error in naming this party will likely be fatal to the claim (Nita Lake Lodge Corp. v. Compact Systems (2004) Ltd., 2006 BCSC 885).

4. The amount due, and when that amount became due or will become due. Even if part or all of the amount claimed is disputed, make the claim if it has merit, because if it is not claimed it may not be recovered. Once filed, the amount of a claim of lien cannot be increased (Westburne Industries Ltd. v. Lougheed Towers Ltd. (1985), 61 B.C.L.R. 187 (C.A.), although a second claim of lien can be filed if the lien filing deadline has not passed. Include all amounts the client reasonably believes will come due, including pending change-order amounts or claims for extra work and unpaid progress claims (Arch Windoor Ltd. v. Aragon (Quayside) Properties Ltd., 2012 BCSC 179). Claims for damages are not properly included in a lien claim unless they can be characterized as part of the price/cost of the work, see Astro Contracting Ltd. v. McArthur (1986), 7 C.L.R. 230 (B.C. Co. Ct.). Put another way, if the amounts claimed are for work performed or provided, or material supplied, or are so closely connected to them that it is reasonable and proper that they should be included in the statutory regime under the Act, they are properly the subject of a claim of lien (M3 Steel (Kamloops) Ltd. v. RG Victoria (Construction) Ltd., et al., 2005 BCSC 1375; Grace Residences Ltd. v. Jeda Mechanical Ltd., 2008 BCSC 1616). Interest is not recoverable through or on a builders lien (Horsman Bros. Holdings Ltd. v. Lee (1985), 12 C.L.R. 145 (B.C.C.A.); Westburne Industrial Enterprises v. Lougheed Towers Ltd. (1985), 61 B.C.L.R. 187 (B.C.S.C.); Bank of Montreal v. Vanmore Holdings Ltd., [1989] 4 W.W.R. 697 (B.C.C.A.).

5. The address for service of the lien claimant. Usually this is the claimant’s business address. Unless you are acting for a good, reliable client, do not give your address as the address for service. A notice to commence an action can be delivered to the address for service under s. 33(4) (see §8.35 of this chapter). If your office is served with a notice to commence an action and the notice is not properly attended to (with proceedings being commenced and a certificate of pending litigation filed within 21 days), that omission is likely to constitute negligence. In addition, you should confirm with the lien claimant, in writing, precisely what s. 33 requires and the steps the claimant must take on receipt of a notice to commence an action, in order to preserve the lien.

When receiving instructions to file a claim of lien, it is good practice to ask whether your client is aware of any labour and material payment bond posted in respect of the improvement by the person with whom the client contracted. Your client should be advised to inquire if such a bond exists. There are strict time limits for giving notice and commencing enforcement actions under such bonds.

Owing to the short time limitations for filing claims of lien, it may not always be possible to obtain all of the information described above in time. It is not uncommon for potential lien claimants to approach a lawyer with only one or two days left in the claim of lien filing...
period. In those circumstances, the lawyer’s priority should be to try to ensure that a claim of lien is filed against at least the correct property within the claim of lien filing period. If necessary, file against multiple properties and keep investigating. The claim of lien can be released against “extra” properties when the correct property is identified.

§8.04 Section 15—Filing the Claim of Lien

Once the Form 5 is completed, it must be filed electronically in the Land Title Office. Counsel should obtain a title search immediately pre-registration in order to confirm that the legal description has not changed since the claim of lien was prepared. After filing, obtain a post-registration search to ensure that the claim of lien is shown as a pending application against title.

Section 18 of the Act concerns procedure for filing a claim of lien against mineral property under the Mineral Tenure Act. These lien claims are relatively rare; nonetheless, you should be aware of these provisions.

§8.05 Section 20—Limitations for Filing Claims of Lien

If a claim of lien is not filed in the Land Title Office within the time set out in s. 20, the lien is extinguished and it cannot be revived.

Section 20 reads as follows:

(1) If a certificate of completion has been issued with respect to a contract or subcontract, the claims of lien of
   (a) the contractor or subcontractor, and
   (b) any persons engaged by or under the contractor or subcontractor may be filed no later than 45 days after the date on which the certificate of completion was issued.

(2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after
   (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
   (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.

(3) Subsection (1) does not operate to extend or renew the time for filing of a claim of lien if
   (a) that time would otherwise be determined with reference to the time an earlier certificate of completion was issued, or

(b) time had started to run under subsection (2).

(4) On the filing of a claim of lien under this Act, the registrar or gold commissioner has no duty to inquire as to whether or not the lien claimant has complied with the time limit for filing the claim of lien.

The time for filing a claim of lien under s. 20 expires no later than 45 days after the first event that triggers the running of time. The Interpretation Act provides that the first day is excluded and the last day included.

Under the Act, three different events can trigger the running of time for filing a claim of lien (s. 20):

(1) a relevant “certificate of completion” is issued;

(2) the head contract is completed, abandoned or terminated (if there is a head contract);

(3) the improvement is completed or abandoned (if there is no head contract).

1. Certificate of Completion

A “certificate of completion” is a document (Form 3) issued by the “payment certifier” under s. 7 of the Act. (See Builders Lien Appendix 2 for the prescribed form.) The certificate states that work under a particular contract or subcontract has been completed.

Section 7 indicates that the payment certifier will normally be the person identified in the contract or subcontract as being responsible for payment certification. However, if no payment certifier is identified, the payment certifier will be the owner acting alone in respect of amounts due to a contractor, and the owner and a contractor acting together in respect of amounts due to a subcontractor.

There must be a request from the appropriate contractor or subcontractor before the payment certifier can issue a valid certificate of completion; a certificate unilaterally issued without such a request will likely be invalid (Quigg Homes WV345 Ltd. v. Bosma, 2004 BCSC 1582).

Issuance of a certificate of completion causes the time to start to run for the filing of a claim of lien by the contractor or subcontractor whose work is certified complete, and any persons claiming under that contractor or subcontractor. It is important to note, however, that a certificate of completion will not extend or renew the time for filing a claim of lien if the 45 days had already started to run because of another triggering event.

If no certificate of completion is issued, the triggering event that will cause the time for filing claims
of lien to commence depends on whether there is a “head contractor.” If there is a “head contractor” (defined in s. 1, and more or less equivalent to what is commonly referred to as a “general contractor”), the time for filing begins to run when the head contract has been completed, abandoned or terminated. If there is no “head contractor” then the time for filing begins to run when the “improvement” has been completed or abandoned.

Note that mere completion, termination or abandonment of a subcontract, or of a contract which is not a head contract, will not in itself trigger any claim of lien filing deadline.

2. Completed

Under the Act “completed” means substantially completed, but the precise meaning of the word depends on whether it is used in reference to a contract/subcontract or to an improvement. If used in reference to a contract/subcontract, completion is determined objectively with reference to the arithmetical formula contained in s. 1(2) of the Act, commonly referred to as the “3-2-1 Formula”:

For the purposes of this Act, a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than

(a) 3% of the first $500,000 of the contract price,
(b) 2% of the next $500,000 of the contract price, and
(c) 1% of the balance of the contract price.

If “completed” is used in reference to an improvement, then s. 1(3) of the Act applies and the test is whether the improvement or a substantial part of it is ready for use, or being used, for the purpose intended.

Section 1(4) provides that the construction of a strata lot is completed, or a contract for its construction is substantially performed, no later than the date it is first occupied. Note as well that s. 88(1) of the Strata Property Act limits the claim of lien filing period to 45 days after initial conveyance. So, in the case of a strata lot, these additional triggering events may determine the claim of lien filing deadline.

3. Abandoned

The meaning of “abandoned” in s. 20(2)(a) and (b) of the Act is the same for a contract and for an improvement. The term is defined in s. 1(5):

For the purposes of this Act, a contract or improvement is deemed to be abandoned on the expiry of 30 days during which no work has been done in connection with the contract or improvement, unless the cause for the cessation of work was and continued to be a strike, lockout, sickness, weather conditions, holidays, a Court order, shortage of material or other similar cause.

In McManamna v. Chorus, 2008 BCCA 471, the Court held that the legislature “did not intend the deemed abandonment provision to override proof of a clear intention of the parties not to abandon a project” (at para. 14). The Court held that it is more reasonable to interpret s. 1(5) as a default position applicable where the parties’ intentions are uncertain.

[§8.06] Other Notes on Filing Times

A claim of lien should not be filed where it is clear that it is obviously out of time or without merit.

The courts regard the deliberate wrongful filing of a claim of lien as an abuse of process and have, in cases where a claim of lien was obviously filed as “legal blackmail” and was without any legal foundation or merit, awarded damages against the party wrongfully filing the claim of lien. For authorities on this point see Guilford Industries Ltd. v. Hankinson Management Services Ltd., [1974] 1 W.W.R. 141 (B.C.S.C.) and Castile Construction Ltd. v. Szeto Enterprises, [1981] B.C.D. Civ. 3602-04 (Co. Ct.).

Note as well that s. 19 of the Act specifically provides that a person filing a claim of lien against land to which the lien does not attach is liable for costs and damages incurred by an owner of the land as a result of the wrongful filing. Nonetheless, if in doubt, it is prudent to file the claim of lien and be ready to remove it quickly if it turns out to be invalid. Note also that s. 45 of the Act provides that a person who knowingly files or causes an agent to file a claim of lien containing a false statement commits an offence and is liable for a fine.
[§8.07] Section 3—Non-Contracting Owners

The issue of a “non-contracting” owner often arises where an owner has leased property to a tenant who, in turn, has contracted to have work done on the property. Under the Act, anyone with a legal or equitable interest in the property can be an owner. In the case of the leased property, both the registered owner and the tenant are owners, with different interests in the property.

Section 3 states:

1. An improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.
2. Subsection (1) does not apply to an improvement made after the owner has filed a notice of interest in the land title office.

The effect of these provisions is that an owner’s interest in property can be subject to a lien even if the owner did not request the improvement in question, unless the owner filed a notice of interest in time.

In response to s. 3, many landlords file notices of interest in the Land Title Office as a matter of course against title to all properties that they own. Note, however, that a notice of interest will not protect a landlord who actually requests that work be done. The notice of interest only prevents the “deemed request” in s. 3(1).

A typical tenant improvement situation arose in Advance Electric Co. Ltd. v. Marino (1977), 5 B.C.L.R. 120 (Co. Ct.). Under a lease, the tenant was required to make improvements, which would become the property of the owner on termination of the lease. The tenant contracted with the lien claimants to make the improvements. The tenant failed to pay the contractors, who filed claims of lien. The court found that the registered owner was an “owner” within the meaning of the Act and was liable for the lien because the owner had not posted notices. The fact that the lease required the improvements was evidence that the owner knew of the improvement.

The Court of Appeal in Barclay Construction Corp. v. 229531 B.C. Ltd. (1989), 34 C.L.R. 97 (B.C.C.A.), stated that the corresponding section in the former Act required actual knowledge of an improvement, as distinct from a “possibility” that such work might be done.

[§8.08] Mortgagee as Owner

The definition of “owner” in s. 1 of the Act expressly excludes a mortgagee unless the mortgagee is in possession of the land.

[§8.09] Purchasers

An issue that can arise is whether a valid claim of lien can be filed for work done or material supplied for an owner who transfers title before expiry of the time for filing claims of lien but after the purchaser receives a certificate of title clear of liens.

This issue was dealt with in Carr & Son v. Rayward & Bell (1955), 17 W.W.R. 399 (B.C. Co. Ct.), in which Archibald J. stated:

The court held that a lien filed in those circumstances was effective against the purchaser even though at the time he took title to the property the Certificate of Title showed that he was the owner free of encumbrances. The question is whether or not the lien was filed in time. For example, if a house was substantially completed on January 15, title transferred to a bona fide purchaser on February 1, a lien filed after February 1 and yet within the 45 day period, the lien is valid against the purchaser.

This scenario raises some serious concerns for a solicitor acting for the purchaser of a newly completed or renovated property. If the solicitor is aware that improvements on the premises have recently been completed or are not yet completed, steps should be taken to protect the purchaser from exposure to claims of lien. Clients should be advised of the risk of claims of lien being filed after completion, and an agreement for a purchaser’s holdback made. An attempt to hold back money from the vendor on the day set for completion without prior agreement can be a dangerous practice. Counsel should, therefore, attempt to negotiate a builder’s lien holdback in advance.

A purchaser’s liability for liens is limited by s. 35 of the Act, which provides:

The amount that can be claimed under this Act against the interest of a purchaser in good faith of an improvement in respect of claims of lien filed after the latest of

(a) acceptance for registration of the purchaser’s interest in a land titles office or gold commissioner’s office,
(b) completion, abandonment, or termination of the head contract for construction of the improvement, and
(c) completion or abandonment of the improvement if the owner did not engage a head contractor

must not exceed 10% of the purchase price of the improvement.

Therefore, if the improvement is completed before the conveyance, a purchaser who retains a 10% holdback is fully protected. Note, however, that it is not entirely
clear whether “the purchase price of the improvement” refers to the entire amount paid for the property or only to the portion of the purchase price which can be properly allocated to the new building (for example) as opposed to the land itself.

Regarding the conveyance of strata lots, be aware of s. 88(2) of the Strata Property Act, which provides that a purchaser of a strata property must hold back a prescribed amount (currently 7% of the purchase price), which also represents the maximum liability of the purchaser for subsequently filed claims of lien. A purchaser of a strata property, therefore, has protection in addition to that given to an ordinary purchaser under the Act.

[§8.10] Payment to Discharge Liens

Sections 23 and 24 provide means by which an owner, contractor, subcontractor, or authorized mortgagee can clear a claim of lien from title before a determination as to the validity and proper amount of the lien. This often must be done quickly in order to keep the construction advances and project going.

Section 23, available to discharge claims of lien filed by classes of lien claimants other than those directly engaged by an owner, provides that claims of lien can be discharged by paying a defined amount into court. The lien then becomes a lien against the money in court and is discharged from title. The amount that must be paid in under s. 23 is the lesser of:

(a) the total amount of the claim(s) filed, and

(b) the amount owed by the payor to the person engaged by the payor through whom the liens are claimed, provided the amount at least equals the required holdback between them [which required holdback is discussed in §8.11 of this chapter].

Section 24, by contrast, provides that the claim of lien can be cancelled upon “sufficient” security for the payment of the claim being posted.

Usually it is the owner who wants to sell or requires mortgage advances and cannot proceed while lien claims are on title. However, it also happens that a contractor or subcontractor is contractually bound to keep the title free of claims of lien filed by persons engaged by or under it, and therefore makes the court application.

If no action has been commenced to enforce the claim of lien, the s. 23 or 24 application is made by way of petition in the appropriate Supreme Court registry. If a lien action has been commenced, the application can be made by a notice of application in the action, instead of a petition, if the applicant is a party to the action.

The order will set out the amount of money required to cancel the claim of lien, or the amount and form of security that may be given. The order will also provide that upon payment into court of the money, or the posting of security, and upon production of a Registrar’s Certificate certifying the same, the Land Title Office shall cancel the claim of lien and any corresponding certificate of pending litigation.

Under s. 24, the amount of security is usually the face amount of the lien claim. However, s. 24(3) expressly allows an order for discharge upon posting security that is less than the amount of the lien. This is happening with increasing frequency. The Court of Appeal introduced a two-step test in Q West Van Homes Inc. v. Fran-Car Aluminum Inc., (2008), 83 B.C.L.R. (4th) 349; see also Centura Building Systems (2013) Ltd. v. 601 Main Partnership, 2018 BCCA 172. Under the first part of the test, the court considers what claims should be taken into account in fixing security. If it is “plain and obvious” that a claim will not succeed, that claim will not be considered in fixing security. Under the second part of the test, the court looks at the evidence as a whole and fixes an amount as appropriate security.

Note that it was formerly standard practice under s. 24 for an additional amount to be posted as security for costs (often 10% or 15% of the claim of lien); however, that practice has been brought to an end by the decision in Tylon Steepe Homes Ltd. v. Pont, 2009 BCSC 253; leave to appeal refused, 2009 BCCA 211.

When security has been posted under s. 23 or s. 24, the person who posted the security can have the money paid back out if and when the lien claimant’s lien rights have been extinguished for failure to commence an action in time; see Colour Plus Paint Centres Ltd. v. Cameo Developments Ltd. (1980), 21 B.C.L.R. 63 (C.A.).

Under s. 24, security can be cash or any other form satisfactory to the court, such as an irrevocable letter of credit or a lien bond. It is sometimes thought that if a lien bond is to be posted, it is necessary to file evidence of the solvency of the lien bond issuer in the material in support of the application. However, the Supreme Court has held that it is satisfactory to refer to the registrar’s list of acceptable bonding companies (Maple Resources Investment Co. Ltd. v. Plasti-Fab Ltd. (11 July 1994) (B.C.S.C.); Hoofer Investments v. MPH Supply (7 July 1997) (B.C.S.C.)); IDL Projects Inc. v. M3 Steel (Kamloops) Ltd., 2011 BCSC 1600).

It is common practice for counsel to simply agree that funds (or a lien bond) will be held in trust by one of them, instead of being deposited in court pursuant to s. 24. This typically saves legal expense and can be arranged quickly. Care should be taken to clarify the terms, and counsel should confirm in writing that payment into trust in exchange for a discharge of claim of lien is on these terms:

(a) payment is made in lieu of payment into court pursuant to s. 24 of the Act;
(b) the funds stand in place of the lands as security for the lien claim;
(c) the funds do not stand as security for any debt or contractual claim;
(d) the arrangement does not deprive any affected person of any rights or defences under the Act;
(e) the arrangement is not a waiver of the owner’s holdback rights or defences under the Act;
(f) the funds will be paid out either by agreement of the parties or by order of the court after any appeal periods have expired.

It should be noted that an owner adopting this approach may theoretically risk loss of its “holdback” defence, since arguably the in rem lien has been replaced by a purely contractual right that can be ignored by other lien claimants. This approach should therefore be used with caution where there may be multiple lien claims and an available “holdback” defence.

It is also possible to obtain a s. 23 or s. 24 order by consent under Supreme Court Civil Rule 17-1, without a petition or a lien enforcement action, by electronically filing a requisition and an endorsed consent order through Court Services Online. The order can be submitted with a request for rush processing in appropriate circumstances. Use of this procedure avoids the risk of losing a holdback defence.

[§8.11] Section 4—Holdback

The primary purpose of the “holdback” scheme is to limit the effective lien liabilities of owners, contractors and subcontractors to prescribed amounts, but the overall scheme results in protection for both lien claimants and those liable to pay their claims.

British Columbia has a multiple holdback system. Each person primarily liable on a contract or subcontract, who may be an owner, contractor or subcontractor, is required to retain a holdback equal to 10% of the greater of: (a) the value of the work or material supplied under the contract or subcontract; and (b) the payments made on account of the contract or subcontract.

In harmony with this scheme, under s. 34, the maximum amount that can be recovered under the Act by persons claiming under a particular contractor or subcontractor is the greater of:

- 10% of the value of work or material actually provided by the said contractor or subcontractor or the amount of the payments made to the said contractor or subcontractor (i.e. the “statutory holdback” under s. 4); and
- the amount actually owing to the said contractor or subcontractor (often referred to as the “actual holdback”).

Section 4(6) provides that a holdback must not be retained from a worker, engineer, architect or material supplier.

Note that s. 34(1) of the Act only limits the amount that may be recovered under the Act, and does not affect contractual rights to payment.

Subsection 34(2) provides that three things do not operate to reduce the “amount owing”:

- (a) an amount asserted as a counterclaim;
- (b) a payment made with notice of and after the filing of a claim of lien by a person claiming under the person to whom the payment is made; and
- (c) a payment made in bad faith.

However, under s. 34(3), claims arising under the same contract, such as extra costs to complete the contract due to default, do reduce the “amount owing.”

[§8.12] Holdback Account

1. General Requirements

Section 5 of the Act requires an owner to establish and deposit holdback money into a holdback account. The account is administered “jointly” with the contractor from whom the holdback is retained. Usually this means joint signing authority.

When an owner acts as its own general contractor and enters into several contracts, a holdback account must be established for each contract.

The owner is excused from establishing and maintaining a holdback account when:

- (a) the owner is a public body designated by regulation, such as a government or school board (s. 5(8)(a)); or
- (b) the aggregate value of work and material under the contract is less than $100,000.00 (s. 5(8)(b)).

Failure to pay the holdback into a holdback account entitles the contractor to suspend operations on 10 days’ notice (s. 5(7)).

Money in a holdback account is charged with the payment of liens arising under the contractor from whom the holdback was retained, and subject to that, is held in trust for that contractor. The money must not be paid out without agreement of all administrators of the account (s. 5(2)). The money is not, however, charged with payment of liens arising under other contractors. Finally, the money held in
a holdback account established under s. 5 is not subject to garnishment (s. 13(4)).

2. Holdback Period

Section 8 provides:

8(1) If a certificate of completion is issued with respect to a contract or subcontract, the holdback period in relation to
(a) the contract or subcontract, and
(b) any subcontract under the contract or subcontract
expires at the end of 55 days after the certificate of completion is issued.

(2) The holdback period for a contract or subcontract that is not governed by subsection (1) expires at the end of 55 days after
(a) the head contract is completed, abandoned or terminated, if the owner engaged a head contractor, or
(b) the improvement is completed or abandoned, if paragraph (a) does not apply.

(3) Payment of a holdback required to be retained under s. 4 may be made after expiry of the holdback period, and all liens of the person to whom the holdback is paid, and of any person engaged by or under the person to whom the holdback is paid, are then discharged unless in the meantime a claim of lien is filed by one of those persons or proceedings are commenced to enforce a lien against the holdback.

This means that the holdback period typically (but not always) expires 10 days after the lien filing period.

Section 6 of the Act provides that if a contractor or subcontractor defaults, the statutory holdback must not be used to remedy deficiencies “until the possibility of any lien arising under the person in default is exhausted.” Until then, the owner remains liable for the statutory holdback amount, even if nothing is owing to the person from whom the holdback was retained.

Note that a portion of the holdback retained from a contractor may be released to the contractor where the subcontract of a subcontractor retained by the contractor is certified as complete in accordance with s. 9(1). This is commonly referred to as “progressive release of holdback” or “early release of holdback.”

Until the decision of the BC Court of Appeal in Shimco, supra, counsel routinely advised owners to check the relevant Land Title Office for lien claims at the end of the holdback period and release the holdback if none were present. However, Shimco confirms the existence of a separate lien against the holdback which can be asserted by commencing an action. This lien is not subject to the limitation periods specified in the Act. As a result, some cautious owners conduct court registry searches for lawsuits asserting holdback lien claims, before releasing holdback monies.

In Wah Fai Plumbing & Heating Inc. v. Ma, 2011 BCCA 26, the Court of Appeal confirmed that the Act does not provide for enforcement of a holdback lien where there has been no holdback or the holdback has been wrongfully paid out.

Holdback money can be the subject of a garnishing order if no claims of lien are filed (Mikes Roofing and Insulation Ltd. v. Harder (1964), 46 D.L.R. (2d) 595 (B.C. Co. Ct.)).

[8.13] Section 10—Trust

A statutory trust is created by s. 10(1) of the Act, which provides:

Money received by a contractor or subcontractor on account of the price of a contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

Until all trust beneficiaries are paid, the contractor or subcontractor “must not appropriate any part of the fund to that person’s own use or to a use not authorized by the trust” (s. 10(2)). In other words, the money must only be used to pay trust beneficiaries as defined above.

Subsections 10(1) and (2) do not apply to money received by an architect, engineer or material supplier (s. 10(4)).

An absence of lien rights does not affect the trust. Even if a claim of lien has not been filed, the trust remains. The trust provisions are distinct from the sections relating to the filing of a claim of lien.

Money only becomes impressed with a trust when it is “received” by a contractor or subcontractor. Once the money is “received” the receiver becomes a trustee of the money for the benefit of persons engaged by the receiver in connection with the improvements.

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In A & M Painting Contractors Ltd. v. Byers Construction Western Ltd. (1981), 28 B.C.L.R. 43, the Court of Appeal dealt with the issue of when the trust is created. Money in the hands of an owner is not impressed with a trust, but immediately upon being paid into court pursuant to a garnishing order it becomes subject to the trust. When money held by an owner is paid into court under a garnishing order, it is constructively “received” on account of the contract price. Section 13 of the Act reflects this principle. Money will also be deemed to be “received” by a contractor or subcontractor when it is paid to an assignee of the contractor or subcontractor.

Section 12 of the Act provides that if a person makes a payment from money in a trust fund constituted in respect of a particular improvement, a person who receives the money must credit it against the debt in respect of the improvement. In other words, funds paid by a contractor or subcontractor that were impressed with a trust must be credited to the improvement in respect of which the money originated.

**[§8.14] Director Liability—Breach of Trust**

Section 11(3) of the Act provides that if a contractor or subcontractor is a corporation, a director or officer of the corporation who knowingly assents to or acquiesces in a breach of trust commits an offence.

Likewise, officers, directors or “prime operators” of a company can be personally liable in damages for participating in a breach of trust. For example, if a corporate contractor receives money on account of the contract price but does not use it to pay trust beneficiaries, the officer, director or “prime operator” of the corporation can be liable personally for damages for participating in the breach of trust. This can be so even if the breach was innocently committed (Horsman Bros. Holdings Ltd. v. Panton, [1976] 3 W.W.R. 745 (B.C.S.C.)).

In Henry Electric Ltd. v. Farwell (1986), 5 B.C.L.R. (2d) 273, decided under the former Act, the Court of Appeal imposed liability on an officer of a contractor who deposited trust funds into the company’s general bank account. The bank unilaterally took those funds and applied them in reduction of the contractor’s indebtedness to the bank. The bank did so in good faith and without knowledge of the trust, and was allowed to keep the money. However, the corporate officer was held personally liable for the breach of trust. See also Pitkethly & Buzz Ltd. v. Westview Construction Ltd. (1991), 44 C.L.R. 304 (B.C.S.C.).

Subsection 11(7) of the Act provides:

If a contractor or subcontractor commingles, with other money, any part of the fund referred to in section 10, that, of itself, does not constitute a breach of the trust created under section 10(1) or a contravention of section 10(2).

Subsection 11(7) was likely introduced to address the harshness of the decision in Henry Electric in case of an innocent breach of trust.

**[§8.15] Trust Actions**

An action for breach of trust must be commenced within one year after:

(a) the head contract is completed, abandoned or terminated, or

(b) if the owner did not engage a head contractor, the completion or abandonment of the improvement (s. 14).

The court has no discretion to extend this deadline (A.R.C. Stucco v. Waterstop Systems et al., 2004 BCSC 360).

In order to succeed in an action for breach of trust, the claimant must first prove that it is within the class of persons defined as beneficiaries of the trust under s. 10(1).

Secondly, the trust claimant must prove that the trustee received trust money on account of the price of the relevant contract or subcontract.

Thirdly, the trust claimant must prove that it remains unpaid for work or material provided to the contractor or subcontractor.

Fourthly, in an action against an officer, director or “prime operator” of a corporate trustee, or other individual defendant, the trust claimant must prove that the individual was involved in the application of trust funds (or that he or she had a duty to ensure that the funds were properly applied).

Once those factors are proven, the onus shifts to the defendant to account for the trust money and to show that all the money was applied for the purposes of the trust. If that is proven, the action will be dismissed.

Proper trust payments are payments to persons engaged in connection with the improvement for which the trust money was received. Proper payments do not include payments for the general overhead expenses of the trustee, and may exclude payments to corporate principals even if they performed actual work on the project. Reference should be made to the latest case law to determine exactly what does and does not constitute a proper trust expenditure.

**[§8.16] Liability of Trustee’s Bank**

The financial institution that a trustee deals with can be liable if it is privy to a breach of trust. Financial institutions are attractive defendants because of their ability to pay. However, this is a complex issue.
There are many cases in this area, including *Port Coquitlam Building Supplies v. Royal Bank* (1979), 15 B.C.L.R. 168 (S.C.). That case contains a good review of the authorities and underscores the necessity for the plaintiff to establish actual knowledge on the part of the financial institution that trust beneficiaries would not be paid if the institution appropriated funds on deposit, or that there were unusual circumstances which ought to have put the institution on notice to inquire.

Factors that indicate that a bank is privy to a breach of trust include:

- knowledge by the bank of the breach by the customer (contractor or subcontractor);
- knowledge that the funds were received on account of the price of a contract or subcontract; and
- knowledge that the contract holdback was not large enough to pay unpaid accounts of parties engaged by the customer.

Generally, if an institution acts in good faith and in the ordinary course of its business, a breach of trust action is difficult to maintain against it. In *E.B. Horsman & Sons Ltd. v. Hongkong Bank of Canada*, supra, the bank was found liable in part because it had notice of its customer’s insolvency.

### [§8.17] Section 11(4)(a) and (b)—Set-Off Against Trust Funds

Subsection 11(4) of the Act creates exceptions to the general trust rule:

4. Despite subsections (1) to (3),
   
   a. to the extent that a contractor or subcontractor has paid for work or material supplied under a contract or subcontract, the retention by the contractor or subcontractor of trust money in an amount equal to the amount paid is not an appropriation or conversion that contravenes section 10, and
   
   b. if money is loaned to a person on whom a trust is imposed by section 10 and is used to pay for all or part of work or material supplied, trust money may be applied to discharge the loan to the extent that the lender’s money was so used by the trustee, and the money so applied is not an appropriation or conversion that contravenes section 10.

In other words, where a contractor or subcontractor has already paid a trust beneficiary with either its own money or borrowed money, it may retain money from the trust fund or use it to repay the loan to the extent of the money so applied. Generally, if the total payments to trust beneficiaries equal or exceed the total trust funds received by the trustee, there is no breach of trust.

### [§8.18] Priorities Affecting the Builders Lien

Claims for a declaration of lien or by a s. 10 trust beneficiary under the Act will often come into conflict with the interests of other parties involved in a construction project, including mortgagees, receivers, trustees in bankruptcy, Crown agencies, garnishing creditors and others. The following paragraphs are a simplified review of the position of a lien claimant or trust beneficiary in relation to some of those other creditors.

### [§8.19] Lien Claimant and a Mortgagee

Section 32 of the Act deals with priorities between a lien claimant and a mortgagee.

In sum, under subsections 32(1) and (2), if money is advanced in good faith under a mortgage that is registered prior to the filing of claims of lien, and the advance is made prior to the filing of the claims of lien, the advance will take priority over the interests of the lien claimants as against the land.

In *Financial Trust Company v. Hawkwood Developments* (1989), 40 B.C.L.R. (2d) 388, the BC Supreme Court held that where a mortgage is registered subsequent to the filing of some claims of lien, but prior to the filing of other claims of lien, all lien claimants share pari passu in the funds available, but only up to the total amount of the claims of lien filed prior to the mortgage.

### [§8.20] Advancing Funds Under a Mortgage

A mortgagee advancing funds after the filing of claims of lien will generally not obtain priority for money advanced to pay liens or to meet the cost of completion of the improvement (*Great West Permanent Loan Co. v. National Mortgage Co.*, [1919] 1 W.W.R. 788 (B.C.C.A.)). However, s. 32(4) of the Act provides that a mortgagee who has applied mortgage money in payment of a filed claim of lien is subrogated to the rights and priority of the lien claimant to the extent of the money applied.

In addition, subsections 32(5) and (6) allow a court to order that further advances under a mortgage will have priority, in appropriate circumstances:

5. Despite subsections (1) and (2) or any other enactment, if one or more claims of lien are filed in a land title office in relation to an improvement, a mortgagee may apply to the court for an order that one or more

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further advances under the mortgage are to have priority over the claims of lien.

(6) On an application by a mortgagee under subsection (5) the court must make the order if it is satisfied that
(a) the advances will be applied to complete the improvement, and
(b) the advances will result in an increased value of the land and the improvement at least equal to the amount of the proposed advances.

Subsections 32(5) and (6) are intended to allow a sensible completion of improvements to the ultimate benefit of all parties concerned.

Note that the court only has jurisdiction to make an order granting priority to further advances under an existing mortgage (Bank of Montreal v. Peri Formwork Systems Inc., 2012 BCCA 4).

§8.21 Mortgagee’s Priority for Interest

A mortgagee has priority over a lien claimant for interest accrued on mortgage monies advanced prior to the filing of a claim of lien. The registration of a claim of lien does not stop the accrual of interest and does not affect the mortgagee’s priority for interest. See M. Sullivan & Son Ltd. v. Rideau Carlton Raceway Holdings Ltd., [1971] S.C.R. 2 and Marogna Bros. v. Highliner Inn Ltd. (1985), 66 B.C.L.R. 349 (Co. Ct.).

§8.22 Debentures and Mortgages Securing Guarantees

A debenture that is properly registered and under which money is advanced or secured prior to the filing of a claim of lien qualifies as a mortgage for the purposes of s. 32 of the Act (Bank of BC v. Smallwood Lumber (1987), 13 B.C.L.R. (2d) 339 (S.C.)). A registered mortgage securing a guarantee can also take priority over a subsequently filed claim of lien (TD Bank v. Setter-Donaldson (1977), 2 B.C.L.R. 67 (C.A.)).

§8.23 Foreclosures

Lien claimants must prosecute their claims expeditiously in order to avoid being removed from title in a foreclosure. In Canada Trust Co. v. Blumenhagen Construction Ltd., [1980] 2 W.W.R. 376 (B.C.S.C.), the Court held that an execution creditor had priority over a lien claimant to any surplus left over after a mortgagee’s sale of the property where the lien claimant had not yet proven its claim. However, in Conder v. North Star Construction Co. Ltd. (1979), 17 B.C.L.R. 186 (S.C.), the Court held that the surplus was to be held for the benefit of lien claimants pending proof of their liens. It should be noted, however, that in Conder certain lien claimants had obtained judgment already and were seeking to exclude other claimants who had not obtained judgment before the order for sale. Lien claimants should be aware of these two apparently conflicting judgments and should be careful to prosecute their claims quickly to avoid risk of losing their interest in land through foreclosure proceedings.

§8.24 Competing Lien Claimants

The rules governing the distribution to lien claimants of money paid into court or the proceeds of sale of land are contained in ss. 36 to 38 of the Act.

The first objective these sections seek to achieve is pro rata sharing, and the second is priority for enforcement costs and workers’ wages.

Application of the rules can be very complex, except in the most common situation, where the same (usually insolvent) person engaged all of the lien claimants. In that situation, distribution is generally in the following order of priority:

(a) costs of enforcement;
(b) up to 6 weeks wages owed; and
(c) the rest of the claims (including wages beyond 6 weeks).

Subsection 42(3) provides that a device by an owner, contractor, or subcontractor adopted to defeat the priority given by the Act to a worker is void against the worker.

Another principle applied in ss. 36 to 38 is that in a situation where some lien claimants are engaged directly by an owner and other claimants are not, the claimants who are not engaged directly by the owner will have priority over the claimants who are engaged directly by the owner.

There is no priority as between lien claimants based upon the date of registration of their claims of lien.

§8.25 Lien Claimants Granted a Mortgage

In Griff Building Supplies Ltd. v. Lucas Anderson Development (1993) Corp. (1995), 23 C.L.R. (2d) 188 (B.C.S.C.), the Court held that lien claimants who accept a mortgage in exchange for a discharge of their claims of lien are entitled to the remedy of foreclosure. They are thereby able to extinguish remedies for subsequent lien claimants. The arrangement must be made in good faith and for the purpose of settling the claims of lien and not for the ulterior purpose of granting some lien claimants priority over others. Section 42(1) of the Act provides that a mortgage given for the purpose of granting a lienholder a preference is void for that
[§8.26] Lien Claimants, Receiver Managers and Trustees in Bankruptcy

Section 21 of the Act provides that a “claim of lien filed under the Act takes effect from the time work began or the time the first material was supplied for which the lien is claimed, and it has priority over all . . . receiving orders recovered, issued or made after that date.” This section applies to both receiving orders made under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, and receiving orders made under provincial law, and a filed claim of lien takes priority over both (Yorkshire Trust Company v. Canusa Construction Company (1984), 54 B.C.L.R. 75 (C.A.)).

[§8.27] Lien Claimants, the Crown, and Crown Agencies

Section 21 of the Act gives a lien “priority over all judgments, executions, attachments. . . recovered, issued or made after the lien takes effect.” As noted above, a lien takes effect from the date of commencement of the work or when the first material was furnished or placed on the land. It follows that a lien takes priority over any judgments obtained and registered against the land after the work that is the subject of the lien was commenced. A registered lien also has priority over a certificate issued under the Employment Standards Act for unpaid wages (Westmin Resources Ltd. v. Haste Mine Developments Ltd. (1984), 58 B.C.L.R. 235 (S.C.)).

The Workers Compensation Board is not a proper lien claimant and it is thought that any certificate issued by it would also be subsequent in priority to any interest of lien claimants.

Canada Revenue Agency’s “superpriority” rights pursuant to a Requirement to Pay issued under s. 224(1.2) of the Income Tax Act or the corresponding provisions of the Excise Tax Act take priority over the rights of lien claimants and trust claimants under the Act, although this is a difficult and complex subject (Trans Canada Ltd. v. Mid Plains Contractors Ltd., [1995] 1 W.W.R. 1 (S.C.C.)). A subsequent decision of the British Columbia Supreme Court may provide some relief in some circumstances to lien claimants who are competing with Canada Revenue Agency for holdback monies. To simplify, CRA has priority to the extent that the holdback is owing to the tax debtor, but only the lien claimants have a claim to the holdback amount in cases where the holdback is not owing to the tax debtor as a result of set-off (PCL Constructors Westcoast Inc. v. Norex Civil Constructors Inc., 2009 BCSC 95).

[§8.28] Lien Claim Competing With Section-10 Trust Claims


Even if no claim of lien was filed, or the land on which the improvement was constructed could not be liened, as in the case of federal Crown land or highways, the s. 10 trust provisions still apply to money received on account of the price of the contract or subcontract.

However, where some claimants file valid claims of lien but others simply rely on their trust rights, the liening claimants have more remedies available to them and have a better chance of recovery.

[§8.29] Priorities Between Trust Beneficiaries

Generally trust beneficiaries share equally in trust funds. In the case of insolvency, trust funds are to be distributed proportionately among the beneficiaries (Re Purtherbough Construction Ltd. (1958), 37 C.B.R. 6 (Ont.)).

[§8.30] Section-10 Claims Competing With Crown Claims

As noted earlier, the right to claim against money impressed with a trust granted under the Act is a separate and distinct remedy from lien rights also granted by the Act.

A trustee holding money that may have become impressed with a trust may apply to the Supreme Court for directions as to the payment of those funds to trust beneficiaries (Langley v. Revenue Canada Taxation (1980), 19 B.C.L.R. 223 (S.C.)).

A trust beneficiary takes priority over claims made pursuant to the Employment Standards Act (Westmin Resources Ltd. v. Haste Mine Resources Ltd. (1984), 58 B.C.L.R. 235 (S.C.)).

However, a trust claim is liable to be defeated by the superpriority granted to a federal Crown Requirement to Pay under the Income Tax Act or the corresponding provisions of the Excise Tax Act (see §8.27).

[§8.31] Section-10 Claims Competing With Trustees

Section 67 of the Bankruptcy and Insolvency Act exempts property held in trust from the property belonging to a bankrupt estate, and a trustee in bankruptcy has no claim against funds impressed with a
trust. The Supreme Court of Canada, however, has drawn a distinction between a common law trust and a statutory trust in relation to the Bankruptcy and Insolvency Act (BC v. Henfrey Sampson Belair Ltd. (1989), 38 B.C.L.R. (2d) 145 (S.C.C.)). This is a complex area and the case law is at least superficially inconsistent. Lawyers should refer to the latest case law if faced with this issue (see e.g. 0409725 B.C. Ltd. (Bankruptcy of), 2015 BCSC 561).

[§8.32] Lien Claims and Trust Beneficiaries Competing With Assignments

Subsection 42(4) of the Act provides:

No assignment by the contractor or subcontractor of any money due in respect of the contract or subcontract is valid as against any lien or trust created by this Act.

In other words, a trust claim or lien will not be defeated by, for example, a contractor’s assignment of an account receivable to its bank. A trust beneficiary will rank in priority ahead of an assignee of book debts in relation to trust funds (Canadian Imperial Bank of Commerce v. T. McAvity & Sons Ltd., 1959 CanLII 9 (S.C.C.) and A.S.L. Paving Ltd. v. Magnus Construction Ltd., 1994 CanLII 4546 (Sask. C.A.)).

[§8.33] Section-10 Claim Competing With Garnishing Orders

Section 13 of the Act deals with garnishment. Subsection (1) provides:

In the case of money owing to a contractor or subcontractor that would, if paid to the contractor or subcontractor, be subject to a trust under section 10, the money, if it is paid into court under an attachment under the Court Order Enforcement Act, is subject to a trust as if it had been paid to the contractor or subcontractor, and the interest of the garnishor is subordinate to the interest of the beneficiaries of the trust.

Even though money held by an owner is not impressed with a trust in the hands of the owner and can be garnished, funds paid into court will not be paid out to the garnishing creditor until there has been a determination as to whether there are unpaid trust beneficiaries.

[§8.34] Section 33—Enforcing the Lien

1. Court Registry

Any action for a declaration of lien must be commenced in a registry of the Supreme Court in the judicial district in which the land in question is located (s. 27). In addition, if there is a registry of the Supreme Court in the municipality where the land is located, then it is not enough to commence an action in the same judicial district. The action must be commenced in that registry. Note, however, that Vancouver and New Westminster are deemed to be the same registry for purposes of the section.

2. Commencing the Action

A claim of lien is enforced by a proceeding under the Supreme Court Civil Rules (s. 26). See Practice Material: Civil for procedures under the Supreme Court Civil Rules. The builders lien cause of action should be sufficiently described in the notice of civil claim.

A certificate of pending litigation must also be registered against the title to the property unless security has been posted under s. 24 or a payment into court has been made under s. 23 and the claim of lien has been removed from title.

An action to enforce a claim of lien in the Supreme Court must be commenced, and a certificate of pending litigation registered, within the time limits specified in the Act; otherwise, the lien is extinguished (s. 33(5)).

In the action, the claimant will typically request the following:

(a) a declaration of builders lien in the amount claimed against the improvement, the land and any security posted for the lien claim;

(b) an order that the lien ranks in priority to the right or interest of any party subsequent in interest, including the owner;

(c) an order that, if the amount claimed is not paid, the land and improvement be sold or the security paid or realized;

(d) an order for directions and an accounting;

(e) an order for personal judgment together with interest against the person(s) who are liable to pay;

(f) a certificate of pending litigation;

(g) costs; and

(h) any “other” relief.

3. The Defendants

Typically, defendants to a lien claim include:

- The party with whom the claimant contracted.
- The owner or owners whose interest the lien claimant wants to attach. Note the broad definition of owner in s. 1. Lessees
are frequently defendants in lien actions, particularly when the interest of the registered owner is protected by a notice of interest. Also name a vendor or a mortgagee under s. 32 if priority over its interest is being claimed. If there is a registered agreement for sale, the purchaser under the agreement for sale (often the person who contracted to have the work done) is joined.

- Anyone who posted security for the claim of lien under s. 24 of the Act (but see Paramount Drilling and Blasting Ltd. v. North Pacific Roadbuilders Ltd., 2005 BCCA 378).
- Anyone over whom the lien claimant wishes to claim priority (such as the holder of a judgment registered against title to the land).

[§8.35] Limitation Periods and Notice to Commence Action (“21-Day Notice”)

Section 33(1) provides that an action to enforce a claim of lien must be commenced within one year from the date of filing of the claim of lien. Unless the lien action is commenced and a certificate of pending litigation is filed within this time, the lien is extinguished.

There is no provision in the Act for an extension of time.

In Squeo v. Del Bianco, [1976] W.W.D. 38 (B.C. Co. Ct.), the court held that the one year time period for commencing an action and filing a certificate of pending litigation expires on the first day on which both the registry and the Land Title Office are open on or after the anniversary date of the filing of the claim of lien.

Section 33(2) permits an owner, or a lien claimant who has commenced an action, to serve a written notice (in Form 6) on a lien claimant requiring the lien claimant to both commence an action to enforce its claim of lien and register a certificate of pending litigation within 21 days from service of the notice. Such a notice is technically called a “notice to commence an action” but commonly referred to as a “21-day notice.” The notice can be served by mail, in which case service is conclusively deemed to occur 8 days after mailing. There are a number of cases relating to the sufficiency of notices. In Swiss-Tex Systems Ltd. v. Gold Banner Construction Ltd. (1990), 44 C.L.R. 202 (B.C.S.C.), a 21-day notice was held to be valid when it substantially conformed with the form although it was missing the date and failed to refer to the lien claimants.

Several cases confirm that strict compliance with the 21-day limitation period is required, even if the notice is not properly delivered by the post office (Wheaton Construction Ltd. v. C.R.D.B. Properties Ltd. (9 July 1991), Victoria No. 107/90 (B.C.S.C.); Fitzpatrick Contracting (1977) Ltd. v. Darwin Construction Ltd. (1992), 72 B.C.L.R. (20) 269 (C.A.); Jewish Home for the Aged of British Columbia v. Broome Concrete Ltd. (1993), B.C.D. Civ. 2591-01 (S.C.)).

Section 14 of the Act provides that an action to enforce the trust created under s. 10 of the Act must be commenced not later than one year after:

(a) the head contract is completed, abandoned or terminated, or
(b) if the owner did not engage a head contractor, the completion or abandonment of the improvement.

This is a marked difference from the limitation period allowed for trust actions under the Limitation Act.

Note that the limitation period on a trust may expire earlier than the one year period for commencing the corresponding lien action.

[§8.36] Summary Judgment and Summary Trial

A lien claimant may use the summary judgment procedure in Supreme Court Civil Rule 9-6 for the purpose of seeking judgment on any claim for personal judgment as well as a claim for a declaration of lien (Imbrook Properties Ltd. v. Bordignon Construction Ltd. (1984), 51 B.C.L.R. 66, and Jordan Electric Co. v. Post 83 Cooperative Housing Association (1984), 56 B.C.L.R. 261).

Although owners and lien claimants can apply for a summary judgment under Supreme Court Civil Rule 9-6 on a builders lien application, an application is likely more effectively made for a summary trial under Supreme Court Civil Rule 9-7. An opposing party on a summary judgment application will often be able to raise a triable issue and defeat the application.

It is important when applying for summary judgment or summary trial to give notice to every person whose interests may be affected by the application. It has been held that it is necessary to serve all other lien claimants with notice of an application for a declaration of lien (Dayross Developments Ltd. v. Jade Technical Services Ltd. (1986), 17 C.L.R. 268 (B.C. Co. Ct.); Rempel Bros. Concrete Ltd. v. C.J. Smith Contracting Ltd., 2014 BCSC 1186).

Because an application for summary judgment or summary trial seeks a final order, affidavits on information and belief are not admissible (C.I.B.C. v. Nandhra and Taylor (1977), 31 B.C.L.R. 242 at 243 (C.A.) and Supreme Court Civil Rule 22-2(13)). This may be important, particularly in the case of a claim for delivery of material where proof of delivery is necessary. In such a case, counsel might consider using s. 42 of the British...
Columbia Evidence Act to have business records admitted.

If several actions have been commenced in respect of the same improvement, it may be possible for lien claimants to obtain a declaration of lien on a summary judgment or trial. However, it may be necessary to wait for the other lien claimants to obtain their declarations of lien before it is possible to realize on the liens (Arctic Distributors v. Nordine (1984), 52 B.C.L.R. 110 (Co. Ct.)). Consequently, as the Court noted in Rempel Bros. Concrete Ltd. v. C.J. Smith Contracting Ltd., 2014 BCSC 1186, “While there is no hard-and-fast rule against permitting a lien claimant to prove its claim before other potential claimants, doing so accomplishes little and potentially prejudices others” (at para. 34).

§8.37 Consolidation of Proceedings

Practice in lien actions, including consolidation of actions, is governed by the Supreme Court Civil Rules (s. 26 of the Act). Supreme Court Civil Rule 22-5 governs consolidation of actions (Rempel Bros., supra).

§8.38 Counterclaim

Practice in lien actions, including counterclaims, is governed by the Supreme Court Civil Rules (s. 26 of the Act).

Section 30 of the Act provides as follows:

1. Subject to the rights of lien claimants engaged by or under the plaintiff, a defendant in an action to enforce a claim of lien may set up by way of counterclaim any right or claim arising out of the same transaction for any amount, whether the counterclaim is for damages or not.

2. On the trial of an action to enforce a claim of lien, the court may, so far as the parties before it are debtor and creditor, give judgment for any indebtedness or liability arising out of the claim of lien in the same manner as if the indebtedness or liability had been the subject of an action in the court without reference to this Act.

§8.39 Interest

The Court of Appeal has held that neither contractual interest nor court order interest can be included in the amount of a declaration of lien (Horsman Bros. v. Lee (1985), 12 C.L.R. 145 (B.C.C.A.) (contractual interest), and Westburne v. Lougheed Towers, supra (court order interest)).

§8.40 Assignment

Section 43 of the Act permits a lien claimant to assign a claim of lien. See Henfrey & Co. Ltd. v. Poplar Properties Ltd. (1986), 70 B.C.L.R. 23 (C.A.), to the effect that an assignee of a lien is entitled, without giving notice of the assignment, to file and perfect a lien. See also Commonwealth Mechanical Ltd. v. Polygon Properties Ltd. (1985), 12 C.L.R. 213 (B.C. Co. Ct.).

§8.41 The Judgment

Final orders vary with the circumstances of each case. If the court decides that the lien claimant is entitled to a lien under the Act, the judgment will provide a declaration that the claimant is entitled to a lien and will set out the amount and describe the lands involved. If personal judgment has been sought and obtained, the judgment will also provide that the plaintiff is entitled to judgment in a specified amount against the defendant involved.

If money has been paid into court under ss. 23 or 24, the judgment may order payment out to the plaintiff of the amount of its lien, and direct that the balance, if any, be paid to the person who paid in.