

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p style="text-align: center;">INTRODUCTION</p> <p>Purpose and currency of checklist. This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) and ASSET PURCHASE AGREEMENT DRAFTING (B-2) checklists. It is primarily intended for use by the purchaser’s lawyer, but may be of use as a guide to the vendor’s lawyer. This checklist is current to September 1, 2016.</p> <p>New developments:</p> <ul style="list-style-type: none"> • Additional property transfer tax on residential property transfers to foreign entities. Effective August 2, 2016, the <i>Property Transfer Tax Act</i>, R.S.B.C. 1996, c. 378 was amended to impose an additional tax of 15 per cent on transfers of residential property in the Greater Vancouver Regional District (the “GVRD”) to “foreign entities” (see ss. 2.01 to 2.04). The additional tax applies on all applicable transfers registered with the Land Title Office on or after August 2, 2016, regardless of when the contract of purchase and sale was made effective. A “foreign entity” is defined as a “foreign national”, as defined in s. 2(1) of the <i>Immigration and Refugee Protection Act</i>, S.C. 2001, c. 27, or a “foreign corporation”, which is a corporation not incorporated in Canada or a corporation incorporated in Canada but controlled directly or indirectly by a foreign national or a foreign corporation. An Additional Property Transfer Tax return (FIN 532) must be filed at the time the transfer is registered. Further information, including the municipalities included in the GVRD, can be found in the Ministry of Finance Tax Information Sheet 2016-006 at www2.gov.bc.ca/assets/gov/taxes/property-taxes/property-transfer-tax/forms-publications/is-006-additional-property-transfer-tax-foreign-entities-vancouver.pdf. • Franchises Act. The British Columbia <i>Franchises Act</i>, S.B.C. 2015, c. 35 received Royal Assent on November 17, 2015, and will come into force on February 1, 2017 (B.C. Reg. 238/2016). The new legislation will impose a duty of fair dealing, require a franchisor to provide a disclosure document to a prospective franchisee, and provide remedies for the failure to do so or for misrepresentation. The Franchises Regulation, B.C. Reg. 238/2016 is available at www.bclaws.ca. • Articled students permitted to act as commissioners for taking affidavits. Effective September 1, 2015, articled students and temporary articled students are prescribed as persons who are commissioners for taking affidavits in British Columbia (B.C. Reg. 142/2015, pursuant to s. 60(1) of the <i>Evidence Act</i>, R.S.B.C. 1996, c. 124). Principals remain responsible for students’ actions and will need to ensure that students understand the effect of acting as commissioner. • Code of Professional Conduct for British Columbia (the “BC Code”). In July 2015, rule 3.7-9 of the <i>BC Code</i> was amended to require that a lawyer promptly notify the client, other counsel, and the court or tribunal of the lawyer’s withdrawal from a file. An annotated version of the <i>BC Code</i> is published at www.lawsociety.bc.ca. • Law Society Rules. On July 1, 2015, revised and consolidated Law Society Rules came into effect. See www.lawsociety.bc.ca/page.cfm?cid=4089&t=Law-Society-Rules-2015. 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>Of note:</p> <ul style="list-style-type: none"> • General duty of honesty in contractual performance. In <i>Bhasin v. Hrynew</i>, 2014 SCC 71, the Supreme Court of Canada recognized the general duty of honesty in contractual performance: parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of a contract. • Aboriginal law. Special considerations apply to businesses involving “Indians” and “Indian reserves” (both as defined in the <i>Indian Act</i>, R.S.C. 1985, c. I-5). While significant tax and other advantages may be available under the <i>Indian Act</i>, these are affected by the type of business, transaction nature, business entity (sole proprietorship, partnership, joint venture, trust, or incorporated company), location of business activity on or off reserve land, and the specific reserve and its governance. In addition to <i>Indian Act</i> considerations, some Indian bands or First Nation entities have entered into treaties that may have governance, taxation, and other business-related implications. The Crown’s duty to consult and seek accommodation with respect to activities potentially affecting Aboriginal title or rights may also have implications for businesses with government agreements or government-issued tenures. Businesses that engage in activities on reserve lands and on lands subject to treaty or claims of Aboriginal rights on title are strongly encouraged to familiarize themselves with applicable laws and governmental policies. Consider seeking advice from a lawyer with experience in Aboriginal law matters. Further information is available on the “Aboriginal Law” page in the “Practice Points” section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications. • Additional resources. For further information about asset purchase procedures, see <i>Advising British Columbia Businesses</i>, looseleaf and online (CLEBC, 2006); <i>Buying and Selling a Business: Annotated Precedents</i>, looseleaf (CLEBC, 2000); <i>British Columbia Personal Property Security Act Practice Manual</i>, looseleaf and online (CLEBC, 1995); <i>Due Diligence Deskbook</i>, looseleaf and online (CLEBC, 1994); and <i>Negotiating and Structuring Business Transactions with First Nations</i> (CLEBC, 2011). <p style="text-align: center;">CONTENTS</p> <ol style="list-style-type: none"> 1. Initial Contact 2. Initial Interview 3. After the Initial Interview 4. Drafting the Agreement 5. Prior to Closing 6. Closing 7. Post Closing 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
CHECKLIST					
1. INITIAL CONTACT					
1.1 Arrange the initial interview.					
1.2 Ask the client to bring to the initial interview all available financial and operational information on the target company and vendor, particularly financial statements, annual reports, prospectuses, press releases, list of assets, contracts, leases, government permits, etc. Where information is not available, consider how it will be obtained.					
1.3 Confirm compliance with Law Society Rules 3-98 to 3-109 on client identification and verification and complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist.					
1.4 Determine and assess actual and potential conflicts of interest. See <i>Code of Professional Conduct for British Columbia</i> (“BC Code”), s. 3.4 and the model conflicts of interest checklist on the Law Society website at www.lawsociety.bc.ca/docs/practice/resources/checklist-conflicts.pdf .					
2. INITIAL INTERVIEW					
2.1 Advise the client regarding calculation of your account, the method and timing of payment, and the conditions upon which you will act as solicitor (see <i>BC Code</i> , s. 3.6). Ask the client to sign a retainer letter or agreement. If there is more than one purchaser, make it clear for whom you are acting. Urge others, in writing, to get independent legal representation. Make it clear that you are not protecting their interests and that you are acting exclusively in the interests of your client (<i>BC Code</i> rule 7.2-9). If your retainer will be limited in scope (e.g., confidential drafting), note that <i>BC Code</i> rule 3.2-1.1 requires that, before undertaking a “limited scope retainer” (a defined term under <i>BC Code</i> rule 1.1-1), you must advise the client about the nature, extent, and scope of the services that you can provide and must confirm in writing as soon as practicable what services will be provided. Note that rule 3.2-1.1 does not apply to situations in which you are providing summary advice or to an initial consultation that may result in the client retaining you as lawyer. See <i>BC Code</i> , s. 3.6 for the rules regarding reasonable fees and disbursements, and commentary [1] to rule 3.6-3 regarding the duty of candour owed to clients respecting fees and other charges. Also be aware of the obligations in <i>BC Code</i> rules 3.1-2, 7.2-6, and 7.2-6.1. Note Law Society Rule 3-59 with respect to the restrictions on receiving cash and Rule 3-70 for records of cash transactions.					
2.2 Determine whether the client has already reached an agreement with the vendor concerning the general terms of the transaction. If not:					
.1 Advise the client regarding the possibility of structuring the transaction as a share purchase (if appropriate in the circumstances). Consider the tax consequences of purchasing assets versus purchasing shares.					
.2 Consider signing a confidentiality agreement to allow negotiations to commence. If the client and vendor are competitors, consider safeguards in sharing competitively sensitive information; consider the implications of the <i>Competition Act</i> , R.S.C. 1985, c. C-34.					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>2.3 Determine the client’s objectives and why the client wants to complete this transaction. Will it be integrated into an existing business? Seek to determine specific risks and regulatory requirements that may be of concern to the purchaser.</p> <p>2.4 Consider the name under which the business will be conducted post-closing to determine due diligence of trademarks and other intellectual property.</p> <p>2.5 Review financial statements and other information with the client, the client’s accountant, and tax advisor (if you are not providing tax advice).</p> <p>2.6 Determine the principal elements of the transaction: who is buying what from whom, and for how much? How does the client intend to finance it? Are there any unusual restrictions, covenants or conditions that are important? Consider the use of any restrictive covenant against the vendor and the target, and its enforceability.</p> <p>2.7 Review any tax implications of the transaction: .1 Consider the applicability of PST/GST and input tax credits.</p>					
<p>3. AFTER THE INITIAL INTERVIEW</p>					
<p>3.1 Confirm in writing your retainer and instructions from the client. Confirm in writing your retainer and instructions from the client (see item 2.1).</p> <p>3.2 Ensure that you will not act for more than one party to the transaction unless you comply with the rules on conflicts (see <i>BC Code</i>, s. 3.4, and the model conflicts of interest checklist). If you are permitted to act under a joint retainer, see <i>BC Code</i> rules 3.4-5 to 3.4-9 and the precedent letter on the Law Society website at www.lawsociety.bc.ca under “Practice Support and Resources” that may be used as a basis for compliance with rule 3.4-5. If the client is a company, verify who has the authority to give instructions. Consider having a directors’ resolution confirm your retainer and giving one officer or director the authority to instruct you.</p> <p>3.3 If the client has not reached a tentative agreement with the vendor, draft a letter of intent outlining the transaction in clear terms. Consider whether the client wishes the letter of intent (or any parts of it) to be binding. Review the letter with the client to ensure that it reflects his or her intentions. Forward the letter to the vendor. Negotiate, if so instructed.</p> <p>3.4 Finalize the arrangements regarding financing, if any, if so instructed.</p> <p>3.5 Initiate the necessary searches to complete the due diligence for the transaction and, where necessary, obtain the written authorization of the vendor and its shareholders for release of information and the relevant government account numbers (note: certain searches may vary for federally regulated undertakings even if operated only in British Columbia). Consider in particular the following: .1 Corporate Registry (or equivalent office in jurisdiction of incorporation) re: memorandum (where still applicable), notice of articles, articles, and any amendments; registered and records offices; annual reports; directors and officers; whether the company has been struck off and subsequently restored; copies of encumbrances which may still bind the company; order certificate of good standing; check that there is no notice of dissent pursuant to <i>Business Corporations Act</i>, S.B.C. 2002, c. 57, s. 301(5).</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>.2 Personal Property Registry.</p> <p>.3 Vehicle Records Department of ICBC.</p> <p>.4 Land title offices re: judgments; title; copies of charges and permitted encumbrances; copies of leases and restrictive covenants; other relevant information.</p> <p>.5 Office of the Superintendent of Bankruptcy (Industry Canada).</p> <p>.6 Canadian Securities Registration Systems for security under <i>Bank Act</i>, S.C. 1991, c. 46, s. 427.</p> <p>.7 Canada Revenue Agency: (a) Income tax re: source deductions and corporate or personal income tax. (b) PST/GST.</p> <p>.8 WorkSafeBC.</p> <p>.9 Employment Standards Branch.</p> <p>.10 Labour Relations Board.</p> <p>.11 Consider searches re: other special assets being acquired (e.g., Mineral Titles Online, Ministry of Forests, Lands and Natural Resource Operations, Ships Registry).</p> <p>.12 Insurance agent (confirming placement of adequate insurance).</p> <p>.13 Municipal offices re: taxes and utilities; planning department; licences and permits; fire inspector; health inspector; zoning and restrictive by-laws.</p> <p>.14 Court registry search re: actions commenced against the vendor or its shareholders (consider which registries to search).</p> <p>.15 Sheriff’s offices for writs of executions.</p> <p>.16 Environmental matters: environment ministries (federal and provincial), Fisheries and Oceans Canada, Contaminated Site Registry. Consider having an environmental audit conducted.</p> <p>.17 Canadian Intellectual Property Office (patents, trademarks, copyrights, etc.).</p> <p>.18 Consider searching the Canadian Internet Registration Authority (www.cira.ca).</p> <p>.19 Review CLEBC’s <i>Due Diligence Deskbook</i> for other possibly relevant searches and the appropriate scope of the searches.</p> <p>3.6 Review all material contracts and permits to be assigned, and consider whether consents to assignment are required.</p> <p>3.7 Consider consulting a tax expert.</p> <p>3.8 Consider the impact on the transaction of the <i>Family Law Act</i>, S.B.C. 2011, c. 25 (or, if applicable, the former legislation, <i>Family Relations Act</i>, R.S.B.C. 1996, c. 128); <i>Investment Canada Act</i>, R.S.C. 1985, c. 28 (1st Supp.); <i>Competition Act</i> (i.e., regarding mergers and notifiable transactions); and other relevant legislation.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>3.9 Open a document file and retain successive drafts of the agreement. Open a separate sub-file for each major document that the transaction will require.</p>					
<p>4. DRAFTING THE AGREEMENT</p> <p>4.1 Before drafting the agreement, prepare a timetable and a draft of the closing agenda which will act as a reminder of what is required in the transaction and when.</p> <p>4.2 Prepare an outline of the document. The ASSET PURCHASE AGREEMENT DRAFTING (B-2) checklist may serve as a basis for the document.</p> <p>4.3 Prepare the first draft.</p> <p>4.4 Review the first draft for coherence and continuity. Go over the first draft with the client to ensure that it expresses the client’s intentions.</p> <p>4.5 When you and the client are satisfied with the agreement, send it to the vendor or his or her lawyer for comment and changes.</p> <p>4.6 Note changes to the agreement during the course of negotiation in some readily discernible manner.</p> <p>4.7 Do not alter the document without indicating the changes to the vendor’s lawyer.</p> <p>4.8 When negotiations are concluded, prepare the final agreement and check to ensure that the document reflects the transaction as it has been formulated.</p> <p>4.9 Arrange for signing of the agreement.</p>					
<p>5. PRIOR TO CLOSING</p> <p>5.1 Prepare or obtain all the necessary documentation (for additional considerations, see the ASSET PURCHASE AGREEMENT DRAFTING (B-2) checklist), including:</p> <p>.1 Conveyancing documents with respect to the transfer of real property interests. Note the obligation to maintain the security of the digital signature. Password entry is required each time a lawyer signs an electronic document. The offence provision under s. 168.9(b) of the <i>Land Title Act</i>, R.S.B.C. 1996, c. 250, the Juricert terms and conditions, Law Society Rule 3-64(8), and <i>BC Code</i> rule 6.1-5 prohibit lawyers from permitting others to use their personalized encrypted electronic access to register documents or from disclosing to others, including support staff, the password or access phrase or number. See also the Law Society’s Discipline Advisory of October 2, 2015.</p> <p>.2 Bill of sale for chattels and other personal property.</p> <p>.3 Assignment of contracts.</p> <p>.4 Transfer forms for licensed vehicles, registered vessels.</p> <p>.5 Assignment of receivables.</p> <p>.6 Assignment of intangible property, such as trademarks, patents and goodwill, etc.</p> <p>.7 Third-party consents as necessary, especially re: franchises, leases, licences and all contracts essential to operate the business, etc.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>.8 Releases of encumbrances not assumed by client.</p> <p>.9 Certified extract of a resolution of the vendor company’s directors authorizing the execution, delivery, and implementation of the agreement.</p> <p>.10 Certified extract of special resolution of members of the vendor company pursuant to <i>Business Corporations Act</i>, s. 301(1), if required.</p> <p>.11 Resolution of the purchaser’s directors authorizing the transaction.</p> <p>.12 Assumption agreements, confirmation of outstanding balances, and other covenants and assurances required to procure releases with respect to liabilities or indebtedness being assumed.</p> <p>.13 Certified copies of insurance policies with transfer and consent forms duly endorsed (if applicable).</p> <p>.14 Tax remittances (confirm obligation for and timing of payment):</p> <p>(a) Certified cheque payable to the Minister of Finance for applicable PST/GST in respect of tax payable on the transaction, together with an appropriate remittance form.</p> <p>(b) Calculation of federal GST payable on closing, if an election under <i>Excise Tax Act</i>, R.S.C. 1985, c. E-15, s. 167 is not utilized.</p> <p>Note that effective April 1, 2013, the harmonized sales tax (“HST”) was eliminated, and the <i>Provincial Sales Tax Act</i>, S.B.C. 2012, c. 35 reinstated the PST. GST (rather than HST) applies under the <i>Excise Tax Act</i>. Further information about the GST and PST can be found at www.cra-arc.gc.ca and www2.gov.bc.ca.</p> <p>(c) Calculation of property transfer tax payable on closing of a conveyance of real property. (Note the additional 15 per cent property transfer tax applicable to transfers of residential properties to foreign entities in the Greater Vancouver Regional District effective August 2, 2016, pursuant to s. 2.02 of the <i>Property Transfer Tax Act</i>, R.S.B.C. 1996, c. 378.)</p> <p>.15 Extraprovincial registration pursuant to the <i>Business Corporations Act</i> (where the purchaser is a foreign corporation intending to carry on business in British Columbia). Note that British Columbia and Alberta agreed, under the <i>Trade, Investment and Labour Mobility Agreement</i> (the “<i>TILMA</i>”), to reconcile their business registration and reporting requirements, so that an enterprise meeting the requirements of one province will also be deemed to meet the requirements of the other province (however, the need for extraprovincial registration has not been eliminated). The relevant provisions of the <i>Trade, Investment and Labour Mobility Agreement Implementation Act</i>, S.B.C. 2008, c. 39 (the “<i>TILMA Act</i>”) and the Extraprovincial Companies and Foreign Entities from a Designated Province Regulation, B.C. Reg. 88/2009, came into force on April 27, 2009. The <i>TILMA Act</i> added several sections to the <i>Business Corporations Act</i>, and amended others. The New West Partnership Trade Agreement (the “<i>NWPTA</i>”) between British Columbia, Alberta, and Saskatchewan, implemented by BC Registry Services on July 1, 2012, eliminates the need to file and maintain company information with each province individually (though not the need for extraprovincial registration). For information about corporate registry procedures pursuant to the <i>NWPTA</i>, visit the <i>NWPTA</i> page on the Corporate Registry website at www.bcregistryservices.gov.bc.ca.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>.16 Statements of adjustments.</p> <p>.17 Certificate pursuant to <i>Income Tax Act</i>, R.S.C. 1985, c. 1 (5th Supp.), s. 116 (regarding withholding tax to be withheld by purchaser if the vendor is not a resident of Canada).</p> <p>.18 Security documents, and financing statements under the <i>Personal Property Security Act</i>, R.S.B.C. 1996, c. 359, if required.</p> <p>.19 Employment contracts, if required.</p> <p>.20 Non-competition and confidentiality agreements.</p> <p>.21 Banking arrangements.</p> <p>.22 Opinion of the vendor’s lawyer. Consider including that the vendor is duly incorporated, validly existing and in good standing and all necessary steps and corporate proceedings have been taken to validate the transfer of assets, the agreement has been duly executed and delivered and is a legal, valid and binding obligation, enforceable against the vendor, and that lawyers know of no claims or actions affecting the assets or the transfer of the assets to the purchaser. Consider opinions specific to the transaction (see statements and opinions of the Solicitors’ Legal Opinions Committee on the Law Society website at www.lawsociety.bc.ca under “Practice Support and Resources”). See also CLEBC’s <i>Advising British Columbia Businesses</i>.</p> <p>.23 Evidence of appropriate filings under the <i>Investment Canada Act</i>, (R.S.C., 1985, c. 28 (1st Supp.)), and the <i>Competition Act</i> and any other required regulatory consents.</p> <p>.24 <i>Excise Tax Act</i>, s. 167 election regarding GST exemption, if applicable.</p> <p>.25 <i>Income Tax Act</i>, s. 22 election regarding accounts receivable exemption, if applicable.</p> <p>.26 Name the change documents for the vendor, if applicable.</p> <p>5.2 Ensure that the conditions of the client’s obligation to close have been satisfied.</p> <p>5.3 Complete the financial arrangements.</p> <p>5.4 Prepare the final draft of the closing agenda.</p> <p>5.5 Gather together the documents needed for closing.</p> <p>5.6 Update searches for closing.</p> <p>5.7 Remind the client to arrange insurance on the assets being purchased, and that the insurance should take effect when (or before) the risk passes.</p> <p>5.8 Consider application of the <i>Proceeds of Crime (Money Laundering) and Terrorist Financing Act</i>, S.C. 2000, c. 17.</p> <p>5.9 Consider timing and management of funds (payment by wire transfers, lawyers’ trust accounts, Law Society trust administration fee, etc.). Use directions to pay as necessary. With regard to wire transfers, see Law Society Rule 3-64(7) and (8) and pages 23, 28, and 29 of the <i>Trust Accounting Handbook</i> at www.lawsociety.bc.ca/docs/trust/Trust-Accounting-Handbook.pdf. Note that a financial institution’s system that calls for a lawyer or staff member to log into a law firm’s trust account online, enter the information, and provide the authorizations necessary to process a wire transfer is not presently permitted by Law Society Rule 3-64.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>6. CLOSING</p> <p>6.1 Ensure that all the conditions of closing are satisfied.</p> <p>6.2 Ensure that each party receives the appropriate documents.</p> <p>6.3 Transfer the property and pay the purchase price and all applicable taxes.</p> <p>6.4 Obtain acknowledgment in writing from each party that all conditions of closing have been satisfied or waived.</p> <p>6.5 Complete filings at the land title office as necessary in respect of real property interests. Register any financing statements and financing change statements that require registration at the Personal Property Registry. Do these registrations on or before closing, if possible.</p> <p>7. POST CLOSING</p> <p>7.1 Send copies of insurance policies to encumbrance holders, as required.</p> <p>7.2 Remit GST if <i>Excise Tax Act</i>, s. 221(1), applies.</p> <p>7.3 Prepare a reporting letter and account as soon as practicable after closing. Forward the brief of documents to the client and indicate those matters requiring further action on the part of the client.</p> <p>7.4 Advise the client to file tax elections in time (they must be filed within the regular reporting period in which the closing falls), and advise the client to confirm with his or her tax advisor whether any other filings are required.</p> <p>7.5 Close the file. Consider storage and destruction requirements. See <i>Closed Files—Retention and Disposition</i>, July 2015, Appendix B at www.lawsociety.bc.ca/docs/practice/resources/ClosedFiles.pdf.</p>					