

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 COMMERCIAL LEASE DRAFTING (B-11) checklists. Unless otherwise indicated, this checklist is primarily intended for use by the lawyer acting for the landlord. This checklist is current to September 1, 2016.</p> <p>New developments:</p> <ul style="list-style-type: none"> • 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. • 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. • Code of Professional Conduct for British Columbia (the “BC Code”). In July 2015, rule 3.7-9 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. <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 land situated within an Indian reserve. While Aboriginal Affairs and Northern Development Canada (“AANDC”) helps to manage a significant number of reserves for the benefit of “Indians” (as defined in the <i>Indian Act</i>, R.S.C. 1985, c. I-5), there are some bands or First Nations in B.C. that manage their own reserve lands. To investigate whether a particular First Nation is a signatory to the Framework Agreement on First Nations Land Management (ratified and implemented by the <i>First Nations Land Management Act</i>, S.C. 1999, c. 24), consult the website of the First Nations Land Management Resource Centre (www.labrc.com). Some bands (like the Sechelt Indian Band, Nisga’a Nation, and the Tsawwassen Indian Band) are registered under the provincial land title system, although special provisions in the <i>Land Title Act</i>, R.S.B.C. 1996, c. 250, apply to the lands of those First Nations. <p>AANDC maintains the Indian Lands Registry, which includes information about the creation of the reserve and any allotments of parcels of land within a reserve to individual Indians (under certificates of possession or certificates of occupation), as well as any surrenders or designations of lands and any third party interests in or on the reserve lands (such as leases, easements, permits, etc.). The registry is an informational system only and does not create priority (except in the case of a registered assignment having priority over an unregistered assignment (<i>Indian Act</i>, s. 55(4)). First Nations operating under a land code adopted under the <i>First Nations Land Management Act</i> have a separate registry system established under that Act that contains some rules on priorities established by regulation.</p>					

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<p>While Indian reserve lands are within federal jurisdiction, consider conducting title searches in the provincial system as well, since some reserve lands are registered in both systems. In contrast to the provincial land title system, note that the Indian Land Registry is not always up-to-date and, from a title search perspective, may be unreliable. However, do not consider the provincial system as authoritative, given the potential for interjurisdictional immunity issues where conflicts arise between the two jurisdictions.</p> <p>If a lease, mortgage, land conveyance, or transfer of leasehold interest involves reserve or First Nation lands, consider seeking the advice of a lawyer who has experience in Aboriginal law matters. Further information on Aboriginal law issues is available on the “Aboriginal Law” page on the “Practice Points” section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications.</p> <ul style="list-style-type: none"> • Additional resources. For detailed information about commercial lease procedures, including a precedent First Nations lease and commentary, see <i>Commercial Leasing: Annotated Precedents</i>, looseleaf and online (CLEBC, 1996). <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. Offer or Agreement to Lease 5. Preparing the Lease 6. Concluding the Agreement 7. Closing the File <p style="text-align: center;">CHECKLIST</p> <ol style="list-style-type: none"> 1. INITIAL CONTACT <ol style="list-style-type: none"> 1.1 Arrange an interview. 1.2 Ask the client to bring all relevant information, including offers to lease and leases, to the interview. 1.3 Confirm compliance with Law Society of British Columbia Rules 3-98 to 3-109 on client identification and verification and complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. 2. INITIAL INTERVIEW <ol style="list-style-type: none"> 2.1 Find out the name and address of the other party and his or her lawyer. Ensure that you have the correct names of the landlord, the tenant, and the indemnitor, if any. 2.2 Ensure that there is no conflict of interest. The <i>Code of Professional Conduct for British Columbia</i> (the “BC Code”) addresses conflicts at s. 3.4. Also see the model conflicts of interest checklist on the Law Society website at www.lawsociety.bc.ca/docs/practice/resources/checklist-conflicts.pdf. 					

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<p>2.3 Advise the client regarding calculation of your account, method and timing of payment, and conditions upon which you will act (see <i>BC Code</i>, s. 3.6). Note Law Society Rule 3-59, which prohibits lawyers from accepting \$7,500 or more in cash from clients, subject to certain exceptions. See Rule 3-70 regarding records of cash transactions. If your retainer is limited (for example, where you are only providing confidential drafting advice), note that <i>BC Code</i> rule 3.2-1.1 requires that, before undertaking a “limited scope retainer” (a defined term under 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 regarding “limited scope retainers” 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. Also be aware of the obligations in <i>BC Code</i> rules 3.1-2, 7.2-6, and 7.2-6.1.</p> <p>2.4 Discuss the nature of the transaction and the steps you will be taking.</p> <p>2.5 Discuss the client’s objectives and the background of the transaction.</p> <p>2.6 If you are acting for the landlord, find out whether you will be drafting leases for all tenancies in a development, and whether a standard form of lease already exists for the development.</p> <p>2.7 Collect information and discuss the provisions of the lease or offer to lease, referring to the COMMERCIAL LEASE DRAFTING (B-11) checklist and noting any special features of the transaction. Include:</p> <ol style="list-style-type: none"> .1 Type of building or development (e.g., shopping centre, office, stand-alone, or strata lot). .2 Whether the building is existing (and, if so, whether there are existing tenants), new, or planned. .3 The type of tenants who are or will be leasing, and whether their leases are or will be similar (if not, the landlord will probably require that the leases not be registered). .4 The landlord’s costs, including which costs the landlord will absorb and which are to be recovered from the tenants (e.g., is the lease to be on a completely net basis? Who is responsible to pay for structural or capital replacements or repairs?) .5 The way in which amounts (e.g., rent, costs) payable by each tenant are to be determined and allocated. Consider whether a particular tenant’s consumption may be high (e.g., a fast food outlet’s garbage output). .6 Who is responsible to undertake what maintenance, repairs, and replacements (e.g., landlord is responsible to make structural repairs, and repairs of common areas). .7 Financing arrangements and lender’s requirements. If the landlord has not yet obtained financing, consider provisions allowing for cancellation if he or she fails to do so. Inquire as to what terms, if any, the lender requires in the landlord’s leases. .8 Insurer’s requirements. .9 Whether estoppel certificates are required. .10 Whether any inducements are to be given to any tenants. 					

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<p>.11 Special shopping centre considerations:</p> <ul style="list-style-type: none"> (a) Whether the rent should allow the landlord to participate in sales by percentage rent (and if so, what the minimum rent and percentage rent should be). (b) The extent to which the landlord wants to control tenant use and tenant mix by restrictive covenants (where a restrictive covenant grants a tenant exclusive right to carry on a particular activity, ensure that activity is an excluded activity in all other tenants' leases). (c) Covenants regarding operation for entire premises and fully stocked/employee-serviced. (d) Joint landlord and tenant actions (e.g., promotion fund, official opening of centre). (e) Tenants' use of common areas and parking. (f) Whether there are any "anchor-tenant" requirements. <p>.12 If the premises are strata property, consider the need for an easement from the strata corporation.</p> <p>.13 Various types of defaults and the proposed consequences.</p> <p>.14 Circumstances in which the lease can or will be terminated.</p> <p>.15 Whether any security will be taken by the landlord to secure payment of rent (e.g., deposit, personal property security interest).</p> <p>.16 Whether any particular services are available and who is to pay for them.</p> <p>.17 What rules and regulations the landlord wants attached to the lease.</p> <p>.18 Whether the lease is to be registered in the land title office ("LTO"), and if so at whose expense. Consider whether a short form of lease should be registered so that financial aspects of the transaction are not disclosed to the public (e.g., tenant inducements, rent). Also consider whether easements, licences, etc. are required over land; if not, make that explicit in the lease, to avoid the effect of <i>Property Law Act</i>, R.S.B.C. 1996, c. 377, s. 5(2). Consider whether property transfer tax is payable, which might influence whether the lease is registered. Consider whether a reference plan is required for a lease of part of a building, if the lease is to be registered.</p> <p>2.8 If the land is part of an Indian reserve, note that there are special considerations (see the Introduction to this checklist).</p> <p>2.9 Discuss the nature of an offer or agreement to lease, and determine whether it is desirable to use one.</p> <p>2.10 Get instructions to draft the lease or offer to lease and any supplementary documents required (e.g., guarantees, environmental indemnity, or a tenant fixturing loan agreement—see item 3.9).</p>					

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<p>3. AFTER THE INITIAL INTERVIEW</p> <p>3.1 Send a letter to your client, confirming the retainer and instructions, setting out the manner in which you will determine your fee for services, stating the conditions upon which you have agreed to act, and summarizing the points discussed (see <i>BC Code</i>, s. 3.6). Confirm compliance with Law Society of British Columbia Rules 3-98 to 3-109 on client identification and verification (see item 1.3).</p> <p>3.2 Open a file: place this checklist in the file and make entries in your diary and “BF” systems.</p> <p>3.3 Send a letter to counsel for the other party, if any, advising of your involvement. If that party has not retained counsel, urge the party, in writing, to get independent legal representation. Make it clear that you are not protecting their interests and that you act exclusively in the interests of your client (see <i>BC Code</i> rule 7.2-9).</p> <p>3.4 If the landlord has not yet purchased the property, or if the tenant is concerned, conduct relevant searches, such as:</p> <ol style="list-style-type: none"> .1 LTO. .2 Zoning. .3 Property taxes. .4 Environmental inquiries (Contaminated Site Registry, Ministry of Environment, municipality, investigation of property). <p>3.5 Conduct company search on corporate parties.</p> <p>3.6 If premises to be leased are on an unsubdivided portion of a legal lot, consider the effect and application of <i>Land Title Act</i>, ss. 73(1)(b) and 73.1. Note that s. 73(3) provides that s. 73(1) does not apply to a subdivision for the purposes of leasing a building or part of a building. <i>International Paper Industries Ltd. v. Top Line Industries Inc.</i> (1996), 20 B.C.L.R. (3d) 41 (C.A.), held that any lease that offends s. 73 is not only unregistrable, but unenforceable as an illegal contract. However, in 2007, s. 73.1 was enacted, providing that a lease or an agreement for lease of part of a parcel of land is not unenforceable between the parties by reason only that it does not comply with Part 7 of the <i>Land Title Act</i>, or that an application to register it may be refused or rejected. In <i>Idle-O Apartments Inc. v. Charlyn Investments Ltd.</i>, 2010 BCCA 460, the court held that, while s. 73.1 is remedial legislation in effect to prevent the hardship caused by <i>Top Line</i>, it does not operate retroactively. Subsequently, in <i>Idle-O Apartments Inc. v. Charlyn Investments Ltd.</i>, 2014 BCCA 451, the court held that where the non-retroactive nature of s. 73.1 results in hardship, equitable remedies may be appropriate. The court upheld the trial judge’s use of proprietary estoppel as a basis for granting a replacement lease but emphasized that there can be no retroactive reliance on s. 73.1 in reaching such a conclusion. The court varied the trial judge’s finding that the replacement lease should be under the exact same terms as the lease signed by the parties, saying that the terms should strike a balance between the parties’ expectations and the public policy impact of creating an equitable exception to the requirements of the <i>Land Title Act</i>.</p> <p>3.7 If the premises are strata property, determine if any special levies have been assessed that will be passed on to the tenant as part of operating costs, or if any will be in future. Also, review the bylaws of the strata corporation.</p>					

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<p>3.8 Discuss the results of your searches and inquiries with the client.</p> <p>3.9 Prepare or obtain supplementary documents, such as:</p> <ul style="list-style-type: none"> .1 For corporate parties: <ul style="list-style-type: none"> (a) Certificate or opinion letters from lawyers, to include matters such as: corporate status, good standing, incumbency, authorization, and execution. (b) Directors' resolution and shareholders' resolution, if required (certified copies). .2 Estoppel certificates. .3 Non-disturbance agreement, if you are acting for the tenant, and an attornment agreement, if required by the lender. .4 Subordination agreements. .5 Insurance policy (if you are acting for the tenant, ask for a certificate of insurance only). .6 Surveyor's certificate, if the lease includes a portion of building. .7 Notice of interest under the <i>Builders Lien Act</i>, S.B.C. 1997, c. 45, if you are acting for the landlord and the tenant plans to carry out any improvements to the premises (see <i>Builders Lien Act</i>, s. 3). .8 Copies of current bylaws and rules, if the premises are a strata lot. .9 Tenant fixturing loan agreement, where the landlord takes a security interest in fixtures on the premises. This is especially desirable if the landlord has provided any incentives or allowances for fixturing in advance of work being performed. Ensure that registrations in the LTO and Personal Property Registry are made, and that no purchase money security interest ("PMSI") is claimed by another lender or lessor of goods. .10 Priority agreements from any creditors of the tenant who have taken a security interest in the tenant's fixtures, where the landlord takes a security interest in fixtures on the premises. .11 Security agreement from the tenant, or a guarantee or indemnity to ensure that the rent is paid. .12 Property transfer tax return, if the lease is to be registered in the LTO. 					
<p>4. OFFER OR AGREEMENT TO LEASE</p> <p>4.1 If so instructed, draft an offer or agreement to lease, including:</p> <ul style="list-style-type: none"> .1 Parties. .2 Offer, acceptance, and consideration. .3 Basic provisions to be included in the lease (see the COMMERCIAL LEASE DRAFTING (B-11) checklist). .4 Work to be done by both parties. 					

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<p>.5 Inducements to be offered, including free rent. Consider the effect of GST/PST on inducements and ownership of tenant improvements. Note that, effective April 1, 2013, harmonized sales tax (“HST”) was eliminated, and provincial sales tax (“PST”) was reinstated under the <i>Provincial Sales Tax Act</i>, S.B.C. 2012, c. 35. GST (rather than HST) applies under the <i>Excise Tax Act</i>, R.S.C. 1985, c. E-15. Commercial lease payments due or paid before April 1, 2013 may be subject to HST, but commercial leases would not generally include PST, which applies to tangible personal property and some services. Both PST and GST are generally applicable to legal services. Further information about the GST and PST can be found at www.cra-arc.gc.ca and www2.gov.bc.ca.</p> <p>.6 Provision that the tenant’s interest in affixed goods (fixtures) does not arise until 24 hours after affixation, to attempt to avoid application of the <i>Personal Property Security Act</i>, R.S.B.C. 1996, c. 359, s. 36(3).</p> <p>.7 Termination in the event that conditions precedent, if any, are not met.</p> <p>.8 Security deposit/security for rent under the lease (see <i>West Shore Ventures Ltd. v. K.P.N. Holding Ltd.</i>, 2001 BCCA 279, which held that a letter of credit taken as security for a tenant’s obligations under a lease had to be repaid where the tenant became bankrupt and the trustee in bankruptcy had disclaimed the lease, because there were no outstanding obligations under the lease).</p> <p>.9 Legal effect of an offer after the lease is executed.</p> <p>.10 Lease form as an attachment.</p> <p>.11 Plan of the premises as an attachment (avoid using colours).</p> <p>.12 Rights or prohibitions on assignment.</p> <p>4.2 Discuss it with the client and revise as required.</p> <p>4.3 Discuss it with the other party and revise as required, discussing revisions with the client.</p> <p>4.4 Have the offer or agreement executed by both parties.</p>					
<p>5. PREPARING THE LEASE</p> <p>5.1 Prepare an outline of the lease, indicating the clauses from your precedent file that will be included (see the COMMERCIAL LEASE DRAFTING (B-11) checklist).</p> <p>5.2 Prepare the first draft.</p> <p>5.3 Review the first draft, checking each segment to ensure that it achieves the client’s objectives, and checking the document as a whole to ensure that it is internally consistent. Make any necessary corrections and prepare a second draft.</p> <p>5.4 Go over the second draft with the client, or send it to the client with a request that the client review it and note any changes or questions. Discuss it with the client.</p> <p>5.5 Make any changes required to the second draft and send copies to the other party or his/her lawyer for comment. Review any alterations with the client.</p> <p>5.6 Prepare the final lease, and arrange for signing.</p>					

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<p>6. CONCLUDING THE AGREEMENT</p> <p>6.1 Update searches.</p> <p>6.2 Ensure proper signing and execution of the lease:</p> <p> .1 Prepare a general instrument (Form C), if the lease is to be registered, and ensure compliance with LTO format requirements.</p> <p> .2 Have the lease signed by an authorized signatory.</p> <p> .3 Execute it before a certifying officer (lawyer, commissioner, notary public), if it is to be registered in the LTO.</p> <p>6.3 Ensure proper signing and execution of supplementary documents.</p> <p>7. CLOSING THE FILE</p> <p>7.1 Arrange for preparation of an explanatory plan of survey (<i>Land Title Act</i>, ss. 74 and 99) and register the plan and the lease in the LTO unless the lease provides otherwise. (The tenant usually arranges and pays for preparation of the plan and registration.)</p> <p>7.2 Prepare and file a property transfer tax return. If the lease is for 30 years or less, including renewals, file a “special” return.</p> <p>7.3 If the landlord obtained a security interest in fixtures on the premises, file a financing statement in the Personal Property Registry and a fixturing notice in the LTO, if appropriate.</p> <p>7.4 If the tenant may be carrying out any improvements to the premises, file a notice of interest under the <i>Builders Lien Act</i> in the LTO (see <i>Builders Lien Act</i>, s. 3). If you are acting for a landlord of a shopping centre or an office tower where tenants are often carrying out improvements to the premises, file a generic notice of interest in the LTO with respect to the whole building or development.</p> <p>7.5 Send a reporting letter and statement of account to the client. Include copies of relevant documents, details of registration, and details regarding your searches. Diarize the renewal option date and other deadlines for the tenant, or advise the tenant that you are not taking responsibility for these items.</p> <p>7.6 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>					