

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 SHARE PURCHASE AGREEMENT DRAFTING (B-4) checklists. It is primarily intended for use by the purchaser’s lawyer, but may serve as a guide for the vendor’s lawyer. The checklist is also primarily intended for use in the acquisition of shares in a British Columbia company that is not a reporting company. 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. • 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 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. 					

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<p>Of note:</p> <ul style="list-style-type: none"> <p>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.</p> <p>Aboriginal law. Special considerations apply to businesses involving “Indians” and “Indian reserves” (both as defined in the <i>Indian Act</i>, R.S.C. 1985, c. I-5). While significant tax and other advantages may be available under the <i>Indian Act</i>, these are affected by the type of business, transaction nature, business entity (sole proprietorship, partnership, joint venture, trust, or incorporated company), location of business activity on or off reserve land, and the specific reserve and its governance. In addition to <i>Indian Act</i> considerations, some Indian bands or First Nation entities have entered into treaties that may have governance, taxation, and other business-related implications. The Crown’s duty to consult and seek accommodation with respect to activities potentially affecting Aboriginal title or rights may also have implications for businesses with government agreements or government-issued tenures.</p> <p>Businesses that engage in activities on reserve lands and on lands subject to treaty or claims of Aboriginal rights on title are strongly encouraged to familiarize themselves with applicable laws and governmental policies. Consider seeking advice from a lawyer with experience in Aboriginal law matters. Further information on Aboriginal law issues is available on the “Aboriginal Law” page in the “Practice Points” section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications.</p> <p>Additional resources. For further information about share purchase procedures, see <i>Advising British Columbia Businesses</i>, looseleaf and online (CLEBC, 2006); <i>Buying and Selling a Business: Annotated Precedents</i>, looseleaf (CLEBC, 2000); and the <i>Due Diligence Deskbook</i>, looseleaf and online (CLEBC, 1994).</p> 					

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<p style="text-align: center;">CONTENTS</p> <ol style="list-style-type: none"> 1. Initial Contact 2. Initial Interview 3. After the Initial Interview 4. Drafting the Agreement 5. Prior to Closing 6. Closing 7. Post Closing <p style="text-align: center;">CHECKLIST</p> <p>1. INITIAL CONTACT</p> <ol style="list-style-type: none"> 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 the vendor, particularly financial statements, annual reports, prospectuses, press releases, list of assets, contracts, leases, government permits, etc. Consider requesting client information if the target is to be combined with or complementary to an existing investment of the client. 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. <p>2. INITIAL INTERVIEW</p> <ol style="list-style-type: none"> 2.1 Advise the client regarding calculation of your account, the method and timing of payment, and conditions upon which you will act (see <i>BC Code</i>, s. 3.6; see also item 3.1). Clarify your role in the transaction and that of other advisors to the client. Make it clear for whom you are working. 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 clients (<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 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. 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. 					

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<p>2.2 Determine whether the client has already reached an agreement with the vendor concerning the general terms of the transaction. If not, advise the client regarding the possibility of structuring the transaction as an asset purchase (if appropriate in the circumstances). Consider the tax consequences of purchasing shares versus purchasing assets.</p> <p>2.3 Determine the client’s objectives and why the client wants to complete this transaction. Will it be integrated into an existing business? Confirm any areas of risk relating to the transaction. Assess any impact on the client’s existing business, if relevant.</p> <p>2.4 Consider the name under which the business will be conducted post-closing, to exercise due diligence regarding trademarks and other intellectual property.</p> <p>2.5 Review the financial statements and other information with the client’s accountant and the client. Review the transaction with the client’s tax advisor to identify any tax implications.</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 the transaction? Are there any conditions to be met before the deal can proceed (e.g., regulatory approvals)? Are there any third-party consents that need to be obtained (e.g., landlord consents)? Are there any unusual restrictions, covenants or conditions that are important to the client? Does the business being conducted by the company involve any particular risks (e.g., environmental), and how are these risks to be allocated between the purchaser and the vendor? Are there any special or unusual procedures that need to be followed (e.g., governmental consultation with Aboriginal groups)?</p> <p>2.7 Consider signing a confidentiality agreement to allow formal negotiations to open. If the client and vendor are competitors, consider safeguards in sharing information. Sharing competitively sensitive information can be problematic, particularly if the transaction fails to close. Consider the implications of the <i>Competition Act</i>, R.S.C. 1985, c. C-34.</p>					
<p>3. AFTER THE INITIAL INTERVIEW</p>					
<p>3.1 Confirm your retainer and the instructions you have received in a letter to the client. Set out the manner in which the fees, disbursements, interest, and taxes will be determined (see <i>BC Code</i>, s. 3.6). Confirm in the letter the scope of your responsibilities and the roles of other advisors in relation to 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. Where the purchaser is a company, verify who has the authority to give instructions. Consider getting a directors’ resolution confirming your retainer and giving one director or officer the authority to instruct you.</p>					
<p>3.3 If 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 (all or part 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>					

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<p>3.4 Participate in or finalize the arrangements regarding financing, if applicable and if so instructed.</p> <p>3.5 Initiate the necessary searches to complete the due diligence for the transaction, and where necessary, obtain written authorization from the vendor and the target company for release of the information. Consider which, if any, of these searches should be conducted in relation to the vendor (e.g., to confirm its right, and any limitations on its ability, to sell to your client) or the target, or both. In some instances, searches of both the vendor and the target will be appropriate. Consider the fact that, in a share purchase, the purchaser will inherit all of the obligations and liabilities of the target.</p> <p>.1 Corporate Registry to obtain (depending on the date of incorporation) available certified copies of constating documents such as memorandum (if applicable), notice of articles, articles, and any amendments or other applicable search, depending on the jurisdiction of incorporation of the vendor or the target, or both. Determine whether the company has ever been struck off the register and subsequently restored.</p> <p>.2 Records office search and minute book review. Examine all registers and determine any deficiencies with respect to directors, members, transfers and allotments of shares, mortgages, debentures and debentureholders, and other indebtedness. Examine share registers, share certificates, waivers of pre-emptive rights, and resolutions authorizing issuance, transfer, and buy-back of shares to determine if the shares are validly allotted, issued, fully paid, transferred, and redeemed. Examine cancelled share certificates. Determine if directors' and shareholders' meetings have been properly constituted and if the directors have been validly appointed. Determine if the proper authorization for every transaction and material contract has been obtained. Review for appropriate disclosures of interest. Determine if the minutes disclose any further contracts or commitments (including, in particular, any outstanding shareholders' agreements or options to acquire shares). Review articles to determine whether restrictions on transfer of shares exist and the procedure for executing documents. Determine if a shareholders' agreement exists and whether it contains restrictions on the transfer of shares.</p> <p>.3 Personal Property Registry.</p> <p>.4 ICBC Vehicle Records Department.</p> <p>.5 Land title offices.</p> <p>.6 Canadian Securities Registration Systems re: assignment under <i>Bank Act</i>, S.C. 1991, c. 46, s. 427.</p> <p>.7 Office of the Superintendent of Bankruptcy (Industry Canada).</p> <p>.8 Labour Relations Board (for pending certifications, collective agreements, or any disputes before the Board involving the target company).</p> <p>.9 Other searches as required, depending on the nature of the business of the company (e.g., Mineral Titles Online, ships registry, Ministry of Forests, Lands and Natural Resource Operations, hotel/motel tax).</p> <p>.10 Municipal offices re: taxes, utilities, building, fire, zoning, licensing, and other requirements.</p> <p>.11 Court registry in each area where the target company (and, in some instances, the vendor) has substantial business dealings.</p>					

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<p>.12 Sheriff’s offices for writs of execution.</p> <p>.13 Provincial sales tax (“PST”).</p> <p>.14 Corporation capital tax.</p> <p>.15 Mining tax.</p> <p>.16 Logging tax.</p> <p>.17 Motor fuel tax.</p> <p>.18 Insurance premium tax.</p> <p>.19 Canada Revenue Agency: (a) GST/HST. (b) Taxation re: corporate tax, payroll.</p> <p>.20 Consider credit searches and other search services for background on the target, the vendor, and the principals, as applicable.</p> <p>.21 Insurance carried by the target company.</p> <p>.22 WorkSafeBC.</p> <p>.23 Employment Standards Branch.</p> <p>.24 Environment ministries (federal and provincial) and Fisheries and Oceans Canada, if the target company has any permits.</p> <p>.25 Securities searches for public company vendor, target company, or both, including through SEDAR.</p> <p>.26 Intellectual property searches, such as for trademarks.</p> <p>3.6 Review all leases, government permits, and contracts to determine if any consents to the purchase are required.</p> <p>3.7 Consider environmental risks associated with property of the company. Assess need for a Ministry of Environment, Environment Canada, or Fisheries and Oceans Canada search (see item 3.5.24), a search of other applicable environmental authorities (e.g., municipal and federal), or an environmental compliance review. Consider having an environmental audit conducted on property owned by the company. Consider the impact of contaminated sites legislation.</p> <p>3.8 Consider reviewing GST/HST/PST returns filed. (Note that effective April 1, 2013, the harmonized sales tax (“HST”) was eliminated, and the <i>Provincial Sales Tax Act</i> reinstated the PST; GST (rather than HST) applies under the <i>Excise Tax Act</i>, R.S.C. 1985, c. E-15. Further information about the GST and PST can be found at www.cra-arc.gc.ca and www2.gov.bc.ca.)</p> <p>3.9 Consider consulting a tax expert.</p> <p>3.10 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); the <i>Investment Canada Act</i>, R.S.C. 1985, c. 28 (1st Supp.); the <i>Competition Act</i>; and other relevant legislation.</p> <p>3.11 Open a document file and retain successive drafts of the agreement. Open a separate file for each major document required in the transaction.</p>					

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<p>4. DRAFTING THE AGREEMENT</p> <p>4.1 Before drafting the agreement, prepare a timetable and a draft of the closing agenda that will act as a reminder of what is required in the transaction and when.</p> <p>4.2 Prepare an outline of the document. The SHARE PURCHASE AGREEMENT DRAFTING (B-4) 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. Review 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 made 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 incorporates the transaction as it has been formulated and agreed.</p> <p>4.9 Arrange for signing the agreement.</p> <p>5. PRIOR TO CLOSING</p> <p>5.1 Prepare or obtain all the necessary documentation (consult the SHARE PURCHASE AGREEMENT DRAFTING (B-4) checklist for additional considerations), including:</p> <p>.1 Notices, applications for review, or rulings pursuant to the <i>Investment Canada Act</i>, the <i>Competition Act</i>, and any other relevant legislation. Consider applying for an advance ruling certificate under the <i>Competition Act</i>.</p> <p>.2 A directors’ resolution of the target company authorizing the transfer of shares.</p> <p>.3 A certificate pursuant to <i>Income Tax Act</i>, R.S.C. 1985, c. 1 (5th Supp.), s. 116, if the vendor is a non-resident.</p> <p>.4 A directors’ resolution of the purchaser (if a company) authorizing the transaction.</p> <p>.5 If the vendor is a company, a director’s resolution of the vendor authorizing the transaction; plus, if the shares of the target company represent substantially all of the assets of the vendor, a special resolution of the shareholders of the vendor authorizing the transaction.</p> <p>.6 Share register of the target company to show the transfer, issuance of new shares, and cancellation of old shares.</p> <p>.7 Waivers of any pre-emptive rights or rights of first refusal.</p>					

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<p>.8 Officer’s certificate of the vendor, dated on the closing date, attesting to the accuracy of representations and warranties contained in the share purchase agreement, the fulfillment of the vendor’s pre-closing covenants, and the waiver or fulfillment of the vendor’s conditions precedent.</p> <p>.9 Opinion of the vendor’s lawyer making proper qualifications and assumptions, with respect to the vendor or the target, or both, and asserting among other things:</p> <p>(a) Valid incorporation of the company and the vendor.</p> <p>(b) The company and the vendor are in good standing.</p> <p>(c) All necessary steps and proceedings have been taken to effect share transfer and transaction.</p> <p>(d) Capital structure and the vendor’s interest are as represented.</p> <p>(e) Outstanding shares are validly issued, fully paid, and non-assessable.</p> <p>(f) Company has good and marketable title to assets in the schedule, subject only to specified encumbrances.</p> <p>(g) No legal actions against the company or vendor are threatened or in progress (vendor’s lawyer could consider qualifying this with reference to searches or officers’ certificates relied upon).</p> <p>(h) To the best of the lawyer’s knowledge, there is no cause for legal action against the company.</p> <p>(i) Agreement is fully enforceable against the vendor (the vendor’s lawyer should consider whether to grant this opinion).</p> <p>(j) In reliance on the officer’s certificate and without independent investigation, the re-presentations and warranties are true.</p> <p>(k) Consider the above opinions, where necessary, regarding a corporate vendor.</p> <p>(Note: Many of the preceding items may be resisted by vendor’s counsel and may not be appropriate.) Consider reviewing chapter 7 (Legal Opinions) in CLEBC’s <i>Advising British Columbia Businesses</i>.</p> <p>.10 Resignations of directors and officers and releases from them in favour of the target company. (Note: the vendor may request releases in favour of directors and officers.)</p> <p>.11 Shareholders’ resolution appointing new directors.</p> <p>.12 Directors’ resolution appointing new officers.</p> <p>.13 Third-party consents as necessary.</p> <p>.14 Non-competition agreements.</p> <p>.15 Documentation transferring the registered and records office.</p> <p>.16 Discharges of loans/charges to be discharged on closing.</p> <p>5.2 Ensure that the conditions of the client’s obligation to close have been or will be satisfied.</p> <p>5.3 Complete the financial arrangements.</p> <p>5.4 Prepare the final draft of the closing agenda.</p>					

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<p>5.5 Have the parties sign the necessary documentation prior to closing (to be held in escrow pending closing, if tabled) and marshal the documents for each party.</p> <p>5.6 Update searches for closing.</p> <p>5.7 Obtain cheques, or receipts for cheques, as necessary.</p> <p>5.8 Consider application of the <i>Proceeds of Crime (Money Laundering) and Terrorist Financing Act</i>, S.C. 2000, c. 17.</p> <p>5.9 Consider the 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>					
<p>6. CLOSING</p> <p>6.1 Ensure that all the conditions of closing are satisfied or waived.</p> <p>6.2 Obtain acknowledgment in writing that all conditions of closing have been satisfied or waived.</p> <p>6.3 Ensure that each party receives the appropriate documents and funds.</p> <p>6.4 Obtain books and records of the company.</p> <p>6.5 Obtain the company seal.</p>					
<p>7. POST CLOSING</p> <p>7.1 Prepare a reporting letter and account as soon as practicable after closing. Forward the documents to the client and indicate those matters requiring further action. Alternatively, advise the client to review the documents to determine what further action is required. Additionally, consider including a “post closing” section in the closing agenda, setting out all post-closing matters (e.g., filings, registrations, deferred payments, press releases), and the party responsible for each matter.</p> <p>7.2 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>					