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<p style="text-align: center;">INTRODUCTION</p> <p>Purpose and currency of checklist. This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) and SHAREHOLDERS' AGREEMENT DRAFTING (B-7) checklists. It deals with companies governed by the British Columbia <i>Business Corporations Act</i>, S.B.C. 2002, c. 57 (the "BCA"). 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, pursuant to the <i>Miscellaneous Statutes (Housing Priority Initiatives) Amendment Act, 2016</i>, S.B.C. 2016, c. 27, to require that foreign nationals, foreign-controlled corporations, and certain trustees pay an additional 15 per cent property transfer tax when purchasing residential property in the Greater Vancouver Regional District (the "GVRD"). If a company's business involves the acquisition of residential property in the GVRD, its shareholders may wish to consider including in the shareholders' agreement restrictions on certain share transfers that would result in the company becoming a foreign-controlled corporation for the purposes of the <i>Property Transfer Tax Act</i>. • Changes to tax rules relating to inter-corporate dividends. The 2015 federal budget introduced a number of amendments to s. 55(2) of the <i>Income Tax Act</i>, R.S.C. 1985, c. 1 (5th Supp.), which prevents a corporate shareholder from converting certain taxable transactions into tax-free, inter-corporate dividends. As a result of these changes, the anti-avoidance rule set out in s. 55(2) was significantly expanded to apply to a broad range of transactions. Companies must now exercise more caution when considering the payment of inter-corporate dividends. The rules in s. 55(2) are complicated, and it is strongly recommended that companies seek advice from their tax advisors in connection with the payment of inter-corporate dividends. • 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. <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. 					

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<p>• Additional resources. For more information about shareholders' agreement procedures, see the <i>British Columbia Company Law Practice Manual</i>, 2nd ed., looseleaf and online (CLEBC, 2003).</p> <p style="text-align: center;">CONTENTS</p> <p>1. Initial Contact 2. Initial Interview 3. After the Initial Interview 4. Drafting the Agreement 5. Closing the File</p> <p style="text-align: center;">CHECKLIST</p> <p>1. INITIAL CONTACT</p> <p>1.1 Arrange interview.</p> <p>1.2 Ask the client to bring to the interview all relevant information, such as incorporation documents, notice of articles and articles, financial information, and any existing agreements to which the company or the shareholders are party (particularly if the company is already in existence).</p> <p>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.</p> <p>2. INITIAL INTERVIEW</p> <p>2.1 Determine who you will be acting for, and consider an engagement letter clarifying your role, the matters referred to in item 2.2, and when your engagement will end. The determination of who you will be acting for requires careful consideration. If you will be retained by more than one shareholder or the company and one or more shareholders, comply with <i>Code of Professional Conduct for British Columbia</i> ("BC Code"), rule 3.4-5. It would rarely be possible to act for all shareholders jointly in settling a shareholders' agreement and be in compliance with BC Code rule 3.4-5. Since all of the parties to the agreement will not have the same interests, the usual way to proceed is to act for one party (or more than one if it is reasonably determined that they have the same interests) and urge the others to seek independent legal representation. Alternatively, the lawyer representing the company could prepare an agreement that contains commonly adopted provisions for consideration by the individual shareholders and their own counsel. In considering whether there is a conflict of interest, see the Model conflicts of interest checklist on the Law Society website at www.lawsociety.bc.ca/practice/resources/checklist-conflicts.pdf and <i>BC Code</i>, s. 3.4. In the case of a corporate client, confirm who is authorized to give you instructions. Consider a directors' resolution authorizing you to accept instructions from a specific individual. Find out the names and addresses of the other parties and their lawyers, if any.</p>					

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<p>2.2 Advise the client regarding calculation of your account, method and timing of payment, conditions upon which you will act, and privacy matters, and consider an engagement letter clarifying your role and the matters referred to in this item. See s. 3.6 of the <i>BC Code</i> for the rules regarding reasonable fees and disbursements. Set out the manner in which the fees, disbursements, interest, and taxes will be determined (see <i>BC Code</i>, s 3.6). If your retainer will be limited in some regard, 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. 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>2.3 Discuss the background of the parties and their relationship, including their relative ages, the relative importance of the parties to the business of the company and their respective financial positions, the business of the company, the general nature of the proposed agreement as your client understands it, and your client’s objectives and expectations.</p> <p>2.4 If the company has not been incorporated:</p> <p>.1 Find out who will be drawing up the incorporation documents. If you are instructed to handle the incorporation, refer to the INCORPORATION—BUSINESS CORPORATIONS ACT PROCEDURE (B-5) checklist.</p> <p>.2 If the company is to be a party to the shareholders’ agreement, consider the need for a pre-incorporation agreement whereby the parties covenant to cause the company to enter into the agreement when it is incorporated.</p> <p>2.5 Review and discuss the notice of articles and articles (or proposed notice of articles and articles), including matters such as:</p> <p>.1 The fact that, without a shareholders’ agreement, the company is managed pursuant to the <i>BCA</i> and the articles. Consider how this differs from what the client proposes.</p> <p>.2 Whether it is preferable to include certain provisions in the articles or in the shareholders’ agreement, bearing in mind such considerations as:</p> <p>(a) Amendment procedures in each case. For example, the <i>BCA</i> may provide a minimum level of shareholder approval for certain matters, which could be increased to unanimous approval in a shareholders’ agreement or possibly the articles.</p> <p>(b) The effect of the provision in <i>BCA</i>, s. 136, that directors are obliged to manage, subject to the articles (i.e., if it is proposed that the directors’ powers be transferred pursuant to s. 137, this must be done in the articles).</p>					

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<p>.3 Whether the articles raise any problems with respect to provisions that might be included in the shareholders' agreement. For example, a pre-existing company is subject to restrictions on the allotment and purchase or redemption of shares, unless it has amended its articles to remove the pre-existing company provisions. Also, the pre-existing company provisions specify that a special resolution requires a 3/4 majority of those entitled to vote. Such restrictions do not apply to a company incorporated under the <i>BCA</i>, so it may be desirable to add this to a shareholders' agreement. In addition, there are a number of provisions that must be in the articles to be effective (e.g., if it is proposed that the company buy back or redeem its own shares, ensure that it has authority under its articles to do so, and specify whether it must be done on a pro rata basis).</p> <p>2.6 If you are representing a minority shareholder, ensure that he or she is protected as much as is consistent with the interests of the parties and efficient management (and vice versa with respect to a majority shareholder).</p> <p>2.7 Discuss in detail the proposed agreement, referring to the clauses set out in the SHAREHOLDERS' AGREEMENT DRAFTING (B-7) checklist. Include points such as:</p> <p>.1 Management of the company and the role of the shareholders:</p> <p>(a) In general, who are the directors and employees, who has banking authority, who is responsible for day-to-day management, and how are major decisions made under the <i>BCA</i>?</p> <p>(b) If there is a corporate shareholder, how will it be represented, and what will be the effect of various circumstances such as the death of the representative or a change of corporate control?</p> <p>(c) Will all shareholders be and remain actively involved in management? If your client is not going to be actively involved, advise him or her to keep informed of financial affairs. Consider the desirability of your client being a signing officer for banking purposes or the inclusion of certain reporting requirements and audit rights.</p> <p>(d) Will your client be an officer or director? If so, advise regarding duties and potential liability. The potential liability of directors is an evolving area of law and care should be taken to ensure your client is made aware of his or her duties. Consider whether the company will obtain directors' and officers' liability insurance.</p> <p>(e) Will your client be an employee of the company? If so, consider the need for a separate employment contract (possibly tied to the shareholders' agreement) or for employment clauses in the agreement.</p> <p>(f) Consider <i>BCA</i>, s. 137, which permits the articles to transfer the directors' powers to manage to one or more persons. Consider incorporating provisions in the articles transferring power to manage to shareholders, then deal with management in the shareholders' agreement.</p> <p>(g) Consider how to balance the need for protecting minority rights against the discretion of the directors to manage. Consider how to avoid deadlocks, and whether to increase the minimum level of shareholder approval, if any, required under the <i>BCA</i> for decisions on certain matters.</p>					

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<p>.2 Financing:</p> <ul style="list-style-type: none"> (a) In general, consider how much money is needed for the proposed venture; for what purposes is it to be spent (on what, how much, when); how the company is going to be financed; what the composition of the share capital will be; if shareholders put money or other assets or contributions into the company by share subscription or by way of loan, and on what terms (including any security), will shareholders be required to make contributions in certain circumstances (e.g., majority decision of directors, or a major decision of shareholders requiring a specified majority); how shareholders will have their investment returned. (b) If the client has not already done so, advise the client to discuss financing issues with a financial advisor (e.g., the prospective accountant/auditor). (c) Consider advising your client to meet with the other parties and draw up a pro forma budget. This might be attached to the shareholders' agreement as a statement of intention. (d) Discuss methods by which shareholders can get a return from the company (e.g., salary, interest payments on loans, repayment of loans, dividends). <p>.3 Restrictions on transfer of shares and preemptive rights:</p> <ul style="list-style-type: none"> (a) In general, whether there are to be any restrictions on transfers of shares and, if so, in what circumstances and why such restrictions are needed, particularly to qualify for the private issuer exemption under the <i>Securities Act</i>, R.S.B.C. 1996, c. 418. (b) Advise regarding prohibitions on transfer of shares, and that restrictive clauses are likely to be narrowly construed. (c) Advise regarding rights of first refusal, whether such rights are triggered by having received an offer or not; and drag-along and piggy-back rights (should the company or the other shareholders have the first right of purchase?). <p>.4 Consequences of certain types of events:</p> <ul style="list-style-type: none"> (a) In general, discuss various types of events that might occur, and the desired consequences. Determine whether the consequences will be optional or mandatory. (b) Events to consider include: death, termination of employment, shareholder intentions to sell shareholdings, retirement, incapacity, bankruptcy, default under the shareholders' agreement or an employment contract, change in control of a corporate shareholder, application under the <i>Family Law Act</i>, S.B.C. 2011, c. 25 against a shareholder for a division of his or her shares in the capital of the company, etc. (c) Cover all circumstances in which a shareholder can force the company or the other shareholders to buy him or her out, and in which the company or other shareholders can force a shareholder to sell to it or them. (d) If the company has non-Canadian resident shareholders, consider the effect that any rights to acquire shares in favour of the non-resident shareholder(s) will have on the company's Canadian-controlled private corporation status, if applicable. 					

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<p>.5 Where a sale to the company or the other shareholders is contemplated:</p> <p>(a) Is the sale to the company, the shareholders, or both, and, if it is to both, how will this be handled (e.g., priority, procedures, timing)?</p> <p>(b) How will the purchase be funded and paid?</p> <p>(c) What standard representations, warranties, covenants, etc. should be included in any purchase and sale transaction (e.g., title, no encumbrances)? Should there be standard terms relating to guarantees, closing arrangements, indebtedness, resignations, third-party approvals, non-competition clauses, restrictive covenants?</p> <p>.6 Valuation (calculation of purchase price, etc. in various circumstances, e.g., minority discount, control premium):</p> <p>(a) Values or methods for calculating values should be set out in the shareholders' agreement and should be practical, reasonable, and certain.</p> <p>(b) Advise the client to consult a chartered business valuator or an accountant for the most appropriate methods.</p> <p>.7 Mechanisms for dispute resolution (e.g., a "shotgun" or compulsory purchase clause, dissolution of the company, obligation to negotiate or mediate first, then arbitrate). Consider the appropriateness of the various mechanisms in light of financial resources of the parties and disparity in respective shareholdings.</p> <p>2.8 Advise regarding the tax consequences of the proposed provisions, or advise the client to get specialized tax advice (particularly with respect to provisions dealing with purchase of the interest of a deceased shareholder).</p> <p>2.9 Ensure that the proposed provisions are workable and reasonable in the circumstances.</p> <p>2.10 Where the client has not already done so, advise the client to discuss the various issues with the other parties and reach a satisfactory solution that will ensure continuing fairness to all parties, and to inform you of the results.</p> <p>2.11 Get instructions to proceed with drafting the shareholders' agreement and, if appropriate, an employment contract.</p>					
<p>3. AFTER THE INITIAL INTERVIEW</p> <p>3.1 Send a letter to the 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).</p> <p>3.2 Open file: place checklist in file and make entries in diary and "BF" systems. Confirm compliance with Law Society Rules on client identification and verification (see item 1.3).</p> <p>3.3 Communicate by letter or email with counsel representing the other parties, advising them that you are acting for your client. If the other parties have not retained counsel and you will be dealing with them, urge them, in writing, to obtain independent legal representation. Take care to see that the unrepresented persons are not proceeding under the impression that their interests will be protected by you, and make it clear to them that you are acting exclusively in the interests of your client (<i>BC Code</i> rule 7.2-9).</p>					

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<p>3.4 Conduct any relevant searches, including a company search for each corporate party and a detailed search (refer to item 3.5 of the ASSET PURCHASE PROCEDURE (B-1) checklist) where the company which is the subject of the agreement is already in business.</p>					
<p>4. DRAFTING THE AGREEMENT</p> <p>4.1 Prepare an outline of the agreement, indicating the clauses from your precedent file which will be included (see the SHAREHOLDERS' AGREEMENT DRAFTING (B-7) checklist). Also prepare an outline of any other documents required, such as an employment contract.</p> <p>4.2 Prepare the first draft.</p> <p>4.3 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 necessary corrections and prepare the second draft.</p> <p>4.4 Go over the next draft(s) with the client or send to the client with a request that the client review it and note any changes or questions. Discuss changes or questions.</p> <p>4.5 Make any changes required to the second draft and send copies to the other parties or their solicitors for comment. Review any alterations with the client.</p> <p>4.6 After all drafts are reviewed and finalized, prepare the final agreement (and employment contract) and arrange for signing.</p> <p>4.7 Prepare and execute resolutions of the directors of the company approving the agreement and authorizing a director or officer to execute and deliver the agreement on behalf of the company.</p> <p>4.8 Ensure that each party receives an executed copy of the agreement. Arrange for the company's copy to be filed in its minute book in a section not accessible to the public.</p> <p>4.9 Place any required legends on share certificates.</p>					
<p>5. CLOSING THE FILE</p> <p>5.1 Send a reporting letter and statement of account to the client. Advise that changes in circumstances, legislation (e.g., tax law), insurance requirements, valuations (if applicable), etc. make it essential that the agreement be reviewed from time to time. Ascertain whether the client wishes that you meet with him or her for this purpose from time to time and, if so, make entries in your diary and "BF" systems.</p> <p>5.2 Place a copy of the agreement in the company's minute book.</p> <p>5.3 If the agreement requires that the share certificates have a legend referring to the agreement, ensure that the legend is placed on the certificates.</p> <p>5.4 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>					