

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) checklist. It applies to Provincial Court and Supreme Court sentencing hearings. It is intended for use by defence counsel. It should also be used with the CRIMINAL PROCEDURE (C-1) checklist.</p> <p>This checklist is designed to help counsel prepare for sentencing proceedings: to identify and organize relevant information required to persuade a judge of the merits of a sentence being suggested on behalf of the client. However, a simple recitation of the checklist information should not replace advocacy on behalf of the client.</p> <p>When preparing for sentencing proceedings, counsel should be guided by:</p> <ol style="list-style-type: none"> (1) the principles of sentencing as set out in the <i>Criminal Code</i>, R.S.C. 1985, c. C-46; (2) the case law; and (3) the sentence proposed on behalf of the client. <p>This checklist is current to September 1, 2018.</p> <p>New developments:</p> <ul style="list-style-type: none"> • Criteria for withdrawal of guilty plea/informed guilty plea. In <i>R. v. Wong</i>, 2018 SCC 25, the Supreme Court of Canada held that accused persons who seek to withdraw their guilty plea on the basis that they were unaware of legally relevant consequences at the time of the plea must establish subjective prejudice by way of affidavit evidence. The court further held that a plea must be “voluntary, unequivocal and informed”. To be informed, the accused “must be aware of the nature of the allegations made against him, the effect of his plea and the consequence of his plea”. • Collateral consequences/mitigating circumstances. In <i>R. v. Suter</i>, 2018 SCC 34, the Supreme Court of Canada provided general guidance on the relevance of collateral consequences and their potential mitigating effect on sentence. Specifically, the court held that vigilante violence should be considered to a “limited extent” at sentencing and that the Alberta Court of Appeal erred in failing to give any effect to it. • Appellate intervention in sentence appeals. In <i>R. v. Agin</i>, 2018 BCCA 133, the Court of Appeal held that the threshold for appellate intervention on sentence is reached: (1) if the sentencing judge has committed an error in principle, failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor that had an impact on sentence; or (2) if the sentence is demonstrably unfit. • Dangerous offender designations. In <i>R. v. Boutilier</i>, 2017 SCC 64, the Supreme Court of Canada concluded that s. 753(1) of the <i>Criminal Code</i> and s. 753(4.1) of the <i>Criminal Code</i> do not infringe s. 7 of the <i>Charter of Rights and Freedoms</i>, Part 1 of the <i>Constitution Act, 1982</i>, being Schedule B to the <i>Canada Act 1982</i> (UK), 1982, c. 11, and that s. 753(4.1) does not constitute cruel and unusual punishment under s. 12 of the <i>Charter</i>. All of the evidence heard at the dangerous offender hearing must be considered at both the designation and the penalty stage of the sentencing judge’s analysis. • Provincial Court Standard Criminal Law Picklists. In 2017, the Provincial Court created “Picklists” (standardized terms for court orders) for bail, probation orders, conditional sentence orders, and ancillary orders. The Picklists contain suggested wording for court orders and may be modified by the judge as appropriate. The Picklists are available on the Provincial Court website at http://www.provincialcourt.bc.ca/types-of-cases/criminal-and-youth/links#Q7. 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<ul style="list-style-type: none"> • Statutory 1:1 pre-trial credit restrictions violate Charter. In <i>R. v. Romanchych</i>, 2018 BCCA 26, the Court of Appeal held that the statutory restriction of pre-trial credit to a ratio of 1:1 where the person was detained in custody under s. 524(4) or (8) violates <i>Charter of Rights and Freedoms</i>, s. 7, Part 1 of the <i>Constitution Act, 1982</i>, being Schedule B to the <i>Canada Act 1982 (UK)</i>, 1982, c. 11, and is not saved by s. 1. The court declared the impugned portion of the provision to be of no force and effect under s. 52 of the <i>Constitution Act, 1982</i>. The Supreme Court of Canada had previously made the same declaration in relation to the other restriction under s. 719(3.1) barring enhanced credit where the accused was detained in custody primarily because of a previous conviction in <i>R. v. Safarzadeh-Markhali</i>, 2016 SCC 14. Accordingly, the decision to award an accused enhanced credit at a rate of 1.5:1 pursuant to s. 719(3.1) is based solely on whether “the circumstances justify it” in accordance with <i>R. v. Sumner</i>, 2014 SCC 26. Note: this restriction is set to be repealed by Bill C-51, <i>An Act to Amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act</i>, s. 66. • Law Society Rules <ul style="list-style-type: none"> • Juricert password. When using the electronic filing system of the Land Title Office, a lawyer must not disclose the lawyer’s password or permit any other person, including an employee, to use the password or affix the lawyer’s e-signature (Law Society Rule 3-96.1). • Temporary articulated student restrictions. Temporary articulated students are restricted from making certain appearances in Supreme Court, but not Provincial Court (Law Society Rule 2-71(2)). • Electronic transfer of trust funds. The Rules were amended in December 2017, effective July 1, 2018, to allow lawyers to electronically transfer trust funds using an online banking platform (Law Society Rules 3-64(4) and (6) to (8); 3-64.1; 3-64.2; 3-65(1), (1.1), and (2) and 3-66(2)). For questions, contact trustaccounting@lsbc.org or 604.697.5810. • Client identification and verification. The Federation of Law Societies of Canada has proposed amendments to its Model Rule on Client Identification and Verification Requirements. If the Federation’s Council approves the amendments, they will be forwarded to the law societies for adoption. Changes to the Law Society of BC’s rules would require the Benchers’ approval and, if approved, may affect the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist current to September 1, 2018. • The Law Society Rules are published at www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules. • Of note: <ul style="list-style-type: none"> • Fraud prevention. Lawyers should maintain an awareness of the myriad scams that target lawyers, including the bad cheque scam and fraudulent changes in payment instructions, and must be vigilant about the client identification and no-cash rules. See the “Fraud Prevention” page, including the “Fraud Alerts” section, on the Law Society website at www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyers-insurance-fund/fraud-prevention. • Searches of lawyers’ electronic devices at borders. In 2017, in response to the Law Society’s concerns about the searches of lawyers’ electronic devices by Canada Border Services Agency officers, the Minister of Public Safety advised that officers are instructed not to examine documents if they suspect they may be subject to privilege, if the documents are specifically marked with the assertion they are privileged, or if privilege is claimed by a lawyer with respect to the 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>documents. View the Minister’s letter and Law Society’s response at www.lawsociety.bc.ca/our-initiatives/rule-of-law/issues-that-affect-the-rule-of-law. Lawyers are reminded to claim privilege where appropriate and to not disclose privileged information or the password to electronic devices containing privileged information without client consent or a court order. See also “Client Confidentiality—Think Twice before Taking Your Laptop or Smart Phone across Borders” in the Spring 2017 <i>Bencher’s Bulletin</i> and “Crossing the border into or out of the United States” in the Spring 2018 <i>Bencher’s Bulletin</i>.</p> <ul style="list-style-type: none"> • Additional resources. See the Canadian Bar Association’s publication “Collateral Consequences of Criminal Convictions” at www.cba.org/Sections/Criminal-Justice/Resources/Resources/Collateral-Consequences-of-Criminal-Convictions. <p style="text-align: center;">CONTENTS</p> <ol style="list-style-type: none"> 1. Interview Client 2. Prepare for Sentencing 3. Contact the Crown to Find Out Its Position 4. Attend Sentencing Hearing 5. After Sentencing <p style="text-align: center;">CHECKLIST</p> <ol style="list-style-type: none"> 1. INTERVIEW CLIENT <ol style="list-style-type: none"> 1.1 Confirm compliance with the Law Society Rules 3-98 to 3-109 on client identification and verification; complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. Consider whether the client has the capacity to instruct you (see <i>BC Code</i> rule 3.2-9). Collect the following additional information: <ol style="list-style-type: none"> 1. Citizenship and immigration status, including place and date of birth. Where appropriate, review the <i>Immigration and Refugee Protection Act</i>, S.C. 2001, c. 27 (the “<i>IRPA</i>”) to determine the possible impact of any conviction or any particular sentence, or refer the client to counsel who has expertise in immigration law. Consider <i>IRPA</i>, s. 36(1) and (2) to determine whether your client is facing a removal order, as well as s. 64 to consider the effect of the length of sentences on your client’s right to appeal a removal order. (See <i>R. v. Gonzales</i>, 2016 BCCA 436, <i>R. v. Zhang</i>, 2017 BCCA 185, and <i>Tran v. Canada (Public Safety and Emergency Preparedness)</i>, 2017 SCC 50, regarding the effect of the collateral consequences of immigration laws on sentencing.) <p>(If the client was between the ages of 12 and 17 at the time of the commission of the offence, refer also to the <i>Youth Criminal Justice Act</i>, S.C. 2002, c. 1 (the “<i>YCJA</i>”).)</p> 2. Address(es) for the past 10 years, including names of people the client lives with now, as well as alternate means of contacting the client if he or she were to move (e.g., parents). 3. Education (where, when, level achieved) and any current schooling. 4. Other training, including certificates, special licences, or trade tickets. 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>.5 Employment history, including:</p> <ul style="list-style-type: none"> (a) Current employment: employer’s name, address, and phone number (obtain permission to contact the employer); job title, length of employment with that employer, name of immediate supervisor, hours regularly worked, typical duties, and future prospects. (b) Previous employment: same details as set out in (a) above; reasons for leaving. (c) If unemployed: employment prospects, likelihood that any prospective employer will hire the client. <p>.6 Family:</p> <ul style="list-style-type: none"> (a) Marital status, including date and place of marriage, or duration and status of any common-law relationship. (b) Children’s names, ages, and gender, as well as custodial status. (c) Dependents: including whether the client is under an obligation to make maintenance payments. If the client owes maintenance, whether payments are up-to-date. (d) Parents: names, addresses, and occupations; relationship with parents if they are still living. (e) Persons who raised client; if not the client’s parents, get the same information as for parents. (f) Siblings: ages, addresses, occupations. <p>1.2 Obtain consents and releases from the client to obtain relevant information (e.g., medical, school, tax and probation records).</p> <p>1.3 Collect information relevant to sentencing: refer to item 2.4 on submissions to sentence.</p> <p>1.4 Ask for names and addresses of people who can testify to the client’s good character.</p> <p>1.5 Find out whether the client can raise money to pay a fine.</p> <p>1.6 Review the client’s criminal record with them, including previous convictions and outstanding charges, with the client. Consider the offence, place, date, penalty, and circumstances. Find out whether the client is currently on probation and if the probation officer is aware of the new charges.</p> <p>1.7 Obtain the name of the client’s probation officer and, unless the client instructs otherwise, contact the probation officer to determine his or her position regarding the client and the charge.</p> <p>1.8 Counsel the client regarding behaviour from now until trial or sentencing; advise the client of possible repercussions of further criminal charges.</p> <p>1.9 Explain the sentencing procedure to the client.</p> <ul style="list-style-type: none"> .1 Have discussions with the Crown concerning the appropriate range of sentence and inform the client about those discussions. Explain to the client that the court is not bound by recommendations of counsel. .2 If the client is entering a guilty plea, review <i>Criminal Code</i>, s. 606(1.1) to ensure the client understands that a guilty plea is an admission of the essential elements of the offence; the nature and consequences of a plea; and that the court is not bound by any agreement made between the accused and the prosecutor. Also note rules 5.1-7 and 5.1-8 of the <i>BC Code</i>. See also <i>R. v. Wong</i>, 2018 SCC 25. 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>1.10 Advise the client of the victim fine surcharge under <i>Criminal Code</i>, s. 737. As a result of the repeal of s. 737(5) and (6) of the <i>Criminal Code</i> (S.C. 2013, c. 11, s. 3), the court has no discretion to waive the victim fine surcharge. The surcharge is 30% of the fine or \$100 per count for summary conviction offences and \$200 per count for indictable offences. In practice, when dealing with indigent accused, some judges make the surcharge payable immediately and, in default of payment, impose one day in custody such that no fine surcharge is actually payable. Note in <i>R. v. Barinecutt</i>, 2015 BCPC 189, the court held that the victim surcharge infringed the accused’s ss. 7 and 12 <i>Charter of Rights and Freedoms</i> rights in his particular circumstances. In April 2018, this issue was before the Supreme Court of Canada in <i>R. v. Boudreault</i> (SCC File No. 37427). The matter was on appeal from the Quebec Court of Appeal, which found the mandatory surcharge to be constitutional (2016 QCCA 1907). As of September 15, 2018, the Supreme Court of Canada has not yet ruled in <i>Boudreault</i>. However, Bill C-28, which would have the effect of giving sentencing judges some discretion to exempt an offender from the surcharge in the case of undue hardship, received first reading in October 2016. In the meantime, it is common practice for some judges to make the surcharge payable forthwith and set the default time at one day.</p> <p>1.11 Contact Crown counsel to discuss the possibility of alternative measures. If necessary, provide a without prejudice letter to the Crown indicating why the client should be considered for alternative measures. If the Crown agrees, then assist the client at an initial interview with the probation officer to determine the feasibility of alternative measures (including diversion or restorative justice programs). It might be necessary to adjourn the case for a number of weeks to allow that interview to take place.</p> <p>.1 This process will require initial consent from Crown counsel that alternative measures are appropriate. Discuss with the client, advising that diversion will require an acceptance of responsibility for the allegation and, if accepted, the client may be required to write a letter of apology or do community work service, but will be able to avoid a conviction under the <i>Criminal Code</i>. If there is a restorative justice component, the client may be required to have a meeting with the victim to apologize personally and to explain his/her conduct.</p> <p>.2 The other requirements that often accompany an alternative measures resolution would be some form of counselling and a short essay from the client expressing an understanding of what a criminal record would mean for him or her. Go over this with the client, so that he or she is prepared.</p> <p>1.12 Contact Crown counsel to determine, where appropriate, whether the matter can be resolved by way of a s. 810 peace bond so as to avoid a criminal conviction. The client should be advised that the peace bond may have compulsory conditions attached to it. The court must also consider whether a weapons prohibition would be appropriate (s. 810(3.1)).</p> <p>1.13 For an Aboriginal client, consider unique systemic or background factors that may have brought the client before the court. Also consider alternatives to incarceration existing inside or outside the Aboriginal community. For the purposes of <i>Criminal Code</i>, s. 718.2(e), counsel should provide to the judge case-specific information or it should be set out in the pre-sentence report (a “<i>Gladue Report</i>”, following <i>R. v. Gladue</i>, [1999] 1 S.C.R. 688).</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>Particularly if the offence is not violent and serious, and an appropriate infrastructure is in place, the judge should be encouraged to consider a restorative approach to sentencing. However:</p> <ol style="list-style-type: none"> .1 Disposition must protect the community from future short-term and long-term harm. .2 The offender must want to participate, and community representatives should be willing to assume some responsibility in the healing process. .3 The victim’s interests must be accounted for (and the victim invited to participate). <p>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>1.14 Send a letter confirming your retainer, instructions from the client, and instructions to the client. If you are acting under a “limited scope retainer” (a defined term in the <i>BC Code</i>), ensure the client understands the limited scope of the retainer and the risks associated with the limits on the services you will provide. <i>BC Code</i> rule 3.2-1.1 requires that before undertaking a limited scope retainer, you must advise the client about the nature, extent, and scope of the services you can provide and must confirm in writing as soon as practicable what services will be provided. Also be aware of the obligations in <i>BC Code</i> rules 3.1-2, 7.2-6, and 7.2-6.1. Note that <i>BC Code</i> rule 3.2-1.1, regarding “limited scope retainers”, does not apply to situations in which you are providing summary advice (e.g., as duty counsel) or to an initial consultation that may result in the client retaining you. If you are providing “short-term summary legal services” (different from a “limited scope retainer) under the auspices of a not-for-profit organization with the expectation by you and the client that you will not provide continuing representation in the matter, note <i>BC Code</i> rules 3.4-11.1 to 3.4-11.4 and commentaries regarding conflicts and confidentiality. See “Limited Scope Retainer FAQs” in the Fall 2017 <i>Benchers’ Bulletin</i> for more information.</p> <p>1.15 See <i>BC Code</i> s. 3.6 for the rules regarding reasonable fees and disbursements, and note rule 3.6-3, commentary [1], regarding the duty of candour owed to clients respecting fees and other charges for which a client is billed.</p> <p>2. PREPARE FOR SENTENCING</p> <p>2.1 Review case law on sentencing relevant to this case.</p> <p>2.2 Review <i>Criminal Code</i>, Part XXIII, ss. 718 to 751.1 (note amendments pursuant to the <i>Victims Bill of Rights Act</i>, S.C. 2015, c. 13), <i>Controlled Drugs and Substances Act</i>, S.C. 1996, c. 19 (the “<i>CDSA</i>”), s. 10, and, if applicable, <i>YCJA</i>, Part 4.</p> <p>2.3 Consider the client’s criminal record in context:</p> <ol style="list-style-type: none"> .1 How does the client explain previous convictions. .2 Whether the previous offences are related. .3 Time lapse since the last offence. .4 Whether the client was sentenced for previous similar offences. .5 Options for rehabilitation. 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>.6 If the client received a discharge or record suspension (formerly called a “pardon”) for a prior offence, participated in an alternative measures program, or committed the prior offence when a young person, research the law on the weight to be given to such offences.</p> <p>2.4 Prepare a draft submission to sentence. Consider including some of the following matters. (Assess which points help the client’s case, which points will be introduced by a social worker or probation officer, and which points may be raised by the Crown.) Note any further research that needs to be done. For an Aboriginal client, consider whether systemic or background factors affect any of the following factors (for the purposes of <i>Criminal Code</i>, s. 718.2(e)).</p> <p>.1 The offence:</p> <p>(a) The client’s mental state:</p> <p>(i) Circumstances immediately prior to the offence (e.g., intoxication, personal or financial difficulties), and whether these problems have since ceased or abated.</p> <p>(ii) Whether the client’s mental state at the time of the offence was such that the degree of personal responsibility for his or her act was diminished.</p> <p>(b) Degree of direct contact between the client and the victim (e.g., physical contact or proximity, or no contact at all).</p> <p>(c) Whether there was harm to an individual, a business or corporation, a public or government body, and society generally.</p> <p>(d) Degree of violence:</p> <p>(i) Whether there was physical harm involved; if so, whether it was intended, actual, threatened, or potential.</p> <p>(ii) Whether there was death or permanent injury as a result of violence.</p> <p>(iii) Whether the client used more violence than was necessary for the successful completion of the offence, or whether there was an attempt to minimize violence.</p> <p>(e) Whether a weapon was involved. Consider firearms provisions of the <i>Criminal Code</i>.</p> <p>(f) Loss in monetary terms (value of goods taken or damaged).</p> <p>(g) Whether the client received a pecuniary profit. Consider proceeds of crime provisions of the <i>Criminal Code</i>.</p> <p>(h) Whether the offence involved an abuse of a position of trust.</p> <p>(i) Whether the crime was an isolated offence or part of an organized criminal enterprise.</p> <p>(j) What consequences the client has already suffered as a result of the incident (e.g., loss of employment from being charged, deterioration of relationship with a loved one, adverse publicity, or shaming in the community).</p> <p>(k) Role played by the client in the commission of the offence:</p> <p>(i) Whether the client was the principal.</p> <p>(ii) Whether the client was under the influence of others by reason of age, intelligence, personality, or because of a special relationship with one of the other parties to the offence.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>(iii) Whether the client purposely involved others of previously good character in the commission of the offence.</p> <p>(iv) Whether the harm done was contemplated by the client at the time, or was the result of accident or through the commission of a lesser crime.</p> <p>(l) Motive:</p> <p>(i) The client’s motivation (e.g., money, revenge, excitement, need).</p> <p>(ii) The degree of premeditation.</p> <p>(iii) Whether the client acted under the stress of strong provocation.</p> <p>(m) Whether the victim consented to or provoked the offence.</p> <p>(n) Any previous relationship between the client and the victim.</p> <p>(o) The extent to which the use of alcohol or drugs was a factor in the commission of the offence.</p> <p>(p) Whether the offence was the result of other unusual circumstances.</p> <p>(q) Whether the client co-operated with the police in:</p> <p>(i) The client’s arrest.</p> <p>(ii) Apprehension of others involved.</p> <p>(iii) Recovery of property taken.</p> <p>(r) The client’s present attitude about the crime (e.g., remorseful, repentant, hostile, recalcitrant, denial of guilt).</p> <p>(s) Any circumstances of the offence that are particularly callous, vicious, immoral, or depraved.</p> <p>(t) Any possibility and suitability of the Victim/Offender Reconciliation Program.</p> <p>2. Protection of the public:</p> <p>(a) Whether the client’s record indicates that he or she is a persistent offender whose removal from society for a substantial period of time is necessary to protect the public.</p> <p>(b) Whether the client is a dangerous, mentally abnormal person whose removal from society for a substantial period of time is necessary to protect the public. See BC Code rule 3.3-3 and commentary regarding situations where a lawyer believes on reasonable grounds there is an imminent risk of death or serious bodily harm. A lawyer who believes that disclosure may be warranted should contact the Law Society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.</p> <p>(c) Whether the client’s record indicates that the individual offences committed are few but are serious, indicating that imprisonment is necessary to protect the public.</p> <p>(d) Whether the offence committed was of a type that raises genuine fear on the part of the public or on the part of any special group.</p> <p>(e) Whether the victims of this type of offence can adequately protect themselves.</p> <p>(f) Whether the client’s previous record and the circumstances of the offence indicate that the client knowingly devoted him- or herself to criminal activity as a major source of livelihood.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>(g) Whether the client has a substantial income or resources that could only be derived from criminal activity.</p> <p>(h) Whether the client is a member of a delinquent or criminal group.</p> <p>(i) Whether the short-term gain achieved by the client’s removal from society through imprisonment would offset the possible destructive effects of imprisonment on the client’s future behaviour when he or she is finally released.</p> <p>(j) Whether deterrence is a major objective:</p> <p style="padding-left: 20px;">(i) Whether the sentence contemplated is likely to be effective as a deterrent to this particular type of offence.</p> <p style="padding-left: 20px;">(ii) Whether the publicity given to the sentence is likely to reach potential offenders.</p> <p style="padding-left: 20px;">(iii) The likely deterrent effect of the sentence on the client’s associates.</p> <p style="padding-left: 20px;">(iv) Whether the client would be sufficiently deterred from further crime by reason only of apprehension and appearance in court, thus warranting a nominal penalty.</p> <p>(k) The extent of recent similar crime in the community.</p> <p>(l) Whether the sentence proposed adequately satisfies the public’s sense of justice so that confidence in the courts is maintained.</p> <p>.3 Rehabilitation of offenders:</p> <p>(a) Whether the client’s record indicates a persistent pattern of crime or other forms of antisocial behaviour.</p> <p>(b) Date of the client’s last conviction.</p> <p>(c) Gaps in the client’s criminal record indicating that under certain circumstances he or she can live in the community without violating the law.</p> <p>(d) Motive for this crime:</p> <p style="padding-left: 20px;">(i) Events leading up to it.</p> <p style="padding-left: 20px;">(ii) Specific motivation.</p> <p style="padding-left: 20px;">(iii) Whether the crime was the result of circumstances that are unlikely to recur.</p> <p>(e) Whether the client views the criminal behaviour as wrong and appears to genuinely want to stay out of further trouble; whether the client is prepared to express remorse to the court.</p> <p>(f) Conduct of the client between commission of the offence and sentencing (e.g., co-operation with the police, compensation or restitution voluntarily made, good behaviour, acceptance of treatment, maintenance of steady employment, demonstration of remorse and reformation).</p> <p>(g) Anything in the client’s history that may explain his or her present behaviour:</p> <p style="padding-left: 20px;">(i) History of social maladjustment in other aspects of his or her life (e.g., at school or employment, during military service, within the family group, or in the community generally).</p> <p style="padding-left: 20px;">(ii) Lack of stability in employment or in personal relationships.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>(iii) Whether the client can form constructive relationships with other people.</p> <p>(h) Physical or mental disabilities, and whether they may have contributed to the commission of the offence and are curable or controllable. In particular, whether the client has:</p> <p>(i) An addiction to alcohol or narcotics. Find out details of treatment, including treatment program, dates, and success.</p> <p>(ii) A physical disability or illness. Get details; find out whether the client is presently under medical care; if so, get the doctor's name and address.</p> <p>(iii) A serious physical injury. Get details (type, cause, date of injury); find out whether the client is presently under medical care; if so, get the doctor's name and address.</p> <p>(iv) Been hospitalized. Get details (name and address of hospital, reason for and dates of hospitalization, records).</p> <p>(v) Been in a mental institution. Get details (name and address of institution, reason for and dates of institutionalization, records).</p> <p>(vi) Been treated by a psychiatrist. Get details (name and address of psychiatrist, reason for and dates of treatment, reports or records).</p> <p>(i) If the client is addicted to alcohol or drugs, whether the client sees this as a problem and is doing something about it.</p> <p>(j) The client's educational and vocational handicaps.</p> <p>(k) The client's general level of intelligence and emotional maturity.</p> <p>(l) The extent to which the client has shown evidence of responsibility in the handling of his or her personal affairs.</p> <p>(m) The client's attitude towards authority; if the client has difficulty in this respect, any indications of why this is so.</p> <p>(n) Whether the client belongs to a delinquent or criminal group; if so, why the client joined, and what influence this group has on him or her.</p> <p>(o) Present conditions in the client's home; strength of personal relationships; how the client and his or her family have been affected by involvement in the criminal justice system.</p> <p>(p) Attitude of the client's friends and associates toward his or her criminal behaviour; whether any of these people have criminal records.</p> <p>(q) Whether the client participates in activities that suggest that, because of his or her makeup and personality, the offence will not be repeated (e.g., hobbies, sports, clubs, good deeds, church attendance).</p> <p>(r) The client's future plans (e.g., education, career, marriage, family).</p> <p>(s) Whether the client can face problems and accept criticism.</p> <p>(t) How the client estimates his or her capacity; whether the estimate is realistic.</p> <p>(u) Whether the client accepts supervision; the client's previous response to correctional treatment.</p> <p>(v) Whether unfavourable factors in the client's background can be addressed and overcome.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>(w) Resources available to the court by way of sentence or recommendation that may address factors associated with the client’s criminal behaviour.</p> <p>.4 Appropriate sentence:</p> <p>(a) The maximum penalty; whether this is in line with commonly held beliefs as to the seriousness of this type of offence.</p> <p>(b) Whether there is a minimum penalty:</p> <p>(i) If this is for a second or subsequent conviction, whether the Crown has served the client with notice of intention to seek greater punishment (<i>Criminal Code</i>, s. 727), if it is necessary to do so.</p> <p>(ii) If there is a minimum sentence due to the presence of specified aggravating factors, consider whether the Crown has given notice that they intend to prove the presence of these factors (e.g., <i>CDSA</i>, s. 8).</p> <p>(iii) Review recent jurisprudence on the constitutionality of any applicable minimum sentence.</p> <p>(c) The average sentence for this type of offence and offender.</p> <p>(d) Refer to <i>Criminal Code</i>, ss. 109 and 110, in relation to firearms prohibition orders. However, consider whether your client requires a firearm for hunting or sustenance purposes, and therefore is eligible for a prohibition to be lifted (s. 113).</p> <p>(e) Refer to <i>Criminal Code</i>, s. 490.011, in relation to designated sex offences. Consider whether the impact on the offender of complying with the <i>Sex Offender Information Registration Act</i>, S.C. 2004, c. 10 (the “<i>SOIRA</i>”) would be disproportionate to the public interest.</p> <p>(f) Consider whether the client will be subjected to a DNA order under <i>Criminal Code</i>, s. 487.051. If the offence is a “primary designated offence,” then the court has no option but to order it unless the exception in s. 487.051(2) applies. If it is a “secondary designated offence,” it is discretionary and counsel may make submissions regarding whether it is appropriate.</p> <p>(g) The number of separate counts in the indictment; whether other offences are being taken into consideration.</p> <p>(h) Whether the client spent time in custody. Under <i>Criminal Code</i>, s. 719(3.1), the client may receive up to 1.5 days’ credit per day spent in custody prior to sentencing. The decision to award an accused enhanced credit at a rate of 1.5:1 pursuant to s. 719(3.1) is based on whether “the circumstances justify it” in accordance with <i>R. v. Summer</i>, 2014 SCC 26. See also <i>R. v. Romanchych</i>, 2018 BCCA 26 at para. 71.</p> <p>(i) Whether the client will incur other penalties as a result of conviction (e.g., deportation, automatic loss of licence or accreditation). Consider whether any property will be subject to forfeiture (see, for example, <i>CDSA</i>, s. 17, <i>Criminal Code</i>, s. 490.1 (order of forfeiture of property on conviction) and ss. 462.37 to 462.46 (proceeds of crime)). Consider also whether the Crown did or will institute civil forfeiture proceedings.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>(j) Whether incarceration will affect treatment programs in which the client is involved. Consider the difference between a provincial sentence and a federal sentence, and which would better serve the client’s interests. Consider the timing of parole provisions, as well as treatment programs that are offered in each.</p> <p>(k) Effect of segregation: in <i>R. v. Anderson</i>, 2015 BCPC 210, the court reduced the global sentence from eight years to seven because the accused was likely to serve his sentence in segregation, for his own safety, and the likelihood of adverse effects on his rehabilitation.</p> <p>(l) Alternatives to incarceration:</p> <p>(i) Community service programs.</p> <p>(ii) Absolute or conditional discharge. Note that under the new s. 737.1 of the <i>Criminal Code</i>, the court must consider making a restitution order if an offender is convicted or is discharged under s. 730 of an offence.</p> <p>(iii) Probation.</p> <p>(iv) Fine.</p> <p>(v) Conditional sentence of imprisonment (<i>Criminal Code</i>, s. 742.1). Note the offences for which a conditional sentence is not available under s. 742.1.</p> <p>(vi) Electronic monitoring.</p> <p>(vii) A judge is required to consider all available sanctions other than imprisonment that are reasonable in the circumstances and, under the amendment to s. 718.2(e), consistent with the harm done to victims or to the community, with particular attention to the circumstances of Aboriginal offenders (<i>Criminal Code</i>, s. 718.2(e)) (see item 1.13).</p> <p>(m) If a young person, refer to <i>YCJA</i>, Part 4.</p> <p>2.5 Gather and make copies of documentary evidence:</p> <p>.1 Letters of reference (e.g., employer, character references). The ideal letter is from an individual who knows the client well and addresses the offence(s). However, general reference letters are also useful.</p> <p>.2 Restitution receipt, letter of apology to victim.</p> <p>.3 Progress report from present correctional centre.</p> <p>.4 Case law.</p> <p>.5 Existing medical reports, assessments, and pre-sentence reports. See also items 2.9 and 2.10.</p> <p>2.6 Witnesses:</p> <p>.1 Interview and take statements.</p> <p>.2 Decide whether to call any witnesses.</p> <p>.3 Prepare witnesses for hearing (e.g., discuss courtroom procedure, how to answer questions, etc.).</p> <p>.4 Advise them of the hearing date, time, and place.</p> <p>.5 Advise the court clerk of any need for a translator.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>2.7 Determine whether the client’s family and friends should attend in court, and so advise them.</p> <p>2.8 Prepare the client, discussing what will happen, how to dress, and what to do and say (e.g., whether the client will say anything when the judge offers the opportunity at sentencing; if so, what).</p> <p>2.9 Consider whether to get a pre-sentence report (particularly if an appeal from conviction will be pursued). If proceeding with a pre-sentence report:</p> <ul style="list-style-type: none"> .1 Obtain a judge’s order for preparation of the report. .2 Advise the client to see his or her probation officer as soon as possible. .3 Advise the client that anything client says to the probation officer can be included in the report. While the client should be truthful with the probation officer, the client may wish to refrain from giving opinions about complainants, the judge, Crown counsel, etc. .4 When the report is received, review it with the client. <p>2.10 Consider the advisability of getting a psychiatric assessment, a report from an alcohol and drug counsellor, or a treatment plan; if you do, decide whether to tender it in evidence.</p>					
<p>3. CONTACT THE CROWN TO FIND OUT ITS POSITION</p>					
<p>3.1 Assess the strengths of your position and weaknesses of the Crown’s position, thinking about what you have to offer the Crown:</p> <ul style="list-style-type: none"> .1 Discuss the possibility of alternative measures. .2 Discuss the possibility of a peace bond (<i>Criminal Code</i>, s. 810) where appropriate. .3 Discuss offering a guilty plea on one, some, or all charges. Before agreeing on a guilty plea, consider <i>BC Code</i> rules 5.1-7 and 5.1-8. .4 Discuss waiving charges from other jurisdictions. .5 Discuss amending the counts to be more inclusive, so as to reduce the overall number of counts the client would face. .6 Where appropriate, consider persuading the Crown to proceed summarily rather than indictably. <p>3.2 Confirm with Crown counsel the agreed facts to be presented to the court. If you cannot agree, then discuss a full sentencing hearing with the Crown.</p> <p>3.3 Find out what submissions the Crown intends to make.</p> <p>3.4 Discuss with Crown counsel the possibility of reaching an agreement as to the appropriate sentence, or of the Crown maintaining a neutral position before the court.</p> <p>3.5 If the Crown is likely to be seeking a conditional sentence and/or probation, find out the wording of the proposed conditions and review them with your client.</p> <p>3.6 Discuss with the Crown which ancillary orders they will be seeking (such as weapons prohibition, driving prohibitions, DNA orders, and <i>SOIRA</i>, s. 161 orders)..</p> <p>3.7 Discuss whether the criminal record will be filed.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>3.8 Ask if the Crown intends to request a pre-sentence report.</p> <p>3.9 Prepare a final draft of submissions to sentence. (See item 2.4.)</p>					
<p>4. ATTEND SENTENCING HEARING</p>					
<p>4.1 Prior to the sentencing hearing, provide Crown counsel with copies of any letters or reports you intend to tender as exhibits, and get agreement or have the authors ready to testify. Consider filing the sentencing materials with the court in advance.</p>					
<p>4.2 If a guilty plea has been entered, listen to Crown counsel’s reading of the circumstances of the offence:</p> <ol style="list-style-type: none"> .1 Decide whether any explanation is required. .2 If the client does not accept the facts alleged, dispute them. .3 If the Crown disputes the client’s version of the facts, the Crown may be called upon to call evidence to prove those facts in dispute, and the client should be prepared to call evidence to refute any of the facts alleged by the Crown. 					
<p>4.3 If there is a guilty plea, identify any triable issues that could have been argued had the matter gone to trial.</p>					
<p>4.4 If the sentence is proceeding by way of a joint submission, advise the court. In <i>R. v. Anthony-Cook</i>, 2016 SCC 43, the Supreme Court of Canada held that a sentencing judge should not depart from a joint submission unless it would bring the administration of justice into disrepute or otherwise be contrary to the public interest.</p>					
<p>4.5 Ask the judge to order a pre-sentence or psychiatric report, or both, where appropriate:</p> <ol style="list-style-type: none"> .1 Advise the client to see his or her probation officer as soon as possible. .2 When the report is received, go over it with the client. 					
<p>4.6 If the Crown is seeking a greater penalty, ensure that proper notice has been served and proved (<i>Criminal Code</i>, s. 727) or obtain instructions from the client to admit.</p>					
<p>4.7 When the client’s criminal record is put to him or her, advise the court whether the client agrees with the criminal record and, if not, ask Crown counsel whether the Crown insists on its accuracy, intends to rely on it, and is prepared to provide some proof that it is accurate.</p>					
<p>4.8 Make submissions, calling witnesses if appropriate, tendering exhibits, and focusing on viable alternatives to incarceration.</p>					
<p>4.9 When sentence is ordered by the court:</p> <ol style="list-style-type: none"> .1 Note the terms. .2 If a fine is imposed and time to pay is required, ask the client’s view on the reasonable time for payment and advise the court of the client’s request regarding time to pay. .3 If jail is imposed and the client prefers a certain institution, consider asking the judge to recommend it. 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>5. AFTER SENTENCING</p> <p>5.1 Explain the sentence to the client, including any probation terms, victim fine surcharge, restitution order, and time limits.</p> <p>5.2 The pardon regime has now been replaced by the record suspension regime, so explain to the client about the availability of a record suspension (see <i>Criminal Records Act</i>, R.S.C. 1985, c. C-47, s. 4). (Note <i>Chu v. Canada (Attorney General)</i>, 2017 BCSC 630, where the court held that the retrospective application of the record suspension regime is unconstitutional. Thus, the shorter waiting periods under the pardon regime will apply if the offender was sentenced when the pardon regime applied.)</p> <p>5.3 Discuss with the client whether a sentence appeal is advisable.</p> <p>5.4 Notify the client of limitation periods for appeal, and diarize dates.</p> <p>5.5 Send a reporting letter and statement of account.</p> <p>5.6 If the client is not going to appeal, close the file. Consider storage and destruction requirements. See <i>Closed Files—Retention and Disposition</i> (including the guidelines for retention of criminal files set out in Appendix B), August 2017, Appendix B at www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/ClosedFiles.pdf.</p>					

