

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;"><b>INTRODUCTION</b></p> <p><b>Purpose and currency of checklist.</b> This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. It deals with enforcement of mortgages by foreclosure or sale. It does not deal with cancellation of agreements for sale. It assumes that the lawyer represents the mortgagee, not the mortgagor, guarantor, or other respondent. This checklist is current to September 1, 2018.</p> <p><b>New developments:</b></p> <ul style="list-style-type: none"> <li>• <b>Costs in uncontested foreclosures, even commercial ones, must be assessed at Scale A.</b> In <i>First West Credit Union formerly known as Valley First Credit Union v. Gateway Industrial Park Ltd.</i>, 2018 BCSC 1749, the mortgagor opposed only an award of special costs in a commercial foreclosure. The court thoroughly reviewed the law, including s. 5 of Appendix B of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the “SCCR Rules”), and granted Scale A costs to the petitioning mortgagee.</li> <li>• <b>Duty to inquire as to vendor’s residency status.</b> In <i>Mao v. Lui</i>, 2017 BCSC 226, a notary, acting for a purchaser, was found liable for failing to make reasonable inquiries regarding the vendor’s residency status. The court held that withholding the non-resident income tax from the purchase price (per s. 116 of the <i>Income Tax Act</i>, R.S.C. 1985, c. 1 (5th Supp.) [“ITA”]), does not place a purchaser in breach of the contract of purchase and sale, where the registered owner may be a non-resident. Accordingly, real estate practitioners should consider advising their purchaser clients to withhold non-resident income tax in appropriate circumstances.</li> <li>• <b>A s. 116 <i>Income Tax Act</i> holdback is property of the mortgagor in bankruptcy.</b> In <i>Nielsen (Re)</i>, 2018 BCSC 1161, the mortgagee applied, but was refused, the ability to obtain clearance certificates from the Canada Revenue Agency (“CRA”) to avoid the need for a s. 116 <i>ITA</i> non-resident owner holdback. In the bankruptcy that followed, the CRA wanted to set off other taxes owing to it against the non-resident holdback. The court ruled that, absent non-resident taxes owing to the CRA, the holdback was property of the bankrupt and returnable to the trustee in bankruptcy (and therefore available to all creditors of the mortgagor, including the CRA and the foreclosing mortgagee, per priorities under the <i>Bankruptcy and Insolvency Act</i>, R.S.C. 1985, c. B-3 [“BIA”]). Accordingly, absent agreement with the CRA as to the return of a s. 116 holdback, bankruptcy may be a useful process available to mortgagees to resolve s. 116 holdback disputes.</li> <li>• <b>Limitations periods for mortgage security may run on date of uncured default and not on demand.</b> In <i>Leatherman v. 0969708 B.C. Ltd.</i>, 2018 BCCA 33, the Court of Appeal distinguished between demand and contingent obligations as they related to mortgage loans and security. They concluded that the lender was within time for seeking judgment on the covenant to pay the entire mortgage obligation (demand obligation) except to the extent of any interest payable more than two years prior to the commencement of the foreclosure (contingent obligation). In that case, the default in payment of interest triggered the running of the two-year limitations clock and the lender was out of time for realizing on its security because the lender failed to do that within two years of the first missed interest payment.</li> </ul>					

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<ul style="list-style-type: none"> <li>• <b>Law Society Rules</b> <ul style="list-style-type: none"> <li>• <b>Juricert password.</b> When using the electronic filing system of the Land Title Office (“LTO”), 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).</li> <li>• <b>Temporary articulated student restrictions.</b> Temporary articulated students are restricted from making certain appearances in Supreme Court, but not Provincial Court (Law Society Rule 2-71(2)).</li> <li>• <b>Electronic transfer of trust funds.</b> The SCCR 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 <a href="mailto:trustaccounting@lsbc.org">trustaccounting@lsbc.org</a> or 604.697.5810.</li> <li>• <b>Client identification and verification.</b> 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.</li> <li>• The Law Society Rules are published at <a href="http://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules">www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules</a>.</li> </ul> </li> </ul> <p><b>Of note:</b></p> <ul style="list-style-type: none"> <li>• <b>Fraud prevention.</b> 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 <a href="http://www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyers-insurance-fund/fraud-prevention">www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyers-insurance-fund/fraud-prevention</a>.</li> <li>• <b>Searches of lawyers’ electronic devices at borders.</b> 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 documents. View the Minister’s letter and Law Society’s response at <a href="http://www.lawsociety.bc.ca/our-initiatives/rule-of-law/issues-that-affect-the-rule-of-law">www.lawsociety.bc.ca/our-initiatives/rule-of-law/issues-that-affect-the-rule-of-law</a>. 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>Benchers’ Bulletin</i> and “Crossing the border into or out of the United States” in the Spring 2018 <i>Benchers’ Bulletin</i>.</li> <li>• <b>Aboriginal law.</b> Special considerations apply to land that is held directly by, or for the benefit of, a “band” as defined under the <i>Indian Act</i>, R.S.C. 1985, c. I-5, or a First Nation. Some of these are reserve lands subject to the exclusive jurisdiction of the federal government, and others are under the jurisdiction of the province. If a mortgage or foreclosure involves reserve or First Nation lands, consider seeking the advice of a lawyer who has experience in Aboriginal law matters. While Aboriginal Affairs and Northern Development Canada (“AANDC”) helps to manage a significant number of reserves for the benefit of</li> </ul>					

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<p>“Indians” (as defined in the <i>Indian Act</i>), some bands or First Nations in British Columbia manage their own reserve lands. To investigate whether a particular First Nation is a signatory to the Framework Agreement on First Nation Land Management (ratified and implemented by the <i>First Nations Land Management Act</i>, S.C. 1999, c. 24), consult the website of the First Nations Land Management Resource Centre (<a href="http://www.labrc.com">www.labrc.com</a>). First Nations operating under a land code adopted under the <i>First Nations Land Management Act</i> have a separate registry system established under that Act that contains some rules on priorities established by regulation. Some First Nations, such as the Nisga’a Nation, have created their own land title systems based on the Torrens system. Other First Nations, such as the Tsawwassen First Nation, have lands registered under the provincial land title system as a result of treaties, though special sections of the <i>Land Title Act</i>, R.S.B.C. 1996, c. 250, apply to these lands. The new <i>FNCIDA [First Nations Commercial and Industrial Development (Canada)] Implementation Act</i>, S.B.C. 2012, c. 21, came fully into force on June 25, 2012. It allows some <i>Land Title Act</i> provisions, as may be adopted by federal regulations, to apply to reserve land. AANDC maintains the Indian Lands Registry System, which includes information about the creation of the reserve and any allotments of parcels of land within a reserve to individual Indians (under certificates of possession or certificates of occupation) as well as any surrenders or designations of lands and any third-party interests in or on the reserve lands (such as leases, easements, permits, etc.). The registry is an informational system only and does not create priority (except in the case of a registered assignment having priority over an unregistered assignment (<i>Indian Act</i>, s. 55(4)).</p> <ul style="list-style-type: none"> <li>• While Indian reserve lands are within federal jurisdiction, consider conducting title searches in the provincial system as well, since some reserve lands are registered in both systems. In contrast to the provincial land title system, the Indian Lands Registry System is not always up to date and, from a title search perspective, may be unreliable. However, the provincial system should not be considered authoritative, given the potential for interjurisdictional immunity issues where conflicts arise between the two jurisdictions.</li> <li>• If a leasehold interest in reserve lands managed under the <i>Indian Act</i> will be mortgaged, note that a lease on reserve lands to an Indian can only be mortgaged and seized if the land is designated (<i>Indian Act</i>, s. 89(1.1)). A lease to an Indian on lands that are held by an Indian under a certificate of possession does not have the same exemption from the protective effect of s. 89(1) of the Act.</li> <li>• Further information on Aboriginal law issues is available on the “Aboriginal Law” page in the “Practice Areas” section of the Continuing Legal Education Society of British Columbia website (<a href="http://www.cle.bc.ca">www.cle.bc.ca</a>) and in other CLEBC publications.</li> <li>• <b>Additional resources.</b> For further information about foreclosures, see <i>British Columbia Creditors’ Remedies—An Annotated Guide</i> (CLEBC, 2001–); <i>Supreme Court Chambers Orders—Annotated</i>, 2nd ed. (CLEBC, 1995–); <i>Foreclosure Practice—2013 Update</i>, course materials (CLEBC, 2013); and <i>Priorities</i>, course materials (CLEBC, 2009).</li> </ul>					

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<p style="text-align: center;"><b>CONTENTS</b></p> <ol style="list-style-type: none"> <li>1. Initial Contact</li> <li>2. Consult with the Client and Obtain Instructions</li> <li>3. After Initial Interview</li> <li>4. Demands for Payment</li> <li>5. Prepare for Foreclosure Proceedings</li> <li>6. Order Nisi</li> <li>7. After Obtaining Order Nisi</li> <li>8. Order for Conduct of Sale</li> <li>9. Order Approving Sale</li> <li>10. Order Absolute</li> <li>11. Receivers</li> <li>12. Costs</li> <li>13. Close the File</li> </ol> <p style="text-align: center;"><b>CHECKLIST</b></p> <ol style="list-style-type: none"> <li>1.1 Consider Law Society Rules 3-98 to 3-109 on client identification and verification, and complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. Arrange an initial interview if you have not done work for the client before or wish to meet the client. Determine their legal capacity to your satisfaction.</li> <li>1.2 Ask the client to bring all information on the loan, the property, the mortgage(s), and the mortgage default(s) to the interview.</li> <li>1.3 Ascertain if there is any collateral security (for example, general security agreements, guarantees, title insurance) or documents modifying the terms of the loan (for example, renewal agreements, modification agreements, assumption agreements) and, if so, ask the client to bring them to the interview.</li> <li>1.4 Find out the date and nature of the mortgage default(s) to determine whether there are any limitation problems.             <ol style="list-style-type: none"> <li>.1 The <i>Limitation Act</i>, S.B.C. 2012, c. 13, sets a general limitation period of two years, subject to some exceptions; although the Act is not retroactive, note that it has specific transition provisions (s. 30). For further information on the exceptions, discoverability rules, and transition, including a video overview and a transition rules flowchart, see the Ministry of Justice website at <a href="http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/limitation-act">www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/limitation-act</a>.</li> <li>.2 Consider if there has been a confirmation that extends or suspends the limitation date (<i>Limitation Act</i>, ss. 24 to 26).</li> </ol> </li> <li>1.5 Obtain enough details from the client to determine if a conflict of interest exists (client’s name, mortgagor’s name, owner(s) of property’s name(s), etc.). Then conduct a title search to determine the identities of other parties with registered interests in the property. Note the <i>Code of Professional Conduct for British Columbia</i> (the “BC Code”), s. 3.4, regarding conflicts. Proceed only when you have confirmed that no conflict exists. See the model conflicts of interest checklist at <a href="http://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/checklist-conflicts.pdf">www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/checklist-conflicts.pdf</a>.</li> </ol>					

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<p><b>2. CONSULT WITH THE CLIENT AND OBTAIN INSTRUCTIONS</b></p> <p>2.1 Determine the client’s objectives. Ensure that the client wishes to proceed with foreclosure and does not merely wish to collect the arrears due and owing under the mortgage.</p> <p>2.2 Advise the client regarding how your account is calculated, the method and timing of payment, and any conditions on which you undertake to act as lawyer. Discuss with your client the fact that your accounts will not likely be fully recoverable.</p> <p>2.3 Collect and discuss information on:</p> <p>.1 The client: name (including actual legal name of legal entity if trade name used); address; telephone number(s); fax number(s); email address; contact person(s).</p> <p>.2 The property: legal description; street address; type of property (for example, residential, commercial, manufactured home, farmland); whether the property is vacant, occupied, or abandoned; if the property is occupied, whether the occupant is the borrower, a subsequent purchaser, or a tenant; if the occupant is a tenant, his or her name and details of the revenue from the property; value of the property (including appraisals, if available); equity in the property; whether the mortgagor’s interest in the property is freehold or leasehold; whether the property is insured, whether the insurance is satisfactory, and when the insurance expires; whether there is actual or potential waste or damage; whether there are potential environmental problems; whether any of the activities listed in Schedule 2 of the Contaminated Sites Regulation, B.C. Reg. 375/96, have occurred on the site (if so, a site profile may have to be submitted to a prospective purchaser and to a director in accordance with the Regulation); and whether there is a building under construction.</p> <p>.3 The mortgage: a complete copy (a fully executed copy; not just the unexecuted electronically registered copy) of the mortgage (including the terms); any assumption or modification agreements, and relevant correspondence relating to the mortgage. Consider such matters as an acceleration clause, default provisions, costs, whether the mortgage is enforceable, and advise the client of any obvious problems. Identify the owners, mortgagors, and guarantors.</p> <p>.4 The default: date when last payment was made, when the mortgage matured or when the mortgage otherwise went into default; amount owing; any defaults in payment of taxes, insurance premiums, or strata charges, including dates and amounts; any other defaults under the mortgage, including dates and details; amounts mortgagee has paid as protective disbursements for taxes, insurance, repairs, etc.; whether mortgage is insured and, if so, any requirements of that insurer; any other security in relation to the loan. Ensure that the balance claimed does not include any penalty or similar amount for early prepayment.</p> <p>.5 Venue: there are very specific rules as to which registry to use in commencing a foreclosure proceeding (<i>Law and Equity Act</i>, R.S.B.C. 1996, c. 253, s. 21). The intent of these rules is to ensure that the proceeding is commenced in the registry closest to where the property is situated, but the rules are complex, so review carefully. For the purposes of foreclosure, the Vancouver and New Westminster court registries are deemed to be the same registry, and the mortgagor can consent to filing</p>					

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<p>at a different registry. Be very careful with the boundaries of judicial districts: Whistler/Pemberton and Cobble Hill/Shawnigan, for example, are on or near boundaries. Note that in <i>Island Savings Credit Union v. Brunner</i>, 2014 BCCA 449, the Court of Appeal held that s. 21 permits the court, either before or after commencement of a foreclosure proceeding, to order that the proceedings be continued in or transferred to a jurisdiction other than that specified in s. 21.</p> <p>2.4 Discuss the foreclosure process and the steps you will be taking.</p> <p>.1 Advise the client that if demand is made for the full balance due and owing, the client cannot later ask for any prepayment penalty to be paid.</p> <p>2.5 Discuss the client’s position.</p> <p>.1 Where the mortgage has not matured, is the client willing to accept payment of arrears and reinstate the mortgage? If so, determine the time to be allowed for reinstatement. Consider the <i>Law and Equity Act</i>, s. 25 provisions regarding relief against reinstatement.</p> <p>.2 Discuss common types of relief available to a mortgagee: order nisi; summary accounting of the amount required to redeem (see <i>Law and Equity Act</i>, s. 18); leave to apply for further accounting (if there is a variable interest rate or if the client receives monies during the redemption period or has to make disbursements for taxes, insurance, etc.); order absolute; conduct of sale (to another party or to the petitioner after the redemption period has expired); order to approve a sale; costs (on a Scale A party-and-party basis, unless the court orders otherwise).</p> <p>.3 Discuss special types of relief available to a mortgagee: immediate order absolute or a shortened redemption period where the security is in jeopardy or the property is abandoned, or both; action for judgment on the deficiency (<i>Property Law Act</i>, R.S.B.C. 1996, c. 377, s. 32, prohibits an action as against the covenantors and guarantors after an order absolute of foreclosure has been obtained). Note that action on the personal covenants should generally be included in the foreclosure proceeding.</p> <p>.4 If there is actual or potential waste or damage, consider appointment of a receiver, by instrument or court order, to take possession of the property to protect it.</p> <p>.5 If the property is a revenue property, consider redirecting rent payments to the client, appointing a receiver or agent to collect the rentals, or giving notice to the tenants if your client also has an assignment of the rents due and owing on the property. Note the provisions of <i>BIA</i> on whether 10 days’ notice is required before commencing foreclosure or appointing a receiver (or receiver-manager) where a business property is involved that represents all or substantially all of the mortgagor’s property.</p> <p>.6 If the property is a manufactured home (not all manufactured homes are mobile homes or trailers), conduct a search of the manufactured home registry. Does the client hold any <i>Personal Property Security Act</i>, R.S.B.C. 1996, c. 359 (“<i>PPSA</i>”) security on the home, in addition to the mortgage of land? Is the manufactured home a fixture? If the client holds collateral <i>PPSA</i> security, be careful with seize-or-sue provisions, and consider <i>PPSA</i>, s. 55(6). Consider the provisions of <i>Manufactured Home Act</i>, S.B.C. 2003, c. 75, and Regulations.</p>					

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<p>.7 If the property is farm land, or if the mortgagor is a farmer, as defined by <i>Farm Debt Mediation Act</i>, S.C. 1997, c. 21, s. 2, give notice in the prescribed form under that Act, as set out in the Farm Debt Secured Creditors Notice Regulations, SOR/86-814. Note the definition of “farmer” under the Act is broad, and the notice requirements under s. 21 of the Act also apply to non-farm land owned by a farmer. Discuss the effect of, and procedure under, the Act. Note that proceedings following demands not in compliance with the Act are a nullity (<i>Farm Debt Mediation Act</i>, s. 22).</p> <p>.8 If the mortgage extends over five or more lots or strata lots, consider the disclosure statement provisions under <i>Real Estate Development Marketing Act</i>, S.B.C. 2004, c. 41, Division 4. If the mortgage charges a new home, consider <i>Homeowner Protection Act</i>, S.B.C. 1998, c. 31, s. 22.</p> <p>.9 If the mortgage is against a lease, review the lease to ascertain the effect of foreclosure on the lease. Obtain and review a copy of the tripartite non-disturbance agreement. Ascertain what consents, if any, are required if the mortgagor’s interest in the lease is to be sold or transferred. Check with the landlord re: defaults under lease. Check provisions in the mortgage on leasehold interests; often the last day of the term of a lease is excluded from the charge in the mortgage. Consider the possibility of relief against forfeiture. Consider that most mortgages of First Nation lands are leasehold mortgages.</p> <p>.10 Does the client want a judgment against the mortgagor based on the covenant to repay? Determine whether the original borrower is the registered owner; if not, is there a formal assumption agreement? If there is no formal assumption agreement, should the original borrower be sued? If there is an assumption agreement but the original borrower was not released from the covenant, should he or she be sued as well as the current registered owner? Has there been novation of the mortgage? Consider the potential release of the previous owner under the <i>Property Law Act</i>, ss. 20 to 24.</p> <p>.11 Does the client want a judgment against the current registered owner (if different from the original borrower), or against any intervening purchasers who have assumed the mortgage? Consider the deemed covenant provisions of <i>Property Law Act</i>, ss. 20 to 24.</p> <p>.12 If there is a guarantee, should the guarantor be sued?</p> <p>2.6 Obtain instructions and a retainer.</p> <p>.1 Are your instructions to proceed to foreclosure (petition), to sue on the covenant (notice of civil claim), or to do both (petition)? Remember that pre-judgment garnishment is not available under petitions.</p> <p>.2 Consider whether a written engagement agreement is appropriate.</p> <p>2.7 Ask the client to provide you with any other relevant documents.</p> <p>2.8 Open the file: note the limitation period for bringing proceedings and any other relevant dates; place this checklist in the file; make entries in any diary and “BF” systems. Confirm compliance with the Law Society Rules on client identification and verification. See items 1.1 and 1.4.</p>					

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<p>2.9 Send a letter to the client confirming the retainer, explaining how you will calculate your fee for services, as well as other charges, disbursements, and taxes; setting the conditions under which you have agreed to act; and summarizing the points discussed. Note <i>BC Code</i>, s. 3.6, regarding reasonable fees and disbursements, and commentary [1] to rule 3.6-3 regarding the duty of candour respecting fees and other charges. Send copies of all documentation to the client on an ongoing basis so that the client will be aware of what you are doing on his or her behalf; this means you may not need to send formal report letters.</p>					
<p><b>3. AFTER INITIAL INTERVIEW</b></p>					
<p>3.1 Collect any information that the client was unable to provide (see item 2.3 for the type of information required).</p>					
<p>3.2 Verify the information provided by the client (for example, confirm default and details of last payment; obtain current tax information to see whether the property has gone into tax sale; obtain current figures from BC Assessment in order to ascertain the value of the property). Confirm the status of strata charges and payments.</p>					
<p>3.3 Conduct a LTO search on the property. Verify that the mortgagor is the registered owner and see what other charges and charge holders are registered (consider priority of charges and whether anyone else has commenced proceedings). Note and check any pending charges. Obtain copies of all pages of all financial charges and legal notations against the property. Conduct a separate search for each mortgagor and any guarantors to identify any other properties that a judgment could be registered against.</p>					
<p>3.4 Identify and obtain addresses for all potential respondents, including the names of tenants if the property is a revenue property (see item 5.2.1 re: adding tenants as parties to the petition). If you cannot locate a respondent, employ a skip tracer (after ensuring that you have instructions to do so).</p>					
<p>3.5 Conduct company searches, if any parties are incorporated.</p>					
<p>3.6 Conduct searches of the manufactured home and personal property registries, if appropriate.</p>					
<p>3.7 Ascertain the position of the Farm Debt Review Board, if it is involved.</p>					
<p>3.8 If you are seeking a shortened redemption period, consider getting an appraisal if the client does not have a current one or if appraisal material is not available from proceedings commenced by other parties having charges against the property.</p>					
<p><b>4. DEMANDS FOR PAYMENT</b></p>					
<p>4.1 Determine who should be sent a demand letter (for example, current owner, purchasers who signed assumption agreements, original mortgagor, guarantor).</p>					
<p>4.2 Determine the form of demand (for example, a demand for arrears only, acceleration and demand for the full balance, a combination of the two, or a demand for the full balance after the mortgage has matured) and note events of default.</p>					



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<p>4.3 Consider reasonable notice requirements under the common law (for example, <i>R.E. Lister Ltd. v. Dunlop Canada Ltd.</i>, [1982] 1 S.C.R. 726), <i>BIA</i>, s. 244, and <i>Farm Debt Mediation Act</i>, s. 21. Note that the <i>Farm Debt Mediation Act</i> counts business days, not calendar days.</p> <p>4.4 Send demand letter(s) and notices, if applicable; send copies to the client; and ensure methods of delivery meet reasonable notice requirements.</p> <p>4.5 Enter the demand expiry date in your diary and “BF” systems.</p> <p>4.6 Consider Law Society Rule 3-59 (cash transactions), which prohibits lawyers from accepting \$7,500 or more in cash, in most circumstances, as well as Law Society Rule 3-70 concerning how records of cash transactions are made.</p>					
<p><b>5. PREPARE FOR FORECLOSURE PROCEEDINGS</b></p>					
<p>5.1 After the demand period expires, ensure that you have instructions, confirmed in writing, to proceed.</p>					
<p>5.2 Prepare documents.</p>					
<p>.1 Petition. Ensure that the relief sought conforms to your instructions. Add as parties:</p> <ul style="list-style-type: none"> <li>(a) Mortgagor.</li> <li>(b) Registered owners (if different from the mortgagor).</li> <li>(c) All charge holders being foreclosed (for example, those charge holders whose interests are subordinate to your client’s).</li> <li>(d) Tenants.</li> <li>(e) Any other persons against whom relief is sought (for example, guarantors).</li> </ul> <p>.2 Affidavits in support. Have the affidavit sworn by the client, because only the client has personal knowledge confirming the facts and the amount owing. Include:</p> <ul style="list-style-type: none"> <li>(a) Information about the amount owing for principal, interest, and any protective disbursements when the affidavit is sworn, plus a per diem rate thereafter.</li> <li>(b) Confirmation that the amount owing does not include any penalty for early prepayment.</li> <li>(c) A detailed statement of account showing calculation of interest (in cases involving variable-rate mortgages).</li> <li>(d) Copies of the demand letter, mortgage, and any modification agreements (alternatively, append these documents to the petition as schedules).</li> <li>(e) Proof that any notice required has been given and that the time set out has expired (for example, if you are relying on an acceleration clause requiring notice to be given).</li> <li>(f) A statement of no knowledge of facts constituting a defence.</li> </ul>					

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<p>(g) If seeking a shortened redemption period, supporting materials (for example, attaching a copy of any appraisals, the BC Assessment evaluation, valuation letters from local real estate licensees, or such other material as will evidence to the court the current market value). You can also show other “special circumstances” such as abandoned property or wasting property.</p> <p>.3 Certificate of pending litigation. To be filed pursuant to item 5.4.2.</p> <p>5.3 Meet with the client to review, sign, and swear documents.</p> <p>5.4 File documents.</p> <p>.1 Court registry: file petition and affidavit(s) in the appropriate registry under local venue rules. (See item 2.3.5.)</p> <p>.2 LTO: file a certificate of pending litigation and request for state of title certificate showing the certificate of pending litigation. (The certificate of pending litigation should be filed even if new charges have appeared on title.) Conduct a post-registration search; obtain copies of all charges registered subsequent to any previous search.</p> <p>5.5 If the LTO search shows new charges, these charge holders must be added as respondents. Prepare and file a “desk order” application under Rules 6-2(7), (9), and (10) and 17-1 of the SCCR Rules, by requisition and affidavit (without notice) to amend the petition and change the style of proceeding accordingly. Include a draft order with the application materials, and diarize to ensure receipt. Amend the petition and file it at the court registry after the order is entered.</p> <p>5.6 Arrange for personal service of the petition (or amended petition) and affidavit on all named parties (see Rules 16-1(3) and 21-7(2)). Obtain affidavits of personal service for each respondent and record dates of service. Diarize the expiry dates for respondents to file a response to petition in your “BF” systems. Be aware of the many special rules for service on different types of parties, including those in Rules 4-3 and 20-1(2), relating to companies, societies, partnerships, the Crown, financial institutions, strata corporations, etc.</p> <p>5.7 If a respondent cannot be served, obtain particulars of attempts to locate or serve, and consider making an application for substituted service under Rule 4-4. Prepare and file a requisition and affidavit by a “desk order” application without notice, pursuant to Rule 17-1. Include a draft order in the application materials, and diarize to ensure receipt. Diarize the date for filing a response to petition in your “BF” systems.</p> <p>5.8 On expiry of the response period, search for responses at the court registry. Record the names of all respondents who filed a response to petition and their lawyers, with their addresses for service.</p> <p>5.9 Prepare a notice of hearing returnable on a convenient date far enough ahead (at least, but preferably more than, seven clear days) so that you can provide notice to all parties (either directly or through their lawyers) whether or not they filed a response to petition. (See Rule 16-1(8)(b), which requires service of the Form 68 notice of hearing on each party who has filed a response to petition at least seven days before the date set for the hearing of petition.) Record dates of service. Obtain affidavits or acknowledgments of service from all respondents who filed a response to petition.</p>					

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<p>Send copies to your client. If a response raising a substantive defence is filed by a lawyer, contact the lawyer to discuss and arrange a mutually convenient hearing date.</p> <p>5.10 Prepare and serve an affidavit (sworn by you or another lawyer in your firm) attaching the state-of-title certificate you obtained.</p> <p>5.11 Prepare an affidavit to update the accounting in the petition to provide for the amount due as of the hearing date, including any taxes, insurance, or other expenses properly expended by the client since filing the petition. The affidavit should set out the individual protective disbursements in detail, because the court generally scrutinizes the propriety of each expense.</p> <p>5.12 Prepare a summary accounting statement and provide a copy to all parties (either directly or through their lawyers) whether or not they have filed a response to petition.</p> <p>5.13 Prepare a requisition summarizing the relief sought and provide a copy to all parties (either directly or through their lawyers) whether or not they have filed a response to petition.</p> <p>5.14 If no response to petition has been served, file the Form 68 notice of hearing at any time before the hearing of the petition. If a response to petition has been filed and served, file at least seven days before the hearing date file and serve the notice of hearing on each petition respondent.</p> <p>5.15 If any part of the petition is opposed, file a petition record by 4 p.m. on the day that is one full day before the hearing, at the latest (Rule 16-1(11)). The petition record must contain a copy of the petition, each response, and each affidavit that is to be referred to at the hearing, and may contain a draft order, a written argument, a list of authorities, and a draft bill of costs.</p> <p>5.16 If you anticipate the hearing will take two hours or longer, the date and time of hearing must be fixed by the registrar (Rule 16-1(10)). In Vancouver, see also the chambers assize and notices thereto.</p>					
<p><b>6. ORDER NISI</b></p>					
<p>6.1 Prepare for and appear in chambers:</p> <ol style="list-style-type: none"> <li>.1 Record the names of respondents and their lawyers who attend, as well as that of the master or judge.</li> <li>.2 If a respondent appears in person, ask the chambers judge or master to make an order that the respondent's approval as to form of the order be waived. If the court will not make that order, ask for an order that, if the approval as to form has not been given by a particular date, you may submit the order without the approval, together with proof that the respondent has refused to sign the order. Record terms of the order.</li> <li>.3 If the chambers judge or master is not prepared to approve a summary accounting of the amount owing under the mortgage, he or she may direct that it be heard before the registrar. Ask for the order to request a certificate pursuant to Rule 18-1(2) rather than a report under Rule 18-1(3) so that a further application before the court can be avoided. Also ask that the redemption period run from the date of the order nisi rather than from the date of the accounting before the registrar.</li> <li>.4 If the matter is suitable to have the order signed on the bench on the day of the hearing, consider local registry practices of vetting of orders and AN-17, effective November 5, 2018.</li> </ol>					

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<p>6.2 Prepare the order nisi, and circulate it to all parties who attended the hearing for approval as to form.</p> <p>6.3 Report to the client, and consider submitting an account, if that would accord with the retainer and fee arrangements.</p> <p>6.4 File the order nisi at the court registry. Ensure you get it back and then send a copy of the entered order to each respondent, whether or not they filed a response to petition.</p> <p>6.5 Diarize the date the redemption period expires, and note to bring forward the file two weeks prior to this date, so that you can have all the documents prepared and be ready to move immediately upon expiry.</p>					
<p><b>7. AFTER OBTAINING ORDER NISI</b></p>					
<p>7.1 Advise the client that any respondent may apply for an order vacating the order nisi (in special circumstances), an order extending the redemption period, or an order for leave to appeal the order nisi.</p>					
<p>7.2 If the property is sold or redeemed (paid out in full from monies other than sale proceeds) during the redemption period:</p> <p>.1 Upon redemption, the respondent may give notice to assess costs. The appointment to assess the bill of costs must then be filed within 14 days (Rule 21-7(10)), otherwise the client is not entitled to any assessed costs. See item 12.</p> <p>.2 Arrange for receipt and disbursement of funds, removal of certificate of pending litigation, and (if necessary) discharge of mortgage. Remember that you are entitled to your costs when receiving the balance due and owing under the mortgage. All respondents are entitled to their costs if the matter is to be discontinued, and the petitioner must pay these costs if requested, whether or not they have been recovered from the mortgagor. Accordingly, if the proceeding is discontinued, the sums must be obtained from the mortgagor when the mortgage is being paid out.</p>					
<p>7.3 Note that a notice of discontinuance cannot be filed after the order nisi, without leave of the court.</p>					
<p>7.4 During the redemption period, any party may apply for an interlocutory order or orders (for example):</p> <p>.1 Order for conduct of sale. See item 8.</p> <p>.2 Order approving sale. See item 9.</p> <p>.3 Order appointing or discharging a receiver. See item 11.</p>					
<p>7.5 If the mortgage is not paid in full during the redemption period, your client may instruct you to obtain an order absolute. See item 10.</p>					
<p>7.6 The petitioner may execute on the judgments obtained with the order nisi and does not have to wait for a sale of the property. Obtain instructions as to whether your client wishes to proceed with execution. If so, get any information the client has about exigible assets, arrange to conduct an examination in aid of execution, or both. Attempts at execution might prompt applications for stays of execution pending sale of the mortgaged property. Successful execution might result in extensions of the redemption period.</p>					

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<p><b>8. ORDER FOR CONDUCT OF SALE</b></p> <p>8.1 Any party of record may apply for an order that the property be put up for sale (Rule 21-7(7)). Subsequent charge holders often apply for conduct of sale during the redemption period in order to protect their interests.</p> <ol style="list-style-type: none"> <li>.1 A mortgagee may apply either at the time of the hearing of the petition or by later application for an order for conduct of sale. A mortgagee has a prima facie right to such an order after expiry of the redemption period, but the court has equitable discretion to refuse or delay.</li> <li>.2 Subsequent encumbrancers may also apply for an order for conduct of sale at any time during the redemption period.</li> <li>.3 A petitioner may not succeed in obtaining the order until after expiry of the redemption period, unless there are special circumstances. In <i>CIBC Mortgage Corporation v. Gomez</i>, 1997 CanLII 1823 (B.C.S.C.), a master granted a concurrent order nisi and conduct of sale to a petitioner in special circumstances. However, in <i>Pope v. Roberts</i> (1979), 10 B.C.L.R. 50 (C.A.), the Court of Appeal held that granting the petitioner conduct of sale within the redemption period is generally inconsistent with the mortgagor’s right to redeem. The master in <i>HSBC Bank Canada v. A.S. Bains Developments Ltd.</i>, 2015 BCSC 2194, held that the order for sale that was granted at the same time as the order nisi in <i>Reliable Mortgages Investment Corp. v. Longiye</i>, 2015 BCSC 903, should not be considered the new “usual order”. See item 8.4.</li> <li>.4 If the petitioner obtains conduct of sale, and sells the property for less than the debt due, the petitioner may still pursue the mortgagor or guarantor on the judgments against them (see item 2.5.10), so this remedy may be more appropriate than an order absolute when the property is worth less than the amount owing.</li> <li>.5 If the petitioner makes an application after the expiry of the redemption period, usually the period for the conduct of sale will be open ended, subject to the right of any respondent to make application to terminate the conduct given to the petitioner.</li> </ol> <p>8.2 Obtain instructions from the client.</p> <p>8.3 Obtain relevant information.</p> <ol style="list-style-type: none"> <li>.1 Amounts owing on prior encumbrances (or, if this is not possible, the original amounts of encumbrances can be obtained from the LTO) and property taxes and strata charges;</li> <li>.2 Assessed value of the property for property tax purposes, or from a recent appraisal (appraisal is preferable);</li> <li>.3 How the mortgagee intends to market the property, if conduct of sale is granted (typically, the court will want the property to be listed on a multiple listing service or “MLS” basis);</li> <li>.4 Are there existing orders for conduct of sale in other foreclosure actions that have been commenced relating to the mortgages on this property? If so, you must draw this to the attention of the court, and you must give all affected charge holders notice of your application, whether or not they are parties in your proceedings.</li> <li>.5 Consider issues like real estate commission rates, viewing times, access problems, and collateral security. If appropriate, consider inserting special provisions for such issues in the order being sought.</li> </ol>					

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<p>8.4 Procedure: May be part of the petition for an order nisi or a separate application (but see the discussion at item 8.1.3).</p> <p>.1 Set out the value of the property and the amounts owing to the charge holders in supporting affidavits, so that the court can determine whose equity is in jeopardy. The affidavit should also state how the applicant intends to sell the property (for example, MLS).</p> <p>.2 Serve documents (ensuring that the mortgagor is given notice of the application whether or not he or she has filed a response to petition).</p> <p>.3 File documents according to Rule 16-1 (if part of the petition for order nisi) or Rule 8-1 (if separate application).</p> <p>.4 Attend in chambers and, if successful, draft the order (see item 6).</p> <p>8.5 Report to the client, and consider submitting an account, if that would accord with the retainer and fee arrangements.</p> <p>8.6 If successful, prepare, or advise regarding preparation of, the listing agreement. It must accord with the order and specify terms: acceptance is subject to court approval; payment of any real estate commission is subject to a sale completing pursuant to an order approving such a sale; and that it is subject to the right of redemption by any of the respondents, with no real estate commission being payable if the property is redeemed. Note that this listing agreement will displace any listing agreement already in effect, even if that listing agreement has not expired. Note that the party with conduct of the sale is the vendor for most purposes; warn your client about the risks that result from this, and ensure that all agreements of purchase and sale are strictly “as is, where is” and only include the property charged by the mortgage (normally, no personal property).</p> <p>8.7 If an offer is received, court approval must be sought, unless all parties agree to the sale (see item 9).</p> <p>8.8 Consider applicability of PST and GST if personal property is involved in a sale, and advise the client that the party who has conduct is obligated to collect and remit tax. Tax issues can involve considerable complexity (for example, if the property is residential and exceeds half a hectare); consider obtaining advice from a lawyer who has tax expertise, including if the registered owner is not a Canadian citizen (see <i>Mao v. Lui</i>, 2017 BCSC 226; <i>Nielsen (Re)</i>, 2018 BCSC 1161).</p>					
<p><b>9. ORDER APPROVING SALE</b></p>					
<p>9.1 Any party to a proceeding may apply to court to have a sale approved even though that party was not given the exclusive right to have conduct of the listing of the property for sale.</p>					
<p>9.2 The court’s main concern will be with adequacy of the proposed sale price, so obtain relevant information: a new appraisal or statements as to the currency of the old appraisal, particulars of listing, any offers received, details of how the property was advertised, the number of people who have viewed the property, current balances of prior and subsequent encumbrances, amounts of taxes, and real estate commission. The real estate licensee can often provide a marketing history.</p>					
<p>.1 Note that in <i>Providus Mortgage Investment Corp. v. JDS Properties Ltd.</i>, 2016 BCSC 955, the master held that a \$2.56 million offer on a property appraised at \$2.8 million was not “provident,” as the property</p>					

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<p>had not been marketed at all for three and a half months in a market that was “robust”, and the offer left a significant shortfall on the encumbrances.</p> <p>.2 Per <i>Bank of Nova Scotia v. Marvin</i>, 2016 BCSC 1033, where offers generated by a sealed bid process are virtually identical, the first offer should be preferred.</p> <p>.3 In <i>CIBC Mortgages Inc. v. Oddoux</i>, 2016 BCSC 251, the court favoured a two-step sealed bid process for court-approved sales in the Victoria judicial district. However, in <i>Reliable Mortgages Investment Corp. v. Gautam</i>, 2017 BCCA 233, the Court of Appeal held that the method of considering bids, including when to order or receive sealed bids, is a matter of practice falling within the expertise of masters, and upheld the master’s decision (in 2015 BCSC 2357) to adopt the one-step method of considering sealed bids.</p> <p>.4 Per <i>Addenda Capital Inc. v. 0781995 B.C. Ltd.</i>, 2016 BCSC 957, a master’s order approving a backup offer is unenforceable as infringing on the court’s equitable jurisdiction.</p> <p>9.3 Give notice of your application to the mortgagor and all parties (whether or not they have filed a response to petition). If any of the covenants or guarantors have not been joined in the proceedings, you may lose your right to proceed against them if you fail to provide them with notice of the application to approve the sale. Consider the possession date. If the property is occupied (and especially if it is residential), the court will be reluctant to approve a sale without giving the occupants a reasonable time to vacate and find new accommodations (30 days is a good general rule).</p> <p>9.4 Consider tenants carefully. For example, if the property is residential and tenants are not respondents but were in possession prior to the commencement of the proceeding, the notice provisions of the <i>Residential Tenancy Act</i>, S.B.C. 2002, c. 78, likely apply.</p> <p>9.5 Procedure: notice of application seeking order for approval of sale, together with supporting affidavit(s) (note Rules 13-5 and 21-7(5), (7), and (9) and refer to items 6 and 8 above). Order normally includes provisions for:</p> <p>.1 Vesting of title in the purchaser on registration of:</p> <p>(a) A certified copy of order (“vesting order”—see <i>Law and Equity Act</i>, s. 37, and Rule 21-7(9)).</p> <p>(b) Your letter authorizing the registration of the vesting order.</p> <p>.2 Release and discharge of encumbrances of parties. Any subsequent encumbrances registered after your certificate of pending litigation are discharged automatically by the LTO (see <i>Land Title Act</i>, s. 30, and Rule 21-7(4)). Note the following:</p> <p>(a) The order will not release prior encumbrances as these charge holders were not made parties to the proceedings; discharges must be obtained and registered if clear title is to be delivered to the purchaser.</p> <p>(b) The order will not release subsequent encumbrances where subsequent charge holders were not made parties, but should have been, because their charges were registered prior to your certificate of pending litigation. Consider this when drafting the provisions in the vesting order governing the distribution of the sale proceeds.</p>					

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<p>(c) Before paying out any strata corporation claims, ensure that they fall within the appropriate categories (for example, late charges and NSF charges do not generally have priority). See <i>Strata Property Act</i>, S.B.C. 1998, c. 43, s. 116, for obtaining a release of the charge for a strata corporation. No Form F is required for a court-ordered sale (<i>Peoples Trust Co. v. Meadowlark Estates Ltd.</i>, 2005 BCSC 51).</p> <p>.3 Distribution of proceeds (usually through the trust account of the lawyer acting for the party presenting the offer to the court for approval).</p> <p>.4 Costs.</p> <p>.5 If a manufactured home is involved, the notice of application and order should contain a direction to the manufactured home registry to transfer the manufactured home and discharge any charges.</p> <p>.6 If personal property is involved, the notice of application and order (under Rule 8-1) should contain authority for the mortgagee’s lawyer to update the Personal Property Registry after completion of the sale.</p> <p>9.6 Obtain a certified copy of the vesting order, to be sent to the purchaser’s lawyer upon appropriate undertakings as to registration.</p> <p>9.7 Review the vendor’s statement of adjustments prepared by the purchaser’s lawyer. The party presenting the application to court usually stands in place of the registered owner as vendor, but the standard form vendor’s statement of adjustments is not used because it contains representations and warranties that are not appropriate in the circumstances. The adjustments are usually confirmed in a letter to the purchaser’s lawyer subject to appropriate undertakings as to payment.</p> <p>9.8 Prepare a letter authorizing registration of the vesting order to be sent to the purchaser’s lawyer upon appropriate undertakings as to registration.</p> <p>9.9 Prepare a letter to the purchaser’s lawyer enclosing the certified copy of the vesting order, the approved statement of adjustments, and the letter authorizing registration of the vesting order, subject to appropriate undertakings as to payment.</p> <p>9.10 Obtain a certified copy of order and send it to the purchaser’s lawyer, upon appropriate undertakings as to registration.</p> <p>9.11 Ensure that a certificate of result of sale, verified by affidavit, is filed pursuant to Rule 13-5(6).</p> <p>9.12 Report to the client, and consider submitting an account, if that would accord with the retainer and fee arrangements.</p> <p>9.13 You are doing a conveyance; acting for a vendor. Review the relevant parts of the RESIDENTIAL CONVEYANCE PROCEDURE (F-1) checklist.</p>					
<p><b>10. ORDER ABSOLUTE</b></p>					
<p>10.1 The grant of an order absolute means that the petitioner can no longer pursue the mortgagor on any judgment obtained on the covenant to pay (<i>Property Law Act</i>, s. 32). This has been held to apply to guarantors as well as mortgagors (<i>Walter E. Heller Financial Corp. v. Timber Rock Enterprises Ltd.</i> (1982), 40 B.C.L.R. 85 (S.C.)). It is unusual to apply for order absolute. Otherwise, consider applying for an order for conduct of sale (see item 8). After an order absolute has been granted, the petitioner is not in a</p>					



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<p>position to set it aside; however, other parties may make such an application, even years later. In <i>1002805 B.C. Ltd. v. 0975403 B.C. Ltd.</i>, 2016 BCSC 851, the court found the circumstances justified the reopening of the order absolute to permit the corporate mortgagor to redeem.</p> <p>10.2 Advise the client that property transfer tax must be paid when an order absolute is registered in the LTO. Advise the client, or the directors and officers if the client is a company, that the client will be liable for any environmental contamination as owner. Consider the <i>Environmental Management Act</i>, S.B.C. 2003, c. 53 (“<i>EMA</i>”), and the Contaminated Sites Regulation, B.C. Reg. 375/96; advise the client to determine whether a site profile must be submitted to a prospective purchaser and to a director of waste management in accordance with the Regulation (<i>EMA</i>, s. 40(6)) (see the Ministry of Environment’s “Administrative Guidance on Contaminated Sites” at <a href="http://www.env.gov.bc.ca">www.env.gov.bc.ca</a>).</p> <p>10.3 Obtain instructions from the client.</p> <p>10.4 Procedure: may be part of a petition asking for an immediate order absolute or on an application (pursuant to Rule 8-1) after the redemption period has expired (see Rule 21-7(6)).</p> <p>.1 In order to oppose an order absolute, the respondent must show that there is equity in the property and that there is some prospect of the petitioner being paid within the proposed extended redemption period (<i>Canada Permanent Mortgage Corp. v. Dan-Al Construction Co.</i>, [1982] B.C.J. No. 2339 (QL) (C.A.)).</p> <p>.2 Obtain a registrar’s certificate stating that no monies have been paid into court. It must be dated after the redemption period has expired (as close as possible to the application for order absolute).</p> <p>.3 Provide a notice of application, the registrar’s certificate, a supporting affidavit from you stating that no monies have been paid to you, and a supporting affidavit from your client stating that no monies have been paid to your client (sworn after the expiry of the redemption period).</p> <p>.4 Ensure that all parties to the proceeding are given notice of the application for order absolute, whether or not they have filed a response to petition.</p> <p>.5 If there is a manufactured home, application and order absolute must contain a direction to the manufactured home registry regarding transfer.</p> <p>.6 If there is personal property involved, the order should contain a provision dealing with registration in the Personal Property Registry.</p> <p>.7 Prepare for and attend in chambers, and obtain the order.</p> <p>10.5 Register the order absolute in the LTO to transfer the property into the name of the mortgagee, free and clear of all encumbrances of the parties to the foreclosure proceedings and of charge holders whose charges were registered after the certificate of pending litigation (but subject to the charges of prior charge holders).</p> <p>.1 Obtain certified copies of the order nisi and the order absolute (required by <i>Land Title Act</i>, s. 271(1)). Prepare the property transfer tax return. Register the documents in the LTO.</p> <p>.2 Request a state of title certificate from the LTO.</p>					

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<p>.3 Remember that the mortgage of the petitioner will automatically be merged off title upon registration of the order absolute. If, for any reason, your client wishes the mortgage to remain on title, you must advise the LTO not to merge the mortgage when you register the order absolute. Ensure that the Form 17 is completed correctly as regards the petitioner’s mortgage and all other charges.</p> <p>10.6 Report to the client, sending the state of title certificate and a final account.</p> <p>.1 Advise the client that any respondent may apply (but the petitioner cannot) to reopen the foreclosure in order to redeem the mortgage, even though the property has been transferred into the client’s name pursuant to the order absolute (this is based on the maxim from equity, “once a mortgage, always a mortgage”).</p>					
<p><b>11. RECEIVERS</b></p>					
<p>11.1 Consider applying for appointment of a receiver if the property is income producing, if there is actual or potential waste or damage, if the property is vacant, or if a building is under construction. The court will not ordinarily order the appointment of a receiver where premises are residential and the mortgagors or owners are in sole occupation. If the building is under construction, you should note that any borrowings of the receiver will not rank ahead of existing builders liens. Accordingly, proceed with caution and try to get a consent order from all lien holders.</p>					
<p>11.2 Authority for appointing a receiver comes from <i>Law and Equity Act</i>, s. 39; Rules 10-1 and 10-2; and the terms of the mortgage or other security.</p>					
<p>11.3 Obtain instructions from the client. In particular, you should caution your clients that a receiver’s accounts are scrutinized by the court, and that receiverships can be costly and time consuming.</p>					
<p>11.4 Obtain relevant information, including details on the tenancy, waste, or construction.</p>					
<p>11.5 Review the rules relating to eligibility and requirements of receivers in the <i>PPSA</i>, ss. 64 to 69 (incorporated as regards receivers of real property by <i>Law and Equity Act</i>, s. 64) as well as the <i>BIA</i>, s. 243(1)(a), (b), and 2(b), in regard to receivers of business property. For example, an employee of the petitioner may be appointed receiver, provided that the employee acknowledges that he or she will be acting without remuneration as an officer of the court, and under obligation to the court even though in the petitioner’s employment. Obtain the consent of the proposed receiver and a letter setting out the receiver’s acknowledgment and qualifications, for inclusion in an affidavit.</p>					
<p>11.6 Consider the <i>EMA</i> and the Contaminated Sites Regulation; determine whether a site profile is required to be submitted to a director of waste management in accordance with the Regulation (<i>EMA</i>, s. 40(7)) (see the Ministry of Environment’s “Administrative Guidance on Contaminated Sites” at <a href="http://www.env.gov.bc.ca">www.env.gov.bc.ca</a>).</p>					
<p>11.7 Procedure: may be part of the petition or on a separate application (pursuant to Rule 8-1). Effective August 1, 2015, PD-47 prescribes the use of model forms of orders, including preservation of assets and receiverships. The model orders are available at <a href="http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/model_orders.aspx">www.courts.gov.bc.ca/supreme_court/practice_and_procedure/model_orders.aspx</a>.</p>					

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<p>.1 Set out the powers applied for, such as collecting rents and profits, overseeing construction completion, or paying the mortgage, taxes, insurance premiums, utilities etc. Set out that the receiver is appointed without a security bond, if appropriate.</p> <p>.2 Include supporting affidavit(s).</p> <p>.3 Obtain a written consent to act from the proposed receiver.</p> <p>.4 Include in the order a provision that the receiver is appointed until there is a further court order.</p> <p>.5 Ensure that all parties who have filed a response to petition are notified of the application. Also notify the owner, mortgagors, and tenants whether or not they have filed a response.</p> <p>.6 Consider if borrowing powers are required.</p> <p>11.8 Discharge of the receiver.</p> <p>.1 Obtain instructions from the client to apply to court for an order discharging the receiver.</p> <p>.2 Follow the same procedure used in obtaining an order for appointment.</p> <p>.3 Have the receiver’s accounts (which will include a statement of all receipts and disbursements, proposed remuneration, and a breakdown of time spent) approved by the court at the same time on a summary basis. Alternatively, there can be a reference to the registrar. On a reference to the registrar, the registrar may provide a certificate as to the result of the passing of accounts, or may make a report which the court may approve summarily upon an application. (See item 6.1.3.)</p> <p>.4 If an order absolute of foreclosure has been granted, any funds in the hands of the receiver will go to the registered owner. So if you want funds in the receiver’s hands to be remitted to the petitioner, the receiver’s accounts should be passed prior to granting the order absolute, or the order absolute should provide that funds in the hands of the receiver will be remitted to the petitioner after the passing of accounts.</p>					
<p><b>12. COSTS</b></p>					
<p>12.1 Attempt to settle your costs with the parties. If that is not possible, have your costs assessed by the registrar:</p> <p>.1 In order for your costs to be added to the balance due and owing under the mortgage, your costs must be assessed, unless all parties agree to waive their right to require this assessment.</p> <p>.2 Consider whether to wait until there has been a sale or refinancing before having costs assessed. Sometimes there is not enough equity in the property to cover costs, so assessing costs may be an unnecessary expense.</p> <p>.3 If you wish to have an interim bill of costs assessed, you must prepare and serve a bill of costs along with an appointment to review it. These should be served on all parties whether or not they have filed a response to petition, and you should make arrangements to appear for review by the district registrar on the date set out in the appointment. Note that Rule 23-6(3.1) requires that a bound hearing record be filed in advance of a registrar’s hearing. At the review, ensure you have an entered copy</p>					

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<p>of the order nisi and a record of the activities on the file and the disbursements to be included in the costs, unless all parties agree to waive their right to require this. This interim assessment should be done only in unusual circumstances. There is authority that the registrar cannot assess multiple bills of costs at different stages of a proceeding.</p> <p>.4 Unless otherwise ordered, costs in foreclosure proceedings are assessed on a scale A party-and-party basis (see Appendix B of the SCCR Rules). If you believe that they should be assessed on a higher scale, you must request this at the time of application for order nisi or for further orders, if the right to do so is reserved in the order nisi.</p> <p>.5 If you have been given a notice pursuant to Rule 21-7(10), you must arrange for an appointment to assess costs within 14 days, otherwise your client might be disentitled to any assessed costs. But note Rule 22-7(2)(e).</p> <p><b>13. CLOSE THE FILE</b></p> <p>13.1 Depending on the detail on the final statement of account and the reporting sent to the client throughout the foreclosure process, you may want to send a detailed reporting letter to the client setting out the various steps taken in the foreclosure proceeding.</p> <p>13.2 Submit your final account to the client and monitor payments on your account. Once your account is paid, close the file.</p> <p>13.3 For guidance, see Closed Files—Retention and Disposition, August 2017, Appendix B (Minimum retention and disposition schedule for specific records and files—Rules and Guidelines) at <a href="http://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/ClosedFiles.pdf">www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/ClosedFiles.pdf</a>.</p>					