

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, VERIFICATION, AND SOURCE OF MONEY (A-1) and the CLIENT FILE OPENING AND CLOSING (A-2) 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. Unless otherwise indicated, any reference to a “Rule”, “Rules”, or “SCFR” is to the Supreme Court Civil Rules, B.C. Reg. 168/2009. This checklist is current to September 1, 2023.</p> <p>New developments:</p> <ul style="list-style-type: none"> • Supreme Court Civil Rules. Changes to the SCFR came into effect on September 1, 2023 (B.C. Reg. 176/2023). The changes are primarily focused on trial management conferences, trial briefs, and trial certificates. See Supreme Court Civil Practice Direction PD-63—Trial Management Conferences, Trial Briefs and Trial Certificates – Transitional Guidance for transitional guidance on the changes. Note that if available, an email address for service is required of counsel and unrepresented parties alike. • Sealed bids in foreclosure proceedings. On August 12, 2022, the Supreme Court of British Columbia set out Supreme Court Civil Practice Direction PD-62—Sealed Bid Process for Foreclosures and Other Matters Involving Sales of Land, which sets out the process for submitting sealed bids in foreclosure proceedings. Within a reasonable period of time after filing an application for approval of sale, seller’s counsel must forward a copy or link of PD-62 to the listing agent for distribution to any interested buyer(s) and/or their agent(s). • Updated practice directions for sealing orders and applications to commence proceedings anonymously. Litigants seeking a sealing order in a civil or family law proceeding must follow the guidelines as set out in Supreme Court Civil Practice Direction PD-58—Sealing Orders in Civil and Family Proceedings. For the procedure to commence proceedings using initials or a pseudonym in civil or family law proceedings, see Supreme Court Civil Practice Direction PD-61—Applications to Commence Proceedings Anonymously. Practice Directions 58 and 61 were updated on August 1, 2023. • Forms of address. The Supreme Court of British Columbia provides instruction on how counsel, litigants, witnesses, and others are to address a justice in a courtroom by Supreme Court Civil Practice Direction PD-60—Forms of Address. Supreme Court Civil Practice Direction PD-59—Forms of Address for Parties and Counsel in Proceedings provides clarification on how parties and counsel ought to introduce themselves with their preferred pronouns to be used in the proceeding. • Communicating with the Court. Supreme Court Civil Practice Direction PD-27—Communicating with the Court was updated on February 10, 2023 and sets out the guidelines for appropriate communications with the court for the limited circumstances in which it is permitted. <p>Of note:</p> <ul style="list-style-type: none"> • Aboriginal law. Special considerations apply to First Nations lands. If a mortgage or foreclosure involves First Nations lands, consider seeking the advice of a lawyer with experience in Aboriginal law matters. The Framework Agreement on First Nation Land Management (the “Framework Agreement”) was ratified 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>as the central authority by the <i>Framework Agreement on First Nation Land Management Act</i>, S.C. 2022, c. 19, s. 121, which came into force on December 15, 2022. The Framework Agreement recognizes First Nations’ inherent right to govern their lands, and signatory First Nations assume the administration and law-making authority over their lands. Consider the following searches when ascertaining interests and priorities in First Nations lands:</p> <ul style="list-style-type: none"> • First Nations Land Management Resource Centre (www.labrc.com) for First Nation signatories operating under a land code and maintaining their own register of interests in their lands; • Self-Governing First Nations Land Register for First Nations operating under the terms of self-government agreements; <ul style="list-style-type: none"> ○ the Nisga’a Nation created their own land title system based on the Torrens system; • Land Title Survey Authority of British Columbia <ul style="list-style-type: none"> ○ the Tsawwassen First Nation negotiated to have their lands registered under the provincial land title system as part of their treaty, though special sections of the <i>Land Title Act</i>, R.S.B.C. 1996, c. 250, apply to these lands; • Indian Land Registry System (“ILRS”) for records on interests in reserve and surrendered lands, pursuant to and as defined under the <i>Indian Act</i>, R.S.C. 1985, c. I-5; <ul style="list-style-type: none"> ○ the Crown-Indigenous Relations and Northern Affairs Canada supports some First Nations in British Columbia in managing their lands and through maintaining the ILRS, although the ILRS is an information system only and does not create priority (except in the case of a registered assignment having priority over an unregistered assignment by s. 55(4) of the <i>Indian Act</i>). <p>If a leasehold interest in First Nations lands subject to the <i>Indian Act</i> will be mortgaged, note that a lease on First Nations lands to a First Nations person can only be mortgaged and seized if the land is designated (<i>Indian Act</i>, s. 89(1.1)). A lease to a First Nations person on lands that are held by a First Nations person under a certificate of possession does not have the same exemption from the protective effect of s. 89(1) of the Act.</p> <p>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 (www.cle.bc.ca) and in other CLEBC publications.</p> <ul style="list-style-type: none"> • COVID-19 pandemic. For guidelines on the impact of the suspension on limitation periods during the state of emergency in British Columbia, see the Law Society of British Columbia guidance document available at www.lawsociety.bc.ca/about-us/covid-virtual-practice-resources/guidelines-for-calculating-bc-limitation-periods/. • Additional resources. For further information about foreclosures, see <i>British Columbia Creditors’ Remedies: An Annotated Guide</i> 2nd ed. (CLEBC, 2018–); <i>Supreme Court Chambers Orders—Annotated</i>, 2nd ed. (CLEBC, 1995–); <i>Foreclosure Practice—2021</i>, course materials (CLEBC, 2021); and <i>Priorities</i>, course materials (CLEBC, 2017). • Law Society of British Columbia. For changes to the Law Society Rules and other Law Society updates and issues “of note”, see LAW SOCIETY NOTABLE UPDATES LIST (A-3). 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>CONTENTS</p> <ol style="list-style-type: none"> 1. Initial Contact 2. Initial Interview 3. After the Initial Interview 4. Demands for Payment 5. Prepare for Foreclosure Proceedings 6. Order Nisi 7. After Obtaining Order Nisi 8. Order for Conduct of Sale 9. Order Approving Sale 10. Order Absolute 11. Receivers 12. Costs 13. Close the File <p style="text-align: center;">CHECKLIST</p> <p>1. INITIAL CONTACT</p> <ol style="list-style-type: none"> 1.1 Arrange the initial interview. 1.2 Conduct a conflicts of interest check. Complete the CLIENT FILE OPENING AND CLOSING (A-2) checklist. 1.3 Confirm compliance with Law Society Rules 3-98 to 3-110 for client identification and verification and the source of money for financial transactions, and complete the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1) checklist. Consider periodic monitoring requirements (Rule 3-110). 1.4 Ask the client to bring all information on the loan, the property, the mortgage(s), and the mortgage default(s) to the interview. If this is a private loan, review and consider the Law Society Discipline Advisory on Private Lending (April 2, 2019) and be alert to mortgage foreclosure fraud. 1.5 Discuss and confirm the terms of your retainer and the calculation of your fee. Refer to the CLIENT FILE OPENING AND CLOSING (A-2) checklist. 1.6 Ascertain whether 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. 1.7 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"> .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). .2 Consider whether there has been a confirmation that extends or suspends the limitation date (<i>Limitation Act</i>, ss. 24 to 26). 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>2. INITIAL INTERVIEW</p> <p>2.1 Discuss the terms of your retainer and the calculation of your fee. Refer to the CLIENT FILE OPENING AND CLOSING (A-2) checklist. Discuss with your client the fact that your accounts will not likely be fully recoverable.</p> <p>2.2 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>2.3 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, their 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, strata fees, 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. The mortgagor can consent to filing 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</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>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 acceleration provisions in mortgages.</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 the <i>Bankruptcy and Insolvency Act</i>, R.S.C. 1985, c. B-3 (the “BIA”) 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. Is the manufactured home listed as “registered” or “exempt”. Does the client hold any <i>Personal Property Security Act</i>, R.S.B.C. 1996, c. 359 (“PPSA”) security on the home, in addition to the mortgage of land? Is the manufactured home a fixture? If the client holds collateral PPSA security, be careful with seize-or-sue provisions, and consider PPSA, s. 55(6). Consider the provisions of <i>Manufactured Home Act</i>, S.B.C. 2003, c. 75, and Regulations.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<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. 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 and other property 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 the mandatory home warranty provisions of the <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>.13 Is there any unsecured debt owed by the mortgagor that the client would like to include in the foreclosure proceeding? (<i>Royal Bank of Canada v. Lord</i>, 2011 BCSC 1623).</p> <p>2.6 If you are not in a position to act, advise the client. Make a record of the advice given, and file your notes. Send a non-engagement letter (for samples, see the Law Society website at www.lawsociety.bc.ca/support-and-resources-for-lawyers/practice-resources/).</p>					
<p>3. AFTER THE INITIAL INTERVIEW</p>					
<p>3.1 Confirm your retainer. Refer to the CLIENT FILE OPENING AND CLOSING (A-2) checklist.</p>					
<p>3.2 Confirm your instructions: 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>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>3.3 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.</p> <p>3.4 Collect any information that the client was unable to provide (see item 2.3 in this checklist for the type of information required).</p> <p>3.5 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>3.6 Conduct a land title office 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>3.7 Confirm the client holds the security it intended to take (for example, ensure the mortgage is registered against all property that it was intended to secure. Review the title search and examine the assessment roll report to ascertain whether the civic address is comprised of multiple parcel identifiers (“PIDs”). If there has been an error and the mortgage is not registered against title, discuss this with the client and make inquiries. Consider whether a caveat can be registered on the property through the land title office. Consider whether a making a title insurance claim is appropriate in the circumstances.</p> <p>3.8 Identify and obtain addresses for all potential respondents, including the names of tenants if the property is a revenue property (see item 5.4.1 in this checklist 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>3.9 If the mortgagor and/or guarantor is deceased, obtain a copy of the death certificate, conduct a search to determine whether probate proceedings have been commenced, and obtain copies of filed probate materials, if available.</p> <p>3.10 Conduct company searches if any parties are incorporated.</p> <p>3.11 Conduct searches of the manufactured home and personal property registries, if appropriate.</p> <p>3.12 Ascertain the position of the Farm Debt Mediation Service, if it is involved.</p> <p>3.13 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>4. DEMANDS FOR PAYMENT</p>					
<p>4.1 Determine who should be sent a demand letter (for example, current owner, original mortgagor, guarantor, purchasers who signed assumption agreements, estate representative, committee, bankruptcy trustee, individual who takes title to the property subject to the mortgage).</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<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 or confirm on demand mortgage.</p> <p>4.3 Consider whether the demand needs to include any legal notices (for example, Notice of Intent to Realize on Security as required by the <i>Farm Debt Mediation Act</i>, Notice of Intention to Enforce Security given pursuant to the provisions of the <i>BIA</i>).</p> <p>4.4 If the mortgagor does not reside in the subject property consider requesting, if applicable, their consent to commence the foreclosure proceeding in a venue that is more convenient to the parties.</p> <p>4.5 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>4.6 Send demand letter(s) and notices, if applicable; send copies to the client; and ensure methods of delivery comply with any applicable legislation (s. 17 of the <i>Farm Debt Mediation Regulations</i>, S.O.R./98-168, for example, prescribes the method of delivery of notice) and the terms of the mortgage, or loan documents, or both, which may stipulate the means for delivering demand letters and other notices.</p> <p>4.7 Enter the demand expiry date in your diary and “BF” systems.</p> <p>4.8 Consider Law Society Rule 3-59 (cash transactions), which prohibits lawyers from accepting more than \$7,500 in cash, in most circumstances, as well as Law Society Rule 3-70 concerning how records of cash transactions are made.</p>					
<p>5. PREPARE FOR FORECLOSURE PROCEEDINGS</p>					
<p>5.1 After the demand period expires, ensure that you have instructions, confirmed in writing, to proceed.</p> <p>5.2 Review the assessed value of the property and any priority charges and discuss with your client whether a sale will produce insufficient funds to cover the amount owing. If so, consider obtaining an appraisal and obtain instructions as to whether the client would like to seek a shortened redemption period and/or an order for immediate conduct of sale at the hearing of the petition.</p> <p>5.3 Review the title search for the property to determine if any registered charges can be cancelled due to the effluxion of time, and if so, file a Form 17 at the land title office to remove them. This eliminates the requirement to name and serve the cancelled charge holder in your client’s proceeding.</p> <p>5.4 Prepare documents.</p> <p>.1 Petition. Ensure that the relief sought conforms to your instructions. Add as parties:</p> <p>(a) Mortgagor.</p> <p>(b) Covenantor (if relief is sought against them).</p> <p>(c) Registered owners (if different from the mortgagor).</p> <p>(d) All registered charge holders whose interests rank in priority after your client’s mortgage.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>(e) Tenants.</p> <p>(f) Any other persons against whom relief is sought.</p> <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> <p>(a) Information about the amount owing for principal, interest, and any protective disbursements when the affidavit is sworn, plus a per diem rate thereafter. (If you paid any protective disbursements, such as outstanding property taxes or strata arrears, on behalf of your client, copies of the correspondence enclosing payment should be included).</p> <p>(b) Confirmation that the amount owing does not include any penalty for early prepayment.</p> <p>(c) A detailed statement of account showing calculation of interest (in cases involving variable-rate mortgages).</p> <p>(d) Copies of the demand letter, mortgage, and any modification agreements (alternatively, append these documents to the petition as schedules).</p> <p>(e) Copies of security agreement and personal property security registry search, if applicable.</p> <p>(f) If property taxes are owing, a copy of the property tax certificate.</p> <p>(g) If the mortgagor is insolvent, copies of bankruptcy documents or consumer proposals.</p> <p>(h) In the case of a deceased mortgagor, copies of death certificate, probate search, and/or probate documents, if available.</p> <p>(i) 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).</p> <p>(j) A statement of no knowledge of facts constituting a defence.</p> <p>(k) 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. In the body of the affidavit, a calculation should be provided which sets out the deficiency taking into account such things as property taxes due, real estate commission payable, and amounts owing under higher ranking mortgages.</p> <p>.3 Affidavit in support of affixation of “registered” manufactured home. This document should be sworn by the property inspector who attended at the property and confirmed the existence of such a home. The affidavit should include details of how the manufactured home is affixed to the lands.</p> <p>.4 Certificate of pending litigation. To be filed pursuant to item 5.6.2 in this checklist.</p> <p>.5 Informational Notice in Form 125 (Rule 21-7(4.1)).</p> <p>5.5 Meet with the client to review, sign, and swear documents.</p> <p>5.6 File documents.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>.1 Court registry: file petition and affidavit(s) in the appropriate registry under local venue rules. (See item 2.3.5 in this checklist.)</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>5.7 If the state of title certificate shows new charges have been registered prior to the registration of your client’s certificate of pending litigation, 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, 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>5.8 Arrange for personal service of the petition (or amended petition), affidavit, and informational notice on all named parties (see Rules 16-1(3), 21-7(4.1), 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>5.9 If a respondent cannot be served, obtain particulars of attempts to locate or serve, and consider making an application for alternative method of 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>5.10 If you are aware or become aware that a respondent is under legal disability because they are a “mentally incompetent person”, ensure they are served in compliance with Rule 4-3(2)(f). Rule 20-2, which provides a “complete code” for proceedings brought by or against a person under a legal disability, must be followed (<i>Smith v. Nabi</i>, 2018 BCSC 1492).</p> <p>5.11 Review all responses to petition that are received and, if appropriate, address any issues raised. Additional affidavit material may be required before the matter is ready for hearing. Consider adjourning any issues that may be dealt with at a later time or may become moot (e.g. Crown priority claims, orders for personal judgment etc.).</p> <p>5.12 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>5.13 Confirm that no triable issue have been raised in any filed response materials.</p> <p>5.14 Provided no triable issues have been raised, the hearing of the petition should take place in chambers and may be heard by a master (<i>Western Arres Capital Inc. v. Currey</i>, 2011 BCSC 522). It is settled law that an order nisi is a final order and that subsequent orders are ancillary.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>5.15 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. (Be aware that certain registries require foreclosure chambers matters to be set on specific days. Check the BC Courts website and canvass the scheduling page to ensure that you comply).</p> <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>5.16 Prepare and serve an affidavit (sworn by you or another lawyer in your firm) attaching the state-of-title certificate you obtained.</p> <p>5.17 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. Attach an updated payout statement from your client as an exhibit to their affidavit.</p> <p>5.18 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. Attach a draft order nisi to this requisition.</p> <p>5.19 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 the Form 68 at least seven days before the hearing date and serve the notice of hearing on each petition respondent.</p> <p>5.20 If the proceeding has been commenced in an out-of-town registry where there is no available agent, consider filing a requisition in Form 17 to appear at the hearing of the petition via MS Teams (Rule 23-5(4)).</p> <p>5.21 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 title page bearing the style of proceedings, an index, and copies of the filed petition, each filed response, and each affidavit that is to be referred to at the hearing. It may also contain a draft order, a written argument, a list of authorities, and a draft bill of costs if necessary.</p> <p>5.22 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>6. ORDER NISI</p>					
<p>6.1 Prepare for and appear in chambers:</p> <ol style="list-style-type: none"> .1 Record the names of respondents and their lawyers who attend, as well as that of the master or judge. .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. Record terms of the order. 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>.3 In your submissions, outline the relief being sought. The relief sought will usually include:</p> <ul style="list-style-type: none"> (a) a declaration that the mortgage is valid, enforceable, and registered against title to the lands; (b) a declaration that the mortgage is in default; (c) a summary accounting of the amount required to redeem the mortgage (draw the court’s attention if that amount includes any paid protective disbursements such as paid property taxes, strata charges, etc.); (d) an order setting the length of the redemption period; (e) personal judgment against the mortgagor and any covenantor for the mortgage debt (and any unsecured debt, if applicable); (f) leave to apply for further accounting; and (g) costs. <p>.4 If the chambers judge or master is not prepared to approve a summary accounting of the amount owing under the mortgage, they 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.</p> <p>.5 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 Administrative Notice AN-17—Registry Vetting of Orders in Civil and Family Proceedings.</p> <p>6.2 Prepare the order nisi and circulate it to all parties who attended the hearing for approval as to form (unless that approval was dispensed with by the chambers judge or master). The order should be served along with signing instructions in Form 33.1. If the party fails to sign and return the order or provide a written objection within 14 days of service, the order can be submitted for entry without their signature (Rule 13-1(1.1)–(1.4)).</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 receipt and 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 two weeks prior to this date so you can have all the documents prepared and be ready to move immediately upon expiry.</p> <p>7. AFTER OBTAINING ORDER NISI</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 Register a certificate of judgment against title to the property for any order for judgment granted in the order nisi for unsecured debt.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>7.3 Conduct a search of the land title office registry using the mortgagor’s/covenantor’s name to find out whether they own any additional properties and, if so, register a certificate of judgment against them for any order for judgment granted in the order nisi.</p> <p>7.4 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 in this checklist.</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>7.5 Note that a notice of discontinuance cannot be filed after the order nisi, without leave of the court.</p> <p>7.6 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 in this checklist.</p> <p>.2 Order approving sale. See item 9 in this checklist.</p> <p>.3 Order appointing or discharging a receiver. See item 11 in this checklist.</p> <p>7.7 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 in this checklist.</p> <p>7.8 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 eligible 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>					
<p>8. ORDER FOR CONDUCT OF SALE</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> <p>.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.</p> <p>.2 Subsequent encumbrancers may also apply for an order for conduct of sale at any time during the redemption period. As a general rule, a subsequent charge holder can apply for conduct of sale three months into the redemption period, even if it appears from the evidence that there will be equity available for that party (Allan McEachern, C.J.B.C., “On Foreclosure Practice” (1983), 41 <i>The Advocate</i> 583).</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>.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 Corp. 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 in this checklist. Generally, the court will not grant an order for conduct of sale effective at the expiry of a six-month redemption period at the hearing of the petition (see <i>HSBC Bank Canada v. A.S. Bains Developments Ltd.</i>, 2015 BCSC 2194).</p> <p>.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 in this checklist), so this remedy may be more appropriate than an order absolute when the property is worth less than the amount owing.</p> <p>.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.</p> <p>8.2 Obtain instructions from the client. Confirm they have not received any money on account of the mortgage debt since order nisi was granted.</p> <p>8.3 Obtain relevant information.</p> <p>.1 Amounts owing on prior encumbrances (or, if this is not possible, the original amounts of encumbrances can be obtained from the land title office) and property taxes and strata charges;</p> <p>.2 Assessed value of the property for property tax purposes, or from a recent appraisal (appraisal is preferable);</p> <p>.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);</p> <p>.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.</p> <p>.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.</p> <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 in this checklist).</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>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<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 in this checklist).</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 the property consists of a used manufactured home, the client’s real estate licensee or property manager must ensure the home displays a label supplied by the appropriate provincial safety manager, a label otherwise known as a silver label, prior to listing (see s. 21(1)(d) of the Electrical Safety Regulation, B.C. Reg 100/2004).</p> <p>8.8 If an offer is received, court approval must be sought, unless all parties agree to the sale (see item 9 in this checklist).</p> <p>8.9 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 resident (see <i>Mao v. Lui</i>, 2017 BCSC 226; <i>Re Nielsen</i>, 2018 BCSC 1161; and <i>Al-Thamer v. Bakhtiyari</i>, 2018 BCSC 1526).</p> <p>8.10 If the listing agent encounters problems accessing the property to market it for sale, an application for forced entry into the property may be necessary. The affidavit in support of this application should include copies of the demand letter that was served on the occupants demanding access, and a log of the listing brokerage licensee’s failed attempts to contact the occupants and/or access the property.</p> <p>8.11 In rare circumstances, an application for vacant possession may become necessary (for example, if the occupants of the property continue to frustrate the listing brokerage licensee’s attempts to market the property for sale notwithstanding a forced entry order, the property is found to be in an unsafe and/or uninhabitable condition, the occupants are threatening or exhibiting unsafe behaviors, etc.). The affidavit in support of this application should be sworn by the listing brokerage’s licensee. The order should include a term that the registrar issue a writ of possession, which can then be enforced by court bailiffs.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>9. ORDER APPROVING SALE</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 and should confirm for the court that marketing activity continues to the date of the approve-sale application.</p> <p>.1 Per <i>Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.</i>, 2013 BCCA 281, the overlying principal on an approval of sale application is that the mortgagee must find a buyer in a businesslike manner and the court must be satisfied that the proposed sale is provident in all the circumstances.</p> <p>.2 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 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>.3 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>.4 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>.5 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>.6 Rule 22-2(13) does not allow hearsay evidence to be adduced in support of a final order (with limited exceptions). Where hearsay evidence may be advanced, such as in the case of a real estate licensee’s Marketing Service Report attached to an affidavit filed in support of an approve-sale application (a final order), the source of the information must be provided and the affidavit itself must include an averment of the truth of the statements offered in evidence (<i>Elite Mortgage Corp. v. Derewenko</i>, 2019 BCCA 125).</p> <p>.7 Per <i>Romspen Mortgage Corp. v. Lantzville Foothills Estates Inc.</i>, 2013 BCSC 2222 (Chambers), the best indicator for property value is offers that have been made and exposure to the market. An appraisal is “no more than an expert’s opinion” on likely sale price, and in this case the judge found the “market speaks loudly” and that the appraisal was little more than an inaccurate prediction.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<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 covenantors 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 (see <i>First National Financial GP Corporation v. Sirotko</i>, 2011 BCSC 340).</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 in this checklist, 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 land title office (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> <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 “non-exempt” 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>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>9.6 Supreme Court of British Columbia Practice Direction PD-62—Sealed Bid Process for Foreclosures and Other Matters Involving Sales of Land sets out the process for submitting sealed bids in foreclosure proceedings. Within a reasonable period of time after filing an application for approval of sale, seller’s counsel must forward a copy or a link of PD-62 to the listing agent for distribution to any interested buyer(s) and/or their real estate licensee(s). When submitting sealed bids to the court ahead of the approval of sale application, all timelines and procedures set out in PD-62 must be complied with.</p> <p>9.7 Obtain a certified copy of the vesting order, to be sent to the purchaser’s lawyer upon appropriate undertakings as to registration.</p> <p>9.8 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>9.9 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>9.10 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>9.11 Following completion of the sale, ensure that a certificate of result of sale, verified by affidavit, is filed pursuant to Rule 13-5(6) and in Form 60.</p> <p>9.12 If any occupant of the property refuses to vacate following completion of the sale, you will need to obtain a writ of possession from the court registry and engage a court bailiff to execute and evict the occupant.</p> <p>9.13 Report to the client, and consider submitting an account, if that would accord with the retainer and fee arrangements.</p> <p>9.14 You are doing a conveyance; acting for a vendor. Review the relevant parts of the RESIDENTIAL CONVEYANCE PROCEDURE (F-1) checklist.</p>					
<p>10. ORDER ABSOLUTE</p>					
<p>10.1 The granting of an order absolute of foreclosure extinguishes the mortgagor’s right to redeem the land and provides a mechanism for the mortgagee to obtain immediate vacant possession of the land, and upon registration of the order with the land title office, the mortgagee becomes the registered owner of the lands free and clear of all encumbrances ranking subordinate in priority to the mortgage.</p>					
<p>10.2 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.</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>Otherwise, consider applying for an order for conduct of sale (see item 8 in this checklist). After an order absolute has been granted, the petitioner is not in a 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>10.3 Advise the client that property transfer tax must be paid when an order absolute is registered in the land title office. 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 (“EMA”), 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 and Climate Change Strategy’s “Administrative Guidance for Site Remediation” at www2.gov.bc.ca/gov/content/environment/air-land-water/site-remediation/guidance-resources).</p> <p>10.4 Obtain instructions from the client.</p> <p>10.5 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> <ol style="list-style-type: none"> .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.)). .2 When making an order absolute application after a redemption period has expired (not in the case of an immediate order absolute application), 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). .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). .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. .5 If there is a “non-exempt” manufactured home, application and order absolute must contain a direction to the manufactured home registry regarding transfer. .6 If there is personal property involved, the order should contain a provision dealing with registration in the Personal Property Registry. .7 Prepare for and attend in chambers, and obtain the order. <p>10.6 Register the order absolute in the land title office 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>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<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 land title office.</p> <p>.2 Request a state of title certificate from the land title office.</p> <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 land title office 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>10.7 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>11. RECEIVERS</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 they 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 and Climate Change Strategy’s “Administrative Guidance for Site Remediation” at Contaminated sites guidance and resources—Province of British Columbia (gov.bc.ca)).</p>					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>11.7 Procedure: may be part of the petition or on a separate application (pursuant to Rule 8-1). Supreme Court Civil Practice Direction PD-47—Model Orders prescribes the use of model forms of orders, including preservation of assets and receiverships. The model orders are available at Supreme Court—Model Orders (bccourts.ca)</p> <ol style="list-style-type: none"> .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. .2 Include supporting affidavit(s). .3 Obtain a written consent to act from the proposed receiver. .4 Include in the order a provision that the receiver is appointed until there is a further court order. .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. .6 Consider if borrowing powers are required. <p>11.8 Discharge of the receiver.</p> <ol style="list-style-type: none"> .1 Obtain instructions from the client to apply to court for an order discharging the receiver. .2 Follow the same procedure used in obtaining an order for appointment. .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 6.1.4 in this checklist.) .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>12. COSTS</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> <ol style="list-style-type: none"> .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. .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. 					

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<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 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 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 after order nisi of foreclosure 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>13. CLOSE THE FILE</p>					
<p>13.1 Prepare a reporting letter and account as soon as practicable after closing.</p>					
<p>13.2 Close the file. See CLIENT FILE OPENING AND CLOSING (A-2) checklist.</p>					