

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p style="text-align: center;">INTRODUCTION</p> <p>Purpose and currency of checklist. This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. It is designed primarily for counsel representing the lien claimant. Counsel representing the owner should refer to item 5.1 (notice to commence an action) and item 7 (removal of a lien from title). This checklist is not exhaustive and does not cover payments into court, holdbacks, or trusts in any detail. This checklist is current to August 31, 2016.</p> <p>Supreme Court Civil Rule 15-1 (Fast Track Litigation) applies to cases involving claims under \$100,000 where the trial can be completed within three days, but does not automatically apply; the parties must consent or apply for a court order to proceed under Rule 15-1.</p> <p>New developments:</p> <ul style="list-style-type: none"> • Supreme Court Civil Rules. The Supreme Court Civil Rules, B.C. Reg. 168/2009 were amended effective July 1, 2015 (B.C. Reg. 103/2015) and July 1, 2016 (B.C. Reg. 3/2016 and B.C. Reg. 162/2016). • Practice Direction—Masters’ Jurisdiction. Effective May 15, 2016, PD-50 rescinds and replaces PD-42. PD-50 sets out the matters in respect of which a master is not to exercise jurisdiction, and provides guidelines for the assistance of the profession and the public. • Changes to Court of Appeal Rules. The Court of Appeal Rules, B.C. Reg. 297/2001 were amended pursuant to B.C. Reg. 134/2015, effective July 24, 2015, and pursuant to B.C. Reg. 6/2016, effective January 29, 2016. • Changes to Small Claims Rules. The Small Claims Rules, B.C. Reg. 261/93 were amended pursuant to B.C. Reg. 244/2015, effective May 1, 2016. Amendments include the repeal of provisions regarding Rule 7.4 mediation of claims for more than \$5,000 or for damages for personal injury.; see also Notice to the Profession NP 08. The Rule 7.2 mediation program was terminated on July 31, 2015 (see B.C. Reg. 135/2015, Sch. 1 and NP 07). • Law Society Rules. On July 1, 2015, revised and consolidated Law Society Rules came into effect. See www.lawsociety.bc.ca/page.cfm?cid=4089&t=Law-Society-Rules-2015. • Code of Professional Conduct for British Columbia (the “BC Code”). Effective July 2015, an amendment to <i>BC Code</i> rule 3.7-9 requires a lawyer to promptly notify the client, other counsel, and the court or tribunal of the lawyer’s withdrawal from a file. • Articled students permitted to act as commissioners for taking affidavits. Effective September 1, 2015, articled students and temporary articled students are prescribed as persons who are commissioners for taking affidavits in British Columbia (B.C. Reg. 142/2015, made pursuant to s. 60(1) of the <i>Evidence Act</i>, R.S.B.C. 1996, c. 124). Principals remain responsible for students’ actions and will need to ensure that students understand the effect of acting as commissioner. <p>Of note:</p> <ul style="list-style-type: none"> • Additional resources. For detailed information about builders lien procedure, precedents, and discussion of potential liabilities, see the <i>British Columbia Builders Liens Practice Manual</i>, looseleaf and online (CLEBC, 1999). For information about builders lien and land title practice, see chapter 32 of the <i>British Columbia Land Title Practice Manual</i>, 3rd. ed., looseleaf and online (CLEBC, 2007). 					

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<p>CONTENTS</p> <ol style="list-style-type: none"> 1. Initial Contact 2. Consult with Client and Obtain Instructions 3. Follow-up from Initial Interview 4. File Claim of Lien 5. Notice to Commence an Action to Enforce a Lien 6. Commence an Action to Enforce a Lien or Sue for Debt, Damages, or Breach of Trust 7. Remove Lien from Title 8. Closing the File <p>CHECKLIST</p> <p>1. INITIAL CONTACT</p> <ol style="list-style-type: none"> 1.1 Arrange the initial interview. 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. 1.2 Ask the client to bring all relevant records (e.g., contracts, purchase orders, invoices, acknowledgments of receipt of material supplied, correspondence, credit applications, certificates of completion, documents relating to the completion of the work). 1.3 Check potential limitation dates. Note limitation periods for the following, checking case law in doubtful cases: <ol style="list-style-type: none"> .1 Filing claim of lien—no later than 45 days after a certificate of completion is filed or a head contract or improvement is completed, abandoned, or terminated (see <i>Builders Lien Act</i>, S.B.C. 1997, c. 45, s. 20 and <i>Strata Property Act</i>, S.B.C. 1998, c. 43, s. 88). .2 Responding to a 21-day notice to commence an action to enforce a claim of lien—within 21 days after service of the notice (<i>Builders Lien Act</i>, s. 33). .3 Commencing an action to enforce a claim of lien and filing a certificate of pending litigation—within one year of filing the claim of lien if no 21-day notice to commence action was served (<i>Builders Lien Act</i>, s. 33). .4 Initiating a trust action: no later than one year after the head contract has been completed, abandoned, or terminated; or, where there is no head contractor, after the improvement has been completed or abandoned (<i>Builders Lien Act</i>, s. 14). 1.4 Check whether there are any bonds for labour and material or performance. Check for contractual limitation periods or notice periods under bonds. 1.5 If the matter is urgent, get the civic address and legal description required to obtain a title search. Obtain the title search before the interview. 					

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<p>1.6 Obtain the names of all parties possibly adverse in interest and ensure that there are no conflicts of interest before the interview. Note the <i>Code of Professional Conduct for British Columbia</i> (the “BC Code”), s. 3.4, regarding conflicts. Also see the model conflicts of interest checklist at www.lawsociety.bc.ca/docs/practice/resources/checklist-conflicts.pdf.</p>					
<p>2. CONSULT WITH CLIENT AND OBTAIN INSTRUCTIONS</p>					
<p>2.1 After reviewing the title search, confirm that there is no conflict of interest.</p>					
<p>2.2 Advise the client how your account will be calculated, the method and timing of payment, and the conditions upon which you undertake to act. Discuss your retainer (see also item 2.13). Consider whether a written retainer agreement is appropriate. See also <i>BC Code</i> s. 3.6 for the rules regarding reasonable fees and disbursements, and commentary [1] to rule 3.6-3 regarding the duty of candour owed to clients respecting fees and other charges. Also, note restrictions on cash transactions of \$7,500 or more from one client or client matter (Law Society Rule 3-59). See also Law Society Rule 3-70 concerning how records of cash transactions are made.</p>					
<p>2.3 Determine the client’s objectives.</p>					
<p>2.4 Verify the client’s identity and collect information. (Consider Law Society Rules 3-98 to 3-109 and the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist, as in item 1.1. If the client is a corporate claimant, note the rules about verifying the identity of the company and the individual(s) instructing you on behalf of the company.)</p>					
<p>.1 Client:</p>					
<p>(a) Full name, address, telephone, e-mail, and fax numbers, and occupation.</p>					
<p>(b) Name, address, and position of the person who will sign the claim of lien.</p>					
<p>(c) Classification of claimant under the <i>Builders Lien Act</i> (e.g., owner, contractor, subcontractor, worker, material supplier).</p>					
<p>(d) If the client is a corporate claimant, consider whether the client is properly incorporated or registered in British Columbia, or if it “carries on business” in British Columbia (<i>Business Corporations Act</i>, S.B.C. 2002, c. 57, ss. 375, 378, and 426(1)). Review <i>British Columbia Builders Lien Practice Manual</i>, §10.22 and “Foreign Entities Not Registered in BC Acquiring or Holding an Interest in Land”, Land Title Practice Bulletin No. 106, dated March 23, 2006, posted on the website of the Land Title and Survey Authority (the “LTSA”) at www.ltsa.ca.</p>					
<p>.2 Description of the property:</p>					
<p>(a) Address and legal description. (If the property is not registered in the land title office (“LTO”), check case law regarding the availability of a lien on unpatented land and a lien on the holdback.)</p>					

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<p>(b) Whether the property is a “highway” under the <i>Builders Lien Act</i>, s. 1.1, Indian land, or is owned by the federal Crown. If it is one of these, the <i>Builders Lien Act</i> does not apply, but there may be an opportunity to lien adjoining property (<i>Pedre Contractors Ltd. v. 2725312 Canada Inc.</i>, 2004 BCSC 1112, and <i>Sandhill Development Ltd. v. Green Valley Developments Ltd.</i>, 2008 BCSC 1646). Note to check case law and the <i>British Columbia Builders Lien Practice Manual</i>, chapter 3, where special categories of owner or land are involved (such as the Crown, Indian reserves, municipalities, and public organizations), or where unregistered leasehold interests, federal Crown agencies, or provincial Crown corporations are involved. See also <i>Vancouver International Airport v. Lafarge Canada Inc.</i>, 2009 BCSC 961, affirmed 2011 BCCA 89, leave to appeal refused [2011] S.C.C.A. No. 182 (QL), where a lien against a leasehold interest that went to the core of a federal undertaking was not permitted.</p> <p>(c) Whether the property is subject to a mineral title held under the <i>Mineral Tenure Act</i>, R.S.B.C. 1996, c. 292 (<i>Builders Lien Act</i>, s. 18).</p> <p>(d) If a plan is available, have the client identify the location of the project on it and consider, if it is an integrated project over several parcels, whether to file against related lands on which the client may not have worked. Check case law and <i>Builders Lien Act</i>, s. 16.</p> <p>(e) If there is doubt, contact the municipality to determine whether a building permit or occupancy permit has been issued for the property to be liened. (<i>Carmel Pacific Enterprises Inc. v. Spirit Equestrian Centre Ltd.</i>, 2005 BCCA 266, held that the question under s. 20(2)(b) is whether the “improvement”, rather than the “contract”, has been completed.)</p> <p>(f) In filing against a strata project, exercise care, since strata plans can be filed without warning creating new legal descriptions. See <i>British Columbia Builders Lien Practice Manual</i>, §3.31 and <i>Strata Property Act</i>, s. 87.</p> <p>.3 Identify the person or persons who engaged the client or to whom the client supplied material. Also identify who is, or will become, indebted to the client, and who must be identified in the claim of lien regarding work done or material supplied (a failure to describe accurately the contracting parties may be fatal to the claim of lien: <i>Nita Lake Lodge Corp. v. Compact Systems (2004) Ltd.</i>, 2006 BCSC 885; <i>Framing Aces Inc. v. 0733961 B.C. Ltd.</i>, 2009 BCSC 389):</p> <p>(a) Name, address, telephone, and fax numbers.</p> <p>(b) Position in the contractual chain (e.g., owner, general contractor, subcontractor, material supplier, worker).</p> <p>(c) Lawyers’ names.</p> <p>.4 Details of the construction and the client’s involvement, including:</p> <p>(a) Sufficient information to be able to determine all persons fitting the definition of “owner” under the <i>Builders Lien Act</i> (s. 1, but see also s. 3) including mortgagees who may be more than “mere” mortgagees. Obtain names, addresses, telephone numbers, and lawyers’ names.</p>					

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<p>(b) Details of work done or material supplied by the client, including copies of any contract, purchase orders, invoices, or acknowledgments of receipt (<i>Builders Lien Act</i>, s. 29).</p> <p>(c) Names of any construction managers, consultants, architects, engineers, and payment certifiers.</p> <p>(d) Name of any general or head contractor.</p> <p>.5 Amount due (including any holdback) and the date when the amount became or will become due. Failure to identify when payment for the work became due and owing is a material and fatal defect (see <i>Persepolis Contracting Inc. v. 0887678 B.C. Ltd.</i>, 2014 BCSC 2016). Note that once a claim of lien is filed, the amount of the claim cannot be increased in pleadings. For a discussion on quantum of liens and the distinction between lienable and nonlienable damages, see <i>British Columbia Builders Lien Practice Manual</i>, chapter 4. Damages for delay may be included, in limited circumstances. A declaration of builders lien cannot include interest on the amount owing (<i>Fast Trac Bobcat & Excavating Service v. Riverfront Corporate Centre Ltd.</i>, 2009 BCSC 840).</p> <p>.6 State of completion of the head contract, contract, subcontract, and improvement, in view of the definitions of “completed”, “performed”, and “abandoned” in <i>Builders Lien Act</i>, s. 1(1) to (5). If your review of s. 20 indicates that these definitions are relevant, also consider the case law on “terminated”, which is not defined in the Act. Identify:</p> <p>(a) Whether a certificate of completion has been issued under s. 7(3), or a notice of certification of completion has been issued under s. 7(4). But see <i>W Redevelopment Group, Inc. v. Allan Window Technologies Inc.</i>, 2010 BCSC 1601, where the court held that certificates of completion that did not comply with the <i>Builders Lien Act</i> were invalid.</p> <p>(b) Whether any deficiency lists have been prepared.</p> <p>(c) Whether an occupancy permit has been issued.</p> <p>(d) Whether the improvement is ready for use or is being used for the purpose intended.</p> <p>(e) Whether the building is occupied.</p> <p>(f) Whether there are any sales of strata units and, if so, the dates of transfer for the purposes of the <i>Strata Property Act</i>, ss. 88 and 116, as limitation periods for filing can be triggered earlier by transfer.</p> <p>(g) Consideration of limitation periods for filing can be complex and triggered by certificates, completed improvements, conveyances, occupation, termination, or abandonment, deemed or actual (see <i>British Columbia Builders Lien Practice Manual</i>, chapter 5). For example, the time limit to file a claim of lien can be 45 days after the <i>earliest</i> of actual completion of the head contract (determined by a 3%-2%-1% formula); termination of the head contract; abandonment of the head contract (no work is done for 30 days and the reason is not one referred to in s. 1(5)); see <i>Gill Tech Framing Ltd. v. Gill</i>, 2012 BCSC 1913, and <i>Sandhill Development (Langley) Ltd. v. Save On Black Top (2008) Ltd.</i>, 2013 BCSC 237); a certificate of completion is issued for the head contract or for any subcontract under which the lien claimant is claiming; or, in the case of a strata lot, the strata lot is sold or occupied.</p>					

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<p>.7 Details of any holdback accounts established under <i>Builders Lien Act</i>, ss. 4 and 5. Consider an information request under s. 41(1)(a) to obtain the name and address of the savings institution, account number, particulars of credits to and payments from the account, and the balance. Note the exclusion to the holdback account in s. 5(8).</p> <p>.8 Names and addresses of any financial institutions connected with the project or with the general contractors. Also names and addresses of defendant’s banks, in case garnishment under s. 13 is an option. Also consider whether a mortgagee is in possession (and is therefore an owner under s. 1), and whether a lender has made any representations to potential or existing lien claimants upon which to found a claim for unjust enrichment.</p> <p>.9 Performance bonds or labour and material bonds, and name of the bonding company. Consider implications of subcontractor default insurance, if it is in place (see <i>British Columbia Builders Lien Practice Manual</i>, chapter 11).</p> <p>.10 Whether there has been any agreement to waive the lien, which may be void (<i>Builders Lien Act</i>, s. 42).</p> <p>.11 Whether there has been a previous demand for payment.</p> <p>.12 Whether there have been allegations of deficient workmanship or materials.</p> <p>.13 Details relating to a breach of trust by a contractor or subcontractor arising from the recent or deemed receipt of funds (<i>Builders Lien Act</i>, ss. 10, 11, 12, and 14), including:</p> <ul style="list-style-type: none"> (a) Any apparent unauthorized use made of the funds or monies paid into any holdback account, although note that the trust provisions in s. 10 of the <i>Builders Lien Act</i> do not apply to funds retained or held back from the contractor or any subcontractor (see <i>Preferred Steel Construction Inc. v. College of New Caledonia</i>, 2014 BCSC 1137, varied on another point 2015 BCCA 16.) (b) The possible quantum of amounts appropriated or converted. (c) The identity of any “prime operator” who participated in the breach. Obtain names, addresses, telephone numbers, and lawyers’ names. (d) Identity of any other persons who may have participated in the breach, including financial institutions. Obtain names, addresses, telephone numbers, and lawyers’ names. (e) Potential application of a tracing remedy to land, or otherwise. (f) Limitation issues, since the limitation period is one year (<i>Builders Lien Act</i>, s. 14) and see <i>Preferred Steel Construction Inc. v. M3 Steel (Kamloops) Ltd.</i>, 2013 BCSC 664 (Master) at para. 25. <p>.14 Details of any negligence that may affect a claim (e.g., negligence by a consultant, architect, engineer, payment certifier, or others). Obtain names, addresses, telephone numbers, and lawyers’ names.</p>					

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<p>2.5 Determine whether there is likely a valid claim of lien under the <i>Builders Lien Act</i>, considering such things as whether the facts meet the requirements set out in s. 2. Be wary of accepting instructions to file a lien on behalf of an architect, engineer, or construction manager if no actual construction on the improvement has commenced (<i>Chaston Construction Corp. v. Henderson Land Holdings (Canada) Ltd.</i>, 2002 BCCA 357; <i>Tuscany Village Holdings Ltd. v. Conquest Development Corp.</i>, 2005 BCSC 1392; <i>Stanley Paulus Architect Inc. v. Windhill Holdings Ltd.</i>, 2014 BCSC 1816). Be wary of accepting instructions to file a lien where: there is no entitlement; the lien is clearly out of time (<i>Persepolis Contracting Inc v. 0997678 B.C. Ltd.</i>, 2014 BCSC 2016); delivery of materials may not be proven (<i>Rempel Bros. Concrete Ltd. v. C.J. Contracting Ltd.</i>, 2014 BCSC 1186); or the amount claimed is clearly exaggerated (<i>BC Code</i> rules 2.1-1(a) and 3.2-7; <i>Smith v. Rusk</i>, 2009 BCCA 96). Note the liability and offence provisions in <i>Builders Lien Act</i>, ss. 19 and 45, and consider case law on the tort of abuse of process. See <i>BC Code</i> rule 3.2-8 regarding the duties of a lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows or ought to know that the organization has acted, is acting, or intends to act dishonestly, criminally, or fraudulently.</p> <p>2.6 Consider whether the client is entitled to file a lien against other properties where the work performed and material supplied was of a direct benefit and an integral and necessary part of the construction (<i>Pedre Contractors Ltd. v. 2725312 Canada Inc.</i>, 2004 BCSC 1112).</p> <p>2.7 Determine whether the client is eligible under <i>Builders Lien Act</i>, s. 41, to make a request for particulars or to apply to court for copies of relevant documents or inspection of relevant documents.</p> <p>2.8 Consider whether an action could be brought for debt, breach of contract, breach of trust, or negligence, and consider attempting to garnish bank accounts.</p> <p>2.9 Consider whether notice must be given or action commenced under any bonds. Note the provisions of <i>Law and Equity Act</i>, R.S.B.C. 1996, c. 253, s. 48, on the status of claimants to commence action.</p> <p>2.10 Consider an action for <i>quantum meruit</i> or unjust enrichment.</p> <p>2.11 Consider an action for a declaration of lien against the holdback, even where the time limits for filing a claim of lien may have expired (<i>Shimco Metal Erectors Ltd. v. North Vancouver (District)</i>, 2003 BCCA 193; <i>Myles Enterprises Ltd. v. Atlas Painting & Decorating Ltd.</i> (1997), 29 B.C.L.R. (3d) 173 (S.C.)). Persons who have lost lien rights against the land may still share equally in the 10% statutory holdback. But see <i>Wah Fai Plumbing & Heating Inc. v. Ma</i>, 2011 BCCA 26, which held that there can be no lien claimed against a holdback where no holdback was actually retained.</p>					

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<p>2.12 Where appropriate, discuss:</p> <ul style="list-style-type: none"> .1 The nature of builders’ liens (including methods of discharge), the trust fund, holdback account, and the holdback. Explain the multiple holdback system and the basis for determination of the amount of the statutory holdback with reference to the <i>Builders Lien Act</i>, s. 4, and, in the case of strata lots, <i>Strata Property Act</i>, s. 88, and the Strata Property Regulation, B.C. Reg. 43/2000, s. 5.2. For example, the combined recovery by all lien claimants claiming under a single contractor or subcontractor may be limited to the <i>greatest</i> of 10% of the total payments made to that contractor or subcontractor, 10% of the total value of the work and material provided under the contract or subcontract; and the amount still owing to the contractor or subcontractor. .2 The process, the steps you will be taking, the timing, the estimated cost, the probable result (considering limitations on the owner’s liability, other potential lien claims, priorities, etc.). .3 Alternatives (e.g., suing on the contract—refer to the COLLECTIONS PROCEDURE (E-4) checklist; taking security; arbitration; mediation; negotiation). <p>2.13 Obtain a retainer and instructions defining the extent of your authority. In the case of a new client, satisfy yourself as to the identity and authority of the person giving you instructions (see item 2.4). If you will act under a “limited scope retainer” (a defined term in the <i>BC Code</i>), ensure that the client understands the nature, extent, and scope of the services that will be provided and the limits and risks associated with the limited services provided. Confirm the understanding, where reasonably possible, in writing.</p> <p>2.14 Ask the client to provide you with any other relevant documents: the contract or subcontract and specifications; all drawings and revisions, including relevant architect’s, engineer’s, and shop drawings; all change orders; all invoices or progress claims; payment record; correspondence; minutes of site meetings; and informational brochures. Diarize to ensure receipt.</p> <p>2.15 Ask the client to recommend trade journals, texts, etc., which you might use to educate yourself regarding any technical areas in dispute.</p>					
<p>3. FOLLOW-UP FROM INITIAL INTERVIEW</p>					
<p>3.1 Send a letter to the client confirming the retainer, setting out how your fee will be calculated, stating the conditions upon which you have agreed to act, and summarizing the points discussed. Clarify whether you accept responsibility for being the address for service and for diarizing the one-year limitation period. See <i>BC Code</i> s. 3.6 in regard to reasonable fees and disbursements, and commentary [1] to rule 3.6-3 regarding the duty of candour owed to clients respecting fees and other charges. Note the requirements in the <i>Legal Profession Act</i> (ss. 64 to 68), the Law Society Rules (8-1 to 8-4), and <i>BC Code</i> rule 3.6-2 regarding contingency fee agreements. See <i>BC Code</i> rule 3.6-2, commentary [2], according to which “a lawyer cannot withdraw from representation for reasons other than those set out in Rule 3.7-7 (Obligatory withdrawal) unless the written contingency contract specifically states that the lawyer has a right to do so and sets out the circumstances under which this may occur.”</p>					

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<p>3.2 Open the file: place this checklist in the file, and note relevant dates. Diarize dates for action in your “BF” systems, including the limitation period of 45 days for filing a claim of lien (<i>Builders Lien Act</i>, s. 20). For a strata lot, note the limitation period of not later than 45 days from conveyance to a purchaser (<i>Strata Property Act</i>, ss. 1(1), definition of “purchaser”, and 88) but see <i>Builders Lien Act</i>, s. 1(4).</p> <p>3.3 Conduct LTO search, including:</p> <ul style="list-style-type: none"> .1 Legal description (to be reviewed carefully for any pending strata plan that may complicate registration, or any excepted property or notice of interest filed by a non-contracting owner under <i>Builders Lien Act</i>, s. 3(2)). .2 Plan (obtain a copy). .3 Registered owner (note the extended definition of “owner” in <i>Builders Lien Act</i>, s. 1). .4 Charges, encumbrances, etc. (noting in particular any registered mortgages or agreements for sale, bearing in mind the priorities under <i>Builders Lien Act</i>, ss. 21 and 32, the possibility of a foreclosure action, etc.). <p>3.4 Conduct other searches and obtain copies of documents, as required:</p> <ul style="list-style-type: none"> .1 Searches for claims filed in gold commissioner’s office, if the property is a mine or mineral title (<i>Builders Lien Act</i>, s. 18). .2 Company searches for all corporate parties: <ul style="list-style-type: none"> (a) Name. (b) Registered and records offices. (c) Identity and addresses of directors. .3 Personal property registry searches of parties against whom personal judgment is sought. .4 Court registry searches for related actions and appearances. .5 Bankruptcy search. (Consider whether leave to bring an action is required by reason of stays, by statute, or pursuant to court orders in insolvency proceedings under the <i>Bankruptcy and Insolvency Act</i>, R.S.C. 1985, c. B-3, or the <i>Companies’ Creditors Arrangement Act</i>, R.S.C. 1985, c. C-36. Consider priorities.) .6 Consider potential priority issues arising from bankruptcy, court-ordered charges in insolvency proceedings, requirements to pay under the <i>Income Tax Act</i>, the <i>Excise Tax Act</i>, R.S.C. 1985, c. E-15, and otherwise. Note that trust claims under the <i>Builders Lien Act</i> may survive a bankruptcy (see <i>Re 0409725 B.C. Ltd.</i>, 2015 BCSC 561 and 2015 BCSC 1221). <p>3.5 Review documents obtained from the client.</p>					

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<p>4. FILE CLAIM OF LIEN</p> <p>4.1 Prepare a claim of lien (consult <i>Builders Lien Act</i>, s. 15, and use Form 5). Note that an affidavit of claim of lien is not required under the current <i>Builders Lien Act</i>. Also note the September 28, 1998 Practice Note from the LTO on “Filing and Releasing a Claim of Builders Lien by a Partnership” (reproduced at §2.29 of the <i>British Columbia Builders Liens Practice Manual</i>).</p> <p>4.2 Meet with the client.</p> <p>.1 Have the client identify the property on the plan and sign on the correct lot or lots.</p> <p>.2 Review additional costs for filing where a strata plan is in place.</p> <p>.3 Obtain claim of lien Form 5, available through BC OnLine or the LTSA’s website (www.ltsa.ca). Under the Director’s Requirements DR 06-11, effective May 7, 2012, a claim of builders lien is required to be filed electronically. There are certain exemptions, which include an application to file a claim of builders lien or a Form C release made in person.</p> <p>.4 Explain the significance of 21-day notice, where time runs from the date of service or deemed service (<i>Builders Lien Act</i>, s. 33), and explain the importance of using an accurate and current address for service on the claim of lien. If your address will be the address for service, provide the name of the responsible lawyer rather than simply the firm name.</p> <p>.5 Have the client sign the original true copy of the claim of lien in black ink; your digital signature will be affixed to the electronic filed copy.</p> <p>Note the obligation to maintain the security of the digital signature. Password entry is required each time a lawyer signs an electronic document. The offence provision under s. 168.9(b) of the <i>Land Title Act</i>, R.S.B.C. 1996, c. 250, the Juricert terms and conditions, Law Society Rule 3-64(8), and <i>BC Code</i> rule 6.1-5 prohibit lawyers from permitting others to use their personalized encrypted electronic access to register documents or from disclosing to others, including support staff, the password, access phrase, or access number. See also the Law Society’s Discipline Advisory of October 2, 2015.</p> <p>.6 Explain the practical benefits of prompt commencement of proceedings, claiming a lien on the holdback, and service on the owner prior to the owner distributing the holdback monies. This is separate and distinct from a lien against the property, and may potentially be pursued where the property itself may not be lienable.</p> <p>4.3 File the claim of lien.</p> <p>.1 For property subject to a mineral title held under the <i>Mineral Tenure Act</i>, other than a Crown-granted mineral claim, file a claim of lien in the gold commissioner’s office where the mineral title is recorded, and file a duplicate or certified copy in the appropriate LTO.</p> <p>.2 For other property, file a claim of lien in the appropriate branch of the LTO.</p> <p>4.4 Conduct a post-registration search, obtain a copy of the state of title certificate and a certified copy of the claim of lien (as evidence of the filing and the date of filing (<i>Builders Lien Act</i>, s. 28)).</p>					

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<p>4.5 Diarize the one-year limitation period for commencing an action to enforce the lien and filing a certificate of pending litigation (<i>Builders Lien Act</i>, s. 33).</p> <p>4.6 Report to the client and submit your account. Remind the client of the limitation period to commence action, and the potential for a s. 33 notice.</p>					
<p>5. NOTICE TO COMMENCE AN ACTION TO ENFORCE A LIEN</p>					
<p>5.1 For owner:</p> <ul style="list-style-type: none"> .1 Discuss with the client and obtain instructions. .2 Determine whether the limitation period to commence action and file a certificate of pending litigation has expired (<i>Builders Lien Act</i>, s. 33). .3 Prepare a notice to commence an action in Form 6 of the <i>Builders Lien Act</i>. .4 Serve or send the notice in compliance with <i>Builders Lien Act</i>, s. 33(3). .5 Diarize the 21-day limitation period from the date of service of notice for the claimant to commence an action to enforce lien (or 29-day limitation period where service of notice is by mail (<i>Builders Lien Act</i>, s. 33(3) and (4)). .6 Consider an application for security for costs and ancillary directions for a stay of proceedings or dismissal under <i>Business Corporations Act</i>, s. 236, or under the court’s inherent jurisdiction, if a lien claimant commences an action but may be unable to satisfy an award for costs if the action is dismissed. <p>5.2 For the lien claimant:</p> <ul style="list-style-type: none"> .1 On receipt of a notice to commence an action, diarize the 21-day limitation period for commencing an action and filing a certificate of pending litigation. Time runs from the date of service or deemed service of the notice. Note that a lawyer who knows that another lawyer has been consulted in the matter must not proceed by default without inquiry and reasonable notice (<i>BC Code</i> rule 7.2-1, commentary [5]). .2 Discuss with the client and obtain instructions to commence an action and file a certificate of pending litigation. 					
<p>6. COMMENCE AN ACTION TO ENFORCE A LIEN OR SUE FOR DEBT, DAMAGES, OR BREACH OF TRUST</p>					
<ul style="list-style-type: none"> 6.1 Confirm instructions, after considering the limitation periods mentioned at item 1.3. 6.2 Collect and verify facts, using a request for information, if necessary (<i>Builders Lien Act</i>, s. 41). 6.3 Check the law, if necessary. 6.4 Identify all defendants. <ul style="list-style-type: none"> .1 In a lien action, consider as defendants: <ul style="list-style-type: none"> (a) Persons with whom the client contracted, and guarantors or indemnitors. 					

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<p>(b) Any “owner”, or person required to maintain a holdback, or a payment certifier within the meaning of the <i>Builders Lien Act</i> (see <i>Paramount Drilling and Blasting Ltd. v. North Pacific Roadbuilders Ltd.</i>, 2005 BCCA 378).</p> <p>(c) Mortgagee, if his or her priority is attacked under s. 32 or 42(1), or if the equitable doctrine of marshalling is sought to be engaged (<i>Narduzzi v. Richardson</i>, 2009 BCSC 588), or if the mortgagee may be liable for holdback under s. 4(4). See also <i>Bank of Montreal v. Peri Formwork Systems Inc.</i>, 2012 BCCA 4, supplementary reasons 2012 BCCA 252, leave to appeal refused [2012] S.C.C.A. No. 361 (QL). See <i>Mission Creek Mortgage Ltd. v. New Recreations Ltd.</i>, 2012 BCSC 1931, affirmed 2014 BCCA 112, regarding a priority dispute in connection with debtor-in-possession (DIP) financing and security posted for the discharge of liens.</p> <p>(d) If property is leased, the lessee and registered owner, unless the non-contracting owner filed a notice of interest in the LTO in Form 1 pursuant to <i>Builders Lien Act</i>, s. 3(2), at the relevant time.</p> <p>(e) Sureties under labour and material payment bonds.</p> <p>.2 In a trust action, include all persons who participated in the breach including directors or officers.</p> <p>6.5 Prepare a notice of civil claim under the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the “Rules”), ensuring that:</p> <p>.1 Action is commenced in the appropriate court—in a lien action, the Supreme Court registry located in the municipality (and otherwise, in the judicial district) where the land and improvement is situated (<i>Builders Lien Act</i>, s. 27; <i>Law and Equity Act</i>, s. 21).</p> <p>.2 Action is commenced within one year of the filing of the claim of lien or within 21 days of service of notice to commence an action (<i>Builders Lien Act</i>, s. 33).</p> <p>.3 You have named all proper parties and included all claims for relief (e.g., declaration of builders lien against land and holdback, declaration of priorities, sale in default of payment, directions and accounting, personal judgment against person with whom client contracted, certificate of pending litigation, damages for breach of trust, costs, other relief). For discussion of the potential independent claim against the holdback, regardless of whether a claim of lien or certificate of pending litigation has been filed in a branch of the LTO, see <i>British Columbia Builders Lien Practice Manual</i>, §5.14.</p> <p>6.6 Obtain a certificate of pending litigation from the appropriate court registry (<i>British Columbia Builders Lien Practice Manual</i>, §10.14; <i>Builders Lien Act</i>, s. 27) and file in the appropriate branch of the LTO (or gold commissioner’s office) within one year of filing the claim of lien or within 21 days of service of notice to commence an action.</p> <p>6.7 Follow normal procedures for an action (refer to the GENERAL LITIGATION (E-2) checklist), but note that in an action to enforce a lien:</p> <p>.1 There are certain restrictions regarding counterclaims (<i>Builders Lien Act</i>, s. 34(2)) and use of holdback (ss. 6 and 23(5)).</p> <p>.2 A default judgment on the lien is not available due to <i>Builders Lien Act</i>, s. 30(2) (but see case law on [repealed] Supreme Court Rule 17(9) (replaced by Supreme Court Civil Rule 3-8(9))).</p>					

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<p>.3 Before applying for summary judgment (Rule 9-6) or a summary trial (Rule 9-7), check the case law regarding availability and requirements.</p> <p>.4 If more than one action is commenced with respect to the same contract or improvement, and the owner or contractor has not applied to have all actions heard at the same time, consider applying for consolidation under Rule 22-5(8) (the Rules apply in accordance with s. 26 of the <i>Builders Lien Act</i>).</p> <p>.5 Dismissal for want of prosecution is more readily granted by the court. Delay in prosecuting the claim may have an adverse impact on a lien claimant (<i>M.H. Rent-a- Rod Ltd. v. Cooper</i>, 2016 BCSC 927).</p> <p>6.8 If the action is dismissed, diarize the date the appeal period expires, and advise the client that the claim of lien remains in force until the limitation period has expired without an appeal having been taken (<i>Builders Lien Act</i>, s. 25(1)(b)).</p> <p>6.9 Report to the client, obtain instructions on appeal, and submit an account.</p>					
<p>7. REMOVE LIEN FROM TITLE</p>					
<p>7.1 If the client wishes to dispute or give security (generally in the form of cash, letter of credit, or lien bond) for the claim of lien:</p> <p>.1 Consider applying to the court for cancellation (<i>Builders Lien Act</i>, ss. 23, 24, and 25(2); <i>Strata Property Act</i>, ss. 89 and 90; <i>British Columbia Builders Lien Practice Manual</i>, chapter 6):</p> <p>(a) By notice of application, if an action has been commenced to enforce the claim of lien.</p> <p>(b) By petition, if an action has not been commenced to enforce the claim of lien.</p> <p>.2 The summary procedures for removal of claims of lien include:</p> <p>(a) Summary determination of holdback liability where s. 23 of the <i>Builders Lien Act</i> applies and there is no dispute with sub-trades' builders liens, and payment is made into court of the lesser of the total amount of the lien claim or the required holdback.</p> <p>(b) Securing disputed liens upon giving security satisfactory to the court, in an amount equal to or less than the amount of the lien claim pursuant to <i>Builders Lien Act</i>, s. 24 (<i>Q West Van Homes Inc. v. Fran-Car Aluminum Inc.</i>, 2008 BCCA 366). But see <i>West Fraser Mills Ltd. v. BKB Construction Inc.</i>, 2012 BCCA 89, where the Court of Appeal held that a lien claim cannot be summarily discharged unless it is "plain and obvious" that the claim will not succeed. The amount to be posted may not include security for costs (<i>Tylon Steepe Homes Ltd. v. Pont</i>, 2009 BCSC 253, leave to appeal refused 2009 BCCA 211). In <i>Mission Creek Mortgage Ltd. v. 0631783 British Columbia Ltd.</i>, 2014 BCCA 112, the court addressed claims of priority to a fund deposited in court as security for the discharge of numerous charges during a <i>Companies' Creditors Arrangement Act</i> proceeding. Ensure the order grants liberty to vary the amount and type of security lodged, particularly where security for multiple lien claims is involved. See the <i>British Columbia Builders Lien Practice Manual</i> for forms and precedents including letter of credit and lien bond.</p>					

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<p>(c) Discharging a clearly invalid lien, such as those filed against the wrong land, or filed late, or with respect to which a legal action to enforce the lien was not commenced in time where <i>Builders Lien Act</i>, s. 25 applies. But see <i>BKB Construction, supra</i>. Where the claim of lien does not relate to the land against which it is filed, see <i>Builders Lien Act</i>, s. 25(2)(a).</p> <p>(d) Discharging a lien charging more than one strata lot by payment into court by the owner of the strata lot’s apportioned share, where <i>Strata Property Act</i>, s. 90 applies.</p> <p>(e) Discharging a claim of lien against the holdback upon posting suitable security. See <i>Preview Builders International Inc. v. Forge Industries Ltd.</i>, 2013 BCSC 1532.</p> <p>.3 File in the LTO (or gold commissioner’s office) a certified copy of the order, stamped Form 17 (<i>Land Title Act</i>), and a registrar’s certificate of payment or deposit into court. Review any letter of credit, lien bond, or other security for possible expiry dates and diarize.</p> <p>.4 To avoid a s. 24 court application, consider an agreement between counsel to hold funds in trust on undertakings on the same terms as if an order had been obtained. Such an agreement must be precise and detailed. See <i>British Columbia Builders Lien Practice Manual</i>, §6.18. Consider whether security is intended to cover the lien only, or also for the contractual claim. Beware of letters of credit or bonds with expiry or limitation dates, and require evidence of the financial stability of issuers (if you are in doubt and if the security is not in cash). If acting for the mortgagee, also consider the possible effect on priorities of the doctrine of sheltering. See <i>British Columbia Builders Lien Practice Manual</i>, §9.11. Counsel for the claimant provides a registrable discharge and a letter to the LTO requesting cancellation of any certificate of pending litigation filed if the action is not discharged or dismissed (see <i>Land Title Act</i>, s. 253).</p> <p>7.2 In other cases, file the following documents in the LTO (or gold commissioner’s office):</p> <p>.1 If an action is not commenced or certificate of pending litigation filed within the one-year limitation period (<i>Builders Lien Act</i>, s. 33(1)), file <i>Land Title Act</i>, Form 17 for cancellation by effluxion of time. See <i>Builders Lien Act</i>, ss. 22, 25(1)(a), and 33(5).</p> <p>.2 If an action is not commenced within the 21-day limitation period after service of a notice to commence an action (<i>Builders Lien Act</i>, s. 33(2)), file Form 17 and a statutory declaration, attaching as exhibits the claim of lien, title search, search for certificate of pending litigation, a copy of the notice to commence action, and proof of service or mailing of the notice. Note that service on the registered office of a company is not proper service under <i>Builders Lien Act</i>, s. 33(3)(b). See <i>Builders Lien Act</i>, ss. 25(1)(a), and 33(5).</p> <p>.3 If the action has been dismissed for want of prosecution or on the merits (<i>Builders Lien Act</i>, s. 25(1)(b)), file Form 17 and a certificate certifying the dismissal and that no appeal from the dismissal has been taken within the time prescribed for appeal. See <i>Land Title Act</i>, s. 254.</p> <p>.4 If the action has been discontinued (<i>Builders Lien Act</i>, s. 25(1)(c)), file Form 17 and a certificate certifying the discontinuance. See <i>Land Title Act</i>, s. 253.</p>					

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<p>.5 If the claim of lien has been satisfied (<i>Builders Lien Act</i>, s. 25(1)(d)), file a Form C discharge of lien and a solicitor’s letter requesting the cancellation of the certificate of pending litigation. See <i>Land Title Act</i>, s. 255.</p> <p>7.3 Conduct a post-cancellation search and obtain a copy of the state of title certificate.</p> <p>8. CLOSING THE FILE</p> <p>8.1 Report to the client and submit your account, outlining the manner in which you arrived at the amount and confirming that your engagement is complete.</p> <p>8.2 Close the file. Consider storage and destruction requirements. For guidance, including a suggested minimum retention and disposition schedule for specific documents and files, see <i>Closed Files—Retention and Disposition</i>, July 2015, Appendix B at www.lawsociety.bc.ca/docs/practice/resources/ClosedFiles.pdf.</p>					