

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p><b>INTRODUCTION</b></p> <p><b>Purpose and currency of checklist.</b> This checklist deals with a conventional first mortgage of residential property. It is designed for use by counsel for the mortgagee. It should be used with the MORTGAGE DRAFTING (F-3) checklist. This checklist is current to September 1, 2016.</p> <p><b>Fraud alerts.</b> For current information about fraudulent activities relevant to real estate and conveyancing work, refer to the Law Society’s “Fraud Alerts” page at <a href="http://www.lawsociety.bc.ca">www.lawsociety.bc.ca</a>.</p> <p><b>New developments:</b></p> <ul style="list-style-type: none"> <li>• <b>Property transfer tax increase.</b> Effective February 17, 2016, the property transfer tax was increased on properties with a fair market value exceeding \$2,000,000 (<i>Budget Measures Implementation Act, 2016</i>, S.B.C. 2016, c. 3, s. 46). Pursuant to s. 3(1)(c) of the <i>Property Transfer Tax Act</i>, R.S.B.C. 1996, c. 378, the tax on the fair market value that exceeds \$2,000,000 is now 3 per cent.</li> <li>• <b>Additional property transfer tax on foreign entities.</b> Effective August 2, 2016, an additional 15 per cent property transfer tax applies to residential property transfers to “foreign entities” in the Greater Vancouver Regional District on or after August 2, 2016 (ss. 2.01 to 2.04 added to the <i>Property Transfer Tax Act</i> under the <i>Miscellaneous Statutes (Housing Priority Initiatives) Amendment Act, 2016</i>, S.B.C. 2016, c. 27). See <a href="http://www2.gov.bc.ca/assets/gov/taxes/property-taxes/property-transfer-tax/forms-publications/is-006-additional-property-transfer-tax-foreign-entities-vancouver.pdf">www2.gov.bc.ca/assets/gov/taxes/property-taxes/property-transfer-tax/forms-publications/is-006-additional-property-transfer-tax-foreign-entities-vancouver.pdf</a>.</li> <li>• <b>New electronic form templates.</b> On August 16, 2016, the following electronic land title form templates were updated: Form A—Freehold Transfer (v23), Form B—Mortgage (v23), and LTO Application to Deposit Plan (v14). The Property Transfer Tax Form (v27) was updated August 2, 2016. The forms are available at <a href="http://ltsa.ca/practice-information/land-title-forms">ltsa.ca/practice-information/land-title-forms</a>.</li> <li>• <b>New Land Title and Survey Authority of British Columbia fee listings.</b> As of April 16, 2016, the Land Title and Survey Authority (the “LTSA”) implemented new fee listings for its services. See <a href="http://ltsa.ca/fees">ltsa.ca/fees</a> or contact the LTSA at 1.877.577.LTSA (5872).</li> <li>• <b>Mortgage not valid despite full registration.</b> The decision in <i>Lin v. CIBC Mortgages Inc.</i>, 2015 BCCA 518 challenges standard practices for real estate conveyancing in British Columbia. The mortgagee, CIBC, advanced funds to its notary with instructions to release the funds to the borrowers’ notary on conditions, including furnishing a valid first charge, but the borrowers’ notary absconded with \$440,000 of the \$519,000 advanced. The notary did not pay out the existing first mortgage, and CIBC’s mortgage was registered second. The Court of Appeal held that the mortgage never advanced to the point where the borrowers had the right to call for the funds for their own benefit, and therefore the funds remained the property of CIBC. Since no valid consideration was received by the borrowers in return for granting the mortgage, CIBC did not have any right to the mortgage and thus its mortgage, though fully registered, was not valid, and the borrowers were entitled to order striking the mortgage from title. For further commentary, see the Law Society’s practice resource at <a href="http://www.lawsociety.bc.ca/docs/practice/resources/mortgage_Lin-v-CIBC.pdf">www.lawsociety.bc.ca/docs/practice/resources/mortgage_Lin-v-CIBC.pdf</a>.</li> <li>• <b>Mandatory e-filing.</b> For e-filing user guides, see <a href="http://ltsa.ca/practice-information/e-filing-user-guides-and-publications">ltsa.ca/practice-information/e-filing-user-guides-and-publications</a>, as well as <a href="http://www.ltsa.ca/cms/required-e-filing">www.ltsa.ca/cms/required-e-filing</a> and “Protocol for Land Title Electronic Instruments” at <a href="http://www.lawsociety.bc.ca">www.lawsociety.bc.ca</a>.</li> </ul>					

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<ul style="list-style-type: none"> <li>• <b>Real Estate Development Marketing Act disclosure statements.</b> When acting for a lender with respect to a loan for a developer of real property, obtain instructions as to whether you are to review the disclosure statement to determine whether any amendments are required; see <i>Woo v. Onni Ioco Road Five Development Limited Partnership</i>, 2014 BCCA 76.</li> <li>• <b>Law Society Rules.</b> On July 1, 2015, revised and consolidated Law Society Rules came into effect. See <a href="http://www.lawsociety.bc.ca/page.cfm?cid=4089&amp;t=Law-Society-Rules-2015">www.lawsociety.bc.ca/page.cfm?cid=4089&amp;t=Law-Society-Rules-2015</a>.</li> <li>• <b>Code of Professional Conduct for British Columbia (the “BC Code”).</b> In July 2015, rule 3.7-9 was amended to require that a lawyer promptly notify the client, other counsel, and the court or tribunal of the lawyer’s withdrawal from a file. Rule 3.6-3, commentary [1] was amended in June 2015 regarding the duty of candour owed to clients respecting fees and other charges for which a client is billed.</li> <li>• <b>Articled students permitted to act as commissioners for taking affidavits.</b> 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.</li> </ul> <p><b>Of note:</b></p> <ul style="list-style-type: none"> <li>• <b>Aboriginal law.</b> Special considerations apply to land situated within an Indian reserve. While Aboriginal Affairs and Northern Development Canada (“AANDC”) helps to manage a significant number of reserves for the benefit of “Indians” (as defined in the <i>Indian Act</i>, R.S.C. 1985, c. I-5), there are some bands or First Nations in British Columbia that manage their own reserve lands. AANDC maintains the Indian Lands Registry System, which includes information about the creation of the reserve and any allotments of parcels of land within a reserve to individual Indians (under certificates of possession or certificates of occupation), as well as any surrenders or designations of lands and any third party interests in or on the reserve lands (such as leases, easements, permits, etc.). The registry is an informational system only and does not create priority, except in the case of a registered assignment having priority over an unregistered assignment (<i>Indian Act</i>, s. 55(4)). First Nations operating under a land code adopted under the <i>First Nations Land Management Act</i>, S.C. 1999, c. 24 have a separate registry system established under that Act that contains some rules on priorities established by regulation. To investigate whether a particular First Nation is a signatory to the Framework Agreement on First Nation Land Management (ratified and implemented by the <i>First Nations Land Management Act</i>), consult the website of the First Nations Land Management Resource Centre (<a href="http://www.labrc.com">www.labrc.com</a>). Some bands (like the Sechelt Indian Band, Nisga’a Nation, and the Tsawwassen Indian Band) are registered under the provincial land title system, though special provisions in the <i>Land Title Act</i>, R.S.B.C. 1996, c. 250 apply to the lands of those First Nations. The federal <i>First Nations Commercial and Industrial Development Act</i>, S.C. 2005, c. 53 (“<i>FNCIDA</i>”) has been implemented in B.C. by the <i>FNCIDA Implementation Act</i>, S.B.C. 2012, c. 21, which came fully into force on June 25, 2012. It allows some <i>Land Title Act</i> provisions to apply to reserve land. While Indian reserve lands are within federal jurisdiction, consider conducting title searches in the provincial system as well, since some reserve lands are registered in both systems. In contrast to the provincial land title system, the Indian Lands Registry is not always up to date and, from a title search perspective, may be unreliable.</li> </ul>					

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<p>However, do not consider the provincial system authoritative, given the potential for interjurisdictional immunity issues where conflicts arise between the two jurisdictions.</p> <p>Note that a lease on reserve lands to an Indian can only be mortgaged and seized if the land is designated (<i>Indian Act</i>, s. 89(1.1)). A lease to an Indian on lands held by an Indian under a certificate of possession does not have the same exemption from the protective effect of s. 88 of the Act.</p> <p>If a mortgage, land conveyance, or transfer of leasehold interest involves reserve or First Nation lands, consider seeking the advice of a lawyer with experience in Aboriginal law matters. Further information on Aboriginal law issues is available on the “Aboriginal Law” page in the “Practice Points” section of the Continuing Legal Education Society of British Columbia website (<a href="http://www.cle.bc.ca">www.cle.bc.ca</a>) and in other CLEBC publications.</p> <ul style="list-style-type: none"> <li>• <b>Additional resources.</b> See the <i>British Columbia Mortgages Practice Manual</i>, looseleaf and online (CLEBC, 1992); <i>Land Title Electronic Forms Guidebook</i>, 6th ed., print and online (CLEBC, 2013); and <i>Residential Real Estate Conference—2014</i> (CLEBC, 2014).</li> </ul> <p style="text-align: center;"><b>CONTENTS</b></p> <ol style="list-style-type: none"> <li>1. Initial Contact</li> <li>2. After the Initial Contact</li> <li>3. Prepare the Mortgage</li> <li>4. Concluding the Mortgage</li> <li>5. Registration and Pay Out</li> <li>6. Closing the File</li> </ol> <p style="text-align: center;"><b>CHECKLIST</b></p> <ol style="list-style-type: none"> <li>1. <b>INITIAL CONTACT</b> <ol style="list-style-type: none"> <li>1.1 If your first contact with the client is by telephone, consider the desirability of an interview, bearing in mind the client’s experience and knowledge.</li> <li>1.2 If your first contact with the client is by way of written instructions:           <ol style="list-style-type: none"> <li>.1 Examine the instructions carefully, considering such matters as:               <ol style="list-style-type: none"> <li>(a) Whether the instructions need clarification.</li> <li>(b) Whether there are any non-standard requirements.</li> <li>(c) Whether the lender has requested a standard form of opinion that includes opinions you are unable to give. If so, contact the lender immediately to settle the opinion.</li> <li>(d) Whether the lender requires or permits the use of title insurance.</li> <li>(e) Whether the lender has agreed to accept a protocol opinion.</li> </ol> </li> <li>.2 Ensure that you have all the necessary information (see items 1.8 and 1.9).</li> <li>.3 Consider whether it is desirable to meet with or telephone the client.</li> <li>.4 Contact the client to acknowledge receipt of instructions and to discuss the transaction.</li> </ol> </li> </ol> </li> </ol>					

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<p>1.3 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. When arranging an interview, ask the client to bring all relevant information (e.g., the purchase contract or the commitment letter from the mortgagee), and all identification you will need. Ensure you review, and keep a photocopy of, this identification for your records. Obtain this identification from all individuals you take instructions from, whether they are the buyers/borrowers or other parties. Verify the client’s identity and determine the client’s legal capacity (see rule 3.2-9 of the <i>Code of Professional Conduct for British Columbia</i> (the “BC Code”) and the BCLI Report on Common Law Tests of Capacity).</p> <p>1.4 Advise the client how your account is calculated, when and how payment should be made, and upon what conditions you undertake to act as lawyer. Be sure to include disbursements in the calculation of your account. Include PST/GST. Also advise that if transaction becomes more complicated, the fees and disbursements might have to be increased. Explain conflict rules.</p> <p>1.5 If there are two or more clients, see <i>BC Code</i> rules 3.4-5 to 3.4-9 and the joint retainer letter, which can be used to comply with the rules, on the Law Society website at <a href="http://www.lawsociety.bc.ca/docs/practice/resources/ltr-joint-retainer.pdf">www.lawsociety.bc.ca/docs/practice/resources/ltr-joint-retainer.pdf</a>.</p> <p>1.6 Where desirable, bearing in mind the client’s experience and knowledge, discuss the background of the transaction, the purpose of the financing, and the client’s objectives and expectations. Be alert to real estate fraud flags (for example, see the Law Society’s <i>Insurance Issues Newsletter No. 2</i>, March-April 2006, “Curbing Risk in Real Estate Practice,” for a review of mortgage instructions that should raise concern; see also the Law Society’s publications regarding real estate and mortgage fraud found in “Fraud Alerts” at <a href="http://www.lawsociety.bc.ca">www.lawsociety.bc.ca</a>).</p> <p>1.7 Review the purchase contract/commitment letter and note what they say about financing, such as the terms of the mortgage and the responsibilities of each party.</p> <p>1.8 Consider the Law Society Rules on client identification and verification and complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. Collect additional information including:</p> <p>.1 Lender:</p> <ul style="list-style-type: none"> <li>(a) Full name.</li> <li>(b) Address.</li> <li>(c) Telephone.</li> <li>(d) Name, position, and contact information for individual(s) authorized to give you instructions.</li> <li>(e) Is the lender an institutional, corporate, or individual lender? Is the lender a designated foreign bank (<i>Bank Act</i>, S.C. 1991, c. 46, s. 508)? If dealing with a foreign lender, consider whether filings need to be made with the mortgage—e.g., a Certificate of Status.</li> <li>(f) Is the lender a financial institution eligible to participate in the Western Law Societies Conveyancing Protocol?</li> </ul>					

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<p>.2 Borrower:</p> <ul style="list-style-type: none"> <li>(a) Full name.</li> <li>(b) Address (home, business).</li> <li>(c) Telephone (home, business).</li> <li>(d) Occupation(s).</li> <li>(e) Whether there is a joint tenancy or tenancy in common.</li> <li>(f) Any problems regarding capacity (e.g., age, mental competence, trustee, attorney, representation agreement)?</li> <li>(g) Name of lawyer.</li> <li>(h) Is the borrower a company? Is it a British Columbia company, a federal corporation, or a foreign entity (see item 1.8.1(e))?</li> </ul> <p>.3 Guarantor or covenantor:</p> <ul style="list-style-type: none"> <li>(a) Name.</li> <li>(b) Address.</li> <li>(c) Telephone.</li> <li>(d) Occupation.</li> <li>(e) Any problems regarding capacity (e.g., age, mental competence, trustee, attorney)?</li> <li>(f) Name of lawyer.</li> <li>(g) If guarantee contains postponement and assignment of loans/claims, conduct personal property registry search(es) in appropriate jurisdictions. Register financing statement.</li> <li>(h) Form of independent legal advice required by mortgagee. See <i>BC Code</i> rule 3.4-32 with respect to providing a certificate of independent legal advice. Also see the Independent Legal Advice Checklist on the Law Society website at <a href="http://www.lawsociety.bc.ca/docs/practice/resources/checklist-ila_annotated.pdf">www.lawsociety.bc.ca/docs/practice/resources/checklist-ila_annotated.pdf</a>.</li> </ul> <p>.4 Property:</p> <ul style="list-style-type: none"> <li>(a) Civic address.</li> <li>(b) Legal description.</li> <li>(c) Age of premises; any construction (substantial renovations).</li> <li>(d) Existing tenancies.</li> <li>(e) Property insurance, including name of agent.</li> <li>(f) Zoning and survey, if available. Ask vendor/borrower (if applicable) or lender whether a recent survey is available.</li> <li>(g) Environmental searches.</li> <li>(h) Archaeology search.</li> <li>(i) Tax and utility searches.</li> </ul> <p>.5 Find out whether a conveyance is involved and, if so, the basic details, including closing date.</p> <p>.6 Find out whether title insurance is or may be involved and, if so, the details of insurer, policy, retainer, procedures.</p>					

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<p>1.9 Discuss in detail the proposed mortgage, referring to the MORTGAGE DRAFTING (F-3) checklist. Include:</p> <ul style="list-style-type: none"> <li>.1 Type of loan (e.g., conventional, with holdback, building loan with progress advances, CMHC-insured, other insured, demand loan, line of credit).</li> <li>.2 Type of property (e.g., principal residence of borrower or revenue property). Consider advising lender to take an assignment of rents from the borrower.</li> <li>.3 Completion date.</li> <li>.4 Payment date (are the funds required at any particular time?) and conditions precedent to advance of funds.</li> <li>.5 Principal (and any amounts to be deducted from principal, such as taxes in arrears, legal fees and disbursements, interest adjustment, arrangement fees), interest, term, amortization, special clauses (e.g., due on sale, prepayment, due on leaving employment with the lender), environmental representations, and warranties or indemnities.</li> <li>.6 The MT number of the filed standard mortgage terms (if any) or the prescribed mortgage terms and any additional terms (i.e., Form E Schedule) for inclusion in the mortgage.</li> <li>.7 Copies of lender's forms: standard mortgage terms, schedules to Form B, if there are additional or modified terms, acknowledgment of receipt of mortgage terms.</li> </ul> <p>1.10 Discuss other relevant matters, including:</p> <ul style="list-style-type: none"> <li>.1 Desirability of getting an appraisal; desirability of getting title or mortgage insurance (e.g., CMHC or private insurance for title defects).</li> <li>.2 Whether it is necessary to check zoning and bylaw compliance (generally only if there is reason to believe there may be a problem). Note: this typically takes three to four weeks.</li> <li>.3 Whether a survey is required (does the Western Law Societies Conveyancing Protocol apply?). Determine whether vendor has survey already and whether appropriate statutory declaration will be satisfactory to the lender. Will the lender accept title insurance in lieu of a survey?</li> <li>.4 Property insurance requirements (e.g., lender as loss payee, mortgage endorsement clause) and necessity of ensuring that the borrower has obtained satisfactory insurance before advancing funds.</li> <li>.5 Advise the borrower to arrange for own liability and contents insurance.</li> <li>.6 Any possibility of there being an unregistered interest pursuant to the <i>Family Law Act</i>, S.B.C. 2011, c. 25? If so, consider getting a waiver from the non-owning spouse, or, if that is not prudent or possible, a statutory declaration from the borrower.</li> <li>.7 Any possible builders lien issues (although the lender is not required to hold back funds, advances should not be made without checking for builders liens). Note that holdback requirements under <i>Strata Property Act</i>, S.B.C. 1998, c. 43, s. 88, are mandatory.</li> </ul>					

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<p>.8 Tax matters: PST/GST (or HST prior to April 1, 2013, and transitional tax for new homes where construction was commenced before April 1, 2013), income tax, withholding tax, property transfer tax.</p> <p>.9 Environmental concerns or problems that would erode or eliminate the mortgagee’s security.</p> <p>.10 Whether there is any concern that a security interest may exist in any fixtures (including manufactured homes) or crops on the property and whether a personal property registry search should be conducted.</p> <p>1.11 Be sensitive to any possibility of a fraudulent conveyance or preference. Note <i>BC Code</i> rule 3.2-7, which states that a lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime, or fraud. The lawyer has an obligation to “make inquiries” rather than to just be “wary”. Also note <i>BC Code</i> rule 3.2-8 if the client is an organization. Consider the indicia of unconscionability under the <i>Business Practices and Consumer Protection Act</i>, S.B.C. 2004, c. 2 (the “<i>BPCPA</i>”), ss. 7 to 10. Consider the usury provisions under <i>Criminal Code</i>, R.S.C. 1985, c. C-46, s. 347. Check disclosure statement requirements (<i>Bank Act; Mortgage Brokers Act</i>, R.S.B.C. 1996, c. 313; and <i>BPCPA</i>, Part 5).</p> <p>1.12 Clarify who is responsible for each item: the borrower, the lender, or you. Also clarify which party is to pay in each case.</p> <p>1.13 If the lender is a non-institutional lender, obtain a retainer and instructions defining the extent of your authority. In the case of a new corporate client, consider obtaining a directors’ resolution confirming the conditions of the retainer and setting out who will give instructions and who you will report to. Check that the lender has the power to lend. Consider the jurisdiction of the lender.</p>					
<p><b>2. AFTER THE INITIAL CONTACT</b></p> <p>2.1 Send a letter to the client confirming your instructions, setting out the manner in which you will determine your fee for services, stating the conditions upon which you have agreed to act, and summarizing the points discussed. Consider reporting on the results of searches as set out below.</p> <p>2.2 Open the file: place relevant checklists in the file and make entries in your diary and “BF” systems (ensuring that you note the commitment expiry, completion, and payment dates). Note the requirement to deliver a true copy of standard or express (or both) mortgage terms along with any amendments thereto. Keep a photocopy of any individual client’s picture ID in the file.</p> <p>2.3 Communicate with counsel representing the other parties, advising that you are acting for your client. If the other parties have not retained counsel, send a letter urging that this be done. Note <i>BC Code</i> rule 7.2-9.</p> <p>2.4 Search title:</p> <p>.1 Confirm civic address and legal description. Conduct a BC Assessment search to ensure that the legal description correctly identifies the subject property, and to verify if there is more than one legal parcel.</p> <p>.2 Confirm the name(s) of registered owner(s) and the manner in which they hold title to land—joint tenancy or tenancy in common.</p>					

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<p>.3 Check all numbers on the title and any pending registrations. Match numbers against registered charge numbers and legal notations.</p> <p>.4 Ensure that the subject of the mortgage is a legal lot.</p> <p>.5 Determine whether any land has been transferred from title.</p> <p>.6 Review: plan of property and plans of charges affecting the property; notations, mortgages, charges, and encumbrances on title (e.g., rights of way, building schemes, land use contracts); judgments, certificates of pending litigation, caveats, transfers, miscellaneous notes, and pending documents; notice of a marriage or separation agreement; other endorsements on the title certificate; appurtenant easements, and rights of way.</p> <p>.7 If a prior mortgage has been registered, the subsequent mortgagee’s lawyer should contact the prior mortgagees to obtain written confirmation relating to the balance and standing of the mortgage.</p> <p>.8 Obtain copies of relevant documents, such as: copy of title search, plan of the property, and charges.</p> <p>.9 Determine whether the duplicate certificate of title is issued by the land title office (“LTO”) and, if so, where it is located.</p> <p>2.5 If the mortgage relates to a strata lot, conduct relevant searches and obtain necessary information (e.g., strata plan, charges against common property, bylaws and amendments, Form P—Phased Strata Plan Declaration under the <i>Strata Property Act</i>, disclosure statement under the <i>Real Estate Development Marketing Act</i>, S.B.C. 2004, c. 41 and any amendments to the disclosure statement (these can be obtained from the Superintendent of Real Estate: see <a href="http://www.fic.gov.bc.ca">www.fic.gov.bc.ca</a>), Form J—Rental Disclosure Statement under the <i>Strata Property Act</i>, Form B—Information Certificate, and Form F—Certificate of Payment (if conveyance)). Inquire whether there are any current or proposed special levies. Determine whether the strata corporation is relying on a depreciation report to assist in determining the annual contribution to the contingency reserve fund (and confirm the most recent depreciation report is attached to the Form B—Information Certificate). Also, if the purchaser is buying for investment purposes, confirm that the bylaws do not prohibit or limit rentals.</p> <p>2.6 Report search results to the client and discuss, if desirable. In particular:</p> <p>.1 Have the client identify the property on the plan.</p> <p>.2 Discuss the effect of the various charges, etc., including priorities and restrictions on the use of the land, and get instructions (e.g., to pay out certain charges). Confirm instructions and advice in writing.</p> <p>.3 Discuss <i>Land Title Act</i>, R.S.B.C. 1996, c. 250, s. 23, and the possibility of unregistered interests (note: and those possibly derived by fraud).</p> <p>2.7A Conduct company search on corporate parties—borrower, guarantor, and, where necessary, lender—noting the following:</p> <p>.1 Registered and records office.</p> <p>.2 Annual report.</p> <p>.3 Directors and officers.</p>					

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<p>.4 Notice of Articles, and amendments. If company was formed before the <i>Business Corporations Act</i>, S.B.C. 2002, c. 57, came into force, ensure that it was transitioned under that Act and has not been struck, or is not in the process of being struck from the register.</p> <p>.5 Good standing, including whether the company has been struck off and subsequently restored. If it has, consider the effect of <i>Business Corporations Act</i>, ss. 354 to 368, and the <i>Escheat Act</i>, R.S.B.C. 1996, c. 120.</p> <p>2.7B Obtain other constating documents (articles, and amendments thereto) from the company’s records office. Review these for general corporate provisions and for powers and the manner in which they are to be exercised:</p> <p>.1 Borrower’s power to borrow.</p> <p>.2 Lender’s power to lend: <i>Business Corporations Act</i>; also consider any limitations such as the loan-to-property-value ratio; prohibitions on lending to directors, shareholders, etc.; and the aggregate value of loans.</p> <p>.3 Manner of execution of documents (signing authority, use of seal).</p> <p>.4 Foreign lenders—<i>Bank Act</i>, Part XII restrictions on carrying on banking business in Canada.</p> <p>.5 Is extraprovincial registration required?</p> <p>2.8 Consider the <i>Personal Property Security Act</i>, R.S.B.C. 1996, c. 359; if appropriate, conduct a personal property search under the vendor’s or borrower’s names (or both), and if applicable, the guarantor’s or covenantor’s names, and any trade names. If there has been a recent change of name of a party you are searching, consider also searching the prior name.</p> <p>2.9 If so instructed, prepare or check commitment letter, including matters such as:</p> <p>.1 Basic terms and parties.</p> <p>.2 Conditions precedent to advance.</p> <p>.3 “Walk away” clause whereby the lender can walk away from the commitment if there is a change in circumstances.</p> <p>.4 Deposit required on acceptance of commitment letter. Nature of deposit; whether it is earned upon acceptance or refundable upon the loan being advanced; appraisal fees, commitment fees, stand-by fees.</p> <p>.5 Documentation required, and who is responsible for preparing it; documentation to be satisfactory to the lender’s lawyer and not a matter for negotiation.</p> <p>.6 Consider severance clause, particularly regarding illegal interest rates.</p> <p>.7 If it is a building loan with progress advances, consider whether “lien holdbacks” are appropriate or whether the client should ensure that the borrower directly complies with <i>Builders Lien Act</i>, S.B.C. 1997, c. 45. If the client holds back, advise of the risks, i.e., if not a true lien hold-back, the lender may not benefit as “owner” under the <i>Builders Lien Act</i> and may risk liability by holding back.</p> <p>.8 Priority requirements.</p> <p>.9 Compliance with zoning and other local bylaws.</p> <p>.10 Insurance requirements.</p>					

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<p>.11 Payment of real property taxes.</p> <p>.12 Provision of financial statements.</p> <p>.13 Costs (legal fees, disbursements, and taxes).</p> <p>.14 Restrictions on assignment.</p> <p>.15 Commitment to survive execution, delivery, and registration of mortgage (provided that it does not conflict with the documents flowing from it).</p> <p>.16 Other important terms and conditions (consider some of the matters mentioned in the MORTGAGE DRAFTING (F-3) checklist).</p> <p>.17 Prepayment privileges (if any).</p> <p>.18 Is the mortgage assumable or due on sale?</p> <p>2.10 Search with the municipality for property taxes and any improvement levies (current and past year, any arrears, any appeals), zoning, etc.</p> <p>2.11 Consider whether to make special inquiries respecting pending local improvement charges and special area debt levies.</p> <p>2.12 Conduct other searches, request confirmations, etc. as required, on such matters as: builders liens, bankruptcy, WCB liability, Employment Standards Branch liability, corporation capital tax liability, PST and GST liability, security instruments, outstanding work orders or requirements regarding improvements. Consider the effect of inchoate Crown liens and advise the client whether you intend to search.</p> <p>2.13 Obtain, review, or prepare all required documents, such as:</p> <p>.1 Any issued duplicate certificate of title (which is needed to register the mortgage: <i>Land Title Act</i>, s. 195(1)).</p> <p>.2 If so instructed, certificate of compliance with restrictive covenants, statutory building schemes, land use contracts, and <i>Land Title Act</i>, s. 219 covenants.</p> <p>.3 For corporate parties:</p> <p>(a) Certificate or opinion letters from the borrower’s and guarantor’s lawyers, on relevant matters: corporate status, good standing, incumbency, authorization, execution, and delivery. Consider settling these early, if possible, so there are no surprises at closing.</p> <p>(b) Directors’ resolution and shareholders’ resolution, if required (certified copies).</p> <p>(c) Certificate of good standing.</p> <p>.4 Consents or priority/subordination agreements regarding any prior charges.</p> <p>Many mortgages are now structured as a “current or running account” and are designated as such in s. 7, Part 1 of the Mortgage—Form B. This designation allows lenders to secure monies re-advanced to the borrower under the mortgage.</p> <p>Upon the application and grant of a subsequent second mortgage, if the secondary lender has not satisfied the conditions under s. 28 of the <i>Property Law Act</i>, R.S.B.C. 1996, c. 377, any monies re-advanced by the first lender under the pre-existing mortgage may maintain their priority position.</p>					

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<p>In order to ensure a priority position over re-advances under the initial mortgage, the second lender must give the first lender notice in writing of the registration of the second mortgage, pursuant to s. 28 of the <i>Property Law Act</i>. This letter is best addressed to the branch manager or other manager.</p> <p>.5 Property insurance binder/policy that meets requirements, or certificate of insurance stating that coverage meets specified requirements.</p> <p>.6 Title/mortgage insurance.</p> <p>.7 <i>Family Law Act</i> waiver or declaration (see item 1.10.6).</p> <p>.8 Certificate of independent legal advice (e.g., for spouses who are joint tenants where only one is receiving mortgage proceeds).</p> <p>.9 Appraisal.</p> <p>.10 Survey or statutory declaration regarding survey. Does the survey disclose any building location defects? If so, advise the lender and determine whether the lender wishes to accept a protocol opinion.</p> <p>.11 Form B and any other forms required.</p> <p>.12 Trustees' resolutions for any trust borrower or guarantor.</p> <p>2.14 Contact other lawyers regarding concurrent registration and exchange of undertakings. Clarify financial details and division of responsibility for clearing title. If the borrower's or vendor's lawyer wishes to clear title, confirm with the client whether this is acceptable</p> <p>2.15 Clear charges as instructed:</p> <p>.1 Obtain payout information (in particular, whether the charge may be prepaid and whether there is a penalty) and confirm by letter. Consider any need to obtain pre-executed, registrable discharges of mortgages from non-institutional lenders. Consider whether last payments have cleared—if not, hold back money as required.</p> <p>.2 Request payout statements.</p> <p>.3 Draw release documents.</p> <p>Note that s. 72(3) of the <i>BPCPA</i> stipulates that a credit grantor/lender must not accept any amount for the provision of a mortgage discharge to a borrower that exceeds the maximum amount prescribed. The current maximum amount is \$75 (Disclosure of the Cost of Consumer Credit Regulation, B.C. Reg. 273/2004, s. 16). The B.C. Financial Institutions Commission's interpretation of s. 72 of the <i>BPCPA</i> is that other costs can be charged over and above the \$75 discharge fee so long as they are itemized: Information Bulletin MB 07-003 (January 31, 2007), <a href="http://www.fic.gov.bc.ca">www.fic.gov.bc.ca</a>. It is common practice for private lenders to add the legal costs they incur for the preparation and execution of the discharge. Separate charges for preparation of the payout statement are unusual because they are usually prepared in-house; arguably, if a lender requires the services of an accountant or other professional to prepare the payout statement, this cost could be added. The lawyer should advise the borrower to review the payout statement to confirm whether the additional costs are legitimate costs incurred by the lender to provide the discharge.</p>					

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<p>2.16 Determine whether there are any matters requiring adjustment. Prepare a statement of loan proceeds and send to the client.</p> <p>2.17 Prepare an authorization and order to pay mortgage proceeds.</p> <p>2.18 If applicable, ensure that mortgagee has prepared a disclosure statement. Have the mortgagee execute it.</p> <p>2.19 If the mortgage relates to a strata lot, request Form B—Information Certificate and Form F—Certificate of Payment from the strata corporation. Also, consider preparing limited appointment of proxy granting the lender powers wider than those under <i>Strata Property Act</i>, s. 54.</p>					
<p><b>3. PREPARE THE MORTGAGE</b></p>					
<p>Note: Most institutional lenders provide their own form. See the electronic land title Form B—Mortgage template (v23), updated on August 16, 2016, and the issues it addresses, at <a href="http://ltsa.ca/practice-information/land-title-forms">ltsa.ca/practice-information/land-title-forms</a>.</p>					
<p>3.1 Prepare an outline of the mortgage:</p> <ol style="list-style-type: none"> <li>.1 Note the clauses from your precedent file that will be included (see the MORTGAGE DRAFTING (F-3) checklist.</li> <li>.2 Ensure that valid consideration is being given by the lender for (a) the mortgage, and (b) any covenant/guarantee. Consider execution as a deed under seal if no consideration is being given (see <i>Property Law Act</i>, s. 16(2)).</li> <li>.3 If it is a CMHC mortgage, use the CMHC form (bearing in mind that any deviations will need to be approved by CMHC’s lawyer).</li> <li>.4 If using standard clauses from the <i>Land Transfer Form Act</i>, R.S.B.C. 1996, c. 252 (ss. 9 and 10 and Schedules 5 and 6), ensure that the wording is exact; also consider any need to make express exceptions (e.g., regarding relief from forfeiture).</li> <li>.5 Consider using prescribed standard mortgage terms (see <i>Land Title Act</i>, s. 227).</li> <li>.6 Ensure compliance with the <i>Interest Act</i>, R.S.C. 1985, c. I-15; e.g., blended principal/interest payments have equivalent rate stated as half-yearly interest not in advance (s. 6); no higher rate or penalty on default (s. 8); open mortgage after five years (s. 10).</li> <li>.7 Consider criminal interest rate issues, if applicable.</li> </ol>					
<p>3.2 Prepare Part 1 of the mortgage (Form B), following closely the completion instructions in connection with Form B:</p> <ol style="list-style-type: none"> <li>.1 For the purposes of Item 9 of Form B, determine whether the prescribed standard mortgage terms, filed standard mortgage terms, or express mortgage terms will be employed; determine whether any additional or modified terms are required for the purposes of Item 10 of Form B and, if so, whether the same can be included in Item 10 or whether Item 10 should be completed to state “see schedule”.</li> <li>.2 If necessary, annex additional pages as a schedule in Form E.</li> </ol>					

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<p>.3 In preparing a paper version of Form B (although for final filing purposes the electronic form must be used), number the pages: insert page ___ of ___ on the first page, and number each subsequent page; type “END OF DOCUMENT” at end.</p> <p>.4 The electronic Form B is numbered automatically. “END OF DOCUMENT” is not required. If the electronic form includes additional material, those pages do not have to be numbered.</p> <p>3.3 Prepare the first draft.</p> <p>3.4 Review the first draft, checking each segment to ensure that it achieves the client’s objectives, and checking the document as a whole to ensure that it is internally consistent. Ensure that no provisions operate as a clog on the equity of redemption (e.g., option to purchase, right of first refusal or other provision limiting redeemability). Make necessary corrections and prepare a second draft.</p> <p>3.5 Go over the second draft with the client or send it to the client asking that the client review it and note any changes or questions. Discuss it with the client, and make any changes required.</p> <p>3.6 If it is a CMHC mortgage, send it to CMHC’s lawyer for approval, if any substantive changes are required to appropriate CMHC filed standard mortgage terms. Diarize to ensure receipt.</p> <p>3.7 Prepare the final Part 1 (Form B) and any additional terms; prepare the receipt to be signed by the borrower (and covenantor or guarantor, if applicable) acknowledging receipt of Part 2 pursuant to <i>Land Title Act</i>, s. 229.</p> <p>3.8 Confirm the exact sum of proceeds expected from the lender; consider “hidden” and other miscellaneous banking or transfer fees and charges that may lead to a shortfall.</p> <p>3.9 Prepare written authority to pay, addressed to the lender and the lender’s lawyer, identifying the payee of the balance of proceeds and authorizing all disbursements of mortgage proceeds (e.g., any existing mortgage payouts, CMHC or brokerage fees, fees payable to the lender, outstanding property taxes, and legal fees and disbursements).</p>					
<p><b>4. CONCLUDING THE MORTGAGE</b></p> <p>4.1 Forward the mortgage documents to the borrower’s lawyer. Advise the borrower’s lawyer of undertakings you will require on closing (e.g., payout of prior charges).</p> <p>4.2 For electronic filing, forward the document to the borrower’s lawyer by e-mail, fax, or delivery. If changes need to be made to the Form B, it can be unlocked and changed by the borrower’s lawyer. A new unique identifier will be given to the amended Form B. Request return of the signed true copy of the electronic form (i.e., paper copy) by e-mail (PDF), fax, or courier. Where an electronic instrument is to be filed under the <i>Land Title Act</i>, and an amendment is required after execution of the true copy but before the subscriber digitally signs the instrument, see the Law Society’s Protocol (December 19, 2011) for land title electronic instruments at <a href="http://www.lawsociety.bc.ca">www.lawsociety.bc.ca</a>.</p>					

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<p>4.3 The borrower’s lawyer has his or her client sign a paper copy of the electronic Form B, and witnesses it in the usual manner. The paper copy is then returned to the lender’s lawyer.</p> <p>4.4 Update searches as required.</p> <p>4.5 If required by the lender, give the signed disclosure statement to the borrower.</p> <p>4.6 Ensure that the mortgage and the other documents (including the receipt by the borrower of a set of filed standard mortgage terms referred to in <i>Land Title Act</i>, s. 225(5)(a) or (b)), are properly executed. Use black ink. Include the certifying officer’s name, address, title of officer, etc. If electronic Form B is sent by e-mail, ensure that the borrower’s and witnesses’ particulars are completed on Form B.</p> <p>4.7 Check that all documents are received from the borrower’s lawyer. Ensure all documents are dated and are in registrable form; that no changes have been made; that certifications include the officer’s full name, address, and professional capacity; and that the full name of the authorized signatory of a corporate borrower is printed below the signature and, if not witnessed, that there is an affidavit of execution. Bear in mind provisions of <i>Land Title Act</i>, ss. 41 to 48. Note the requirements in <i>Land Title Act</i>, ss. 45 to 47 governing powers of attorney. Review the lender’s instructions regarding proof of the borrower’s identity, and consider if you can comply with those instructions yourself or by requesting information from the borrower’s lawyer. Alert the lender if you are unable to comply with the instructions. Obtain the lender’s approval of any changed instructions and consider whether to advise the lender to be aware of the indicia of fraud and to take appropriate steps to minimize the potential for fraud.</p> <p>4.8 The lender’s lawyer incorporates his or her digital signature into the electronic form upon receipt of the executed paper copy of the mortgage or a copy of the executed document (e.g., by fax or PDF).</p> <p>4.9 If an affidavit of execution is taken before a foreign notary, confirm that the notary has affixed his seal to the affidavit and ensure that the expiry date of the notary’s appointment is included. Note that in some foreign jurisdictions, the mortgage must be executed before the Canadian Consul in order to be registrable.</p> <p>4.10 Check for any undertakings imposed on you by the borrower’s lawyer. If you are given the mortgage documents on a form of undertaking that limits the client’s discretion to refuse to advance after registration, get the client’s authority to so limit such discretion or obtain a release from the undertaking (most mortgages give the lender this discretion). Note the Law Society’s suggestions to protect you and your lender clients in light of the decision in <i>Lin v. CIBC Mortgages Inc.</i>, 2015 BCCA 518: <a href="http://www.lawsociety.bc.ca/docs/practice/resources/mortgage_Lin-v-CIBC.pdf">www.lawsociety.bc.ca/docs/practice/resources/mortgage_Lin-v-CIBC.pdf</a></p> <p>4.11 Complete requisition of funds, preliminary title opinion (if required), and protocol opinion (if applicable), and forward to the lender. Clarify how funds will be delivered (e.g., bank draft, direct deposit).</p>					

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<p><b>5. REGISTRATION AND PAY OUT</b></p> <p>5.1 Affix electronic signature to documents in e-filing and download the mortgage to myLTSA on hold or with a specified registration date. 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>, 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> <ol style="list-style-type: none"> <li>.1 Conduct a pre-registration title search.</li> <li>.2 File (or release hold if submitted on hold) together with any duplicate certificate of title (<i>Land Title Act</i>, s. 195(1)), discharges, priority agreements, and any other documents required. Ensure that the documents are filed in proper order.</li> <li>.3 Conduct a post-registration title search.</li> <li>.4 Order a state of title certificate (or request a state of title certificate with electronic registration) and diarize for receipt.</li> <li>.5 Register financing statement at the personal property registry with respect to guarantors where there is an assignment and postponement of claim.</li> </ol> <p>5.2 Pay funds to third parties (prior lenders, brokerage fees, property taxes). Note Law Society Rules 3-95 and 3-96, which require a lawyer to report to the Law Society if a lender fails to deliver a discharge of mortgage within 60 days of payout of the mortgage or a lawyer fails to register a discharge within the 60-day period. <i>BPCPA</i>, s. 72(2) and (3) requires financial institutions to make mortgage discharges within 30 days of repayment of a mortgage loan; the maximum discharge fee prescribed under s. 16 of the Disclosure of the Cost of Consumer Credit Regulation, B.C. Reg. 273/2004, made pursuant to s. 72(3) of the <i>BPCPA</i>, is \$75.</p> <p>Under s. 72(3), a credit grantor/lender must not accept any amount for the provision of a mortgage discharge to a borrower that exceeds the maximum amount prescribed. The B.C. Financial Institutions Commission’s interpretation of s. 72 of the <i>BPCPA</i> is that other costs can be charged over and above the \$75 discharge fee so long as they are itemized: Information Bulletin MB 07-003 (January 31, 2007), <a href="http://www.fic.gov.bc.ca">www.fic.gov.bc.ca</a>. See further discussion at item 2.15.3.</p> <p>5.3 Pay funds to the borrower/borrower’s lawyer:</p> <ol style="list-style-type: none"> <li>.1 Conduct a title search just prior to payout.</li> <li>.2 If the agreement was to pay out on a post-application or post-registration title search, ensure that all conditions precedent have been met prior to paying funds to the borrower.</li> <li>.3 Otherwise, send a reporting letter to the client, together with copies of registered documents and any other required material, and obtain instructions to pay funds to the borrower.</li> <li>.4 Inform the lender of the disbursement date.</li> </ol>					

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<p><b>6. CLOSING THE FILE</b></p> <p>6.1 Review the state of title certificate.</p> <p>6.2 Send a reporting letter and statement of account to the client. Include copies of relevant documents and any information and opinions not included in previous reports. Advise regarding any matters to check before making further advances (e.g., builders liens; see item 1.10.7).</p> <p>6.3 Retain true copies of electronic forms for a reasonable period of time (for example, 6 years after the expiry of the mortgage term).</p> <p>6.4 Close the file. Consider storage and destruction requirements. See <i>Closed Files—Retention and Disposition</i>, July 2015, Appendix B: <a href="http://www.lawsociety.bc.ca/docs/practice/resources/ClosedFiles.pdf">www.lawsociety.bc.ca/docs/practice/resources/ClosedFiles.pdf</a>.</p>					