

PROVISIONS TO BE CONSIDERED	NOTES
<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) and the MORTGAGE PROCEDURE (F-2) checklists. It relates primarily to a conventional first mortgage on residential property, where express mortgage terms are to be added to filed or prescribed standard mortgage terms, or where you are creating a set of standard mortgage terms to be filed. This checklist is not exhaustive, and must be considered in relation to the particular facts in the matter at hand and augmented or revised as appropriate. This checklist is current to September 1, 2016.</p> <p>New developments:</p> <ul style="list-style-type: none"> • Additional property transfer tax on foreign entities. Effective August 2, 2016, an additional 15 per cent property transfer tax applies to residential property transfers in the Greater Vancouver Regional District to “foreign entities” (ss. 2.01 to 2.04 added to the <i>Property Transfer Tax Act</i>, R.S.B.C. 1996, c. 378, under the <i>Miscellaneous Statutes (Housing Priority Initiatives) Amendment Act, 2016</i>, S.B.C. 2016, c. 27). See www2.gov.bc.ca/assets/gov/taxes/property-taxes/property-transfer-tax/forms-publications/is-006-additional-property-transfer-tax-foreign-entities-vancouver.pdf. • New electronic form templates. 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 ltsa.ca/practice-information/land-title-forms. • New Land Title and Survey Authority of British Columbia fee listings. As of April 16, 2016, the Land Title and Survey Authority (the “LTSA”) implemented new fee listings for its services. For details of the fee listing, see ltsa.ca/fees or contact the LTSA at 1.877.577.LTSA (5872). • Consent to spousal home transfers under the Wills, Estates and Succession Act. Practice Note 01-16 issued by the LTSA on March 3, 2016, concerns the interpretation of ss. 26 and 28 of the <i>Wills, Estates and Succession Act</i>, S.B.C. 2009, c. 13. The registrar will require evidence of a surviving spouse’s consent to the transfer of the spousal home where the home is part of an intestate estate or a partial intestate estate and the disposition is during the 180-day period after issuance of the representation grant. See ltsa.ca/sites/default/files/Practice-Note-01-16.pdf. • Incentive rates and the Interest Act. In <i>Krayzel Corp. v. Equitable Trust Co.</i>, 2016 SCC 18, the Supreme Court of Canada considered for the first time whether “incentive rates” (where the interest rate of a mortgage is reduced if the mortgagor does not default) violate s. 8 of the <i>Interest Act</i>, R.S.C. 1985, c. I-15, which prohibits a lender from charging a higher rate of interest following a default on a mortgage than that charged during the term of the mortgage. The court held that an interest rate increase triggered by the passage of time alone does not, in and of itself, infringe s. 8, but a rate increase triggered by default does infringe s. 8, whether the increase is characterized as imposing a higher rate as a result of default (a penalty) or allowing a lower rate by way of reward for the absence of default (an incentive). • 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. 	

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<ul style="list-style-type: none"> • Code of Professional Conduct for British Columbia (the “BC Code”). 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. • 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"> • Fraud Alerts. For current information about fraudulent activities relevant to real estate and conveyancing work, refer to the Law Society’s Fraud Alerts page at www.lawsociety.bc.ca. • Additional resources. See the <i>Land Title Electronic Forms Guidebook</i>, 6th ed., print and online (CLEBC, 2013) for instructions on filing either express mortgage terms or a set of pre-filed standard mortgage terms. See also the prescribed standard mortgage terms in the <i>Land Title Electronic Forms Guidebook</i>, and the <i>British Columbia Mortgages Practice Manual</i>, looseleaf and online (CLEBC, 1992). <p style="text-align: center;">CONTENTS</p> <ol style="list-style-type: none"> 1. Date 2. Introductory Clauses 3. Identification of Parties 4. Description of Property 5. Grant of Mortgage 6. Payment 7. Express Exclusion of Specified Land Transfer Form Act Clauses 8. Borrower’s Representations and Covenants 9. Lender’s Covenants 10. Default 11. Enforcement 12. Other Rights of the Lender 13. Security Provisions 14. Miscellaneous 15. Interpretation and General Provisions <p style="text-align: center;">CHECKLIST</p> <ol style="list-style-type: none"> 1. DATE 2. INTRODUCTORY CLAUSES <ol style="list-style-type: none"> 2.1 Whether made under the <i>Land Transfer Form Act</i>, R.S.B.C. 1996, c. 252 (if other than prescribed mortgage terms). 	

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<p>2.2 Recitals setting out the special features of the transaction.</p> <p>2.3 Consideration clause.</p> <p>3. IDENTIFICATION OF PARTIES</p> <p>3.1 Borrower (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).</p> <p>3.2 Lender (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).</p> <p>3.3 Guarantor or covenantor (presumably independent legal advice will be obtained, and the client identification and verification rules will be applied by the lawyer retained for that purpose).</p> <p>4. DESCRIPTION OF PROPERTY</p> <p>4.1 Legal description and civic address.</p> <p>4.2 Interests included (if relevant, consider <i>Land Transfer Form Act</i>, s. 10).</p> <p>5. GRANT OF MORTGAGE</p> <p>5.1 Consider the effect of <i>Land Title Act</i>, R.S.B.C. 1996, c. 250, s. 231, and whether formal words of transfer and conveyance should be retained in the grant of mortgage.</p> <p>6. PAYMENT</p> <p>6.1 Mortgage to be void on payment of principal and interest, and costs and expenses described in mortgage.</p> <p>6.2 Calculation of interest and date of commencement (ensure compliance with the <i>Interest Act</i>, R.S.C. 1985, c. I-15, <i>Bank Act</i>, S.C. 1991, c. 46, and Part 5 of the <i>Business Practices and Consumer Protection Act</i>, S.B.C. 2004, c. 2 (the “BPCPA”), disclosure requirements; ensure there is no violation of <i>Criminal Code</i>, R.S.C. 1985, c. C-46, s. 347).</p> <p>6.3 Interest on overdue payments.</p> <p>6.4 When, where, and how payments are to be made.</p> <p>6.5 Acceleration clause (see item 10.1).</p> <p>6.6 Right to prepay part or all prior to maturity date; prepayment penalties.</p> <p>6.7 Right of lender to deduct interest adjustment from the advance.</p> <p>6.8 Interest adjustment date and provisions.</p> <p>7. EXPRESS EXCLUSION OF SPECIFIED LAND TRANSFER FORM ACT CLAUSES</p> <p>7.1 If the mortgage is made pursuant to the <i>Land Transfer Form Act</i>, consider excepting out the provision in Clause 15, Column 2 of Schedule 6, which allows the borrower automatic relief from acceleration upon repayment of arrears.</p>	

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<p>8. BORROWER'S REPRESENTATIONS AND COVENANTS</p> <p>8.1 Accuracy of representations.</p> <p>8.2 Borrower has done and will do nothing to transfer the land or encumber the land, except as specified.</p> <p>8.3 To pay the principal and interest when due.</p> <p>8.4 To pay all costs relating to:</p> <ul style="list-style-type: none"> .1 The creation, registration, and discharge of the mortgage. .2 An assignment under the <i>Law and Equity Act</i>, R.S.B.C. 1996, c. 253, s. 14. .3 Lender's costs in the event of default, including enforcement costs. <p>8.5 Title to the mortgaged property:</p> <ul style="list-style-type: none"> .1 Borrower has title and right to convey the land. .2 Borrower will defend title. <p>8.6 Release of all claims on the land subject to the payment proviso.</p> <p>8.7 To maintain the property and keep it in good repair, and to make all repairs reasonably required by the lender.</p> <p>8.8 Not to abandon or leave the property unoccupied for more than 30 days.</p> <p>8.9 Not to do anything that will decrease the value of the land.</p> <p>8.10 Insurance:</p> <ul style="list-style-type: none"> .1 To maintain insurance against fire and other risks, with loss payable to the lender, and subject to standard mortgage clause. .2 To deliver policies to the lender. .3 To furnish proofs of loss to the lender, and to do all things necessary to enable the lender to obtain payment. <p>8.11 To pay real property taxes or to pay tax money to the lender.</p> <p>8.12 To grant collateral security to the lender on request.</p> <p>8.13 To obey the law.</p> <p>8.14 To permit entry and inspection by the lender.</p> <p>8.15 To furnish specified information to the lender.</p> <p>8.16 Further assurances.</p> <p>8.17 To pay all sums due on any prior encumbrances and keep in good standing.</p> <p>9. LENDER'S COVENANTS</p> <p>9.1 Borrower to have quiet possession until default.</p> <p>9.2 To apply payments made on account of taxes in payment of taxes when due, as long as the borrower is not in default.</p> <p>9.3 To provide a discharge; borrower to pay costs.</p>	

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<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, which is currently \$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), www.fic.gov.bc.ca. 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> <p>10. DEFAULT</p> <p>10.1 Effect (e.g., acceleration at the option of the lender).</p> <p>10.2 Events of default:</p> <ul style="list-style-type: none"> .1 Non-payment of the principal or interest when it becomes due and payable. .2 Breach of a provision of the mortgage. .3 A representation made to obtain the mortgage loan is found to be untrue. .4 Non-payment of or default under a prior charge. .5 Insolvency. .6 Property sold or further encumbered. .7 Default under another mortgage or loan agreement with the lender or otherwise. .8 Failure to discharge a builders lien or judgment within 30 days of notification (or to give security and diligently defend and dispute builders lien claims). <p>10.3 The lender may waive any breach or default, but this does not affect the rights arising from subsequent breaches or defaults.</p> <p>11. ENFORCEMENT</p> <p>11.1 Specify circumstances in which the lender may use the various measures set out in the mortgage.</p> <p>11.2 Power to enter, take possession of, and use the property, and to exclude the borrower, but the lender in doing so will not be considered a lender in possession.</p> <p>11.3 Power to preserve, maintain, and repair the property.</p> <p>11.4 Power to lease or sell, with the proceeds of the sale being applied as set out in the mortgage.</p> <p>11.5 Power to have a receiver or receiver-manager appointed.</p>	

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<p>12. OTHER RIGHTS OF THE LENDER</p> <p>12.1 To do anything the borrower is required to do, if the borrower fails to do so. Costs to be added to debt and bear interest and to be immediately payable by the borrower.</p> <p>12.2 To pay monies to preserve, protect, or repair the property. Costs to be added to the debt and bear interest and to be immediately payable by the borrower.</p> <p>12.3 To discharge any unregistered encumbrances having priority, of which the lender is unaware upon making the advance.</p> <p>12.4 To deduct from advances, unpaid taxes, taxes to become due in that year, or interest to the adjustment date.</p> <p>12.5 To release one guarantor or covenantor without releasing the others or prejudicing the security.</p> <p>12.6 To apply insurance proceeds to the repair or reinstatement of the property or to monies owing.</p> <p>12.7 To require the borrower to surrender any statutory right to require the insurance proceeds to be applied in any particular manner.</p> <p>12.8 To realize on all securities in any order. Rights and remedies set out in the mortgage are cumulative and additional to any other remedies.</p> <p>13. SECURITY PROVISIONS</p> <p>13.1 Security is additional to any other security held by the lender. No merger.</p> <p>13.2 Obligation to pay is not extinguished by a judgment.</p> <p>14. MISCELLANEOUS</p> <p>14.1 Lender has no obligation to advance monies.</p> <p>14.2 Conditions to be satisfied for redemption.</p> <p>14.3 Right to assign. Assigns are bound by the provisions of this mortgage.</p> <p>14.4 Relationship between commitment letter and mortgage (e.g., non-merger of commitment letter, with mortgage prevailing in the event of inconsistency).</p> <p>14.5 Renewal provisions; for example:</p> <ul style="list-style-type: none"> .1 Contracting out of <i>Interest Act</i>, R.S.C. 1985, c. I-15, s. 10. .2 Priority of any increased interest rate over the subsequent charges. <p>14.6 Strata lot clauses (<i>Strata Property Act</i>, S.B.C. 1998, c. 43, s. 54).</p> <p>14.7 Subdivision clauses.</p> <p>14.8 In event of default, lender has no right to choose the registry in which to commence action (<i>Law and Equity Act</i>, s. 21).</p> <p>14.9 Doctrine of consolidation applies or is waived (<i>Property Law Act</i>, R.S.B.C. 1996, c. 377, s. 31(2)).</p> <p>14.10 Guarantor's or covenantor's clause.</p> <p>14.11 Assignment of rents clause.</p> <p>14.12 Consider form required for e-filing (electronic Form B).</p>	

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<p>15. INTERPRETATION AND GENERAL PROVISIONS</p> <p>15.1 Definitions.</p> <p>15.2 Principles that govern the interpretation of the mortgage (e.g., use of the masculine form, insertion of headings for convenience only).</p> <p>15.3 Severability.</p> <p>15.4 Time of the essence.</p> <p>15.5 Notices.</p> <p>15.6 Enurement.</p> <p>15.7 Amendment.</p> <p>15.8 Appendices.</p> <p>15.9 Jurisdiction and governing law.</p>	