

Highlights of the 2018 Practice Checklists Manual

The 2018 update reflects legislative amendments, new case law, and changes in practice. Each checklist is current to September 1, 2018. The following highlights are not exhaustive; see the checklists for more details.

I. LAW SOCIETY

Juricert password. When using the electronic filing system of the Land Title Office, a lawyer must not disclose the lawyer's password or permit any other person, including an employee, to use the password or affix the lawyer's e-signature (Law Society Rule 3-96.1).

Temporary articulated student restrictions. Temporary articulated students are restricted from making certain appearances in Supreme Court, but not Provincial Court (Law Society Rule 2-71(2)).

Electronic transfer of trust funds. The Rules were amended in December 2017, effective July 1, 2018, to allow lawyers to electronically transfer trust funds using an online banking platform (Law Society Rules 3-64(4) and (6) to (8); 3-64.1; 3-64.2; 3-65(1), (1.1), and (2); and 3-66(2)). For questions, contact trustaccounting@lsbc.org or 604.697.5810.

Client identification and verification. The Federation of Law Societies of Canada has proposed amendments to its Model Rule on Client Identification and Verification Requirements. If the Federation's Council approves the amendments, they will be forwarded to the law societies for adoption. Changes to the Law Society of BC's rules would require the Benchers' approval and, if approved, may affect the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist current to September 1, 2018.

II. CORPORATE/COMMERCIAL

Changes to the Partnership Act. The *Finance Statutes Amendment Act, 2012*, S.B.C. 2012, c. 12, includes amendments to the *Partnership Act* that are not yet in force. Amendments affecting forms of registration statements and notices, registration of foreign partnerships, and reservation of names are scheduled to come into force on December 14, 2018 (BC Reg. 15/2018). It is strongly recommended that practitioners verify their status prior to drafting any partnership agreement.

Changes for tax planning using private corporations. Effective January 1, 2018, income splitting is now limited under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), for shareholders of private corporations, particularly professional corporations, with some narrow exceptions available. Further legislative changes will come into effect in 2019 to limit the small business deduction for private corporations paying dividends to a holding corporation or for passive investment purposes. Lawyers who act for private corporations should review the legislative changes prior to structuring or reorganizing their corporate structure and seek assistance of a tax advisor where necessary.

III. CRIMINAL

Maintenance Records Breathalyzers are subject to the disclosure regime that applies to third parties. In *R. v. Gubbins*, 2018 SCC 44, a decision released on October 26, 2018, the Supreme Court of Canada held that the records relating to the maintenance of breathalyzers are not subject to first party disclosure principles, but rather the regime for records in the hands of a third party should apply. Accordingly, an accused must apply to the court for disclosure of the records, and must show that the records are “likely relevant” in order to obtain them. This decision will likely have an impact on the disclosure of similar records in British Columbia, as the previous governing authority, *R. v. Phagura*, 2010 BCSC 944, held that such records are governed by first party disclosure principles and should be obtained and disclosed by the prosecution wherever requested by defence, on the basis of possible relevancy.

New blood drug concentration driving offences. Parliament has now criminalized the act of driving with various drugs in one’s bloodstream. The new “per se” offences which make it an offence to drive with a certain level of THC—or any amount of several other drugs such as cocaine, heroin, meth, or LSD, among others—in your system, came into force earlier this year under Part I of the Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*. The second part of Bill C-46, which overhauls the entire legislative framework for the investigation and prosecution of impaired driving caused by alcohol, comes into force later this year, in mid-December. Revised versions of this checklist will be published at that time to reflect the new provisions.

Appellate intervention in sentence appeals. In *R. v. Agin*, 2018 BCCA 133, the Court of Appeal held that the threshold for appellate intervention on sentence is reached: (1) if the sentencing judge has committed an error in principle, failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor that had an impact on sentence; or (2) if the sentence is demonstrably unfit.

Statutory 1:1 pre-trial credit restrictions violate Charter. In *R. v. Romanchych*, 2018 BCCA 26, the Court of Appeal held that the statutory restriction of pre-trial credit to a ratio of 1:1 where the person was detained in custody under s. 524(4) or (8) violates s. 7 of the Charter and is not saved by s. 1. The court declared the impugned portion of the provision to be of no force and effect under s. 52 of the *Constitution Act, 1982*. The Supreme Court of Canada had previously made the same declaration in relation to the other restriction under s. 719(3.1), barring enhanced credit where the accused was detained in custody primarily because of a previous conviction in *R. v. Safarzadeh-Markhali*, 2016 SCC 14. Accordingly, the decision to award an accused enhanced credit at a rate of 1.5:1 pursuant to s. 719(3.1) is based solely on whether “the circumstances justify it” in accordance with *R. v. Summer*, 2014 SCC 26. Note: this restriction is set to be repealed by Bill C-51, *An Act to Amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, s. 66.

IV. FAMILY

L.S. v. British Columbia. In *L.S. v British Columbia (Director of Child, Family and Community Services)*, 2018 BCSC 255, the British Columbia Supreme Court considered whether it could use its *parens patrie* jurisdiction to provide an interim access order. Because no interim order had been made under the *CFCSA* in Provincial court, and no hearing could be held for some months, the mother could not apply under s. 55 of the *CFCSA* for interim access. The court determined that it could use its *parens patriae* jurisdiction due to the gap in legislation caused by s. 55 of the *CFCSA*, resulting in the Provincial court being unable to provide a remedy to the mother. The court increased access to the mother so she could breastfeed the child.

V. HUMAN RIGHTS AND IMMIGRATION

Citizenship Act. *An Act to amend the Citizenship Act and to make consequential amendments to another Act* (Bill C-6), S.C. 2017, c. 14, received royal assent on June 19, 2017. Changes as of January 11, 2018, provide a new citizenship revocation process with the Federal Court as the decision-maker in most cases.

Representation before the Tribunal. On October 24, 2017, the BC Human Rights Tribunal substantively amended Rule 7 (Representation before the Tribunal) of the BC Human Rights Tribunal Rules of Practice and Procedure (the “BCHRT Rules”).

Applications for Reconsideration. On May 30, 2018, the BC Human Rights Tribunal amended the BCHRT Rules to add Rule 36, Reconsideration of Decisions, setting out the requirements for an application for reconsideration, including a 14-day time limit.

VI. LITIGATION

Change in when limitation period begins to run. In *Leatherman v. 0969708 BC Ltd.*, 2018 BCCA 33, the Court of Appeal found that, where a security is enforceable on default, the limitation period under which a lender can realize on its security begins on the date of the first default. Lenders and their counsel must ensure that defaults are cured or proceedings are commenced within two years of the first default in order to preserve the right to enforce their security.

Insurance (Vehicle) Amendment Act and CRT Amendment Act. Significant changes are being made to the basic insurance system in British Columbia that increase accident benefits for injured customers, introduce a limit on payouts for pain and suffering on minor injury claims, and give the CRT jurisdiction to resolve disputes concerning certain motor vehicle injury claims. These changes are reflected in Bill 20, *Insurance (Vehicle) Amendment Act*, 3rd Sess., 41st Leg., British Columbia, 2018 (assented to May 17, 2018), and Bill 22, *Civil Resolution Tribunal Amendment Act*, 3rd Sess., 41st Leg., British Columbia, 2018 (assented to May 17, 2018). *The Insurance (Vehicle) Act* amendments are already in force. Provisions governing limits on minor injury claims (ss. 101 to 104) are effective April 1, 2019.

Costs in uncontested foreclosures, even commercial ones, must be assessed at Scale A. In *First West Credit Union formerly known as Valley First Credit Union v. Gateway Industrial Park Ltd.*, 2018 BCSC 1749, the mortgagor opposed only an award of special costs in a commercial foreclosure. The court thoroughly reviewed the law, including s. 5 of Appendix B of the Supreme Court Civil Rules, and granted Scale A costs to the petitioning mortgagee.

Limitations periods for mortgage security may run on date of uncured default and not on demand. In *Leatherman v. 0969708 B.C. Ltd.*, 2018 BCCA 33, the Court of Appeal distinguished between demand and contingent obligations as they related to mortgage loans and security. They concluded that the lender was within time for seeking judgment on the covenant to pay the entire mortgage obligation (demand obligation) except to the extent of any interest payable more than two years prior to the commencement of the foreclosure (contingent obligation). In that case, the default in payment of interest triggered the running of the two-year limitations clock and the lender was out of time for realizing on its security because the lender failed to do that within two years of the first missed interest payment.

Court of Appeal—Consent Orders. Effective February 28, 2018, where a consent order involves the granting of substantive relief (e.g., a stay of proceedings or the posting of security for costs), the party filing the order must submit a letter copied to all parties explaining why the court ought to endorse the order. Where no such letter is submitted, the registry may reject the order for filing. If the parties are uncertain whether the order involves substantive relief, they should submit a letter as described.

VII. REAL ESTATE

Tracking Beneficial Ownership. The province has proposed the establishment of a new, publicly accessible registry outlining who owns real estate in British Columbia through draft legislation, the *Land Owner Transparency Act*. If established, it will be the first registry of its kind in Canada and is meant to improve transparency in the real estate market. The white paper can be found online at <http://www.fin.gov.bc.ca/pld/fcsp/LOTA-white-paper-june-2018.pdf>.

New property transfer tax disclosure requirements. Effective September 17, 2018, certain types of trusts and corporations that acquire property must identify all individuals with a significant interest in the corporation or trust on the property transfer tax return. For each individual identified, you must include their name, date of birth, citizenship information, contact details, and tax identifiers. The Property Transfer Tax Return (V31) is available online from the Land Title and Survey Authority of British Columbia (LTSA) website. For more information, see www2.gov.bc.ca/gov/content/taxes/property-taxes/property-transfer-tax/file/legal-professionals#trustees-corporate-interest-holders.

Additional property transfer tax on residential property transfers to foreign entities.

Effective February 21, 2018, the Property Transfer Tax Regulation, B.C. Reg. 74/88, was amended to increase the additional property transfer tax on residential properties to “foreign entities” (see the *Property Transfer Tax Act*, R.S.B.C. 1996 ss. 2.01 to 2.04) from 15% to 20%. Further, the scope of the additional property transfer tax has been expanded to include properties located in the Greater Vancouver Regional District (the “GVRD”), Capital Regional District, Regional District of Central Okanagan, and Regional District of Nanaimo. The additional tax applies on all applicable transfers registered with the Land Title Office on or after February 21, 2018, regardless of when the contract of purchase and sale was made effective. An Additional Property Transfer Tax Return (FIN 532) must be filed at the time the transfer is registered. Further information, including the municipalities included in the GVRD, can be found at www2.gov.bc.ca/gov/content/taxes/property-taxes/property-transfer-tax/understand/additional-property-transfer-tax.

New property transfer tax forms. The Additional Property Transfer Tax Return form was updated on February 21, 2018. The Property Transfer Tax Return form (V30) was updated on February 20, 2018 (replacing V29). Among the several new required fields in the new V30 return is the requirement for a vendor to disclose its residency. The forms are available at ltsa.ca/practice-information/land-title-forms.

Duty to inquire as to vendor’s residency status. In *Mao v. Lui*, 2017 BCSC 226, a notary, acting for a purchaser, was found liable for failing to make reasonable inquiries regarding the vendor’s residency status. The court held that withholding the non-resident income tax from the purchase price (per s. 116 of the *Income Tax Act*) does not place a purchaser in breach of the contract of purchase and sale, where the registered owner may be a non-resident. Accordingly, real estate practitioners should consider advising their purchaser clients to withhold non-resident income tax in appropriate circumstances.

VIII. WILLS AND ESTATES

Trust reporting requirements. On July 27, 2018, the Department of Finance Canada released draft legislation proposing amendments to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and the Regulations made thereunder, which will require certain trusts to report personal information (name, address, date of birth, jurisdiction of residence, and tax identification number) of all trustees, beneficiaries, settlors (as that term is broadly defined in s. 17(15) of the *Income Tax Act*), and certain other persons having an ability to exert influence over trustee decisions regarding appointment of income or capital. If enacted as proposed, the new reporting requirements will take effect in 2021. An estate which qualifies as a graduated rate estate (“GRE”) will be exempt from the reporting requirements, but testamentary trusts and estates which extend longer than three years or otherwise do not qualify as a GRE will be required to comply. Penalties for failing to comply knowingly or in circumstances amounting to gross negligence will result in a penalty of 5% of the highest value of all of the trust’s property. If the omission spans more than one taxation year, the 5% penalty may apply in respect of each year.

Private corporation tax amendments. Amendments to the provisions of the *Income Tax Act* dealing with taxation of private corporations and their shareholders were introduced to take effect in 2018 and subsequent taxation years. The amendments may have significant tax consequences where private corporation shares are held by a taxpayer on death. Clients holding private corporation shares may wish to obtain tax advice specific to their situation regarding the impact of the amendments.