

Practice Resource

Solicitors' Liens and Charging Orders

[Updated August 2025]

Introduction

When your retainer comes to an end, you may encounter challenges in obtaining payment from your clients for your outstanding bills¹. One method of trying to secure payment of these bills is to claim a solicitor's lien.

For centuries, courts have recognized that the doctrine of the lien benefits clients as well as lawyers. Specifically, liens “encourage lawyers to represent clients who are unable to pay as their cases progress”.²

There are two types of solicitors' liens that may be available to you. The first is a possessory or **retaining lien**, which allows you to retain your client's property, with a few exceptions, until you have been paid. The second is a common law or **charging lien**, which entitles you to a charge against property recovered or preserved for your client through a litigation proceeding.³ Section 79 of the *Legal Profession Act* (“Act”) is the statutory provision codifying the charging lien.⁴

This resource will outline:

- when solicitors' liens may be available;
- what costs may be recovered;
- what types of property may be subject to a lien;
- when and how you may lose your solicitor's lien;
- priorities of charging orders; and,
- the effects of withdrawal or discharge on solicitors' liens and charging orders.

A checklist is included at the end of this resource to assist you in obtaining payment of your

¹ See ss. 64(1) and 69 in the *Legal Profession Act*, SBC 1998, c. 9 for legislative requirements regarding lawyers' bills.

² *Mauldin v Cassels Brock & Blackwell LLP*, 2014 ONCA 641, citing *Taylor v. Taylor*, [2002] OJ No 2313 at para 29.

³ *Hama v Werbes*, 2004 BCSC 463, [*Hama*].

⁴ *Legal Profession Act*, SBC 1998, c 9 [*LPA*].

bills through the use of a solicitor's lien.

Retaining Liens (Possessory Liens)

When might you claim a retaining lien?

Under the common law, a retaining lien allows you to keep (or retain), as security for payment of your bill, a client's files, documents, funds, and property that have come into your possession. The right to retain your client's documents is available from the moment your client or former client resists payment until your bill has been paid.⁵

As a possessory lien, a retaining lien does not allow you to take any action against the property. The retaining lien is strictly limited to the right to hold on to the property until your bill has been paid or the fee dispute otherwise resolved.⁶ Once the bill is paid or the fee dispute has been resolved, you must return the property to your client or you may be guilty of professional misconduct.⁷

1. What costs are recoverable?

Retaining liens are classified as "general liens" because the lien secures payment for all outstanding fees owed by the client for any matter on which you are retained, including the costs that you incur in recovering payment of these fees (i.e., costs that you incur in asserting and enforcing the lien).⁸ Recoverable amounts include fees, charges and disbursements, but do not include loans you may have made to the client in a personal capacity.⁹

2. What type of property can be retained?

Typically, a retaining lien extends to any/all of the client's property that has lawfully come into your possession in your professional capacity as a lawyer and is not limited to the property to which the outstanding bill relates.¹⁰

The value of the property that is being retained may exceed the amount of the outstanding bill, except for funds held under a retaining lien which must not exceed the amount of the bill

⁵ *Barratt v Gough-Thomas*, [1951] Ch 242, [1950] 2 All ER 1048 referred to in *National Hav-Info Communications Inc v Poznanski*, [1995] BCJ No 1174, 6 BCLR (3d) 46 (BCSC) [*National Hav-Info Communications*] and *DeCottis v Owen Bird*, [1998] BCJ No 274, 51 BCLR (3d) 272 (BCSC).

⁶ *Re Alberta Western Wholesale Lumber Ltd.*, [1961] BCJ No 115, 27 DLR (2d) 598 (BCSC) [*Alberta Western*].

⁷ Law Society of British Columbia, Discipline Case Digest – 1992: No 5 May (Pierce).

⁸ *Lambert v Buckmaster*, 107 ER 513, [1824] 2 B&C 616; *Neural Capital GP, LLC v 1156062 BC Ltd.*, 2022 BCSC 1228 [*Neural Capital*].

⁹ *Neural Capital; Re Taylor, Stileman & Underwood*, [1891] 1 Ch 590 (BCCA) referred to in *Gordon Turriff QC, Annotated Legal Profession Act, loose-leaf (consulted on May 15, 2012)*, (Toronto, ON: Thomson Reuters, 2012) at 8-83.

¹⁰ *Cochrane v Phillips*, [1924] BCJ No 71, [1924] 3 DLR 996 (BCCoCt).

owed.¹¹

Some types of property cannot be retained under a lien including:

- **Corporate records.** If your firm is no longer the official records office of a company, you must deliver all corporate records and minute books to the new records office as required under the applicable legislation.¹²
- **Mortgage documents.** If you were acting for both the lender and the borrower in a mortgage agreement, you cannot enforce a lien against the mortgagee for a bill owed by the mortgagor.¹³
- **Original court records.**¹⁴
- **Documents delivered to you without authorization.** A lien cannot be enforced against property that came into your possession if you did not have authorization from the client to accept that property.¹⁵
- **Property held for a specific purpose.** A lien does not apply to property held for a specific purpose, such as property held ‘in trust’ for a third party, but it does apply to other funds held in your trust account such as a retainer which the client demands be returned without payment of the account.¹⁶
- **Original wills.** In England, it has long been held that a solicitor’s lien does not apply to a client’s will.¹⁷ However, the Ontario Superior Court of Justice has determined that a solicitor’s retaining lien can apply to an original will and has held that a will is comparable to any other type of document that may be retained by a lawyer.¹⁸ At the time of writing, no BC decisions have been discovered that address this issue.

While client property must be returned on request or on conclusion of the retainer (see Code

¹¹ Judith Ayling et al, eds, *Cordery on Legal Services*, loose-leaf (consulted on 14 May 2012), (London, UK: LexisNexis, April 2012), Volume 1, Division F at 1515.

¹² *Kingswood Explorations 1985 Ltd. v Elkind*, [1988] OJ No 955 [1988] CLD 1495 (Ont HCJ); *Business Corporations Act*, SBC 2002, c 57, at s 42; *Canada Business Corporations Act*, RSC 1985, c C-44, at s 20.

¹³ *Wakefield v Newbon* (1844), 6 QB 276 referred to in *Knutson v The Bourkes Syndicate*, [1941] SCR 419, [1941] 3 DLR 593 (SCC).

¹⁴ *Bird v Heath* (1848), 6 Hare 236.

¹⁵ *Gibson v May* (1853), 4 De GM & G 512 referred to in *Taylor v Ginter* (1979), 108 DLR (3d) 223, 19 BCLR 15 (BCSC).

¹⁶ *Canadian Commercial Bank v Parlee McLaws*, 95 AR 321, [1989] AJ No 59 (Alta QB) and *Nesmont Precious Metals Corp. (Re)*, 2001 BCSC 1240; *MacDonald v Arensen*, [1981] 1 WWR 573 (MBCA), 37 CBR (NS) 30. Consider also Law Society Rules, Rule 3-65(5): “A lawyer must not take fees from trust funds when the lawyer knows that the client disputes the right of the lawyer to receive payment from trust funds, unless ...”. Seemingly a lien may prevail over the funds but they cannot be “taken”.

¹⁷ *Balch v Symes*, (1823) Turn & R 87, 37 ER 1028.

¹⁸ *Szabo Estate v Adelson*, [2007] OJ No 636, 39 CPC 6th 147 (ONSC).

rule 3.5-6), the obligation to return papers and property to a client is subject to a lawyer's right of lien.¹⁹ Commentary [3] of Rule 3.7-9 of the *Code of Professional Conduct for British Columbia* ("Code") states that a lawyer is expected to have due regard for the effect of exercising the right on a client's position and should not withhold documents if doing so would materially prejudice an uncompleted matter.²⁰

3. Exceptions to retaining liens

There are certain circumstances under which a retaining lien may not be recognized by the courts:

- **Where there is lawful demand by a third party.** While imposing a possessory lien over a client's property, a lawyer has no greater right to retain the property than the client would have if it were in the client's possession. Therefore, in circumstances where your client would be obliged to produce the documents to a third party, such as to a court appointed receiver or a trustee in bankruptcy, you must also comply.²¹ A lawyer cannot assert a lien on property that the client did not have a lawful right to possess.²² In the event of conflicting claims to property, a lawyer should make every effort to have the claimants settle the dispute as stipulated under commentary [3] of Rule 3.7-9 of the Code.²³
- **Where the court orders delivery of the documents.** Under sections 77 and 78 of the Act,²⁴ the courts have discretionary power to order the return of property to your client or to your client's subsequent lawyer. A court may order you to return the property to the client if maintaining the retaining lien will materially prejudice your client's position in a matter or proceeding (see below).
- **Where the lien may prejudice or delay proceedings involving third parties.** The Court in *Re Gladstone* ordered the delivery of documents held under a retaining lien in order to prevent prejudice to the children affected by a divorce proceeding.²⁵

¹⁹ More information on what is considered client property is available in the article "Ownership of Documents in a Client's File" on the Law Society website under "Client Files" of the Practice Resources page. This article was authored in June 2015 by Barbara Buchanan, Practice Advisor, and Chris Canning, Summer Law Student, relying in part on Jacqueline Morris, Felicia Folk, and John Vamplew's article "Whose File is it Anyway?" published in *The Advocate* 87 (Vol 52 Part I January 1994).

²⁰ *Code of Professional Conduct for British Columbia ("BC Code")*, Vancouver: Law Society of British Columbia, 2013.

²¹ *Re Alberta Western; Moriseau, Re*, [1982] BCJ No 1777, 6 WWR 523 (BCSC); *Northland Bank v LG Lands Ltd.*, [1983] 4 WWR 86, 44 BCLR 237 (BCSC); and *Imperial Developments (Canada) Ltd. (Receiver of) v Field & Field*, 1988 ABCA 1534.

²² *Young Estate (Re)*, 2013 ABQB 171.

²³ *LPA*, SBC 1998, c 9.

²⁴ *Ibid.*

²⁵ *Re Gladstone*, [1972] 2 OR 127, 25 DLR (3d) 43 (ONCA) and "Whose File Is It Anyway?".

4. Losing a retaining lien

Your right to a retaining lien may be waived or deemed waived in certain situations. A lien will be lost if you voluntarily part with retained documents without reserving your lien.²⁶ A lien may be waived if you take security that is inconsistent with the lien, including accepting an undertaking.²⁷ You should ensure the wording of any undertaking that secures payment of your fees in return for the transfer of documents protects your interests, despite loss of the retaining lien. See **Appendix A** for sample language to consider for such an undertaking.

Finally, your entitlement to a lien may be lost if your client has begun an action and can prove a *prima facie* case of negligence against you.²⁸ In order to further secure payment of your fees, you should consider whether to pursue a review of your bill (formerly known as “taxation”) by the Registrar under section 70 of the Act, in conjunction with a retaining lien.

Charging Liens (or Liens at Common Law)

1. When does a charging lien apply?

A charging lien may be used to secure your fees and disbursements where property has been recovered or preserved as a result of a litigation proceeding in which you have been involved as counsel. As observed in *Wilson King & Co v Lyall (Trustees of)*²⁹, the purpose of a charging lien is to protect a lawyer from the unjust result of recovering or protecting property and not receiving full payment for services rendered.³⁰

A charging lien does not fall under the traditional definition of a “lien” as it does not apply to property in your possession. Rather, it is your right to request the equitable interference of the court and claim a charge against property that has been recovered or preserved through your efforts.³¹ This common law right has been codified at section 79 of the Act, which permits the court to pronounce a charging order in respect of recovered or preserved property to secure payment of your bill.

Only the Supreme Court of BC has jurisdiction to pronounce charging orders pursuant to

²⁶ *Dicas v Stockley* (1836), 7 Car & P 587, 173 ER 258 and “Whose File Is It Anyway?”.

²⁷ *Re Alberta Western; Waters (Guardian ad litem of) v Baird*, [1999] BCJ No 1231, 69 BCLR (3d) 365 (BCSC); and “Whose File Is It Anyway?”.

²⁸ *National Hav-Info Communications*.

²⁹ *Wilson King & Co v Lyall (Trustees of)*, [1987] BCJ No 709, 12 BCLR (2d) 353 (BCCA) [*Wilson King*]

³⁰ *Ibid*, see also Adam M Dodek & Jeffrey G Hoskins, *Canadian Legal Practice: A Guide for the 21st Century*, loose-leaf (consulted on May 14, 2012), (Markham, ON: LexisNexis Canada, April 2012), section 10.41.

³¹ *Cliffs Over Maple Bay Investments Ltd. (Re)*, 2011 BCCA 346, [*Cliffs Over Maple Bay*]; *Hama*; and *Tots and Teens Sault Ste. Marie Ltd., Re*, [1975] OJ No 2549, 65 DLR (3d) 53 (ONSC) [*Tots and Teens*].

section 79 of the Act.³² The language of section 79 of the Act is not to be construed narrowly.³³

A lien does not cease in the event of your death; rather, the claim will pass to your personal representative.³⁴

Because a ‘lawyer’ is defined in the Act as a “member of the Law Society,” neither a solicitor’s lien under section 79 of the Act nor a common law charging order against assets is available to foreign lawyers.³⁵

2. Statutory charging order

Section 79(1) of the Act states that “[a] lawyer who is retained to prosecute or defend a proceeding in a court or before a tribunal has a charge against any property that is recovered or preserved as a result of the proceeding for the proper fees, charges and disbursements of or in relation to the proceeding, including counsel fees.”

The nature of the charge arising has been described as an “inchoate right” by the BC Court of Appeal³⁶; it exists from the moment that the lawyer has performed work on behalf of a client in pursuit of a claim that has resulted in some recovery or preservation of property. While the charge exists upon the recovery or preservation of property, “the charge only becomes enforceable upon the declaration of the Court under section 79(3)” of the Act.³⁷

Additionally, the court has discretion to grant a charging order for enforcement of a charging lien. To obtain such an order, the lawyer will generally have to make a *prima facie* case demonstrating the following³⁸:

1) That a lawyer was retained in the matter

As outlined by the BC Court of Appeal in *Hosseini v Oreck Chernoff*, the lawyer seeking the order must have been retained to prosecute or defend a proceeding. A lawyer is prosecuting a proceeding when seeking to recover property and a lawyer is defending a claim when attempting to preserve the property for their client.³⁹

2) That a lawyer will not be paid unless the lien is granted

³² *Bolton (Estate) v Davies*, 2014 BCSC 182.

³³ *Gundersen v Volrich*, 1986 BCJ No 1390, 3 ACWS (3d) 208 (BCSC).

³⁴ *Kellett v Kelly* (1842), 5 Ir Eq R 34, cited in *Clark v Eccles*, [1871] OJ No 316; see also “Whose File Is It Anyway?”.

³⁵ *GLAS Americas LLC v Diony Med Brand Inc.*, 2020 BCSC 367.

³⁶ *FitzGibbon v Piters*, 2012 BCCA 269, [*FitzGibbon*].

³⁷ *Ibid.*

³⁸ *MacAdams v Grewal*, 2023 BCSC 2121 citing *Chouinard v Insurance Corp. of British Columbia* 2002 BCSC 655.

³⁹ *Hosseini v Oreck Chernoff*, 1999 BCCA 386.

Although not expressly outlined in the statutory provision, there is a longstanding common law requirement of proof that you will not be paid unless the statutory charging order is granted.⁴⁰

3) That property was recovered or preserved as a result of the lawyer's work in the proceeding

A charging order may only be pronounced in respect of property recovered or preserved in a proceeding before a court or a tribunal. Thus, property recovered or preserved through mediation or a settlement negotiation that is not held in conjunction with a proceeding would not be subject to a charging lien. However, a charging lien may apply to property recovered through a settlement agreement reached after a proceeding (including an arbitral proceeding) has commenced.⁴¹

“Property” has been liberally interpreted in BC to include any property recovered or preserved through the lawyer's litigation efforts.⁴² This definition includes personal property as well as real property; common law charging liens do not apply to real property.⁴³ Furthermore, property may include a chose in action and any identifiable property that may become available to the client as a result of the future judgment.⁴⁴ A charging order may be valid even if the property to which it applies has not been specifically identified at the time of the order. The court in *Doyle v Keats*,⁴⁵ cited with approval in *FitzGibbon v Pifers*,⁴⁶ held that a charging order attaches to the client's interest in the property and the exact extent of the interest may be determined at a time subsequent to the making of the lien claim.

A lawyer is deemed to have preserved property by arranging a re-financing that ends a foreclosure proceeding.⁴⁷ If, however, preservation is found to be “merely technical”, a lien may be refused by the court.⁴⁸

Discretion of the court

Even if the above criteria are met, the court has discretion to decide whether the statutory charging order should be granted under the specific circumstances of the case.⁴⁹ The court's

⁴⁰ *Chouinard v ICBC et al*, 2004 BCCA 255 [*Chouinard* 2004]; *Nor-Lite Sea Farms Ltd. v Ellingsen*, [1991] BCJ No 259, 1991 CanLII 1975 (BCSC); Stephen Antle, “Solicitors' Charging Liens” (1990) 48:5 *The Advocate* at p 673.

⁴¹ *Chouinard* 2004 and *Hubbard v Everyman's Saving and Mortgage Ltd.*, 59 CBR (NS) 251, 62 AR 81 (ABQB).

⁴² *Canadian Legal Practice*, *supra* note 28 at section 10.42.

⁴³ *Albion Securities Co. v Nathanson, Schachter & Thompson, a Law Partnership*, 2003 BCSC 232. [*Albion Securities*] and *Cliffs Over Maple Bay*.

⁴⁴ *Birchall v Pugin* (1875), LR 10 CP 399 and *Doyle v Keats*, 46 BCLR (2d) 54, [1990] BCJ No 1191 [*Doyle*].

⁴⁵ *Doyle*, *ibid.*

⁴⁶ *FitzGibbon*.

⁴⁷ *Central Valley Mechanical Ltd. v Putoto*, 2013 BCSC 1093.

⁴⁸ *Pullman v Pullman*, 2002 BCSC 141.

⁴⁹ *Henry v Columbia Securities Ltd.*, 58 BCR 193, [1942] 4 DLR 596 (BCCA) [*Henry*]; *Wilson King; Hama; Patten v Jajcaj*, [1994] BCJ No 2066, 97 BCLR (2d) 195 (BCSC) [*Patten*]; and *Tots and Teens*.

assessment will include a determination of whether it would be “just and proper” to grant the order against the property recovered or preserved. Factors considered by the court in making this assessment may include: a review of the reasons for withdrawal from the retainer agreement; the likelihood that the lawyer will be paid; and the significance of the lawyer’s work in recovering or preserving the property at issue.⁵⁰

The court may also consider whether the lien is unreasonable, unnecessary, scandalous, frivolous, vexatious, or otherwise an abuse of process.⁵¹

A client’s unwillingness and incapacity to satisfy its obligation to its lawyer are additional factors considered by the court hearing a charging order application.⁵² Notably, the fact that a client contests the amount owed, pending review, has not been considered as evidence of unwillingness or inability to pay.⁵³

When the recovery or preservation of the property is merely technical, it is unlikely that the court will grant a charging order on the basis that it would not be just and proper to do so. In *Wilson King & Co v. Lyall (Trustees of)*,⁵⁴ the court did not charge property preserved for a client in a matrimonial property dispute in which the overall result of the proceeding had not gone in favour of the lawyer’s client. The court held that the insignificant preservation of assets for the client did not justify granting the extraordinary privilege of a charging order.⁵⁵ Notably, the “starting point” in family cases is that each spouse is entitled to 50% of the family assets, property is neither recovered nor preserved where it is determined that the lawyer’s client should have less than 50%.⁵⁶ In *Taylor v Taylor*, a charge was refused by the court because nothing was recovered from the proceeds of a court-ordered sale of a matrimonial home.⁵⁷

3. What costs are recoverable?

Charging orders may be used to recover all fees, charges and disbursements for services related to the recovery or preservation of the property for which your bills remain unpaid as well as any costs associated with obtaining the charging order.⁵⁸ The word “charges” in section 79 of the Act can be properly interpreted to include the costs of the lawyer awarded to them in respect of the collection of the lawyer’s unpaid bill.⁵⁹

⁵⁰ *Medici v Roy*, [2004] OJ No 2789, 5 CPC (6th) 94 (Ont SCJ).

⁵¹ *Albion Securities*.

⁵² *Sangha v Sangha*, 2021 BCSC 2145.

⁵³ *625536 BC Ltd. v Strata Plan LMS 4385*, 2019 BCCA 397.

⁵⁴ *Wilson King*.

⁵⁵ *Ibid* and *Henry*.

⁵⁶ *Thompson v Thompson*, 2000 BCSC 515.

⁵⁷ *Taylor v Taylor*, 2016 BCSC 740.

⁵⁸ *Walker v Saunders et al* (1984), 58 BCLR 387 (BCCA) [*Walker*]; *Re Exner*, 2003 BCSC 260 [*Exner*]; *Shandro Dixon Edgson v Kedia*, 2006 BCSC 1986 [*Shandro*]; and *LPA* at s 79(1).

⁵⁹ *Shandro, ibid*.

In BC, if you have entered into a contingency agreement with a client, you may still obtain a charging order against property recovered or preserved.⁶⁰ However, the amount and recovery of the funds needed to cover your bill will depend on the outcome of the judgment.⁶¹

Therefore, if you are dismissed from a contingency fee agreement before the end of the proceeding, you must await judgment before collecting your fees, subject to the argument that you are entitled to payment sooner should the terms of your retainer agreement so stipulate.

4. Scope of charge

A charging order is “specific”. It only applies to secure the payment of money owed for the work the lawyer has done concerning the property sought to be attached.⁶²

5. Third party liability

The court may grant a charging order to protect you from an attempt by your client to avoid paying you by operation of collusion or conspiracy. The court may intervene to protect your claim on funds recovered, or due to be recovered, against a third party if that party is colluding with your client to defeat your charge, or if the party is on notice that you have a claim on the funds for outstanding charges.⁶³ If you suspect collusion, you must prove to the court that the client and the other party conspired to deprive you of your fees.⁶⁴

Negligence on the part of the opposing party may also be sufficient proof to allow for the enforcement of the lien. For instance, if a defendant negligently pays settlement costs to your client without ensuring that you have been paid, the defendant may be jointly liable for payment of your outstanding bill.⁶⁵

Additionally, a charging order may also have a retrospective effect. In *FitzGibbon v Piters*, the court charged settlement proceeds notwithstanding that the funds had already been paid to the client. If a subsequent lawyer were to pay settlement funds to a client without verifying that the previous lawyer has been paid, the new lawyer may be jointly and severally liable to pay the former lawyer’s fees.⁶⁶

⁶⁰ “Solicitors’ Charging Liens”.

⁶¹ *McQuarrie Hunter v Foote*, [1983] 2 WWR 283, 143 DLR (2d) 354 (BCCA); *Cotugno v Kingsway General Insurance Co.*, 2011 ONSC 1904; and *Doyle*.

⁶² F T Horne, *Cordery’s Law Relating to Solicitors*, 8th ed (London, UK: Butterworths, 1988) at 250.

⁶³ *Khans Solicitors v Chifuntwe*, [2013] EWCA Civ 481.

⁶⁴ *Carla Courtenay Law Corp v Lalani*, 2001 BCCA 82.

⁶⁵ *Jenik v Fearn*, [1995] BCJ No 2568, 16 BCLR (3d) 22 (BCSC) [*Jenik*] and *FitzGibbon*.

⁶⁶ *FitzGibbon*; see also *Jenik*, *ibid*.

6. Priority of a charging order

Generally, subject to specific legislation to the contrary, provided the charged property is in the hands of a person over whom the courts have jurisdiction, a charge will be effective against everyone save a *bona fide* purchaser for value without notice.⁶⁷ A statutory charging order obtained against real property may be registered with the Land Title Office if so authorized by a court order.⁶⁸ However, a lawyer with a lien claim cannot assert against an entity a right their client did not have a right to assert.⁶⁹

A charging order granted under section 79 of the Act will generally take priority over all other creditors.⁷⁰ This may include priority over:

- Trustees of estates in bankruptcy;⁷¹
- Unsecured creditors in bankruptcy;⁷²
- Garnishing orders by judgment creditors;⁷³
- Writs of seizure and sale by judgment creditors;⁷⁴
- Creditors with unregistered personal property security agreements;⁷⁵
- Secured creditors under the *Companies' Creditors Arrangement Act*;⁷⁶
- Insurance benefits claimed by your client's mortgagees;⁷⁷
- Beneficiaries of the property, if held in trust; and⁷⁸

⁶⁷ *Suffield and Watts (Re); Brown, Ex parte* (1888), 20 QBD 693. *LPA*, at s 79(6).

⁶⁸ Law Society of British Columbia, *Bencher's Bulletin*, No 2, March - April 2000, "Legal Profession Act changes sought"; Wendi J Mackay et al, eds, *Land Title Practice Manual*, (The Continuing Legal Education Society of British Columbia, 2011) at 62.5; User Guides and Publications, "Electronic Form 17 Help Guide", online: BC Land Title and Survey <ltsa.ca/cms/>.

⁶⁹ *Jenkins Marzban Logan LLP v Canada (Attorney General)*, 2014 BCSC 1405.

⁷⁰ *Cliffs Over Maple Bay; Davidson & Co. v MacAdam*, 2001 BCSC 1393 [*Davidson*]; and *Patten*.

⁷¹ *Walker*.

⁷² *Hama; King Insurance Finance (Wines) Inc. v 1557359 Ontario Inc. (cob Willowdale Autobody Inc.)*, 2012 ONSC 4263; *Re Moriseau; Patten*; and *Tots and Teens*.

⁷³ *Neepawa-Gladstone Co-Operative Ltd. v Colin Campbell Farms Ltd.*, [1982] 4 WWR 744, 24 Man R (2d) 173 (MBQB).

⁷⁴ *Patten*

⁷⁵ *Griff Building Supplies Ltd. v Lucas Anderson Development (1993) Corp.*, [1995] BCJ No 1511, 23 CLR (2d) 188 (BCSC).

⁷⁶ *Triton Tubular Components Corp. v Steelcase Inc.*, [2006] OJ No 1435, 20 CBR (5th) 278 (ONSC) referred to in *Cliffs Over Maple Bay; Companies' Creditors Arrangement Act*, RSC, 1985, c C-36.

⁷⁷ *Arlington Investments Ltd. v Commonwealth Insurance Co.*, [1986] BCJ No 3024, 15 CCLI 167 (BCCA).

⁷⁸ *Cliffs Over Maple Bay*.

- Perfected and unperfected security interests under the *Personal Property Security Act*⁷⁹

There are exceptions to the general rule regarding priority. A charging order does not have priority over:

- **Registered charges with the Land Title Office.** Since a lien holder can have no greater interest in the property than the client, any previous encumbrances take priority over the charging lien. Nonetheless, you are entitled to register a charging order granted under section 79 of the Act against the property;⁸⁰
- **Current arrears of child support and spousal maintenance.** A charging order against property that was recovered or preserved in a family law proceeding does not take priority over payments for child or spousal support;⁸¹
- **A lien of the director of employment standards under the *Employment Standards Act*,**⁸² pursuant to section 87(3); and,
- **CPP benefits,** pursuant to section 65(1) of the *Canada Pension Plan*.⁸³

If you and another lawyer were employed in succession in a proceeding and you are both claiming liens or both have charging orders over the property, the lawyer who was acting at the time that the judgment was rendered or settlement was made will have first priority for the recovery of their unpaid bills. The former lawyer will then be able to assert a claim on the remaining funds.⁸⁴

The Effect of Withdrawal or Discharge on Liens and Charging Orders

1. When a lawyer is discharged by the client or withdraws with good cause

The reason for your withdrawal from a retainer agreement will also affect your entitlement to a solicitor's lien. If you are discharged by your client without cause, if you withdraw because of

⁷⁹ *Personal Property Security Act*, RSBC 1996, c 359. Under section 32 of the *Personal Property Security Act*, a lien on "goods", as defined in section 1, has priority over perfected and unperfected security interests unless the legislative authority for the lien specifies otherwise. The *LPA* does not specify a different priority for solicitors' liens.

⁸⁰ *Marzara v Marzara*, 2011 BCSC 1142 and *Vukelic v Vukelic*, [1993] BCJ No 2206, 43 ACWS (3d) 614 (BCSC).

⁸¹ *Kuznecov v Kuznecov*, 2006 BCSC 1926; *Canadian Legal Practice*, at s 10.44.

⁸² *Employment Standards Act*, RSBC 1996, c 113 and *Dunhill Construction Ltd. v Ledcor Industries Ltd.*, [1993] BCJ No 2830, 108 CLR (4th) 334 (BCSC).

⁸³ *Davidson and Hislop v Canada (Attorney General)*, 2009 ONCA 354; *Canada Pension Plan*, RSC 1985, c C-8.

⁸⁴ *Re Wadsworth; Rhodes v Sugden* (1886), 34 Ch D 155; *Hama*; *Canadian Legal Practice* at s 10.45.

serious loss of confidence under rule 3.7-2 of the Code, if you are obliged to withdraw under Rule 3.7-7 of the Code, or if you withdraw with good cause and on reasonable notice, you may claim a retaining lien.⁸⁵ Information on what constitutes good cause and reasonable notice may be found in the commentary under rules 3.7-1 of the Code.

Rule 3.7-3 of the Code and corresponding commentary specify that withdrawal for non-payment of fees is permitted “if, after reasonable notice, the client fails to provide a retainer or funds” and so long as “there is sufficient time for the client to obtain the services of another lawyer”.⁸⁶ However, if the fee arrangement is by contingency agreement, you have impliedly undertaken the risk of not being paid if the outcome of the proceeding is unsuccessful. Accordingly, as commentary [2] to Rule 3.6-2 indicates, unless your contingency fee agreement says otherwise, you may only withdraw from a contingency fee agreement for the reasons set out in Code rule 3.7-7 (obligatory withdrawal). In cases where such a contingency agreement defines the relationship the Court retains the right to, and may grant a charging order, leaving the issue of the appropriateness of a lawyer’s withdrawal from a contingency agreement to be determined the Registrar.

Generally, the manner of withdrawal is set out in Rules 3.7-8 and 3.7-9 of the Code. If you plan to withdraw, unless you are obliged to withdraw or there is a serious loss of confidence, you must take steps to minimize prejudice to your client, must provide your client with sufficient time to retain new counsel such that new counsel would have sufficient time to get up to speed on the file including, but not limited to allow new counsel to adequately prepare for closings, court appearances and/or trial.

There are no hard and fast rules as to what sufficient time may be in a particular matter or proceeding; advice on what may be appropriate can be sought from a Practice Advisor at the Law Society.

You must also be sure to comply with the applicable court rules when withdrawing as counsel in a civil matter. Rules 3.7-4 to 3.7-6 of the Code relate to withdrawal in a criminal proceeding. It should be noted that a court has the discretion to refuse counsel’s withdrawal for non-payment of fees from a criminal matter if the withdrawal would cause serious harm to the administration of justice.⁸⁷ In any circumstance, the court has discretion to impose terms on withdrawal.

⁸⁵ *Linauskas v Linauskas*, 38 OR (3d) 113, 1998 CanLII 14657 (ONSC). See also *BC Code* at Rule 3.7-9(b) and commentary [3].

⁸⁶ *BC Code* at Rule 3.7-3 and commentary.

⁸⁷ *R v Cunningham*, 2010 SCC 10.

2. When a lawyer withdraws without good cause

Courts have generally held that a solicitor's lien will not apply if a lawyer withdraws from the relationship with a client without good cause.

In addition to losing the right to a lien, if you withdraw from the relationship without cause, you may in some instances lose any right you had to claim payment for outstanding fees.⁸⁸ For example, an entire contract will generally exist when you agree to represent a client in a proceeding through to its conclusion.⁸⁹ Unless otherwise outlined in a retainer agreement, an entire contract does not permit a lawyer to demand payment for services rendered until all services contracted for are complete. Therefore, if you withdraw without cause before you have completed the contracted services, you are not entitled to recover payment of your outstanding fees,⁹⁰ regardless of whether the client has obtained some benefit from the work previously completed on the file.⁹¹ Further, a lawyer who has agreed to act for a contingent fee, and who withdraws without cause before completing the work called for by the retainer, cannot deliver a bill on a *quantum meruit* basis for the services performed before withdrawal.⁹²

The entire contract doctrine applies to both fee-for-service retainer agreements and contingency fee agreements.⁹³ The courts have allowed compensation for disbursements,⁹⁴ and have upheld previous accounts paid on an interim billing schedule in cases of unjustified withdrawal.⁹⁵

3. When a lawyer departs from a law firm

When a lawyer works with a firm, the contract for legal services is generally formed between the client and the firm, not between the individual lawyer and the client. As a result, if you leave the firm and continue to work on your client's file, the firm may assert a lien on the documents if the client's bill is unpaid. If the firm has asserted a lien on the file, you may not interfere with the lien and you cannot remove the documents from the firm,⁹⁶ subject to the

⁸⁸ *Pushor Mitchell v McDougall*, 2008 BCSC 150, [*Pushor*].

⁸⁹ *Slater Vecchio LLP v Cashman*, 2014 BCCA 6.

⁹⁰ *Ladner Downs v Crowley*, 41 DLR (4th) 403, 1987 CanLII 161 (BCSC); *Thompson Valley Law Corporation v Childs*, 2012 BCSC 15 [*Thompson Valley*]; *Conkie & Co. v Free Quincy Productions Ltd.*, 2012 BCSC 33; and *Davis & Co. v Jiwan*, 2006 BCSC 658.

⁹¹ *Pierce, Van Loon v Edwards*, [1998] BCJ No 2212, 82 ACWS (3d) 1021 (BCSC) referred to in *Maillot v Murray Lott Law Corporation*, 2002 BCSC 343 [*Maillot*].

⁹² *Trainor v Deverell*, [1980] 111 DLR (3d) 171, 4 ACWS (2d) 9 (BCSC); *Edwards v Barwell-Clarke*, 4 ACWS (2d) 9, [1980] BCJ No 1686 (BCSC).

⁹³ *Pushor and Maillot*. For a discussion of what constitutes reasonable grounds for terminating a contingency agreement see the decisions of *Voss v Smith*, 2007 BCCA 296 and *MacIsaac & Co. v Frayne*, 2007 BCSC 1620.

⁹⁴ *Pierce Law Group v Chirita*, 2004 BCSC 675.

⁹⁵ *Thompson Valley*.

⁹⁶ *Vertlieb-Anderson v Nelford*, [1992] BCJ No 1229, [1992] 5 WWR 97 (BCCA) and "Whose File Is It Anyway?".

‘exceptions to retaining liens’ noted above. Additionally, both you and the firm must comply with the procedures for notifying your client about your departure, as outlined in commentaries [4] through [10] under Rule 3.7-1 of the Code.

If a firm is purchased by another firm, the original firm’s lien will be lost. The purchaser cannot claim a lien on the files since the purchaser was never retained by the client to work on the file. Conversely, you cannot continue to assert the lien after your firm has been bought as the outstanding bill would have indirectly been paid through the purchase agreement.⁹⁷

4. Transferring documents to another lawyer

When your client changes lawyers before the completion of the file, the subsequent lawyer may pay your disbursements upon billing and provide an undertaking for payment of your fees upon resolution of the proceeding. Often, an undertaking between you and the subsequent lawyer will be sufficient to secure payment of your bill; however, you are not obligated to accept such an undertaking or to rely on it as the sole means of securing payment.⁹⁸

Where a successor lawyer does not agree to give an undertaking to protect your charges, you are entitled to some details of the resolution of the claim and the terms of your client’s retainer with the successor.⁹⁹

You cannot, however rely on or enforce an undertaking given by a self-represented client unless the undertaking is found to give rise to a contractual relationship which could form the basis of an action in breach of contract. In situations where an undertaking is not given or no other security is in place, you may wish to hold onto the files until an order for the transfer of the documents is rendered under the Act, or you have had your bill reviewed, obtained a certificate, and been paid or otherwise obtained security.¹⁰⁰

Your client or your client’s subsequent lawyer may apply to the court for the return of property or transfer of the documents pursuant to sections 77 and 78 of the Act. Under these provisions, the court has the discretion to order that you return the documents that are being withheld. In doing so, the court may also order the complete payment of your bill or payment of security for those fees and a review of your final bill by the registrar.¹⁰¹

If the matter involves a court proceeding and no undertaking is put in place, and no application under sections 77 or 78 of the Act is anticipated, then you should give notice to

⁹⁷ *Commonwealth Construction Co. v Defazio Bulldozing & Backhoe Ltd.*, [1988] BCWLD 1725, 25 BCLR (2d) 140 (BCSC); “Solicitors’ Charging Liens”.

⁹⁸ *Ashurst v Wilson*, [2000] BCJ 1247 and *Foisy v Zak*, 2001 BCSC 1003.

⁹⁹ *Herman v Ian Sisett Law Corp.*, 2012 BCSC 605.

¹⁰⁰ *Re Neylan*, [1986] BCWLD 1673, 8 BCLR (2d) 314 (BCSC).

¹⁰¹ *LPA* at sections 77 and 78.

the successor firm and to your former client through the successor firm, or directly if the client is self-represented, that you are maintaining a lien, and you may apply for a charging order under section 79 of the Act if property has been preserved or recovered. See **Appendix B** for sample language for such a notice. You will need to follow up from time to time to track the progress of the proceeding.

Conversely, if you are the subsequent lawyer and you are given such notice, be careful not to pay out judgment or settlement proceeds without first addressing the issue of the former lawyer's lien. In *FitzGibbon v Pipers*, the court held that the subsequent lawyer and the client both having notice that the former lawyer was maintaining a lien were jointly and severally liable to that lawyer for an amount to be assessed by the registrar.¹⁰²

Asserting a retaining lien and a charging lien – A checklist¹⁰³

This checklist provides some suggested steps to help you assert a lien as security for payment of your outstanding bill:

1. Send your client a final bill that outlines your fees, charges and disbursements, and details regarding the work completed.¹⁰⁴
2. You may then assert a retaining lien by withholding delivery of the client's property, including files, unless the client or the subsequent lawyer agrees to pay or secure payment of your bill. At this point, you may also request that your client or your client's subsequent lawyer pay your disbursements immediately.

Your client's new lawyer may request the transfer of the retained property or documents on (i) terms to be agreed; or (ii) may apply for a document production order:

i. S u c h a n agreement may include one or more of the following terms:

- Immediate payment of your disbursements;
- Immediate payment of your fees, or payment of a certain percentage of the final settlement amount pending resolution or judgment;
- An agreement that, upon resolution of the proceeding, all previous and then current counsel will submit bills to the registrar for review, with the current lawyer holding the funds in trust until the review is completed and/or settled;

¹⁰² *FitzGibbon*.

¹⁰³ "Whose File Is It Anyway?"

¹⁰⁴ *LPA* at section 69(1); Law Society Rules, Rule 3-65; *BC Code*, Rule 3.7-9(e).

- Other security for the payment of your bill; or
- An undertaking by your successor not to disburse settlement or judgment funds until your entitlement has been determined.

In deciding whether to accept an undertaking, you should consider what might happen if your former client discharges your successor. Sample wording for a basic undertaking is found at **Appendix A**. You may wish to add other aspects to the undertaking such as immediate payment of disbursements.

Keep in mind that you are under no obligation to accept an undertaking or security in exchange for the property and files.

- ii. Your client or your client’s subsequent lawyer may apply to court for a document production order under section 78 of the Act. This order may be obtained by way of notice of application within a pending proceeding or by way of petition.¹⁰⁵ Note, Part 8 of the Act defines “court” as the Supreme Court. In exchange for the transfer of files, a court may order a review of your final bill by the registrar and require the client to:

- Pay your disbursements immediately;
- Make complete payment of your outstanding bill; or
- Provide security for the payment of an amount designated by the court.

3. If the matter involves a litigation proceeding, you may apply for a charging order under section 79(3) of the Act by petition, or by filing a notice of application to the court that heard the proceeding in which property was recovered or preserved or in which the proceeding is pending.¹⁰⁶

In circumstances where the lien is being asserted against real property, identify the parcel of land using the proper legal description, and indicate that it was recovered or preserved as a result of a proceeding as set out in section 79 of the Act.

You should give your former client written notice of your intention to enforce your charging lien. If your former client is represented by a subsequent firm, notice to the client should be through that subsequent firm.¹⁰⁷ Sample wording for notice is found at **Appendix B**.

¹⁰⁵ Supreme Court Civil Rules, Rule 2-1(2)(b).

¹⁰⁶ *Henry; Walker; Exner; and Nor-Lite*.

¹⁰⁷ *Dallow v Garrold* (1884), 13 QBD 543 at 546, affd (1884), 14 QBD 543 (CA) cited in *Davidson; Jenik; and FitzGibbon*.

While awaiting a charging order in relation to real property, you may:

- Apply to register a certificate of pending litigation against your client's property; or
 - Seek the approval of the registrar to lodge a caveat.¹⁰⁸
4. Once a statutory charging order is granted by the court, you can apply for a payment order under section 79(3) of the Act.¹⁰⁹

If you are asserting a charge against real property, you should do so in the Land Title Office by submitting electronic Form 17, along with a copy of the judicial order granting the charging order.¹¹⁰

5. Since you cannot transfer fees from your trust account to your general account if you know your client disputes your right to receive payment,¹¹¹ you may want to apply for a review of your bill by the registrar in accordance with section 70 of the Act. The registrar will review your bill in order to determine whether your fees are reasonable and order a certificate for payment of fees, charges, disbursements and costs as determined to be appropriate.

The court may also order a review of the bills by the registrar as a result of an application under sections 77, 78 or 79 of the Act.

Questions

If you have questions about this resource or any other issue regarding ethics or practice management, feel welcome to [contact a practice advisor](#).

Lawyers must exercise their professional judgment respecting the correctness and applicability of the material. The Law Society accepts no responsibility for any errors or omissions and expressly disclaims any such responsibility.

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¹⁰⁸ See note 68.

¹⁰⁹ *Lidder v Lidder*, 2001 BCSC 401 and *Ray v Hou*, [1928] BCJ No 115, 40 BCR 438 (BCCA) followed in *Henry*.

¹¹⁰ See note 68.

¹¹¹ Law Society Rules, Rule 3-65(5).

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APPENDIX A – Sample Undertaking Language

“I am now counsel for your former client, [name]. So that I can discharge the terms of my retainer, I will need the files you compiled on [client name]’s behalf before you ceased to act for [client name]. I understand your claimed charges for your work for [client name] have not been paid in full and that you claim a possessory lien over the files.

In consideration of your delivering to me all of the property of [client name] in your possession or under your control relating to my retainer, I undertake to pay so much of your proper fees, charges and disbursements, for the work you performed for [client name] as my predecessor, from any settlement or judgment fund that might be realized for [client name] while I am retained by [client name], to the extent the fund is sufficient to bear your proper fees, charges and disbursements.”

APPENDIX B – Sample Notice Language

“As you know, I acted for [name of former client] in the following proceeding(s) [style of cause, [location of court registry] [name of court] [court file number] (the “Proceeding”).

I write to advise that I claim a lien at common law (otherwise known as a charging lien), for my proper fees, charges and disbursements pertaining to my work, including counsel work, of or in relation to the Proceeding, against any property, including any settlement or judgment fund, recovered or preserved as a result of the Proceeding.

As you may know, any person who, without regard for my lien claim, participates in the transfer of any recovered or preserved property, or in the disbursement of any recovered or preserved settlement or judgment fund, may be personally liable to satisfy my proper fees, charges and disbursements, including any expense I incur to recover the fees, charges and disbursements.

If you are not able to confirm by [a date that is two to three business days in future] that my lien will be recognized, I will apply to court for a charging order under section 79 of the *Legal Profession Act* and will add to my claim the expense I incur in respect of the application.”