CAUTION

The **Professional Legal Training Course (PLTC)** provides the *Practice Material* to users as an aid to developing entry-level competence, with the understanding that neither the contributors nor **PLTC** are providing legal or other professional advice.

Practice Material users must exercise their professional judgment about the accuracy, utility and applicability of the material. In addition, the users must refer to the relevant legislation, case law, administrative guidelines, rules, and other primary sources.

Forms and precedents are provided throughout the *Practice Material*. The users also must consider carefully their applicability to the client's circumstances and their consistency with the client's instructions.

The Law Society of British Columbia and **PLTC** can accept no responsibility for any errors or omissions in the *Practice Material* and expressly disclaim such responsibility.

Professional Legal Training Course 2025

Practice Material

Real Estate

Recent Contributors:
Scott Anderson
Dick Chan
Natasha Ford
Tyler Galbraith
Tony Magre
Greg Umbach
The Land Title and Survey Authority of BC

Practice Material Editor:
Katie McConchie

Printed for the February 2025 Session
of the Professional Legal Training Course

Law Society
of British Columbia

A requirement for admission to the bar of British Columbia, the Professional Legal Training Course is supported by grants from the Law Society of British Columbia and the Law Foundation of British Columbia.

REAL ESTATE

CONTENTS

REMEDIES

APPENDICES--*NOT AVAILABLE IN ONLINE VERSION*

MORTGAGES AND RIGHTS TO PURCHASE

Chapter 1

Land Ownership, Rights and Interests[1]

[§1.01] Introduction to These Materials

These chapters in *Practice Material: Real Estate* focus on two aspects of real estate: the first is ownership interests (including rights and obligations) and the second is buying and selling real property.

This first chapter addresses ownership interests and rights. It canvasses statutory rights and Aboriginal rights as well as rights in strata property. At the end of this chapter is a list of resources for further study.

Subsequent chapters look at the steps and documents in transferring land and the remedies when something goes wrong. The final chapter addresses builders liens.

Throughout these chapters there are several appendices with examples of documents and of language that should be used in preparing particular kinds of forms or claims.

[§1.02] Statutes Governing Land Ownership in British Columbia

Real estate law involves a large body of common law and a great deal of legislation, including many regulations. It is difficult for any person to be familiar with more than a small part of this body of knowledge. It is perhaps most useful to be aware of the breadth and specialized nature of the field and the many resources available. (See §1.05 for a list of resources.)

1. *Land Title Act*

In British Columbia, the *Land Title Act*, R.S.B.C. 1996, c. 250 is the key statute for conveyancing transactions. Some of the more significant provisions of the *Land Title Act* will be touched on briefly here.

Section 1 of the *Land Title Act* defines words and phrases for the purposes of the *Land Title Act* and regulations made under it. Section 4 provides for the division of land in British Columbia into seven land title districts.

The boundaries of each land title district are set out in the *Land Title Act (Board of Directors) Regulation*, B.C. Reg. 332/2010, s. 3 and Schedule A. Responsibility for the seven land title districts is divided among the three Land Title Offices (New Westminster, Victoria and Kamloops).

The Land Title and Survey Authority of British Columbia manages the land title and survey systems in British Columbia.

Part 3 of the *Land Title Act* (ss. 20 to 38) contains the provisions that form the foundation of the British Columbia Torrens system. Under the Torrens system, security of title is based on the principles of indefeasibility (s. 23), registration (ss. 20 to 22) and abolition of notice (s. 24). Section 25(3) provides that a state of title certificate is conclusive evidence of title (assurance).

In effect, ownership of, and charges both against and for the benefit of land, are construed by a registered indefeasible title and evidenced by a title issued by the Land Title Office, which includes the name of the owner and the names of any others that have interests in the property. Other interests include, for example, mortgages, leases, easements, covenants, rights-of-way and certificates of pending litigation. Registration has the effect of passing the estate or interest in land.

Some exceptions exist to the principle of indefeasibility. These are set out in s. 23(2) of the *Land Title Act*.

With the adoption of the Torrens system, the principle of notice was abolished. In British Columbia it is not necessary to make an exhaustive inquiry into the validity of a title or an interest. Rather, a person who deals with land is entitled to rely on the Land Title Office register. Some exceptions to this principle are set out in s. 29 of the *Land Title Act*.

Registered interests in land take priority according to the date and time at which the registrar receives the application for registration, except where a contrary intention appears in the instrument, or subject to the other qualifications concerning a caveat or certificate of pending litigation as set out in s. 28.

[1] Revised by **Scott Anderson** and **Natasha Ford**, Lawson Lundell LLP, Vancouver, in November 2023. Reviewed regularly by the Land Title and Survey Authority for content relating to the BC land title and survey system, most recently in October 2023. Previously revised by Edward L. Wilson and Jessica H. Chung (2022); Gregory Lee (2017); Randy Klarenbach and Aneez Devji (2012); Ian Davis (2010); Joel Camley (2005, 2006 and 2008); and Lawson Lundell, Real Estate Department (1991–2004). Tina Dion reviewed the Aboriginal title content of this chapter in November 2011. Doug Graves revised the Aboriginal title part of this chapter in December 2010. John M. Olynyk contributed comments about Aboriginal title in January 2002.

However, because of these qualifications, it is important to note that the order in which charges appear on the title may not signify their priority.

Forms of instruments that are registrable in the Land Title Office are dealt with in Part 4 of the *Land Title Act* and in the Director's Directions (online: ltsa.ca/practice-info/director-land-titles-directions). The key prescribed forms are the Form A Freehold Transfer (to pass or create an estate or interest in land), Form B Mortgage (to record a charge of mortgage on title), and Form C General Instrument (used for various purposes including the registration and discharge of different types of charges on land).

The Land Title Electronic Filing System ("EFS") requires users (typically lawyers, notaries and Land Title agents) to use an electronic format of the forms to submit many types of Land Title filings online. As of March 31, 2014, e-filing of virtually all documents is mandatory. For more information on EFS and other Land Title forms, see Chapter 5.

Requirements for preparing, executing and filing Land Title documents are technical. Lawyers should review any amendments to the legislation and the practice guides before drafting documents or submitting them for registration in the Land Title Office (see "E-filing User Guides" and "Director of Land Titles Directions" on the LTSA website at ltsa.ca). A trained real estate paralegal can be invaluable in helping a lawyer prepare forms and avoid delays in registrations due to defects with their Land Title filings.

The provisions highlighted here, and other significant provisions of the *Land Title Act*, will be reviewed further in the subsequent chapters.

2. *Land Act*

The *Land Act,* R.S.B.C. 1996, c. 245 governs the disposition of provincial Crown land in British Columbia. Section 50 sets out the reservations and exceptions in every disposition from the Crown. For example, a Crown land grant does not usually include rights to minerals, coal, geothermal resources or oil and gas, nor does it include rights to water bodies, unless the Crown grant contains an express provision to the contrary. There is an application process for obtaining a grant of Crown land which is set out in the *Land Act*. If you are the lawyer for a party seeking to acquire this type of property, you should ensure that your client understands that the client will purchase the property subject to the reservations and exceptions set out in the *Land Act* unless the Crown grant states otherwise.

3. *Strata Property Act*

The *Strata Property Act*, S.B.C. 1998, c. 43, provides for the creation of legally described parcels of land called "strata lots." The *Strata Property Act* came into force on July 1, 2000, replacing the *Condominium Act.* As a caution, the overview that follows is brief, and many of these issues are complex.

In some ways, transferring strata property is different from transfers of other kinds of title. Builders liens require a different holdback procedure (under the *Strata Property Act*, s. 88), and the registrar will not register a transfer of strata title without a Form F Certificate of Payment (under the *Strata Property Act*, s. 256).

The easiest way to approach a transaction involving a strata lot is to consider it to be both a share in a corporation and a personal interest in land.

(a) Strata Corporation's Rights and Obligations

Under s. 2(1)((b) of the *Strata Property Act*, the owners of strata lots are members of a strata corporation called "The Owners, Strata Plan No. …" (the strata plan number). That corporation is governed by a strata council of owners elected at an annual general meeting of members (*Strata Property Act*, s. 25). As a corporation, it has rules and bylaws.

As members of the corporation, members have rights to share (as tenants in common) in the assets of the corporation, which essentially means that an owner owns their strata lot and a proportionate share of the common property that is owned by the strata corporation:

> 66. An owner owns the common property and common assets of the strata corporation as a tenant in common in a share equal to the unit entitlement of the owner's strata lot divided by the total unit entitlement of all the strata lots.

"Common property" is defined in the *Strata Property Act*, s. 1. It is generally property owned by the strata corporation that is outside of any owner's strata lot, but may include such things as water pipes and heating ducts that are within a strata lot if they are intended for the better use of other strata lots.

The strata corporation manages and maintains the strata complex (*Strata Property Act*, s. 3):

> 3. The strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.

Managing the strata complex includes routine maintenance (clearing snow, removing garbage, cleaning windows). Routine expenses are paid

for by the strata corporation from an operating fund, which is funded from monthly strata fees the owners pay. The operating fund is for common expenses that arise yearly (or more often than that). The strata is also required, under s. 92 of the *Strata Property Act*, to maintain a contingency reserve fund for expenses that arise less often than once a year.

Money can be loaned from the contingency reserve into the operating fund (*Strata Property Act*, s. 95(4)). This might happen to deal with a major expenditure, such as a new roof. Another way to handle a major expenditure is to levy a special assessment on all owners (*Strata Property Act*, s. 108).

The strata corporation cannot mortgage common property (*Strata Property Act*, s. 81).

The strata corporation has a limited duty to repair under s. 72 of the *Strata Property Act*, which covers repairs to common property but does not cover repairs that are entirely inside an owner's unit.

The strata corporation might adopt the standard bylaws available under the Schedule of Standard Bylaws set out in Schedule 1 of the *Strata Property Act*, or might customize its bylaws to do things like restrict whether owners can smoke or have pets in their strata units.

(b) Strata Lot Owner's Rights and Obligations

Strata lot owners have obligations in addition to paying strata fees, including the obligation to abide by the strata corporation's bylaws. Strata lot owners may be obligated under the bylaws to keep their lots in good repair or to maintain insurance, including on vehicles parked on the property. The bylaws provide for fines to be assessed against the strata lot if an owner violates the bylaws.

Strata lot owners have the right to vote at the annual general meeting (*Strata Property Act*, s. 54(1)) or at special general meetings that may be held. Strata lot owners have rights to receive at least two weeks' written notice of such meetings and of the business to be discussed at those meetings (*Strata Property Act*, ss. 45(1)), unless the business includes a resolution winding up the strata, in which case four weeks' notice is required (*Strata Property Act*, s. 45(1.1)).

Each owner pays taxes to municipal authorities based on the assessed value of their strata lot and their share in the common property (*Strata Property Act,* s. 67):

> 67. For the purposes of assessment and taxation, each strata lot, together with its share in the common property, is deemed to be a separate parcel of land.

A buyer considering purchasing strata property should carefully review the bylaws to be sure that they do not restrict how the buyer plans to use the property. A buyer should also carefully review the strata meeting minutes going back at least a few years, to see what kinds of major repairs have been discussed, what (if any) litigation is ongoing, and what kinds of topics have generated disagreement. In particular, buyers should note whether the strata has had a recent depreciation report, and review such report to see what major expenditures the strata might be responsible for in the future.

A prospective buyer should obtain a Form B Information Certificate from the seller (or the buyer's lawyer can request it directly from the strata corporation). The Form B sets out information such as the following:

- the monthly strata fees for that strata lot;
- any amounts in arrears;
- the balance in the contingency reserve fund; and
- any agreements under which the owner of that strata lot agrees to accept liability (such as for improvements to the strata lot, like installing a gas fireplace).

A prospective buyer should also receive a Form F Certificate of Payment from the seller (or the buyer's lawyer can request it directly from the strata corporation). The Form F certifies that the owner does not owe the strata corporation money. The strata corporation must issue it within one week of being asked to do so (*Strata Property Act*, s. 115). The Form F must be filed with the registrar in purchasing or leasing a strata lot (*Strata Property Act*, s. 256).

A prospective buyer who is taking out a mortgage on strata property should carefully review the terms of the mortgage. The mortgage terms might give the mortgage lender rights: for example, a right to vote at general meetings where topics such as insurance are addressed (*Strata Property Act*, s. 54(1)(c)).

Regarding the conveyance of strata lots, be aware of s. 88(2) of the *Strata Property Act*, which provides that a purchaser of a strata property must hold back a prescribed amount (currently 7% of the purchase price) until the time for filing a builder's lien expires (or 55 days after the closing date).

4. *Land Owner Transparency Act*

Effective November 30, 2020, any transferee applying to register an interest in land must make a concurrent disclosure filing under the *Land Owner Transparency Act*, S.B.C. 2019, c. 23 ("*LOTA*"). Owners of existing registered interests in land were given until November 30, 2022 to make any disclosure filings that were necessary in order to become compliant with *LOTA*.

The purpose of *LOTA* is to increase transparency as to who owns land in the province. It is intended to eliminate hidden ownership of land by requiring that certain corporations, trustees of certain trusts, and partners of certain partnerships holding registered interests in land disclose any significant beneficial owners or other indirect owners of those interests in land. This information will allow the public, government agencies and law enforcement to look behind the ownership information available in the existing land title registry. The Province's goals are to see who truly owns real estate in British Columbia, improve tax agencies' ability to collect, and reduce money laundering.

Disclosures as to beneficial ownership are collected under *LOTA* and maintained in the Land Owner Transparency Registry ("LOTR"). The LOTR is administered by the Land Title and Survey Authority of BC, but is separate from the existing land title registry. The LOTR has been searchable by the public, government authorities and law enforcement since April 30, 2021. As it contains sensitive personal information, not all LOTR information is available to the public. Non-public information is only available to certain government authorities and law enforcement agencies.

The *Land Owner Transparency Regulation* came into effect concurrently with *LOTA*, and sets out key timelines and other important details necessary to interpret and understand *LOTA*'s requirements.

[§1.03] Other Statutes and Rules Relevant to Ownership

1. *Property Law Act*

The *Property Law Act,* R.S.B.C. 1996, c. 377*,* contains substantive law relating to the rights and obligations of parties to a real estate transaction. Of particular interest are the following sections:

- ss. 4 to 6 (on registering title);
- ss. 11 to 12 (on jointly held interests);
- ss. 16, 18, 20 to 24 (on instruments creating and transferring title); and
- ss. 33, 36 to 37 and s. 39 (on mortgages and limits on title).

Section 5(1) provides that a person transferring land in fee simple must deliver to the transferee a transfer registrable under the *Land Title Act*. Similarly, section 5(2) says that a landlord who makes a lease for a term of more than three years must deliver a registrable instrument or agreement with respect to the lease to the tenant. However, this requirement is subject to an agreement to the contrary, and most commercial leases prohibit registration.

Also note that ss. 11 and 12 suggest that persons who buy an interest in land together do not automatically take title as joint tenants. Joint owners will be deemed to be tenants in common unless a contrary intention appears in the instrument. As there are advantages and disadvantages to each form of joint ownership, it is important to determine what a client is seeking to do with the property in order to properly advise the client.

Section 18 allows a person to transfer land to themselves. This is a method of severing a joint tenancy. Section 18 is also useful for other purposes, such as allowing a person to register an easement to themselves over adjoining properties.

The issues that arise from s. 22—the personal covenant aspect of a mortgage—are discussed in greater detail in Chapter 7.

2. *Family Law Act*

The *Family Law Act,* S.B.C. 2011, c. 25*,* is important to conveyancing lawyers because a spouse who is not registered as an owner of real estate has, in certain instances, rights to real estate registered in their spouse's name. Conveyancing lawyers should ask their clients about personal relationships. If there is any indication that a seller and the seller's spouse have separated, lawyers should consider the points below.

Key provisions of the *Family Law Act* are ss. 81, 99 and 103.

Section 81 of the *Family Law Act* provides that, on separation, a spouse has a right to an undivided half interest in all family property as a tenant in common. This applies to an interest in real property.

Section 103 of the *Family Law Act* incorporates s. 29 of the *Land Title Act*, which protects innocent buyers who have no notice of unregistered interests. Even if an unregistered interest is not enforceable against a bona fide purchaser for value without notice, the *Family Law Act*, s. 103 does say that the interest of a spouse is enforceable against the other spouse. Note that s. 29 of the *Land Title Act* has not always been strictly applied by the courts, and notice of an interest arising from a separation could later cause problems for the buyer. Often a realtor (in these materials referred to as a "licensee")

knows that a property is on the market because of a marriage breakdown. Accordingly, it is important to advise a client who is a buyer about the effect of a separation, in case they have had some notice of a seller's spouse's unregistered interest.

Another concern arises when a spouse who is involved in a marital dispute attempts to obtain mortgage financing. When acting for a lender in such a case, review your instructions carefully. If you have any concern that the owner spouses might be dividing their entitlement to the property, consider raising the borrower's marital status with the lender.

Be aware of potential conflicts when acting for more than one party in any transfer of property where there is any potential for a marital dispute.

Section 99 provides that a party to a property agreement (which may be part of a marriage or separation agreement) may file a notice of agreement in a Land Title Office as a charge against the land described in the notice. The registrar will then not allow the registration of a transfer or certain other dealings with the land unless each party to the agreement signs and files a cancellation or postponement notice.

Be aware of any special requirements when you are acting for a spouse of a member of a treaty First Nation. Some treaty First Nations have specific provisions regarding marriage or common law breakdown in relation to land or property holdings.

3. *Fraudulent Conveyance Act, Fraudulent Preference Act,* and the *BC Code*

Clients must understand the legal consequences if the purpose of a conveyance or other transaction is to delay, hinder or defraud creditors of their just and lawful remedies. The *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, and the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164 contain provisions rendering such conveyances void or capable of being set aside.

If you are acting for a party to a transaction and become aware that the purpose of the transaction is to avoid creditors, you must not continue to act. If you become aware that your client is transferring property to avoid creditors, even if your client has no current creditors but is simply anticipating potential creditors, you are likely unable to continue to act for that client.

The *BC Code* prohibits lawyers from assisting or encouraging any dishonesty, crime or fraud. Rule 3.2-7 of the *BC Code* states (in part):

> 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 commentary to rule 3.2-7 provides:

> [1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.
>
> [2] A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: [. . .] purchasing and selling real estate.
>
> [3] If lawyers have suspicions or doubts about whether they might be assisting a client in any dishonesty, crime or fraud, before accepting a retainer, or during the retainer, the lawyers should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature and purpose are not clear.
>
> [3.1] The lawyer should also make inquiries of a client who:
>
> (a) may be seeking, contrary to the prohibition in Rule 3-58.1(1) of the Law Society Rules, the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter, or
>
> (b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.
>
> [3.2] The lawyer should make a record of the results of these inquiries.

[§1.04] Indigenous Land Claims and Interests in Reserve Lands

A thorough treatment of Indigenous rights to land (also called Aboriginal title in many decisions) is beyond the scope of this *Practice Material: Real Estate*. This material aims only to flag potential issues of significance to conveyancers and to highlight some considerations in dealing with land subject to Indigenous claims. More information is available from CLEBC's Indigenous law materials and from authoritative texts and manuals.

As a starting point, it is important to understand that there are legal systems in place that govern and manage interests in Indigenous reserve lands located in British Columbia. These are specific, varied and complex. The laws concerning the conveyancing and management of reserve lands are distinct from the laws concerning lands situated outside a reserve but to which Indigenous peo-

ple claim title. The laws for interests in reserve lands are distinct also from the laws and procedures that apply to conveyances of fee simple lands or transactions or lease agreements respecting lands owned by an Indigenous Band but located outside the reserve lands of that Nation (off-reserve land transactions).

In this section, we provide only a general background to land claims by Indigenous peoples. We then present a brief overview of the systems in British Columbia for managing and registering interests in reserve lands.

1. Background to Indigenous Land Claims

Indigenous people claim title (often called "Aboriginal title") to lands they occupied before British sovereignty was asserted in what is now Canada. Aboriginal title is known legally as a "burden" on Crown title to land. In brief, that burden arises from the prior use and occupation of lands by Indigenous peoples, which was recognized by the British King George III in the Royal Proclamation of 1763 (the "Royal Proclamation"). The Royal Proclamation set out guidelines for the British settlement of what is now North America. It confirms that Indigenous peoples had title to their lands and continue to have title. It forbids settlers from buying land directly from Indigenous peoples, and says that only the Crown can buy land from Indigenous people. Although the Royal Proclamation was written from the perspective of British settlers without input by Indigenous peoples, it affirms that Indigenous peoples have title to land. The Royal Proclamation has not been overruled, and is consistent with s. 35 of the *Constitution Act, 1982*, which also affirms pre-existing Indigenous rights.

Aboriginal title is a common law interest in land that is held collectively by the members of the First Nation or Indigenous group. Title to that land can be alienated by that Band or group only to the Crown in right of Canada.

In much of Canada, the Government of Canada negotiated treaties with Indigenous peoples, under which those peoples surrendered rights and title in exchange for treaty rights and land entitlements. Historically, except on southern Vancouver Island and in northeastern British Columbia, treaties were not negotiated with Indigenous peoples in British Columbia. As a result, many Indigenous groups in British Columbia assert continuing rights over and title to lands they have traditionally occupied.

The leading case in Canada on Aboriginal title is *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44. In this judgment, the Court found for the first time that Aboriginal title had been established to a particular area of land. In doing so, the Court applied the test in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) (formerly the leading British Columbia case), which states that to establish title to a parcel of land, an Indigenous group must meet the following criteria:

(a) the land must have been **occupied** by the Indigenous group prior to British sovereignty;

(b) if present occupation is relied upon as proof of pre-sovereignty occupation, there must be **continuity** in occupation between the present and the pre-sovereignty occupation; and

(c) at the time of sovereignty the occupation must have been **exclusive**.

The Court clarified that "occupation" for the purposes of this test means regular and exclusive use of the land, which can be established in a number of ways and is a question of fact dependent on all the circumstances.

Where an Indigenous group establishes Aboriginal title, it confers the right to the exclusive use and occupation of the land and to reap the benefits flowing from the land. This right is subject to the restriction that the use cannot be inconsistent with the group nature of the interest and the enjoyment of the land by future generations. Lands held under this form of title cannot be sold, transferred, or surrendered to anyone other than the Crown. A Band or Indigenous group therefore cannot convey land held under Aboriginal title to third parties.

Since Indigenous peoples' title to land is protected under s. 35 of the *Constitution Act, 1982*, it enjoys constitutional protections against unjustifiable extinguishment or infringement by government. As confirmed in *Tsilhqot'in*, where such title is asserted but not yet established, governments have a duty to consult with the relevant Indigenous group and, where necessary, accommodate the asserted interest.

Where an Indigenous group establishes a claim of Aboriginal title, a government may infringe on that title only if the government has the consent of the Indigenous group or if the government can show that the infringement is justified. The justification test requires considering if the action is justified by a compelling and substantial government objective and is consistent with the Crown's fiduciary duty to the Indigenous group. As stated in *Tsilhqot'in*, provincial laws apply on lands over which Aboriginal title is claimed or proven, subject to the justification test. The Court also stated that if Aboriginal title is later established, prior Crown decisions and legislation may need to be reassessed if they would result in unjustifiable infringement of title. The potential effect of these comments remains to be seen.

Most of the province of British Columbia is subject to claims of Indigenous rights or title. However, unless one receives notice of a claim by the Indige-

nous group making the claim, it remains difficult to determine whether a given parcel of land is subject to such claims. Aboriginal title cannot be registered in the Land Title Office, as it lacks the element of marketability necessary to establish a "good safe holding and marketable title" as required under the *Land Title Act* (*Uukw v. British Columbia* (1987), 16 B.C.L.R. (2d) 145 (C.A.)). As such, the BC Court of Appeal confirmed the registrar's refusal to register a certificate of pending litigation and a caveat arising out of a challenge to a transaction involving fee simple land, on the basis that Aboriginal title is not a registrable interest (see *Skeetchestn Indian Band and Secwepemc Aboriginal Nation v. Registrar of Land Titles, Kamloops*, 2000 BCCA 525). Thus, a prospective buyer cannot determine by a search of the land title records if a given parcel of land is subject to unresolved claims of rights or title by Indigenous people.

To date, with the exception of the parcel of land identified in *Tsilhqot'in*, Aboriginal title to specific land has not been recognized by the courts in British Columbia. Still, there are treaty negotiations completed or underway affecting various parts of British Columbia (discussed later in this section). Aboriginal title is an active subject of negotiation and litigation, and there are locations where it has become common for decisions affecting the land to be made in conjunction with local Indigenous groups, particularly on Haida Gwaii. Also, it is becoming increasingly widely recognized, partly as a result of the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 affirming the application in British Columbia of the *United Nations Declaration on the Rights of Indigenous People*, that uses of the land must involve consultation with and consent of the Nations that claim title to that land.

For the conveyancer, Aboriginal title creates legal uncertainty of a magnitude that is currently difficult to predict. The prudent practitioner will monitor developments in the field and be aware of the potential for questions of title by Indigenous people to arise in any transaction. Lawyers who encounter such title issues in conveyancing transactions are urged to consult specialists in the field.

2. *Indian Act* and Indian Land Registry

Reserve lands are not governed by the provincial Torrens system under the *Land Title Act*. Most transactions regarding interests in reserve lands located in British Columbia are governed by the federal *Indian Act*, R.S.C. 1985, c. I-5, unless the Indigenous group develops its own agreement with the federal government. See §1.04(3) to (5) below regarding some of these arrangements. The rules and procedures for dealing with reserve lands can vary considerably depending on whether the Indigenous group claiming rights or title has entered into an agreement with the federal government regarding the reserve lands. Those Indigenous peoples whose reserve lands *are* governed by the *Indian Act* do not have the power to develop and manage reserve lands.

If the lands are governed by the *Indian Act*, the first thing to determine is whether the land in question is locatee land or Band land.

(a) Locatee Land

"Locatee land" (also called "Certificate of Possession lands" or "CP lands") refers to land within a reserve to which a member of an Indigenous group (the "locatee") has acquired lawful possession pursuant to s. 20 of the *Indian Act*. Evidence of this right of possession is usually contained in a Certificate of Possession issued in the name of the locatee. The holder of such a certificate has rights similar to those of a private owner but with the limitation that the land can only be alienated to another member of the same Indigenous group.

Under s. 58(3) of the *Indian Act*, the Minister of Indigenous Services Canada has the power to lease land for the benefit of the locatee. Although the *Indian Act* does not require it, the federal government has a policy that any proposed lease of locatee land for more than 49 years must be approved by a vote of members of the Indigenous group involved. If the proposed lease is for less than 49 years, a vote by the members is not required but a resolution from the group or Band will be required to confirm that council does not object to the lease.

(b) Band Land

"Band land" refers to land within a reserve that is not subject to the rights of an individual member of the First Nation or Indigenous group. Band land may be leased after it has been designated under s. 38(2) of the *Indian Act*.

Land can be designated through a referendum of the relevant Indigenous group's electors (persons registered on a Band List or membership list who are 18 years of age or older and not otherwise disqualified from voting at Band elections). For the designation to be valid, it must be assented to by a majority of the Indigenous group's electors voting at a referendum held in accordance with the regulations, recommended to the Minister of Indigenous Services by the Band Council, and accepted by the Minister (*Indian Act*, s. 39.1).

In British Columbia, the Minister of Indigenous Services is the primary administrator of all transactions involving designated lands, except for those belonging to First Nations that have specific land management powers (see §1.04(3) below).

Transactions involving interests in reserve lands are managed under the *Indian Act* by the federal government. The Indian Lands Registry System (ILRS) is one tool for registering interests in reserve lands. Currently the ILRS is managed by Indigenous Services Canada and is available to the public on the Indigenous Services Canada website (users set up an account). It provides records relevant to ownership, leases, permits, and other interests that may apply to land.

Unlike the provincial registry, the ILRS is not based on a Torrens system but on a *root of title* system. This means that a person searching entitlements must trace the history of the interest back to the original designation (in the case of designated lands) and to the original grant of the Certificate of Possession (in the case of locatee or CP lands).

It is important to note some key differences in the transactions involving reserve lands. The standard forms and documents used under the *Land Title Act* are not appropriate for transactions involving reserve lands, since the *Land Title Act* does not apply. The Indian Lands Registration Manual on the website of Indigenous Services Canada provides information about documents and procedures for registration in the ILRS. In addition, provincial statutes affecting land (such as the *Real Estate Development Marketing Act*, the *Real Estate Services Act*, the *Strata Property Act*, and the *Builders Lien Act*) have limited to no application to reserve lands. Municipal zoning and construction laws will apply to reserve lands only if they are incorporated by contract or adopted by the Indigenous group (such as a Band Chief and Council) through a bylaw. Municipal property taxes payable on interests held by non-Indians can be collected by municipalities only until the relevant Indigenous group passes and approves a bylaw under s. 83 of the *Indian Act* to tax all interests on reserve lands.

Lawyers should note that the BC Real Estate Association and the Canadian Bar Association (BC Branch) have developed a standard form contract for the purchase and sale of a leasehold interest in reserve lands administered by the federal government, which may be used where an existing lease or sublease is for residential purposes. The form is available to CBABC members through their website at: www.cbabc.org/Home.

3. *Framework Agreement on First Nation Land Management Act*

Some Indigenous groups have powers to develop and manage reserve land pursuant to the *Framework Agreement on First Nation Land Management Act*, S.C. 2022, c. 19, s. 121 (the "*FAFNLMA*").

The *FAFNLMA* came into force in December 2022, replacing the former *First Nations Land Management Act*, S.C. 1999, c. 24 (the "Former Act"). The Former Act ratified and brought into effect the *Framework Agreement on First Nation Land Management* signed on February 12, 1996 by Her Majesty in right of Canada and 13 First Nations, and by other First Nations after that date (the "Framework Agreement"). As noted on the website of the First Nations Land Advisory Board (www.labrc.com/), the repeal and replacement of the Former Act "was initiated by the signatory First Nations of the Framework Agreement to correct inconsistencies in the [Former Act] and provide clear and concise ratifying legislation emphasizing the central importance of the First Nation-driven Framework Agreement on First Nation Land Management." The *FAFNLMA* states that the Framework Agreement continues to have effect and has the force of law, and that the Framework Agreement prevails in the event of any inconsistency between the *FAFNLMA* and the Framework Agreement.

Indigenous groups may enter into the Framework Agreement with the Minister of Crown-Indigenous Relations. In order to opt into the Framework Agreement, an Indigenous group needs to adopt a land code governing dealings with its reserve lands. Codes will cover things such as zoning, granting new interests or licences, environmental assessment, and protection and provision of local services to the land in issue. The *Indian Act* provisions will not apply once those land codes are effective. Consequently, any practitioners acting for clients who wish to have dealings with these lands will need to be familiar with the *FAFNLMA*, the Framework Agreement, and the land code adopted by the particular Indigenous group.

Lawyers should refer to the website of the First Nations Land Advisory Board to determine if particular reserve lands fall under the *FAFNLMA*. These lands will be registered in the First Nation Land Register in Ottawa, which is separate from the Indian Lands Registry System (ILRS). Title to any reserve land involved remains with the Crown.

4. Self-Governing Band-Adopted Registry System

Some Indigenous groups in British Columbia are self-governing. Under the legislation applicable to those Nations, they have powers over some or all of the land that formerly constituted their reserves.

Two self-governing Nations are the shíshálh Nation (under the *shíshálh Nation Self-Government Act*, S.C. 1986, c. 27) and the Westbank First Nation (under the *Westbank First Nation Self-Government Act*, S.C. 2004, c. 17).

(a) shíshálh Nation

Title to the former reserve land has been transferred to the shíshálh Nation in fee simple. The shíshálh Nation is authorized, but not required, to use the provincial land title system for registering dealings with its land. Titles that are not registered under the provincial system will still be registered under the *Indian Act*.

Practitioners should note that both the shíshálh Nation and the shíshálh Nation Government District have powers to regulate the use of shíshálh lands.

(b) Westbank First Nation

Title to the Westbank reserve lands remains with the Crown, but the Westbank First Nation has all the rights and powers of an owner of the land. Transactions dealing with Westbank lands are registered in the Westbank Lands Registry and not the provincial land title system. Under the Westbank registry system, registered interests in land have priority over unregistered interests. Priority between registered interests is based on the time and date of registration.

5. Fee Simple by Treaty[2]

Four treaties have been signed by which Indigenous groups have powers over some or all of the land that formerly constituted their reserves. When Indigenous groups enter into treaties, they are no longer governed by the *Indian Act*. Treaties are self-government arrangements, as distinct from the "Recognition of Rights" (ROR) negotiations between Indigenous people and the Crown that deal with narrower issues such as rights to fish or to harvest timber. Lawyers dealing with Indigenous groups that have executed treaties should refer to the terms of that treaty and any applicable constitution and other governing documents of the Indigenous group.

The Indigenous groups that have signed treaties are the Nisga'a Nation, the Tsawwassen Nation, the five Maa-nulth First Nations and the Tla'amin Nation.

(a) Nisga'a Nation

By a treaty known as the Nisga'a Final Agreement, the Nisga'a Nation has fee simple title in two types of land:

(i) Nisga'a Lands are core lands held by the Nisga'a Nation with no reservations or exceptions. These core lands include four villages and much of the lower Nass River valley. The Nisga'a Lisims Government has jurisdiction over the Nisga'a Lands and no change in their ownership can affect their legal status as Nisga'a Lands.

(ii) Nisga'a Fee Simple Lands ("NFSL") are lands over which the Nisga'a Lisims Government does not have jurisdiction. Both these types of lands would cease to be NFSL if they were sold to a non-Nisga'a village, corporation or citizen. There are two types of NFSL:

- Category A: These are former reserve and adjacent lands held by the Nisga'a Nation in fee simple, including surface and sub-surface water rights but subject to Crown water rights.
- Category B: These are former Crown lands held by the Nisga'a Nation in fee simple, subject to mineral, water and other rights reserved to the Crown.

Under the Nisga'a Final Agreement, former locatees were given Certificates of Possession by the Nisga'a Nation and continue to have the same rights as if they held a Certificate of Possession under the *Indian Act*.

The Nisga'a Final Agreement authorized the Nisga'a Nation to use the provincial land title system to register dealings with its lands, but it has opted to set up its own land title system.

The Nisga'a Lisims Government has enacted new land laws, including the *Nisga'a Landholding Transition Act*, which permits individual Nisga'a citizens to obtain fee simple title to certain residential-zoned parcels of land in Nisga'a villages.

(b) Tsawwassen First Nation

By a treaty known as the Tsawwassen Final Agreement, the Tsawwassen First Nation has fee simple title in two types of land:

(i) "Tsawwassen Lands", are former reserve and Crown lands with no reservations or exceptions and are subject to all pre-existing rights and interests. Under the Tsawwassen Final Agreement, former locatees acquired a Tsawwassen Fee Simple In-

[2] The Land Title and Survey Authority of British Columbia contributed comments regarding the Maa-nulth First Nations in September 2011 and updated this content in December 2016.

terest in their lands and retained all their former rights. The Tsawwassen First Nation is empowered to dispose of any or all of the Tsawwassen Lands without federal or provincial consent. However, the *Land Act* enacted by the Tsawwassen First Nation limits transfers of any Tsawwassen Fee Simple Interests to other Tsawwassen First Nation members or entities.

(ii) "Other Tsawwassen Lands" are Boundary Bay and Fraser River land parcels. Under the Tsawwassen Final Agreement, the Tsawwassen First Nation has fee simple title in these lands subject to all reservations, exceptions and pre-existing interests. Tsawwassen First Nation laws do not normally apply to Other Tsawwassen Lands.

All transactions involving Tsawwassen Lands or Other Tsawwassen Lands must be filed in the provincial land title system.

(c) Maa-nulth First Nations

The Maa-nulth First Nations consist of five nations on the west coast of Vancouver Island.

Unlike the Tsawwassen Final Agreement, the Maa-nulth Final Agreement is a multi-First Nation Final Agreement. As a multi-First Nation Final Agreement, the Maa-nulth Final Agreement sets out some elements that are specific to each First Nation, such as each First Nation having its own constitution, its own government, and its own land base.

Under the Maa-nulth Final Agreement, each Maa-nulth First Nation has fee simple title in lands that are former reserve and former Crown lands, with no reservations or exceptions. Treaty settlement lands were transferred to the Maa-nulth First Nations as of the effective date of the Maa-nulth Final Agreement. Each Maa-nulth First Nation may apply to have its lands registered in the Land Title Office.

Each Maa-nulth First Nation government has law-making authority over its land, although federal and provincial laws will apply concurrently with Maa-nulth First Nation laws to the extent they do not conflict. The Maa-nulth Final Agreement and the laws of each of the individual First Nations contained in that agreement limit transfers of any fee simple interest to other members or entities of the individual nations.

Each Maa-nulth First Nation has also identified parcels of fee-simple land it may acquire after the effective date of the Maa-nulth Final Agreement. The Maa-nulth Final Agreement includes provisions that will allow for these parcels to be declared Maa-nulth First Nation lands if they are purchased within 15 years of the effective date of the Maa-nulth Final Agreement.

(d) Tla'amin Nation

By a treaty effective April 5, 2016 known as the Tla'amin Final Agreement, the Tla'amin Nation has fee simple title to approximately 8,323 hectares of treaty settlement land (known as "Tla'amin Lands"), which includes 1,917 hectares of former Tla'amin reserves and 6,405 hectares of former provincial Crown land. An additional 0.97 hectares known as the "Lund Hotel Parcels" have also become treaty settlement land. The Tla'amin Nation has law-making authority over Tla'amin Lands, although provincial and federal laws continue to apply. The Tla'amin Final Agreement sets out which law prevails if the laws conflict.

The Tla'amin Nation also owns two small parcels of land located on Savary Island and in Powell River, but does not have law-making authority over these parcels. A further 1,212 hectares of Crown land could become Tla'amin Lands if acquired by Tla'amin Nation under the terms of the Tla'amin Final Agreement.

[§1.05] Further Reading

1. Practice Manuals

British Columbia Real Estate Practice Manual. Vancouver: Continuing Legal Education Society of BC (updateable with online access).

British Columbia Strata Property Practice Manual. Vancouver: Continuing Legal Education Society of BC (updateable with online access).

Conveyancing Deskbook. Vancouver: Continuing Legal Education Society of BC (updateable with online access).

Land Title Practice Manual. Vancouver: Continuing Legal Education Society of BC (updateable with online access).

2. Texts

Warner La Forest, Anne. *Anger and Honsberger Law of Real Property*. 3rd edition. Aurora, Ont.: Canada Law Book (updated).

McCarthy Tétrault. *Annotated British Columbia Strata Property Act* (loose-leaf).

Chapter 2

Conveyancing Practice[1]

[§2.01] Role of the Lawyer

To build a conveyancing practice, a lawyer must understand the context of a residential real estate transaction, the parties involved, each party's role and obligations, and the laws that govern them. Building a practice requires developing an inventory of practical solutions and understanding the needs of buyers and sellers, while balancing the lawyer's ethical and legal responsibilities.

The lawyer's essential role in a conveyance is to complete the transaction. This might include fixing any issues left to the lawyer by the real estate agent or by the parties themselves (where the deal is private). In a stable market, where the price of real estate is neither climbing nor falling sharply, it is usually a relatively easy process to complete transactions. In a volatile market, a lawyer's lack of understanding of *what* needs attention and *when* can expose the lawyer to insurance claims and can damage the lawyer's reputation in the real estate community.

Lawyers must keep current with developments in law and practice. The Continuing Legal Education Society of BC (CLEBC) offers helpful resources, such as the *Land Title Practice Manual*. Attending meetings of the Real Property sections of the Canadian Bar Association can be helpful, as is maintaining relationships with real estate agents, municipal planners, appraisers and fellow practitioners. Also, officials in the Land Title Offices are extremely helpful in assisting practitioners.

Effective and economic conveyancing practice depends upon efficient file management. The lawyer must be well organized and have a system to anticipate the timing of each step and to document completion of the steps. A checklist will assist. Refer to the CLEBC's practice manuals and the Law Society of British Columbia's *Practice Checklists Manual* (www.lawsociety.bc.ca/support-and-resources-for-lawyers/practice-checklists/).

1. Buyer's Lawyer

The role of the buyer's lawyer is to deliver what the client is expecting. Generally this means delivering title clear of the seller's mortgage or financial encumbrances, and free of any avoidable negative charges (such as liens or private easements).

The buyer's lawyer does the heavy lifting in a real estate transaction. That might include drafting or reviewing the purchase agreement, although often in sales of used residential property the agreement is delivered to the lawyer already completed by the real estate agent using the standard Contract of Purchase and Sale (see §3.03). The buyer's lawyer will also review the title, prepare most of the transaction documents, and coordinate signatures, registration and money exchanges.

The buyer's lawyer must be alert to many practical considerations in order to carry out these responsibilities in a timely manner. The lawyer must know how long it takes for money to move from the client to the lawyer. This depends on where funds originate, how they are sent, and what form they take. For example, certified cheques from foreign jurisdictions can take more than a month to clear in the lawyer's trust account. Locally drawn cheques deposited to a trust account can also take a week or two to clear, and require time-consuming follow-up with banks to confirm clearance. Certain banks may impose waiting periods to clear amounts over certain thresholds. Wire transfers may present a solution to most problems with moving funds from the lender or the buyer at closing, but the cut-off times for such transfers should be carefully noted, as well as time differences between offices in different time zones. Where there is a very short timeline for closing, it is critical for the lawyer to understand how funds will be transmitted and to anticipate timing issues.

Early on, the buyer's lawyer must evaluate all the timing factors. If the existing transaction timeline does not look feasible, the lawyer should ask for an extension of the completion date (or give an early warning that an extension might be needed), while avoiding anticipatory breach of the contract. The buyer's lawyer should create a chronology of "critical dates" at the outset to assist in managing the timeline, particularly if the lawyer did not prepare the purchase agreement. It is easier to obtain an extension from a seller if the request is made early, before the seller has made other commitments that depend on timely completion.

The buyer's lawyer must also prepare any documents required under the *Land Owner Transparency Act*, S.B.C. 2019, c. 23, which imposes disclosure requirements on buyers and their conveyancers (see §1.02(4)).

[1] Revised by **Scott Anderson** and **Natasha Ford**, Lawson Lundell LLP, Vancouver, in November 2023. Reviewed regularly by the Land Title and Survey Authority for content relating to the BC land title and survey system, most recently in October 2023. Previously revised by Edward L. Wilson and Jessica H. Chung (2022); Gregory Lee (2017); Randy Klarenbach and Aneez Devji (2012); Ian Davis (2010); and Joel Camley (2005, 2006 and 2008). Reviewed annually by Lawson Lundell, Real Estate Department until June 2004.

On receipt of registrable transfers, the buyer's lawyer must provide the fundamental undertaking to the seller's lawyer to not file the transfer until the buyer's lawyer has sufficient funds in trust to complete the transaction. Where the buyer has a new mortgage to fund the purchase, this undertaking is modified: the buyer's lawyer must hold funds in trust that, when combined with the amount to be advanced by the mortgage lender, are sufficient to complete the transaction, and the buyer's lawyer must know of no reason why the new mortgage would not be registered and funds disbursed.

Most transactions are closed pursuant to the Canadian Bar Association's Standard Undertakings (the "CBA Standard Undertakings" set out in Appendix 7). This is because most residential real estate sales use the British Columbia Real Estate Association and Canadian Bar Association (Real Property Section) standard form Contract of Purchase and Sale, which requires that the parties close pursuant to the CBA Standard Undertakings. This Contract is discussed in the next chapter.

2. Seller's Lawyer

The primary role of the seller's lawyer is to vet the documentation produced by the buyer's lawyer and pay out the seller's mortgage or other financial encumbrances prior to paying net sale proceeds to the seller. The letter from the buyer's lawyer enclosing the documents will generally identify what encumbrances the buyer expects the seller to clear from title, but both sides should obtain a current copy of the title to verify. The seller's lawyer must find out the amounts due and confirm that the proceeds of sale will be enough to clear title, especially if there are holdbacks for builders liens or because the seller is a non-resident.

The seller's lawyer provides the fundamental undertaking to clear title of all encumbrances not permitted by the purchase agreement. In practice this means not paying the seller without having paid out the financial encumbrances first. Most financial institutions are obligated to provide a registrable discharge to remove its financial encumbrance from title in due course after payment. Keep in mind that, in exceptional cases, such as where an encumbrance is a privately held mortgage, the seller's lawyer might need to obtain the registrable discharges and have them in hand before allowing the transaction to complete. Complications can arise when the encumbrance is an old private mortgage, long paid off, but the mortgage lender has died or otherwise disappeared. If a private mortgage is registered on title, the seller's lawyer should consider the steps and the time involved in the discharge process as early as possible.

[§2.02] Role of Non-lawyers

Lawyers who have a conveyancing practice often rely on non-lawyers, including paralegals and legal assistants, to assist with some stages or parts of a transaction. As well, lawyers are often consulted by clients who have already been working with a real estate agent (sometimes called "licensees") who provide real estate services under the *Real Estate Services Act*, S.B.C. 2004, c. 42 and are licensed by the BC Financial Services Authority. Despite the number of people involved, there should be one person in charge of the conveyance: the lawyer who has conduct of the transaction. The lawyer must always keep sight of the client's interests and the lawyer's ethical duties when taking instructions or delegating tasks.

Rule 6.1-1 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*") contains the guiding principle as to the division of responsibility between the lawyer, the legal assistant, and other staff:

> **Direct supervision required**
>
> **6.1-1** A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.

This section of the *BC Code* sets limits on the roles of non-lawyer staff in a law firm. For example, under rule 6.1-3, a non-lawyer may not give legal advice (rule 6.1-3(b)) or act finally and without reference to the lawyer in matters involving professional legal judgment (rule 6.1-3(d)). In real estate transactions, examples of tasks a legal assistant or paralegal may take on include attending to routine matters and drafting correspondence and documents, provided the lawyer advises the client and takes instructions on all substantive matters, and meets other criteria under section 6.1 of the *BC Code*.

Paralegals, as non-lawyers with legal training, can perform an expanded range of tasks under the supervision of a lawyer. A paralegal who is a "designated paralegal" may be permitted to give legal advice if the paralegal has the necessary skill and experience (rule 6.1-3.3).

Certain tasks cannot under any circumstances be delegated. For instance, a lawyer must sign any letter imposing an undertaking, and must not permit anyone else to use the lawyer's electronic Juricert password to sign documents for filing in the Land Title Office. The Law Society has censured lawyers for failure to comply with these rules.

See the *Practice Material: Professionalism: Practice Management*, Chapter 1, §1.03, for more on lawyers' responsibilities and support systems.

[§2.03] Receiving Instructions From the Buyer

Instructions to a lawyer come in a variety of ways and from different parties to a transaction:

1. directly from a buyer, before or after the contract is firm (i.e. subjects have been removed);
2. from a bank or mortgage broker working on the transaction, before or after the contract is firm;
3. directly from the seller, before or after the contract is firm; or
4. from one of the real estate agents, after the transaction is firm.

You must comply with the client identification and verification rules under Law Society Rules 3-98 to 3-110 when retained by a client to provide legal services. These rules and other important anti-money laundering measures are discussed in detail in *Practice Material: Professionalism: Practice Management*, Chapter 7.

In checking the buyer's identity, watch for complications arising from the federal law prohibiting foreign buyers from purchasing residential property in Canada (effective January 1, 2023 for a period of four years). Under the *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, S.C. 2022, c. 10, s. 235, property that is sold to a non-Canadian in contravention of this act may be ordered re-sold and the parties involved in the transaction could be fined up to $10,000. Non-Canadians are persons who are neither Canadian citizens nor status Indians. If a person's spouse is a Canadian citizen, that person would be exempt, as are certain persons who fall under the *Immigration and Refugee Protection Act*. The regulations provide for various exemptions, and should be reviewed carefully in transactions where the buyer is a non-Canadian.

[§2.04] Conflict of Interest

Frequently, a real estate lawyer is asked to act for more than one party, particularly in residential transactions. The parties will perceive this as being in their interest, with a view to minimizing costs, and often have no idea as to the extent of the lawyer's function in a conveyancing transaction or how any conflict of interest could arise. The lawyer's function is often seen as merely filling in blanks in standard form documents. Parties often are not fully aware of the extent to which legal rights and obligations are affected by a transaction. If you are asked to act for more than one party in a real estate transaction, even if it appears straightforward, you must carefully consider the potential for a real conflict of interest to emerge.

The buyer and seller might also happen to contact different lawyers in the same office. Law firms that do a lot of conveyancing need systems to keep track of who has contacted them and when, to avoid conflicts of interest.

As the contacted lawyer, first clarify who you will represent. It is recommended that lawyers act only for either the buyer or seller, not both. Although permitted in certain limited circumstances, if any dispute arises between the buyer and seller on any issue, the lawyer who started out acting for both will end up acting for neither because the lawyer must refer both out. Such an event is extremely inconvenient for all involved and will not be good for the lawyer's practice.

In some circumstances, a lawyer might act for the buyer and have the unrepresented seller acknowledge two things:

1. they have been advised to obtain independent counsel, and
2. in taking the seller's signatures and clearing title, the lawyer is acting solely for the buyer in doing these things to facilitate the transaction.

Classic circumstances in which this practice may arise are short-fuse deals, deals in rural areas where there are no reasonable alternatives, and where both buyer and seller have long-standing relationships with the lawyer and do not want to go to outside counsel.

You must in any event strictly adhere to the rules in the *BC Code*. Be aware of the rules in section 3.4 and Appendix C of the *BC Code* regarding acting for more than one party in any matter where there is a conflict of interest between any of the parties. Under rule 3.4-1, "A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code." Appendix C sets out the circumstances in which a lawyer is permitted to act for more than one party with different interests in a real property transaction (see commentary [0.1] to 3.4-1).

Section 2 of Appendix C sets out the guidelines with respect to acting for parties with different interests in a real property transaction. A lawyer must not act for parties with different interests in a real property transaction unless the transaction falls within the exceptions set out in the section:

> 2. A lawyer must not act for more than one party with different interests in a real property transaction unless:
>
> (a) because of the remoteness of the location of the lawyer's practice, it is impracticable for the parties to be separately represented,
>
> (b) the transaction is a simple conveyance, or
>
> (c) paragraph 9 applies.

Paragraph 9 concerns the situation where an unrepresented party is only asking the lawyer to execute documents removing an encumbrance. The lawyer has advised that party of the limited scope of the lawyer's ser-

vices, and that the lawyer could not act further for that party if a conflict arose between the parties:

> 9. If one party to the real property transaction is otherwise unrepresented but wants the lawyer representing another party to the transaction to act for him or her to remove existing encumbrances, the lawyer may act for that party for those purposes only and may allow that party to execute the necessary documents in the lawyer's presence as witness if the lawyer advises the party in writing that:
>
> (a) the lawyer's engagement is of a limited nature, and
>
> (b) if a conflict arises between the parties, the lawyer will be unable to continue to act for that party.

Section 4 of Appendix C sets out factors in determining whether a transaction is a "simple conveyance." Commentary [1] to s. 4 gives examples of transactions that **may** be treated as simple conveyances:

> [1] The following are examples of transactions that may be treated as simple conveyances when this commentary does not apply to exclude them:
>
> (a) the payment of all cash for clear title,
>
> (b) the discharge of one or more encumbrances and payment of the balance, if any, in cash,
>
> (c) the assumption of one or more existing mortgages or agreements for sale and the payment of the balance, if any, in cash,
>
> (d) a mortgage that does not contain any commercial element, given by a mortgagor to an institutional lender to be registered against the mortgagor's residence, including a mortgage that is
>
> (i) a revolving mortgage that can be advanced and re-advanced,
>
> (ii) to be advanced in stages, or
>
> (iii) given to secure a line of credit,
>
> (e) transfer of a leasehold interest if there are no changes to the terms of the lease,
>
> (f) the sale by a developer of a completed residential building lot at any time after the statutory time period for filing claims of builders' liens has expired, or
>
> (g) any combination of the foregoing.

Commentary [2] to s. 4 of Appendix C gives examples of transactions that **must not** be treated as simple conveyances:

> [2] The following are examples of transactions that must not be treated as simple conveyances:
>
> (h) a transaction in which there is any commercial element, such as
>
> (i) a conveyance included in a sale and purchase of a business,
>
> (ii) a transaction involving a building containing more than three residential units, or
>
> (iii) a transaction for a commercial purpose involving either a revolving mortgage that can be advanced and re-advanced or a mortgage given to secure a line of credit,
>
> (i) a lease or transfer of a lease, other than as set out in subparagraph (e),
>
> (j) a transaction in which there is a mortgage back from the purchaser to the vendor,
>
> (k) an agreement for sale,
>
> (l) a transaction in which the lawyer's client is a vendor who:
>
> (i) advertises or holds out directly or by inference through representations of sales staff or otherwise as an inducement to purchasers that a registered transfer or other legal services are included in the purchase price of the property,
>
> (ii) is or was the developer of property being sold, unless subparagraph (f) applies, or
>
> (m) a conveyance of residential property with substantial improvements under construction at the time the agreement for purchase and sale was signed, unless the lawyer's clients are a purchaser and a mortgagee and construction is completed before funds are advanced under the mortgage, or
>
> (n) the drafting of a contract of purchase and sale.

Commentary [3] to s. 4 of Appendix C states:

> [3] A transaction is not considered to have a commercial element merely because one of the parties is a corporation.

A number of cases have imposed liability on lawyers who acted for more than one party in a real estate transaction. There are also discipline cases published in the Law Society's *Discipline Digest*. See, for example, the December 1992, No. 10 case, where the lawyer professionally misconducted himself by representing parties to real estate transactions in breach of the *Professional Conduct Handbook* (replaced by the *BC Code* on January 1, 2013). The hearing panel found that the lawyer demonstrated a disturbing attitude to real estate practice, that he was unable to recognize conflicts of interest, and that he did not see himself as the protector of anyone's interests but simply as the mechanical facilitator of transactions.

Most often you will be asked to act for a buyer and a lending institution in a residential conveyance. Sample conflict letters to the buyer and the lender appear at the end of this chapter as Appendices 1 and 2.

There is further discussion of conflicts of interest in *Practice Material: Professionalism: Ethics*.

Chapter 3

Purchase Agreements[1]

[§3.01] The Purchase Contract

1. Nature and Origin of the Purchase Contract

The purchase contract is the key document in a real estate transaction. It governs the rights and obligations of the parties with respect to the transaction. Also, it is an *executory contract*: it is an exchange of promises to do something in the future, but as soon as those promises are made, in writing, they bind the promisors. Unfortunately, in most residential transactions, the parties sign a purchase contract (often prepared by a real estate agent) before consulting a lawyer.

Often a standard purchase contract is used for residential real estate transactions in British Columbia: the Contract of Purchase and Sale published jointly by the Canadian Bar Association (BC Branch) and the British Columbia Real Estate Association. All references in this chapter to the "Contract of Purchase and Sale" are references to that standard purchase contract. A sample form of the Contract of Purchase and Sale is at Appendix 3.

The basic promises of a real estate purchase contract include the seller's promise to the buyer that, on a certain date in the future (typically called the "completion date" or the "closing date"), the seller will deliver to the buyer title to the subject property "free and clear" of all encumbrances, except those agreed upon in the purchase contract. The seller may also agree to do certain things by the completion date, such as make improvements to the property or remove a mortgage on title to the property.

In exchange, the buyer promises to pay to the seller a sum of money (often called the "purchase price") on the completion date. The buyer may also promise to assume some or all of the seller's existing obligations in respect of the property. For example, the buyer may assume the seller's mortgage, or promise to pay the purchase price over a period of time before taking title (usually by registering a "right to purchase" that is commonly referred to as an "agreement for sale" against title to the land). For more on this topic, refer to Chapter 7.

The seller's obligation to deliver clear title and the buyer's obligation to pay the purchase price are mutually dependent covenants (*Campbell v. Frolek*, 1995 CanLII 161 (B.C.S.C.), affirmed 1997 CanLII 3761 (B.C.C.A.)).

Frequently, sellers or buyers face practical obstacles to fulfilling their respective promises. For example, a seller might be unable to provide clear title on closing because there is a mortgage on title and the seller needs the sale proceeds from the buyer in order to pay out that mortgage. Alternatively, a buyer who is relying on mortgage proceeds to pay part of the purchase price cannot access those mortgage proceeds until the buyer is listed on title as the owner.

To overcome these difficulties, clauses 13 and 14 of the Contract of Purchase and Sale incorporate the requirement that when a buyer is financing the purchase with the proceeds from a new mortgage charging the property being purchased, or a seller wants to use the sale proceeds to clear title, the parties must complete the transaction on the basis of the Canadian Bar Association (BC Branch) (Real Property Section) Standard Undertakings (the "CBA Standard Undertakings").

The CBA Standard Undertakings incorporate into the Contract of Purchase and Sale arrangements to obtain and pay off mortgages, which are now handled by standardized undertaking letters. In this way, the contract establishes a protocol for the parties to follow in completing the transaction. However, if a different contract is used and that purchase agreement is silent on the use of undertakings, the courts have been clear that the practice of giving undertakings is only a practice and cannot be imposed by one party upon another. See §3.03(11) for more on the CBA Standard Undertakings, and see §5.19.

2. Initial Review of the Purchase Contract

Some lawyers rely too heavily on their paralegals or conveyancers to manage the process. Ultimately, the lawyer is responsible for ensuring the conveyance is properly managed.

[1] Revised by **Scott Anderson** and **Natasha Ford**, Lawson Lundell LLP, Vancouver, in November 2023. Edited in 2024 by PLTC for changes to the standard form Contract of Purchase and Sale. Reviewed regularly by the Land Title and Survey Authority for content relating to the BC land title and survey system, most recently in October 2023. Previously revised by Edward L. Wilson and Jessica H. Chung (2022); Gregory Lee (2017); Randy Klarenbach and Aneez Devji (2012); Ian Davis (2010); and Joel Camley (2005, 2006 and 2008). Reviewed annually until June 2004 by Lawson Lundell, Real Estate Department, Vancouver.

The first obligation of a lawyer is to become familiar with the terms of the agreement between the parties. When the agreement is in writing, this can only be done by studying the relevant documents (*Kwok v. Griffiths*, 1996 CanLII 2768 (B.C.S.C.)).

When the lawyer has completed the initial review of the purchase contract, the lawyer needs to confer with the client to ensure that the written contract reflects the client's understanding of the transaction. Consider your client's knowledge level when advising. If your client is a first-time buyer, you should explain things in detail that you might not need to go into if your client is experienced in real estate.

At a minimum, during this review a lawyer should:

- confirm whether the purchase contract is binding and whether it contains any errors;
- confirm that any representations or other promises upon which the buyer is relying are in the purchase contract or in a collateral agreement;
- discuss the subject clauses with the client and confirm the timing of their removal, particularly in relation to any financing the client may be seeking; and
- advise the client as to relevant dates and the importance of observing the strict timetable imposed upon the parties, especially when the purchase contract contains a "time is of the essence" clause.

[§3.02] Is the Purchase Contract Binding?

1. Offer and Acceptance

An offer is made when a potential buyer presents a purchase contract to a seller. If the seller signs the purchase contract without alteration, and communicates acceptance to the buyer in the manner and by the time stipulated, the offer is accepted.

Any alteration to the purchase contract before acceptance constitutes a counteroffer that requires acceptance, either within the original time limit for acceptance or within a newly specified time for acceptance of the counteroffer. Making a counteroffer before accepting any prior offer automatically terminates the prior unaccepted offer.

If an offer or counteroffer is not accepted within the time set for acceptance, no binding contract is formed. Consequently, in cases where the parties have exchanged several offers and counteroffers, it may not be possible for the lawyer to determine whether a binding contract has been formed in law simply by examining the purchase contract and without reviewing the addendums.

The answer to whether there has been proper acceptance of the purchase contract must be found in the wording of the purchase contract. Most purchase contracts, including the Contract of Purchase and Sale, provide that there will be a binding contract of purchase and sale upon acceptance of the offer or counteroffer in writing, and upon notifying the other party of such acceptance.

2. Amendments

It may be necessary to amend a purchase contract after it has been signed. If the parties agree to an amendment, the amendment to the contract should be in writing and signed by all the parties.

Sometimes one party wants to amend the purchase contract. For instance, a seller might have agreed to complete the sale of their property then use the sale proceeds to purchase a second property on the same day, and has discovered a problem with the timing. Or a buyer might be concerned about receiving the proceeds in time, and want to extend the completion date. While a change to a purchase contract might only directly benefit one party, the opposite party is often willing to cooperate, especially if the transaction has been friendly up to that time. There may also be leverage if the opposite party needs to close at all costs. Often, a client's real estate agent can help amend the contract.

Note that a request by one party to clarify essential terms or to rectify discrepancies in the purchase contract may cause the transaction to collapse. Accordingly, a lawyer should consult with the client before suggesting amendments to a purchase contract. Also, when a lawyer communicates a client's request for an amendment, the lawyer should be careful not to indicate that the client is unwilling to fulfill their obligations under the existing contract, which might be construed as an anticipatory breach.

Depending on the circumstances, rather than amending the purchase contract, it may be more appropriate to allow the transaction to complete without alerting the other party to any defects in the contract. In such a situation, the lawyer would advise the client of the risk but take no steps to amend the purchase contract.

If one party cannot complete unless the contract is amended, great care must be taken to avoid breaching the contract in advance. In such a case, the lawyer for the party seeking the amendment should consider whether the other party has any contractual difficulties on their part, and clear instructions must be obtained before attempting an amendment.

3. Certainty on Essential Terms

(a) Minimum Requirements—*Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 59

A purchase agreement must be certain as to its essential terms, otherwise it will not be enforceable.

As required under the *Law and Equity Act*, s. 59(3), a contract respecting land or disposition of land is only enforceable if:

- the contract is in writing, contains a reasonable indication of the subject matter, and is signed by the party against whom it is sought to be enforced;
- there has been partial performance of the contract; or
- the party seeking to enforce the contract has reasonably relied on the contract, such that non-enforcement would create an inequitable result.

When interpreting the *Statute of Frauds* (the predecessor of the *Law and Equity Act*), courts have held that the written evidence can be minimal and can be in the form of an exchange of letters. At minimum, the written information must include the parties, property and price ("the three Ps"). While the majority of residential purchase agreements in British Columbia are drawn using the Contract of Purchase and Sale, no particular form is required.

A written agreement should be used for all transactions, to avoid the risks of asking a court to enforce an oral agreement.

(b) Conditions Precedent/Subject Removal

It is common for purchase agreements to contain subject clauses that are, in fact, conditions precedent, normally for the benefit of the buyer, and that must either be fulfilled or waived before the buyer is bound to complete the contract. The fulfillment or waiver of the condition precedents, or subject clauses, is normally referred to as "subject removal." A common example of a condition precedent is: "the Buyer's obligation to complete the purchase of the Property is subject to the Buyer being satisfied with the results of a physical inspection of the Property on or before [*month, day, year*]."

Section 54 of the *Law and Equity Act* allows one party to unilaterally waive the performance of a condition precedent where:

- the condition was included for that party's benefit;
- the contract can be completed without fulfillment of the condition; and
- the waiver is made before the time stipulated for fulfilling the condition, or within a reasonable time.

As a result of s. 54, when a subject or condition is for the benefit of a party to the purchase agreement, that party can waive or remove the subject within the specified time without requiring the other party to agree to the subject removal or waiver.

Clause 3 of the Contract of Purchase and Sale reads (at the bottom of the page):

> Each condition, if so indicated is for the sole benefit of the party indicated. Unless each condition is waived or declared fulfilled by written notice given by the benefiting party to the other party on or before the date specified for each condition, this Contract will be terminated thereupon and the Deposit returnable in accordance with the *Real Estate Services Act.*

This clause requires the benefiting party to perform the positive act of giving written notice in order for the contract to survive beyond the condition or subject removal date. If no written notice is given—that is, if there is silence on the condition or subject removal date—according to clause 3 of the Contract of Purchase and Sale, the contract is terminated, the buyer is not bound to complete, and the deposit is returnable in accordance with the *Real Estate Services Act,* S.B.C. 2004, c. 42. However, it is important to review the provisions of *each* purchase agreement, since not all agreements require that the benefiting party perform the positive action of removing or waiving the condition precedent.

When a lawyer receives a purchase agreement containing a subject clause, before taking any steps on the conveyance, the lawyer should be satisfied that each subject clause that has come due has been fulfilled or waived. In many residential real estate transactions, the lawyer will not see the contract until after the conditions have been fulfilled or waived. Pursuant to clause 3 of the Contract of Purchase and Sale, the removal of subject clauses must be in writing, signed by the benefiting party. Ideally (but not *necessarily*) the party receiving the notice should sign it as well, to indicate that the receiving party acknowledges that the subject clause has been removed.

When a real estate agent is involved, it is common for a subject removal to take the form of an amendment, even though it is not an *amendment* but a notice. During the subject re-

moval phase, the party having conditions in its favour will often request that certain amendments be made to the purchase contract before it will waive or declare its conditions satisfied. Thus, the subject removal notice is also commonly included as a part of a separate purchase contract amendment.

Any work that a lawyer does on a file before the subject removal may be unnecessary if the buyer backs out. The difficulty for the lawyer arises when the subject removal date is very close to the completion date. In this situation, the lawyer should discuss the issue with the client and ask the client to weigh the cost of proceeding against the risk of waiting.

When lawyers are involved prior to the removal of subject clauses, they sometimes have to deal with a client who does not want to remove a subject condition, but for a reason unrelated to the substance of the subject clause. For example, the clause might say the purchase is subject to the buyer obtaining financing, but the buyer has found a better property to buy and does not want to complete. The buyer may have made no efforts to comply with the financing clause, or may even have secured other funds. The buyer in such a situation cannot rely on the uncertainty of the subject clause and refuse to proceed for reasons that are unrelated to the subject matter of the subject clause. But, as a practical matter, the buyer does not need to give a reason for not removing a subject clause. This leaves the suspicious seller in the position of accepting the situation and trying to find another buyer, or starting an action to take advantage of the discovery process to learn the facts about why the buyer really refused to complete. Most sellers will avoid litigation without hard facts to support a claim. However, buyers often inadvertently provide evidence of failing to make efforts to remove subjects by buying another property right after.

Because of the risks identified above, lawyers acting for buyers often want to word subject clauses in favour of a buyer as broadly as possible, giving the buyer as much discretion as possible. Lawyers for sellers will want to seek the converse. The practice of writing subject clauses subjectively or vaguely has, however, invited a host of problems. These issues are canvassed in the following case law.

(i) Removing Subject Clauses

In *Sky Ranches Ltd. v. Nelson*, 1980 CanLII 477 (B.C.C.A.), the clause read "subject to your obtaining financing, provided that this subject clause shall be removed on November 30, 1975." The agreement was silent as to whether notice was required that financing had not been arranged prior to the subject clause removal date. Mr. Justice Hutcheon said:

> In my view no notice was necessary. The interpretation which I put on the clause is that unless the buyer gave notice before November 30th that he was unable to arrange financing, the clause was removed from the agreement and the buyer was bound to complete.

McNabb v. Smith, 1981 CanLII 771 (B.C.S.C.), affirmed 1982 CanLII 645 (B.C.C.A.), was to the same effect where the contract had slightly different wording: "[s]ubject to buyer arranging a first mortgage . . . by September 22nd, 1980." Mr. Justice Bouck said:

> Unless Mrs. McNabb gave notice to the Smiths by September 22, 1980, that she was unable to arrange financing, the clause was no longer a means for her to escape the bargain, and she was bound to complete.

However, subsequent decisions of the BC Supreme Court have not followed *McNabb* and have distinguished *Sky Ranches* based on the wording of the subject clause in that case. BC courts have held in *Sun-Kahn Investments Ltd. v. Dalton*, 1982 CanLII 526 (B.C.S.C.) and *First Canadian Land Corporation Ltd. v. Rosinante Holdings Ltd. and Fane*, 1985 CanLII 431 (B.C.C.A.) that the buyer's silence did not constitute a waiver of the condition precedent. *First Canadian* was applied in *G.J.V. Investments Ltd. v. Katz*, 1993 CanLII 2450 (B.C.S.C.), but distinguished in *Mark 7 Development Ltd. v. Peace Holdings Ltd.*, 1991 CanLII 604 (B.C.S.C.) and *Peterson v. 446690 B.C. Ltd.*, 2016 BCSC 158.

This issue is not settled. Lawyers should consider the case law when confronted with the problem of an agreement that creates ambiguity about what constitutes waiver or satisfaction of a subject clause.

(ii) Uncertain Subject Clauses

In *Chan v. Hayward* (1983), 44 B.C.L.R. 251 (S.C.), the court considered a clause that the "buyer obtain suitable financing" and struck it down because the clause was so vague that the court could not hold that a bargain had been struck. This decision was followed in *Pietrobon v. McIntyre*, 1987

CanLII 2612 (B.C.S.C.), where the subject clause read "this offer subject to the buyers obtaining satisfactory personal financing."

The Court of Appeal took a different approach where the buyer was unsuccessful in suing for the return of a deposit based on an unfulfilled subject clause stipulating that the buyer was to obtain "satisfactory financing" (*Griffin v. Martens*, 1988 CanLII 2852 (B.C.C.A.)). The court held that the contract was not void for uncertainty and that the buyer must use reasonable efforts to fulfill a subject clause. Although the case did not expressly overrule the *Chan* and *Pietrobon* cases, the court did say, "as long as an agreement is not being construed by the court to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves" (*Salama Enterprises (1988) Inc. v. Grewal*, 1992 CanLII 4035 (B.C.C.A.)). See also *Flack v. Sutherland*, 1995 CanLII 560 (B.C.C.A.), where the court found that "subject to satisfactory financing" means "satisfactory to a reasonable person with all the subjective but reasonable standards of the particular buyer," and *Empress Towers Ltd. v. Bank of Nova Scotia*, 1990 CanLII 2207 (B.C.C.A.).

Finally, in *Head v. Scott-Bathgate Ltd*., 1994 CanLII 1817 (B.C.C.A.), the plaintiff buyer signed an interim agreement "subject to the buyer satisfying himself that a parking area will likely be allowed by the City in the basement area of the building." The condition was not removed, the seller refused to return the deposit, and the buyer sued to recover the deposit.

The Court of Appeal in *Head* held that the condition was not void for uncertainty, referring to the well-established principle that if an agreement is not being construed to the surprise of the parties, or at least to the surprise of one of them, the court should try to give effect to the agreement that the parties have reached, even if they have phrased that agreement incompletely or imprecisely. Moreover, the court implied a term that the construction of the parking must be reasonably economically feasible in the circumstances, and a term that the amount of parking must be appropriate for the proposed development.

(iii) Subjective Subject Clauses

A subject clause that allows the benefiting party the opportunity to "indulge a whim, fancy, like or dislike in deciding whether or not to complete the transaction" is subjective and will prevent a binding contract from forming until the conditions are waived (V. DiCastri, *The Law of Vendor and Purchaser*, 3d ed., Vol. 1 at p. 190).

If the purchase agreement contains a purely subjective clause, such as "subject to the president's approval," the subject clause imposes no obligation on the buyer until the president gives approval (*Murray McDermid Holdings Ltd. v. Thater*, 1982 CanLII 686 (B.C.S.C.)). The effect of such a subjective clause is to create a bare offer to purchase on the part of the buyer, the final acceptance of which depends upon the removal of the clause by the buyer. If such a wholly subjective clause is necessary, it should really be drafted as an option to purchase exercisable by the buyer, not a purchase agreement with a subject clause. Separate consideration would be required for such an option.

In practice, some buyers include in the subject clause wording to the effect that the clause creates an option for which the buyer has provided *separate and sufficient consideration*, the receipt and sufficiency of which is acknowledged by the seller.

In *Kitsilano Enterprises Ltd. v. G & A Developments Ltd.* (1990), 48 B.C.L.R. (2d) 70 (S.C.), the Supreme Court held that a subject clause relating to the buyer's "review of all leases, etc., to its sole satisfaction" and other rather vague subject clauses were not binding on the seller, and that the language of the clauses required only that the buyer act honestly. *Kitsilano* was followed by *Cox v. Alley* (1991), 17 R.P.R. (2d) 283 (B.C.S.C.), where, again, the court found that the buyer had acted honestly. See also *Mark 7 v. Peace Holdings*, 1991 CanLII 252 (B.C.C.A.), where a clause allowing the buyer to be "arbitrary in his acceptance" in his review of leases created only an offer instead of a binding agreement.

Although a subjective subject clause may prevent an agreement from coming into effect, other cases show the courts attempting to give effect to the obvious intentions of the parties and find an agreement. See e.g. *Tau Holdings Ltd. v. Alderbridge Devel-*

opment Corporation (1991), 60 B.C.L.R. (2d) 161 (C.A.), where completion was subject to the buyer obtaining financing and approving engineering and other reports. The Court of Appeal held that the clauses required the buyer to consider the reports, not reject them arbitrarily, and to seek and not unreasonably reject financing.

This area of the law is not settled. The wording of each subject clause must be scrutinized carefully to determine whether it has the effect of rendering the agreement void or unenforceable, or in some way affects what appears to be an attempt by the parties to enter into a binding contract.

(c) Cooling Off Period

In the past few years, before the real estate market slowed down in 2022, a number of potential buyers of residential properties were making subject-free offers in order to "win" a bidding war for a particular property.

The Province adopted amendments to the *Property Law Act*, R.S.B.C. 1996, c. 377, in April 2022 to establish a new Homebuyer Protection Period in BC. These amendments provide buyers of residential real estate with a mandatory "cooling-off period," giving them more time to consider their offers, ensure financing, and conduct due diligence on the property (including obtaining a home inspection). In July 2022 the Government of British Columbia announced the *Home Buyer Rescission Period Regulation* (the "Rescission Regulation"), which sets out further details regarding the cooling-off period. The Homebuyer Protection Period, amending the *Property Law Act* by adding s. 42, came into effect on January 1, 2023.

While buyers of properties in BC have always been able to make their offers subject to conditions (for example, making an offer conditional upon the buyer obtaining satisfactory financing or being satisfied with the results of a home inspection), the concern is that homebuyers are not doing so for fear that their offers will not be accepted in a competitive market.

The Homebuyer Protection Period gives homebuyers a statutory right to rescind their offer within three clear business days after the offer has been accepted by the seller. This right is referred to within the Contract of Purchase and Sale as the "Rescission Right." The Homebuyer Protection Period applies to buyers of "residential real property," which is defined in the Rescission Regulation (s. 2) as a detached or semi-detached house, a townhouse, an apartment in a duplex or a multi-unit dwelling, a residential strata lot, a manufactured home that is affixed to land, or a cooperative interest as defined in the *Real Estate Development Marketing Act* ("*REDMA*"). Other properties regulated by *REDMA*, such as presales for strata property, are already subject to a seven-day cooling-off period once the offer is accepted (*REDMA*, s. 21(2)).

Notably, BC is currently the only province in Canada to implement a cooling-off period for sales of used properties.

The Rescission Regulation contains exemptions to the Homebuyer Protection Period. The cooling-off period does not apply to residential real property that is located on leased land, that is sold at auction, or that is sold under a court order. In addition, the protection period does not apply to a leasehold interest.

To prevent buyers from making multiple bids on various properties and then simply rescinding all of them, the buyer who rescinds during the cooling-off period must pay the seller a penalty of 0.25% of the purchase price (Rescission Regulation, s. 6). For example, on a property purchased for $1,000,000, that penalty would amount to $2,500.

A homebuyer cannot waive the Homebuyer Protection Period (Rescission Regulation, s. 7). Also, the seller is not required to allow a home inspector or an appraiser to access the property during the cooling off period, unless the parties add a term to the contract to that effect.

(d) Additional Covenants, Representations or Warranties

In addition to subject clauses, many contracts contain commitments for the seller to perform repairs or make changes to the property prior to completion or within a period of time following completion. These commitments will typically appear in addendums to the Contract of Purchase and Sale. They are often poorly drafted.

Where the seller fails to perform these commitments, the buyer cannot refuse to complete unless the failure constitutes a "fundamental breach" of the contract. The buyer's remedy is to complete and sue for damages or abatement of the purchase price, unless the contract explicitly provides otherwise. The buyer is not entitled to demand a holdback pending the seller's performance, where it was not agreed to in the contract. The buyer also does not have a right of inspection before completion to check if promised work has been done, unless it is agreed to in the contract.

If consulted early enough, the buyer's lawyer should advise on the wording of such a commitments clause. Failing that, the buyer's lawyer should discuss with their client the possibility of trying to amend the clause to provide the right of inspection, right to a holdback, or express classification of the commitment as a fundamental term that, if not done, would amount to seller repudiation of the contract. If the parties agree to a holdback, the amount should sufficiently exceed the estimated cost so as to motivate the seller to do the work. Also, the holdback clause should include a clear mechanism for determining when and how the holdback will be paid out. Perhaps it will be tied to satisfactory inspection by a third party to confirm compliance.

Alternatively, the buyer can negotiate an abatement of the purchase price. While negotiating, the lawyer will need to be clear about the client's intention to complete the existing agreement, to prevent triggering an anticipatory breach.

Another common additional commitment by the parties is a clause that deals with the prospect of special assessments by strata corporations. These paragraphs are added by most real estate agents along with a subject clause for review of strata minutes and bylaws. These reviews are the real estate industry's practical substitute for a building inspection in the context of strata properties. This is because an inspection that does not inspect an entire strata complex is of limited value. The clauses dealing with special assessments might make them the responsibility of the seller, make them the responsibility of the buyer, or split the responsibility between buyer and seller, depending on what portions of the special assessment are payable before and after the completion date. Note that pending special assessments might not have been quantified before the completion date. (See *Strata Property Act* s. 109, which provides rules where a levy is approved before a strata lot is conveyed to a purchaser.)

[§3.03] The Main Elements of the Contract of Purchase and Sale

The Contract of Purchase and Sale provides important initial information about a conveyance, including some details about the parties, the property, the price and the completion date. Unfortunately, this information is often inadequate for the purpose of preparing the Form A Freehold Transfer, Form B Mortgage (if the buyer is obtaining financing), statement of adjustments and other conveyancing documents. The information in the contract must **always** be verified.

While non-lawyer staff can alert the lawyer to issues in the contract and other documents, managing the conveyance and appreciating the issues and consequences is the lawyer's responsibility. The lawyer is the one who needs to deal with the issues that arise. Consequently, at a minimum, the lawyer should review the purchase contract, correspondence, title search and statement of adjustments to ensure that all of these are accurate.

1. Description of Parties

(a) Correctly Describing the Buyer

The buyers are described in the Contract of Purchase and Sale at the very top, at the bottom where they sign, and possibly in the sales record sheet prepared by the real estate agent. The purchase contract should contain an accurate, complete description of the buyer. Usually, the description of the buyer in the purchase contract is insufficient for preparing the conveyancing documents and needs to be discussed with the client. In no case should the lawyer rely upon this description of the buyers for the transfer documents.

It is the lawyer's responsibility to determine the correct legal names of the buyers to appear on title to the property (initials are not acceptable to the Land Title Office). If there is more than one buyer, the lawyer must also determine whether the buyers intend to hold their interest in the property as joint tenants or tenants in common.

The buyer may be a corporation. Section 165(1) of the *Land Title Act*, R.S.B.C. 1996, c. 250 provides that, for the purposes of the *Land Title Act*, a corporation has the same powers of acquiring and disposing of land as a natural person. When a corporation is a party to a purchase contract, it is important to do a corporate search with the Registrar of Companies to ensure that the corporate name is correctly recorded in the instrument and that the company existed when it executed the instrument.

The buyer may be a First Nation. Prior to recent changes to the *Property Law Act* and *Land Title Act*, a First Nation needed to set up a corporation in order to buy fee simple land in BC, or had to use other alternative arrangements for the purchase, like proxies. Effective May 1, 2024, a First Nation that is recognized as a legal entity under federal law can directly acquire, register, hold and dispose of fee simple land.

In a purchase contract prepared by a real estate agent, the buyer is sometimes listed as "Corporation ABC and/or its nominee." While courts have found that such language does not, on its own, render the contract void for uncertainty, a prudent lawyer will not use such language and will instead insert a clause that clearly sets out the circumstances in which the buyer may name another entity as purchaser.

(b) Correctly Describing the Seller

A title search of the property will verify that the registered owner of the property is the party who has signed the purchase contract. If the party who has signed the purchase contract is not the registered owner, the lawyer should ensure that the signing party had the authority to bind the registered owner. For example, the seller might be a limited company and the contract is signed by that company's authorized signatories, or the seller and signatories might have a trust, agency or other relationship.

If the property is registered in the name of more than one party and only one of the parties has signed the purchase contract as seller, the lawyer or the buyer should either have all the parties sign the contract, or confirm that the signing party was authorized to sign the purchase contract on behalf of all the owners. For example, if spouses or common law partners are joint owners, and only one of them has signed the contract, the lawyer must be sure, at an early stage, that the other party has authorized the signing party to act as an agent and will join in signing the conveyance documents.

In short, the lawyer must always establish the line of authority between the sellers identified in the contract and the registered owners appearing on title.

2. Description of Property

Generally, the property is described in the Contract of Purchase and Sale in two ways: by the civic address (unless it is a new subdivision), and by some attempt at a legal description. The lawyer should not rely upon the legal description contained in the contract for the purpose of preparing the conveyancing documents. A proper legal description is based on Land Title Office records and does not refer to the civic address.

As a first step, the lawyer should check to ensure that both descriptions in the contract refer to the same property by obtaining an assessment report from BC Assessment that contains both the civic address and a form of legal description for every parcel of land. The legal description can also be obtained by searching in ParcelMap BC, or from various title search companies. The lawyer must then obtain a Land Title Office search of the property for the purposes of preparing the conveyancing documents, as only the precise legal description set out in the Land Title Office search should be used in such documents. Obtaining a legal description is reviewed more in Chapter 4.

The lawyer must be particularly careful with the purchase and sale of more than one parcel. The buyer may be buying two adjacent lots with only one house. There may only be one street address in this situation and one tax roll number. However, the conveyance documents must pick up both lots. How does the lawyer verify exactly what the parties have agreed to buy and sell?

Obviously, the first step is to discuss directly with the buyers their understanding of what they have agreed to purchase. Always order a plan from the Land Title Office as part of ordering a search, and allow the buyers to see the plan as soon as possible. Outline the property on the plan and have the buyer initial the plan confirming the property the clients think they are purchasing. This bird's-eye visual check means far more to most buyers than any discussion of legal descriptions. Give special attention to legal descriptions that contain exceptions, or begin the description of land with "That **part** of lot…" Ensure that the parcel defined in the legal description comprises the entire land that the buyers believe they have agreed to purchase.

The lawyer should review the assessment report (which typically lists any associated parcels), and should take additional steps such as searching for the subject property on internet mapping or imaging sites. The more information a lawyer has, the easier it is to spot problems.

3. Price

In the Contract of Purchase and Sale, the purchase price is inserted in clause 1. Clause 1 specifies that unless the buyer and seller agree otherwise in writing, when GST is applicable it is included in the purchase price. Clause 1 also sets out the "Rescission Amount," which is the amount payable by the buyer to the seller if the property is residential real property that is not exempt from the Rescission Right and the buyer exercises that right.

It is important, at an early stage, to quickly review the figures on the purchase contract to ensure that the transaction makes sense from a financial point of view. For instance, if the purchase price is $800,000 then the various components of the transaction must be subtracted from $800,000 (for example, the amount to be assumed under an existing mortgage and the amount to be covered by a new

mortgage), and any property transfer taxes payable by the buyer must be added, to arrive at the cash required to close. This initial check will reveal any fundamental financial misconceptions that may have crept into the deal. The sooner the buyer can be advised of the amount required to complete the conveyance, the better. (See also Chapter 5 for more on adjustments and property transfer tax.)

4. Deposit

The deposit is the part of the purchase price that the buyer has agreed to put at risk after the subject clauses have been removed and the buyer has become committed to purchase the property. If the buyer fails to complete, the seller usually has the choice of canceling the agreement and keeping the deposit, or affirming the contract and suing the buyer either for specific performance of the contract or for the actual damages arising from the failure. These damages may be more or less than the amount of the deposit. Note, however, *Bains & Sarai Holdings Ltd. v. Sahota* (1985), 37 R.P.R. 70 (B.C.C.A.), in which a seller's relief was limited to recovery of the deposit on the particular facts of that case. Refer to Chapter 6 for further discussion of remedies. Note that clause 2 provides that if the buyer exercises the Rescission Right, the Rescission Amount is deducted from the deposit and sent to the seller, and the buyer is entitled to the return of the remainder of their deposit.

When a real estate agent is involved, the deposit is normally paid to the real estate brokerage and is held in trust under the provisions of the *Real Estate Services Act*. The lawyer must be cautious if a real estate agent is not involved, and should look at a few things in particular. First, has the deposit in fact been paid? Second, to whom has it been paid, and can it be returned to the buyer if the transaction does not complete through no fault of the buyer?

It is common for a purchase contract that contains subject clauses to provide for a two-stage deposit. The first deposit—placed at the time of the making of the offer—is relatively small, with a substantially larger deposit after the subject clause has been removed. More commonly in residential transactions, the first and only deposit is paid once all conditions have been satisfied or waived. It is important to remember that the real deposit contemplated by the purchase agreement is the larger total deposit, not just the first deposit. It is important when checking the subject removal to ensure that the full amount of the deposit has in fact been paid. A brokerage is required to hold the deposit in a brokerage trust account as a stakeholder (s. 28 of the *Real Estate Services Act*). The importance of holding the deposit as a stakeholder lies in the stakeholder's ability to pay the deposit into court if there is a dispute between the parties (s. 33 of the *Real Estate Services Act*).

If the transaction does not complete and the seller forfeits the deposit, GST remains payable on the deposit amount (if the transaction originally attracted GST). Also note that the seller may be liable to pay real estate commissions even if the buyer fails to complete, because commission is often triggered by the execution of a binding listing agreement. Consequently, the seller faced with a defaulting buyer should consider two things: first, what compensation they will seek from the buyer, and second, whether they are responsible to pay commission. Many real estate agents will waive their entitlement to the commission if they continue to have the listing of the property, but this cannot be assumed.

5. Completion Date

The completion date determines the timetable for the particular file. The Contract of Purchase and Sale refers to the completion date as follows:

> 4. COMPLETION: The sale will be completed on _____, yr.___ (Completion Date) at the appropriate Land Title Office.

6. Possession Date

The possession date is the date when actual physical change of possession occurs. In the case of a residence, it is the date when the buyer may actually move in. In the case of rental property, the possession date means the date when the new landlord takes charge of the building.

Possession is subject only to those tenancies, if any, set out in clause 5 of the Contract of Purchase and Sale. If tenants are to remain, the buyer should be sure about the legality of suites and the status of the tenants (that is, rent, deposit and other responsibilities of the landlord). Even if clause 5 reads as if there are no tenants, if tenants are in possession of the property, the buyer may not be able to evict them except as provided in the *Residential Tenancy Act.* Whether the buyer in that case could undo the contract or sue for damages would depend on the facts.

The possession date is critical to the parties. The parties, usually with the real estate agent's help, arrange to obtain keys and move. The possession date is usually one or two days after the completion date. Most sellers are reluctant to give up possession until they have been paid.

7. Adjustment Date

The Contract of Purchase and Sale identifies the adjustment date the parties will use in calculating amounts that one party pays that should be debited to the other, or amounts that one party receives that should be shared with the other. These amounts form the statement of adjustments (see §5.13). That is, some costs such as property taxes are payable annually, so one party must pay to the appropriate authority the full amount due for not only the time that party owns the land, but the time the other party owns the land as well. Then the payor party is entitled to partial reimbursement by the other party. The adjustment date appears in the Contract of Purchase and Sale as follows:

> 6. ADJUSTMENTS: The Buyer will assume and pay all taxes . . . from, and including, the date set for adjustments, and all adjustments both incoming and outgoing of whatsoever nature will be made as of _____, yr._____(Adjustment Date).

This language clarifies that the buyer's responsibility for the property commences on and includes the adjustment date itself.

8. Included Items and Viewed

Clauses 7 and 8 of the Contract of Purchase and Sale read:

> 7. INCLUDED ITEMS: The Purchase Price includes any buildings, improvements, fixtures, appurtenances and attachments thereto, and all blinds, awnings, screen doors and windows, curtain rods, tracks and valances, fixed mirrors, fixed carpeting, electric, plumbing, heating and air conditioning fixtures and all appurtenances and attachments thereto as viewed by the Buyer at the date of inspection, INCLUDING: _____, BUT EXCLUDING: _____.
>
> 8. VIEWED: The Property and all included items will be in substantially the same condition at the Possession Date as when viewed by the Buyer on _____, yr.____.

By clause 7, all buildings and other improvements that the buyer inspected on the date set out in clause 8 must be included in the transfer. The seller has an obligation to preserve the property and the included items so that they will be in substantially the same condition at the possession date as when viewed by the buyer. Even without clause 7, anything described in law as a fixture must remain with the property and be included in the sale, while the seller would be entitled to remove anything described in law as a chattel. Clause 7 attempts to ensure that the buyer receives all the items listed, and the seller can name items, whether chattels or fixtures, that the seller excludes from the sale. If a seller wrongfully takes something that should have been included pursuant to this clause, the buyer's remedy would be an action in damages or specific performance.

The clause 8 warranty could allow the buyer to seek compensation if the property were damaged after viewing. Damage could result from vandals, the moving process, disgruntled tenants or weather events.

Lawyers should note that the standard "Addendum A" used by financial institutions in purchase agreements for a property subject to foreclosure proceedings specifically overrides clause 8 and stipulates that the buyer accepts the condition of the property "as is" at completion. Banks will refuse to alter their Addendum A. Insurers rarely understand that clause 8 creates an insurable interest in the property for the buyer, and insurers might refuse to provide pre-completion insurance to the buyer in a foreclosure. The buyer in that position needs to pursue insurance aggressively. There are many stories of foreclosed owners dismantling their home before handing it over, including removing doors, windows and cabinetry.

9. Title Free and Clear

Unless the Contract of Purchase and Sale is amended, the interest being sold is an estate in fee simple, free from encumbrances except those set out in clause 9, which reads:

> 9. TITLE: Free and clear of all encumbrances except subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown, registered or pending restrictive covenants and rights-of-way in favour of utilities and public authorities, existing tenancies set out in Section 5, if any, and except as otherwise set out herein.

If the seller cannot provide the title in accordance with clause 9, then depending on the materiality of the title defect, the buyer may be entitled to accept the seller's repudiation of the contract and terminate it. Alternatively, the buyer may complete the purchase with the right to demand abatement of the purchase price.

This clause can cause difficulties in some cases. Remember that the Contract of Purchase and Sale is essentially a seller's document: it protects the seller by specifying limits on clear title. Most buyers assume they are entitled to clear title (apart from any mortgages they may be assuming by agreement). However, the exceptions to title set out in clause 9 include restrictive covenants (charges which prevent something from being done to or with the property) and statutory rights-of-way in favour of

utilities and public authorities (for example, in favour of BC Hydro), as well as any surviving conditions, provisos, restrictions, exceptions and reservations contained in the original Crown grant. As the buyer's lawyer, if you see a restrictive covenant or a right of way on the title, you must advise the buyer that, because of clause 9, the buyer must purchase the property subject to those encumbrances that are in favour of a utility or public authority.

Clause 9 does not cover private encumbrances like easements with neighbours or building schemes governing what a neighbourhood will look like. Therefore, in signing the Contract of Purchase and Sale, the seller agrees to deliver the title free and clear of such encumbrances. If the seller fails to remove these encumbrances from the title, the buyer may rely on that failure to back out of the transaction (especially in volatile falling markets). Many real estate agents have therefore adopted the practice of attaching a state of title certificate (see Appendix 10) to the Contract of Purchase and Sale and having the buyer agree to accept all "non-financial encumbrances" listed on it.

Some exceptions to an indefeasible title are set out under s. 23(2) of the *Land Title Act.* A person named as owner on title is indefeasibly entitled to an estate in fee simple to the land, subject to the exceptions specified in s. 23(2). A Crown grant search is necessary as part of the process to determine whether rights to resources such as timber, minerals and water are included in the title to land. Typically a Crown grant search is unnecessary for a residential conveyance of land located in a municipality. To understand these rights to resources, review the applicable related legislation (e.g. *Mineral Tenure Act*, *Petroleum and Natural Gas Act, Water Sustainability Act*).

Another difficulty with this clause arises if the buyer's mortgage lender will not agree to advance funds on a mortgage that is subject to certain existing encumbrances (see Item 5 on the Information Page of the Contract of Purchase and Sale). If you are retained to carry out both the conveyance and to prepare the mortgage, you need to take care with your reports on title. The report to the mortgage lender must conform to your instructions from the mortgage lender, and your report to the buyer should refer to this clause in the contract.

Where land being purchased is vacant (i.e. has no buildings) or is located in a rural area, it becomes especially important to locate all rights of way or easements to ensure that the buyer can build where the buyer wants to. There might be issues with positioning water wells and septic systems, or road access might be limited. Even in urban settings, access to certain aspects of the subject property may require the cooperation or permission of a neighbour. Any agreements between the seller and a neighbour will generally not be enforceable by the buyer, unless access has been granted via an easement registered against the neighbour's property, so take care to have such access arrangements documented in writing or make the delivery of such documents a condition to closing.

The various encumbrances allowed by clause 9 are dealt with in further detail in other chapters.

10. Closing Procedure

Clauses 10, 11 and 12 set out how the purchase price is to be paid, the terms on which documents are to be delivered, and the requirement that time will be of the essence.

Clause 11 reads as follows:

> 11. DOCUMENTS: All documents required to give effect to this Contract will be delivered in registrable form where necessary and will be lodged for registration in the appropriate Land Title Office by 4 pm on the Completion Date.

Clause 11A requires the seller to give the buyer a statutory declaration of residence. If the seller is a non-resident, the buyer holds back (from the purchase price payable) the amount provided for under s. 116 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). Clause 11A also requires the seller to provide the buyer with particulars the buyer needs to complete the Property Transfer Tax Return.

> 11A. SELLER'S PARTICULARS AND RESIDENCY: The Seller shall deliver to the Buyer on or before the Completion Date a statutory declaration of the Seller containing:
>
> A. particulars regarding the Seller that are required to be included in the Buyer's Property Transfer Tax Return to be filed in connection with the completion of the transaction contemplated by this Contract (and the Seller hereby consents to the Buyer inserting such particulars on such return);
>
> B. a declaration regarding the Vancouver Vacancy By-Law for residential properties located in the City of Vancouver; and
>
> C. if the Seller is not a non-resident of Canada as described in the non-residency provisions of the *Income Tax Act*, confirmation that the Seller is not then, and on the Completion Date will not be, a non-resident of Canada. If on the Completion Date the Seller is a non-resident of Canada as described in the residency provisions of the *Income Tax Act*, the Buyer shall be entitled to hold back from the Purchase Price the amount provided for under Section 116 of the *Income Tax Act*.

Clause 11B concerns obligations to pay GST:

> 11.B. GST CERTIFICATE: If the transaction contemplated by this Contract is exempt from the payment of Goods and Services Tax ("GST"), the Seller shall execute and deliver to the Buyer on or before the Completion Date, an appropriate GST exemption certificate to relieve the parties of their obligations to pay, collect and remit GST in respect of the transaction. If the transaction contemplated by this Contract is not exempt from the payment of GST, the Seller and the Buyer shall execute and deliver to the other party on or before the Completion Date an appropriate GST certificate in respect of the transaction.

GST, if applicable, is customarily borne by the buyer. As noted earlier, under clause 1 of the Contract, unless the buyer and seller agree otherwise in writing, the purchase price includes GST (if applicable). Unless the parties deal with GST in an amendment, the lawyer should confirm with the client whether the sale attracts GST. Whether a transaction is subject to GST or not is determined first by the seller's usage and status (see §5.09). Clause 11B says that if the transaction is exempt from GST, the seller delivers to the buyer a GST exemption certificate. If the transaction attracts GST, the parties deliver appropriate GST certificates to each other in respect of the transaction.

Clause 12 specifies that time is of the essence:

> 12. TIME: Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreemen[t] to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be non-refundable and absolutely forfeited to the Seller, subject to the provisions under the *Real Estate Services Act*, on account of damages, without prejudice to the Seller's other remedies.

"Time will be of the essence hereof" means the parties have agreed that the time when the transaction closes is an essential element of the transaction. These words create specific rights for the parties if any dates in the agreement are not met. For example, if the buyer fails to pay the balance of the purchase price on the completion date, the seller may immediately cancel the agreement. If the reason for this failure is simply delay due to the conduct of the buyer's law firm, that law firm may be liable to the buyer in negligence.

In every transaction it is important to determine whether time is of the essence. If it is unclear whether time is of the essence, it is difficult to determine whether failure to perform amounts to a breach or repudiation of the agreement, and it may be necessary to allow a "reasonable" period of time for performance before commencing an action. Take careful notes of any statements made in connection with extensions of time, and any such extension should be made in writing, restating that time is of the essence (see §6.03(2)).

11. Completion

Clauses 13 and 14 of the Contract of Purchase and Sale provide for completion of the conveyance on the basis of the CBA Standard Undertakings. These clauses were introduced in response to the Court of Appeal's decision in *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 145, 1989 CanLII 245.

Norfolk considered lawyers' closing procedures under the "Interim Agreement," a predecessor to the current Contract of Purchase and Sale. In *Norfolk*, the Interim Agreement did not include clauses comparable to clauses 13 and 14 providing for closings based on undertakings. The Interim Agreement required the buyer to pay cash and the seller to deliver clear title, all by the completion date. This created the following problems, which were common at the time:

(a) the buyer not having mortgage funds necessary to pay the purchase price until after application for registration of title; and

(b) the seller being unable to clear title until after receiving the funds from the buyer.

The buyer's solicitor attempted to resolve these problems by tendering documents to the seller's solicitor upon the "usual undertakings." The Court of Appeal held the seller was under no obligation to agree to any method of completion different from the method set out in the Interim Agreement. The court pointed out that solicitors who intend to complete conveyances using any method that departs from the Interim Agreement must first obtain:

(a) authority from their client to complete by a method other than that in the Interim Agreement; otherwise, the solicitor may be liable to the client; and

(b) the agreement of the other side to the different method of completion, well in advance of the completion date.

To overcome the problems arising from *Norfolk*, clauses 13 and 14 were included in the Contract of Purchase and Sale.

Clause 13 reads:

> 13. BUYER FINANCING: If the Buyer is relying upon a new mortgage to finance the Purchase Price, the Buyer, while still required to pay the Purchase Price on the Completion Date, may wait to pay the Purchase Price to the Seller

until after the transfer and new mortgage documents have been lodged for registration in the appropriate Land Title Office, but only if, before such lodging, the Buyer has:

A. made available for tender to the Seller that portion of the Purchase Price not secured by the new mortgage, and
B. fulfilled all the new mortgagee's conditions for funding except lodging the mortgage for registration, and
C. made available to the Seller, a Lawyer's or Notary's undertaking to pay the Purchase Price upon the lodging of the transfer and new mortgage documents and the advance by the mortgagee of the mortgage proceeds pursuant to the Canadian Bar Association (BC Branch) (Real Property Section) standard undertakings (the "CBA Standard Undertakings").

Clause 14 reads:

14. CLEARING TITLE: If the Seller has existing financial charges to be cleared from title, the Seller, while still required to clear such charges, may wait to pay and discharge existing financial charges until immediately after receipt of the Purchase Price, but in this event, the Seller agrees that payment of the Purchase Price shall be made by the Buyer's Lawyer or Notary to the Seller's Lawyer or Notary, on the CBA Standard Undertakings to pay out and discharge the financial charges, and remit the balance, if any, to the Seller.

Clauses 13 and 14 of the Contract of Purchase and Sale incorporate the CBA Standard Undertakings. Under the CBA Standard Undertakings, the buyer agrees that the seller, although still required to clear financial charges from title, may wait until the seller receives the purchase funds, so the seller can use those funds to pay out the charges.

The current CBA Standard Undertakings are posted on the CBA website at www.cbabc.org/Home, and are included in Appendix 7. They were amended in April 2020 to facilitate the electronic transfer of funds.

The CBA Standard Undertakings were amended in March 2003 to address problems if a lawyer failed to comply with undertakings to discharge mortgages and instead misused conveyance funds. The amendments introduced transparency provisions to hinder such fraudulent actions (see clause 9.5 of the CBA Standard Undertakings). The transparency provisions put the seller's lawyer on an undertaking to provide the buyer's lawyer with documentation of payout:

- a copy of the payout statement;
- the letter or confirmation transmitting the funds to the lender; and
- confirmation showing the lender received payment and discharged the account.

The seller's lawyer is to provide the buyer's lawyer with the above documents within five business days of the completion date, on the undertaking of the buyer's lawyer not to release the seller's financial information (disclosed in the documentation) to the buyer, unless the seller's lawyer fails to provide satisfactory evidence of discharge of the mortgage within 60 days of the completion date.

As an alternative to relying on clauses 13 and 14 in the Contract of Purchase and Sale and the CBA Standard Undertakings, you can obtain instructions from your client about closing procedures and seek agreement with the other lawyer as to the appropriate undertakings.

With respect to clearing title, lawyers acting for mortgage lenders should note the decision in *Lin v. CIBC Mortgage Inc.*, 2015 BCCA 518. In *Lin*, CIBC advanced mortgage funds in the amount of approximately $520,000 to its own notary, who in turn forwarded the funds to the borrowers' notary on the borrowers' notary's undertaking to pay off the existing mortgage. The borrowers' notary advised that she had paid out the funds required to discharge the existing mortgage, and paid the remaining funds to the borrowers. However, the borrowers' notary subsequently disappeared, and it was discovered that no funds were actually paid to the existing first mortgage holder. The Court of Appeal upheld the trial judge's decision that the CIBC mortgage should be struck from the borrowers' title. This decision was based on the Court of Appeal's finding that the funds remained the property of CIBC, and not the borrowers, as the conditions controlling release of the funds were never satisfied, and thus the borrowers never had any control over the funds advanced to their notary. Because of this decision, a lawyer acting for a mortgage lender should consider imposing a condition that the lender's lawyer must receive a copy of the relevant payout statement and be authorized to complete the payout of the existing mortgage on behalf of the property owner (whether the owner is the borrower or the seller of the property). It can be difficult to obtain a payout statement and authority to pay from an unrelated party (such as a seller in a purchase financing transaction), so when deciding how to proceed, a lender's lawyer should consider the nature of all parties and agents involved in a transaction and the level of potential risk involved. A lender's lawyer may also consider title insurance, which covers losses arising from the invalidity or unenforceability of the insured mortgage.

See Chapter 7 for more on clearing title, and see Chapter 5 for more on closing procedures and undertakings.

12. Costs

Clause 15 of the Contract of Purchase and Sale obliges the buyer to pay the costs of the conveyance and any financing. Clause 15 reads:

> 15. COSTS: The Buyer will bear all costs of the conveyance and, if applicable, any costs related to arranging a mortgage and the Seller will bear all costs of clearing title.

The point of the "COSTS" clause is to set out the duties of the respective parties concerning legal and registration costs. If a party is wondering why they have to pay your bill, you can refer them to this clause. See Item 6 on the Information Page of the Contract of Purchase and Sale, and go over it with clients who are not clear about costs.

In some other provinces and jurisdictions, it is common for the seller to pay the costs of conveying the property. In British Columbia, the general practice is that the buyer assumes responsibility for the conveyance, except for clearing title. See *Shaw Industries Ltd. v. Greenland Enterprises Ltd*., 1991 CanLII 3955 (B.C.C.A.), additional reasons at (1991), 79 D.L.R. (4th) 641 at 649, where the Court of Appeal held that if the purchase contract says that the buyer bears all costs of the conveyance, the buyer must prepare the transfer, unless title to the land is not registered in the name of the seller, in which case the seller prepares the documents.

13. Risk

The buyer should obtain insurance against fire and other perils before paying the seller, and the seller should keep the property insured until the completion date, in accordance with the risk-transfer provision in clause 16 of the Contract of Purchase and Sale:

> 16. RISK: All buildings on the Property and all other items included in the purchase and sale will be, and remain, at the risk of the Seller until 12:01 am on the Completion Date. After that time, the Property and all included items will be at the risk of the Buyer.

As soon as the buyer and seller enter into a binding agreement, the buyer has a beneficial interest in the property. Without a clause such as clause 16, the risk of loss from fire or similar perils could be on the buyer. If you have a transaction that does not use the Contract of Purchase and Sale, a risk-transfer clause may not be included. In that situation, the buyer should be advised to consider obtaining all-risks insurance immediately.

The risk-transfer clause has the effect of making the seller responsible for a loss up to (but not including) the completion date. Based on clause 16, the buyer must have insurance in place by 12:01 am on the completion date. Regardless of the particular wording, insurance should always be in place in the name of the buyer before the seller is paid.

What happens if there is a fire or other damage during the period between the signing of the purchase agreement and the completion date? Assume that fire destroys the home. The buyer now wants to cancel, get the deposit back, and buy another house. The contract may allow the buyer to do so, if the seller is unable to provide the building in the condition required by the agreement. Note, however, that the clause does not require the seller to have insurance or to pay insurance proceeds to the buyer. There is some case law that indicates a buyer has no right to receive insurance proceeds from a seller's policy of insurance unless the buyer has been assigned an interest in those proceeds in the agreement (*Wile v. Cook*, 1986 CanLII 27 (S.C.C.)).

Most fires only partially damage a house. If the buyer is anxious to complete the purchase on that particular home, and has a cooperative seller who has properly insured the house, then, by a further agreement, the seller's insurance proceeds can be made available to the buyer to repair the home. If, however, the seller is either uninsured, or, being insured, is unwilling to cooperate with the buyer, the buyer is left with only two choices: complete the purchase of a partially burnt home; or, if it is a condition of the contract that the building be transferred undamaged, cancel the agreement.

14. Representations and Warranties

Clause 18 reads:

> 18. REPRESENTATIONS AND WARRANTIES: There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.

Part of this clause helps the seller, and part helps the buyer. The first part says that anything that may have been said about the house or property but is not written in the document is not binding. Accordingly, unless there is fraud (or possibly recklessness) involved, comments by the real estate agent or the seller about, for example, the state of the roof or the state of the electric wiring, will not be binding upon the seller. On the other hand, representations and warranties that do appear in the purchase contract, such as a representation concerning urea formaldehyde insulation, will bind the seller, and will continue to bind the seller after closing.

The second part of clause 18 confirms that the doctrine of merger does not apply to this contract. This

means that the representations made in the contract continue to apply even after the sale completes.

In most cases, representations and warranties by the seller that go unfulfilled only allow the buyer to sue for damages. Unless they go to the root of the contract, these unfulfilled representations or warranties do not allow the buyer to cancel the agreement, nor do they allow the buyer to hold back a certain amount from the purchase price (unless permitted by a specific amendment to the contract). Your buyer must be advised that the only recourse is a lawsuit *after* completion.

15. Personal Information

Clause 19 has been added to address issues around consenting to the disclosure of personal information, which can now arise under the *Personal Information Protection Act*, S.B.C. 2003, c. 63.

16. Restriction on Assignment of Contract

Clause 20A requires the buyer to obtain the seller's written consent before the buyer can assign the Contract. The clause reads:

> 20A. RESTRICTION ON ASSIGNMENT OF CONTRACT: The Buyer and the Seller agree that this Contract:
> A. must not be assigned without the written consent of the Seller; and
> B. the Seller is entitled to any profit resulting from an assignment of the Contract by the Buyer or any subsequent assignee.

"Assignment" means a party to a contract transfers rights in the contract to a third party before the transaction completes. Previously, the Contract of Purchase and Sale was silent as to assignment. If the right to assign was not expressly dealt with by the parties, buyers could assign their interests to third parties without the sellers' consent, so long as buyers gave sellers written notice of assignment.

Regulations effective May 2016 require contracts that involve real estate agents licensed under the *Real Estate Services Act* to include the term that the contract cannot be assigned without the written consent of the seller, and that the seller is entitled to any profit resulting from the assignment of the contract. These regulations were imposed, in part, to protect sellers against "shadow flipping," where a buyer assigns a sales contract to another buyer (for a higher price than the original purchase price) before the deal with the original seller closes. When shadow flipping occurs, the original seller receives less than what the property ends up selling for, the buyer in the middle receives the increased value, and the real estate agent earns an additional commission on the flip. See s. 8.2 of the *Real Estate Services Regulation*, B.C. Reg. 506/2004.

17. Agency Disclosure

Clause 21 provides for the seller and buyer to acknowledge the agency relationship that each may have with a real estate agent. The various options for agency are set out in the document prepared by the BC Financial Services Authority entitled "Disclosure of Representation in Trading Services." This document must be delivered by the agent(s) to the seller and buyer by the time an offer is made. Every real estate agent must disclose their agency relationship to the parties to a real estate transaction (Part 5 of the *Real Estate Services Act Rules*, Ministerial Order: M417).

Note that as of June 15, 2018, dual agency, where one agent represents both the buyer and seller, has been limited under the *Real Estate Services Act* and the Real Estate Services Rules. It is only possible in rare circumstances where the transaction is in a remote location underserved by real estate agents and there is no practical alternative to dual agency.

18. Acceptance Irrevocable

As a general rule, unless executed under seal, a contract of purchase and sale requires consideration to be legally binding. In order to create a contract under seal, the parties must be shown to have "consciously and deliberately" created an instrument under seal (*1021846 B.C. Ltd. v. Hare*, 2018 BCSC 814), rather than merely stating that the contract is executed under seal.

Clause 22 requires the seller and buyer to initial in order to confirm that the Contract of Purchase and Sale is effectively executed under seal:

> The parties intend that the act of inserting their initials as set out above is to have the same effect as if this Contract of Purchase and Sale had been physically sealed by wax, stamp, embossing, sticker or any other manner. It is agreed and understood that, without limiting the foregoing, the Seller's acceptance is irrevocable including without limitation during the period prior to the date specified for the Buyer to either:
> A. fulfill or waive the terms and conditions herein contained; and/or
> B. exercise any option(s) herein contained.

Clause 22 was revised following *Pooni v. Storsley*, 2022 BCSC 1011, in which the court found that the digital stamp, applied prior to the parties' signatures on the former clause 22 of the standard form Contract of Purchase and Sale, was not "consciously and deliberately" applied, and therefore failed to cure the lack of consideration, thus rendering the contract unenforceable.

19. Disclosure of Buyer's Rescission Right

Clause 23 discloses the cooling-off period provided under s. 42(1) of the *Property Law Act* (the Rescission Right), as discussed earlier in this chapter.

Under clause 23, the seller and buyer acknowledge that, unless the property is exempt, the buyer is entitled to rescind the Contract of Purchase and Sale by serving written notice of the rescission on the seller within three business days after the offer has been accepted by the seller.

At the end of the Contract of Purchase and Sale, after clause 27, a section entitled "Notice for Buyer's Rescission Right" provides space for the seller's contact information including their address, email and fax number, which may be used by the buyer if they choose to exercise the Rescission Right provided in clause 23. This section also provides spaces to set out the date of acceptance of the Contract and, based on that date, the date by which the buyer must exercise the Rescission Right. Notice should be delivered in a timely manner.

20. Real Estate Commission

Clause 27 reads:

> 27. ACCEPTANCE: The Seller:
>
> A. hereby accepts the above offer and agrees to complete the sale upon the terms and conditions set out above,
> B. agrees to pay a commission as per the Listing Contract, and
> C. authorizes and instructs the Buyer and anyone acting on behalf of the Buyer or Seller to pay the commission out of the proceeds of sale and forward copies of the Seller's Statement of Adjustments to the Cooperating/Listing Brokerage, as requested, forthwith after Completion.

The seller usually pays the commission. The amount of the commission is not in the Contract of Purchase and Sale but in the listing contract. If there is no letter from the listing broker setting out the commission, it may be necessary to request a copy of the listing contract in order to determine how much commission to calculate in the statement of adjustments. Note that the seller pays the commission to its real estate agent, but the buyer may also have an agent who is entitled (by arrangement with the seller's agent) to a share of that commission.

Clause 27 also authorizes the buyer's lawyer to forward copies of the seller's (not the buyer's) statement of adjustments to the listing agent.

On multiple listing sales ("MLS") properties, the pattern outside Vancouver (and increasingly within Vancouver) is for the buyer's lawyer to be asked to follow the "two cheque system" of commission disbursement. The system follows Rule 7.07 of the Rules of Cooperation used by real estate boards in BC. Under this system, if the deposit is an amount *less than* the selling commission owing, the buyer's lawyer will be asked to forward payment to satisfy the commission shortfall to the "listing brokerage" (which acts for the seller), and forward a second commission payment to the "selling brokerage" (which acts for the buyer). When the deposit is an amount *greater than* the commission owing, the listing brokerage deducts from the deposit it is holding in trust the portion owing to it on completion, and forwards the balance to the buyer's lawyer in trust, to then be paid to the selling brokerage.

21. Information Page

A page of "Information About this Contract" prefaces the Contract of Purchase and Sale. Its purpose is to inform parties about their transaction, rather than to affect their legal rights. Lawyers and conveyancers should refer clients to this information.

[§3.04] Property Disclosure Statement

The BC Real Estate Association has developed a property disclosure statement ("PDS"). There are different versions for residential (non-strata) property, strata property, and rural property. All real estate boards have resolved to make use of the PDS mandatory in connection with multiple listing service transactions. Real estate agents usually request that sellers complete the form, though there is no statutory requirement to do so.

The PDS provides information that is not included in the Contract of Purchase and Sale but is of interest to buyers. It also purports to limit the liability of real estate agents by clarifying the representations upon which the buyer is relying. By clause 18 of the Contract of Purchase and Sale, the PDS does *not* form a part of the Contract of Purchase and Sale without an additional written term to that effect.

As the Supreme Court of British Columbia found in *Malenfant v. Janzen*, 1994 CanLII 285 (B.C.S.C.), there is no authority saying that answers to the questions in the PDS constitute representations in the form of warranties as to the condition of the property. However, the questions and answers in the PDS form part of the contract if the parties agree in writing that they do.

Where the parties do incorporate the PDS into the Contract of Purchase and Sale, representations made in the PDS may ground a claim of breach of contract. For example, in *Doan v. Killins* (1996), 5 R.P.R. (3d) 282 (B.C.S.C), the defendants were found to have known part of the property was municipal land and misrepresented their knowledge on the PDS.

As the BC courts have repeatedly held, a PDS obligates sellers to honestly disclose their knowledge, not to warrant that it is actually correct. In *Arsenault v. Pedersen*, 1996 CanLII 3519 (B.C.S.C.) the plaintiff purchased the defendants' residential property. The defendants signed a PDS in which they denied, among other things, being aware of any structural problems, water damage or roof leakage. The plaintiff later discovered structural problems and a severe roof leak, and sued for damages for fraudulent misrepresentation. The Supreme Court dismissed the action. The court held that the PDS did not require the sellers to warrant a certain state of affairs existed. It was enough for the sellers to say that they were not aware of problems. Barring proof of fraud in real estate matters, "buyer beware" applies.

In *Nixon v. MacIver*, 2016 BCCA 8, the BC Court of Appeal followed *Arsenault* with respect to the obligations imposed on a vendor by the PDS:

> [48] Information contained in a disclosure statement that is incorporated into a contract of purchase and sale may be a representation upon which a purchaser can rely: *Ward v. Smith,* 2001 BCSC 1366 at para. 31. However, a vendor is only obliged to disclose his or her current actual knowledge of the state of affairs of the property to the extent promised in the disclosure statement and need say "no more than that he or she is or is not aware of problems": *Arsenault* at para. 12. In other words, the vendor must correctly and honestly disclose his or her actual knowledge, but that knowledge does not have to be correct. A vendor is not required to warrant a certain state of affairs but only to put prospective purchasers on notice of any current known problems.

In *Hamilton v. Callaway*, 2016 BCCA 189, the Court of Appeal confirmed that *Nixon* is the governing authority in BC. The plaintiff buyer in that case had argued that the defendant seller was liable for breach of contract because the PDS representation—that the seller was not aware of any problems with the plumbing system—was incorporated into the Contract of Purchase and Sale, and the representation was false. However, the trial judge had found that the seller had an honest belief in the truth of what she said in her PDS. The Court of Appeal rejected the buyer's suggestion that accuracy is the criteria by which to measure the seller's statement.

Even when the PDS is not incorporated into the Contract of Purchase and Sale, dishonest answers on the PDS may form the basis for an action in negligent misrepresentation. See e.g. *Dirksen v. Au*, [1996] B.C.J. No. 2738 (Prov. Ct.), where despite having had considerable difficulty selling their property previously due to water damage, the sellers had answered "no" when asked on the PDS whether they were aware of roof leakage or damage due to wind, fire, or water.

A buyer of a strata lot must review the strata corporation meeting minutes carefully, despite the contents of the PDS. In *Sask v. Brook*, 2000 BCSC 1745, the sellers indicated that they were not aware of any water damage or roof leakage in the condominium building. The defendant, who completed the PDS, was the chair of the strata council and was aware of water leakage problems in the building generally. However, he honestly believed that the questions related to the seller's unit and not the building generally. For this reason, the plaintiff could only rely on negligent misrepresentation to bind the defendant. However, given the fact that the strata corporation meeting minutes disclosed the leaks in the building, it was not reasonable for the plaintiff to rely on the PDS. As such, the claim in negligent misrepresentation failed.

Chapter 4

Searches[1]

[§4.01] Searching for Titles, Documents and Plans From the Land Title Office

Obtaining and carefully reviewing a land title search is a critical obligation of both the buyer's lawyer and the seller's lawyer. A buyer's lawyer should prepare a report on title for their client's review. A seller's lawyer will want to review the nature of the charges that the lawyer will likely have to undertake to discharge from title.

A significant cause of real estate claims in British Columbia is the failure of lawyers to manage the title search and review process. For instance, the lawyer may carry out the title search, but make these practice errors:

(1) assuming, without reading the search, that it does not raise any issue for the client (for example, the lawyer misses a judgment registered on title or a bylaw contravention);

(2) failing to read the title search carefully and missing a flag or "miscellaneous note" that indicates further searching is required;

(3) not paying special attention to legal descriptions in the title search that contain exceptions or describe the land as "That part of lot…" to ensure the parcel defined in the legal description comprises the entirety of the lands that the buyers understand they have agreed to purchase;

(4) failing to report items recorded on title because the lawyer assumes they will not be an issue; or

(5) delaying the delivery of the lawyer's report to the client, thus leaving the client with insufficient time to react to any issues arising.

The Land Title Office has transferred most active title records into electronic format. Accordingly, it is rare for lawyers to encounter any title registered under the old system of "index books"; in that system, titles and charges were marked manually in large books stored on counters throughout the Land Title Offices. If the title is not yet recorded electronically, the lawyer must request an index search. Among other data, the index shows all *pending* charges that have not yet been registered and do not yet show on title.

The New Westminster Land Title Office, responsible for the Vancouver and New Westminster Land Title Districts, is located at 500-11 8th Street, New Westminster, BC. The Kamloops Land Title Office, responsible for the Kamloops and Nelson Land Title Districts, is located at 900-175 2nd Avenue, Kamloops, BC. The Victoria Land Title Office, responsible for the Victoria, Prince George and Prince Rupert Land Title Districts, is located at 200-1321 Blanshard Street, Victoria, BC.

Normally, there are a number of distinct steps that need to be taken when conducting a title search.

1. Obtaining the Legal Description

A parcel of land is identified by its legal description. It is not possible to search a title if you have only the civic address. Therefore, it is necessary to find the legal description corresponding to the civic address. A legal description can be obtained by searching BC Assessment's website or ParcelMap BC. Title search companies, such as "Instant Legal" (604.585.1108), can also quickly ascertain the corresponding legal description once they know the civic address.

The legal description will include a parcel identifier number ("PID"), to allow easier access to an electronic record of title. The PID is a nine-digit number assigned to every electronic title record. It is located just above the remainder of the legal description on all documents affecting title. The PID is unique to the parcel of land represented by the title, and will not change unless the parcel is subdivided or consolidated.

2. Searching the Title

Once you have obtained the PID, a title search can be obtained through myLTSA (an official point of access to the LTSA's Electronic Services and information), registry agents, or by going to one of the three Land Title Offices. You will note that the last item on the title is the heading "Pending Applications." All registrations that have been accepted but not processed appear here by registration number. However, the pending registrations do not always appear in order of priority, so the only safe way to determine pending priority is to look at the pending documents themselves and note the time and date of each application.

[1] Revised by **Tony Magre** of Blake, Cassels & Graydon LLP in November 2023. Reviewed regularly by the Land Title and Survey Authority for content relating to the BC land title and survey system, most recently in October 2023. Previously revised by Greg Umbach and Tony Magre (2018–2022); Randy Klarenbach and Aneez Devji (2012), Ian Davis (2010), Joel Camley (2005, 2006 and 2008), and Lawson Lundell LLP's Real Estate Department (annually until 2004). John M. Olynyk contributed comments in 2002 regarding conveyancing regimes for First Nations' lands. Tina Dion reviewed the First Nations' lands content in 2011.

3. Obtaining Particulars of Charges (If Requested)

Most documents received in the Land Title Office after 1990 and all documents registered from 1993 onwards, except those that exceed 100 pages and those that are unsuitable for imaging, have been scanned and are available through myLTSA. Documents that are not yet available electronically can be ordered using the "Scan on Demand" service in myLTSA.

People who have been issued a Direct Access Pass may enter restricted areas within LTSA offices to search, inspect and copy records, including the physical records maintained in LTSA vaults. Lawyers are among those eligible to apply for Direct Access privileges (see the LTSA's Direct Access to Operational Records Policy at https://ltsa.ca/wp-content/uploads/2020/11/Direct-Access-to-Records.pdf).

Direct Access privileges give individuals access to records, including historic records, relating to the operations of the LTSA. These records include original titles and microfilmed documents. A Direct Access Pass holder must pay fixed fees for Land Title Office services (see the "Fees" page of the LTSA website for current fees (ltsa.ca/fees)).

4. Obtaining Plans

As part of your search, you should obtain a copy of the survey plan or strata plan, both of which show the location and dimensions of the property.

Lawyers with a myLTSA account can download many of the survey plans and strata plans directly onto their personal computers. You can use the "Scan on Demand" service in myLTSA to order copies of plans that are not yet available electronically.

You should also obtain any other plans that affect the property, such as those that show the locations of relevant rights of way, easements, and other relevant interests. When property is being purchased for development, redevelopment, mineral or timber rights, you should obtain a copy of the Crown grant in order to ensure that rights of way, timber and minerals were not reserved to the Crown.

Special consideration should be given to strata plans where the search is to determine an owner's unit entitlement or interest on destruction. Unit entitlement divides the strata corporation's assets and liabilities proportionately among the strata units. It sets what proportion of expenses relating to common property must be borne by each strata lot, as well as the strata lot's share of the common expenses, special assessments and other liabilities of the strata corporation.

Interest on destruction is used to determine each owner's share, as tenants in common, of the property and assets of the strata corporation in the event of the destruction of the building. Section 273 of the *Strata Property Act* creates a schedule that is to be used to determine each owner's share of the common property and assets as of the date of the dissolution or winding up of the strata corporation. However, under s. 273(3) if a strata corporation has a schedule of interest on destruction created under the former *Condominium Act*, that schedule determines the owner's interest in the land and personal property upon the winding up of the strata corporation.

5. Land Title Office Search Checklist

(a) A full search should include the following:

(i) A printout of the title record that combines:

- the title search, which gives particulars of ownership and a complete list of all encumbrances recorded on the title (i.e., registered and pending charges); and
- the location of the duplicate indefeasible title if one has been issued. If the duplicate indefeasible title is not in the Land Title Office, it must be returned there before the conveyance can be completed.

(ii) Copies of all charges against the title, including copies of all pending charges, if available, and if copies are not available, particulars of the pending charges. However, certain charges that encumber many properties are recurrent and very bulky, such as mortgages of public rights of way, certain bylaws and *Aeronautics Act* filings. You should determine whether it makes sense in the circumstances to obtain full copies of these notations or charges;

(iii) A copy of the survey plan or strata plan of the property;

(iv) Copies of all other plans affecting the property (such as right of way plans); and

(v) Anything else affecting title.

(b) In reviewing the title, consider the following:

(i) Charges may not appear in order of priority. Priority is determined by the time and date of registration, subject to s. 28 of the *Land Title Act*, but charges do not necessarily appear in the same order in which they were registered. Therefore, in order to read the title properly, you need to pay attention to the time and date of registration of each document.

(ii) Read the headings at the end of the title search carefully:

- "Pending Applications"

  Registrations that have been accepted but not processed show as pending applications on the title itself. A document is given a number when it is presented to the cashier or e-filed.

  In accordance with the Director's E-filing Directions, with only limited exceptions, all applications and plans must be submitted electronically.

  An electronic application is noted as a pending application immediately after it is electronically submitted, but it is not formally reviewed and noted on the title as registered for some time. Until the application is noted on title as registered, it could be rejected for some reason.

- "Duplicate Indefeasible Title"

  This entry indicates whether a duplicate indefeasible title (also called a duplicate certificate of title) has been issued. The *Land Title Act* provides that the registrar may, at the request of the registered owner of a property, issue a duplicate certificate of title. Until that duplicate is returned to the Land Title Office, no transfer, mortgage or Agreement for Sale (registered as a "Right to Purchase") may be registered regarding that property. A duplicate title will not be issued if the title is subject to a registered mortgage or an agreement for sale (see Chapter 7).

- "Transfers"

  If any portion of the parcel of land included in the legal description has been transferred it will be indicated here.

- "Corrections"

  Corrections made to the title to rectify errors are indicated here, with reference to the application number used to apply the correction. Obtaining a copy of the correction application provides a brief description of the error that was corrected, and a copy of the title as it existed prior to the correction being applied (pursuant to s. 383(2) of the *Land Title Act*).

(iii) Miscellaneous notes must be checked separately. Always request the electronic record of those notes and review miscellaneous notes that incorporate what would formerly have been noted on the index but would not have appeared as a charge on title. Various miscellaneous filings affecting a parcel are registered under "MN": posting plans, statutory right of way plans (that is, the plans alone without any accompanying right of way agreement), references to public official plans, and Agricultural Land Reserve determinations. As a result of enhancements made to the search functionality in myLTSA, much of the information for parcels that was previously accessed via a miscellaneous notes search is now accessed via the "associated plan" functionality in myLTSA. See Practice Note PN 03-16 at www.ltsa.ca in this regard.

(iv) The general index and common property record must also be searched when searching strata titles. Pending applications affecting the common property are noted as pending applications on all of the strata lot titles.

(c) Consider signing on to the Parcel Activity Notifier service. This service allows myLTSA customers to automatically receive an email advising of any activity relating to the subject property between the date of the request for the service and the expiration of the notice period (usually 90 days). Once the service is requested for a particular parcel of land, the customer is notified via email of any activity (such as the filing of a transfer, mortgage, claim of builders lien or certificate of pending litigation) affecting that property. The customer can then use the Document Retrieval service to obtain a copy of the document.

[§4.02] Index Searches

In rare circumstances, some titles and very old subdivisions are not in electronic form. If a record of title is not in electronic form, you must request or conduct an index search. If you encounter such a title, your land title agent or the Land Title Office staff will usually help to retrieve the documents.

[§4.03] Strata Title Searches

Strata title searches are more complicated than standard residential searches. You need to take the following additional steps:

(a) obtain an electronic record of the common property for charges against the common property or judgments against the strata corporation;

(b) obtain minutes of strata council meetings and annual general meetings for at least the last two years; and

(c) obtain an electronic record of the strata plan general index. For stratas created under the *Strata Property Act*, the Land Title Office will have a general index for each strata corporation. The schedules of unit entitlement, voting rights, any bylaw amendments, resolutions and other documents required to be filed in the Land Title Office under the *Strata Property Act* and not noted or endorsed elsewhere in the records of the Land Title Office will be noted on the general index.

In addition to these searches from the Land Title Office, obtain the following from the strata corporation:

(a) a copy of the strata corporation balance sheet and income statement;

(b) a copy of the strata plan, to confirm the lot location and the placement of common property and limited common property;

(c) a Form F Certificate of Payment under s. 115(1) of the *Strata Property Act* certifying that no money is owing to the strata corporation by the seller (registration of the transfer cannot proceed without this certificate (*Strata Property Act*, s. 256(1));

(d) a Form B Information Certificate under s. 59 of the *Strata Property Act*; (note that the Form B requires that documents be attached to it, such as the rules of the strata corporation and a recent budget, so you should check that indeed they are); and

(e) the name and phone number of the insurance agent that has arranged insurance for the strata corporation.

[§4.04] Real Property Taxes

A lawyer must find out if real property taxes are paid to date. In some municipalities, these taxes include separate utilities, dyking or other charges. You obtain real property tax information from the local taxing authority, usually the city or municipality.

Municipal tax certificates for many municipalities can be obtained through myLTSA. A lawyer with a myLTSA Enterprise account can request a tax certificate by entering the PID or roll number of the property, and the tax certificate from any participating municipality will be delivered to the lawyer's myLTSA Inbox.

Note that most municipal tax statements are issued subject to s. 249(3) of the *Community Charter*, S.B.C. 2003, c. 26, which states that the issuing municipality is not liable in damages for an error in a statement under s. 249. As well, if other municipal charges have been incurred but not assessed (such as a special area debt levy, local improvement charge, or other extraordinary municipal charge), the tax statement could be misleading. You may want to investigate further if your client is purchasing a property in a newer subdivision, or if municipal improvements have been undertaken in the area.

The responsibility for paying real property taxes follows the property rather than the owner of the property. Unpaid taxes constitute a *charge* on the property. If taxes are unpaid, delinquent, or in arrears, and the seller is to be responsible for payment, it is critical that you ensure that these taxes are paid. Ideally, you will do so by showing a holdback on the seller's statement of adjustments in an amount sufficient for the buyer's lawyer to fully pay any outstanding property taxes, inclusive of any interest and penalties.

[§4.05] Corporate Searches

If the seller is a corporation, a solicitor must search in the office of the Registrar of Companies to ensure that the corporation has not been dissolved and struck from the Corporate Registry.

If a corporation has been dissolved, any land it owns in British Columbia escheats to the government, meaning it becomes the property of the Provincial Crown (*Escheat Act*, s. 4(1)). For the first two years after the date of dissolution, the Attorney General cannot grant or dispose of that escheated land (*Escheat Act*, s. 4(3)). If the corporation is revived within two years from the date it was dissolved, then (subject to the terms of any court order), ownership of the land vests in the corporation again, as if the land had never escheated to the government. After the two-year period has expired, a corporation can still apply to get escheated land back, by applying to the Supreme Court for an order that the escheated land vest in the corporation pursuant to s. 4(5) of the *Escheat Act*. However, such an order will not be available if the government has already disposed of the land in the meantime (s. 4(5.1)).

Land that has become the property of the Provincial Crown is *not* reflected in the records of the Land Title Office. Consequently, escheats often go undiscovered until an application to transfer land is submitted to the Land Title Office, and rejected on the basis that the land has escheated to the Crown.

Be sure to also check that the names you have been given for the directors and officers of the company acting in the sale of the property correspond with the names of directors and officers filed in the registry.

[§4.06] Encumbrances

The most common financial charges you will come across in your search are mortgages. Mortgages are discussed in Chapter 7.

What follows is a selection of **non-financial** charges that you might have to advise your client about.

1. Easements

An easement is an interest in land in which the owner of one parcel (the "dominant tenement") is granted certain rights over an adjacent parcel (the "servient tenement"). Easements can include rights of encroachment, access and passage from one parcel of land to an adjacent parcel.

The easement area may be described in the instrument, although more usually it is described by reference to a plan filed with the instrument.

For your client's protection, you must ensure that you carefully identify the precise location of the easement area and that your client understands how the rights of the owner of the dominant tenement may impair your client's use of the property. For example, many easement instruments contain restrictive covenants (promises) of the owner of the servient tenement not to improve or build within the easement area. This would therefore limit your client's ability to build a previously contemplated structure such as a garage. For an example of an easement, see Appendix 4.

2. Statutory Rights of Way and Statutory Covenants

A statutory right of way is an easement without a dominant tenement. Only certain parties, named in ss. 218 or 219 of the *Land Title Act*, qualify to hold statutory rights of way or statutory covenants. These include public bodies, utilities, municipal corporations, or persons designated by the minister. Statutory covenants also do not require a dominant tenement. They may be positive in nature, including "conservation covenants" that require land to be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state (s. 219(4)(b)).

It is common to find a statutory right of way on title. Often it presents no problem. However, each must be examined to see precisely what powers have been granted to the holder of the right of way. You must discuss this with your client. As with an easement, you must review how your client's use of the portion of the property covered by the right of way area may be impaired by it. For an example of a statutory right of way, see Appendix 5.

3. Certificate of Pending Litigation

A certificate of pending litigation is a certificate issued by the court and filed in the Land Title Office. If a proceeding has been commenced that claims an estate or interest in land, or a right of action in respect of land is given by an Act other than the *Land Title Act*, the effect of a certificate of pending litigation is to freeze immediately all or some part of the title so as to prevent subsequent applications from being registered, unless the instrument supporting the application is expressed to be subject to the final outcome of the proceeding (s. 216). In addition, some interests can be registered as of right *after* the certificate of pending litigation. These include a caveat, a sublease, an involuntary charge (such as a judgment), a builders lien claim, and a subsequent certificate of pending litigation (s. 216(2)).

Sometimes, a certificate of pending litigation is registered in the time between when an application for registration of an interest in title is filed and when that interest is actually registered (that is, when the registration is still "pending"). If the prior applicant is a party to the action, the prior applicant will take title subject to the claim (s. 217). If the certificate of pending litigation relates to a registered charge, *Family Law Act* proceedings, or *Wills, Estates and Succession Act* proceedings, the registrar will register prior applications subject to the claim, whether or not the prior applicants are parties to the action. In all other cases, if the prior applicant is *not* a party to the action, the prior applicant will take title free of the claim.

A prior applicant whose interest is registered subject to a claim may use a summary procedure to cancel the claim on the grounds that no steps have been taken for one year in the proceedings, or on the grounds of hardship and inconvenience (s. 252 and s. 256). Section 256 is not available if the certificate relates to either foreclosure or *Wills, Estates and Succession Act* proceedings.

4. Caveat

A caveat is a temporary instrument that may be filed with the Land Title Office. Essentially, it is a request made to the registrar to prevent the registration of any instrument dealing with the property described in the caveat, until the caveat is withdrawn or discharged. The caveat must allege an estate or interest in land, and it is discretionary. The registrar will not grant a caveat unless satisfied that a claim for an estate or interest in the land has been set out properly.

Most caveats expire after two months, or earlier if notice is given to the caveator to commence an action or remove the caveat. A caveat lodged by a

committee of the Public Guardian and Trustee acting under the *Patients Property Act*, R.S.B.C. 1996, c. 349, does not expire after two months, but the registrar may withdraw the caveat (pursuant to s. 282(3) of the *Land Title Act*).

From a conveyancer's point of view, the caveat has the same effect as a certificate of pending litigation in that it freezes the title and will have to be resolved before the conveyance is completed.

[§4.07] Investigating Title

This section describes a number of statutes that may affect the title to or use of a property. A few of the key ones affecting title were introduced in Chapter 1—the *Land Title Act*, *Land Act*, *Strata Property Act*, *Family Law Act*, *Land Owner Transparency Act*, *Property Law Act*, *Fraudulent Conveyances Act* and *Fraudulent Preference Act*. In addition, this section discusses, in a limited way, Aboriginal title (a non-statutory form of title), which was introduced in Chapter 1.

These brief descriptions highlight that when searching title the lawyer must always be alert to the possibility that further investigation may be required.

1. Aboriginal Title

As noted in Chapter 1, §1.04, unextinguished Aboriginal title presents a potential challenge to the validity of third-party interests in land granted by the Crown. However, Aboriginal title, or caveats or certificates of pending litigation based on asserted but not yet proven claims of Aboriginal title, will not be found in the land title registry. In *Delgamuukw (Uukw) v. British Columbia*, 1987 CanLII 2630 (B.C.C.A.), the Court of Appeal held that Aboriginal title itself is not registrable under the *Land Title Act* because the fact that it is inalienable except to the Crown means that it lacks the marketability needed to establish a "good safe holding and marketable title" as required under the *Land Title Act*. As a result, a certificate of pending litigation based on that non-registrable interest was similarly not registrable. The Court of Appeal confirmed its decision in *Delgamuukw (Uukw)* in *Skeetchestn Indian Band v. British Columbia*, 2000 BCCA 525. In *Skeetchestn*, the Court held that a certificate of pending litigation based on a claim of Aboriginal title could not be registered against lands held by a private party under a certificate of indefeasible title.

As claims based on Aboriginal title cannot be registered under the *Land Title Act*, a real estate practitioner will not be able to rely on land title records to indicate whether a given parcel of land is subject to a claim by Indigenous people. There is currently no reliable way for a practitioner to determine whether a parcel of land is subject to such a claim, short of a court decision to that effect. Practitioners should keep this uncertainty in mind when advising clients as to the validity of title being acquired. See also the leading case on Aboriginal title, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, and the discussion in Chapter 1, §1.04.

2. *Builders Lien Act*

A detailed discussion of the *Builders Lien Act* is contained in Chapter 8. Note that mortgages registered before the lien claim take priority to the extent of the advances under the mortgage before filing the lien (s. 32(1)). Also, when a lien is filed, it is backdated in priority to the date of commencement of the work or the first supplying of materials so as to give priority over judgments, executions, attachments and receiving orders made after that backdating (s. 21).

A builders lien cannot be filed against the federal Crown, but can be filed against the provincial Crown (*Interpretation Act*, s. 14). If the lien is to be filed against a Crown agency, consider the statute creating that agency.

Lawyers should consider the decision in *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*, 2002 BCSC 238 (affirmed in *Shimco Metals Erectors Ltd. v. District of North Vancouver*, 2003 BCCA 193). The Court of Appeal, upholding the BC Supreme Court's interpretation of the *Builders Lien Act*, found that a lien may be created on a holdback, separate from the lien on the property.

3. *Environmental Management Act*

Most of the attention under the predecessor to the *Environmental Management Act*—the *Waste Management Act*—was on commercial rather than residential transactions. However, it was and continues to be possible for lawyers, sellers, buyers, landlords, tenants, licensees, local governments and lenders to attract liability for environmental matters in any type of land transaction. The liability may be contractual, civil or statutory under legislation such as the *Environmental Management Act*, S.B.C. 2003, c. 53, s. 45; the *Canadian Environmental Protection Act* 1999, S.C. 1999, c. 33; and the *Fisheries Act*, R.S.C. 1985, c. F-14, ss. 34 to 36. For example, maximum fines under the *Environmental Management Act* range up to $3 million or imprisonment if a person intentionally causes damage to the environment or shows reckless disregard for the lives or safety of other persons. The *Environmental Management Act* should be read with the regulations corresponding to that Act—the primary one being the Contaminated Sites Regulation.

If a potential toxic waste or other environmental problem is suspected, the buyer should probably insist on an appropriate subject clause allowing site investigation in the contract and, depending on the size of the transaction and the circumstances, conduct special searches.

It is unlikely that circumstances will require a search on residential property. However, it is up to each lawyer and the informed client to determine if an environmental search is required on a particular transaction. You may not want to perform a search on a residential transaction unless you are alerted to a potential risk of contamination as a result of a former industrial use or otherwise, for example, if your client becomes aware that the property was constructed on an underground oil tank. Pursuant to s. 392 of the *Land Title Act*, the director as defined in the *Environmental Management Act* may file in the Land Title Office a notice of contaminated land. The notice must include the legal description of the land affected, and specify the nature of the contamination and state the estimated period that the danger will persist. This notice is registered as a legal notation on title.

The most important searches may be to the Ministry of the Environment and the subject local government, although several other governmental agencies and departments may have information.

The *Waste Management Act* created absolute, retroactive, and joint and several liability for past and present owners of real property (former s. 27(1)). The *Environmental Management Act* retains these principles. Past and present owners of real property are considered "persons responsible for remediation of a contaminated site," subject to the exceptions in s. 46 (s. 45). These persons are "absolutely, retroactively and jointly and separately liable" for the reasonably incurred costs of remediation (s. 47). They may be held responsible for remediation costs by means of a government order or as a result of being joined as a party to a cost recovery action. A statutory lien mechanism facilitates recovery for clean-up costs.

Section 46 of the *Environmental Management Act* sets out several exemptions from liability. For example, buyers are exempt from liability if they acquired the land already contaminated, had no reason to suspect that the land was contaminated, made all appropriate inquiries to discover any contamination, did not contribute to contamination, and did not subsequently transfer contaminated land knowing it to be so without disclosing this fact (s. 46(1)(d)). A seller can also be exempt if the seller can prove that the site was not contaminated at the time of purchase or while the seller owned the site (s. 46(1)(e)). Finally, a seller who remediates the site and obtains certification as to the remediation will be exempt if a subsequent individual dealing with the site proposes to or undertakes to make a different use of the site and provides additional remediation (s. 46(1)(m)).

Secure creditors are another group who are exempt if they act primarily to protect their security interests (s. 45(4)). However, they will be responsible if they "at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements, in whole or in part, caused the site to become a contaminated site" or become the owner (s. 45(3)).

For specific types of current or past land use, sellers must disclose a *site profile* to prospective buyers, unless the prospective buyers waive this right.

Site profiles provide a mechanism to assist in identifying potentially contaminated sites. A site profile is based on the owner's knowledge of the property, and the owner should not require a consultant's assistance to complete the profile. Specific industrial or commercial land uses trigger site profiles and are listed in the regulations.

4. *Mineral Tenure Act*

Although landowners may hold an indefeasible title to property, their title rarely includes what lies beneath the surface. The Government of British Columbia owns and may dispose of subsurface rights to most lands in the province. This coincides with why an estate in fee simple to land described in an indefeasible title is subject to the reservations set out in s. 23(2)(a) of the *Land Title Act*. This fact may surprise landowners, especially because a free miner (or an employee) who is exercising a right under the *Mineral Tenure Act*, is entitled to enter private lands without being in contravention of the *Trespass Act*.

The *Mining Right of Way Act* also provides a recorded mineral title holder with the legal right to take and use private land for the purpose of securing a right of way, whether across, over, under or through the land, without the consent of the land owner, subject to the provisions of the *Expropriation Act*.

Recorded holders of mineral and placer claims made pursuant to the *Mineral Tenure Act* may have a subsurface interest below the same lands that a potential purchaser is seeking to acquire a fee simple interest in. Because the interest of a recorded holder of a mineral or placer claim issued pursuant to the *Mineral Tenure Act* is a chattel interest, and therefore cannot be registered as an interest in real

property, such an interest does not appear on the title search issued by the Land Title Office.

The potential for a conflict more often occurs on lands located outside of the boundary of a municipality. Therefore, a prudent solicitor acting for a purchaser who wishes to acquire land outside of a municipality should check the respective mineral titles map in the regional Gold Commissioner's office or through the Mineral Titles Online data base to ascertain the existence of a mineral title over specific ground.

5. *Family Law Act*

Under the *Family Law Act*, a "spouse" (as defined in the Act) who is a party to a property agreement may file a notice in the Land Title Office (s. 99). If a notice is filed, the registrar will not allow registration of a transfer, mortgage, agreement for sale, conveyance or lease, unless a cancellation or postponement notice is filed (s. 99(3)).

A spouse's interest in land under a property agreement or under s. 81 of the *Family Law Act* is subject to s. 29 of the *Land Title Act* (*Family Law Act*, s. 103(2)). Even if there is notice of an unregistered interest affecting land, that fact will not affect the transfer or charge except to the extent provided in s. 29.

The exception in s. 29 is fraud. This raises the question of what steps you should take to protect title on the acquisition of an interest in land if the person from whom that interest is being obtained is divorced or separated.

6. *Heritage Conservation Act*

In the sale and purchase of a property, the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187 affects what changes may be made to that home if it is a "heritage site" or "Provincial heritage site" or contains "heritage objects" or "Provincial heritage objects" (as defined in the legislation).

Section 12.1 of the *Heritage Conservation Act* requires a person to obtain a permit before doing various things such as altering, damaging, covering or removing protected objects or features that have heritage or archaeological value.

The minister also has the power to make an order affecting the property.

The *Heritage Conservation Act* also requires the minister to file a written notice in the Land Title Office with respect to land that is designated a Provincial heritage site, and upon receipt of such notice, the registrar must make a note of the filing on title of the land (s. 32).

To strengthen protection for heritage and archeological sites in British Columbia, significant changes to the *Heritage Conservation Act* were brought into effect on May 30, 2019. In addition to increasing enforcement and compliance powers of authorized officials, the amended legislation expands the circumstances in which the minister may amend, suspend or cancel a permit issued under the *Heritage Conservation Act*.

7. *Land Act*

Under the *Land Act*, the minister has the right to cancel a disposition of Crown land for failure to pay or to perform a required covenant (s. 43(1) and (2)). The definition of a "disposition" in s.1 of the *Land Act* is sufficiently wide to include a transfer:

> **"disposition"** means the act of disposal or an instrument by which the act of disposal is effected or evidenced, or by which an interest in Crown land is disposed of or effected, or by which the government divests itself of or creates an interest in Crown land.

Once the necessary procedural steps have been complied with under s. 43, the minister may then cancel a disposition. Once cancelled, any right of the holder of that disposition and all persons claiming through or under the holder is forfeited.

A certificate is the authority for the registrar of the Land Title Office to cancel the registration, according to the *Land Act*, s. 43(5):

> If a disposition, registered in a land title office, is cancelled, the minister may, by a certificate signed and sealed by the minister and setting out the reason for the cancellation, require the registrar to cancel registration.

Note that under the *Land Act* s. 55(2), the "land that comprises the bed or shore" of water cannot vest in any person, no matter what the title documents say:

> Nothing in any Act or rule of law to the contrary is to be construed to vest or to have vested in any person the land that comprises the bed or shore of the body of water below the natural boundary, and despite an indefeasible or absolute title to land, the title must be construed accordingly.

8. *Land (Spouse Protection) Act*

Section 3 of the *Land (Spouse Protection) Act* allows a spouse to file an entry in the register of land titles that will prevent the sale of the family home:

> s. 3(1) If an entry has been made on the register under section 2, a disposition of the homestead by a spouse during the life of that spouse if the interest of that spouse must or may vest in any other person at any time during the life of that spouse, or during the life of the spouse of that spouse living at the date of the disposition, is void for all pur-

poses unless made with the written consent of the spouse on whose behalf the entry is made.

s. 3(2) A conveyance designed to avoid the right given by this Act has no effect.

9. *Land Title Act*

Section 23(2) of the *Land Title Act* provides that the person named in the title certificate as the registered owner is indefeasibly entitled to an estate in fee simple of the lands described. An estate in fee simple is the greatest interest or estate that one can have in land.

Section 23(2) also provides that a certificate of indefeasible title is conclusive evidence that the registered owner holds an estate in fee simple subject to certain exceptions listed in that section. Refer to the *Land Title Act* while reviewing the discussion that follows.

The exception in s. 23(2)(a) provides that an indefeasible title is subject to any "subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown." The reference to "any other grant or disposition from the Crown" encompasses the situation where the Crown reacquires title to lands and subsequently disposes of it.

If there are any specific reservations, there may be a note on the title. However, your best approach is to ascertain the use to which the property will be put. If it is an area where the use could be affected by a Crown reservation, you should check the original Crown grant as well as advise your client as to the statutory reservations in the *Land Act*.

Many provincial and federal statutes allow for the creation of liens that may have priority, even if not filed in the Land Title Office (s. 23(2)(b)).

You must check municipal taxes before preparing the statement of adjustments. However, the title is also subject to local improvement taxes, such as for street lights (s. 23(2)(c)).

Indefeasible title is also subject to a lease or agreement for a lease not exceeding three years, if there is actual occupation (s. 23(2)(d)). Review the definition of such leases and agreements to lease under s. 1 of the *Land Title Act*. If there are leases for more than three years that are not registered, remember that they may still affect the title. It is basically a question of knowledge on the part of the buyer: if there are leases and the buyer knows of them, those leases could affect the title.

Highways, public rights of way, water courses and other public easements do not have to be endorsed on the certificate to affect the title (s. 23(2)(e)). See the *Transportation Act*.

The rights of expropriation and to escheat are explicitly exempted by s. 23(2)(f). Expropriation is authorized under a number of statutes and can include rights of expropriation given to the province, municipalities and utilities.

The *Escheat Act* provides that the land of individuals dying intestate without lawful heirs escheats to the Crown, as does land of companies which are dissolved (*Escheat Act*, ss. 3 and 4). However, there are provisions that enable the corporation to recover the land. If the company is restored within two years from the date the company was struck, the land revests to the company. After two years, a company must apply to the Supreme Court for an order that the escheated land vests in the company pursuant to s. 4(5) of the *Escheat Act*.

10. *Land Owner Transparency Act*

As noted in Chapter 1, the *Land Owner Transparency Act* ("*LOTA*") is a relatively new piece of legislation in British Columbia. It requires certain corporations, trustees of certain trusts, and partners of certain partnerships holding registered interests in land (referred to as "reporting bodies" in *LOTA*) to disclose any indirect owners of such interests. Certain information from these disclosures is searchable by the public in the Land Owner Transparency Registry ("LOTR"). Lawyers acting on transactions involving real property should conduct a search of LOTR to confirm that any indirect owners have been appropriately disclosed as part of the transaction. It is important to note that searches of LOTR may not reveal all current indirect owners because disclosures are not publicly available until at least 90 days after filing.

11. *Land Transfer Form Act*

Unless otherwise stated, every transfer of an estate in fee simple shall be deemed to be made under the *Land Transfer Form Act*, and to contain the forms of words set out in column 1 of Schedule 2 of the Act (s. 186 of the *Land Title Act*). The Act imports archaic language to these transfers, as well as to certain leases and mortgages.

12. *Personal Property Security Act*

Section 49 of the *Personal Property Security Act* provides for the filing of a notice in the Land Title Office of a security interest in fixtures. Although not defined except as excluding building materials (s. 1(1)), fixtures may include manufactured homes (s. 36) or crops (s. 37).

Sections 37 and 38 of the Personal Property Security Regulation, B.C. Reg. 227/2002, prescribe Form 1, Notice of a Security Interest in Fixtures or Grains Crops and Form 2, Notice Affecting a Notice of a Security Interest in Fixtures or Grains Crops for the purpose of s. 49 of the Act. Upon the filing of these forms in the Land Title Office and payment of the prescribed fee, the registrar makes an entry in the proper register for the title to the land. The date of filing the s. 49 notice fixes one's priority to claim fixtures as against subsequent claims to interests in the land, further advances on existing mortgages, and registered judgment creditors. Therefore, it is crucial that you file the notice as soon as possible, notwithstanding certain grace periods that might otherwise apply under the *PPSA* in relation to other interests. There is no statutory time limit in which the s. 49 notice must be filed. A s. 49 notice may have a fixed expiry date or be an infinite registration. The s. 49 filing remains effective for its stated term, except in the case of future crops, for which a new security agreement must be entered into each year (s. 13(2)(a)).

The security interest in fixtures or crops for which a s. 49 notice has been filed has priority over existing interests in the land. At the same time, any person subsequently dealing with the land (including an owner, buyer, lessee, or other person encumbering the land), whether or not the person acquired the interest in the land before or after the fixtures or crops became attached, need not be concerned with any security interests in fixtures or crops that are not filed under s. 49, unless the person has participated in a fraud.

13. *Power of Attorney Act*

The *Power of Attorney Act* is divided between regular and enduring powers of attorney. The enduring powers of attorney continue to be effective when the adult loses capacity whereas the regular powers of attorney do not. The *Power of Attorney Act* also codifies the duties of an attorney, which include the requirement for the attorney to act honestly and in good faith (s. 19(1)).

In dealing with a power of attorney, be aware of s. 56 of the *Land Title Act*, which puts a three-year limitation period on that power, unless the power expressly excludes the application of s. 56 or it is an enduring power of attorney which has been filed in the Land Title registry.

For more information on enduring powers of attorney, see Practice Bulletin 02-11 at www.ltsa.ca.

14. *Property Law Act*

Under the *Property Law Act*, the merging of ownership of what was the dominant and servient tenements does not extinguish either an easement or a restrictive covenant (s. 18(7) and (8)).

Sections 20 to 24 deal with the situation where an original mortgagor of residential property (or the original buyer under an agreement for sale of residential property) may be released from their liability to the original mortgagee/seller. Sections 20 to 23 are very important to a seller of residential property where the buyer is assuming an existing mortgage. Those sections provide a mechanism by which the seller can be released from the seller's personal covenant on the assumed mortgage.

Sections 28 to 30 concern priorities of mortgages. In particular, s. 28(2) covers advances made under a mortgage after registration of subsequent mortgages. If you act for a second mortgagee, note in particular the notice requirement under s. 28(2)(b).

Section 34 permits an owner of a residence to apply for a court order permitting the owner to enter on adjoining land for the purposes of carrying out repairs on their own house. Section 35 goes even further to permit a court to modify or cancel an easement, a land use contract, a statutory right of way, a restrictive or other covenant burdening the land or the owner, the right to take the produce of or part of the soil, or an instrument by which minerals or timber or minerals and timber being part of the land are granted, transferred, reserved or excepted.

Section 36 gives the court power, where there is an encroachment on adjoining land or a fence enclosing adjoining land, to permit that encroachment or enclosure by way of an easement.

Although ss. 34, 35 and 36 are helpful to persons applying for relief, they represent a statutory interference with the title to the adjoining land.

For lawyers who have non-Canadian clients concerned about their status in a real estate transaction, see s. 39 of the *Property Law Act*.

15. *Resort Municipality of Whistler Act*

Many properties located in Whistler, BC will have a notation on title stating that title may be subject to ss. 12 to 20 of the *Resort Municipality of Whistler Act*. This notation means that the property is "resort land" and subject to assessments by the Whistler Resort Association, which trades as Tourism Whistler. Arrears of assessments will run with the land because of this notation.

16. Miscellaneous Other Statutes

As mentioned above, these brief descriptions of statutes that could affect land serve to remind the lawyer that in searching title or giving an opinion on title further investigation may be required. The statutes below variously limit the uses that may be made of land or allow authorities to claim liens on title.

(a) *Aeronautics Act*

Section 5.4(2) of the *Aeronautics Act* R.S.C. 1985, c. 2, provides that the Governor in Council may make regulations affecting lands adjacent to airports, including purposes those lands may be put to that could be incompatible with, or pose hazards to, the safe operation of an airport or aircraft.

Section 22 of the *Land Title Act* Regulation, B.C. Reg. 334/79, provides for filing of zoning regulations under the *Aeronautics Act* and for the noting of them on the relevant certificates of title. The Regulation provides for the deposit of the plans. The *Aeronautics Act* provides for publication of the zoning regulations under the *Aeronautics Act* and for noting them on the relevant certificates of title. There are filings under this Act that restrict the height of buildings on large tracts of land surrounding the airports in Richmond, Langley and Abbotsford.

(b) *Agricultural Land Commission Act*

The *Agricultural Land Commission Act*, S.B.C. 2002, c. 36, establishes provincial agricultural land reserves. The Commission makes decisions on the inclusion or exclusion of land within a reserve and hears applications for the use and subdivision of agricultural land.

The registrar must endorse that the title may be affected by the *Agricultural Land Commission Act* on every indefeasible title to agricultural land issued after June 29, 1973 (s. 60(2)).

(c) *Bankruptcy and Insolvency Act*

A conveyance or mortgage of property that is subject to an assignment in bankruptcy or a bankruptcy order is valid, under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 75, where the purchaser or mortgage lender is bona fide and provides adequate consideration. However, a conveyance or charge made within three months before the bankruptcy can be deemed a fraudulent preference (s. 95). In such circumstances, a creditor's title will be suspect.

(d) *Business Practices and Consumer Protection Act*

Note that the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, only applies to a "consumer transaction" between an individual consumer and a "supplier" who is providing real estate in the course of business.

Effective July 4, 2004, the *Business Practices and Consumer Protection Act* replaced sections of the *Consumer Protection Act* that deal with *non-commercial* mortgage transactions. Division 2 [Unconscionable Acts or Practices] of the *Business Practices and Consumer Protection Act* allows the court to reopen a *non-commercial* mortgage transaction, vary the term, and even set aside the security.

Section 72(3) of the *Business Practices and Consumer Protection Act* also provides for a prescribed maximum fee that a lender can charge for a discharge of a *non-commercial* mortgage. Regulation B.C. 273/2004 [Disclosure of the Cost of Consumer Credit Regulation] establishes this maximum at $75.00 (s. 16).

(e) *Employment Standards Act*

Under the *Employment Standards Act,* a certificate may be filed by the Director against an employer's interest in land if employees are owed wages. It constitutes a lien and ranks in priority to other liens, judgments and charges previously filed. But (in s. 87) the Act says it will not rank ahead of a mortgage or debenture charging the land, except for money advanced under a mortgage or debenture after the certificate was registered (s. 87(5)):

> The lien, charge and secured debt referred to in subsections (1), (1.1) and (2) has priority over a mortgage of, or debenture charging, land, that was registered in a land title office before registration against that land of a certificate of judgment obtained on the filing, under section 91, of a determination, a settlement agreement or an order of the tribunal, but only with respect to money advanced under the mortgage or debenture after the certificate of judgment was registered.

(f) *Forest Act*

Under s. 121(1) of the *Forest Act*, R.S.B.C. 1996, c. 157, the minister may, for the purpose of providing access to timber or for purposes consistent with the Act, enter onto, take possession of, and construct roads on private lands.

(g) *Homeowner Protection Act*

The *Homeowner Protection Act* legislation represents a scheme for mandatory new home warranty insurance and a regulatory system for licensing residential builders. The Act provides that a person (other than an owner-builder or person exempted by regulation) must not build, offer for sale, or sell a new home unless the new home is covered by home warranty insurance provided by a warranty provider, the coverage of which must comply with s. 22. Under sections 7 and 8, the registrar must keep a register of those builders who hold valid licenses.

(h) *Islands Trust Act*

If the property to be conveyed falls within the ambit of the *Islands Trust Act*, which generally affects the southern Gulf Islands, there may be restrictions on what can be done with the land. These restrictions may limit construction and subdivision, and may require the approval of a trust committee (s. 32).

If you are dealing with property in that area, you should also consult the *Islands Trust Regulation*, B.C. Reg. 119/90.

(i) *Land Tax Deferment Act*

Under the *Land Tax Deferment Act*, R.S.B.C. 1996, c. 249, the minister or a taxation authority designated by the minister may make an agreement with a landowner to defer taxes. If that agreement to defer taxes is registered in the land title office under this Act (s. 11(1)), then it becomes a lien on the applicable property, and the registrar must not register a transfer or conveyance of any part of the property without the written consent of the minister.

(j) *Local Government Act*

Section 716(1) of the *Local Government Act*, R.S.B.C. 2015, c. 1, provides that, despite any other enactment, every assessment or tax imposed on land forms a lien and charge on that land. It does not need registration to preserve it, and it takes precedence over any claim or lien of any person except a claim by the Crown and for municipal taxes already accrued.

(k) *Manufactured Home Act*

Section 7(7) of the *Manufactured Home Act*, S.B.C. 2003, c. 75, provides that, except as against the person making it, an instrument purporting to transfer property in a manufactured home is not effective unless a notice of transfer in the form established by the registrar is filed with the registrar. A mortgage, conditional sale or other security interest registered against a manufactured home must be registered at the Personal Property Registry.

(l) *Riparian Areas Protection Act*

Be aware that legislation affects land in riparian areas, areas that link water to land (e.g. areas bordering streams). Section 12 of the *Riparian Areas Protection Act*, S.B.C. 1997, c. 21 provides, in part, that the Lieutenant Governor in Council may establish directives for the protection and enhancement of riparian areas, directives that could affect bylaws and permits required.

(m) *Transportation Act*

If the property in question has a public highway through it or adjacent to it, section 57 of the *Transportation Act*, S.B.C. 2004, c. 44, might apply, to the effect that "the soil and freehold of every provincial public highway is vested in the government."

(n) *Trespass Act*

There is a statutory obligation on adjoining owners of land in a rural area to make and repair fences and natural boundaries under the *Trespass Act*, R.S.B.C. 2018, c. 3, unless otherwise agreed or unless the adjoining owner is the Crown (s. 10). Provincial land surveyors acting in the discharge of their duties can pass onto any lands (*Land Surveyors Act*, R.S.B.C. 1996, c. 248, s. 59.1).

(o) *Water Sustainability Act*

Under the *Water Sustainability Act*, S.B.C. 2014, c. 15, the provincial government, and its delegated comptroller or water manager, govern the rights to use and divert water, groundwater, streams, lakes and wetlands. When conveying or disposing of land that has one or more water licences, authorizations or permits, lawyers are required to report, in writing, the transfer of ownership. Lawyers must report to the comptroller or a water manager before completing the disposition.

Water licence information is available at https://www2.gov.bc.ca/gov/content/environment/air-land-water/water/water-licensing-rights/water-licences-approvals.

Note the following excerpt from a letter by H.D.C. Hunter in 49:6 *The Advocate* (November 1991):

> As a member of the Environmental Appeal Board for some ten years, I have heard many appeals under the *Water Act*. All too frequently, in an appeal relating to loss of a domestic water supply, one or both parties says: "My

> lawyer never told me anything about that". In areas of the province where there are no public water systems, water licenses are of supreme importance. While it is not illegal for a person to take water out of a stream for domestic purposes, he obtains no rights. A newcomer obtaining a licence can deprive a longtime user of his supply. I suggest that a lawyer has a duty to his client when retained to convey title to property outside of a public supply area to enquire as to the water supply …

(p) *Workers Compensation Act*

The *Workers Compensation Act*, R.S.B.C. 2019, c. 1, s. 265(1), provides that an assessment against an employer of an amount that remains outstanding constitutes a lien. It affects the employer's property that was used for a purpose related to the industry for which the employer was assessed, and it takes priority over other charges, except liens for employee wages and liens under the *Temporary Foreign Worker Protection Act*, S.B.C. 2018, c. 45.

[§4.08] Site Registry

A Contaminated Site Registry was created under s. 26.3 of Part 4 of the *Waste Management Act*, to provide easy public access to reported information on contaminated sites, including basic characteristics of a site, legal events and milestones in the site cleanup process. The Site Registry continues under the *Environmental Management Act* (s. 43).

The registry also contains information on sites that have been investigated and required little, if any, cleanup, and sites that have already been cleaned up. Thus, the registry is a registry of existing contaminated sites and of sites that are no longer contaminated. The registry is, in effect, a registry of decisions about sites that have been evaluated, whether or not they are clean or contaminated.

The Site Registry contains both electronic and paper records. It summarizes the history of investigation and cleanup for each site. The paper Site Registry contains detailed information from which the electronic Site Registry information is created.

The electronic Site Registry contains information generally grouped under seven categories.

1. General—information concerning a site's location, fee category, overall cleanup status and most current site profile.
2. Notations—information concerning legal events such as issuance of pollution abatement, prevention and remediation orders, or issuing Certificates of Compliance and Approvals in Principle. Also, administrative notations such as site investigation and remediation report submissions are included.
3. Participants—information concerning people and their roles in the investigation or cleanup process.
4. Documents—information regarding the existence of reports concerning a site.
5. Land Use—information concerning the land use related to a site.
6. Assessments—general information related to the main substances found at a site.
7. Remediation Plans—general information relating to different cleanup plans used and the target cleanup standards.

The public may access the Site Registry through BC OnLine. The electronic Site Registry provides different levels of access depending on the user's needs. Fees for accessing this information vary with the method of search and level of detail required. Generally, the less detail required, the lower the fee. In addition, it allows the user to search three ways for information:

1. Numeric Search—by PID, Crown Land Parcel Identification Number ("PIN") or file number, and Site Identification Number ("SID").
2. Civic Address Search—by specific or general address.
3. Area-based search—by the latitude and longitude coordinates of a property to search within a 0.5 km or 5 km radius of a property for sites in the vicinity.

The user is presented with a search results list of sites. The user can then select a site, request a synopsis or detailed report for that site, print it, and then return to the search results list to repeat the process. If more detailed information is required after accessing the electronic Site Registry, the paper Site Registry may be accessed by contacting the appropriate regional Ministry of Environment and Climate Change Strategy office.

For properties that have archaeological sites on them, the British Columbia Archeological Site Inventory provides information pertaining to the restrictions on development and alteration of these properties.

[§4.09] Transactions Involving Indigenous Peoples' Lands

Land transactions involving Indigenous peoples' lands are usually outside of the provincial land title system and are subject to different legislative regimes and conveyancing requirements. The most commonly encountered Indigenous peoples' lands are reserve lands managed under the *Indian Act*, R.S.C. 1985, c. I-5, and the *Framework Agreement on First Nation Land*

Management Act, S.C. 2022, c. 19, s. 121 (the "*FAFNLMA*").

As mentioned in Chapter 1, §1.04, some interests in reserve lands under the *Indian Act* are obtained by grant from the federal Minister under powers set out in the *Indian Act*. The *Indian Act* prescribes the nature of the consents required from Band members or council as a prerequisite to the grant. Failure to comply with the requirements of the *Indian Act* can result in the grant of interest being invalid. Consequently, practitioners must consider whether due diligence requires confirmation that the interest in question has been granted in accordance with the requirements of the *Indian Act*.

Most interests in reserve lands are not accepted for registration in the provincial Land Title Office (*Cranbrook (City) v. British Columbia (Registrar of Land Titles)*, 1999 CanLII 5461 (B.C.S.C.). An Indian Lands Registry System is established under the *Indian Act*, and transactions involving interests in reserve land are to be registered in that registry. Remember that the Indian Lands Registry System is a registry only, and registration of a transaction or a charge against land does not necessarily confer a priority or confirm the validity of the transaction. Searches in the Indian Lands Registry System can be performed online (you must create an account): services.aadnc-aandc.gc.ca/ilrs_public/.

Conveyancing under the *Indian Act* involves very different processes and requirements than conveyancing under the provincial land title system. Although leases, permits and easements can be granted under the *Indian Act*, it is important to realize that these are statutory rather than common law interests in land. Therefore, common law principles will not necessarily apply to their interpretation.

The Government of Canada owes a fiduciary duty to Indigenous people in carrying out transactions involving reserve lands (*Guerin v. The Queen*, [1984] 2 S.C.R. 335). In addition, because of the Crown's fiduciary duty and the *sui generis* nature of Aboriginal title or the interest of Indigenous people in their lands, the courts have developed an intention-based approach to interpreting transactions involving reserve lands to ensure that the intentions and interests of Bands are respected and protected in those transactions (*St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85). Keep these principles in mind when advising clients on real estate transactions involving reserve lands.

Some reserve lands are governed by the *FAFNLMA* and the *Framework Agreement on First Nation Land Management* (the "Framework Agreement") (see Chapter 1, §1.04). Under the *FAFNLMA*, land management responsibilities for reserve lands are transferred from the federal government to those Indigenous groups that are signatories to the Framework Agreement. In British Columbia, several First Nations are currently part of this regime.

Once a First Nation establishes a land code that is ratified in accordance with the requirements of the Framework Agreement, the First Nation assumes responsibility for land disposition and management on its reserves. The reserves continue to be reserves as defined in the *Indian Act*, and land transactions are registered in the First Nation Lands Register administered by Indigenous Services Canada. Practitioners involved in a conveyance of an interest in reserve land might consult Indigenous Services Canada.

It is also important to note that lands held by the shíshálh Nation and the Nisga'a Nation are subject to self-government legislative regimes, which are implemented by the *shíshálh Nation Self-Government Act*, S.C. 1986, c. 27, and the *Nisga'a Final Agreement Act*, S.C. 2000, c. 7, respectively. Those regimes are again distinct from the *Indian Act* and the *FAFNLMA* regimes, and the applicable legislation and agreements must be consulted directly.

Finally, the Nisga'a Nation, the Tsawwassen First Nation, the Maa-nulth First Nations and Tla'amin Nation have treaties that govern the entitlements to those Nations' lands. Those treaties must be consulted in the case of these Indigenous peoples.

Chapter 5

Steps and Documents in a Conveyance[1]

[§5.01] Duties of The Buyer's Lawyer

In British Columbia the buyer's lawyer prepares almost all closing documents and forwards them to the seller's lawyer for review and signature. In a residential conveyance, the buyer's lawyer will often act for both the buyer (regarding the conveyance) and for the buyer's lender (regarding setting up the mortgage). This is discussed in §2.01. Usually, the seller lawyer's role is limited to reviewing and arranging for documents prepared by the buyer's lawyer to be executed (signed); receiving and distributing funds; and arranging the payout and discharge of any mortgages and other financial charges for the seller. Accordingly, this chapter will focus on the role of the buyer's lawyer. (In other jurisdictions, such as Alberta, the roles of the lawyers are reversed.)

There are three basic stages when acting for a buyer in a residential conveyance:

(a) gathering information;

(b) preparing and executing documents on the basis of the information gathered; and

(c) receiving funds, tendering documents for registration, and paying out funds.

[§5.02] Steps in a Residential Conveyance

Refer to the "Residential Conveyance Procedure" Checklist in the Law Society of British Columbia's *Practice Checklists Manual* (www.lawsociety.bc.ca). See also the Checklists in the *Conveyancing Deskbook* (Vancouver: CLEBC).

Remember that Law Society Rules 3-98 to 3-110 require lawyers to identify and verify a client's identity when the lawyer provides legal services in respect of a financial transaction. The lawyer must also obtain information about the source of the money. Since land transactions have historically attracted impersonators and fraudsters, conveyancing lawyers need to be especially careful when verifying a client's identity. (Consult the *Practice Material: Professionalism: Practice Management* for more on these requirements.)

1. Initial Contact

(a) Obtain a copy of the purchase agreement and all addendums executed by the seller and the buyer.

(b) Examine your instructions and the purchase agreement.

(c) Review the purchase agreement as to form, parties, dates, description of property, deposit, price, conditions precedent, representations and warranties, encumbrances, tenancies and execution.

(d) Consider any problems as to the type of conveyance, file management, and control.

(e) Consider any conflict of interest; ensure that you are not acting for more than one party in the transaction, or, if you are acting for more than one party as permitted by the *BC Code*, that you follow the steps set out in the *BC Code*.

(f) Consider all relevant legislation.

(g) Open a file and note critical dates in your office diary and bring-forward system.

2. Client Interview

Contact the client to confirm instructions, to obtain any further information you require, and to discuss particulars of the purchase agreement, including the following:

(a) Identify the full name, address and occupation of the buyer, and whether multiple buyers are joint tenants or tenants in common. Under s. 10(2) of the *Wills, Estates and Succession Act*, owners registered as joint tenants are treated as tenants in common for estate purposes if they die within five days of each other.

(b) How will the purchase price be paid, such as:

(i) paying all cash (note that Rule 3-59(3) prohibits the receipt of cash in an aggregate amount greater than $7,500 in respect of any one client matter);

(ii) obtaining a new mortgage; or

(iii) assuming the seller's existing mortgage.

(c) Ensure that the price represents fair market value (in an arm's-length transaction, it usually

[1] Revised by **Dick Chan** of Spagnuolo & Company Real Estate Lawyers in November 2023. Some revisions in 2024 by PLTC for changes relating to provincial taxation. Reviewed regularly by the Land Title and Survey Authority for content relating to the BC land title and survey system, most recently in October 2023. Previously revised by Dick Chan and Robert Spagnuolo (2022); Dick Chan (2020 and 2019); Randy Klarenbach and Aneez Devji, Richards Buell Sutton LLP (2012); Ian Davis, Race & Company (2010); Joel Camley, Gowling Lafleur Henderson LLP (2005–2008); and Lawson Lundell LLP's Real Estate Department (annually until 2004).

does, but be wary if a seller wants the written deal to be a low amount supplemented by undocumented cash, which is a criminal offence that you cannot be a party to).

(d) Identify requirements of the mortgage lender or other requirements for financing, to ensure that you have the proceeds in your trust account before closing.

(e) Consider the status of conditions precedent/subject clauses (obtain a copy of the confirmation of removal of any conditions precedent/subjects).

(f) Consider whether there are any unwritten representations or warranties.

(g) Determine whether there are existing tenants, and details of the rent rate and security deposit.

(h) Identify any deficiencies in the agreement.

(i) If the premises are newly constructed or if there have been improvements, note the provisions of the *Builders Lien Act* or lien holdback under the *Strata Property Act*, and the advisability of deficiency holdbacks, warranties and inspection before completion.

(j) Discuss the necessity for title insurance and homeowner's insurance, both from your client's standpoint and the mortgage lender's standpoint, and who is to arrange it.

(k) Discuss whether zoning is a concern, or whether the client has concerns about the legality of suites on the property, and who is responsible to check.

(l) Discuss whether a survey certificate is necessary from your client's or the lender's standpoint, and who is to obtain it.

(m) Ask whether your client is aware of any marital difficulties between the seller and the seller's spouse, since that might attract problems with title under the *Family Law Act*.

(n) If the seller is a developer who is required to deliver a disclosure statement under the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, ask has the buyer received it, and do they want you to review it.

(o) Arrange for physical possession and obtaining the keys (often the real estate agent will assist).

(p) Ask about any uses of the property or neighbouring land that might have environmental implications or warrant further investigation.

(q) Calculate property transfer tax payable, including additional property transfer tax that may be payable by foreign buyers, and reductions for first-time homebuyers.

(r) Ask whether the clients are Canadian citizens, permanent residents, or foreign entities (and consider the effect of the four-year prohibition on foreign buyers under the *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, S.C. 2022, c. 10, s. 235 and related amendments and regulations).

(s) Determine GST implications of the transaction, such as if the property has been used for a commercial purpose or is newly constructed.

(t) Consider whether any other restrictions may affect the land, such as designation as heritage property.

(u) Consider whether the new "home flipping tax" (scheduled to take effect January 1, 2025) may affect your client's plans for the property; under the *Residential Property (Short-Term Holding) Profit Tax Act,* buyers who sell a home within two years of purchasing it may be liable to pay up to 20% tax on any profits.

(v) Remind your client of their obligation to complete the transaction and pay closing costs.

(w) Discuss the calculation of your account, and the method and timing of payment.

3. Title Search

(a) Order a full title search from the Land Title Office:

(i) search title to the property;

(ii) order copies of all encumbrances, miscellaneous notes, pending registrations, and plans on title, and, if a strata property, bylaws, common property charges, and strata plan; and

(iii) obtain copies of any other documents affecting title that are not located in the Land Title Office, such as municipal charges shown as notations.

(b) Order searches in other appropriate registries:

(i) if a corporation is involved, order a corporate search and determine whether the corporation has ever been struck from the register;

(ii) order tax information and utility information;

(iii) if any chattels are being purchased, order a Personal Property Registry search; and

(iv) if a mobile home is being purchased, consult the *Manufactured Homes Act* and Manufactured Home Registry.

(c) Order a surveyor's certificate, if so instructed by the client or the buyer's lender.

(d) If a strata lot is being purchased, obtain a Form F Certificate of Payment (s. 115) and a Form B Information Certificate (s. 59) from the strata corporation.

(e) Make zoning inquiries or inquiries in any other registry or office, if so instructed.

(f) Request confirmation from the real estate agent as to the commission payable, the deposit and the balance of commission owing.

4. Follow-Up From Interview and Title Search

(a) Review title documents in detail, considering the terms of the purchase agreement:

(i) Examine the title, checking for any irregularities.

(ii) Pay special attention when the legal description in the title search contains exceptions, or begins with "That part of lot…," to ensure that the parcel defined in the legal description comprises the entire land that the buyers believe they have agreed to purchase.

(iii) Check the status of the duplicate indefeasible title, and if it is checked out, take steps to ensure that it is returned to the Land Title Office.

(iv) Check for any pending applications on title, and if there are any, determine how they will affect title to the property.

(v) Examine rights of way, easements and other charges.

(vi) Review any land use contracts, statutory building schemes, and restrictive covenants for unusual provisions.

(b) If mortgages are on title, and the buyer intends to assume the mortgages, ensure they are assumable. Order assumption statements.

(c) If the buyer is not assuming the mortgages and you act for the seller, order payout statements. You should state in your letter that the information requested is for discharge purposes. Beware of payout statements that purport to exclude errors and omissions.

(d) If the buyer is granting a new mortgage, determine who is acting for the lender and coordinate the amounts, the concurrent registration of the transfer and mortgage documents, and any particular mortgage requirements, such as proof of insurance coverage and survey certificate.

(e) Contact the seller (or the seller's lawyer, if known to you) to find out who will be responsible for clearing title and for preparing discharge documents.

(f) If you are instructed to clear existing encumbrances from the title on behalf of the seller, confirm these instructions along with the amount of your account, in writing, with the seller. Also confirm that you can only act for the seller on that limited basis.

(g) If there are restrictive covenants, statutory building schemes, or land use contracts on title, obtain confirmation of compliance with the terms, if possible. Often the holder of these charges no longer exists, and this should be reported to your client.

(h) If the premises are newly constructed, contact the builder to confirm the date for substantial completion, and contact the municipality to see if it has issued an occupancy certificate.

(i) Send the buyer written confirmation of your instructions to act (an "initial report letter" or "interim report letter") and an interim report on title.

(j) Enclose a copy of the survey plan from the Land Title Office and have the buyer verify the correct property. Ask the buyer to initial the plan and return a copy.

(k) Enclose, for your client's review, copies of any encumbrances that will remain on title and the plans relating to those encumbrances, if any. These include rights of way, easements and mortgages that are being assumed. Depending on the nature of the encumbrances, you may need to explain them to your client.

(l) The initial report letter is also an opportunity to set out matters the client will be responsible for. Confirm with your client in writing:

(i) the responsibility for checking zoning and obtaining a surveyor's certificate;

(ii) the responsibility for instituting insurance;

(iii) your client's understanding of any potential for problems under the *Builders Lien Act* or *Family Law Act* and other legislation;

(iv) the responsibility for opening any accounts such as hydro and telephone;

(v) your respective responsibilities for determining whether the transaction attracts GST and which party will absorb the tax;

(vi) the amount of money in excess of anticipated net proceeds of mortgage needed to complete the transaction; and

(vii) your fees and disbursements.

5. Document Preparation

When acting for a buyer, prepare the following documents, as required according to the terms of the contract. Those marked by an "*" are the most common documents in a residential conveyance:

(a)* Form A Freehold Transfer (or Right to Purchase);

(b)* Form B Mortgage, based on the lender's instructions to the lawyer together with acknowledgement of receipt of the lender's standard mortgage terms, if any;

(c)* Property Transfer Tax Return;

(d)* transparency declaration and, if the buyer is a "reporting body" (generally, a corporation, trustee of a trust, or partner of a partnership), then also a transparency report;

(e)* statement of adjustments. Include confirmation of the residency of the seller and a direction to pay funds pursuant to the statement of adjustments by the seller and buyer;

(f)* in/out analysis;

(g)* non-resident declaration of the seller under s. 116 of the *Income Tax Act,* to include the seller's address and telephone number for the Property Transfer Tax Return;

(h) *Speculation and Vacancy Tax* declaration;

(i) (in Vancouver) *Vacancy Tax By-law* ("empty homes tax") declaration;

(j)* irrevocable direction to pay from buyer to buyer's lawyer;

(k) GST rebate if the property is a new construction;

(l) GST declarations;

(m) builders lien declaration;

(n) bill of sale if any chattels are being purchased; and

(o) power of attorney of the buyer in registrable form, if required. Confirm with the buyer's lender that the mortgage is permitted to be signed by attorney.

When acting for a seller, prepare the following documents, as required, with those marked by an "*" being the most common documents in a residential conveyance:

(a)* letter to those parties that hold a registered financial charge against the property (e.g. a mortgage), if any, requesting a written payout statement detailing the amount to pay out the financial charge and obtain a registrable discharge;

(b)* irrevocable direction to pay from the seller to the seller's lawyer, with details as to how the sale proceeds are to be distributed;

(c)* discharge of mortgage, if applicable;

(d) seller (vendor) take-back mortgage;

(e) special resolution of a corporation;

(f) power of attorney; and

(g) assumption of mortgage.

If the seller purchased the property less than two years earlier, under the *Residential Property (Short-Term Holding) Profit Tax Act*, scheduled to take effect January 1, 2025, the seller may owe the Province a home flipping tax of up to 20% of any profit realized on the sale and may be required to file a home flipping tax return within 90 days of the sale.

6. Matters Before Closing

(a) Ensure that all searches you initiated have been received and reviewed, and are satisfactory.

(b) Obtain any mortgagee's consent to assume the mortgage.

(c) Meet with your client to discuss your letter in detail, to confirm that the lot marked on the plan is the lot they expect to purchase, to review the statement of adjustments and mortgage documents, to execute all documents (see 5 above), and to receive the funds necessary to complete.

(d) Buyer's funds for completion, based on the buyer's statement of adjustments, should be in the form of a certified cheque or banker's draft. Consider the implications under rules 7.2-12 and 7.2-13 of the *BC Code* if uncertified funds are deposited into a lawyer's trust account where the lawyer must promptly pay out those funds to complete a purchase.

(e) Deposit funds in the trust account.

(f) If the buyer's solicitor has not prepared the mortgage—for example, in a commercial transaction—obtain the mortgage documents for review and execution, and confirm that all prerequisites to funding have been met. Return the mortgage documents to the mortgagee's solicitors on appropriate undertakings.

(g) Ensure that all documentation received from the seller's solicitor is dated and duly executed in registrable form.

7. Registration

Arrange for electronic registration of the land title documents. Steps are as follows:

(a) conduct a pre-registration search to ensure that no additional encumbrances have been tendered for registration or registered since your initial search;

(b) tender the conveyancing documents electronically and ensure that the mortgage document is tendered concurrently; and

(c) the Land Title Office will email confirmation of acceptance of filing.

8. Closing Procedures

(a) Conduct a post-registration title search to ensure that there are no intervening encumbrances.

(b) If the buyer's solicitor has not prepared the mortgage, request and obtain funds from the mortgagee's solicitor.

(c) Be prepared to hold back a portion of funds for deficiencies, if permitted under the contract of purchase and sale.

(d) Hold back or obtain an undertaking from the seller's lawyer to hold back the required amount under the *Builders Lien Act*. Note s. 88 of the *Strata Property Act* regarding when a purchaser must retain a holdback of 7% of the purchase price. Conversely, there is no right to a holdback for a non-strata property unless provided for in the contract of purchase and sale.

(e) Pay out the balance of the funds. It is common practice in the Lower Mainland to pay out funds immediately. In some other land title districts, the practice is to await confirmation of actual registration before paying out. Be alert for any last-minute changes to payment instructions, in case a fraudster is trying to divert the funds, and confirm emailed payment instructions by phone or in person. Pay out funds to:

(i) the seller (with undertakings to clear the mortgage, if appropriate; see Rules 3-95 and 3-96 below);

(ii) the real estate agent;

(iii) the mortgagees, if appropriate;

(iv) taxing authorities; and

(v) other parties to whom the seller is to pay part of the sale proceeds, such as a strata corporation that is owed money for maintenance costs.

(f) Obtain and register all discharges of mortgage which have not already been registered. Generally, it is the practice to pay out an institutional mortgage before receiving a discharge. However, in the case of a private mortgage, it is prudent practice to obtain the discharge of mortgage before paying out, even if you must hold it in trust until the mortgagee has received their funds.

(g) When registering the discharge of mortgage, you may wish to order a state of title certificate. If you order it before this stage, it will come back to your client showing mortgages that are to be discharged. If no mortgages are being discharged, a state of title certificate may be ordered at the same time that the transfer is tendered for registration.

(h) Report to your client on registration, advising that a final report will follow on receipt of the state of title certificate if requested. It is appropriate to render your account at this stage or, if you wish, you can render the account with your final report.

As a result of problems arising in real estate practice in British Columbia, two conduct rules were introduced in 2003. Rules 3-95 and 3-96 require a lawyer to report to the Law Society the failure of another lawyer or notary to provide satisfactory evidence of having filed a registrable discharge of mortgage at the Land Title Office within 60 days of the closing date for the mortgage transaction. In each case, a lawyer has five business days to make this report (in the form prescribed by the Law Society and available on the Law Society website) under these rules.

Reports filed under these sections are intended to provide the Law Society with information only and are not meant to draw adverse inferences against a lawyer for failing to obtain a discharge of a repaid mortgage from a financial institution, without evidence of a breach of undertaking.

9. Land Title Office Electronic Filing

(a) *E-Filing and Web Filing*

The electronic filing system of the Land Title and Survey Authority (LTSA) allows users to electronically submit documents and plans to the Land Title Office for registration. Virtually all documents and plans are now required to be filed electronically. Except for an electronic signature field, the electronic forms are practically unchanged from the manual equivalents.

Previously, electronic filing involved PDF forms that users would download and fill in. Effective September 12, 2021 all PDF forms are retired except the Application to Deposit Plan, Survey Plan Certification and Declaration forms. PDF forms will only be accepted at the Land Title Office if they were executed or e-signed prior to Sept. 12, 2021. Forms are now created in "Web Filing" using a myLTSA Enterprise account.

When e-filing, land title forms are still printed out for the parties to execute and their signatures still require officer certification (and this remains true with Web Filing). Once satisfied that a document has been appropriately executed, a lawyer or notary applies that lawyer or notary's electronic signature to the electronic form. The completed form, with the electronic signature, is then submitted electronically to the Land Title Office through myLTSA. When the form is submitted, land title fees are deducted from the user's myLTSA deposit account and property transfer tax (if applicable) is collected from the user's bank account via an electronic funds transfer. The Land Title Office then assigns a document number(s) and date and time of receipt, and then sends a notice to the submitting lawyer or notary that includes this information and all pertinent financial information.

The conceptual framework of e-filing is best understood by examining how a simple transfer of a parcel of land from a seller to a buyer is performed. In British Columbia, the essence of a real estate transaction is found in s. 5(1) of the *Property Law Act,* which states that "a person transferring land in fee simple must deliver to the transferee a transfer registrable under the *Land Title Act*."

This simply means that the seller must deliver to the buyer a Form A Freehold Transfer. In practice, the buyer's lawyer usually prepares the Form A for the seller to execute. E-filing does not change this practice. The changes are functional in nature only. Here is an example of the process:

(i) The usual first step in any real estate transaction is for the buyer's lawyer to conduct a search of the seller's title.

(ii) The next step is to create a Form A and a Property Transfer Tax Return through myLTSA.

(iii) The buyer's lawyer then transmits the electronic Form A to the seller's lawyer.

(iv) The seller's lawyer then prints a copy of the Form A for the seller to execute (sign). The seller's lawyer attends on the seller's execution in the usual manner (i.e. officer certification). The paper copy is evidence of the seller's intention to be bound, has the effect of delivery, and is the seller's authorization that the electronic Form A can be submitted to the Land Title Office for registration. The electronic Form A is "trued up" to incorporate the execution details. See Practice Note 02-16—*Truing up an Original Electronic Instrument*, on the Land Title and Survey Authority of British Columbia (LTSA) website (ltsa.ca).

(v) At this point, the seller's lawyer may incorporate their electronic signature or the lawyer can fax or email a copy of the printed and executed Form A to the buyer's lawyer, who may incorporate their own electronic signature into the electronic Form A. The electronic signature is a certification by the lawyer that an execution copy of the electronic instrument has been executed and witnessed in accordance with Part 5 of the *Land Title Act*, and that an execution copy is in the lawyer's possession.

(vi) The practice that has developed is for the seller's lawyer to forward either the originally signed copy or a faxed copy of the Form A to the buyer's lawyer, who then retains it.

(vii) The appropriate undertakings can be imposed using secure email or regular mail.

(viii) Once an electronic signature is incorporated into the Form A and Property Transfer Tax Return, they can be submitted by any party who has access to myLTSA. Thus, the Form A, Property Transfer Tax Return, and Form B Mortgage can be submitted by the buyer's lawyer, the lawyer for the mortgagee or by the real estate agent of either. It is possible to set up electronic "meets" to allow second parties to file documents in order. For example, the buyer's lawyer may file a Form A followed by a lender's lawyer filing a mortgage. The documents may be submitted on a date before the closing date and they will be held in a queue with submission deferred until a date specified by the submitting party (for example, the last day of the month), when they are formally submitted for registration.

(ix) When the Land Title Office receives the documents, the electronic signature is verified, the submitter's myLTSA account is

debited for registration fees and property transfer tax is paid by an electronic funds transfer from either a general or trust account.

(x) When the package is received by the electronic filing system, the application is electronically marked up and the submitter is automatically notified electronically that the application is marked up and is given the pending number. A Notice of Receipt that contains the pending application number, received date and fees is sent to the submitter's myLTSA Inbox.

(xi) The electronic Form A is converted to an image, examined by an examiner, and registered. If anyone wants to get a copy of the document they will receive an image that is an exact copy of the electronic Form A that was submitted.

Documents can be submitted any time the myLTSA system is available, which is currently between 6:00 a.m. and 11:00 p.m., Monday to Saturday. The lawyer identifies the electronic forms to be submitted and the order in which they are to be registered. When two or more documents are submitted they will be received as a "package" so that they will be examined together. If one document is defective (i.e. a Defect Notice is issued), all documents will be held pending.

The submitting lawyer can pick a submission option of "submit immediately" or "defer until":

- The "**submit immediately**" option indeed submits the documents immediately, and the lawyer receives electronic notification within minutes of the pending numbers and confirmation of financial details, such as land title fees and property transfer tax.
- The "**defer until**" option is used when the documents are ready but the lawyer does not want them submitted until a future date, such as mid-month or month end. The advantage of using this option is that the lawyer would receive their pending numbers at 6:10 a.m. on the submission date specified (giving lawyers more time to complete the financial end of the transaction that day).

At any time before the document is received and given a number, the lawyer can change the submission option or delete the submission entirely.

The electronic document received by the Land Title Office is deemed to be the original for all purposes.

The Land Title Office has different options for notifying the lawyer:

- Document Receipt: Notifies the lawyer that the documents have been received and includes the pending numbers, date and time and financial details.
- Notice Declining to Register (Defect Notice): If an electronic document had defects, the examiner issues a Notice Declining to Register electronically.
- Notice of Registration: If requested by the lawyer submitting the documents, the automated system sends the submitter a notice when final registration occurs.

Notices are sent to the lawyer who submitted the documents. The lawyer can decide whether to receive notifications at the existing myLTSA mailbox or by forwarding to another email.

Lawyers may subscribe to receive other notifications from the LTSA, including alerts when parties to a multi-party transaction submit documents, or when a lender applies to discharge a mortgage.

Web Filing Forms are now available in myLTSA through the Web Filing menu option. Rather than downloading PDF form templates to fill in, users create and populate the interactive forms online within a myLTSA account. The basic process is as follows:

- Necessary information is entered directly into the Web Filing Form.
- Once data entry is complete, the Web Filing Form is generated as a completed form, which is downloaded and printed out for execution (the "execution copy").
- The execution copy is signed and witnessed in accordance with Part 5 of the *Land Title Act.*
- The Web Filing Form is "trued up" to incorporate the execution details.
- The lawyer electronically signs the Web Filing Form and submits it through myLTSA.

The e-filing PDF forms have been retired, and users must use the Web Filing Forms instead.

For more information on Web Filing, see https://ltsa.ca/professionals/land-title-practice/land-title-forms/.

(b) *Electronic Signatures*

To electronically sign forms for e-filing, lawyers must apply for a digital certificate from Juricert. Juricert is operated by the Law Society and is

the "certification authority" recognized by the Land Title Office to issue digital certificates for the purpose of electronic filing. The Law Society maintains a copy of each subscriber's certificate in a register. When an electronic form is submitted to the Land Title Office with an electronic signature, the Juricert system automatically ensures that the electronic signature matches the copy of the certificate on file with the Law Society. So long as the certificate was not revoked, this authenticates the electronic signature of the lawyer and verifies that the lawyer is a member in good standing with the Law Society.

Lawyers must personally affix their electronic signatures to documents being filed with the Land Title Office, and must not disclose their Juricert password to anyone, including assistants. Disclosure of the Juricert password is a breach of the Juricert agreement, Part 10.1 of the *Land Title Act*, and rule 6.1-5 of the *BC Code*. If a lawyer permits an assistant to use that lawyer's Juricert password to affix the lawyer's electronic signature to a Property Transfer Tax Return, the lawyer is also in breach of Law Society Rule 3-64(8).

(c) *Quality Verification Program*

The LTSA has introduced a Quality Verification Program with lawyers and notaries to ensure that electronic filing subscribers comply with Part 10.1 of the *Land Title Act*. Electronically submitted instruments will be randomly selected. Under s. 168.57 of the *Land Title Act*, while an application is in pending state, the registrar may verify whether designates who electronically signed submitted forms had in their possession an execution copy, a true copy of that execution copy or, where applicable, the original of the supporting document (all referred to here as the "execution copy"). Designates must provide the execution copy they relied upon when applying their electronic signature to the electronic instrument. Examiners will review both the instrument and the execution copy to ensure compliance with Part 10.1 of the *Land Title Act*.

10. Post-Closing Procedures

(a) Transfer funds from the trust account to pay fees and disbursements.

(b) Pay out any holdback amounts after appropriate confirmation.

(c) Ensure that the lender of a repaid mortgage has discharged the mortgage within 60 days of the closing date of the transaction. If not, report the matter within five days of the 60-day deadline, pursuant to Law Society Rule 3-96.

(d) Present a final report to your client, enclosing the state of title certificate and giving your title opinion. Make sure that the certificate is exactly as you had anticipated it would be. At this time, forward any unused funds in trust, with a trust reconciliation statement. If you have not already done so, render your account.

(e) Close the file and store for ten years.

[§5.03] Witnessing and Executing Documents

Part 5 of the *Land Title Act* governs the execution and witnessing of documents, and applies to all land title instruments. Sections 41 to 50 provide that, generally, execution in registrable form by individuals and corporations requires an instrument to be witnessed by an "officer" who is not party to the instrument. An "officer" is defined in ss. 41 and 42 of the *Land Title Act* as a person who can take an affidavit under the British Columbia *Evidence Act*. The *Evidence Act* lists persons who can take affidavits in BC, including solicitors and notaries, at s. 60, and lists persons authorized to take affidavits outside British Columbia at s. 63.

When an instrument is not witnessed in accordance with the *Land Title Act*, the registrar may accept it for registration upon receiving affidavit evidence that complies with s. 49 of the *Land Title Act*.

Under s. 42(4) of the *Land Title Act*, the signature of an executing party is evidence that the party:

(a) knows the contents of the instrument and has signed it voluntarily; and

(b) has the legal capacity to execute the instrument and intends to be bound by it.

Under s. 43 of the *Land Title Act*, the signature of the officer witnessing the execution of an instrument by an individual is a certification by the officer that:

(a) the individual appeared before and acknowledged to the officer that the individual is the person named in the instrument as transferor; and

(b) the signature witnessed by the officer is the signature of the individual who made the acknowledgement.

(See also *BC Code*, Appendix A, paragraph 2.)

Part 5 of the Act also deals with executions under power of attorney. See especially ss. 45 and 46.

A corporation executes instruments by the signature of its authorized signatory, who signs on its behalf. A seal is not required. An instrument executed by a corporation in accordance with the *Land Title Act* is deemed conclusively to be properly executed as against all persons dealing in good faith with the corporation, and takes effect accordingly. See s. 165(4) of the *Land Title Act* with respect to deemed proper execution by a corporation.

[§5.04] Form A Freehold Transfer

The use of a Form A Transfer to effect a transfer of a fee simple interest in the Land Title Office is mandatory. The form contains the name of the seller, the legal description of the land to be transferred, the market value of the property, the consideration, the names and occupations of the buyers and the signature of the seller and the witness.

The description of the seller comes from the certificate of indefeasible title obtained in your search. Make inquiries if the name of the registered owner on title is significantly different from the seller named on the contract of purchase and sale. If an attorney has signed the contract, review the power of attorney for registrability. If the contract has been signed by a newly-appointed executor, review the grant and confirm that the *Wills, Estates and Succession Act* has been complied with.

The names and occupations of the buyers should come directly from their instructions in your meeting with them. The Land Title Office requires the buyers' full legal names. It is important to consider what address you give for the buyers. If they are moving into their newly purchased home, use the new address. The address given on the transfer form is where mail relating to the property will be sent. There have been situations where property has been forfeited to the Crown because tax notices were delivered to a former address (the one shown on the title) and were never received.

Be aware of s. 186 of the *Land Title Act* for implied covenants in the transfer. Such implied covenants cover, for example, the implication that the transfer is of the entire property listed, unless express limitations are set out that restrict or qualify the transaction.

If the property is being transferred subject to certain encumbrances, such as rights of way, easements, restrictive covenants or mortgages, this information may be stated on the transfer.

[§5.05] Property Transfer Tax Return

1. Property Transfer Tax

The *Property Transfer Tax Act* imposes a tax on land transfers (including agreements for sale). The tax is payable by the buyer.

The tax rate is as follows:

- 1% on the first $200,000 of the fair market value;
- 2% on the portion of the fair market value greater than $200,000 and up to and including $2 million;
- 3% on any portion of the fair market value greater than $2 million and up to the total fair market value of the property; and
- **if the property is residential**, an additional 2% on any portion of the fair market value greater than $3 million. (This 2% tax is on top of the 3% already payable on the portion of the fair market value greater than $2 million. In other words, the buyer pays 3% on the portion of the fair market value greater than $2 million and up to $3 million, and 5% on the portion of the fair market value greater than $3 million.)

If GST is payable on the purchase price of a house, property transfer tax is normally paid on the net amount paid (purchase price less GST). The Contract of Purchase and Sale usually says whether GST is in addition to or included in the price. If it does not, then the parties should confirm GST before closing. The statement of adjustments should show the purchase price and GST separately.

The *Property Transfer Tax Act* contains a number of exemptions from the property transfer tax, two of which are described here.

First-time home buyers who are purchasing a principal residence for the first time may be exempt from the property transfer tax.

To qualify for the exemption, at the time the property is registered the property must be used only as the buyer's principal residence, have a fair market value of $835,000 or less, be 1.24 acres or smaller, and contain only residential improvements. In addition, each buyer applying for the exemption must be a Canadian citizen or a permanent resident of Canada and have resided in British Columbia for 12 consecutive months immediately before the application to register the purchase, or have filed a return under the *Income Tax Act* (British Columbia) for at least two of the six taxation years immediately preceding the purchase. If these requirements are met, the buyer is exempt from property transfer tax on the first $500,000 of the purchase price. To keep the tax exemption, the buyer must move into the property within 92 days of the registration date and must live in the property for one year following the registration date.

A partial exemption may be available if the property has another building on the property other than the principal residence, is larger than 1.24 acres, or has a fair market value of greater than $835,000 but less than $860,000.

Some first-time home buying couples register their first property in the name of one spouse only to save the exemption of the other spouse for their second purchase. This works, but it misses the estate planning benefits of joint tenancy.

There is also an exemption in some cases if the home is a newly built home. To qualify for the exemption, the transfer must be registered at the

Land Title Office after February 16, 2016, and the property must have a fair market value of $1,100,000 or less, be 1.24 acres or smaller, and be used only as the buyer's principal residence. As well, the buyer must be an individual and a Canadian citizen or permanent resident, must move into the home within 92 days after the property is registered at the Land Title Office, and must continue to live in the property for a year following the purchase. The buyer may qualify for a partial exemption if the property has a fair market value of greater than $1,100,000 but less than $1,150,000, is larger than 1.24 acres, or has a building on the property other than the principal residence.

Note that the fair market value thresholds for the above exemptions came into effect April 1, 2024, and different thresholds applied to property transfers registered before April 1, 2024.

2. Additional Property Transfer Tax

An additional property transfer tax applies to transfers of residential property to foreign entities or taxable trustees, if the property is within specified areas of British Columbia. A "foreign entity" is a foreign national or foreign corporation, and a "taxable trustee" is a foreign entity holding title in trust for beneficiaries or a Canadian citizen holding title in trust for beneficiaries who are foreign entities (*Property Transfer Tax Act*, s. 2.01).

The tax rate for property transfers registered on or after February 21, 2018, is 20% of the fair market value of the property, and applies if the property is within the Capital Regional District, Fraser Valley Regional District, Metro Vancouver Regional District, Regional District of Central Okanagan, or Regional District of Nanaimo.

This additional tax applies *only* to the residential portion of a property, as classified by BC Assessment. If the property is classified as residential, the tax is payable on the fair market value of the entire property. If the property is classified as farm land but includes a residential improvement (such as the farmer's home), the tax is paid on the value of the residential improvement plus 0.5 hectares of land. If the property is classified as commercial but includes a residential improvement, the tax is payable on the value of the residential improvement.

Additional property transfer tax applies only to the portion transferred to the foreign entity. Consider whether the transaction is even permitted under the *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, S.C. 2022, c. 10, s. 235 (effective January 2023 for a period of four years).

The additional property transfer tax does not apply to a transfer to a foreign national living in the province who has a work permit under the BC Provincial Nominee program and is using the property as their principal residence.

3. Payment of the Tax

British Columbia lawyers may make property transfer tax payments on behalf of their clients directly from their trust accounts via electronic transfer. This is done at the time that the lawyers submit electronic filings to the Land Title Office (Law Society Rule 3-64.1(6)). A law firm must first arrange for electronic payment of the property transfer tax by authorizing the Ministry of Provincial Revenue and the financial institutions at which the firm holds accounts to debit specified trust accounts to pay the property transfer tax.

4. Completing and Filing the Property Transfer Tax Return

Effective December 14, 2020, legal professionals must file property transfer tax using the new web-based version of the Property Transfer Tax Return (the "PTT Webform").

The PTT Webform replaces the following PDF forms, which are no longer accepted in PDF: Property Transfer Tax Return (FIN 530), Additional Property Transfer Tax Return (FIN 532) and Property Transfer Tax Calculator, Residential (FIN 536).

All property transfers can be completed using the new PTT Webform, including transfers subject to the extra 2% tax for residential properties, and transfers subject to the additional property transfer tax. Buyers required to pay the extra 2% tax on the portion of the fair market value over $3 million must now enter this information into PTT Webform. If the transferee is a foreign entity or taxable trustee, information about the foreign entity must also be added to the PTT Webform, even if the exemptions apply.

After the required information is entered in the PTT Webform, it automatically calculates total property transfer tax owing. Then an execution copy is downloaded and printed. All transferees sign the execution copy. The lawyer then affixes their electronic signature to the PTT Webform to certify that the transferees have signed and been provided with the original or a copy of the return, and authorizing transfer of the amount indicated as property transfer tax payable to the Minister of Finance on behalf of the transferees. The lawyer submits the PTT Webform to the Land Title Office through myLTSA, with the Form A Transfer.

For more information, visit the BC Ministry of Finance's Information for Legal Professionals on Filing Property Transfer Tax web page: https://www2.gov.bc.ca/gov/content/taxes/property-taxes/property-transfer-tax/file/legal-professionals.

[§5.06] Land Owner Transparency Registry Filings

Effective November 30, 2020, the *Land Owner Transparency Act* ("LOTA") requires that any transferee applying to register an interest in BC's land title register must file a "transparency declaration" with the Land Owner Transparency Registry ("LOTR"), declaring whether they are a "reporting body." A reporting body means a corporation, a trustee of a trust, or a partner of a partnership (with some exceptions).

If the transferee is a reporting body, they must also complete a "transparency report" identifying the beneficial owners or other indirect owners of the interest in land.

The transparency declaration and transparency report are created on the myLTSA platform. The buyer's lawyer files the transparency declaration and (if applicable) transparency report with the LOTR.

When a transparency declaration or transparency report is ready for submission to the LOTR, myLTSA generates an ID number. That ID number must be entered with the Land Title package that the lawyer submits to the Land Title Office. The Registrar of Land Titles will refuse to register the interest in land if it is not accompanied by an ID number for the transparency declaration (and if required, transparency report) for each transferee.

Note that existing reporting bodies with an interest in land had to file a transparency report by November 30, 2022.

[§5.07] Form C General Instrument

The Form C General Instrument is a two-part document similar to the Form B Mortgage. Part 1 of Form C is a single page, and Part 2 consists of the terms of the instrument, which may be either incorporated by reference to filed standard charge terms or attached to Part 1. It is possible, though not necessary, to file those standard charge terms in the same manner as standard mortgage terms. Form C is also used for releases and discharges.

[§5.08] Survey Certificate

When instructed, order a survey certificate and examine it for encroachments or bylaw violations. It is prudent practice in almost all cases to recommend that such a certificate be obtained and to clearly confirm your instructions if your client decides not to obtain one. When there is a non-compliance that a certificate would show, you may be liable to your client for any resultant loss, unless you can show that your client understood the consequences of failure to obtain a survey certificate and instructed you not to obtain one. Note that while all survey certificates show encroachments, not all survey certificates show bylaw violations unless you specifically request this. Look on the right-hand side of the sample survey certificate, Appendix 9. Number 2 sets out that the buildings comply with front yard, rear yard and side yard requirements. Note that many older properties do not comply with current bylaws. In most such cases, a letter may be obtained from the appropriate municipality that the non-compliance will not require rectification, but these letters can take weeks to obtain. Consequently, you should advise your client, and any lender, of the non-compliance and inform them that you are attempting to confirm that the non-compliance is not a problem. You should not give an opinion that the non-compliance is acceptable to the municipality until that confirmation is received.

In *theory*, the absence of a survey should not result in liability to the buyer's solicitor if there was a binding contract of purchase and sale when the solicitor was retained. In *theory*, the buyer is buying the land without any warranty that the structures on it do not encroach on adjoining land or on a registered easement or right-of-way. In *theory*, the buyer is not legally entitled to terminate the transaction upon receiving a survey certificate indicating that an encroachment exists (although the mortgagee may be entitled to refuse to advance funds). In *theory*, it should be the real estate agent's duty to recommend that the deal be "subject to" a satisfactory survey, particularly when there is a structure that appears to be close to a lot line or an easement or right-of-way. In *reality*, however, buyers are usually reluctant to incur the extra expense of a survey but, when they later encounter problems, are inclined to state with certainty that if they had been properly advised by their solicitor they would have ordered one and would have successfully backed out of the transaction.

To date, the courts in this province have not said that a buyer's solicitor has a duty to recommend a survey. However, during the last decade it has become standard practice to recommend a survey, at least where the possibility of an encroachment exists.

To protect yourself, you should consider the following:

(a) use a standard retainer letter or interim reporting letter which advises about the importance of a survey and requests the client's instruction in that regard;

(b) make legible file notes confirming that the importance of a survey was fully explained to the buyer and instructions to the contrary were received;

(c) consider including confirmation in the Buyer's statement of adjustments confirming the advice was given and instructions to the contrary were received; and

(d) confirm the advice was given and instructions to the contrary were received in your final reporting letter.

The lawyer should also discuss title insurance as an alternative to a survey certificate. While it will not

identify survey issues prior to completion like a survey will, insurance will provide compensation and insure the buyer against a variety of additional issues such as latent defects, which a survey will not help with. Title insurance may also be less expensive than a survey. Lastly, many financial institutions are making title insurance mandatory.

[§5.09] Goods and Services Tax

All real estate practitioners must become familiar with the provisions of the *Excise Tax Act* that affect residential conveyances, and with the standard practices for dealing with those provisions.

Clarify your respective responsibilities for determining if the transaction attracts GST and, if applicable, set out your advice to your client regarding GST.

Be particularly aware of transactions in which the property is being purchased from a builder or renovator; the property is new, substantially renovated or a converted commercial property; or the property is not owned by the seller as a residence or personal recreational property. If GST is payable, consider how to deal with the seller regarding collection and payment of GST.

1. What Is Taxable

Generally, a buyer must pay GST on new residential housing and substantially renovated residential housing (where only the supporting walls, roof, floors, foundation, and some minor components are left from the original building).

The buyer must pay GST on the full purchase price of new residential housing, including land and the costs of related services, including legal fees incurred in connection with the acquisition.

GST is also payable in the following circumstances:

(a) when a builder constructs a residential building and leases the building or units in the building to tenants;

(b) when a business converts capital real property from commercial use to residential or some other exempt use;

(c) when a business converts capital real property from non-residential exempt uses to residential uses;

(d) when there has been a partial increase or decrease in the proportion of the property used for commercial as opposed to residential or other purposes; or

(e) when GST input tax credits have been claimed by the seller, on the portion of the property affected by the input tax credits claimed, unless the seller made a deemed self-supply of the property after claiming the input tax credits.

(f) effective May 7, 2022, when a contract of purchase and sale of newly constructed or substantially renovated properties is assigned, GST is payable on the assignment amount less reimbursement of the deposit paid to the developer, i.e. the assignor's profit.

GST is not payable on the following:

(a) other taxes, such as the property transfer tax;

(b) property situated outside Canada; or

(c) "used" residential housing, provided it has not been "substantially renovated" and the seller has not claimed any GST input tax credits with respect to the property. However, GST and in some cases Provincial Sales Tax is still payable on legal services, certain disbursements, and real estate commissions.

2. Representations and Warranties

Before signing a purchase contract, a buyer should determine whether GST will be payable and whether the negotiated price includes GST. Any representations or warranties given by the seller about whether GST will be payable and who will pay in the event of improper calculation should be included in the purchase contract.

It is the seller's status and use of a property that determines if GST is payable. The common warranty, "GST, if payable shall be the responsibility of the seller," while better than a silent contract, leaves the buyer's lawyer still needing to determine if the property is subject to GST. Where a property is new (or substantially renovated) and is unoccupied or available for nightly rentals, it has a commercial status and will be taxable.

Many lawyers obtain representations, warranties and covenants from sellers and buyers by obtaining statutory declarations or signatures on notes to statements of adjustments well after the purchase contract has been finalized. The delivery of a statement of adjustments with terms that have not been accepted by the other party, such as the addition of warranties and covenants, may constitute an improper tender that the other party is not obliged to accept.

In any event, if GST is not dealt with in the contract, you must clarify who will determine if the transaction attracts GST. As mentioned earlier, watch for transactions in which the property is being purchased from a builder or renovator, or if the property is new, substantially renovated or a converted commercial property, or if the property is not owned by the seller as a residence or personal recreational property. Watch also for properties in re-

sort communities which may be commercially rented to tourists.

An oral assurance by the seller's real estate agent that a land transaction will not attract GST can lead to the seller being held responsible for indemnifying the buyer for GST payable. In *Sainsbury v. Nanaimo Realty Co*., [1993] G.S.T.C. 30 (B.C.S.C.), the buyer successfully sued the seller's real estate agent to recover $19,600. This amount represented the GST that was payable at the conclusion of a land deal. The real estate agent had repeatedly and incorrectly assured the buyer that GST would not arise from the transaction. The court reasoned that the plaintiff could reasonably expect that the real estate agent was aware of the views of the Real Estate Board, as well as the relevant provisions of the *Excise Act*. Any reasonable person would know that the plaintiff relied on the information provided by the seller. If the seller did not want the buyer to rely on his advice, the real estate agent should have made that clear.

3. Who Collects the Tax

When GST is payable, it must then be determined whether the seller or buyer is required to remit the GST to the Canada Revenue Agency (the "CRA"). If it is the seller's responsibility, then the buyer should pay the tax as part of the closing procedure. If it is the buyer's responsibility, the buyer's solicitor should ensure that the buyer is aware of this requirement.

The general rule is that the seller collects and remits the GST. A lawyer advising a buyer before signing a purchase contract should obtain the seller's GST registration number, properly verified with the appropriate government office. If the seller is registered for GST purposes, the buyer need not obtain a contractual promise from the seller that the seller will remit the tax. This is because a registered seller is an agent of the federal government, and under the Act, once the buyer has remitted the tax to an agent, the buyer's liability is discharged as long as the full amount of GST owing has been paid to the seller.

Exceptions to the general rule that the seller collects the GST are as follows:

(a) sales by a seller who is a non-resident of Canada or a resident of Canada only to carry on activities through a permanent establishment in Canada;

(b) sales of non-residential properties to buyers registered for GST purposes; and

(c) sales of residential properties to buyers registered for GST purposes who are not individuals.

In these cases the buyer must remit the tax directly to the CRA. The buyer is still liable if the buyer remits the GST to the seller, even if the seller is a GST registrant.

4. GST Certificates

If the seller asserts that the sale is exempt from GST and the buyer has no information to the contrary, the buyer should still obtain a written statement from the seller that the supply is exempt under one of the provisions referred to in s. 194 of the *Excise Tax Act*. The statement should be a certificate. The buyer should obtain the certificate on the earlier of the completion date or the possession date. This way, if the statement is incorrect and the transaction isn't exempt, the seller and not the buyer will be liable for the GST. Section 11B of the Contract of Purchase and Sale requires the seller to provide the appropriate GST certificate.

5. Rebates

Various GST rebates are available to individuals who renovate or build their own homes, who purchase new homes from a builder, or who purchase shares in a co-operative.

Sections 254 to 256 of the *Excise Tax Act* deal with the circumstances in which the GST rebate is available. The most common situation involves the purchase of a new home from a builder. In these transactions, a rebate on the GST paid on the purchase price of the home of up to 36% or $6,300, whichever is less, is available if certain conditions are met:

(a) The buyer must purchase from a builder a new or substantially renovated "single unit residential complex or a residential condominium unit," meaning in most cases a condominium unit or single family home, for the buyer or a "relation" of a "buyer."

- A "builder" includes a person who buys unoccupied new houses or condominiums for retail purposes but does not actually build them.
- "Related persons" is defined in s. 251 of the *Income Tax Act*, and includes blood relatives, spouses, former spouses and persons related by adoption. (Consult the *Excise Tax Act* and *Income Tax Act* for the precise definitions.)

(b) The purchase price must be less than $450,000.

(c) Ownership must be transferred after construction.

(d) The property must be unoccupied except in the case of a condominium, where the buyer

may occupy the unit before transfer as part of an agreement to purchase.

(e) GST must be paid on the purchase and the rebate must be claimed within four years of the date ownership is transferred.

The rebate is somewhat reduced when the value of the home is greater than $350,000. A GST form must be completed and remitted to claim the rebate.

Calculations around the GST are premised on the fact that the CRA will pay the rebate to the buyer after closing. The effect is that the buyer pays the full GST and then claims a rebate, which will not be received by the buyer for some months after closing. In order to avoid this delay, s. 254(4) of the *Excise Tax Act* provides that the seller may pay the buyer, or credit the buyer with, the amount of the rebate. In this case, the buyer pays only the net GST payable after the rebate is deducted. The seller then remits the net GST amount to the CRA, together with the GST Form. The buyer receives an immediate benefit equal to the amount of the rebate, while the seller may claim a credit against the GST remitted on the sale equal to the rebate.

If the seller agrees to pay to the buyer or credit the buyer with the GST rebate, the other conditions for the rebate must be met. For example, the buyer or a relative must use the property as a residence. If those conditions are not met, the seller may be liable for the return to the CRA of the amount rebated, if the seller "knows or ought to know" that the buyer does not qualify for the rebate. Accordingly, the seller should require that the buyer provide information sufficient to satisfy a reasonable person that the buyer qualifies for the rebate. Where the buyer intends to rent the property to unrelated tenants, they will have to pay the GST and submit their rebate claim directly once they know the identity of their tenant.

[§5.10] In/Out Analysis

An "in/out analysis" is an informal, internal memorandum that the conveyancing lawyer prepares for themselves. It constitutes a simple financial dry run of the conveyance. In the left-hand column, list the sources of funds in the transaction. For example, one source may be mortgage funds, another the balance of proceeds to be supplied by the buyer. In the right-hand column, list the application of the funds you will receive in trust so that there is a precise match between the two totals. Examples of applications of funds are as follows:

(a) balance of real estate commission (if the commission is greater than the deposit);

(b) pay-out of any discharged mortgages; and

(c) lawyer's fees and disbursements.

[§5.11] Holdbacks for Non-Resident Sellers

Section 116 of the *Income Tax Act* is intended to ensure the CRA will receive the tax on the sale proceeds that is payable by a seller who is not a resident of Canada. Accordingly, the buyer is obliged to make reasonable inquiries as to the residency of the seller (e.g. in *Mao v. Lui*, 2017 BCSC 226, a notary acting for a purchaser was found liable for failing to make reasonable inquiries regarding an owner's residency status). The requirement to make reasonable inquiries is usually satisfied by having the seller sign a statutory declaration that they are a resident of Canada. The standard Contract of Purchase and Sale now requires the seller to deliver a statutory declaration of residence (see §3.03(10)).

If the seller is *not* a resident of Canada, the buyer must either deduct the required withholding tax from the seller's sale proceeds and remit it directly to the CRA, or ensure that the seller has obtained a clearance certificate.

The amount of the withholding tax is 25% for non-depreciable property and 50% for depreciable property and property held as inventory. Some buyer's lawyers take the position that the holdback should be based on 50% of the entire purchase price because the buyer cannot and should not be required to determine on a risk-free basis what property is and is not depreciable or held as inventory by the seller (*Epp v. Yung* (1993), 35 R.P.R. (2d) 1 (B.C.S.C.)).

Since a clearance certificate will only be issued by the CRA when the seller has calculated the actual tax payable on the sale to the satisfaction of the CRA, and has actually remitted that amount, a real hardship may result to the seller if the seller is attempting to obtain a clearance certificate and needs sale proceeds for that purpose. This is true particularly if the seller must pay out a substantial mortgage *and* a substantial tax in order to obtain the clearance certificate. A buyer may be persuaded to accept a statutory declaration from the seller that the property was never held to sell at a profit and is capital in nature (that is, not inventory). Commonly, the parties undertake a somewhat complex calculation that pro-rates the purchase price based on the assessed values of land (non-depreciable) and buildings (depreciable), and the holdback is based on those values.

In most cases, there is a real incentive for the seller to obtain a clearance certificate before closing by paying the actual tax owing, which is usually significantly less than the amount the buyer is entitled to hold back. If the seller needs the sale proceeds in order to pay the tax and obtain the clearance certificate, the seller needs the buyer to cooperate. If the buyer agrees, proceeds may be paid to the seller's lawyer without deduction (other than usual adjustments). In this situation the seller's lawyer must give undertakings to hold back the entire holdback amount required by statute (as calculated above) and to pay that holdback to the CRA if no clearance certificate is obtained by the seller by the time the holdback must

be remitted. The holdback must be remitted 30 days from the last day of the month in which the transaction completes. The seller's lawyer is then free to use the proceeds in excess of the amount of the holdback (and any amount required to pay out seller's mortgages) to obtain the clearance certificate.

In practice, clearance certificates are rarely available prior to the completion date because clearance certificates cannot be applied for before there is a firm contract and the buyer's identity is known. Since real estate agents may create transactions with little time between subject removal and closing, there often isn't adequate time for processing the applications. It is not unusual for CRA clearance applications to take 16 weeks or more to process. Where there will not be sufficient sale proceeds to fund both a mortgage payout and tax clearance holdback, a request to the CRA to process on a "hardship" basis may be made, which will shorten the time frame to under two weeks and quite often to only a few days. Needing sale proceeds to buy another property is not a recognized hardship criteria, except in the very narrow circumstances of a trade of properties by the same buyer and seller.

The clearance application must be filed within 10 days following the completion date or penalties will accrue at a rate of $100 per day. As the clearance certificates are rarely available within the time frame that requires payment of the gross holdback to CRA, the seller's lawyer should make sure the undertaking to remit the holdback allows for the exception where CRA agrees to an extension of the time. The lawyer should always request a letter from CRA acknowledging receipt of the application and waiving the payment of the holdback. CRA routinely issues these letters.

Note as well the impact of tax treaties and conventions with other countries when acting for non-resident sellers. For example, if you act for an American non-resident seller who has held Canadian property since 1980 and who otherwise qualifies under Article 13 of the *Canada—U.S. Income Tax Convention (1980)*, the amount of the gain that is taxable in Canada, and which must be paid to obtain a clearance certificate, may be reduced. The appropriate tax treaty must be scrutinized for a possible exemption, particularly if an indirect interest in real property is sold, such as shares held in a corporation that owns real property.

[§5.12] Loss Prevention Summary[2]

A common cause of claims in real estate matters is the lawyer's failure to accurately interpret or fully execute the client's instructions. Examples might be failing to do these things:

(a) obtain an easement;

(b) search a strata plan;

(c) reserve mineral rights;

(d) register a lease;

(e) register a transfer before registering a mortgage;

(f) advise regarding road access; or

(g) explain restrictive covenants.

Such problems could easily be avoided by developing a habit of taking client instructions using a formalized and comprehensive instruction sheet or a detailed checklist.

When discussing procedures and pitfalls in real estate transactions, the legal process can be categorized into three main functional areas:

(a) client instructions;

(b) implementation; and

(c) completion.

1. Client Instructions

Due to the unique nature of real estate transactions, proper instructions are usually not taken from the client before the matter is commenced. This may result in the transaction being completed in a way that is not truly in accordance with the client's wishes.

There are three main ways in which a breakdown in communication comes about.

(a) Instructions Not Direct From Client

The lawyer may be instructed directly by another party to the transaction, for example, a real estate agent, a banker, etc. Accordingly, the transaction may proceed to closing without proper direct verification of the instructions with the actual clients. This problem is compounded where the lawyer's advice or requests for information are transmitted through the real estate agent. There is a real danger that information will become garbled in this process.

(b) Instructions Not Taken by the Lawyer

Often, a staff person receives the initial instruction document and the transaction is commenced and well underway before being referred to the responsible lawyer. By that stage, the need to clarify or seek additional instructions may be overlooked.

(c) Instructions Incomplete

Because of the strict time constraints that govern real estate transactions, processing and documenting are often commenced on the basis of partial or incomplete instructions. Often

[2] Based on *Conveyancing: Avoiding Complaints* (Vancouver: CLE, 1992).

there is no follow-up to ensure that the outstanding data required to complete the instructions is actually received. The lawyer's final review is too often concerned only with whether the documentation is technically correct and in order, and not with whether it is in accord with the client's wishes or instructions. More particularly, the documentation may not be consistent with the facts. This would have been apparent had complete instructions been obtained in the first place, or had the instructions that were available been compared with the final documentation.

2. Implementation

(a) Precedent Problems

Even though the vast majority of law office transactions are based on precedents, those precedents are frequently poorly reviewed or updated. You must establish proper procedures for using precedents.

Drafting errors frequently show up where the precedent used was not purged of variable data before being used for other transactions. As a result, incorrect data is transcribed to the new document. Such errors have included:

(i) an option to renew a lease was prepared instead of an option to purchase;

(ii) the interest rate was not revised; and

(iii) the new mortgage principal amount was inserted, but the monthly repayments from the previous precedent were not changed.

Statements of adjustments frequently show arithmetic errors that could have been detected had the numbers been added again instead of being proofread only.

(b) Deficiencies in Follow-Up Procedures

These are the main areas where deficiencies in follow-up procedures have led to grief:

(i) searches;

(ii) confirmation of data with third parties, such as outstanding mortgage balances; and

(iii) return of documents sent out for signature.

Most firms are successful in starting these procedures, but can fall down in the follow-up.

(c) Communications Breakdown

Law firms adopt techniques to expedite the workflow, but unless the techniques are properly organized and supervised, they can lead to breakdown in communications.

For example, continuity is lost and errors may occur in a system in which one lawyer works on the file and returns it to a "pool" where it may be taken over by another available lawyer.

When work is delegated to legal assistants, incomplete information may be exchanged between lawyer and assistant at the time the lawyer inherits the file for completion.

A serious problem arises over the failure to have the seller or buyer complete by the closing date. Often, time extensions are arranged between the legal assistants acting for the lawyers on either side of the transaction. The lawyer may not even know about the actual completion dates until it is too late.

3. Completion

It is necessary to have proper control over registration. Many claims have arisen because follow-up ceased after the documents were executed.

Serious problems have arisen because the lawyer left on vacation, or permanently. Because the file was deemed to be closed after execution, the lawyer may not have left instructions in the event that the documents were rejected for not being in registrable form. Accordingly, rejected documents were not attended to when received back by the firm and security was lost or charges not cleared.

As with reporting to the client, the file closing procedures should be carried out promptly to facilitate early detection of errors. Two examples of mistakes that were detected early as a result of proper post-closing file review procedures are:

(a) payment of trust funds to the wrong person (that is, the owner instead of the trustee); and

(b) disbursement of mortgage proceeds to the buyer instead of the lienholders.

Even though, in both cases, claims materialized, the ability to remedy the mistake promptly through early detection reduced the amount of the claim substantially.

4. Specific Deficiencies

In many cases, using comprehensive checklists could have helped prevent the error or omission that gave rise to a claim.

The following are some of the specific procedures which were not properly and completely carried out and have resulted in claims being made:

(a) ascertaining all the facts and instructions from the client;

(b) confirming all the instructions in writing;

(c) searching the property properly and thoroughly;

(d) clarifying with the client what the client must do in the procedure;

(e) disclosing the implications of all the documents to the client;

(f) explaining to the client the consequences of everything the client signs;

(g) calculating the proper amount owing on the mortgage;

(h) preparing all documents properly and accurately; reviewing and checking all documents; and

(i) keeping the client apprised of the situation at all times.

[§5.13] Statements of Adjustments

Statements of adjustments calculate the adjustments to the purchase price that the buyer and seller have agreed to make under the purchase agreement. Payments made or to be made by either of the parties in relation to the use and enjoyment of the property are adjusted, and the adjusted amount is the actual amount to be paid or received by each of the parties on the adjustment date.

The need to adjust arises because amounts payable in relation to the ownership of land, such as taxes, and amounts receivable in relation to the ownership of land, such as rental income, are payable in a calendar year or calendar month. However, a purchase and sale of property usually closes sometime during a calendar year or calendar month.

Statements of adjustments have three main purposes (see *Kirsh v. MacPherson* (1991), 56 B.C.L.R. (2d) 66 (S.C.)):

(a) to define the financial matters to be adjusted as well as the calculation of those items;

(b) to confirm the method of payment of the purchase price; and

(c) to provide for disbursement of the sale proceeds.

The current practice is for the buyer's lawyer to prepare two statements of adjustments—one for the buyer and one for the seller. The following discussion assumes that two statements will be prepared.

If you are dealing with an item that will appear on both the seller's and buyer's statement of adjustments, the items are mirror images of one another. A debit to the buyer will be a credit to the seller, and vice versa. In both cases, the amount will remain constant.

A "debit" is something the buyer must pay for or buy at closing from the seller, or from someone else. For example, at closing the buyer must pay the purchase price to the seller and the legal fees to the conveyancing lawyers. Therefore, these items are debits to the buyer.

A "credit" is money that the buyer has already paid to the seller (for example, a deposit) or that the buyer has paid or will pay to a third party on behalf of the seller. Two examples of credits to the buyer are taxes owed by the seller but paid by the buyer, and the outstanding balance of an existing mortgage assumed by the buyer.

Funds obtained by the buyer in the course of a conveyance through an agreement independent of the contract of purchase and sale (for example, a new mortgage) also constitute a credit to the buyer.

Refer to Chapter 8 of *Real Estate Practice Manual* (Vancouver: CLEBC) and Chapter 6 of the *Conveyancing Deskbook*, for guidance when preparing or reviewing statements of adjustments.

[§5.14] Methodology for Statements of Adjustments

1. Determine Who Paid and Who Owes

When preparing statements, remember that the main objective is to ensure each party bears the expense of the maintenance and operation of the property during that time in which that party is enjoying the use and occupation of the property. In accordance with this objective, most purchase agreements provide that the possession date and the adjustment date are the same. However, it is also common to have possession dates after completion dates.

Most financial obligations or benefits accruing to the property (e.g. taxes, utilities, and rents) are billed or received monthly, or possibly even less frequently. Accordingly, unless the adjustment date coincides with the end of that period, an adjustment must be made to ensure that the benefits and burdens of these items are allocated properly between the parties even though the actual payment is made either at the beginning or the end of the applicable period.

The error most frequently made is placing the adjustment on the wrong side of the balance sheet. The key to avoiding such an error is first to determine *who* paid or will pay for the item being adjusted, and then to ensure that party is credited for that part of the period during which that party will not have the benefit of the item. Once you determine this, it is a simple matter to ensure the adjustment is reciprocal. Consider also whether a specific item is

GST-exempt or whether GST should be included in the adjustment.

2. Calculation

As to the arithmetical calculation of the adjustment itself, a useful rule to remember is that with both loans and deposits, interest accrues from and including the date the loan or deposit was made, but excluding the date it was repaid or withdrawn (paid to the depositor). For example, when applied to the calculation of the tax adjustment, it means that the seller's share of the taxes will be for the number of days from and including January 1 up to but excluding the date of adjustment for the year in which completion occurs (*City of Toronto v. Toronto Railway Co.* (1926), 59 O.L.R. 73 (Ont. C.A.)).

3. Payout Statements

You should obtain a written statement from each of the various sources that are providing information for the statement of adjustments. It is absolutely essential to obtain written payout statements or assumption statements from financial institutions when preparing the adjustments necessary to pay out a mortgage for a seller or assume a mortgage for a buyer.

The seller's lawyer almost invariably gives undertakings with respect to either the discharge or assumption of existing financial encumbrances, so it is essential to have written confirmation of the status of these encumbrances and, in the case of private lenders, discharges in hand. The lawyer must rely on this confirmation in order to fulfill the undertakings.

The lawyer should make every effort to obtain these statements as far in advance of completion as possible. In *Williams Lake Realty (1978) Ltd. v. Symynuk* (1982), 39 B.C.L.R. 313 (C.A.), the buyer failed to produce the necessary documents and the purchase money on the closing date and was suing for specific performance after the seller refused to complete at a later time. The trial judge allowed the buyer's action because the buyer's obligations had been delayed by the tardiness of a mortgagee providing a payout statement on the seller's mortgage. However, the Court of Appeal held that because the agreement stated that time was of the essence, and the provision had not been waived, the buyer lost the right to seek specific performance. See also *Shaw v. Greenland Enterprises Ltd.* (1991), 54 B.C.L.R. (2d) 264 (C.A.), where neither party was ready to complete, but in the circumstances the buyer was entitled to specific performance.

4. Specific Adjustments

(a) Property Taxes

For several reasons, adjustments for taxes are usually more complicated than other adjustments. For one thing, until the tax notice comes out, the actual amount of the taxes is unknown. In this situation it has become common practice to determine the base figure for taxes for the previous year and to inflate that figure by 5% before calculating the adjustment. The seller may resist this practice in a year in which taxes are actually being reduced. Nevertheless, the practice is still acceptable because it gives the buyer better protection if there is an increase, and you can provide for further adjustment when the actual figure is known, giving the seller recourse if any surplus is not credited to them.

Whatever the estimate for taxes, you must provide for readjustment to be made when the taxes are known. No further adjustment is possible unless called for in the statement of adjustments or otherwise between the parties (*Wu v. Campbell* (1977), 4 Alta. L.R. (2d) 392 (Dist. Ct.)).

If completion and possession dates are scheduled for shortly before the annual or biannual tax payment is due, and you are acting for the buyers, you should inform your clients that the due date for the payment is imminent so that they can budget for the payment adequately. Take special care with completions occurring immediately after the due date for the payment of taxes to ensure either that the seller has made payment on or before the due date, or that an additional adjustment is made for the tax penalty in the statement of adjustments.

Some interest charges and penalties for late payment of taxes are assessed on a lump-sum basis, while others accrue on a day-to-day basis or other periodic basis. Interest and penalties should be debited in full to the seller and should not be adjusted between the seller and the buyer.

(i) *Home Owner Grant*

Most disputes arise over the issue as to whether the tax adjustment should be made on the basis of the gross taxes payable (or estimated) or on a net basis after application of the provincial Home Owner Grant.

The Home Owner Grant is a provincial program that reduces the burden of residential property taxes on homeowners who occupy eligible residences. The grant

entitles the owner to a maximum reduction in residential property taxes of $570 for the Metro Vancouver Regional District, Fraser Valley Regional District, and Capital Regional District, and $770 for the rest of the province. (An additional grant of up to $275 is also available if the owner is over 65, permanently disabled, or receives certain war veterans' allowances.)

The grant is reduced by $5 for each $1,000 of assessed value over $2,150,000. This means properties assessed up to $2,264,000 ($2,304,000 in a northern and rural area) can receive a partial grant.

Note that these figures are for 2024 and they may change from year to year.

(ii) *Timing of Grant*

The Vancouver Real Property Section of the Canadian Bar Association made recommendations for adjusting taxes in the statement (see Appendix 12). The recommendations are different if the adjustment date is before or after the due date for payment of taxes:

- Before the due date for payment, property taxes should be adjusted *net* of the anticipated Home Owner Grant if both the seller and the buyer would be eligible to claim the grant in the year of sale.

  For example, if the anticipated taxes were $3,000 and both parties were eligible, the adjustment would be done as follows: $3,000 – $570 = $2,430. If one of the parties is not eligible to claim the grant that year, the adjustment should be done on the full amount of the property taxes (For example, the full $3,000).

- If the adjustment date falls after the due date for payment, taxes should be adjusted on the amount actually paid.

  For example, if the seller paid $2,430, then that is the amount that would be adjusted regardless of whether the buyer qualifies for the Home Owner Grant.

(b) Assumption of Mortgages

It is critical to obtain written statements from financial institutions as to the status of their charges. This is particularly the case if the buyer is assuming an existing mortgage on title. The assumption statement should confirm the balance of the mortgage as at the last payment date and as a per diem amount. This will permit the solicitor to calculate the amount outstanding as at the date payments under the assumed mortgage become the responsibility of the buyer. Note that the Vancouver Real Property Section of the Canadian Bar Association resolved that in the absence of specific instruction from the client or specific provisions in the contract, where the buyer assumes a mortgage, mortgage payments should be adjusted as at the **completion date** rather than the adjustment date, and the buyer should assume payments commencing on the completion date.

The assumption statement also should confirm the following:

(i) the completion of the sale will not cause the mortgage balance to be accelerated;

(ii) the mortgage document on file in the appropriate Land Title Office constitutes the whole of the agreement between the seller and the mortgagee being assumed by the buyer; and

(iii) the mortgage is in good standing and, if possible, an assurance that if the mortgage falls into default before the completion date, the mortgagee will so advise.

In connection with the assumption of mortgages, note ss. 20, 21, and 22 to 24 of the *Property Law Act*, discussed in Chapter 7.

(c) Utilities and Licences

Obtaining the required information from the municipality or other appropriate body is usually straightforward. However, ensure that you obtain statements for all applicable charges. For example, while the City of Vancouver includes most of the charges for the services it provides in the tax notice, many municipalities send out separate invoices for water rates, sewer rates, garbage collection and, in low-lying areas, diking charges. You will need to make the appropriate adjustments and/or holdbacks (if the closing occurs during a billing period) between the seller and the buyer. Water bills are either a fixed amount for a specified period or are based on metered use.

(d) Electricity and Gas

As these items are metered and billed by the supplier, it should be simple to arrange for reading the meter at the adjustment date. The account for service to that date will then go to the seller. As a result, no adjustment is normally made for these items, although it is prudent to advise the buyer to open a new account in the buyer's name for service after the adjustment date.

(e) Oil

Oil tanks are not common. However, if there is one, it is simple to have the supplier of the oil "dip the tank" and provide a written statement of the value of the oil in the tank. Again, as this is usually done on the adjustment date, it is impossible to include the amount on the statements of adjustments prepared before that date. In this situation readjustments after the completion and adjustment date will be necessary, so provide for how this is to be done in the statements of adjustments.

Note that in older established residential areas, many oil tanks installed below ground are approaching the end of their useful life. Accordingly, the buyer should ask the oil supplier to determine whether there is a significant amount of water present in the tank. If water is present, that may indicate that the tank is deteriorating and the buyer could face substantial repair costs or environmental issues. In many cases, the municipal authorities may require the buyer to remove the tank if it is no longer used.

(f) Rents

Unless the date on which rent is payable is the same as the adjustment date, an adjustment will need to be made between the parties.

Ensure that any prepaid rent and security deposits, together with any interest accrued as required by the *Residential Tenancy Act*, are accounted for. The simplest way to do this is to request that the seller prepare and forward a rent-roll for each unit. The rent-roll should show the following:

(i) the monthly rent applicable;

(ii) the due date for the rent;

(iii) the last date rent was increased;

(iv) the amount of any prepaid rent or security deposit; and

(v) the amount of interest held in respect of any prepaid rent or deposit.

The buyer should not be debited for any rent arrears because it is not known whether such arrears can be collected; normally the parties agree that rent arrears for the periods before the adjustment date will be paid to the seller.

(g) Insurance Premiums

If the buyer is taking over the seller's policy of insurance on the property, an adjustment can be made on the basis set out above. However, unless there is a significant rate advantage for assuming the seller's policy, the buyer should arrange for their own insurance on the premises. Thus no adjustment should be required. Placing new insurance forces the buyer to satisfy themselves that the coverage is adequate. Also, the lending institution will require verification that the loss payee clauses have been inserted in the correct priority. By placing their own policy, the buyer also will avoid any problems that may arise as a result of representations made by the seller in the original application for insurance, or actions by the seller voiding the policy.

(h) Deposit and Real Estate Commission

The deposit is shown as a credit on the buyer's statement of adjustments, but is not necessarily included in the seller's statement of adjustments unless the deposit has been paid directly to the seller.

When real estate commission is payable, the amount is usually shown as a debit on the seller's statement of adjustments. The payment of commission is not adjusted on the buyer's statement of adjustments. Real estate commissions are subject to GST.

Under the one cheque system, the real estate agent who is earning the commission holds the deposits. Commonly, the commission is larger than the deposit and an additional balance will be due to the real estate agent. In this situation, the buyer's solicitor usually pays the balance of commission owing directly to the agent from the funds available to the seller on completion. However, take care to ensure that the statement of adjustments properly authorizes this payment, in case a dispute develops between the seller and the real estate agent as to the commission entitlement.

When the commission is less than the deposit, the seller is entitled to a sum back from the real estate agent. In this situation, the real estate agent holds the balance of the deposit until the completion date. Under the *Real Estate Services Act*, the real estate agent requires the written authority of both seller and buyer before releasing the balance of the deposit (presumably to the seller).

When the buyer's lawyer is asked, in writing, to follow the "two-cheque system" for commission, then if the deposit is an amount *less than* the selling commission owing, the buyer's lawyer will make one commission cheque payable to the "listing brokerage" (which acts for the seller and has been holding the deposit in trust) for the balance of commission owing and the other cheque in full payment of the

commission for the "selling brokerage" (which acts for the buyer). When the deposit is an amount *greater than* the commission owing, the listing brokerage will deduct from the deposit it is holding in trust the portion owing it on completion, and will then forward the balance (or excess deposit) to the buyer's lawyer in trust, to then be paid to the selling brokerage. In both instances, upon completion of the conveyance, the buyer's lawyer will deduct the commission owing to any brokerage company from the proceeds of the sale and forward the same together with the registration particulars. When the two-cheque system is being followed, the commission particulars are recorded in the statement of adjustments in a manner that is different from when the one cheque system is being used.

(i) Legal Fees and Disbursements

Although they are not strictly adjustments, the legal fees and disbursements incurred in completing the transaction are common entries on the buyer's statement of adjustments.

When fees and estimated disbursements are included, a separate GST component should also be included.

(j) Property Transfer Tax

When this tax is payable, the amount should be included in the buyer's statement of adjustments and obtained before closing, as it must be transmitted on closing.

(k) GST on Property

When GST must be paid on the property (e.g. on new or substantially renovated residential complexes), it should be shown as a separate item on the statement of adjustments and any rebates may be shown as well.

(l) Holdbacks

Generally, holdbacks are used to secure obligations of the seller either to the buyer or to third parties. If not already dealt with in lawyers' correspondence, the notes to the statement of adjustments should clarify the arrangements respecting holdback money between the seller and the buyer. The buyer's lawyer may try to obtain a holdback in many circumstances, including when:

(i) the mortgagee's statement for assumption purposes is based on the assumption that the last monthly payment has "cleared";

(ii) the seller is obligated to complete work before closing, but is unable to do so;

(iii) the seller's share of any utility payments needs to be secured; and

(iv) the buyer has reason to believe that the seller is a non-resident, for the purposes of s. 116 of the *Income Tax Act*.

(m) Reconciling Cash Balance

It is important for the buyer's lawyer to prepare a cash in/out statement to reconcile the funds received by and disbursed from the law office. The purpose behind preparing this statement is to ensure that sufficient cash will be available to complete the transaction. The importance of preparing these statements cannot be overemphasized. It is not safe to rely on the statement of adjustments because it can balance when the cash in/out statement shows a shortfall. The in/out statement also serves as a quick, accurate reference that cheques are issued in the proper amounts, and is a good checklist of financial receipts and payments on the closing date.

(n) Conflicts

The buyer's lawyer may be asked to discharge existing financial encumbrances on behalf of the seller. Before agreeing to do so, the buyer's lawyer should review and consider section 3.4 and Appendix C of the *BC Code*, which governs acting for more than one party to a conveyancing transaction.

The buyer's lawyer should insist that the seller be separately represented, on the basis of the conflicts rule. While this approach may be resisted by clients, and especially those of practitioners located outside of metropolitan areas, the potential risks of acting for both seller and buyer may far outweigh the benefit of any additional fees that would be realized.

When a buyer's lawyer must accept these additional risks, it is absolutely essential that the lawyer obtain the written consent of both the seller and the buyer. In addition, it is essential for the lawyer to obtain written payout statements for the encumbrances. The fees and disbursements for attending to the payment out and discharge (including preparing the discharge) should be shown on the seller's statement of adjustments.

(o) Disbursement and Delivery of Funds

Obtain the irrevocable authorization of the seller and the buyer regarding the disbursement of funds and include it in the statements of adjustments. The statement of adjustments should also provide the authority to pay mortgagees, real estate agents and the mortgage

discharge fees, and to assign funds to third parties.

There has been some dispute as to whether the seller is responsible to pick up sale proceeds or whether the buyer is to deliver sale proceeds. The Vancouver Real Property Section of the Canadian Bar Association passed a resolution on this subject (see Appendix 11), stating that in the absence of specific instructions from the client or specific provisions in the contract, provided the parties are reasonably proximate, it is the seller's responsibility to pick up the sale proceeds from the buyer's solicitor, or bear the cost of transmission. If possible, determine these matters before preparing the documents so that an appropriate amount for these expenses can be included in the seller's statement of adjustments.

[§5.15] Notes to Statements of Adjustments

Notes to the statements of adjustments often serve all of the following purposes:

(a) clarifying the method used in making the more complicated adjustments, such as taxes;

(b) specifying the duties and responsibilities of the conveyancing solicitor, including authority for the disbursement of funds;

(c) specifying payments to third parties and each lawyer's responsibility for those payments;

(d) setting out various representations and warranties or agreements between seller and buyer that do not merge on completion; and

(e) identifying how certain statutory provisions affecting the conveyance (including lien holdbacks) will be administered.

Notes to the statements of adjustments often include the following items relating to the first purpose:

(a) a statement that adjustments are made on the basis of the best available information obtained from primary sources, the lawyer makes no representations as to the accuracy of the information, and if any figures are in error, further adjustments will be made between the parties;

(b) the expression "errors and omissions excepted" or "E. & O.E.," which is frequently appended to accounts in order to excuse slight mistakes or oversights. The "E. & O.E." qualification will not allow a lawyer to escape liability for negligence in preparing a statement of adjustments.

Obtain clear instructions from the client before inserting anything in the statements of adjustments that creates new contractual arrangements between the parties. An attempt to create new contractual relations may provide the seller with sufficient grounds to avoid the original agreement between the parties (*Fraser v. Gill*, (1981), 32 B.C.L.R. 132 (S.C.)).

If the buyer includes representations and warranties in the notes to the statements of adjustments that are not contained in the original purchase agreement, the seller may reasonably argue that the seller is under no obligation to give these representations and warranties. The seller may argue that they can delete those representations and warranties before executing the statement of adjustments containing them, or even consider that a counter offer has been made which may allow the recipient to avoid the contract.

Agreements between seller and buyer reached after the purchase agreement should already be set out in an amendment to the purchase agreement signed by both seller and buyer. As a result, including them in the statement of adjustments would be redundant.

Sometimes, a lawyer may be obliged to advise the client to attempt to negotiate. In *Halliday v. Underdahl*, 1992 CanLII 1890 (B.C.S.C.), the plaintiffs signed an interim agreement. After they signed they learned they might not be able to build a home because they might not get permission to install a septic system. Three days before completion, they consulted a lawyer about their problem and asked if they were bound to complete. The lawyer did not present negotiation as an option. The court concluded that a reasonably competent, ordinarily prudent solicitor would have advised the plaintiffs not to complete without at least attempting to negotiate. This ruling was on a summary trial application brought by the lawyer to have the client's negligence claim dismissed. The court did not decide that the lawyer was negligent but did find there was a triable issue.

Assuming that the seller agrees to additional covenants, the enforceability of these covenants may still be in question unless there is clear consideration flowing to the seller for these additional covenants, or at the very least, the statement is executed under seal. Accordingly, the simplest method of dealing with this issue is to have the statements of adjustments executed under seal, thus avoiding any question of their enforceability for lack of consideration.

However, there is a problem with this approach as a result of *Fraser v. Gill*, *supra*. By having the seller execute the statement of adjustments under seal, the buyer's solicitor supports the seller's argument that the seller is being asked to commit "many further acts" other than those required by the purchase agreement, and that the statement is an extensive counteroffer.

If the buyer's solicitor is aware that the seller is reluctant to complete, the solicitor should consider carefully whether any notes to the statements of adjustments should be presented to the seller, as they could offer a reluctant seller an opportunity to evade the transaction. In this situation the buyer's solicitor must advise the cli-

ent fully of the situation and the potential risks involved, and obtain specific instructions before proceeding.

In past years, the length and complexity of the notes to the statement of adjustments grew to the extent that judges expressed concern about what effect extensive notes had on the binding nature of the purchase agreement. The current practice is to have brief, non-contentious notes only.

Some of the court rulings on notes to the statements of adjustments are as follows:

- Notes that required many further acts by the seller were really counteroffers. The parties were no longer *ad idem*, the buyer could not establish that tender had properly taken place, and the seller was successful in defending an action for specific performance after having refused to complete a purchase under the purchase agreement (*Fraser v. Gill*, *supra*).
- The buyer had wrongfully repudiated a contract by adding a new covenant to the statement of adjustments (*Lane v. Saunders* (1991), 18 R.P.R. (2d) 301 (B.C.S.C)).
- A statement of adjustments should not include undertakings with respect to closing procedures unless the parties have agreed to the procedures (*Forrest v. M.C.K. Properties Ltd.* (1990), 42 C.P.C. 2nd 158 (C.A.)).
- A seller is entitled to refuse to sign a statement of adjustments that contains additional covenants, but if the buyer subsequently waives the requirement to sign the statement, the seller is not entitled to refuse to complete (*Mahil v. Johal*, 1991 CanLII 1523 (B.C.S.C.)).

In sum, use caution as to the nature and extent of the notes to be included in the statements and as to how the statements are to be executed.

[§5.16] Initial/Interim Report to Client

Many practitioners have modified their conveyancing practice to incorporate an interim report to the client. This modification is largely in response to successful negligence actions against conveyancing solicitors.

An interim report enables the conveyancer to:

(a) confirm receipt of instructions;

(b) provide the client with a title opinion premised on completion of registration of all required documents;

(c) confirm the parameters of the instructions;

(d) advise as to a possible conflict situation; and

(e) advise as to the fees and disbursements to be charged with respect to the transaction.

All of these areas have either led to negligence claims against conveyancers or have been the subject matter of general complaints against lawyers. The following discussion deals with each of the areas.

1. Receiving Instructions

If you are acting for the buyer, you will receive your instructions most often by way of the purchase agreement or "transaction record sheet" sent by the real estate agent. Once you receive a purchase agreement, you should immediately telephone the prospective client to acknowledge receiving it.

Provided that your instructions are ratified, use this telephone conversation to advise the client of any potential problems with the purchase agreement. Also obtain instructions as to the full names, addresses, and occupations of the buyers, together with instructions as to whether multiple buyers intend to be joint tenants or tenants in common. Next, confirm all of this information in an interim report to the client.

The initial telephone conversation might even save you time and money: for example, if the real estate agent sent the instructions to the wrong lawyer.

2. Title Opinion

Once you have the tax information and a full search of the subject property, including copies of all relevant plans, you are in a position to prepare the interim report to the client. The interim report includes your preliminary opinion on title.

An opinion on title is two-fold; it deals with the present status of the title, and the status of the title when all contemplated registrations have been completed. When advising as to the present status of the title, you should deal specifically with the encumbrances to be discharged out of the sale proceeds and also the encumbrances that are to remain on title. If the seller has agreed to clear title on their own behalf or through their solicitor, you should confirm this in order to minimize possible difficulties that may arise on closing if the seller defaults on that obligation. You should also examine the encumbrances to remain on title in detail, including the plans relating to those encumbrances (if applicable).

You cannot assume that because an easement, right of way, etc., has been on the property for years, it does not materially affect the property. By providing your client with copies of the relevant encumbrances and related plans, together with a copy of the land title plan of the property, you enable your client, before the completion of the purchase, to review the plan, and, if concerned, to contact or instruct the relevant parties or authorities. If you do not raise these matters with the buyer until after

completion of the purchase, and if they are then found to adversely affect the property materially, you will likely be liable for the loss.

The final segment of your title opinion deals with its qualifications—statutory and otherwise. Most clients believe that once they have paid their money and the documents are registered, they will get good title, free and clear of everything. Providing your client with these qualifications before closing again allows the client, if concerned, to raise them with you and clarify any questions they may have.

3. Parameters of Instructions

From the lawyer's perspective, outlining the parameters of the client's instructions may be the most important part of the interim report letter. In this part of the report, the lawyer can clarify what they are doing and what the client is doing, and clarify potential problems before completion.

In most instances, the solicitor has no personal knowledge of the property or the sellers, and the agreement makes no reference to potential problems. This has led to situations in which the solicitor does not find out, until the buyer attends to execute documents the day before closing, that the house has recently been constructed, or that tenants are in possession of property that the buyer wants to inhabit. This type of confusion leads to difficulties with the closing, increased time commitments for the lawyer, and dissatisfied clients.

Note the following passage from Murray Patterson, "Real Estate" in the materials for the Law Society/CLEBC seminar, *Loss Prevention—1992* (June 1992):

> We get many claims where, after closing, the buyer discovers that something with respect to the property is not as they expected it to be. Zoning bylaws preventing them from using the property in the manner they would like, an improvement encroaching on adjacent property and false representations by the seller are common examples. The client says that his understanding is that the lawyer would investigate and advise him of any such problems. The lawyer says such services were not part of what she was paid to do. Again, in the absence of corroborative evidence, the Courts often find in favour of the client … The easy answer is to, as soon as possible, send the client a comprehensive interim reporting letter.

In this part of the interim report, advise the client also as to those potential problems about which the client is already aware, for example, deficiencies in or the invalidity of the agreement.

4. Conflicts

If the solicitor also has received instructions from the mortgage company to prepare the security for its loan to the buyer, the solicitor should also advise the client in writing and confirm the client's agreement (see section 3.4 and Appendix C of the *BC Code*).

Within this part of the report, also advise the client as to any particular requirements of the mortgagee; that is, survey certificate, insurance, and so on. This practice eliminates the possibility of the buyer claiming against you if the relationship between the mortgagee and the buyer is prejudiced or severed before funding due to, among other things, misrepresentations by the buyer or problems with the property.

5. Fees

In an interim report, indicate to the client what the estimated fees and disbursements are and also that, if the client wants you to attend to any of those matters placed within the control of the client, the additional fees will be subject to adjustment on a time value basis.

6. Conclusion

You should sign the interim report to the client only after carefully reviewing all the relevant documents; that is, the purchase agreement, search results, tax information, etc.

Send the interim report as soon after receiving the instructions as possible so that the client has ample opportunity to attend to those matters raised in the report. If the circumstances permit, you can modify the report and enclose copies of the buyer's statement of adjustments and mortgage, if applicable.

You will find that the effort required to prepare and send an interim report to client will result in greater clarity, more satisfied clients and a reduction in the risks associated with a conveyancing practice.

[§5.17] Interim Report Letter Checklist

The following is a list of the topics typically covered in an interim report letter for a simple residential conveyance. This is not an exhaustive list. Review the Law Society's *Practice Checklists Manual*, "Residential Conveyance Procedure," in order to discover further items that may be of consequence.

(a) Confirm that you have received instructions.

(b) Provide the client with a title opinion premised on completion of registration of all required documents.

(c) Review all encumbrances and related plans, which are to remain on title.

(d) Confirm the location of the property on the plan with the client and ask the client to initial the lot being purchased.

(e) Confirm with the client that environmental hazards are not a concern.

(f) Outline statutory exceptions to title including, but not necessarily limited to, s. 23(2) of the *Land Title Act*.

(g) Confirm the client's instructions on how title is to be taken (e.g. in whose name, as joint tenants or tenants in common, etc.).

(h) Confirm the closing date, purchase price, deposit paid and GST status of the purchase.

(i) Discuss the proposed method of financing and warn the client of standard deductions from the gross amount of the mortgage before funds are advanced.

(j) Request the name of the mortgage lender or its solicitors if not already done.

(k) Confirm the parameters of your instructions and define and limit the extent of your responsibility for the following matters:

(i) placing insurance (typically the client's responsibility);

(ii) obtaining a survey (institutional lenders generally require up-to-date surveys, otherwise it is up to the client to decide if a survey is necessary, but note that many lenders are now accepting a title insurance policy in lieu of a survey; the lawyer should make it clear that the risk of an encroachment or illegal setback lies with the buyer and not the lawyer and that unless otherwise instructed the lawyer will not obtain a survey);

(iii) arranging utilities (the client should be told to open accounts such as hydro, telephone, etc.);

(iv) checking zoning, heritage, archeological, environmental and other matters (generally the client is advised to check with the municipality regarding zoning, building bylaws and other outstanding orders);

(v) confirming existing tenancies (the client should be satisfied that there are no existing tenancies and if there are, of the notice requirements for terminating tenancy agreements: see Part 4, Division 1 of the *Residential Tenancy Act*);

(vi) inquiring about builders liens (ask if the home is a new building or if recent renovations have been done; leave the responsibility for investigating to the buyer);

(vii) making closing arrangements (normally the client's responsibility, e.g. the transfer of keys, etc.);

(viii) remitting taxes—e.g. (a) in a residential conveyance there may be PST on any personal property of value being conveyed, and although a lawyer does not usually remit the tax on behalf of the client, the client should be advised of the obligation to pay the tax, (b) non-resident seller requirements under s. 116 of the *Income Tax Act*, and (c) whether GST is payable on the purchase price;

(ix) clarifying the representations and warranties clause in the contract of purchase and sale and asking the client to advise if there are any representations or warranties that were made and do not appear in the contract;

(x) obtaining the client's agreement in writing with respect to any conflicts (e.g. where the same lawyer acts for buyer and mortgagee, or buyer and seller—see Appendix C, section 5 of the *BC Code*);

(xi) obtaining the client's written agreement to any departure from the method of completion in the Contract of Purchase and Sale; and

(xii) discussing fees and disbursements (including property transfer tax which can be substantial and is borne by the buyer) and also that if the client wants the lawyer to do any of the matters that are normally left up to the client, those fees will be on a time value basis.

If circumstances permit, the letter can be modified to enclose the following documents for the client to execute:

(a) the original and two copies of the buyer's statement of adjustments; and

(b) the Property Transfer Tax Return.

When there is a mortgage to be executed, the mortgage must be executed in the presence of a lawyer or of a person before whom an affidavit may be sworn under the British Columbia *Evidence Act*.

[§5.18] Insurance

At common law, the beneficial interest in the land passes from the seller to the buyer once a contract for the purchase and sale of land has been executed and any conditions precedent have been removed.

Under s. 29 of the *Insurance Act*, a number of "statutory conditions" are deemed to form part of every contract of insurance in British Columbia. Statutory Condition No. 2, as set out in s. 29, provides as follows:

> The insurer is not liable for loss or damage to property owned by a person other than the insured unless
>
> (a) otherwise specifically stated in the contract, or
>
> (b) the interest of the insured in that property is stated in the contract.

Thus, unless the contract provides otherwise, once a contract of purchase and sale has been executed and all conditions precedent have been removed, the seller's insurance coverage will no longer be effective. Generally this is not a problem in residential conveyancing transactions, because clause 16 of the standard form Contract of Purchase and Sale addresses the matter of the passage of risk as follows:

> RISK: All buildings on the Property and all other items included in the Purchase and Sale will be and remain at the risk of the Seller until 12:01 am on the Completion Date. After that time, the Property and all included items will be at the risk of the Buyer.

If this contractual provision remains unaltered, the buyer must be sure to have insurance in place by no later than 12:01 a.m. on the date of completion. Even if the contract of purchase and sale provides for transferring risk on another date, such as the adjustment date, the buyer should have insurance in place by 12:01 a.m. on the date of completion, in case the seller does not maintain coverage beyond the completion date. In addition, while most insurance policies provide for coverage to be in place as of 12:01 a.m., this is not always the case, and coverage may not be effective until 12:00 p.m. on the specified date. Accordingly, it is good practice to advise a buyer to insure the property from the day before the date of completion.

A fire insurance policy is a personal contract and does not run with the land. Although a seller may assign the policy of insurance to the buyer, this is not recommended. Unless the assignee can establish that a novation of the initial contract has occurred, any claim the assignee may make under the assigned policy will remain subject to any claims or defences that existed on behalf of the insurer at the time of the assignment. The assignee will, accordingly, run the risk of coverage being cancelled as a result of a misrepresentation or other breach of the policy committed by the seller prior to the assignment.

Because insurance is a highly specialized field, when you act for a buyer, do not assume responsibility for placing insurance on the property. Leave this responsibility to the client to handle with the insurance agent. These responsibilities should be confirmed in a retainer letter.

If you are acting also for a mortgage lender in a conveyancing transaction, you cannot avoid assuming responsibilities with respect to the placement of insurance coverage. The mortgage lender will specifically instruct you to ensure that adequate insurance coverage is in place before funding the mortgage.

[§5.19] Undertakings

1. Giving Undertakings

In large commercial real estate transactions, the conditions of closing are often agreed to, in detail, weeks before the closing.

Historically, lawyers closed residential conveyances on undertakings that permitted the parties to complete in spite of the terms of their contract. The decision in *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 145, 1989 CanLII 245, clarified that undertakings must be used with caution and only with instructions from the client (refer to §3.03(11)). If the parties are unable to agree on alternate procedures, completion will have to be strictly set out in the purchase and sale agreement.

Lawyers and notaries can give undertakings. Articled students are also allowed to give or accept undertakings *if* a supervising lawyer has also signed or accepted the undertaking (see Law Society Rule 2-60 and *Practice Material: Professionalism: Practice Management*, §1.04(1)).

2. What Is an Undertaking?

(a) Nature of an Undertaking

An undertaking is a promise or commitment made by a solicitor to another person, whereby the solicitor assumes a *personal* obligation to act, or refrain from acting, in a certain manner. Generally an undertaking is given expressly; however, it may also be implied in special cases, as discussed later.

The ingredients of an enforceable undertaking have been described as follows:

(i) the undertaking must be made by a lawyer in a professional capacity;

(ii) the undertaking must be clear on its face. The words "undertaking" need not be used so long as its existence may be inferred from circumstances in which all of the elements of an enforceable undertaking are otherwise present;

(iii) the undertaking must be made by the lawyer with the understanding that the lawyer will be personally bound by it. For a lawyer to escape liability on this basis, it must be abundantly clear from the wording of the undertaking that the lawyer never assumed personal liability. For example, an undertaking "on behalf

of my client" may not be sufficient to release a lawyer from liability (*Re Solicitors*, [1917] 1 W.W.R. 529 (B.C.C.A.), affirmed in *Domfab Ltd. v. Ross* (1976), 22 N.S.R. (2nd) 185 (N.S.T.D.) and in *Wescana Carpets v. Bennett* (1967), 59 W.W.R. 422 (Sask. Q.B.)); and

(iv) if the promise is conditional, the conditions must have been fulfilled.

An undertaking is not a contractual obligation. Accordingly, no consideration is necessary for an undertaking to be enforceable. It is not a defence to an action to compel performance of an undertaking, or to obtain damages in lieu of performance, that the solicitor acted in good faith or without authority in the giving of the undertaking.

An undertaking will be enforceable, in nearly all circumstances:

> . . . the word of a solicitor is viewed by another solicitor as virtually sacred. The solicitor can rely on it because it will be kept . . . lawyers generally have always done what they have said they would do in undertakings . . . when a solicitor undertakes to do something, he must do it, unless, there is an express direction to him that he need no longer comply. There is an assumption, well founded, that solicitors' undertakings will be met and the courts should do whatever is necessary to continue this practice (*Valleyfield Construction Ltd. v. Argo Construction*, (1978) 20 O.R. (2d) 245 (H.C.)).

Generally, subsequent client instructions will not override an undertaking previously given by the client's lawyer, and an undertaking will take precedence over any dispute that has developed between the lawyers' clients (*McCarthy Tetrault v. Lawson Lundell Lawson & McIntosh* (1991), 58 B.C.L.R. (2d) 310 (S.C.)).

(b) Common Types of Undertakings

In practice, undertakings commonly fall within one of two broad categories:

(i) an undertaking to pay money, held in trust, upon the happening of an event or the occurrence of a specified set of circumstances, for example:

- the execution and delivery of consent orders;
- the tendering of documents effecting a legal, equitable or possessory interest in real or personal property; and
- the filing or registration of documents at an appropriate registry;

(ii) an undertaking to do, or refrain from doing, an act upon the happening of an event or the occurrence of a specified set of circumstances, such as those described in the first category.

The different forms of undertakings that may arise are limited only by the circumstances in respect of which they are given and the ingenuity of the practitioner. Although undertakings are frequently given and received when dealing with real property transactions, they are not restricted to these transactions.

(c) Undertakings—Lawyer's Liability

The lawyer's responsibility for breach of a professional undertaking may arise in the following ways:

(i) the court may enforce the undertaking on a summary application. The court's jurisdiction is based upon its inherent right to govern the conduct of its officers and the observance of their high standard of conduct;

(ii) an injured party may bring a civil action for damages resulting from a breach of undertaking; or

(iii) professional discipline proceedings may be instituted under the *Legal Profession Act.* Usually, breach of an undertaking will support a finding of professional misconduct.

Liability based upon professional undertakings given by a solicitor is discussed in 36 Halsbury, paras. 266–268, as follows:

> [I]t is immaterial that no misconduct on the part of the solicitor is suggested. The solicitor cannot, therefore, defend himself on the ground that his undertaking is not enforceable as a contract against him, or on the ground that the application has been delayed, nor will an undertaking given under a mistaken belief of having authority to fulfil it be set aside . . .
>
> The undertaking must be one which is not impossible *ab initio* for the solicitor to perform. An undertaking will, however, be enforced against the solicitor although after it is given, the client dies or instructs the solicitor not to perform it, or changes his solicitor.

(d) Undertakings—Professional Responsibilities

Chapter 7, rule 7.2-11 of the *BC Code* provides that a lawyer must:

(a) not give an undertaking that cannot be fulfilled;

(b) fulfill every undertaking given; and

(c) honour every trust condition once accepted.

Commentary [1] states:

> [1] Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility.

See also rule 7.2-11, commentary [2]-[4].

Similarly, rule 2.1-4(b) of the *BC Code* states, in part:

> A lawyer should neither give nor request an undertaking that cannot be fulfilled and should fulfill every undertaking given.

A lawyer must report to the Law Society another lawyer's breach of undertaking which has not been consented to or waived by the recipient of the undertaking (See Chapter 7, rule 7.1-3(a.1) of the *BC Code*).

If a solicitor breaches an undertaking, the solicitor's professional reputation in the legal community may be seriously impaired.

Mr. Justice Hollinrake confirmed that undertakings are critical to public confidence in professionals and that delay in complying can amount to a breach of undertaking: *The Law Society of British Columbia v. Heringa*, 2004 BCCA 97. Mr. Justice Hollinrake quoted with approval the Law Society hearing panel decision as follows:

> The heart of the panel's reasoning is, in my opinion, found in these words:
>
> [37] Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.
>
> [38] The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

3. Deemed Undertakings

Chapter 7, rules 7.2-12 and 7.2-13 of the *BC Code* provide for two types of deemed undertakings:

(a) when a lawyer gives a trust cheque, a deemed undertaking arises that the lawyer's cheque will be honoured (except in "the most unusual and unforeseen circumstances, which the lawyer must justify"); and

(b) if a lawyer acting for a purchaser of real property accepts the purchase money in trust and receives a registrable conveyance from the vendor in favour of the purchaser, then the lawyer is deemed to have undertaken to pay the purchase money to or as directed by the vendor on completion of registration.

4. Basic Practical Rules for Undertakings

(a) Never give an undertaking when some lesser form of communication or assurance will suffice.

(b) Never give any undertaking with which you cannot comply. Only give an undertaking, for example, to deliver funds or documents if you have the funds or documents in hand and also have irrevocable instructions from your client with respect to the disposition of those documents or funds.

(c) Draft your undertakings precisely. Avoid using broad phrases such as "the usual undertakings."

(d) Understand the mechanics of the transaction around which you are drafting the undertaking and draft it in such a way as to make it self-determining if some part of the transaction does not proceed according to plan. For example, if you are dealing with a real estate transaction and the purchase price depends, in part, upon mortgage money coming from another source, always make the undertaking to pay conditional upon your receiving that money. If you do not, remember that the only person that

can release you from an undertaking is the person to whom you gave it.

(e) If you do not intend to accept personal responsibility for an undertaking and you intend that your client should be responsible for the performance of the undertaking, make this absolutely clear.

(f) Never give an undertaking based on performance by some third party.

(g) If another lawyer or a third party drafts and puts you on an undertaking, read it very carefully and be quick to indicate that you disapprove if you do. You may otherwise be bound to perform the undertaking (*Wynndel Box & Lumber Co. v. Zlotnik*, 1992 CanLII 1595 (B.C.S.C.).

(h) Be aware of the implied undertakings.

(i) Never use the word "undertaking" except in the very special sense of an irrevocable binding promise.

(j) Always confirm an oral undertaking by a subsequent letter to avoid future misunderstanding as to what was undertaken.

5. Undertakings in Real Estate Transactions

In real estate transactions, undertakings are a very specific, formal type of communication. Most undertakings in real estate transactions have two distinct parts. First, you are undertaking that you have or will have a particular amount of money in trust. Second, you are promising to do something very specific with that sum of money once certain events occur. These events must be clearly spelled out.

In order to give undertakings you can comply with, you must know when an application for registration can be withdrawn and by whom. Note s. 167 of the *Land Title Act* and, in particular, that:

(a) The registrar has discretion whether or not to allow an application for registration to be withdrawn, and may impose terms. The Land Title Office will issue a Defect Notice that allows the application to be withdrawn for 30 days so that appropriate corrections may be made. The Defect Notice ensures that the application doesn't lose priority within those 30 days.

(b) There must be no other pending application affected by the application you wish to withdraw. For example, you cannot withdraw an application to register a transfer if there is an application for registration of a mortgage following, unless the application to register the mortgage is also withdrawn. Bear in mind that you are not in control of applications affecting the land you are dealing with, and a third party may apply to register an unanticipated instrument following your application.

(c) The registrar may refuse to allow an applicant to withdraw an application for registration until the written consent of the applicant's principal is produced, if the applicant is not a lawyer or a notary under the *Notaries Act* but someone acting on their behalf. For this reason, the solicitor or notary in charge of the transaction should always sign the application for registration.

Lawyers should not undertake to discharge an existing mortgage or undertake to pay to the institutional lender sufficient money to discharge the mortgage. Instead, you should obtain a payout statement from the institutional lender and undertake to pay to the institutional lender the amount calculated in accordance with the payout statement, on condition that the institutional lender provide a registrable discharge. This practice will prevent a lawyer from being in breach of their undertaking if the payout statement is subsequently found to be in error and the institutional lender refuses to deliver the discharge of mortgage until further money is paid.

These issues are at least partially dealt with in the standard form Contract of Purchase and Sale, which is discussed in §3.03. Note that the standard form Contract of Purchase and Sale provides that the buyer and seller will complete in accordance with CBA Standard Undertakings. While the parties may have agreed to this, a lawyer should confirm that in fact the undertakings can be fulfilled. For example, it is quite common for non-institutional lenders to refuse to provide a registrable discharge prior to being paid the balance owing under the mortgage, even though this is a requirement under the CBA Standard Undertakings. In such a case, the seller's lawyer cannot give the undertaking, and must obtain instructions to negotiate an amendment to the contract with respect to completing pursuant to the CBA Standard Undertakings.

In December 2002, former Vancouver lawyer Martin Wirick was disbarred for professional misconduct. Mr. Wirick breached his undertakings and misappropriated trust funds by failing to apply the funds to payout and discharge certain mortgages. He paid out the funds contrary to his undertakings. As of December 2005, the Law Society had approved payment in the amount $32.5 million for 347 claims arising from Mr. Wirick's law practice.

As a result of the Wirick case, the Law Society's Conveyancing Practices Task Force implemented reforms in conveyancing practice to reduce the opportunity for fraud.

First, the Real Property Section of the Canadian Bar Association revised the CBA Standard Undertakings by imposing a responsibility on the seller's lawyer who is undertaking to discharge the seller's mortgage after closing to promptly provide the buyer's lawyer evidence that the seller's lawyer has paid out the mortgage (see Appendix 7). These "transparency provisions" respecting mortgage discharges specifically require that the seller's lawyer provide to the buyer's lawyer, within five business days of the completion date, copies of specified documents that demonstrate that the seller's lawyer has made payments to existing chargeholders. Copies of the mortgage payout statement, the letter from the seller's lawyer that accompanies the payout, payout cheque and evidence of delivery of the payor cheque, are all required. The buyer's lawyer is not to release those documents to their client unless the mortgage discharge is still not received 60 days after completion.

Second, the Benchers approved Rules 3-95 and 3-96, known as the "60 day" reporting rules. As noted earlier, these Rules require a lawyer to report to the Law Society the failure of a mortgagee to provide a registrable discharge of mortgage within 60 days of any real property transaction. They also oblige a lawyer to report to the Law Society the failure of another lawyer or notary to provide satisfactory evidence of having filed a registrable discharge of mortgage as a pending application at the Land Title Office within that 60-day period.

Chapter 6

Remedies[1]

[§6.01] Risk of Failed Transactions

This chapter provides some basic guidelines about the remedies available to a seller and a buyer when a real estate transaction collapses. It also suggests various steps that a real estate practitioner may take at an early stage to preserve and enhance the client's position if the transaction collapses and litigation follows.

The repeal of the *Statute of Frauds* and its replacement with s. 59 of the *Law and Equity Act* created a host of new possibilities for litigation and new pitfalls for practitioners.

No other area of solicitors' practice has greater potential for culminating in litigation than the practice of real property law. Consequently, anticipating and avoiding potential difficulties is an important part of the service provided by real estate practitioners.

In addition to the client's need for protection, solicitors must also protect themselves and practise defensively. Increased competition and demand for lower cost legal services create a temptation to cut corners. However, solicitors are now, more than ever, potential defendants at the instance of clients and third parties.

Practitioners must strike a balance between the exigencies of practice and the need for precision and caution.

[§6.02] The Solicitor as Witness

When an action is commenced as a result of a collapsed real estate transaction, the solicitors involved will often be key witnesses. Your discussions and the documents will be evidence in your client's case. The paper produced by a solicitor can be the key to success in litigation between the seller and buyer.

Some of the precautions that a solicitor should take are as follows:

(a) Make good notes. Every time you have a telephone discussion or a conference with anyone involved in the transaction, make a contemporaneous note of what was discussed, date it, and put it in your file. Instruct clerks, assistants, and paralegals to do the same. Ideally, a note will be made even of attempted but unsuccessful communications. In some instances, the precise words spoken by you or someone else ought to be noted.

(b) Confirm all important communications by letter and keep careful records of the dates, and perhaps even the times that all letters are delivered or received. Clarify what you will do and what risks, if any, your client is exposed to.

(c) Don't talk too much. The other solicitor will be making notes at the other end of the telephone. An ill-considered remark might constitute a repudiation of your client's contract. Chatter about the advice you have given your client may waive privilege.

(d) If a dispute develops and you are trying to negotiate a resolution, communicate "without prejudice."

If litigation ensues, you may be an important witness. Consider whether it is appropriate for you or a member of your firm to act as counsel. See section 5.2 of the *BC Code*. Commentary [1] to rule 5.2-1 states:

> A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

[§6.03] Relevant Legal Principles

This section addresses some of the issues that arise regularly in real estate litigation.

1. Enforceability of the Purchase Agreement

An enforceable purchase agreement is essential. If there is no agreement, there is generally no foundation for an action to enforce it. Agreements may be unenforceable for lack of certainty, for failure to comply with a relevant statute, or for other reasons.

[1] Revised by **Tony Magre** of Blake, Cassels & Graydon LLP in November 2023. Reviewed regularly by the Land Title and Survey Authority for content relating to the BC land title and survey system, most recently in October 2023. Previously revised by Greg Umbach and Tony Magre (2018–2022); Randy Klarenbach and Aneez Devji (2012); Ian Davis (2010); Joel Camley (2005 and 2006); Lawson Lundell, Real Estate Department (1994–2004); and Patrick G. Guy (1987–1993). Prepared originally by G.W. Ghikas for Continuing Legal Education in 1983 and revised by the author in 1986.

(a) Certainty of Terms

Although the courts were at one time receptive to technical arguments concerning uncertainty in purchase agreements, this is no longer the case. The courts of British Columbia make every effort to determine the intention of the parties and to enforce the bargain (*Fraser v. Van Nus* (1985), 67 B.C.L.R. 285 (C.A.) and *Boult Enterprises Ltd. v. Bissett* (1985), 67 B.C.L.R. 273 (C.A.)). This does not absolve the lawyer from ensuring that the provisions in the agreement are clearly and simply set out.

(b) *Law and Equity Act*, s. 59(3)

This section provides that a contract respecting land is not enforceable unless

(i) it is written;

(ii) the party to be charged has acted in accordance with the contract; or

(iii) the party to be charged is estopped from denying the contract.

In other words, there must be written or other evidence of the agreement.

(c) *Real Estate Development Marketing Act* ("*REDMA*")

The *Real Estate Development Marketing Act* requires a developer selling "development property" to fulfill many requirements, including the filing and delivery of a disclosure statement to any buyer. "Development property" is defined in s. 1 as including, but not limited to, five or more subdivision lots in a subdivision (unless each lot is at least 64.7 hectares), five or more bare land strata lots in a bare land strata plan, or five or more strata lots in a stratified building.

Part 2 of *REDMA* provides that a developer (seller) may not market any portion of the development property until it has complied with *REDMA*. Section 21 sets out the rights of a buyer to rescind an agreement. Subsection (2) provides for a seven-day right of rescission under certain circumstances. Subsection (3), confers a general right to a purchaser to rescind an agreement at any time when a purchaser is entitled to a disclosure statement in respect of a development property but never received the disclosure statement. These rights of rescission remain effective regardless of whether title (or the other interest for which a purchaser has contracted) to a development unit has been transferred.

2. Essentiality of Time

A properly drawn purchase agreement will state that time is of the essence. If time is of the essence, the failure of a party to perform on time will constitute a breach, giving the other party the right to pursue their remedies immediately. Where, by words or conduct, a party waives strict compliance with time limits, time will no longer be of the essence, and the other party will have a "reasonable time" to perform (*Whittal v. Kour* (1969), 71 W.W.R. 733 (B.C.C.A.)).

Two cases illustrate the approach of the courts to essentiality of time where the purchase contract has been amended to extend the completion date.

First, in *Salama Enterprises (1988) Inc. v. Grewal* (1992), 66 B.C.L.R. (2d) 39 (C.A.) (followed in *Takhar v. P.K.S. Investments Ltd.* (1992), 94 D.L.R. (4th) 139 (B.C.C.A.)), the court held that although an extension of time that merely substitutes a new date for an old one does not amount to a waiver of time of the essence, the court may give equitable relief and refuse to enforce the time of the essence clause. In this case, the parties agreed to an extension, and when the buyer requested a further one-day extension, the seller relied on the time of the essence clause to terminate the contract. The court granted the buyer's request for specific performance on the basis that it was unjust or inequitable to enforce the time is of the essence clause, given the actions of both parties.

Second, in *Ambassador Industries Ltd. v. Kastens*, 2001 BCSC 484, the parties signed an amendment agreement varying the completion date. The seller's documents arrived the day after the new completion date and the buyer sought to rescind the contract, arguing that time was of the essence. The court disagreed, instead finding that the parties had waived the time of the essence provision. Essentially, the parties would have had to reiterate the time of the essence clause for it to have the effect argued by the buyer.

There are a number of similarities between *Ambassador* and *Salama*. First, in both cases the original agreement contained a "time of the essence" provision. Second, both parties agreed to extend the original closing date. Third, the new closing date had to be extended despite the due diligence of the party seeking to enforce the transaction.

However, in *Ambassador* the parties did not agree to the continued enforcement of the time of the essence provision, as was the case in *Salama*. It was also clear in *Salama* that the party in default was notified about the other party's intention to continue to rely on the time of the essence provision, since the provision was included in the part of the contract that was amended.

Salama can be further distinguished from *Ambassador* because the court found it to be unjust or inequitable to allow enforcement of the time of the essence clause. In *Salama*, there was a common intention: before the purchase could complete, subdivision approval was required. When the buyer could not get subdivision approval, through no fault of his own, it became inequitable to allow the seller to rely on the time of the essence provision because such strict reliance would make performance of the condition impossible in any practical sense, despite all due diligence by the buyer.

Mere discussions by the parties relating to further accommodations for the buyer do not amount to a waiver of the time of the essence provision. Where the buyer agreed to an extension of the completion date and took possession, the court held that there had been no waiver of time of the essence (*Sorensen v. Carriage Lane Fine Homes Ltd*. (1998), 21 R.P.R. (3d) 301 (B.C.S.C.)). The buyer was entitled to a return of the deposit and other compensation when the seller was unable to clear title by the extended date for completion.

If time is of the essence and both sides fail to perform, then time ceases to be of the essence unless and until one side gives reasonable notice to the other to perform at a rescheduled time (*Shaw Industries Ltd. v. Greenland Enterprises Ltd.*, 1991 CanLII 3955 (B.C.C.A.); followed in *Kioussis v. Coil* (1992), 71 B.C.L.R. (2d) 78 (B.C.C.A.); applied in *Abramowich v. Azima Developments Ltd.* (1993), 86 B.C.L.R. (2d) 129 (B.C.C.A.) and *Basra v. Carhoun*, 1993 CanLII 1435 (B.C.C.A.)).

In "Putting Together the Puzzle of Time of the Essence" (September 1990), 69:3 *Canadian Bar Review* 417, Paul M. Perell examined Canadian decisions to date and concluded:

(a) where time is actually of the essence in the circumstances, the time stipulation operates as a contractual condition. If a party fails to perform within the time specified, and if the innocent party has not waived the time stipulation, the innocent party may "elect" to treat the breach as ending the contract and to claim damages or a return of its deposit, or to keep the contract alive and to sue for specific performance;

(b) where time is not stipulated as being of the essence, the innocent party may sue only for damages, because the time stipulation operates as a warranty;

(c) where the parties do not stipulate that time is of the essence, the essentiality of time involves interpreting the particular contract. Certain types of contracts are usually interpreted as needing time to be essential; for example, options to purchase land or to renew leases, or where the subject matter of the transaction is an income property or is of a speculative nature;

(d) time being of the essence may be restored or initiated by a party giving notice and specifying a date for performance that is reasonable in the circumstances (*Shaw Industries*, *supra*). When deciding whether the specified time is reasonable, the court will consider all the circumstances, including the prior history and conduct, what remains to be done, the need for performance and whether time was previously of the essence;

(e) waiving "time is of the essence" involves one party leading the other to understand that the strict rights of the contract will not be insisted upon; and

(f) a party who is in default and not ready to perform, or who is the cause of the delay or default, is not entitled to rely on "time is of the essence."

The significance of these principles is that your client must meet the completion dates. When an extension of time is sought or granted by your client, deal with the issue of whether or not time is to remain of the essence expressly and in writing. Beware of casual statements to the opposite party that may waive the essentiality of time. When the opposite party makes such statements to you, make good notes and confirm the statement in writing so as to later be able to rely on any potential waiver.

3. Conditions Precedent (Subject Clauses)

Historically, if a contract contained a condition that required a stranger to the contract to do something before the contract could be fulfilled, that provision would be treated as a "true condition precedent," even if inserted for the benefit of one party only. That condition could not be waived by either party and, until the condition was satisfied, the contract was unenforceable by or against either of them. See *Turney v. Zhilka*, 1959 CanLII 12 (S.C.C.).

Section 54 of the *Law and Equity Act* allows one party unilaterally to waive the performance of a true condition precedent if:

(a) the condition was included solely for that party's benefit;

(b) the contract can be completed without fulfillment of the condition; and

(c) the waiver is made before the time stipulated for fulfilling the condition precedent, or within a reasonable time.

If a condition precedent is included in an agreement for the benefit of one party, that party is under an implied obligation to use its best efforts to fulfill the condition, and may be found liable for damages if it fails to do so. See §3.02(3) for a discussion of subject removal, as well as *Wiebe v. Bobsien* (1985), 64 B.C.L.R. 295 (C.A.) and *Tau Holdings v. Alderbridge Development Corporation* (1991), 60 B.C.L.R. (2d) 161 (C.A.).

4. Anticipatory Breach

If one party to a purchase agreement, before the completion date, clearly indicates an intention not to complete, the other party is entitled to treat that party as being in default. Thus, a statement made to the opposite party that might be construed as an expression of inability to complete or intention to not complete may severely prejudice the client. However, to be a *repudiation* a statement must be consistent only with repudiation. Note that it is doubtful that you can cloak a statement repudiating a contract with privilege merely by stating that it is "without prejudice." However, it may be protected if it is contained in an offer to settle a matter made in good faith and if the court does not construe the offer as a mere device to prevent the repudiation being led in evidence.

A seller who fails to notify the buyer that the seller has accepted the buyer's anticipatory breach is bound to perform its obligations under the contract (*Norfolk v. Aikens* (1989), 64 D.L.R. (4th) 1 and *Homestar Industrial Properties Ltd. v. Philps* (1992), 72 B.C.L.R. (2d) 69 (C.A.)).

[§6.04] Remedies of Seller and Buyer

1. First Election: Affirm or Disaffirm

If one party is in breach of a condition, the other must affirm or disaffirm the contract. Generally, the choice between ending or enforcing the contract is irrevocable and certain remedies are no longer available after that election has been made.

The innocent party's election ought to be communicated to the other party before you commence a legal proceeding. This is most necessary in the case of an anticipatory breach. If your client is unable to decide between affirmation and disaffirmation, and the repudiation has occurred before the closing date, write to the other side telling them that you regard their conduct as amounting to a repudiation and that your client will pursue all available remedies. You are not truly making an election in doing this, but you are probably relieving your client of the need to tender performance (*Roy v. Kloepfer Wholesale*, [1952] 2 S.C.R. 465).

In some cases, the purchase agreement may be rescinded if a party receives the property in a form that is completely different from what was expected and the property cannot be used for the purpose for which it was intended. In *Cherris Estate v. Bosa Development Corp.*, 2001 BCSC 228, the plaintiff purchased a penthouse where the temperature was consistently between thirty and forty degrees Celsius. The court held that as the home was uninhabitable the plaintiff received something completely different from what the property was represented to be, and rescission was allowed. However, in *Lam v. Ernest & Twins Ventures*, 2001 BCSC 710, the plaintiff sought to rescind a contract of purchase and sale for the purchase of two adjacent strata lots. The plaintiff requested that the dividing wall between the two units not be built so that he could use the two lots as one space. The project manager agreed and the plaintiff purchased the two strata lots. A duct was installed in the centre of the space, that would have been installed in the dividing wall had it been built in the first place. The court refused the plaintiff's request to rescind the contract, finding that the basic purpose for the purchase had not been prohibited.

The Supreme Court of Canada has ruled that due diligence is not a condition precedent to rectification of a contract. In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, the Court affirmed a trial judge's decision to apply the equitable remedy to rectify a contract that did not accurately reflect the oral agreement on which it was based. In this case, the parties agreed verbally to enter into a joint venture to purchase a golf and tennis club. The agreement included an option on the 18th fairway for the respondent to develop a specific residential development. When the agreement was put into writing, the option clause misstated the agreed width of the proposed development as 110 feet rather than 110 yards. The Court held that the respondent knew the written term was incorrect and fraudulently insisted on enforcing it. Justice Binnie stated:

> . . . due diligence on the part of the plaintiff is not a condition precedent to rectification. However, it should be added at once that rectification is an equitable remedy and its award is in the discretion of the court. The conduct of the plaintiff is relevant to the exercise of that discretion. In a case where the court concludes that it would be unjust to impose on a defendant a liability that ought more properly to be attributed to the plaintiff's negligence, the court may deny rectification.

2. Seller's Remedies

(a) Claiming the Deposit

If a buyer repudiates the agreement, the seller may simply accept the repudiation, treat the agreement as being at an end, and return the deposit to the buyer. In practice, this alternative is seldom considered. Generally, the seller wishes, at the very least, to claim forfeiture of the deposit.

Most purchase contracts will include a term providing for the forfeiture of the deposit to the seller if the buyer repudiates.

In some circumstances, the seller will be content to take the deposit in full satisfaction of the seller's claims. In other cases, the seller will want to receive the deposit and to pursue additional remedies, such as specific performance and damages.

If the seller claims forfeiture of the deposit, the seller may be precluded from pursuing other remedies. In the absence of an indication to the contrary, the parties will generally be taken to have intended that the stipulated sum operates as a limit on the damages recoverable. (For cases considering this issue, see *Gisvold v. Hill* (1963), 37 D.L.R. (2d) 606 (B.C.S.C.); *Clendening v. Cedarhurst Properties Ltd.* (1977), 31 B.C.L.R. 153 (C.A.) and *Fraser v. Van Nus* (1987), 14 B.C.L.R. (2d) 111 (C.A.)). In practice, lawyers generally include a term in the purchase contract that expressly preserves the seller's right to retain the deposit and claim additional damages.

Note that a term in the contract stating that the deposit will be forfeited to the seller "on account of damages" does not require the seller to prove damages in order to claim the deposit (*Tang v. Zhang*, 2013 BCCA 52). The Court of Appeal also held in *Amiri v. One West Holdings*, 2013 BCCA 155, that "if the funds at issue are characterized as a 'true deposit', it is not necessary that they be a genuine pre-estimate of damages in order for the forfeiture provisions of the contract to be enforceable" (at para. 30). See *Amiri* for a recent summary of the law on forfeiture of deposits in real estate transactions.

If the seller chooses the remedy of specific performance, rather than termination of the contract, the deposit is not forfeited to the seller on account of damages (*Winley Investments Inc. v. Milore Sales Ltd.* (1991), 16 R.P.R. (2d) 200 (B.C.S.C., Master)). A cautious lawyer should therefore, in addition to the usual claim for relief, seek an order that the deposit be paid into court pending the outcome of the trial.

The court has power to grant "relief from forfeiture." Section 24 of the *Law and Equity Act* states that the court may relieve against all penalties and forfeiture and in granting the relief impose any terms as to costs, expenses, damages, compensations and all other matters the court thinks fit.

When acting for a defaulting buyer, consider whether the deposit is excessive and whether a portion of it might be recovered before abandoning all hope. When acting for a seller, especially in a major transaction involving a large deposit, consider developing a rationale for the "deposit" as a genuine pre-estimate of the seller's actual damages and recite that rationale in your agreement.

Appendix 13 is a sample letter claiming the deposit.

(b) Specific Performance or Damages

To enforce the agreement, the seller may sue for specific performance or for damages for breach of contract. These remedies are consistent in that they both represent an enforcement of the contract. Because they are consistent, both remedies are usually pursued in a single action. Although the remedies are consistent, they are alternative remedies. At or before trial, the seller must elect between them. If the seller wishes, the seller may elect only one of the alternative remedies before taking action, although it is usually better to maintain options if you can.

If the property is resold by the seller, or if the seller doubts the buyer's ability to specifically perform, or wishes to keep the property while seeking compensation for diminution in value, the seller may elect to recover damages. Otherwise, an election in favour of an order for specific performance is generally preferable. The relief sought should include one of the following:

(i) specific performance and damages;

(ii) damages in lieu of specific performance; or

(iii) common law damages.

Damages for breaching a purchase contract will be assessed as of the completion date and not the trial date (*Mavretic v. Bowman* (1993), 76 B.C.L.R. (2d) 61 (C.A.)).

Sample letters electing or declining to elect from among these remedies in the event of an

anticipatory breach by the buyer appear as Appendix 14. Sample wording for Part 1 and Part 2 of the seller's notice of civil claim appears as Appendices 15 and 16.

3. Buyer's Remedies

(a) Claiming the Return of the Deposit

If the seller repudiates, the buyer may demand the return of the deposit, and, failing payment, may sue for its return. This clearly constitutes a disaffirmation of the contract so that the buyer's remedy may be confined to the return of the deposit.

As noted in the context of the seller's remedies, the seller may claim entitlement to retain the deposit, but in appropriate circumstances the buyer may seek relief from forfeiture.

(b) Specific Performance or Damages

Like the seller, the buyer may be able to claim one of the following, depending on the circumstances:

(i) specific performance and damages;

(ii) damages in lieu of specific performance; or

(iii) common law damages.

The buyer who seeks specific performance should also claim and file a certificate of pending litigation, which gives notice of litigation affecting title. This filing effectively prevents the seller from selling the property to anyone else.

Historically, courts have held that specific performance was automatically available as a remedy for a buyer because the courts viewed all real property as unique. However, the Supreme Court of Canada decision *Semelhago v. Parmadevan*, 1996 CanLII 209 (S.C.C.) altered this approach. The court suggested in *Semelhago* that specific performance should not be granted without some evidence that the property is unique to the extent that its substitute would not be readily available. The term "readily available" was not defined, and the Court did not specify the evidence needed to establish uniqueness. However, property purchased for a development will generally not be considered unique (*Rostrum Development Corp. v. Wafler*, 1996 CanLII 3129 (B.C.S.C.)). By contrast, in *Cormack v. Harwardt*, 1998 CanLII 5278 (B.C.S.C), a piece of property that accommodated the buyer's desire to raise horses was found to be sufficiently unique for the court to award the remedy of specific performance.

In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388, the BC Court of Appeal decided that "uniqueness" does not mean singularity, and that the plaintiff buyer need not show that the property is incomparable. Madam Justice Newbury emphasized that in *Semelhago* and a subsequent case, *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, "the Supreme Court [had] not signalled that specific performance is 'on the way out' or that contracting parties should no longer expect to be held to their bargains" but had "merely recognized … that in light of the advent of condominiums and other forms of interest in land, the uniqueness of real estate should no longer be presumed" (at para. 52).

Sample wording for Parts 1 and 2 of a buyer's notice of civil claim is included in these materials. See Appendix 18.

4. Damages

(a) Damages in Addition to Specific Performance

These are equitable damages, discretionary in nature, recoverable in only limited circumstances. Generally, they relate to out-of-pocket expenses incurred by the plaintiff and for which the plaintiff has received no benefit. These expenses also must have been incurred as a result of the defendant's delayed performance (*Wade v. Chilco Ranches Ltd. et al.* (1949), 1 W.W.R. 239 (B.C.S.C.) and *Tanu v. Ray* (1981), 20 R.P.R. 22 (B.C.S.C.)).

(b) Damages in Lieu of Specific Performance

Given the liberal and flexible approach of the courts in British Columbia to awarding common law damages, there may no longer be any significant distinction between quantum of damages recoverable "in lieu of specific performance" and that recoverable as "damages for breach of contract." In legal theory, however, there is a distinction. Damages in lieu of specific performance are awarded:

(i) to a plaintiff who would otherwise be entitled to an award of specific performance but who cannot perform, because of circumstances beyond the plaintiff's control; or

(ii) if the court in its discretion deems an award of damages to be more appropriate than the order for specific performance that the plaintiff seeks.

(c) Common Law Damages

In *Ansdell v. Crowther* (1984), 55 B.C.L.R. 216 (C.A.), the Court of Appeal rejected the notion that rigid rules apply to the assessment of common law damages for breach of a purchase agreement that do not apply to awards of equitable damages. Lambert J.A. stated:

> [T]here is no distinction between damages at common law and so-called "equitable damages," no fixed rule as to the date as to when damages ought to be assessed and, in order to do justice, the courts are empowered to fix damages as of the date found to be appropriate in the circumstances.

Ansdell v. Crowther, *supra*, illustrates the exercise of judicial discretion in assessing damages, even though only common law damages may have been pleaded.

(d) Statutory Damages

A buyer may recover damages for loss of bargain from a seller who cannot perform due to a defect in title (s. 37 of the *Property Law Act*).

(e) Liability of Municipalities

In *Strata Plan NW 3341 v. Canlan Ice Sports Corp.*, 2001 BCSC 1214, affirmed 2002 BCCA 526, the project developer, designer, general contractor and municipality of Delta were held jointly liable to the owners of a Strata Corporation for over three million dollars in repair costs resulting from extensive water damage to the building. In this case, the owners noticed water leaks at balconies and windows shortly after moving in. The municipality conducted inspections during construction but these did not include the building envelope. The Strata Corporation sued to recover the costs from the water damage. Delta was named as a defendant for negligent inspection of the construction of the building and for issuing an occupancy permit. Delta did not demand that a project architect provide letters of assurance indicating that the buildings had been designed and constructed in compliance with the BC *Building Code*. The judge noted that water leaks were foreseeable in the Lower Mainland of BC and a history of envelope failures should not have been needed to convince Delta to enforce the relevant sections of the *Building Code*. Delta could have demanded that the architect provide the necessary assurances regarding *Building Code* compliance. Accordingly, the court held that municipalities who adopt the entire BC *Building Code* are responsible for taking reasonable steps to enforce all of it, unless they make valid policy decisions to limit that responsibility. Delta unsuccessfully appealed certain aspects of this judgment, including the finding that Delta was defendant jointly and severally liable with other defendants for the damages (2002 BCCA 526).

[§6.05] Tender as an Evidentiary Tool

"Tender" refers to the delivery of all money, documents and other items required by the purchase agreement in the manner required by the purchase agreement. The basic rule of closing procedure is that to sue successfully for specific performance, the plaintiff must show that the plaintiff was "ready, willing and able" to complete the transaction at the appropriate time. There can be no doubt that tender is an important consideration but it is not as important as often believed. Tender merely provides cogent evidence that the party tendering was, in fact, ready, willing and able to complete. In *Whittal v. Kour*, *supra*, Bull J.A. said:

> Tender is not a *sina qua non* for a claim by a person to force a defaulting party to complete his bargain.

Tender is good evidence, perhaps the best evidence available, to show readiness to perform, but the failure to tender properly is not necessarily fatal (*Hobart Investments Corp. Ltd. v. Walker et al* (1977), 1 R.P.R. 187 (B.C.C.A.)). Tender is equally important to illustrate that the other party was not ready or able to complete.

Chapter 7

Mortgages and Rights to Purchase[1]

[§7.01] Mortgage as a Contract and Security

Most buyers borrow money when they buy their homes. A mortgage is the security that a borrower (mortgagor) gives to a lender to secure the loan made by the lender (mortgagee) to the borrower. The mortgage security is registered as a charge against the title to the land.

At common law, a mortgage consists of two things:

- a contract for a debt; and
- a conveyance of land as security for a debt, subject to a proviso for redemption.

In British Columbia, common law mortgage rights and remedies are expressly retained by s. 231(1) and (2) of the *Land Title Act*:

> (1) Subject to other applicable provisions of this Act being complied with, a mortgage that complies with this Division operates to charge the estate or interest of the mortgagor to secure payment of the debt or performance of the obligation expressed in it, whether or not the mortgage contains words of transfer or charge subject to a proviso for redemption.
>
> (2) Whether or not a mortgage referred to in section 225 contains words of transfer or charge subject to a proviso for redemption, the mortgagor and mortgagee are entitled to all the legal and equitable rights and remedies that would be available to them if the mortgagor had transferred the mortgagor's interest in the land to the mortgagee, subject to a proviso for redemption.

1. Contractual Aspect of a Mortgage

A mortgage is a contract. One of the essential elements of a contract is that there be privity between the parties. At common law, once privity is established with a contracting party, that party remains bound under the contract until it is specifically released or until the contract is otherwise determined.

At common law, the original borrower (and, where applicable, a guarantor) under a mortgage, being in privity of contract with the lender, remains bound by the contractual provisions under a mortgage even though the original borrower may no longer be the owner of the land. Similarly, at common law, a subsequent buyer of the land is not in privity of contract with the lender, even though the buyer has bought the land charged by the mortgage, unless the subsequent buyer enters into a mortgage assumption agreement or other agreement with the lender that specifically creates privity of contract.

A seller may be released from liability under a personal covenant by operation of law. There are two methods by which a seller may be released:

- under the common law doctrine of novation; or
- under ss. 20 to 24 of the *Property Law Act*.

Sections 20, 21, and 22 to 24 of the *Property Law Act* significantly changed the common law position. See the discussion in §7.16(4).

2. Conveyance and Security Aspect of a Mortgage

This aspect of a mortgage can be complicated. As the concept of a mortgage has evolved over many centuries, common law, equitable principles, and statutory provisions have all been applied to mortgages. As a result, a mortgage represents many things that are not apparent upon a simple reading of the document.

All real property mortgages contain a "grant" of land from the borrower to the lender. Before the *Land Title Amendment Act, 1989* came into effect, it was clear that the grant operated as a legal conveyance that was subject to a proviso for redemption. The proviso permitted the borrower to require a reconveyance of the land by paying off the debt owing under the mortgage.

Initially at common law, the borrower had to repay the debt owing under the mortgage on the exact date specified in the mortgage or the conveyance to the lender became absolute and the borrower lost all rights to the land. The courts of equity modified this harsh result by allowing the borrower the right to redeem the property after the contractual date for redemption had expired. Eventually, this equitable right to redemption evolved into an equitable estate known as the equity of redemption. Because there is only one legal estate in land, only the first lender received a conveyance of the legal estate. Any subsequent mortgage given by a borrower could not then transfer the legal estate to the subsequent lender. Therefore, all subsequent mortgages were equi-

[1] Revised by **Tony Magre** of Blake, Cassels & Graydon LLP in November 2023. Reviewed regularly by the Land Title and Survey Authority for content relating to the BC land title and survey system, most recently in October 2023. In February 2023, the Solicitors' Legal Opinions Committee reviewed and provided edits for the parts of this chapter relating to solicitors' legal opinions. This chapter was previously revised by Greg Umbach and Tony Magre (2018–2022); Randy Klarenbach and Aneez Devji (2012); Ian Davis (2010); Joel Camley (2005, 2006 and 2008); and Lawson Lundell Real Estate Department (annually to 2004). Tina Dion reviewed the Aboriginal title part of this chapter in 2011. John M. Olynyk contributed comments regarding Aboriginal title in 2002.

table mortgages conveying an equitable estate or interest in the equity of redemption. A second mortgage conveyed the first right to redeem the first mortgage to the second lender and, in effect, created a new second right of redemption in favour of the borrower to redeem the first mortgage.

Although a mortgage may operate only as a charge and not as transfer of the legal estate, the redemption system survives. If the borrower fails to redeem the mortgage, the lender may foreclose on the borrower's interest (s. 231(2) of the *Land Title Act*). Since a first mortgage grants an interest in the land, a second mortgage effectively grants a right to redeem the first mortgage.

3. Mortgages Under the *Land Title Act* (Division 5)

A Form B Mortgage must be used to register mortgages (Director's E-filing Directions).

Subsection 225(2) of the *Land Title Act* provides that a mortgage "must be in 2 parts."

Part 1 of the mortgage must be in the form approved by the Director of Land Titles (that is, in Form B), and contain the information required under s. 225(3), including the parties to the mortgage, the legal description of the mortgaged land, and the signatures of the mortgagor and witness. Section 225(4) provides that the Director may apply other requirements in approving the form.

Part 2 of the mortgage must consist of all other terms of the mortgage and take one of the following forms:

- the set of standard mortgage terms prescribed under section 227 and the Regulations of the *Land Title Act* at the time the mortgage was executed (s. 225(5)(a));
- the set of standard mortgage terms filed in the Land Title Office by the lender (s. 225(5)(b)); or
- a set of mortgage terms that is expressly set out in Part 2 of the mortgage (s. 225(5)(c)).

If a set of standard mortgage terms referred to under s. 225(5)(a) or (b) is used in a mortgage, the lender must give the borrower a true copy of the set of standard mortgage terms, together with a statement of any modifications to those terms, at or before the time the mortgage is executed (s. 229(1)(a)). The lender must obtain an acknowledgement from the borrower that the borrower has received both a copy of the set of standard mortgage terms and a statement of any modifications (s. 229(1)(b)). If the borrower does not receive and acknowledge receiving the documents from the lender, the set of standard mortgage terms prescribed by regulation will apply to the mortgage (s. 229(2)).

[§7.02] Conflicts

Conflict problems can arise at any time in a conveyancing transaction; however, they most frequently occur when a lawyer is asked to act for both a buyer and a lender on the same transaction. The first thing a lawyer should do when deciding whether or not to act for a party in any matter is to consider whether or not there is a conflict. If there is, the Law Society requires lawyers to follow those rules set out in section 3.4 and Appendix C of the *BC Code*. See §2.04 for a full discussion of this topic.

[§7.03] Capacity of Borrowers

Given that a mortgage is a contract and operates as if it were a transfer of land, it is essential that the borrower has the appropriate estate in the lands to be transferred, the capacity to transfer the lands, and the capacity to contract.

In lending situations, issues of capacity most often relate to infants, persons who are incapable of managing their affairs, and trustees or personal representatives exercising an individual's right.

1. *Infants Act*

An individual who is less than 19 years old is an infant under the *Age of Majority Act*, R.S.B.C. 1996, c. 7. At 19, a person has full capacity to contract for the purchase of land or to secure repayment of money lent.

Infants are limited in their capacity to contract by Parts 3 and 4 of the *Infants Act*, R.S.B.C. 1996, c. 223.

2. Powers of Trustees or Personal Representatives

Section 2:60 of *Falconbridge on Mortgages*, 5th ed. (2020) provides as follows:

> It is sometimes said that a trustee cannot sell or mortgage the trust property except where he or she has received a direction or authority pursuant to a trust instrument or under some statutory authority. However, this is not entirely accurate: a trustee who holds the legal estate has the same power to convey that estate at law as is possessed by any other owner of the legal estate who has capacity to dispose of property, and that power is not affected by the fact that the conveyance is in breach of trust, even if this fact is known to the grantee . . .
>
> As a rule, a *cestui qui* trust under a trust of land cannot make a legal mortgage without the concurrence of the trustee or other person having the legal estate.

A contrary view was expressed in *Montreal Trust v. Victoria Registrar of Land Titles* (1993), 2 E.T.R. (2d) 64 (B.C.S.C.) where a mortgage which was granted by a registered owner subject to a registered declaration of trust was invalid because the power to mortgage had not been signed by the settlors of the trust.

All trust declarations should be reviewed in detail to ensure that the appropriate powers have been granted to the trustee/owner. If you become aware of an undisclosed trust, you should review the trust document, if any, and obtain the consent of the beneficiaries, if applicable.

3. *Patients Property Act*

The *Patients Property Act*, R.S.B.C. 1996, c. 349, provides that on proper evidence, a court may, by order, declare persons incapable of managing themselves or their affairs (or both) (s. 3). In such a case, a personal representative known as the "committee" is appointed. Failing such an appointment, the Public Guardian and Trustee is the committee.

Section 17 provides:

> The rights, powers and privileges vested in the committee include all the rights, powers and privileges that would be exercisable by the patient as a trustee, as the guardian of a person, as the holder of a power of appointment and as the personal representative of a person, if the person were of full age and of sound and disposing mind.

Section 19 provides:

> On a person becoming a patient as defined in paragraph (b) of the definition of "patient" in section 1,
>
> (a) every power of attorney given by the person is terminated, and
>
> (b) unless the court orders otherwise every representation agreement made by the person is terminated.

4. *Power of Attorney Act*

In dealing with a power of attorney, be aware of s. 56 of the *Land Title Act*. It provides that a power of attorney filed in the Land Title Office on or after October 31, 1979, is not valid for land title purposes three years after the date of its execution (which is not the filing date). Subsections 56(2) and (3) provide exceptions to this rule. One exception is where the power of attorney expressly excludes the application of the three-year limitation on the effectiveness of the power of attorney (s. 56(1)). Another exception is found in subsection 56(3), which permits enduring powers of attorney made under Part II of the *Power of Attorney Act* to continue to be valid after the expiry of the three-year period referred to in s. 56(1). See Practice Bulletin No. 02-11—*Enduring Powers of Attorney*.

A third party who deals with a licensee who is acting under a terminated power of attorney can rely on the acts of the licensee, provided that the third party did not know of the termination (s. 4(1) of the *Power of Attorney Act*).

5. Adult Guardian Legislation

Two pieces of legislation deal with adult guardianship issues: The *Representation Agreement Act*, R.S.B.C. 1996, c. 405, and the *Adult Guardianship Act*, R.S.B.C. 1996, c. 6.

The purpose of the *Representation Agreement Act* is to allow adults to arrange in advance how, when, and by whom decisions about their financial affairs (among other things) will be made.

The *Adult Guardianship Act* sets out a new procedure that leads to the court appointing someone to make decisions for a person who is unable to make decisions, including decisions affecting land.

6. Other Considerations

Depending on the parties, legislation in other jurisdictions may be relevant. An example is the *Guarantees Acknowledgement Act*, R.S.A. 2000, c. G-11. A guarantee signed by a person affected by this Alberta Act has no effect unless the person entering into the obligation has had their signature duly authorized as provided by s. 3 of the Act.

[§7.04] Capacity of Corporate Borrowers

1. Generally

If the borrower is a corporation, the solicitor for the lender must investigate whether the borrower has the capacity to grant the mortgage and whether, by corporate resolution, the corporation has authorized the execution and delivery to the lender of the applicable loan and the mortgage documents.

If you act for the lender, you must obtain a copy (preferably certified by the solicitor for the borrower) of the borrower's incorporation certificate and incorporating documents or, if the borrower is a British Columbia company, the "charter" documents, as that word is defined in the British Columbia *Business Corporations Act* (which include the company's articles and notice of articles or memorandum). You should also obtain a solicitor-certified copy of the corporation's register of directors. Confirm that a corporate borrower is in good standing under the laws of its jurisdiction, and that it has never been struck from the Corporate Registry. Such evidence usually consists of a certificate of good standing issued by the applicable registry.

If the corporate borrower was struck from the Corporate Registry, consider the effect of the *Escheat Act*.

In determining the capacity of a company to borrow, refer to incorporating documents, particularly the memorandum (articles if a British Columbia company), which may contain limits on its corporate powers.

Section 165 of the *Land Title Act* deems a corporation to have the same powers of acquiring and disposing of land as a natural person. The section also states that a document executed by a corporation by an individual represented as an authorized signatory in accordance with Part 5 of the Act is conclusively deemed to be properly executed in favour of all persons dealing in good faith with the corporation.

2. British Columbia Companies

Lack of capacity to borrow arises rarely. The *Business Corporations Act* ("*BCA*") provides in s. 30 that "a company has the capacity and the rights, powers and privileges of an individual of full capacity." Under the *BCA*, a company may give financial assistance to any person, for any purpose, by means of a loan, guarantee, provision of security or otherwise. However, s. 195 of the *BCA* requires written disclosure of financial assistance when it is given to persons related to the company or to an affiliated company, and of any financial assistance after the purchase of shares of the company or an affiliated company.

3. Extraprovincial Companies in British Columbia

If a company carries on business in British Columbia, it must be registered with the Registrar of Companies under s. 375(1) of the *BCA*.

The borrower must satisfy the lender on the question of whether or not it is carrying on business in the province.

4. *Canada Business Corporations Act*

There are provisions in the *Canada Business Corporations Act* similar to the *BCA* relating to the powers of companies generally and relating to borrowing and giving of loans and guarantees by companies under its jurisdiction. Refer to the company's documents to determine any restrictions or limitations on the company's powers and capacity to carry out land transactions. See also the *Practice Material: Business: Company*, Chapter 11.

[§7.05] Corporate Procedures

Assuming that the review of all documents filed with the Registrar of Companies contain no problems with respect to the capacity of the company to borrow and to grant security, you must then determine who has the right to make corporate decisions.

The borrowing power is usually exercised by means of a resolution passed by the board of directors under their general power to manage the business (*BCA*, s. 136(1)). Also, the general power is usually specified in the articles. The lender will usually require adequate evidence that the directors and officers purporting to act on behalf of the company have the authority to do so. This evidence usually takes the form of certified copies of those documents and should be supported by a certified copy of the relevant resolution or resolutions of the directors. Assuming that the lender has no cause to doubt the accuracy of such certificates, it may rely upon them as evidence that the necessary formalities have been observed by the company.

The articles or memorandum will disclose who has the right to exercise the power to borrow and grant security, and the resolutions usually provide for specific authorized signatories. Note again s. 165 of the *Land Title Act* regarding land title documents.

[§7.06] Restrictions on Lenders

1. 80% Loan-to-Value Ratio

Restrictions imposed on lenders taking mortgage security on real property are functionally of two different types: internal restrictions prescribed by the lender's enabling statutes and designed for the protection of the lenders' depositors, investors, beneficiaries or members; and external restrictions imposed for the protection of borrowers.

The most significant internal restriction on residential real property loans is the restriction that the total indebtedness charged against residential property securing the loan must not exceed 80% of the value of the property at the time the loan was made (s. 418(1) of the *Bank Act*, S.C. 1991, c. 46). Similar provisions are found in legislation regulating trust companies and insurance companies.

The most common exceptions to the 80% limit are loans made under the *National Housing Act*, which allow a different loan-to-value ratio (s. 418(2)(a) of the *Bank Act*). Another exception to the 80% limit exists if the part of the loan over 80% is guaranteed or insured by a government agency or an approved private insurer (s. 418(2)(b) of the *Bank Act*). Insured loans may be loans insured under a policy issued by Canada Mortgage and Housing Corporation or under a policy issued by a private insurer approved by the Superintendent of Financial Institutions.

2. Loans to Prohibited Individuals

Loans to directors, officers, shareholders, employees, or companies related to those individuals are

regulated and are often prohibited. Examples are found in the British Columbia *Business Corporations Act* (s.195), the *Bank Act*, and in legislation regulating trust companies and insurance companies, such as the *Financial Institutions Act*.

3. Effect of Non–Compliance on Security—Doctrine of Illegality

Generally, the regulatory statutes provide that a lender who fails to comply with the statutory restrictions is guilty of a summary conviction offence punishable by fine.

Although violating statutory restrictions is a serious matter, of more significant concern is the effect on the security taken in a restricted transaction. This question was raised in the case of *Royal Bank of Canada v. Grobman* (1977), 2 B.L.R. 145 (Ont. S.C.), which concerned an equitable mortgage that on the facts was clearly in contravention of s. 75(3) of the former *Bank Act*, R.S.C. 1970. At that time, the section prohibited loans on the security of real property that exceeded 75% of the value of the property. The court was concerned that if the breach of the section rendered the mortgage invalid, the very persons the statute intended to protect would be prejudiced. At pp. 165 and 166, Krever J. said:

> Finally, s. 75 of the Act is found as the first of a number of sections dealing with the powers of the bank and which, I should have thought, were intended to ensure the solvency of the bank in the interests of and for the protection of, its depositors and shareholders. Although there is, in s. 159, a general provision respecting the punishment of any person who commits an offence against the Act, the penalty-creating provisions of ss. 145(1) and (2) are specifically directed to ss. 75(2)(b), (c), (d), (e) and (f) of the Act but not to s. 75(3). The omission may be significant in any consideration of the question whether Parliament intended a contravention of the qualification expressed in s. 75(3) to be treated as illegal in the sense of invalidating a mortgage and thus prejudicing the bank's solvency and the interests of its depositors and shareholders.
>
> It is the last comment that touches upon what I consider to be the modern judicial view of illegality in the contracts field and the consequences the courts are prepared to visit upon a contract entered into a contravention of a statute. The serious consequences of invalidating the contract, the social utility of those consequences and a determination of the class of persons for whom the prohibition was enacted are all factors which the court will weigh. I have indicated my view that the purpose of s. 75(3) of the *Bank Act* is the protection of the bank's depositors and shareholders by a measure that would support the solvency or the soundness of the investing policies of the bank. It would be entirely inconsistent with and, indeed, inimical to that purpose if the collateral security which the bank took by way of protection were to be held unenforceable because the extension of credit exceeded in value 75% of the borrower's equity in the real property secured.

Although the court in *Grobman* specifically referred to the absence of a penalty section in reaching its decision, a mortgage that violates lenders' internal regulations is unlikely to be found void and unenforceable by a court applying the doctrine of illegality cited in *Grobman*.

Section 347 of the *Criminal Code* makes it an offence to enter into an agreement to receive interest at a criminal rate. The term "criminal rate" is defined to mean an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60%[2] on the credit advanced under the agreement. "Interest" is broadly defined and may include application fees, standby fees, legal fees, brokerage fees and other non-refundable charges. However, it is possible to violate this provision of the *Criminal Code* unintentionally; for example, where a loan with a large front-end fee is called in early in its term. This is a very complex area. Prudent lawyers may include a severance clause stating that if any provision of the mortgage is found to be unenforceable, the balance of the mortgage terms will still be operative and binding upon the borrower.

For detailed information on any of these topics, consult the *BC Mortgages Practice Manual* (Vancouver: CLEBC).

[§7.07] Checklists

The first document that should be attached or inserted in a file relating to a real estate transaction—whether it is a conveyance, a residential mortgage or a commercial mortgage—is a checklist. The steps should be followed before the mortgage is registered initially; as well, many of the steps must be followed before each advance.

[§7.08] Instructions (Commitment Letter)

A lawyer must review the lender's instructions carefully alongside the mortgage checklist. In residential mortgage transactions, the lender often forwards the form of the final report that it requires with its initial instructions and documents. It is useful to review this final report at the beginning of the transaction to see precisely those matters on which the lender will require your opinion. For example, some residential mortgage lenders require

[2] Amendments to the *Criminal Code* and new regulations are expected to come into force on January 1, 2025, reducing the criminal rate to an annual percentage rate (APR) that exceeds 35%, subject to some exemptions. Note that an APR represents a different way of calculating interest, and the criminal rate prior to the changes — an effective annual rate of 60% — corresponds to an APR of approximately 48%.

an opinion on zoning, and some do not (see §7.28(4) for more on this). Some of the opinions or certificates a lender requires are impossible to give. The time to discuss these with the lender is at the beginning of the transaction and not on the closing date.

In a commercial mortgage transaction and in any complex residential transaction, you should prepare a list of closing documents early on. This list serves as a useful further checklist as the transaction proceeds and can also form the basis of an index to the binder of closing documents that should be sent to the client at the close of the transaction.

[§7.09] Searches

1. Land Title Office

A land title search will typically reveal two types of encumbrances: those that will stay on the title after the closing, and those that must be discharged before or at the closing. Among the former are such things as easements, land use contracts, and statutory building schemes. A lawyer should review these encumbrances carefully. The lawyer should determine the exact location of any easement on the title and determine, either from the plan on file at the Land Title Office or from a survey, whether or not it affects the present or proposed buildings on the land. Ask those parties who are holders of land use contracts and statutory building schemes whether or not their provisions have been observed and performed.

As soon as possible, the lawyer responsible for discharging financial encumbrances on title should write to the holders of those financial encumbrances that are to be discharged from title to request payout statements. The payout statement will detail the total amount, including penalties and services costs, that is required to be delivered to the lender in order to legally oblige the lender to provide to the appropriate lawyer a registrable discharge of the mortgage. In the case of a non-institutional mortgage lender, in addition to a payout statement, the lawyer should obtain a discharge of the mortgage on suitable undertakings.

2. Company Searches

If the borrower is a company, the lawyer should conduct a search in the Corporate Registry to confirm that the company is in good standing in respect of the company's annual filings and for particulars of its officers and directors. The company's notice of articles will also provide you with the address for the company's records office. It is important to review the corporate borrower's articles to confirm the company has the corporate power and capacity to borrow, to confirm the scope of the company's borrowing powers, to verify who has the authority to execute the loan and mortgage documents, and to determine whether it is necessary to affix the seal of the company to the mortgage documents (despite the infrequency of this last requirement).

3. Zoning and Bylaw Compliance

Whether or not any searches or investigations are made of municipal and other governmental authorities with respect to zoning and bylaw compliance will depend on the instructions received from the lender. Check whether the lender requires any confirmation on these matters in the final report.

4. Environmental Enquiries

The lender may ask that you confirm that the property is not affected by any hazardous waste. Search the Site Registry for any information registered against the property. Consider whether enquiries have to be made under the *Environmental Management Act* or other provincial legislation and under the federal *Canadian Environmental Protection Act*, as well as from the municipality in which the property is located. These requirements are becoming more commonplace as environmental issues become more significant. (See §4.08 for more on the Site Registry.)

[§7.10] Report to Client

A lawyer should give the lender a report on the results of the searches as early as possible. The lawyer should send the lender a copy of the plan of the property on file at the Land Title Office and ask the lender to confirm that this is the property that it intends to have a mortgage registered against as security for the loan.

Frequently, a lender will have to make business decisions as to whether or not a particular charge can remain on the title in priority to the mortgage or whether a particular requirement in the commitment letter can be waived. It may be, for instance, that your search reveals a blanket right of way in favour of a utility. Such a document, by forbidding the erection of any buildings within the area of the right of way, effectively prevents all development on the lands. The best solution to this problem is for the utility to remove its blanket right of way and replace it with one specifically shown on a right of way plan. For many reasons, not the least of which is time, such a solution is often impracticable. In these circumstances, the answer may be to get a comfort letter from the utility that it will consider a modification of the right of way area; though not the perfect solution, it may be acceptable to your client.

Often an up-to-date building location survey is not available and you are asked for an opinion. As the lawyer for the institutional lender, you would normally recommend that the client not advance funds without an up-to-date survey. The institutional lender would then insist that a

borrower obtain a survey before it would advance funds. However, lawyers representing institutional lenders may now have an alternative in mortgage transactions by way of obtaining a title insurance policy (see §7.27 for a discussion of title insurance).

[§7.11] Survey

In most lending transactions, your client will and should require a survey certificate showing, at a minimum, the boundaries and dimensions of the property and the location of all buildings on the property and preferably showing the location of all registered easements and rights of way encumbering the title to the property. The certificate will indicate that the buildings do not encroach on adjoining lands and that the buildings on adjoining lands do not encroach on the surveyed lands. If there is an encroachment, unless it is so small that your client feels that it can be ignored, an encroachment agreement must be obtained from the neighbouring owner. The encroachment agreement will have to be registered against the neighbour's title, in priority to all financial encumbrances. If the neighbouring owner does not cooperate, your client can apply to the court under s. 36 of the *Property Law Act* for an easement over the land encroached on.

Until recently, most lenders would allow a title insurance policy to be placed *in lieu* of a survey certificate. Following the decisions in *Re Oehlerking Estate*, 2009 BCCA 138 and *Gill v. Bucholtz*, 2009 BCCA 137, many lenders now require a title insurance policy for the additional coverage against fraud.

For further discussion of surveys, see §7.28(3).

[§7.12] Insurance

The lender will require that adequate insurance be in place before funds are advanced. Insurance policies are often extremely complicated and highly technical. If at all possible, urge your clients to have insurance policies reviewed by professional insurance agents or brokers. Three matters mentioned in typical insurance instructions are of particular note.

For further discussion of insurance, see §7.28(2) and §5.20.

1. Standard Mortgage Clause

The standard mortgage clause is found in most property insurance policies. It protects the lender's interest even if the insured owner does something that would void the insurance contract.

Most lenders will insist that the borrower's insurance policy name the lender as a "loss payee." This means that if a loss occurs, the lender can recover the proceeds payable under the policy. However, the lender's rights to recover as a loss payee are limited, because a loss payee can have no greater right to the proceeds than the insured owner. If the insurance company has a valid defence against the owner because of the owner's material misrepresentation or wrongful act (such as arson), then the lender cannot recover under the policy.

These problems can be minimized by using the standard mortgage clause, which creates a separate contract between the insurer and the lender. As a result, the insurance policy will remain in force notwithstanding "any act, neglect, omission or misrepresentation" which would otherwise void the insurance policy between the insurer and the owner/borrower. See *National Bank of Greece (Canada) v. Katsikonouris*, (1990) 2 S.C.R. 1029 and *Caisse Populaire des Deux Rives v. Société Mutuelle d'Assurance Contre L'Incendie de la Vallée du Richelieu*, [1990] 2 S.C.R. 995.

2. Co-Insurance

The concept of co-insurance is perhaps best understood if you bear in mind that most insurance claims are for a partial loss only. Thus, if a building was worth $1,000,000, chances are that most losses would be far less than this amount. Therefore, if the insured carried insurance for only $500,000 and paid a premium for that amount only, the insurance company would likely still have to pay in full for most losses, even though it received only half of the premium.

By inserting a co-insurance clause, the insurance company encourages the insured to buy insurance up to a percentage (usually 80%) of the full value of the property. If the insured chooses not to do so, the insured is said to become a co-insurer, that is, the insured is penalized for the failure to insure up to the required percentage by having to bear a portion of the loss. For example, if a building is worth $1,000,000 at the time a loss occurs and the insurance policy has an 80% co-insurance clause, this means that the owner must carry insurance for at least $800,000. If, in fact, the owner has only insured for $500,000 and there is a loss of $200,000, the owner will only recover a proportion of the loss from the insurance company. In this example, the insurance company's liability is limited to:

($200,000 x $500,000) / $800,000 = $125,000

The owner will be responsible for the balance.

The problem with a percentage co-insurance clause is that it requires an insurance appraisal to be done on the building and to be updated from time to time, which is an additional cost. Lenders should insist that insurance policies be written either without co-insurance or for a stated amount of co-insurance. The stated amount co-insurance clause is a clause that stipulates the precise amount of insurance that

the insured must maintain. If satisfactory insurance is in fact obtained, then the owner will have fulfilled their obligation.

3. Replacement Cost Endorsement

The principle of indemnity has long been one of the cornerstones of insurance law. In practice, this meant that the insured, upon the happening of a loss, could only recover the actual cash value of the property destroyed at the time of the loss, that is, its depreciated value. If the insured chose to replace the damaged article with a new article, the insured would have to pay out of pocket to make up the difference in the price between old and new. In theory, the insured would not be any worse off than before, but in practice, the rule worked a great hardship upon the insured who would have to come up with money at a time when the insured could probably least afford it. The insurance industry met this unsatisfactory situation by providing coverage that allows the insured to recover new for old. To protect themselves against abuse, however, the insurance companies insist that they pay the full cost of replacement or repair only if replacement or repair actually took place. The insured is given a choice: take the cash, in which case the insured will suffer the penalty of depreciation, or repair or replace, in which case the actual cost will be reimbursed in full. To protect themselves further, the insurance companies insert a co-insurance clause which penalizes the insured if the insured fails to pay the premium of the full insurable value of the property.

The most important features of replacement cost coverage are the following:

(a) it is not contained in all policies—many policies on commercial buildings do not contain it or provide it only if an additional premium is paid;

(b) it comes into play only if the insured chooses;

(c) if the insured exercises the option, the insured must actually repair or replace the property;

(d) the property must be repaired or replaced promptly and unless the policy permits otherwise, replacement must be on the same site; and

(e) unless the insured has purchased coverage to at least the percentage of the replacement value required by the co-insurance clause, the insured may still be asked to bear a portion of the cost, even if loss is only a partial one.

[§7.13] Registration and Advances

Registration is essential to perfect the lender's security. A pre-registration title search is advisable and a post-registration title search is imperative. The lawyer's obligation is to certify title. To do so properly, the lawyer must be in a position to specify prior charges and to certify the nature of the security obtained by the lender.

It is common practice among lenders' solicitors to pay out mortgage funds after the filing of an application for registration of the mortgage and before the completed (or perfected) registration on the basis of a satisfactory post-registration search. There are a number of pitfalls to this practice, the primary one being the possibility that a subsequent application to register a charge or notice may be made, which either delays completion of prior pending registrations, or worse yet, affects the priorities of previously filed documents. The following are examples of subsequent applications that may have this effect:

(a) a notice under s. 99 of the *Family Law Act* of a spouse claiming an interest in a family property;

(b) a caveat;

(c) a certificate of pending litigation;

(d) a builders lien; or

(e) various statutory liens.

Occasionally, delay or omission by registry staff may result in an intervening application not showing up on the index. These omissions are usually corrected before actual registration. Little can be done in this situation, except to advise the lender that you will be relying on the state of the title at the time of the advance.

It is the practice of some solicitors to advise their lending clients of these potential hazards and ask them to decide for themselves whether they are willing to bear the risks of paying out before actual registration. Most lenders will consent to this in order to remain competitive.

It is very important to note that **priorities as between registered mortgage holders do not arise simply on the basis of the time of registration**. As between registered mortgages, and notwithstanding the respective dates of registration, priority may be based on the time the money is secured or advanced. For example, see s. 28 of the *Property Law Act*. If the mortgage is to be advanced in stages, it is very important that you search at the Land Title Office to ensure that there are no intervening mortgages which, being either fully or partially advanced or secured, will take priority over the next advance under your client's mortgage. Likewise, the time of advance may be the time that the borrower received the funds or the benefit, not the time funds are delivered to the lender's lawyer. Consequently, you should ensure that funds are paid out as soon as possible after registration. Section 28(2) of the *Property Law Act* provides

that, in certain circumstances, further advances made by a lender that are made in accordance with its mortgage provisions rank in priority to advances made under subsequent mortgages.

Sometimes on the closing of a residential sale, the registration of the Form A Freehold Transfer will be followed by a Form B Mortgage in favour of an institutional lender and then, immediately afterwards, by a second mortgage back to the seller (commonly referred to as a vendor take-back mortgage). The face amount of the second mortgage will be secured from the moment that the document is accepted for registration. However, the face amount of the first mortgage will not be secured until it is actually advanced by the lender, which will be after the time at which the second mortgage monies become secured, and therefore will rank in priority behind them. As a result, it is essential that the second mortgage contains an appropriate clause giving priority to advances under the first mortgage, notwithstanding the dates or times of advances under the first mortgage.

Finally, note that under s. 197 of the *Land Title Act*, the registrar may refuse to register a charge where the registrar is of the opinion that:

(a) a good, safeholding and marketable title to it has not been established; or

(b) the charge claimed is not an estate or interest in land that is registrable under the Act.

The registrar has a duty to keep the title register confined to entries of real interests. Registry staff will examine mortgages and other instruments that purport to create charges, to ensure that they have been completed and executed in accordance with the *Land Title Act* and the regulations. The registrar does not assure the enforceability or underlying legal validity of charges (s. 26(2)). Such an in-depth review would be impracticable.

[§7.14] Clearing Title

Obviously, one of the most important functions of the lawyer for a lender is to make sure that the lender gets the priority it expects. The question often arises as to who should clear title.

If a transaction is one in which the buyer is getting a new first mortgage, in theory there should be no complication because the seller will have agreed in the purchase agreement to clear title. In reality, of course, the seller does not have the money to clear title until after the net purchase price is delivered by the buyer's lawyer to the seller's lawyer. In residential transactions, the buyer's lawyer will often be acting also for the buyer's lender. In such transactions, it is not uncommon for the buyer's lawyer to be asked to arrange to clear title on the seller's behalf, using the lender's money. Most often, following clause 14 of the standard Contract of Purchase and Sale, the buyer's lawyer will deliver to the seller's lawyer the net purchase price on the CBA Standard Undertakings that require the seller's lawyer to pay out and discharge any financial charges on title and remit the balance, if any, to the seller.

If the lender is separately represented, there are three alternative methods for clearing title:

(1) The lender's lawyer forwards the mortgage proceeds to the buyer's lawyer on the buyer's lawyer's undertaking to clear title.

(2) The lender's lawyer pays out the amount owing on prior encumbrances (for example, the seller's mortgage) and sends only the balance to the lawyer acting for the buyer/borrower. The difficulty with this method is that the lender's lawyer is now purporting to effect a payout on behalf of the seller.

(3) If the buyer's lawyer will not have enough time to deposit a cheque from the lender's lawyer and issue a new one to pay out the encumbrance, the lender's lawyer delivers a separate trust cheque to the buyer's lawyer for the amount of the loan payout but payable to the prior encumbrance holder (for example, the seller's lender).

Before selecting a particular method for clearing title, the lender's lawyer must ensure that the chosen method complies with the lender's instructions. Also, the lender's lawyer should always be alert to the possibility that the buyer's lawyer may not be able to fulfill the undertakings. Accordingly, the lender's lawyer should be cautious when structuring the terms on which funds will be advanced to the borrower's solicitor. Lawyers acting for lenders should also be aware of the recent decision in *Lin v. CIBC Mortgage Inc*., 2015 BCCA 518, discussed at §3.03(11).

Sometimes a prior lender will have instituted foreclosure proceedings and a certificate of pending litigation will be filed against the title. The *Land Title Act* allows a registration with a certificate of pending litigation on title, subject to certain conditions. Nevertheless, the preferable course is to obtain a letter from the lawyer who acts for the lender, releasing the certificate of pending litigation, which you can file at the same time as your mortgage. You will only be able to obtain such a letter on stringent undertakings as to payment of the amount owing to the prior mortgagee.

Law Society Rules 3-95 and 3-96 apply to transactions involving a payout of a mortgage registered on title to property in British Columbia and obtaining a discharge of the mortgage. Under these Rules a lender whose mortgage is paid out must provide a registrable discharge of that mortgage within 60 days of payout. This reflects the expectation that a financial institution would typically have 30 days after a mortgage repayment in which to issue a discharge, and the lawyer responsible for the discharge (usually the seller's lawyer) would have a further 30 days to register the discharge.

Section 72 of Part 5 of the *Business Practices and Consumer Protection Act* requires lenders to provide a registrable discharge of mortgage for non-business purpose loans within 30 days after the borrower has paid the whole amount of principal and interest owing under the mortgage loan.

If the other lawyer involved in the transaction (usually the buyer's lawyer) has not received confirmation from the lawyer responsible for discharging the mortgage that the discharge has been so obtained and filed, the lawyer is required to report the lawyer who has not satisfied the requirement, and the paid-out lender, to the Law Society.

[§7.15] Final Steps

Having paid off the prior encumbrances, a lawyer should file the discharges and request a state of title certificate. When this is received, the lawyer should check it carefully and forward it to the client. Finally, the lawyer should enclose the firm's opinion, along with the certificate of title (if it has not already been provided).

[§7.16] Problems, Pitfalls, New Developments and Disclosure Requirements

1. *Interest Act*, s. 6

If the mortgage amount is repayable by blended payments of principal and interest, then the mortgage must contain a statement showing the amount of such principal money and the rate of interest chargeable, calculated yearly or half-yearly, not in advance (s. 6 of the *Interest Act*). If this is not done:

> . . . no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced . . .

2. *Interest Act*, s. 8

Section 8(1) of the *Interest Act* prohibits a lender from charging a higher rate of interest on arrears than the rate of interest payable on the principal that is not in arrears. If the lending document stipulates interest at a given rate, but also provides that a lower rate will be accepted if paid punctually, the lender has contravened s. 8(1) (*Re Weirdale Investments Ltd. v. Canadian Imperial Bank of Commerce* (1981), 121 D.L.R. (3d) 150 (Ont. H.C.), applied in *Vohra Enterprises Ltd. v. Creative Industrial Corp.* (1988), 48 R.P.R. 272 (B.C.S.C.)).

The *Weirdale* mortgage set out that interest would accrue at the rate of 10% per annum on the principal balance but provided that:

> . . . in the event the mortgagor or its successors or assigns shall have paid the full amount of the principal sum secured hereunder on or before the 30th day of March, 1980, any requirements for the payment of interest hereunder shall be waived by the mortgagee . . .

The court held that to determine whether such a clause contravenes s. 8(1) of the *Interest Act*, one must look to its effect. The court held that the effect was to make the mortgage interest free unless the mortgagor defaulted and then to provide for an interest rate thereafter. Since this was precisely what s. 8 prohibited, the provision was, therefore, unenforceable.

On the other hand, if a mortgage provided for payments of principal during the term, and for interest to accrue only after maturity and default, such a provision does not contravene s. 8(1) (*Dillingham Construction Ltd. v. Patrician Land Corp. Ltd.* (1985), 37 Alta. L.R. (2d) 193 (C.A.)).

A clause that provides for a significant increase in the interest rate shortly before the term of the mortgage expires might not contravene s. 8 (*Raintree Financial Ltd. v. Bell* (1993), 85 B.C.L.R. (2d) 82 (B.C.S.C.), explained in *Langley Lo-Cost Builders Ltd. v. 474835 BC Ltd*., 2000 BCCA 365).

3. *Interest Act*, s. 10

If a real estate mortgage provides that it cannot be redeemed until more than five years after its date, then at any time after the five-year period expires the borrower may pay off the full amount owing, together with three months' further interest (s. 10(1) of the *Interest Act*). Note the following:

(a) Section 10 is only applicable to mortgages of real estate.

(b) Section 10 does not apply to mortgages given by corporations and joint stock companies (s. 10(2)(a)).

Further to s. 10(2)(b) and the *Prescribed Entities and Classes of Mortgages and Hypothecs Regulations*, s. 10(1) also does not apply to mortgages given after January 1, 2012 by partnerships, trusts settled for business or commercial purposes, Alberta unlimited liability corporations, BC unlimited liability companies and Nova Scotia unlimited companies.

Note that an individual mortgagor who assumes a mortgage originally given by a corporation may not be entitled to the benefit of the prepayment provision in s. 10(1). For instance, *Reich v. Royal Trust Co.* (1983), 47 B.C.L.R. 224 (S.C.) concerned individual buyers who assumed a mortgage from a construction company. The court held that because the original mortgagor was a corporation, the buyers were not entitled to exercise the prepayment right in s. 10(1) of the *Interest*

Act. Whether the reasoning in *Reich* applies appears to depend on the terms of the particular agreement, including whether the agreement is a simple assumption agreement or one that alters the mortgage in any way, and on the parties involved. See the discussion in *Wall v. Maritime Life Assurance Co.* (1992), 64 B.C.L.R. (2d) 358 (B.C.S.C.).

(c) The right to repay arises if any individual term of the mortgage, either the original term or a renewal term, is longer than five years. Caution should be exercised in drafting five-year mortgages because the interest adjustment period of even a few days can extend the term, which will often be stated as five years from the interest adjustment date, beyond five years. Wilson J. summarized the conclusions reached by the Supreme Court of Canada in *Royal Trust v. Potash* (1986), 31 D.L.R. (4th) 321 (S.C.C.) as follows:

(i) The purpose of s. 10(1) of the *Interest Act* is to ensure that mortgagors have the right to pay off their mortgages at the end of each five-year period. They cannot be locked in for more than five years.

(ii) Where the original term of a mortgage exceeds five years, the mortgagor has the right to pay it off at the end of five years in compliance with the section,

(iii) Where the original term of the mortgage is for five years or less and the term is extended by agreement beyond the five-year period (the date of the mortgage remaining unchanged), the mortgagor has the right to pay it off at the end of five years.

(iv) When a mortgagor elects not to exercise their right under s. 10(1) but instead enters into an otherwise valid and enforceable renewal agreement which deems the date of the original mortgage to be the date of maturity of the existing loan, and the term of the renewal agreement does not itself exceed five years, the mortgagor cannot pay off the mortgage until the end of the five-year renewal period.

(v) When a mortgagor makes a conscious decision not to repay on the basis of full knowledge of their statutory right to repay at the end of a five-year period, the mortgagor does not contract out of or waive the statutory right. The mortgagor simply decides not to exercise it. If, however, the mortgagor purports in a mortgage or renewal agreement to relinquish the right to pay off the mortgage at the end of any given five-year period, such a provision could not be enforced against them at the instance of the mortgagee. The mortgagor would still be free to pay off the mortgage in compliance with the statute.

4. Assumption and Novation

At common law, the new buyer of a property against which a mortgage has been registered does not assume a contractual obligation for the mortgage debt unless the buyer enters into some form of assumption agreement with the lender. As well, the original borrower is not relieved of liability for the mortgage debt, even though the property has been sold, unless the lender releases the original borrower from the borrower's covenant or a novation has occurred.

Under s. 22(3) of the *Property Law Act*, a new buyer of property, against which a mortgage (residential or non-residential) is registered, is generally bound to the covenants in the mortgage. The meaning of this section has not been tested in the courts. Consequently, lenders should continue to obtain assumption agreements as the statutory right of action may prove to be no substitute for contractual liability.

Under s. 24 of the *Property Law Act*, the original borrower of a residential property will be relieved from liability to the lender upon transfer of the land in the following situations:

(a) if within three months of the transfer the original borrower asks the lender to approve the person buying the land, subject to the existing mortgage, and the lender so approves (this approval cannot be unreasonably refused (s. 24(4)); and

(b) if the lender does not approve the buyer within three months of the transfer, then the original borrower is released within three months after the expiration of the existing term unless the lender demands payment within that time (s. 23(1)). See section 23(3) for stipulations relating to demand mortgages.

In considering a request for approval, the mortgagee may require the person buying the land to provide financial information and pay requisite fees.

For all non-residential mortgages and any residential mortgages not covered by the *Property Law Act*, the common law will continue to be applicable to keep the original borrower liable upon the sale of the property, subject to express release or novation.

The case law on when novation will occur is far from clear; most of the reported cases do not fully explain the individual circumstances that surround-

ed each, which makes it difficult to extract any positive rule. However, the BC Court of Appeal in *Prospect Mortgage Investment Corp. v. Van-5 Developments Ltd.* (1985), 68 B.C.L.R. 12 went a long way to providing positive direction. The Court affirmed its earlier decision in *Bank of British Columbia v. Firm Holdings Ltd.* (1984), 57 B.C.L.R. 1 by stating that four facts must be established to constitute novation:

(a) the new debtor must assume complete liability;

(b) the creditor must accept the new debtor as a principal debtor, and not merely as a licensee or guarantor;

(c) the creditor must accept the new contract in full satisfaction and substitution for the old contract; and

(d) the new contract must be given with the consent of the old debtor.

The Court of Appeal went on to add the following at p. 26:

> Whether in a given case there has been a novation is essentially an issue of fact. Because novation is essentially an issue of fact it would be wrong in principle to say as a generalization that assumption agreements or extension agreements or other particular classes of documents do or do not create a novation. The question must be decided in each case having regard to all of the circumstances of which the language of the new contract is only one.

In *Canada Permanent Trust Co. v. Neumann and Neumann* (1986), 8 B.C.L.R. (2d) 318 (C.A.), the Court held that the consent of the old debtors (the final principle in the *Prospect Mortgage* case) was not necessary in order to have a novation in straightforward mortgage cases.

5. *Criminal Code*

Section 347 of the *Criminal Code* creates an offence of agreeing to receive or actually receiving interest at an effective annual rate of over 60%.[3] The definition of interest includes:

> . . . the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit.

Since s. 347 is found in the criminal statute one expects that violators will be prosecuted. However, a prosecution requires the consent of the Attorney General of Canada and the Attorney General rarely becomes involved in these disputes. Consequently, most reported cases involving s. 347 are brought in civil court and involve allegations by borrowers that, because the lending transactions that they entered into violate s. 347, they are illegal and, therefore, void and unenforceable.

Judges called upon to decide these cases understand that in many cases the borrowers are sophisticated and have had sophisticated legal advice. They cannot ignore the provisions of s. 347 but understand that the avoidance of the whole lending transaction would give the borrower a windfall. To reconcile the sanctity of contract with the consequences of illegality, the courts will typically permit a lender to recover only its principal and will sever the "interest" provisions of the loan contract.

The leading authority on severance is the Ontario Court of Appeal decision *William E. Thomson & Associates Inc. v. Carpenter* (1989), 44 B.L.R. 125 (Ont. C.A.) leave to appeal refused (1990), 65 D.L.R. (4th) viii (S.C.C.).

In only one reported civil decision has a court held the entire loan transaction to be unenforceable, but in so doing it found the lender's solicitors liable to reimburse the lender for the loss it had suffered (*Croll v. Kelly* (1983), 48 B.C.L.R. 306 (S.C.)).

6. *Mortgage Brokers Act*

This Act regulates mortgage brokers. A mortgage broker includes, for example, a person "who during any one year, lends money on the security of ten or more mortgages" (s. 1).

Sections 17.1(1) to 17.1(3), together with the regulations, require a broker to provide *some* lenders with an Investor/Lender Information Statement before funds are released or advanced. In general, these lenders do not include commercial lenders who are considered under the Act to be "sophisticated persons."

Section 17.4 of the Act requires the broker to provide written disclosure to a lender whenever they or a party related to them has an interest in the mortgage transaction. Lenders who meet the definition of "mortgage broker" in s. 1 of the *Mortgage Brokers Act* must also deliver this Conflict of Interest Disclosure Statement (Form 10) to borrowers (s. 17.3). Exceptions to this disclosure are found in s. 17 of the regulations.

Disclosure requirements under Part 2 of the *Mortgage Brokers Act* and regulations should be read with Part 5 of the *Business Practices & Consumer Protection Act*.

The *Mortgage Services Act* received Royal Assent on November 3, 2022. This new legislation is in-

[3] As noted above, revisions to the *Criminal Code* will reduce this rate once they come into force (see footnote 2 for §7.06(3)).

tended to repeal and replace the *Mortgage Brokers Act* and will expand the authority of the BC Financial Services Authority (BCFSA) to regulate the mortgage industry. When the new Act comes into force (expected in the near future), the BCFSA will be able to implement rules affecting licensing requirements, regulatory compliance, standards of conduct, and disclosure and reporting obligations.

7. *Property Law Act*

If the borrower asks the lender, in writing, to supply a statement, then pursuant to s. 33 of the *Property Law Act*, the lender must supply a statement setting out:

(a) the amount payable under the mortgage to obtain its discharge;

(b) the balance payable on the mortgage on the date stated in the request; and

(c) if applicable, a statement of the terms on which a discharge will be granted.

8. *Business Practices and Consumer Protection Act*

Part 5 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*") contains important initial and ongoing disclosure requirements with which lenders must comply. Lawyers who act for lenders should pay close attention to the obligations under the *BPCPA* and particularly Part 5.

Section 58 outlines the application of Part 5 to different loan transactions. Generally, Part 5 applies to credit agreements if the borrower is an individual and the borrower enters into a credit agreement for primarily personal, family or household purposes. Among other exemptions, Part 5 does not apply to a credit agreement when the credit grantor is provided with a statement (in the credit agreement or other document) to the effect that the borrower has entered into the credit agreement for business purposes primarily, the statement has been signed by the borrower, and the credit grantor believes in good faith that the statement is true.

Section 66(3) provides that when a lender must provide a disclosure statement to a borrower, the lender must do so before the earlier of:

- two business days before the borrower incurs any obligation; or
- the date on which the borrower makes any payment in connection with the loan.

The time period for providing disclosure can be waived by the borrower pursuant to s. 66(4). *BPCPA* Regulation B.C. 273/2004, s. 16 (Disclosure of the Cost of Consumer Credit Regulation) prescribes that a financial institution may not charge more than $75.00 for a discharge of a non-commercial mortgage.

9. Priority of Statutory Liens

Subsections 87(1) and (5) of the *Employment Standards Act* provide that unpaid wages constitute a lien that takes priority over a mortgage of, or debenture charging, land that was registered in the Land Title Office before the registration of a certificate of judgment for nonpayment of wages. However, the priority is limited to money advanced under the mortgage or debenture after the judgment for nonpayment of wages was registered.

The *Workers Compensation Act*, s. 265 gives priority to the lien for unpaid assessments created by this Act over all liens, charges or mortgages of every kind, whenever created or to be created (except a lien for wages). The lien attaches to all the property and not just the employer's equity in it (*Northwest Life Association Company of Canada v. Westridge Construction Ltd.* (1980), 21 B.C.L.R. 235 (S.C.)). In *River Road Marine v. Greenwich Shipyard Ltd.* (1980), 22 B.C.L.R. 101 (S.C.), the Court held that an unpaid seller under an agreement for sale was not the holder of a lien, charge or mortgage, but rather was a registered owner and the s. 265 lien did not have priority. In *Crown Trust Company v. Martin & Gamble Builders Ltd.* (1983), 47 B.C.L.R. 169 (S.C.), a lender who had obtained an order for sale in foreclosure proceedings was given priority over the s. 265 lien because the board had made no effort to appear at the time of the order for sale, although it could have done so.

The federal *Bankruptcy and Insolvency Act*, s.70 neutralizes provincial legislation that purports to give different priorities to certain creditors. For the purposes of the federal Act, the Workers Compensation Board is not a secured creditor and is not entitled to priority over the interest of a lender of a bankrupt borrower (*Workers Compensation Board v. Kinross Mortgage Corporation* (1981), 127 D.L.R. (3d) 740 (B.C.C.A.), reversing in part (sub nom. *Re Kinross Mortgage Corporation and Bushnell*) (1980), 109 D.L.R. (3d) 394 (B.C.S.C.)).

In *Roadburg v. R.* (1980), 110 D.L.R. (3d) 433 (B.C.C.A.), supplementary reasons (1981), 29 B.C.L.R. 186 (C.A.), the court held that the lien for unpaid tax created by the *Corporation Capital Tax Act* had priority over subsequently registered mortgages from the date the lien arose, that is, at the end of the corporation's fiscal year, even though the lien was unregistered.

Section 116(5) of the *Strata Property Act* gives a strata corporation priority over every other lien or charge of whatever kind, except builders liens, and Crown liens other than mortgages in favour of the

Crown, for a certificate filed against a strata lot owner's title for that owner's unpaid share of common expenses.

Many other statutory liens with varying priority positions can apply. For more information, see Volume 3 of the *Land Title Practice Manual* (Vancouver: CLEBC).

[§7.17] Modifications of Mortgages

A modification of a charge does not affect the holder of a subsequent charge registered before the registration of the modification unless the holder of the subsequent charge is a party to the modification (s. 206(2) of the *Land Title Act*). In other words, subsequent charge holders should join in modification agreements to give their consent. In appropriate circumstances, the consent should extend to and include an acknowledgment that the prior charge as modified will continue to have priority over the subsequent charge.

[§7.18] Builders Liens (See also Chapter 8)

If a building has been newly constructed or has recently had work done to it, a lawyer should consider the implications of the *Builders Lien Act* and, where appropriate, obtain statutory declarations from builders concerning completion and payment of subtrades and material suppliers. The lawyer should also find out the lender's intentions with respect to holding back under the *Builders Lien Act*. The buyer may have no right to hold back from the seller, and yet the lender may want to hold back from the buyer. This can cause serious problems at closing, and the buyer may have to provide additional funds to cover the amount the lender will be holding back. If you find yourself in the unfortunate position of acting both for the lender and buyer in such a circumstance, you must consider the obvious conflict problems.

Section 32(1) of the *Builders Lien Act* provides that a registered mortgage has priority over a lien to the extent the mortgage money was secured or advanced in good faith before the claim of lien was filed. If a mortgage is being advanced in stages, for example, a construction mortgage, this is one of the principal reasons why you do a title search before each advance. What do you do if your search reveals a lien on the title? Is it enough, for instance, to hold back the amount of the lien and advance the balance? It may not be. An unregistered lien claimant may argue that the advance has not been made in good faith on the grounds that, since one lien was registered against the property, the lender should have been alerted to the possibility that others might be pending. See, for example, *Ron Miller v. Honeywell* (1991), 4 O.R. (3d) 492 (Gen. Div.). In considering such an argument (referred to as "sheltering'), the court might weigh the following matters:

(a) Did the lender obtain a certificate or statutory declaration from the borrower that it knew of no other claims?

(b) Was there a history of other lien claims being filed against the project?

The safer course to follow is to allow no advances by the lender until arrangements are made to discharge the lien by way of a registrable discharge or an order under s. 23 of the *Builders Lien Act*.

[§7.19] Acting for a Second Mortgage Lender

When acting for a lender whose security will be a second mortgage, you should take the following additional steps to ensure that the position of the second mortgagee is recognized and protected:

(a) Read the first mortgage carefully, particularly to confirm that it does not prohibit the granting of a subsequent charge by the borrower.

(b) A certificate should be obtained from the first mortgagee confirming the balance owing and that the first mortgage is in good standing.

(c) The borrower should covenant to keep the first mortgage in good standing, and the mortgage should incorporate a right on the part of the lender to keep the prior charge in good standing and to add the cost of this to the mortgage debt.

(d) The second mortgage should include a provision that any default under the prior mortgage will constitute a default under the second mortgage.

(e) The first mortgage should be checked to see if it states that the doctrine of consolidation applies. The doctrine has been abolished *unless* the parties have contracted otherwise in the mortgage document (s. 31 of the *Property Law Act*). The doctrine provides that where a mortgagee holds two or more distinct mortgages made by the same mortgagor on different parcels of land, and the mortgagor has defaulted on all the mortgages, the mortgagee may consolidate the mortgages. In other words, the mortgagee may treat the mortgages as one, and refuse to be redeemed as to one unless they are redeemed as to all. In a foreclosure situation, this could have serious consequences for a second mortgagee. If the first mortgagee is foreclosing, the second mortgagee must either pay the full amount owing to the first mortgagee or be foreclosed off.

[§7.20] Mortgage of a Strata Lot

If a strata lot is being mortgaged, you should include special provisions in the mortgage document. You

should consider the special protections that the *Strata Property Act* gives to the lender:

- a lender may file a lender's Request for Notification (Form C) if the lender wants to receive notices under ss. 45 and 113 (s. 60);
- a lender has the right to apply to court for an injunction if the strata corporation is not fulfilling any of its duties and obligations (s. 165);
- a lender may apply to court for a winding-up of the affairs of the strata corporation (s. 284); and
- a lender may apply to court for the appointment of an administrator under s. 174.

The most significant power a lender has is the right to vote (if this right is contained in the mortgage) in the place of a strata lot owner on matters relating to insurance, maintenance, finance, or other matters affecting the lender's security (s. 54(1)(c)). In order to exercise these voting rights, the lender must follow the procedure set out in s. 54(1)(c) of the Act, which requires the lender to give written notice of the mortgage to the strata corporation. A lender must give the owner at least three days' notice before the meeting of its intention to exercise its power to vote on the permissible matters.

As strata title ownership includes title to an individual strata lot, as well as an interest in the assets and liabilities of the strata corporation, a mortgage of a strata lot requires a more detailed investigation than a standard mortgage. The following is a list of items to be completed in addition to the investigations in a standard mortgage transaction.

1. Land Title Search

   A standard strata title search consists of the following:

   (a) a search of the title to the strata lot together with copies of all charges registered against the lot;

   (b) a search of the common property together with copies of all charges registered against the common property; and

   (c) a copy of the strata plan, which shows the location and dimensions of the strata lots and buildings in the strata plan.

   Note that an additional search in the Strata Plan General Index would show whether there are additional documents of note, which might include unit entitlement and bylaw amendments.

2. Review Disclosure Statement

   If the borrower is buying the strata lot from an owner-developer, a disclosure statement will have been filed with the Superintendent of Real Estate and a copy delivered to the mortgagor. The lawyer should obtain and review a copy of the prospectus.

3. Strata Property Certificates

   The *Strata Property Act* requires the strata corporation to provide a Form B Information Certificate certifying various financial and management matters about the strata lot. If you are lender's counsel, you should obtain these certificates and review them. If possible, and in addition to these certificates, you should obtain a copy of the most recent balance sheet and projected revenues and expenses for the strata corporation.

4. Copy of Management Agreement

   If a property management company has been retained, some lenders require their lawyers to obtain a copy of the management agreement. In some situations, the management company may consider the agreement confidential and it will be unavailable. If you are unsuccessful in obtaining the agreement, you should advise the lender and seek further instructions.

5. Insurance Certificate

   Section 149 of the *Strata Property Act* requires the strata corporation to maintain insurance for the buildings and common facilities. You should obtain a certified copy of the policy or a certificate of insurance with the interest of the borrower and lender endorsed on it. Currently, the insurance obtained by the strata corporation is only for the replacement value of the fixtures installed as part of the original construction. Therefore, if the borrower has made substantial improvements to the unit that have increased its value as security to the lender, then the borrower should obtain excess insurance and provide a copy to the lender. Note that recent changes to the *Strata Property Act* will require strata corporations to obtain insurance coverage over all fixtures on a strata lot, even where those fixtures were installed after the original construction. These changes are expected to come into force by regulation at a later date.

6. Survey Certificate Not Required

   The strata plan filed in the Land Title Office includes a plan of the location and dimensions of the lot prepared by a British Columbia land surveyor. Therefore, survey certificates are not required by lenders on mortgages of strata lots.

[§7.21] Mortgage of a Lease

The lender may be loaning money to a borrower who does not own real property but instead is the tenant under a lease. In that case, the lender can take a mortgage

of the lease as security for the loan. The tenant can grant the mortgage either by assigning the remaining interest in the lease term or by granting a sublease. The lender's main concern will be ensuring that the lease does not terminate before the borrower repays the mortgage debt. For more information on preparing these types of mortgages, see Chapter 7 of the *BC Mortgages Practice Manual* (Vancouver: CLEBC).

[§7.22] Mortgage of a Mortgage

The holder of a registered mortgage may grant a mortgage of that mortgage. This is generally accomplished by way of a submortgage or an assignment of the mortgage. The lender under the mortgage of mortgage is subject to the equities and state of accounts between the original mortgagor and mortgagee. Accordingly, written confirmation in the form of an estoppel certificate should be obtained from the original mortgagor. This form of financing is often used by a seller who takes back a mortgage to secure a portion of the purchase price of a property and wishes to borrow against that security. For more information, see Chapter 7 of the *BC Mortgages Practice Manual*.

[§7.23] Equitable Mortgages

An equitable mortgage can be created in one of four ways:

(1) the pledge of a duplicate certificate of title (also called a "duplicate indefeasible title");

(2) the mortgaging by the holder of an equitable interest, such as a subsequent mortgage or a mortgage by a buyer under an agreement for sale;

(3) by an instrument which was intended to create a legal mortgage but which is defective; or

(4) by an agreement, perhaps just a letter, to provide a mortgage.

Some financial institutions accept the pledge of a duplicate certificate of title as security for a loan, to accommodate their customers and to avoid the expense of preparing and registering a formal mortgage document. This is particularly common where a subdivision has a large number of lots, each of which is to be used as security for the loan, but they will only be available as security for a short period of time because the owner plans to sell the lots to individual buyers. There is less incentive to use the duplicate certificate of title to save expense under the current land title registration fee schedule because the new schedule has substantially reduced the cost of registering a mortgage.

The removal of a duplicate certificate of title affords some protection to a lender because it prevents the owner of the land from transferring the land or registering further mortgages against the title (*Land Title Act*, ss. 189 and 195). The duplicate certificate should always be delivered directly to the lender by the Land Title Office. This puts on record where the duplicate has been delivered and on an application for a replacement, will create an impediment to the owner's claim that the duplicate certificate has been lost. Note, however, *Royal Bank of Canada v. Mesa Estates Ltd.* (1985), 70 B.C.L.R. 7 (B.C.C.A.), in which the court stipulated that in order to create an equitable mortgage by pledging a duplicate certificate of title, there must be an intention by the parties to create a mortgage. It is not sufficient for the parties to intend only to afford the lender some security. From a strict security perspective, lenders should nearly always insist that their customers grant them legal, as opposed to equitable, mortgages.

[§7.24] Special Considerations Relating to Right to Purchase

In order to facilitate the sale of real property, a seller may be prepared to provide financing to the buyer and retain a security interest in the real property being sold. This can be accomplished either by taking back a mortgage from the buyer or by way of a right to purchase between the seller and the buyer whereby the seller retains registered title to the lands and the buyer obtains an equitable interest in the lands under the right of purchase, which is registered under the title. The only real advantage in using a right to purchase rather than a mortgage take-back is the avoidance of certain sections of the *Interest Act*.

Under a right to purchase, the seller covenants to convey the property to the buyer once the buyer makes all of the payments under the right to purchase. One of the problems with financing by way of right to purchase is that by this time the seller may either be dead or missing and the buyer may have to make an expensive court application to get title transferred into the buyer's name. Worse still, the delay may cause the buyer to lose the chance of a sale to a third party.

The *Property Transfer Tax Act* provides that property transfer tax is to be paid on the value of the property at the time the right to purchase is registered.

[§7.25] Mortgages of Right to Purchase

1. Mortgage of Buyer's Interest

A mortgage of a buyer's interest under right to purchase is similar to a second mortgage as the interest of the lender will be subject to the interest of the borrower as buyer under the right to purchase. As a result, you should do the following:

(a) review the right to purchase to confirm that there is authority for the buyer to mortgage their interest;

(b) contact the seller under the right to purchase to confirm in writing the outstanding balance owing and that the buyer is not in default; and

(c) review the charges that the seller's interest in the property may be subject to. Advise the lender that its mortgage will be subject to such charges unless priority agreements or non-disturbance agreements can be obtained.

2. Mortgage of Seller's Interest

It is possible to take a mortgage over the seller's interest in a right to purchase. However, you should make it clear to the lender that the seller's interest is a diminishing one because the mortgage will be subject to the right of the buyer to call for a conveyance of title in fee simple from the seller, upon satisfaction of the terms and conditions of the right to purchase. Further, the security should be structured as a mortgage of the seller's interest, rather than an absolute assignment, because an assignment will create privity of estate between the lender and the buyer and will oblige the lender to perform the seller's covenants under the right to purchase. In addition, the Land Title Office is likely to reject the registration of an assignment of the seller's interest unless it is in the form of a transfer of an estate in fee simple, whether or not the assignment is intended as collateral security only and as between the seller and the lender is to be subject to a right to redeem on behalf of the seller.

Section 29 of the *Property Law Act* allows a seller, after having entered into an agreement for sale, to mortgage its interest in the land without the consent of the buyer, unless the seller is expressly forbidden from doing so by the agreement itself.

You should consider inserting a provision in the right to purchase prohibiting the seller from mortgaging the seller's interest, because of s. 242 of the *Land Title Act*. If a seller has registered a mortgage against the land after the right to purchase, and the buyer attends at the Land Title Office with a transfer of the property into the buyer's name while the mortgage is still registered against the title, then the registrar may give notice to the lender of the registrar's intention to register the transfer free of the mortgage (s. 242). This section provides for the resolution of an objection from the lender by a hearing before the registrar with a right to appeal from the registrar's decision to the Supreme Court. If a buyer has to go through these hearings, the buyer may be severely prejudiced by the delay in obtaining title.

It is arguable, however, that a total restriction on the seller's right to mortgage may unfairly prejudice the seller's ability to raise finance on the security of the right to purchase. One solution is to insert a clause in the right to purchase that prohibits the seller from mortgaging their interest in the right to purchase without the express written consent of the buyer. Add that this consent is not to be withheld if the mortgage is granted to a reputable financial institution, such as a bank, credit union or trust company. The clause also should stipulate that the financial institution agrees with the buyer to discharge its mortgage on payment of the full amount due under the right to purchase.

[§7.26] Mortgage Remedies

The following is an outline of the remedies available to a lender for default under a typical mortgage. To determine what remedies will be available in each situation, you must consider the specific terms of the mortgage and the current law of mortgages.

1. Action on the Personal Covenant

(a) Bringing Action on the Covenant

As soon as there has been default of payment, the lender can commence an action based on the covenant alone, or join it with an action for foreclosure. Normally, if the lender obtains an order nisi in a foreclosure proceeding, the lender must ask for judgment on the covenant at that time. The judgment may be enforced during the redemption period, but usually is not.

(b) Acceleration Clause

Upon default in any of the mortgage terms, the lender may usually enforce an acceleration clause that makes the outstanding principal amount of the mortgage interest and costs due and owing on default. Most acceleration clauses are exercisable at the lender's option. If the mortgage is made under the *Land Transfer Form Act* and Clause 15 of Schedule 6 of this Act has not been excluded by the terms of the mortgage, the borrower can be relieved from the consequences of acceleration upon paying the amount in arrears, together with costs.

Section 25 of the *Law and Equity Act* also provides for relief from acceleration upon application by the borrower to court. The relief will usually only be granted in circumstances in which the borrower's equity in the property is substantial, the security is intact, and the borrower's default was not willful.

(c) Enforcement of Personal Covenant after Order Absolute

Section 32 of the *Property Law Act* provides that after obtaining an order absolute for foreclosure, a lender may not enforce the personal covenant of the borrower to pay. A lender may

therefore not issue execution on a judgment obtained on the covenant to pay at order nisi, unless the order absolute is set aside or reopened by process of law. If a lender wants to preserve the judgment obtained at order nisi, then after the redemption period expires, the lender must usually proceed by way of judicial sale rather than order absolute.

2. Action for Foreclosure (Supreme Court Civil Rule 21-7)

In BC, an action for foreclosure is a lender's summary remedy. The effect of foreclosure is that the borrower's equity of redemption is extinguished. Generally, a foreclosure proceeding is brought concurrently with an action on the personal covenants, a claim for a sale, a claim for possession or for the appointment of a receiver, and for costs.

3. Judicial Sale

Only in the context of a foreclosure or other proceeding will the court order the sale of real property.

4. Contractual Power of Sale

For historical reasons, most mortgages in British Columbia give the lender the power to sell the property if default occurs under the mortgage. That remedy has not been used in British Columbia in recent times. The contractual power of sale is unenforceable before the redemption period expires (*South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (C.A.)). A judicial sale remains the more attractive remedy.

5. Possession

Every mortgage provides that, so long as the borrower is not in default, the borrower will have quiet possession of the property secured, but in the case of default, the lender may enforce an assignment of the rents or profits generated by the property. The lender may thereby become a mortgagee in possession and liable to account to the mortgagor for money received.

(a) Mortgagee in Possession

A mortgagee in possession has the rights of an owner, subject to the mortgagor's right of redemption and right to an accounting. A mortgagee in possession must manage the property as a person of ordinary prudence would manage the property if it were their own. The mortgagee in possession will be liable to account for the management so long as the mortgagor has a right to redeem. Before a mortgagee will be considered to be in possession and liable as such, it must be shown that the possession deprived the mortgagor of the control and management of the property.

(b) Appointment of a Receiver

All mortgages should provide for the appointment by the mortgagee of a receiver. This remedy is rarely, if ever, used because the majority of mortgagees (and receivers) prefer the protection of court appointment. Section 39 of the *Law and Equity Act* and Supreme Court Civil Rule 10-2 provide for the court appointment of a receiver. Under s. 64 of the *Law and Equity Act*, the provisions of the *Personal Property Security Act* relating to the appointment and duties of receivers apply also to instruments that charge land.

6. Distress

Distress is the seizure of the goods and chattels of a borrower who is in default. In order for the lender to distrain the borrower's goods, the right must be given to the lender by the terms of the mortgage. Many mortgages limit the right of the lender to distrain for arrears of interest only, however, a mortgage may also give a lender the right to distrain for principal as well. Distress by a lender is highly unusual in BC.

[§7.27] Title Insurance

Many lenders in British Columbia now use title insurance for mortgage financing.

Title insurance is an insurance policy that provides a named insured with the coverage specified in the policy. Title insurance typically covers the policy holder for both past and future events that may cause defects in title. Title insurance covers losses that may arise out of title defects that have already occurred but have not been discovered, such as encroachments, survey irregularities, zoning non-compliance or intervening registrations. Title insurance also may cover future events such as real estate fraud or intervening encroachments or registrations that arise after the vendor gives the transfer documents to the purchaser who submits them to the Land Title Office. Known defects in title that will *not* be insured must be listed as exceptions to the benefits of the policy or "repaired" for policy issuance.

When there is a problem that leads to a claim, the coverage provides compensation both for the policy holder's actual loss relating to the insured area of coverage and for the costs of defending against claims relating to the areas of coverage. Insurers must defend the insured title, subject to any exceptions, qualifications, or limitations in the policy.

Title insurance allows for faster and more timely closings; protection for owners against title defects and intervening registrations; protection for lenders against

the invalidity or unenforceability of documents, or liens having priority over their mortgage; and compensation for legal costs in relation to these issues.

Title insurance is commonly used in British Columbia:

(a) by corporate purchasers and lenders who obtain title insurance on all real estate transactions as a matter of standard practice (this is particularly common among parties that operate in the United States, where title insurance originated);

(b) by most national financial institutions as a lower-cost replacement for a survey certificate and to protect themselves from losses due to a defective survey (coverage can be extended to include the owners of the property for an additional fee);

(c) by owners, purchasers and lenders dealing with land outside the Torrens system, such as with leasehold interests in Indian reserve lands;

(d) to protect against other issues having to do with a property or its title, such as the risk of statutory liens, First Nations land claims, environmental matters, or unenforceable leases;

(e) as a means of "gap" coverage to assist in the closing of transactions when timing considerations related to registration are critical;

(f) in Vancouver, to protect against the "empty homes tax"; and

(g) to protect the lender, as part of the contracted mortgage preparation and registration processes for second mortgages or home equity line of credit programs.

Each policy of insurance should be reviewed for exceptions to coverage and to determine if additional endorsements from the insurer are necessary to achieve the coverage desired.

For further information, consult the *BC Real Estate Practice Manual* (Vancouver: CLEBC) or the *Title Insurance Issues Task Force Report to the Benchers*, (2007) available on the Law Society's website.

[§7.28] Residential Mortgage Instructions, Obligations on Solicitors and Opinions[4]

1. Pitfalls

The purpose of this section is to alert the practitioner to potential problems in preparing residential mortgages for institutional lenders and in ultimately providing the lenders with a legal opinion on the transaction.

The instructions provided by the lender, and the solicitor's opinion requested by the lender, are the essence of the transaction. There are many pitfalls along the way. Two trends in particular should cause solicitors acting for mortgagees to take note. First, solicitors acting in real estate transactions have a high rate of insurance claims in British Columbia. Second, the trend in actions against solicitors suggests that solicitors will be treated as insurers of their clients, in the broadest sense.

2. Instructions and Opinions Generally

(a) Instructions and Ancillary Documents

Mortgage transactions do not always involve an institutional lender. If the solicitor receives instructions in written form from an institutional lender who requires a solicitor's opinion regarding the transaction, the lawyer should carefully read not only the instructions and transaction documents but also any collateral documents. Watch for appendices, amendments, added clauses, inserts, and schedules provided or referenced.

Many mortgage opinions require the solicitor to "certify" that the transaction has been completed "in accordance with the mortgagee's instructions" or "pursuant to its instructions." However, many more do not trigger appropriate wariness by these phrases but merely include in the instructions a list of the responsibilities which the solicitor undertakes by agreeing to act for the mortgagee. These range from specifying the responsibilities in great detail, to a broad directive to the solicitor to complete all necessary documentation, obtain all necessary searches and take all precautions to ensure that the mortgagee acquires what it terms "good security." Some of the items to look for, in no particular order, include the following:

Form

Although the lender will probably provide its own standard mortgage terms, those terms should be reviewed before proceeding and you should satisfy yourself as to the applicable format with regard to, for example:

(i) Canadian Mortgage and Housing Corporation form;

(ii) guarantee clauses;

(iii) collateral mortgages; and

(iv) strata clauses.

[4] Originally prepared by Jane A.G. Purdie and Rosalyn Manthorpe for the CLE publication, *Mortgages, 1985* (September 1985), and reviewed and updated by subsequent reviewers of this chapter.

If there is any doubt, confirm your concerns and the instructions of the mortgagee in writing. Do not modify the standard terms provided unless authorized to do so in writing. Your opinion should indicate that if you have been instructed to use the lender's standard terms regardless of your concerns, you opine only that the mortgage has been prepared on the form provided.

Prepayment

Clauses with prepayment terms are often added as schedules to the mortgage. Read them carefully. You may have an opportunity to cross-check the prepayment terms with those contained in the statement of disclosure required by the *Bank Act* if one is included with your instructions. If a clause is to be added or inserted is there also a clause to be deleted? Ensure that your instructions are complete or you have written authority to change the documentation.

Commitment Letter/Loan Agreements

Often these are expressed to be part of the instructions to the solicitor. Check to see that there are no discrepancies between the instructions and agreement, that you are aware of any further security document required to be prepared by you, and that you have had an opportunity to review any other documents on which you will impliedly base your opinion.

Insertions/Deletions

Generally, the mortgagee will provide instructions about which clauses to insert or delete. The usual terms and changes are dealt with in specific sub-clauses, but beware of insertions/deletions that are assumed or are buried in the wording of the mortgage. For example, look for references to the "guarantee attached" or to "promissory notes, copies of which are enclosed" and the like.

Guarantors

You will often be instructed to have a guarantor of the mortgage, yet some standard mortgage terms do not contain guarantee clauses in the body of the mortgage. When inserting a clause, obtain approval from the mortgagee for the wording of the specific clause used. Ensure that the mortgage clause and the face page correspond, especially in their descriptions of the covenantor or guarantor. The terms "Covenantor" and "Guarantor" have been held to incur different liabilities, so a drafting error in using these terms could result in a release of the "guarantor/covenantor" from liability. Review the preamble and the guarantor clause for an expression of the existence of consideration, and consider the need for independent legal advice. Note that under the *Land Title Act*, a guarantor need not sign the Form B, in accordance with Part 5 of the Act.

Interest Rates and Adjustment

Lenders are entitled to "calculate" or "compound" the interest charged monthly, quarterly, half-yearly, or yearly. In any case, the interest is usually calculated "not in advance" and is expressed as "x% per annum." Two important points to remember are that calculation of interest accrued and balance outstanding from time to time are rarely on a straight-line basis and that frequency of payments is another factor which may further complicate the calculation.

It is not enough to know the rate of interest. For full disclosure of the cost of the borrowing, the method of calculating interest must be known. Since the most common way of calculating interest is "half-yearly" on first mortgages, to satisfy s. 6 of the *Interest Act* and to satisfy the budget-conscious borrower, the lender should be asked to restate the "per cent per annum" as "calculated half-yearly" to permit true comparisons. This is a simple calculation for the lender.

Commitment Expiry Date

Consider the expiry date associated with the commitment immediately upon receiving instructions. The commitment expiry date may represent the date funds are actually needed, or it may just limit the commitment time period. If dealing with a real estate sale closing, the institution's commitment to advance will normally fall on or after the closing date. Even in these situations, buyers may extend closing dates but fail to advise their lender. If the borrower defaults before funds are advanced and before the expiry of the commitment date or last date for advance, the mortgagee will:

(i) cancel the mortgage and retain all appraisal and commitment fees;

(ii) charge the mortgagor a penalty or fee for extension of time to advance; or

(iii) alter the interest rate to the new rate and extend the date for advancement of funds.

Each institution has its own procedure for advancing funds, which could be as simple as a telephone request or as involved as a three-day advance reservation for funding. Review the requirements of each institution carefully, as failure to do so could result in not only the embarrassing situation of being unable to fund a mortgage on time but perhaps collapse of the

entire transaction and potential liability for a higher interest rate.

Consents

The mortgagee may enclose a standard form consenting to your acting for the buyer/borrower as well as the lender pursuant to section 3.4 and Appendix C of the *BC Code*. If not, make sure you have written consent from both parties if acting for them.

The mortgagee may require that the solicitor certify:

(i) that the mortgagor has been advised to read the mortgage;

(ii) that the mortgagor has had an opportunity to do so; and

(iii) that the solicitor has explained the nature and effect of the mortgage to the mortgagor before execution.

It is impractical to allow a mortgagor to read the mortgage word by word while sitting in your office. You also risk a potential conflict of interest if the mortgagor has their own solicitor, and has neither executed a consent nor is capable of complying with consent requirements.

Order to Pay

Determine from the instructions and the form used to requisition funds the mechanism for advance of funds by the lender. Having provided you with instructions, most lenders will provide the solicitor's firm with funds, but note:

(i) in order to advance funds, most institutions require a separate direction to pay authorizing specific disbursements of the mortgage advances and signed by the borrowers; and

(ii) some institutions require you to collect your fees separately from the borrowers and not deduct them from the mortgage advance; make sure you are aware of this and collect your fees and disbursements before registration.

(b) Investigation and Searches

While lawyers are required to perform public searches to investigate title, lenders may not require copies of these searches, and might rely solely on the opinion in the lawyer's report on title.

However, your opinion is just that—a legal opinion, based on the assumption that information obtained is accurate. It must be stated to be based on specified assumptions, facts discovered, and documents obtained from other sources. It is incumbent upon the solicitor to review the information obtained because the law does not presently hold municipalities liable for the negligence of their employees in providing this type of information. Blind reliance on information that is clearly in error will not protect the solicitor.

Taxes

Most institutions require proof that the current year's taxes are paid. Generally, taxes are paid in the summer. Accordingly, from the payment due date until December 31, a tax certificate obtainable in writing from the appropriate taxing authority will suffice. However, review the lender's specific requirement carefully as to payment of current "billed" or "due taxes" or just "current taxes." The latter clause creates the problem. During the months of January through to the tax billing date, a solicitor cannot determine the amount which will be due and has no way of ensuring that these taxes will be paid. If this is required, the most you can do is either:

(i) estimate the taxes and hold this amount back from the mortgage proceeds to be paid when due; or

(ii) pay an estimated sum to the municipality for the future credit of the mortgagor and ensure that you have a system in force to complete documentation when taxes are actually due.

Most of the major institutional lenders require a portion of the upcoming taxes to be paid monthly, and if less than 12 months of payments will be paid before the tax due date, a tax holdback to ensure that there are sufficient funds on hand at the tax billing date to pay the taxes owing. Ensure you are aware of the amount of the holdback and that the holdback is deducted from the available advance, or determine whether the lender will deduct from its customer's account separately.

Insurance (See also §7.12)

Check your instructions pertaining to the lender's requirements for insurance carefully. In most cases the solicitor will not receive or review the actual policy but only the binder letter or cover note. Consider the need to modify your opinion accordingly, especially where the solicitor's responsibility includes determining that the insurance company is a "reputable and financially responsible company" and asks for certification regarding optional loss settlement clauses and co-insurance clauses.

Although the information contained in the binder letter is minimal, it must be checked very carefully. For example, it must show the appropriate name and address for loss purposes for the lenders.

Additional practice tips follow.

(i) Change of Status

The coverage provided by most "homeowner" policies will be in jeopardy if the premises are rented out or vacant for more than 30 days. The licensee should be notified immediately of any changes in status.

(ii) *Law and Equity Act*, s. 23

This section refers to covenants to insure against fire and may be of protection to mortgagees for fire loss where insurance is in place.

(iii) *Mortgage Clauses*

Some institutions want their own mortgage clauses included in the policy but usually a standard mortgage clause approved by the Insurance Bureau of Canada will suffice. The general purpose of this clause is to provide for payment of insurance monies to the mortgagee despite the negligence of the mortgagor.

3. Survey

For further discussion of surveys, see §7.11.

(a) What Is a Survey?

A "site survey" is a vague term usually referring to a drawing of the subject property, usually prepared by a licensed surveyor, showing topographic contours, elevation, underground services, etc., but not usually showing existing buildings.

A "survey certificate," on the other hand, is a drawing of the subject property, again usually prepared by a licensed surveyor, showing the siting of the improvements on the property in relation to the lot lines. The survey certificate will show whether the improvements encroach on adjoining roads or properties or whether the buildings on adjoining properties encroach on the subject lot. If encroachments are significant, the buyer's willingness to complete or ability to finance the transaction may be affected.

Since the term "survey" is used loosely, you should clarify what your client requires; in most cases it is a "survey certificate." We will assume that and refer to it simply as a "survey."

A survey is often required when a buyer is obtaining institutional financing, though title insurance may be required instead (see §7.27). Whether a survey will be required when financing is being obtained from non-institutional sources, such as family, will depend on your instructions. Your client should be advised of the risks involved in not obtaining a survey, including the hampering of ability to sell or finance in the event of an encroachment or other defect discovered subsequently. If the relevant party decides not to obtain a survey, the instructions should be confirmed in writing. If you have an extra concern, this confirmation should be acknowledged in writing by the client.

(b) Obtaining a Survey

A survey may be obtained through any licensed surveyor, although recently some firms of survey technicians have entered the field. If the seller or lender has granted a mortgage to an institutional lender, there may already be a survey. It may be possible to obtain a copy of that survey and update it with a Statutory Declaration. Any such alternative arrangements should be approved by the financial institution for whom you are acting, as each lender has its own requirements as to how old a survey may be before a new one is required, and there may not have been continuity of ownership since the last survey. Generally, at least in urban areas, a survey can be obtained within a few days.

(c) Reviewing the Survey—Encroachments and Municipal Requirements

To be acceptable to a lender, a survey must be taken at least at the footings stage of construction. A survey of "forms" is not acceptable.

Usually, when reviewing a survey for a lender, you will need to satisfy yourself that not only are there no encroachments either by adjoining improvements or by the subject property onto adjoining properties and roads, but that the building complies with all local set-back and site coverage requirements. As each local government's requirements are different, you must contact the appropriate office of the local government to determine what their requirements are and whether the property complies.

Some surveyors are willing to do this research and certify the results. Appendix 9 is an example of this type of survey. It shows that the building does not comply with the stated municipal requirements.

If, as in the example, your client's property does not comply with the requisite set-backs,

you will be required to obtain a "comfort letter" from the local government in which they acknowledge the non-compliance and confirm their intention, at the present time, not to take any action to require compliance. Municipal governments often require a fee to provide a comfort letter. Usually your request will not be processed until the fee is paid, which can create timing problems for your completion. Depending on the municipality, it can take several weeks to obtain a comfort letter.

If your survey shows an encroachment on adjoining properties, you must obtain the necessary right to allow the encroachment to remain, depending on the instructions from your client.

(d) The Opinion

You should state that your opinion as to the location of the improvements, existence of encroachments and other survey matters is based on the survey and such other information obtained from the surveyor or municipal officials. In circumstances where no survey has been requested, your opinion should include a qualification to the effect that the title opinion is subject to any defects an up-to-date survey might disclose.

(e) Western Law Societies Conveyancing Protocol

The Law Societies of BC, Alberta, Saskatchewan and Manitoba have all endorsed the Western Law Societies Conveyancing Protocol (the "Protocol"). The primary purpose of the Protocol is to allow a lawyer to advise an institutional lender client in a residential mortgage transaction that the lender need not obtain an up-to-date building location survey before the lender funds a loan secured by a mortgage, provided no known building location defects exist. If the loan transaction qualifies, the lawyer may give a Western Law Societies Conveyancing Protocol Solicitor's Opinion (commonly called a "protocol opinion").

If building location defects are discovered later and those defects would have been disclosed if a standard building location survey had been done before the funds were released, then the advice to the client was the wrong advice. The Lawyers Indemnity Fund will accept liability and pay the cost of repair, or any actual loss suffered.

It is important to remember that the Protocol does not offer protection to the borrower. When acting for the borrower, the lawyer must still advise the client that the only protection against building location defects is a building survey. A lawyer representing the borrower and lender in a residential mortgage transaction must give the borrower this advice.

Although some additional practice standards are set for BC lawyers in issuing protocol opinions, nothing in the Protocol otherwise diminishes or changes the usual practices of prudent law firms or the standard of care for lawyers acting on mortgage transactions.

Many national lenders accept opinions from lawyers in BC in the conveyance or refinancing of residential properties in accordance with the Protocol. Note that most practitioners, however, do **not** use the Protocol.

For sample wording of a protocol opinion and other related documents, visit the Law Society's website (www.lawsociety.bc.ca).

4. Zoning and Use

All municipalities and many rural areas outside municipalities have zoning bylaws regulating the use of land. For example, the legality of basement suites is a matter of zoning. It is important, particularly in respect of commercial transactions, to obtain a zoning report from the municipality in order to determine that the construction on the property and the use to which the property is to be put are permitted. Even for residential property, it is important that an owner, potential owner and lender know the permitted uses within the zone and that the construction meets municipal requirements. If the property has been bought and is being used as security based on it being revenue property with one or more possibly illegal suites, the lender could be at risk if the municipality discovers this improper use and requires the tenants to vacate.

It is not normally within the scope of the solicitor's retainer to investigate the zoning and use of the property for a residential transaction. The lender should be advised that you are not assuming responsibility for this, and that you can either be specially retained to do so or the lender should investigate the matter itself.

Since the matter of zoning may be part of the lender's standard instructions, you may be asked to investigate and give an opinion on the matter. A typical request for an opinion on zoning often includes a request for the following:

> The building and any ancillary building or structure does not, with respect to its location or use, violate any registered restrictions, provincial statutes and regulations thereto, municipal zoning or building bylaws and regulations of any competent authority.

It is highly unlikely you would ever be in a position to provide the opinion requested, even if you have a zoning report from the municipality. For example,

you would need an exceptional knowledge of all provincial statutes and regulations to provide an opinion that location or use complied with all of them. As well, many older properties do not conform to current bylaws.

The Solicitors' Legal Opinions Committee, which provides guidance on best practices in solicitors' legal opinions, advises against providing a legal opinion on zoning. Instead, zoning should be addressed at the due diligence stage, where reports on zoning would be matters of fact. Instead of providing an opinion on registered restrictions, you should obtain copies of any registered restrictions and, if possible, have the registered owner complete a statutory declaration with regard to the property's compliance with restrictions (such as restrictive covenants, statutory building schemes, easements and rights of way).

5. Marketability

You may be asked to provide an opinion on marketability of title: for example, an opinion that existing easements, encroachments, reservations and restrictions do not affect the marketability of the lands and premises. The Solicitors' Legal Opinions Committee recommends that lawyers decline to give such an opinion, for the reasons that follow.

As discussed in Chapter 1, §1.02(2), BC has a Torrens system. The concept of "good, safe holding and marketable title" has its origins in the common law, where the root of title had to be examined in order to prove ownership. That is not the case in a Torrens system. In BC, the *Land Title Act* provides for certainty of title by way of registration of title. In other words, the question of whether title is "marketable" is answered by whether it is registrable in the Land Title Office.

Section 169 of the *Land Title Act* provides that in order for an application to be made for the registration of indefeasible title to land, the registrar must be satisfied, among other things, that "a good safe holding and marketable title in fee simple has been established by the applicant." The resulting certificate of title is conclusive proof of ownership, subject to any *Land Title Act* exceptions.

Given the provisions of s. 169, there is no need for the lawyer to give the same opinion as the registrar. If the lawyer does give an opinion on marketability, the lawyer should state that the lawyer's opinion is based solely on s. 169 of the *Land Title Act*.

That said, there is some difference of opinion among lawyers as to whether the concept of marketability includes an evaluation of the property's value and appeal to buyers. However, lawyers are not appraisers, real estate licensees or valuers. This type of marketability is outside the expertise and scope of the lawyer, and a lawyer should decline to give an opinion on it.

6. Miscellaneous

The solicitor should consider these items:

(a) Identity—Law Society Rules 3-98 to 3-110 outline the client identification and verification procedures for lawyers. It is imperative that the appropriate policies and procedures have been followed. There have been "scams" where the person executing the mortgage was not the mortgagor or where the persons executing the mortgage were not the registered owners but instead one registered owner and an accommodating "friend" who was not a registered owner.

(b) Purchase Price—confirm the purchase price of the land if the mortgage funds are being used to buy property. A letter from the conveying solicitor or copy of statements of adjustments should suffice. Sometimes inflated prices are shown on agreements for the purchase of land to obtain a larger mortgage when in fact the actual agreement between buyer and seller may be several thousand dollars less, enabling the mortgagor to buy with a much smaller down payment. The mortgagee may also want to ensure that the buyer is in fact making the down payment and is not obtaining secondary financing from another source. This would indicate a potentially less secure loan repayment by the mortgagor because of the higher debt-to-income ratio.

(c) Delivery of Mortgage—the borrower should receive a copy of the registered document. Many institutions require a receipt from the borrower, but these are almost impossible to obtain after completion of the transaction. Ensure that the borrowers have been sent a copy of the mortgage and, if necessary, that a receipt for a duplicate copy of the mortgage has been obtained.

Chapter 8

Builders Liens[1]

[§8.01] A Basic Overview

The object of this chapter is to provide a basic working knowledge of the law and practice relating to builders liens, primarily focusing on the *Builders Lien Act*, S.B.C. 1997, c. 45, as amended (the "*BLA*"). This field can be complex and the law is evolving. This chapter gives only a simplified overview of practice in this area.

For more advanced discussion, consult texts:

- *Construction, Builders' and Mechanics' Liens in Canada*, by David Bristow et al., deals with builders lien legislation across Canada. While lien legislation differs among provinces, decisions from other jurisdictions on similar provisions can be useful.
- *Guide to Builders' Liens in British Columbia*, by David A. Coulson and Dirk Laudan, focuses on the British Columbia legislation.
- *British Columbia Builders Liens Practice Manual*, published by CLE, contains useful precedents and practical tips from leading practitioners in this area.

The *BLA* is structured around three basic concepts:

(1) the right to liens against both property to which labour or material is provided (s. 2) and the holdback retained from a contractor or subcontractor under the *BLA* (s. 4(9));

(2) the capacity of an owner to limit its liability for those liens (the holdback defence) (s. 4); and

(3) the right of unpaid workers and subcontractors (including material suppliers) to a trust interest in money paid on account of construction contracts or subcontracts (s. 10).

As noted, lien rights apply in respect of both the subject property and the holdback. The decision of the British Columbia Court of Appeal in *Shimco Metal Erectors Ltd. v. North Vancouver (District)*, 2003 BCCA 193 confirmed that certain persons have an independent lien on amounts held back from contractors and subcontractors under the *BLA*, even if they have lost their lien rights against the property to which their work or material was provided. This lien is commonly referred to as a "lien on the holdback" or a "*Shimco* lien."

The *BLA* does not guarantee payment for a lien claimant but seeks to balance competing interests. It creates a form of security (and a corresponding right to claim some form of priority over others) for lien claimants and trust beneficiaries.

Under the *BLA*, liens arise when the work or material is provided. Filing a claim of lien and commencing an enforcement action within the times prescribed by the *BLA* preserves the lien against the property. If these things are not done, the lien against the property is extinguished.

Note that the current *BLA* replaced the former *Builders Lien Act*, R.S.B.C. 1996, c. 41 in 1998. The old Act is referred to here as "the former Act."

[§8.02] Lien Claimants and Lien Rights—Section 2

Lien rights against property are created under s. 2 of the *BLA*. Section 2 provides that:

> . . . a contractor, subcontractor or worker who, in relation to an improvement,
>
> (a) performs or provides work,
>
> (b) supplies material, or
>
> (c) does any combination of the things referred to in paragraphs (a) and (b);
>
> has a lien for the price of the work and material to the extent that the price remains unpaid, on all of the following:
>
> (d) the interest of the owner in the improvement;
>
> (e) the improvement itself;
>
> (f) the land in or under which the improvement is located;
>
> (g) the material delivered to the land.

1. The Improvement

"Improvement" is defined in s. 1 of the *BLA*:

> "improvement" includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes

[1] Revised by **Tyler Galbraith**, Jenkins Marzban Logan LLP, in September 2023, 2022, 2020 and 2019. Reviewed regularly by the Land Title and Survey Authority for content relating to the BC land title and survey system, most recently in October 2023. Previously revised by Don Thompson and Tyler Galbraith (2012 and 2016); Mike Demers and Don Thompson (2010); Don Thompson and Scott L. Booth (2003, 2004 and 2006); Brent D. Jordan (2001); and Patrick G. Guy, with comments from Don Thompson (1999). Prepared for PLTC by Patrick G. Guy in April 1998, with the assistance of Robert W. Cameron and publications entitled *New Builders Lien Act* (British Columbia Law Institute and Ministry of Employment and Investment) and *Builders Liens-1997* (Continuing Legal Education Society of British Columbia).

> any clearing, excavating, digging, drilling, tunnelling, filling, grading, or ditching of, in, on or under land[.]

This broad definition requires one to consider carefully, on the particular facts of each case, whether something constitutes an "improvement." For example, something can constitute an "improvement" under the *BLA* even if it does not actually improve the land in the sense of making it better.

Since the definition of "improvement" under the *BLA* is substantially the same as that under the former Act, cases considering the former Act remain helpful. Some significant decisions with respect to the meaning of "improvement" are as follows:

(a) There is no improvement, and therefore no lien, if no physical work takes place (*Chaston Construction Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2002 BCCA 357).

(b) Things that are attached to or intended to become a part of the land in question will usually constitute an improvement, although the test for determining whether something is a fixture is not necessarily the test for determining whether something constitutes an improvement (*Levan Millwork Ltd. v. Larken Industries Ltd.* (1989), 37 C.L.R. 78 (B.C.S.C.); *Deal S.r.l. v. Cherubini Metal Works Ltd.*, 2001 BCCA 49).

(c) Demolition in preparation for construction may constitute an improvement (*Rupert Reinforcing Ltd. v. Worldwide Connections Inc.* (1980), 24 B.C.L.R. 78 (C.A.); *1182604 B.C. Ltd. v. Orak Contracting Ltd.*, 2020 BCSC 2229).

(d) The work need not be entirely performed within the boundaries of the property being "liened" if its only function is to enhance the value of the liened parcel (*Pedre Contractors Ltd. v. 2725312 Canada Inc. and 360 Fibre Ltd.*, 2004 BCSC 1112; *JVD Installations Inc. v. Skookum Creek Power Partnership*, 2022 BCCA 81).

Note that not all land is "lienable." Highways (including municipal streets), federal Crown interests in land, certain interests in land owned by federally regulated enterprises, and reserve land (with the possible exception of some leasehold interests and some lands which are subject to recent treaties) are not "lienable."

2. Classes of Lien Claimants

Classes of lien claimants are defined in s. 1 of the *BLA*. There are three main classes of lien claimants: (1) contractors; (2) subcontractors; and (3) workers. The subclasses architects, engineers and material suppliers are either contractors or subcontractors under the *BLA*.

(a) Contractor

"Contractor" is defined in s. 1 of the *BLA* to mean a person engaged by an owner to do one or more of the following in relation to an improvement:

- perform or provide work;
- supply material;

but does not include a worker.

A lien claimant must have a direct contractual relationship with an owner in order to be a contractor. In most cases a contractor will be a general or "head" contractor. However, where an owner builds a project without hiring a general or "head" contractor and directly employs the persons traditionally thought of as subcontractors (e.g. the electrical trade, the plumbing trade, etc.), those persons become "contractors" as they are engaged directly by the owner.

(b) Subcontractor

"Subcontractor" is defined in s. 1 of the *BLA* to mean a person engaged by a contractor or another subcontractor to do one or more of the following in relation to an improvement:

- perform or provide work;
- supply material;

but does not include a worker or a person engaged by an architect, an engineer or a material supplier.

A "subcontractor" as defined in the *BLA* includes a sub-subcontractor.

A person may qualify as a contractor or subcontractor, and therefore have lien rights, as a result of performing work off-site, if the work is an integral part of the construction process (*Kettle Valley Contractors Ltd. v. Caribou Paving Ltd.* (1986), 1 B.C.L.R. (2d) 236 (C.A.)).

The Court of Appeal has ruled that truckers who merely transport material to a project are not entitled to liens (*Cam Cement Contractors v. Royal Bank* (1973), 38 D.L.R. (3d) 427 (B.C.C.A.)). Similarly, a claimant who provided air transport of workers and supplies to a remote mining camp was not entitled to a lien (*Northern Thunderbird Air v. Royal Oak & Kemess Mines*, 2002 BCCA 58).

(c) Worker

"Worker" is defined in s. 1 of the *BLA* to mean an individual engaged by an owner, contractor, or subcontractor for wages in any kind of work, whether engaged under a

contract of service or not, but does not include an architect or engineer or a person engaged by an architect or engineer.

It is relatively uncommon for workers to file claims of lien. However, it is common for a certificate to be issued under Part 2 of the *Employment Standards Act* on behalf of a worker. Such certificates do not have priority over a lien; see *Ocean Air Conditioning v. Dan*, [1977] 3 W.W.R. 456 (B.C.C.A.), and *Westmin Resources Ltd. v. Haste Mine Development Ltd.* (1984), 58 B.C.L.R. 235 (S.C.).

The definition of "wages" in the *BLA* is broad and includes any money required to be paid under a collective agreement.

(d) Architects and Engineers

Architects and engineers engaged by an owner will be "contractors" and entitled to a lien. Similarly, an architect or engineer engaged by a "contractor" will be a "subcontractor" and entitled to a lien. Architects and engineers provide "services" as defined, which are part of the definition of "work" and so are the proper subject of a lien. It is important to note, however, that a person *engaged by* an architect or engineer has no right to a lien.

The definitions of "services," "work," "contractor" and "subcontractor" have been interpreted so as to entitle an architect or engineer to lien rights for design services, whether performed before or after construction begins, and whether performed on- or off-site, as long as some physical work based on the design takes place (*Chaston Construction Corp. v. Henderson Land Holdings (Canada) Ltd*., 2002 BCCA 357). It is important to note, however, that if no physical construction takes place, there are no lien rights for anyone.

(e) Material Supplier

"Material supplier" is defined in s. 1 of the *BLA* to mean a contractor or subcontractor who supplies only material in relation to an improvement.

Material suppliers are similar to architects and engineers in that no lien or trust rights accrue to a person engaged by or under a material supplier.

In *Pacific West Systems Supply Ltd. v. Rayman Construction Ltd.*, 2001 BCSC 1030, the BC Supreme Court held that the claimant must prove three facts to be classified as a material supplier: (1) that it supplied material for the improvement; (2) that the material was delivered to the land upon which the improvement is situated; and (3) that the claimant knew, at the time of delivery, that the supplied materials were being used for the project and communicated that knowledge to the defendant.

In some segments of the industry, material is delivered to a contractor or subcontractor, combined with other material to manufacture a finished product, and then delivered to the job site. Such "transformation" is not a bar to a lien in favour of the material supplier (*HBG Enterprises Ltd. v. Lamarche Window Manufacturing Ltd.*, [1998] Civ. L.D. 650 (B.C.C.A.)). Note, however, that persons who supply materials to *other material suppliers* do not have lien rights.

The definition of "material" in s. 1 of the *BLA* includes equipment rented without an operator, so persons who rent out such equipment are entitled to liens as material suppliers.

[§8.03] Completing the Claim of Lien Form

Section 15 of the *BLA* requires that a lien claimant file the prescribed form in the appropriate Land Title Office. See Builders Lien Appendix 3 for the prescribed form (Form 5) and for a completed example of the electronic version. Lawyers must file builders liens claims electronically.

The following numbered paragraphs describe the information required in Form 5:

1. The claimant or the claimant's agent (including a lawyer) completes Form 5. A corporate claimant can only make a claim through an agent.

   (a) Identify the Lien Claimant

   The lien claimant must be identified correctly. A failure to do so will be fatal to the lien claim (*Framing Aces Inc. v. 0733961 B.C. Ltd. dba Omni Pacific*, 2009 BCSC 389). Note that if the lien claimant is not the same entity named in the applicable contract, the court may nevertheless uphold the lien so long as the claimant is the entity who actually performed the work: *Klippenstein Development Corp. (c.o.b. Blueprint Custom Homes) v. Van Den Brink,* 2023 BCSC 961. It is good practice to obtain corporate searches and to review the relevant contracts to confirm the correct claimant name.

   (b) Identify the Property

   Form 5 requires the PID and the correct and complete legal description of the land.

   Obtain a land title search and, if in any doubt, obtain a copy of the survey plan

referred to in the legal description. If there is still doubt, have the client/claimant review and initial the plan.

2. A short description of the work done or material supplied (or to be done or supplied).

3. The name of the party with whom the lien claimant contracted, or to whom the claimant supplied material, and who is or will become indebted to the lien claimant. Like misnaming the lien claimant, an error in naming this party can be fatal to the claim (*Orbital Construction Inc. v. Hansen*, 2023 BCSC 712).

4. The amount due, and when that amount became due or will become due. Even if part (or all) of the amount claimed is disputed, claim the full amount. Once filed, the amount of a claim of lien cannot be increased (*Westburne Industries Ltd. v. Lougheed Towers Ltd.* (1985), 61 B.C.L.R. 187 (C.A.)), although a second claim of lien can be filed if the lien filing deadline has not passed. Include all amounts the client reasonably believes will come due, including pending claims for extra work and unpaid progress claims (*Arch Windoor Ltd. v. Aragon (Quayside) Properties Ltd*., 2012 BCSC 179).

   Claims for damages are not properly included in a lien claim unless they can be characterized as part of the price/cost of the work, see *Astro Contracting Ltd. v. McArthur* (1986), 7 C.L.R. 230 (B.C. Co. Ct.). Put another way, if the amounts claimed are for work performed or provided, or material supplied, or are so closely connected to them that it is reasonable and proper that they should be included in the statutory regime under the *BLA*, they are properly the subject of a claim of lien (*M3 Steel (Kamloops) Ltd. v. RG Victoria (Construction) Ltd.*, *et al.*, 2005 BCSC 1375; *Grace Residences Ltd. v. Jeda Mechanical Ltd.*, 2008 BCSC 1616).

   Interest is not recoverable through or on a builders lien (*Horsman Bros. Holdings Ltd. v. Lee* (1985), 12 C.L.R. 145 (B.C.C.A.); *Westburne Industrial Enterprises v. Lougheed Towers Ltd*. (1985), 61 B.C.L.R. 187 (B.C.S.C.); *Bank of Montreal v. Vanmore Holdings Ltd*., [1989] 4 W.W.R. 697 (B.C.C.A.)).

5. The address for service of the lien claimant. This is usually the claimant's business address.

Owing to the short time limitations for filing claims of lien, it may not always be possible to obtain all of the information needed in time. It is not uncommon for potential lien claimants to approach a lawyer with only one or two days left in the claim of lien filing period. In those circumstances, the lawyer's priority should be to try to ensure that a claim of lien is filed against the correct property within the claim of lien filing period. If necessary, file against multiple properties and keep investigating. The claim of lien can be released against "extra" properties when the correct property is identified.

[§8.04] Filing the Claim of Lien—Section 15

Once the Form 5 is completed, it must be filed electronically in the Land Title Office. Counsel should obtain a title search immediately (pre-registration) to confirm that the legal description has not changed since the claim of lien was prepared. After filing, obtain a post-registration search to ensure that the claim of lien is shown as a pending application against title.

[§8.05] Limitations for Filing Claims of Lien—Section 20

If a claim of lien is not filed in the Land Title Office within the time set out in s. 20, the lien is extinguished and it cannot be revived.

Section 20 reads as follows:

> (1) If a certificate of completion has been issued with respect to a contract or subcontract, the claims of lien of
>
> (a) the contractor or subcontractor, and
>
> (b) any persons engaged by or under the contractor or subcontractor may be filed no later than 45 days after the date on which the certificate of completion was issued.
>
> (2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after
>
> (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
>
> (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.
>
> (3) Subsection (1) does not operate to extend or renew the time for filing of a claim of lien if
>
> (a) that time would otherwise be determined with reference to the time an earlier certificate of completion was issued, or
>
> (b) time had started to run under subsection (2).
>
> (4) On the filing of a claim of lien under this Act, the registrar or gold commissioner has no duty to inquire as to whether or not the lien claimant has complied with the time limit for filing the claim of lien.

The time for filing a claim of lien under s. 20 expires no later than 45 days after the *first* event that triggers the running of time.

Under the *BLA* (s. 20), three different events can trigger the running of time for filing a claim of lien:

(a) a relevant "certificate of completion" is issued;

(b) the head contract is completed, abandoned or terminated (if there is a head contract); or

(c) the improvement is completed or abandoned (if there is no head contract).

1. Certificate of Completion

A "certificate of completion" is a document (Form 3) issued by the "payment certifier" under s. 7 of the *BLA* (see Builders Lien Appendix 2 for the prescribed form). The certificate states that work under a particular contract or subcontract has been completed.

Section 7 indicates that the payment certifier will normally be the person identified in the contract or subcontract as responsible for payment certification. However, if no payment certifier is identified, the payment certifier will be the owner acting alone in respect of amounts due to a contractor, and the owner and a contractor acting together in respect of amounts due to a subcontractor.

There must be a request from the appropriate contractor or subcontractor before the payment certifier can issue a valid certificate of completion; a certificate unilaterally issued without such a request will likely be invalid (*Quigg Homes WV345 Ltd. v. Bosma*, 2004 BCSC 1582).

Issuing a certificate of completion starts time running for filing a lien claim for that completed work. It is important to note, however, that a certificate of completion will *not* extend or renew the time for filing a claim of lien if the 45 days had already started to run because of another triggering event.

If no certificate of completion is issued, the triggering event that will cause the time for filing claims of lien to commence depends on whether there is a "head contractor." If there is a "head contractor" (defined in s. 1, and more or less equivalent to what is commonly referred to as a "general contractor"), the time for filing begins to run when the head contract has been completed, abandoned or terminated. If there is no "head contractor" then the time for filing begins to run when the "improvement" has been completed or abandoned.

Note that mere completion, termination or abandonment of a subcontract, or of a contract which is not a *head* contract, will not in itself trigger any claim of lien filing deadline.

2. Completed

Under the *BLA*, "completed" means substantially completed, but the precise meaning of the word depends on whether it is used in reference to a contract/subcontract or to an improvement. If used in reference to a contract/subcontract, completion is determined objectively with reference to the arithmetical formula contained in s. 1(2) of the *BLA*, commonly referred to as the "3-2-1 Formula":

> For the purposes of this Act, a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than
>
> (a) 3% of the first $500,000 of the contract price,
>
> (b) 2% of the next $500,000 of the contract price, and
>
> (c) 1% of the balance of the contract price.

If "completed" is used in reference to an improvement, then s. 1(3) of the *BLA* applies and the test is whether the improvement or a substantial part of it is ready for use, or is being used, for the purpose intended.

Section 1(4) provides that the construction of a strata lot is completed, or a contract for its construction is substantially performed, no later than the date it is first *occupied*. Note as well that s. 88(1) of the *Strata Property Act* limits the claim of lien filing period to 45 days after initial *conveyance*. So, in the case of a strata lot, these additional triggering events may determine the claim of lien filing deadline.

3. Abandoned

The meaning of "abandoned" in s. 20(2)(a) and (b) of the *BLA* is the same for a contract and for an improvement. The term is defined in s. 1(5):

> For the purposes of this Act, a contract or improvement is deemed to be abandoned on the expiry of 30 days during which no work has been done in connection with the contract or improvement, unless the cause for the cessation of work was and continued to be a strike, lockout, sickness, weather conditions, holidays, a court order, shortage of material or other similar cause.

In *McManamna v. Chorus*, 2008 BCCA 471, the Court held that the legislature "did not intend the deemed abandonment provision to override proof of a clear intention of the parties not to abandon a project" (at para. 14). The Court held that it is more reasonable to interpret s. 1(5) as a default position applicable where the parties' intentions are uncertain. (See also *Cannex Contracting 2000 Inc. v. Eagle Ridge Land Sales Corp*., 2019 BCSC 626.)

[§8.06] Wrongful Filing

A claim of lien should not be filed where it is clear that it is obviously out of time or without merit. Courts regard the deliberate wrongful filing of a claim of lien as an abuse of process and have, in cases where a claim of

lien was obviously filed as "legal blackmail" and was without any legal foundation or merit, awarded damages (including exemplary and punitive damages) and costs (including special costs) against the party wrongfully filing the claim of lien. For authorities on this point see *Outback Developments Inc. v. Hare*, 2019 BCSC 2404; *Guilford Industries Ltd. v. Hankinson Management Services Ltd.*, [1974] 1 W.W.R. 141 (B.C.S.C.); and *Castile Construction Ltd. v. Szeto Enterprises*, [1981] B.C.D. Civ. 3602-04 (Co. Ct.).

Note as well that s. 19 of the *BLA* specifically provides that a person filing a claim of lien against land to which the lien does not attach is liable for costs and damages incurred by an owner of the land as a result of the wrongful filing. Nonetheless, if in doubt, it is prudent to file the claim of lien and be ready to remove it quickly if it turns out to be invalid.

Note also that s. 45 of the *BLA* provides that a person who *knowingly* files or causes an agent to file a claim of lien containing a false statement commits an offence and is liable for a fine. This provision has been held to create a punitive offence, and applies only if the offender knowingly made a false statement (*Outback Developments*, *supra*; *Sandhu v. New Western Plumbing & Lighting Supplies Ltd.*, 2018 BCSC 1930).

[§8.07] Who Is an Owner

1. Mortgage Lender

The definition of "owner" in s. 1 of the *BLA* expressly excludes a mortgagee unless the mortgagee is in possession of the land.

2. Purchaser

An issue that can arise is whether a valid claim of lien can be filed for work done or material supplied for an owner who transfers title before expiry of the time for filing claims of lien but after the purchaser receives a certificate of title clear of liens.

This issue was dealt with in *Carr & Son v. Rayward &* Bell (1955), 17 W.W.R. 399 (B.C. Co. Ct.), in which the court held that a lien filed in those circumstances was effective against the purchaser even though at the time he took title to the property the Certificate of Title showed that he was the owner free of encumbrances. The question is whether or not the lien was filed in time. For example, if a house was substantially completed on January 15, title transferred to a bona fide purchaser on February l, and a lien filed after February l and yet within the 45-day period, the lien is valid against the purchaser.

This scenario raises some serious concerns for a solicitor acting for the purchaser of a newly completed or renovated property. If the solicitor is aware that improvements on the premises have recently been completed or are not yet completed, steps should be taken to protect the purchaser from exposure to claims of lien. Clients should be advised of the risk of claims of lien being filed after completion, and an agreement for a purchaser's holdback made. An attempt to hold back money from the vendor on the day set for completion without prior agreement can be a dangerous practice. Counsel should, therefore, attempt to negotiate a builder's lien holdback in advance.

A purchaser's liability for liens is limited by s. 35 of the *BLA*, which provides:

> The amount that can be claimed under this Act against the interest of a purchaser in good faith of an improvement in respect of claims of lien filed after the latest of
>
> (a) acceptance for registration of the purchaser's interest in a land titles office or gold commissioner's office,
>
> (b) completion, abandonment, or termination of the head contract for construction of the improvement, and
>
> (c) completion or abandonment of the improvement if the owner did not engage a head contractor
>
> must not exceed 10% of the purchase price of the improvement.

Therefore, if the improvement is completed before the conveyance, a purchaser who retains a 10% holdback is fully protected.

Regarding the conveyance of strata lots, be aware of s. 88(2) of the *Strata Property Act*, which provides that a purchaser of a strata property must hold back a prescribed amount (currently 7% of the purchase price) until the time for filing a lien expires or 55 days after the closing date.

3. Tenant

The issue of a "non-contracting" owner often arises where an owner has leased property to a tenant who, in turn, has contracted to have work done on the property. Under the *BLA*, anyone with a legal or equitable interest in the property can be an owner. In the case of the leased property, both the registered owner and the tenant are owners, with different interests in the property.

Section 3 states:

> (1) An improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.
>
> (2) Subsection (1) does not apply to an improvement made after the owner has filed a notice of interest in the land title office.

The effect of these provisions is that an owner's interest in property can be subject to a lien even if the owner did not request the improvement in question, unless the owner filed a notice of interest in time.

A typical tenant improvement situation arose in *Advance Electric Co. Ltd. v. Marino* (1977), 5 B.C.L.R. 120 (Co. Ct.). Under a lease, the tenant was required to make improvements, which would become the property of the owner on termination of the lease. The tenant contracted with the lien claimants to make the improvements. The tenant failed to pay the contractors, who filed claims of lien. The court found that the registered owner was an "owner" within the meaning of the *BLA* and was liable for the liens because the owner had not posted notices. The fact that the lease required the improvements was evidence that the owner knew of the improvement.

The Court of Appeal in *Barclay Construction Corp. v. 229531 B.C. Ltd.* (1989), 34 C.L.R. 97 (B.C.C.A.), stated that the corresponding section in the former Act required actual knowledge of an improvement, as distinct from a "possibility" that such work might be done.

[§8.08] Payment to Discharge Liens

Sections 23 and 24 provide means by which an owner, contractor, subcontractor, or authorized mortgagee can clear a claim of lien from title. This often must be done quickly to keep the construction advances and project going.

Section 23 is available to discharge lien claims other than those filed by claimants who were directly engaged by an owner. It allows claims of lien to be discharged by paying a defined amount into court. The lien becomes a lien against the money in court, and is discharged from title. The amount that must be paid in under s. 23 is the *lesser* of:

(a) the total amount of the claim(s) filed, and

(b) the amount owed by the payor to the person engaged by the payor through whom the liens are claimed, provided the amount at least equals the required holdback between them [discussed in §8.09 of this chapter].

Section 24, by contrast, provides that the claim of lien can be cancelled upon "sufficient" security for the payment of the claim being posted. The amount is resolved in a court application.

Usually it is the owner who applies, as they cannot proceed while lien claims are on title. However, it also happens that a contractor or subcontractor who is contractually bound to keep the title free of claims of lien makes the court application.

If no action has been commenced to enforce the claim of lien, the s. 23 or 24 application is made by way of petition in the appropriate Supreme Court registry. If a lien action has been commenced, the application can be made by a notice of application in that same action, instead of a petition, if the applicant is a party to the action.

The order will set out the amount of money required to cancel the claim of lien. The order will also provide that, upon payment into court of the money, or the posting of security, and upon production of a Registrar's Certificate certifying the same, the Land Title Office shall cancel the claim of lien and any corresponding certificate of pending litigation. As s. 24 of the *BLA* implicitly authorizes the court to order cancellation of a certificate of pending litigation as consequential relief to the cancellation of a claim of lien, the tests under the *Land Title Act* for cancellation of a certificate of pending litigation do not need to be met (*4HD Construction Ltd. v. Dawson Wallace Construction Ltd*., 2020 BCSC 1224).

Under s. 24, the amount of security is usually the face amount of the lien claim. However, s. 24(3) expressly allows an order for discharge upon posting security that is less than the amount of the lien. This is happening with increasing frequency. The Court of Appeal introduced a two-step test in *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, (2008), 83 B.C.L.R. (4th) 349; see also *Centura Building Systems (2013) Ltd. v. 601 Main Partnership*, 2018 BCCA 172. Under the first part of the test, the court considers what claims should be taken into account in fixing security. If it is "plain and obvious" that a claim will not succeed, that claim will not be considered in fixing security. Under the second part of the test, the court looks at the evidence as a whole and fixes an amount as appropriate security.

When security has been posted under s. 23 or s. 24, the person who posted the security can have the money paid back out if and when the lien claimant's lien rights have been extinguished for failure to commence an action in time; see *Colour Plus Paint Centres Ltd. v. Cameo Developments Ltd*. (1980), 21 B.C.L.R. 63 (C.A.).

Under s. 24, security can be cash or any other form satisfactory to the court, such as an irrevocable letter of credit or a lien bond. It is sometimes thought that if a lien bond is to be posted, it is necessary to file evidence of the solvency of the lien bond issuer in the material in support of the application. However, the Supreme Court has held that it is satisfactory to refer to the registrar's list of acceptable bonding companies (*Maple Resources Investment Co. Ltd. v. Plasti-Fab Ltd*. (11 July 1994) (B.C.S.C.); *Hoofer Investments v. MPH Supply* (7 July 1997) (B.C.S.C.)); *IDL Projects Inc. v. M3 Steel (Kamloops) Ltd.*, 2011 BCSC 1600).

[§8.09] Holdbacks

The most common statutory provision affecting the conveyance is the provision for a holdback under the *Builders Lien Act* and, in the case of strata titles, under the *Strata Property Act*. If the buyer is acquiring property on which improvements are in progress or were recently completed, it is not clear that a holdback under the *Builders Lien Act* will protect a buyer (who may not be an "owner" within the meaning of the *Builders Lien Act*) against liens filed after the purchase has closed.

If the seller asserts that the time limit for liens has expired, the buyer's solicitor should request both a certificate of substantial completion and an occupancy permit as additional evidence of when the time period for liens expired.

The primary purpose of the "holdback" scheme is to limit the effective lien liabilities of owners, contractors and subcontractors to prescribed amounts, but the overall scheme results in protection for both lien claimants and those liable to pay their claims.

1. *BLA* Holdbacks

British Columbia has a multiple holdback system. Each person primarily liable on a contract or subcontract, who may be an owner, contractor or subcontractor, is required to retain a holdback equal to 10% of the greater of:

(a) the value of the work or material supplied under the contract or subcontract; and

(b) the payments made on account of the contract or subcontract.

For an illustration of how the holdback works, see Appendix 4 at the end of this chapter.

In harmony with this scheme, under s. 34, the maximum amount that can be recovered under the *BLA* by persons claiming under a particular contractor or subcontractor is the greater of:

- 10% of the value of work or material actually provided by the said contractor or subcontractor or the amount of the payments made to the said contractor or subcontractor (i.e. the "statutory holdback" under s. 4); and
- the amount actually owing to the said contractor or subcontractor (often referred to as the "actual holdback").

Section 4(6) provides that a holdback must not be retained from a worker, engineer, architect or material supplier.

Note that s. 34(1) of the *BLA* only limits the amount that may be recovered under the *BLA*, and does not affect contractual rights to payment.

Subsection 34(2) specifically provides that three things do not operate to reduce the "amount owing":

(a) an amount asserted as a counterclaim;

(b) a payment made in bad faith; and

(c) a payment made after the filing of, and with notice of, a claim of lien by a person claiming under the person to whom the payment is made.

However, under s. 34(3), claims arising under the same contract, such as extra costs to complete the contract due to default, do reduce the "amount owing."

2. Strata Holdbacks

Section 88(1) of the *Strata Property Act* states:

> Despite any other Act or agreement to the contrary, if an owner developer conveys a strata lot to a purchaser, a claim of lien under the *Builders Lien Act* filed against the strata lot, or against the strata lot's share in the common property, must be filed before the earlier of
>
> (a) the date on which the time for filing a claim of lien under the *Builders Lien Act* expires, and
>
> (b) the date which is 45 days after the date the strata lot is conveyed to the buyer.

Section 88(2) of the *Strata Property Act* states:

> Despite any other Act or agreement to the contrary, a purchaser of a strata lot from an owner developer must retain a holdback of an amount set out in the regulations until the earlier of
>
> (a) the date on which the time for filing a claim of lien under the *Builders Lien Act* expires, and
>
> (b) the date which is 55 days after the date the strata lot is conveyed to the buyer.

Sections 88(1) and 88(2) of the *Strata Property Act* must be read with the Strata Property Regulation, B.C. Reg. 43/2000, which prescribes the amount of the lien holdback. The regulation states that the amount of the holdback is 7% of the gross purchase price (s. 5.2).

[§8.10] Holdback Account

1. General Requirements

Section 5 of the *BLA* requires an owner to establish and deposit holdback money into a holdback account. The account is administered "jointly" with the contractor from whom the holdback is retained. Usually this means joint signing authority.

When an owner acts as its own general contractor and enters into several contracts, a holdback account must be established for each contract.

The owner is excused from establishing and maintaining a holdback account when:

(a) the owner is a public body designated by regulation, such as a government or school board (s. 5(8)(a)); or

(b) the aggregate value of work and material under the contract is less than $100,000.00 (s. 5(8)(b)).

Failure to pay the holdback into a holdback account entitles the contractor to suspend operations on 10 days' notice (s. 5(7)).

Money in a holdback account is charged with the payment of liens arising under the contractor from whom the holdback was retained, and subject to that, is held in trust for that contractor. The money must not be paid out without agreement of all administrators of the account (s. 5(2)). The money is not, however, charged with payment of liens arising under other contractors. Finally, the money held in a holdback account established under s. 5 is not subject to garnishment (s. 13(4)).

2. Holdback Period

Section 8 provides:

> 8(1) If a certificate of completion is issued with respect to a contract or subcontract, the holdback period in relation to
>
> (a) the contract or subcontract, and
>
> (b) any subcontract under the contract or subcontract
>
> expires at the end of 55 days after the certificate of completion is issued.
>
> 8(2) The holdback period for a contract or subcontract that is not governed by subsection (1) expires at the end of 55 days after
>
> (a) the head contract is completed, abandoned or terminated, if the owner engaged a head contractor, or
>
> (b) the improvement is completed or abandoned, if paragraph (a) does not apply.
>
> …
>
> 8(4) Payment of a holdback required to be retained under s. 4 may be made after expiry of the holdback period, and all liens of the person to whom the holdback is paid, and of any person engaged by or under the person to whom the holdback is paid, are then discharged unless in the meantime a claim of lien is filed by one of those persons or proceedings are commenced to enforce a lien against the holdback.

This means that the holdback period typically (but not always) expires 10 days after the lien filing period.

Section 6 of the *BLA* provides that if a contractor or subcontractor defaults, the statutory holdback must not be used to remedy deficiencies "until the possibility of any lien arising under the person in default is exhausted." Until then, the owner remains liable for the statutory holdback amount, even if nothing is owing to the person from whom the holdback was retained.

Note that a portion of the holdback retained from a contractor may be released to the contractor where the subcontract of a subcontractor retained by the contractor is certified as complete in accordance with s. 9(1). This is commonly referred to as "progressive release of holdback" or "early release of holdback."

Until the decision of the BC Court of Appeal in *Shimco*, *supra*, counsel routinely advised owners to check the relevant Land Title Office for lien claims at the end of the holdback period and release the holdback if none were present. However, *Shimco* confirms the existence of a separate lien against the holdback which can be asserted by commencing an action. This lien is not subject to the limitation periods specified in the *BLA*. As a result, some cautious owners conduct court registry searches for lawsuits asserting holdback lien claims, before releasing holdback monies.

In *Wah Fai Plumbing & Heating Inc. v. Ma*, 2011 BCCA 26, the Court of Appeal considered *Shimco* and confirmed that the *BLA* does not provide for enforcement of a holdback lien where there has been no holdback or the holdback has been wrongfully paid out.

Holdback money can be subject to a garnishing order if no claims of lien are filed (*Mike's Roofing and Insulation Ltd. v. Harder* (1964), 46 D.L.R. (2d) 595 (B.C. Co. Ct.)).

[§8.11] Trust—Section 10

A statutory trust is created by s. 10(1) of the *Act*, which provides:

> Money received by a contractor or subcontractor on account of the price of a contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

Until all trust beneficiaries are paid, the contractor or subcontractor "must not appropriate any part of the fund to that person's own use or to a use not authorized by the

trust" (s. 10(2)). In other words, the fund must only be used to pay trust beneficiaries as defined above.

Subsections 10(1) and (2) do not apply to money received by an architect, engineer or material supplier (s. 10(4)).

Even if a claim of lien has not been filed, the trust remains. The trust provisions in the *BLA* are distinct from the sections relating to filing a claim of lien, and the trust rights exist independently of whether a lien has actually been claimed. Numerous authorities support this position, including *Bank of Nova Scotia v. O. & O. Contractors* (1966), 55 W.W.R. 103 (B.C.C.A.); *Crane Canada Ltd. v. McBeath Plumbing Heating Ltd.* (1965), 54 W.W.R. 119 (B.C.S.C.); and *Okanagan Blasting v. Contech Enterprises Ltd.* (1983), 50 B.C.L.R. 82 (S.C.).

Even if no claim of lien was filed, or the land on which the improvement was constructed could not be liened, as in the case of federal Crown land or highways, the s. 10 trust provisions still apply to money received on account of the price of the contract or subcontract.

Money only becomes impressed with a trust when it is "received" by a contractor or subcontractor. Once the money is "received" the receiver becomes a trustee of the money for the benefit of persons engaged by the receiver in connection with the improvements.

In *A & M Painting Contractors Ltd. v. Byers Construction Western Ltd.* (1981), 28 B.C.L.R. 43, the Court of Appeal dealt with the issue of when the trust is created. Money in the hands of an owner is not impressed with a trust, but immediately upon being paid into court pursuant to a garnishing order it becomes subject to the trust. When money held by an owner is paid into court under a garnishing order, it is constructively "received" on account of the contract price. Section 13 of the *BLA* reflects this principle. Money will also be deemed to be "received" by a contractor or subcontractor when it is paid to an assignee of the contractor or subcontractor.

[§8.12] Priorities Affecting Lien Claimants

Claims for a declaration of lien or by a s. 10 trust beneficiary under the *BLA* will often come into conflict with the interests of other parties involved in a construction project, including mortgagees, receivers, trustees in bankruptcy, Crown agencies, garnishing creditors and others. The following paragraphs are a simplified review of the position of a lien claimant or trust beneficiary in relation to some of those other creditors.

1. Lien Claimant and a Mortgagee

Section 32 of the *BLA* deals with priorities between a lien claimant and a mortgagee. Under subsections 32(1) and (2), if money is advanced in good faith under a mortgage that is registered prior to the filing of claims of lien, and the advance is made prior to the filing of the claims of lien, the advance will take priority over the interests of the lien claimants in the land.

In *Financial Trust Company v. Hawkwood Developments* (1989), 40 B.C.L.R. (2d) 388, the BC Supreme Court held that where a mortgage is registered subsequent to the filing of some claims of lien, but prior to the filing of other claims of lien, all lien claimants share rateably in the funds available, but only up to the total amount of the claims of lien filed prior to the mortgage.

A mortgagee advancing funds after the filing of claims of lien will generally not obtain priority for money advanced to pay liens or to meet the cost of completion of the improvement (*Great West Permanent Loan Co. v. National Mortgage Co.*, [1919] 1 W.W.R. 788 (B.C.C.A.)). However, s. 32(4) of the *BLA* provides that a mortgagee who has applied mortgage money in payment of a filed claim of lien is subrogated to the rights and priority of the lien claimant to the extent of the money applied.

In addition, subsections 32(5) and (6) allow a court to order that further advances under a mortgage will have priority, in appropriate circumstances:

> 32(5) Despite subsections (1) and (2) or any other enactment, if one or more claims of lien are filed in a land title office in relation to an improvement, a mortgagee may apply to the court for an order that one or more further advances under the mortgage are to have priority over the claims of lien.
>
> 32(6) On an application by a mortgagee under subsection (5) the court must make the order if it is satisfied that
>
> (a) the advances will be applied to complete the improvement, and
>
> (b) the advances will result in an increased value of the land and the improvement at least equal to the amount of the proposed advances.

Subsections 32(5) and (6) are intended to allow completion of improvements to the ultimate benefit of all parties concerned.

Note that the court only has jurisdiction to make an order granting priority to *further* advances under an *existing* mortgage (*Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 4, leave to appeal to SCC refused, [2012] S.C.C.A. No. 361).

2. Lien Claimant and an Execution Creditor

Lien claimants must prosecute their claims expeditiously to avoid being removed from title in a foreclosure. In *Canada Trust Co. v. Blumenhagen Construction Ltd.*, [1980] 2 W.W.R. 376 (B.C.S.C.), the Court held that an execution creditor had priority over a lien claimant to any surplus left over after a

mortgagee's sale of the property where the lien claimant had not yet proven its claim. However, in *Conder v. North Star Construction Co. Ltd*. (1979), 17 B.C.L.R. 186 (S.C.), the Court held that the surplus was to be held for the benefit of lien claimants pending proof of their liens. It should be noted, however, that in *Conder* certain lien claimants had obtained judgment already and were seeking to exclude other claimants who had not obtained judgment before the order for sale.

Lien claimants should be aware of these two apparently conflicting judgments and should be careful to prosecute their claims quickly to avoid the risk of losing their interest in land through foreclosure proceedings.

3. Competing Lien Claimants

The rules governing the distribution to lien claimants of money paid into court or the proceeds of sale of land are contained in ss. 36 to 38 of the *BLA*.

The first objective these sections seek to achieve is *pro rata* sharing, and the second is priority for enforcement costs and workers' wages.

Application of the rules can be very complex, except in the most common situation, where the same (usually insolvent) person engaged all of the lien claimants. In that situation, distribution is generally in the following order of priority:

(a) costs of enforcement;

(b) up to six weeks wages owed; and

(c) the rest of the claims (including wages beyond six weeks).

Subsection 42(3) provides that a device by an owner, contractor, or subcontractor adopted to defeat the priority given by the *BLA* to a worker is void against the worker.

Another principle applied in ss. 36 to 38 is that in a situation where some lien claimants are engaged directly by an owner and other claimants are not, the claimants who are not engaged directly by the owner will have priority over the claimants who are engaged directly by the owner.

There is no priority as between lien claimants based upon the date of registration of their claims of lien.

If several actions have been commenced in respect of the same improvement, it may be possible for lien claimants to obtain a declaration of lien on a summary judgment or trial. However, it may be necessary to wait for the other lien claimants to obtain their declarations of lien before it is possible to realize on the liens (*Arctic Distributors v. Nordine* (1984), 52 B.C.L.R. 110 (Co. Ct.)). Consequently, as the court noted in *Rempel Bros. Concrete Ltd. v. C.J. Smith Contracting Ltd.*, 2014 BCSC 1186, "While there is no hard-and-fast rule against permitting a lien claimant to prove its claim before other potential claimants, doing so accomplishes little and potentially prejudices others" (at para. 34).

In *Griff Building Supplies Ltd. v. Lucas Anderson Development (1993) Corp*. (1995), 23 C.L.R. (2d) 188 (B.C.S.C.), the Court held that lien claimants who accept a mortgage in exchange for a discharge of their claims of lien are entitled to the remedy of foreclosure. They are thereby able to extinguish remedies for subsequent lien claimants. The arrangement must be made in good faith and for the purpose of settling the claims of lien and not for the ulterior purpose of granting some lien claimants priority over others. Section 42(1) of the *BLA* provides that a mortgage given for the purpose of granting a lienholder a preference is void for that purpose. See *Hayter Construction Ltd. v. JR Concept Developments Inc.*, 2008 BCSC 1213.

4. Lien Claimant and a Receiver

Section 21 of the *BLA* provides that a "claim of lien filed under the *BLA* takes effect from the time work began or the time the first material was supplied for which the lien is claimed, and it has priority over all . . . receiving orders recovered, issued or made after that date." This section applies to both receiving orders made under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and receiving orders made under provincial law, and a filed claim of lien takes priority over both (*Yorkshire Trust Company v. Canusa Construction Company* (1984), 54 B.C.L.R. 75 (C.A.)).

5. Lien Claimant and Crown Agencies

Section 21 of the *BLA* gives a lien "priority over all judgments, executions, attachments . . . recovered, issued or made after the lien takes effect." As noted above, a lien takes effect from the date of commencement of the work or when the first material was furnished or placed on the land. It follows that a lien takes priority over any judgments obtained and registered against the land after the work that is the subject of the lien was commenced. A registered lien also has priority over a certificate issued under the *Employment Standards Act* for unpaid wages (*Westmin Resources Ltd. v. Haste Mine Developments Ltd.* (1984), 58 B.C.L.R. 235 (S.C.)).

Where there is a holdback and among the lien claimants competing for those funds is a taxpayer who owes money to the Canada Revenue Agency, CRA has priority on the funds owing to that tax debtor (*PCL Constructors Westcoast Inc. v. Norex Civil Constructors Inc.*, 2009 BCSC 95).

[§8.13] Enforcing the Lien

1. Court Registry

Any action for a declaration of lien must be commenced in a registry of the Supreme Court in the judicial district in which the land in question is located (s. 27). In addition, if there is a registry of the Supreme Court in the municipality where the land is located, then it is not enough to commence an action in the same judicial district. The action must be commenced in that registry. Note, however, that Vancouver and New Westminster are deemed to be the same registry for purposes of the section.

2. Commencing the Action

A claim of lien is enforced by a proceeding under the Supreme Court Civil Rules (s. 26). See *Practice Material: Civil* for procedures under the Supreme Court Civil Rules. The builders lien cause of action should be sufficiently described in the notice of civil claim.

A certificate of pending litigation must also be registered against the title to the property, unless security has been posted under s. 24 or a payment into court has been made under s. 23 and the claim of lien has been removed from title.

An action to enforce a claim of lien in the Supreme Court must be commenced, and a certificate of pending litigation registered, within the time limits specified in the *BLA*; otherwise, the lien is extinguished (s. 33(5)).

It has been held that it is necessary to serve all other lien claimants with notice of an application for a declaration of lien (*Dayross Developments Ltd. v. Jade Technical Services Ltd.* (1986), 17 C.L.R. 268 (B.C. Co. Ct.); *Rempel Bros. Concrete Ltd. v. C.J. Smith Contracting Ltd.*, 2014 BCSC 1186).

In the action, the claimant typically requests the following:

(a) a declaration of builders lien in the amount claimed against the improvement, the land and any security posted for the lien claim;

(b) an order that the lien ranks in priority to the right or interest of any party subsequent in interest, including the owner;

(c) an order that, if the amount claimed is not paid, the land and improvement be sold or the security paid or realized;

(d) a certificate of pending litigation;

(e) costs; and

(f) any "other" relief.

3. The Defendants

Typically, defendants to a lien claim include:

(a) The party with whom the claimant contracted.

(b) The owner(s) against whose interest the lien claimant wants to attach. Note the broad definition of owner in s. 1. Lessees are frequently defendants in lien actions. Also name a vendor or a mortgagee under s. 32 if priority over its interest is being claimed.

(c) Anyone over whom the lien claimant wishes to claim priority (such as the holder of a judgment registered against title to the land).

The defendant might raise a defence and counterclaim. Section 30(1) of the *BLA* provides as follows:

> Subject to the rights of lien claimants engaged by or under the plaintiff, a defendant in an action to enforce a claim of lien may set up by way of counterclaim any right or claim arising out of the same transaction for any amount, whether the counterclaim is for damages or not.

[§8.14] Limitation Periods and Notice to Commence Action

Section 33(1) provides that an action to enforce a claim of lien must be commenced within one year from the date of filing of the claim of lien. Unless the lien action is commenced and a certificate of pending litigation is filed within this time, the lien is extinguished.

There is no provision in the *BLA* for an extension of time.

In *Squeo v. Del Bianco*, [1976] W.W.D. 38 (B.C. Co. Ct.), the Court held that the one-year time period for commencing an action and filing a certificate of pending litigation expires on the first day on which both the registry and the Land Title Office are open on or after the anniversary date of the filing of the claim of lien.

Section 33(2) permits an owner, or a lien claimant who has commenced an action, to serve a written notice (in Form 6) on a lien claimant requiring the lien claimant to both commence an action to enforce its claim of lien and register a certificate of pending litigation within 21 days from service of the notice. Such a notice is technically called a "notice to commence an action" but commonly referred to as a "21-day notice."

Section 14 of the *BLA* provides that an action to enforce the trust created under s. 10 of the *BLA* must be commenced not later than one year after:

(a) the head contract is completed, abandoned or terminated, or

(b) if the owner did not engage a head contractor, the completion or abandonment of the improvement.

This is a marked difference from the limitation period allowed for trust actions under the *Limitation Act*.

[§8.15] Judgment

Final orders vary with the circumstances of each case. If the court decides that the lien claimant is entitled to a lien under the *BLA*, the judgment will provide a declaration that the claimant is entitled to a lien and will set out the amount and describe the lands involved.

If money has been paid into court under ss. 23 or 24, the judgment may order payment out to the plaintiff of the amount of its lien, and direct that the balance, if any, be paid to the person who paid it into court.