The Law Society of British Columbia

Practice Refresher Course (PRC)

Learning Materials

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Please note: *Course learning material contents have been updated at various times, as indicated herein.*

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MODULE 1 – CIVIL LITIGATION

1 - Introduction to the Civil Litigation Module

If civil litigation is part of your practice, your clients will bring a range of issues from debt collection to personal injury to enforcing the terms of a contract. This learning module is a very brief introduction to civil litigation at its most basic level, from meeting your client up until commencement of trial.

Successfully practising in this area of law requires precise attention to procedural requirements and a deep understanding of civil law and rules of evidence. It is not for dabblers.

References & Resources

The learning materials for this module refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*. For a summary of the key resources, see section ***1 - References & Resources*** at the end of the module.

Even if you are taking on an occasional civil case, seriously consider investing in authoritative resources like **CLEBC**'s:

- *Provincial Court Small Claims Handbook*,
- *Civil Trial Handbook*,
- *Discovery Practice in British Columbia*, and
- *British Columbia Motor Vehicle Accident Claims Practice Manual*.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed *en masse* for update in 2011.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

1.1 - File Management

1.1-1 - Meeting the Client & Limitation Periods

Prior to meeting the client, you or an assistant should take the opportunity to determine the subject matter of the client's legal issue.

Even if a matter is in your field of expertise, be realistic about your time and interest in pursuing the file.

Resist the temptation to try and solve everyone's problems, great and small.

Keep a list of lawyers to whom you can refer clients who you are not able or willing to assist.

Limitation & Notice Periods

Immediately assess whether any limitation or notice periods apply.

Refer to the Limitations and deadlines page on the **Lawyers Indemnity Fund**'s website for guidance.

1.1-2 - Conflicts of Interest & Space Sharing

Conflicts of Interest

Assess whether you have a potential conflict of interest.

If two or more individuals are at the consultation, consider having them sign a conflict letter.

Do not take instructions or advise a subset of a group of clients about matters you acted on in the past if that advice affects the interests of the absent clients.

Be alive to potential conflicts of interest that can arise after the initial consultation.

Conflicts of interest can arise at almost any time during the course of a file.

If a conflict arises, refer to the Code of Professional Conduct for British Columbia (*BC Code*) and, in particular, section 3.4 (Conflicts).

Space Sharing Arrangements

BC Code rules 3.4-42 and 3.4-43 provide that lawyers in space sharing arrangements must either agree to not act against each other's clients or take steps to make clear that they are functioning as separate firms and intend to act for clients adverse in interest. Notify your clients in writing and take steps to ensure client information is kept confidential from other lawyers in the office.

For more information, see the **Lawyers sharing space** resource in the Support and Resources for Lawyers > Practice Resources area of the Law Society website under the heading *Organizing your law office*.

1.1-3 - Communication

Ongoing communication with clients is a priority. Failing to communicate leads to dissatisfaction with legal services. Encourage routine communication by email but treat email as you would written letters and ensure the same clarity and completeness. If your client cannot communicate by email, you have a professional obligation to either answer your client’s phone calls yourself or employ enough staff to handle the calls and refer them to you as appropriate.

You can save time and properly document your file by giving a questionnaire to your client at the end of an initial interview to return as soon as possible.

Develop questionnaires suited to your particular areas of practice using the **Law Society's** Practice Checklists Manual as a starting point.

1.1-4 - Retainer Agreements

As well as asking clients to fill out a suitable client questionnaire, ask them to sign a retainer agreement, including appropriate contingency fee language if applicable.

Give your client a standard retainer agreement to review and return signed, along with the litigation questionnaire. If the case involves a statutory body like ICBC, have your client sign an authorization for release of information under the *Freedom of Information and Protection of Privacy Act*.

Good lawyers discuss with their clients how much they will charge and clarify the scope of the retainer. It may be that a fee cannot be set without further investigation, but at least discuss the subject in general terms so the client can make an informed decision on whether to proceed.

At the beginning of the retainer:

- check conflicts;
- diarize limitation dates;
- use retainer letters or non-engagement letters as needed;
- have clients complete information questionnaire;
- keep detailed notes; and
- diarize all important dates.

The Law Society has **sample retainer letters** in the Support and Resources for Lawyers > Practice Resources area of the website.

1.2 - Commencing New Litigation

1.2-1 - Initial Client Interview

Client expectations are often high at the initial interview. Your client wants to know how much the litigation will cost, how long it will take, the likelihood of winning and the likely amount of any award.

Before or during the initial interview you should:

- obtain the client information required by the client identification and verification Rules;
- confirm that your client has capacity to instruct you with regard to age, mental competence, absence of duress or undue influence (see capacity resources listed below);
- consider whether the area of law the client needs assistance in is within your own competence;
- consider who the other parties might be and perform a conflicts check; and
- consider whether you can act within relevant limitation periods.

Rather than advising the client that their case is a winner or a loser, consider estimating in a percentage chance of winning. That approach can lead to discussion regarding the risk of losing and the possibility of being responsible for the other party's court costs.

Take notes during the interview and ensure those notes are saved to the file. The notes should include details of the initial advice, information received, and any client admissions.

Keep a record of the initial interview even if you are not retained and not opening an individual client file. If you do not take the case for whatever reason, send a non-engagement letter (see resources listed below) and keep a copy with the client interview notes.

Capacity

Be sure to review *BC Code* rule 3.2-9 (Clients with diminished capacity) and the associated Commentary.

An overview of the relevant obligations and resources regarding client capacity and undue influence is covered in these Practice Advisor's - Frequently Asked Questions.

Additional resources to assist in navigating issues of client capacity are available in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website, including:

- Practical guidance on acting for clients with diminished capacity can be found in "Acting for a Client with Dementia", Spring 2015 Benchers' Bulletin.

The **BC Law Institute (BCLI)** has helpful resources including:

- Tests for capacity are analyzed and evaluated in this Report on Common-Law Tests of Capacity (2013)
- Guidance regarding circumstances involving potential undue influence in this Undue Influence Recognition and Prevention: A Guide for Legal Practitioners (2023), which includes this Undue Influence Recognition and Prevention: A Reference Aid

Non-Engagement

The Law Society has **sample non-engagement letters** in the Support and Resources for Lawyers > Practice Resources area of the website.

1.2-2 - Planning the Litigation

Forum and Mode of Proceeding

A significant advantage to acting for the plaintiff is that you can pick the forum and the mode of proceeding.

For more information, see other sections in this module, including:

- ***1.2-3 - Choosing the Tribunal or Court***,
- ***1.3 - Tribunals & Courts***,
- ***1.4 - Small Claims Court*** and
- ***1.5 - Supreme Court***.

Limitation Periods

If you can't issue the claim right away, diarize the limitation period for a weekday at least one month before the limitation period expires. Consider setting multiple reminders to ensure redundancy.

See section ***1.1-1 - Meeting the Client & Limitation Periods*** of this module, above.

Facts

Start collecting and verifying all the facts as soon as possible. Facts will vary from case to case, but in general you need to be concerned about:

- if you act for the plaintiff, correctly identifying the parties;
- how to locate each witness;
- the location of relevant documents and their author; and
- proving causation and damages, including the need for expert witnesses.

Documents

If you are seeking documents pursuant to the *Freedom of Information and Protection of Privacy Act* do it early. Most agencies take a long time to respond.

Expert Evidence

If you think you require expert evidence, make the appointments even as you are starting to gather information. The wait times to see medical experts can be lengthy. For example, it can take you longer to get medical experts lined up than it takes to set a trial date under Supreme Court Civil Rule 15-1 (Fast Track Litigation).

1.2-3 - Choosing the Tribunal or Court

Your first step in giving advice and preparing the case is to determine the jurisdiction in which the action should be brought.

In British Columbia you have three choices, as explored further in the following sections of this module:

- the Civil Resolution Tribunal (see section ***1.3-1***),
- the provincial Small Claims Court (see sections ***1.3-2*** and ***1.4***), or
- the Supreme Court of British Columbia (see sections ***1.3-3*** and ***1.5***).

Note at the outset that small claims processes in BC have changed significantly, and the Civil Resolution Tribunal now handles many claims without lawyer participation.

1.3 - Tribunals & Courts

1.3-1 - Civil Resolution Tribunal

In 2017, the Civil Resolution Tribunal (CRT) began resolving most small claims up to $5,000, and in 2019 the CRT began resolving motor vehicle injury disputes up to $50,000 including accident benefit claims and minor injury determinations.

The CRT also handles strata property disputes of any amount, and societies and cooperative associations disputes of any amount.

See the Civil Resolution Tribunal website and the *Civil Resolution Tribunal Act (CRT Act)* to learn more.

1.3-2 - Small Claims Court

The monetary jurisdiction for small claims cases in Provincial Court is $35,000 and simplified trials at Richmond and Robson Square include cases up to $10,000.

Small Claims Court is governed by the *Small Claims Act* and court procedure is governed by the Small Claims Rules.

The Court's purpose is set out in s. 2 of the Act:

…to allow people who bring claims to the Provincial Court to have them resolved and to have enforcement proceedings concluded in a just, speedy, inexpensive and simple manner.

The Court has jurisdiction over civil claims for debt, damages, recovery of personal property, specific performance of agreements involving personal property or services, and relief from claims to personal property, for claims valued between $5,000 and $35,000.

Small Claims Court does not have the power to deal with:

- issues related to motor vehicle accidents with some exceptions;
- the rights and obligations of strata owners, tenants, and strata corporations, though some orders may be enforced in Provincial Court;
- an interest in land;

- personal property security;
- bankruptcies;
- trademarks;
- wills and estates;
- libel and slander;
- malicious prosecution;
- residential tenancy, though Residential Tenancy Branch orders may be enforced in Provincial Court;
- almost all builders' lien matters; and
- lawsuits against the federal government.

For more information, see section ***1.4 - Small Claims Court*** of this module, below.

1.3-3 - Supreme Court

The Supreme Court Civil Rules provide two key alternatives to a traditional trial as the means of resolving the dispute:

- Summary Judgment under Rule 9-6 and
- Summary Trial under Rule 9-7.

When planning Supreme Court litigation, consider these options, which may be suitable either before or after discovery.

For more information, see section ***1.5 - Supreme Court*** of this module, below.

1.4 - Small Claims Court

1.4-1 - Jurisdiction & Claim Amount

Claim Amount

Generally, Small Claims Court has jurisdiction between $5,000 and $35,000. Cases involving up to $5,000 now go to the Civil Resolution Tribunal. There are specific practice directions in some Registries. For example, in Vancouver and Richmond, Justice of the Peace Adjudicators may hold one-hour hearings dealing with monetary values between $5,000 and $10,000. In cases where the claim, excluding interest and expenses, is more than $35,000, the claimant may

abandon the excess in order to bring the claim within the Small Claims Court's jurisdiction. If opting to waive amounts in excess of $35,000 the claimant must state in the notice of claim that the amount over the limit is abandoned; see Small Claims Rules 1(4) and (5).

Jurisdiction

Rule 1(2) provides that an action is to be commenced at the registry nearest to:

- where the defendant lives or carries on business; or
- where the transaction or event that resulted in the claim took place.

Under s. 3(1) of the *Small Claims Act*, the Provincial Court has jurisdiction in a claim for:

- debt or damages;
- recovery of personal property;
- specific performance of an agreement relating to personal property or services; and
- relief from opposing claims to personal property

so long as the amount claimed or the value of the personal property or services is equal to or less than an amount that is prescribed by regulation, excluding court-ordered, but not contractual, interest and costs.

Claims from $5,001 to $10,000 in Vancouver and Richmond

In Small Claims Court in Vancouver and Richmond Provincial Courthouses, Justice of the Peace Adjudicators may hold one-hour simplified trials for cases with a money value of $5,001 to $10,000.

In all other Provincial Court locations, claims for $5001 to $10,000 are dealt with in the same way as claims for up to $35,000.

Excluded Actions

While most civil claims for debt or damages under $35,000 are within the Court's jurisdiction, several actions are specifically excluded and must be brought in Supreme Court.

Actions for libel, slander, or malicious prosecution are specifically excluded from the jurisdiction of the Court; see s. 3(2) of the *Small Claims Act*.

Some statutes such as the *Builders Lien Act*, *Property Law Act*, *Strata Property Act*, and the *Wills, Estates and Succession Act* (the "*WESA*"), either have definition sections that define Court as the Supreme Court or specifically state that applications must be brought in Supreme Court. Always review the statute under which your client's right of action arises to determine which court has jurisdiction.

See the Small Claims Cases area of the Provincial Court of British Columbia website for more details.

1.4-2 - Starting a Claim

You might provide various levels of assistance to clients for small claims matters. This may include simply giving general telephone advice, reviewing your client's pleadings, or drafting pleadings for your client without taking full conduct of the file.

If you are only taking limited conduct of the case make sure:

- your client has written confirmation of the limit of what you are doing for your client;
- if asked to draft a pleading, ensure your client's is the address for service, and not your own; and
- if asked to appear at any stage of the proceeding, make it clear to the judge or mediator presiding that you are not taking full conduct of the case.

If you have determined that the subject matter or claim is suited to small claims, commence the action by a notice of claim in Form 1.

Small claims forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

The notice of claim can be filed in person or through Court Services Online.

Rule 2 (Serving a Notice of Claim) sets out how to serve companies, societies, and extra-provincial companies. The notice of claim must be served within 12 months of filing unless it is renewed on application to the Court; see Rule 2(7).

The claimant must serve a blank reply form with the notice of claim.

1.4-3 - Responding to a Claim

The defendant's options upon service of a notice of claim are set out in Small Claims Rule 3 (Replying to a Claim Made by a Notice of Claim).

The defendant may pay the amount claimed directly to the claimant and ask the claimant to file a notice of withdrawal at the registry; see Rule 8(4) (Withdrawal of claim or other filed document).

Otherwise, the defendant must complete and file a Reply in Form 2 in order to do any one or more of the following:

- admit all or part of the claim;
- admit all or part of the claim and propose a payment schedule that the defendant seeks to be ordered by the Court allowing the debtor to pay by a set date or by instalments; see Rule 11(4) (If the creditor agrees);
- oppose all or part of the claim by listing reasons why the claim is opposed; and
- make a counterclaim against the claimant; see Rule 4 (Making a Claim Against a Claimant).

Small claims forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

According to Rule 3(4) (Time limit for replying) the time limit for filing a reply is:

- 14 days after service of the notice of claim if service occurred within B.C.; or
- 30 days after service of the notice of claim if service occurred outside of B.C.

If the defendant fails to file the Reply within the applicable time period, the Registrar may make a default order.

The Registrar serves the reply on the claimant within 21 days of its filing; see Rule 3(5) (How a reply is served). The registry serves by mail to the address of the claimant on the Notice of Claim. If you are taking over conduct of a small claims action for one of the parties, notify the registry by filing a notice of change of address of the party you act for.

Third party actions are allowed, and the procedure for adding and serving third parties is set out in Rule 5 (Third Parties).

1.4-4 - Interlocutory Procedures

There is no summary trial procedure or oral discovery procedure available other than the Small claims pilot - financial debt claims in Robson Square. Document discovery happens primarily through the settlement conference procedure discussed below.

Interlocutory applications are permitted under the *Small Claims Act*.

Rule 16 (Applications to the Court) sets out the types of applications that can be made. While some applications may be granted by a registrar without a hearing, others require a hearing before a judge. A judge may make any orders such as for production of records from third parties. Notice of the application should be served on opposing parties. Defence medical examinations of the claimant may be ordered on application under Rule 7(12) (Defendant may request a medical report).

Section 2(2) of the *Small Claims Act* allows the Court to make any order or give any direction it thinks necessary to achieve the purpose of the Act and its rules. Accordingly, if the Supreme Court Rules provide the solution you require, such as the right to compel the production of a third-party report, consider relying on s. 2(2) when applying to obtain a similar order in your Small Claims proceedings.

Application to transfer a claim to Supreme Court

You may also apply to a judge to transfer a claim to Supreme Court under Rule 7.1(1)(a) (Transfer and Multiple Claims).

The test for transferring to Supreme Court was stated in *Shaughnessy v. Roth*, 2006 BCCA 547 where the Court of Appeal indicated that the jurisdiction under Rule 7.1 provides that the Court must transfer a claim if satisfied that the monetary outcome of the claim may exceed the monetary jurisdiction of the Small Claims Court.

Appeals and Judicial Review

There is no appeal from any order of the Provincial Court in a small claims proceeding, other than an order to allow or dismiss a claim made by a judge after trial; see *Small Claims Act*, s. 5 (Appeal).

For appeals of interlocutory orders, apply for judicial review under the *Judicial Review Procedure Act*. See *Wood and Lauder v. Siwak*, 2000 BCSC 397 and *Cridge v. Turner*, 2006 BCSC 407 dealing with judicial review of a settlement conference order.

The standard of review on judicial review is generally more deferential than for a regular appeal: *Cridge v. Turner*; *Markel Insurance Co. of Canada Ltd. v. Kamloops Freightliner Ltd.*, 1997 BCSC 4239. The judicial review procedure is a limited review to ensure that the hearing or decision was made in a procedurally fair manner. The court of review focuses more on the process, rather than the correctness of the order, to ensure fair treatment of the parties involved.

Rule 17 provides that the Court may change or cancel a previous order if it was obtained in the absence of a party and there are good reasons for setting the previous order aside. This may be a basis upon which a party may be able to obtain review of a previous order.

1.4-5 - Certificate of Readiness

If the action involves personal injury, the claimant must file a certificate of readiness in Form 7 within six months after serving the notice of claim; see Rule 7(9) (Certificate to be filed in personal injury cases). The certificate of readiness triggers scheduling of the settlement conference.

The certificate of readiness must include all medical reports and records of expenses or losses incurred or expected by the claimant. If necessary, make an application to extend the time for filing the form under Rule 16(2)(c).

Defendants have the right to apply for dismissal of the claimant's claim if the certificate of readiness is not served in time. The certificate of readiness will inform the defendant as to what evidence the claimant will be relying on at trial.

Each party must file a trial statement in Form 33 at the registry 14 days before the trial conference and serve it on each of the other parties seven days before the trial conference; see Rule 7.5(9) (What the parties must file before the trial conference).

Form 33 requires the following information:

- a statement of facts in chronological order;
- a calculation of the amount claimed, disputed, or counterclaimed;
- copies of the relevant documents; and
- a list of witnesses with a brief summary of what each witness will say.

At the trial conference, a judge will review the claim and determine the amount of time required for the trial. The judge may also make other orders for the hearing of the trial, decide on any

issues that do not require evidence, dismiss claims that are without reasonable grounds or an abuse of the court's process, or give a non-binding opinion on the probable outcome of the trial.

Small claims forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

1.4-6 - Mediation

Mediation is a process for reaching a settlement acceptable to both parties.

The mediator is a neutral, non-judicial, third party who helps the parties see sufficient mutual interests so that they can bridge the gap, settle the claim, and avoid further litigation.

Small Claims Court makes mediation an integral part of the litigation process.

Mediation for Claims between $10,000 and $35,000

For claims between $10,000 and $35,000, any party may institute mediation by filing a notice to mediate in Form 29 at the court registry where the claim was filed. The requirements, details and mechanics for this mediation process are set out in Rule 7.3 (Mediation for Claims Between $10,000 and $35,000).

The form cannot be filed until at least one Reply in the action has been filed.

Once a notice to mediate form has been filed and delivered to the parties, the matter will not be scheduled for a settlement conference until the mediation process is concluded.

The parties to the claim choose a mediator and share the cost of the mediation.

If an agreement to settle the case is reached, the agreement can be filed with the court.

Small claims forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

1.4-7 - Small Claims Settlement Conference

Once the defendant files a reply, and if no mediation process is underway, the registry will set a settlement conference. If the date is not workable for you or your client, you need to seek an adjournment.

The purposes of the settlement conference are:

- to mediate any issues in dispute;
- to make a payment order if parties agree; and
- if settlement is not possible:
    - order the exchange or disclosure of any documents or records by a party prior to trial;
    - discuss evidence required for trial;
    - set date and length of trial; and
    - make any order for the just, speedy, and inexpensive resolution of the claim.

Although the presiding judge will attempt to mediate a resolution where appropriate, the settlement conference is different than mediation because its secondary goal is to define and narrow the issues and evidence for trial. The settlement conference is an informal 'without prejudice' proceeding. The judge will assist parties by asking questions, stimulating discussion, and making suggestions. The presiding judge has authority to make orders at the settlement conference under Rule 7(14) (What happens at a settlement conference).

The settlement conference is set for a half hour. As a matter of practice, the judge who presides over the settlement conference will not preside over the trial.

The parties and their representatives must attend the settlement conference and must have authority to settle the claim. The parties must bring to the settlement conference all relevant documents and reports. A company must send someone who has authority to settle. Failure of a party to attend the settlement conference may result in dismissal of the claim or a payment order against a defendant; see Rule 7(17) (If a party does not attend).

At the settlement conference the presiding judge may:

- mediate issues being disputed;
- dismiss a claim, counterclaim, reply, or third-party notice;
- make a payment order;
- set a trial date;

- discuss evidence and procedure at trial;
- order a party to:
    - produce information or evidence,
    - give another party copies of documents or records, or
    - allow a party to inspect and copy documents
- order the examination of property damage;
- order a party to file an affidavit; or
- make any order for the just, speedy and inexpensive resolution of the claim.

Trial Preparation Settlement Conference (TPSC)

If the parties cannot resolve the dispute through mediation or if a trial is estimated to take more than one half day, a trial preparation settlement conference (TPSC) may be scheduled.

Although not referred to in the Rules, the TPSC is used by the court to reduce trial adjournments.

Generally, the judge will order a party to prepare and bring to the TPSC a statement of facts, list of witnesses, claim calculations, relevant documents, photographs, repair estimates and any expert reports.

1.4-8 - Offer to Settle

At any time either party may make an offer to settle in Form 18 to the other party under Small Claims Rule 10.1.

If there has been a settlement conference, make the offer to settle within 30 days after the conference. The trial is adjourned if the offer is accepted.

If the offer is rejected and the outcome at trial is the same or better for the party making the offer, a penalty may be imposed under Rule 10.1(4) - (7).

Where the result at trial is equal to or better than the settlement offer made by the offering party, the court has discretion to impose a penalty of up to 20% of the amount of the offer in addition to any other expenses under Rule 10.1(7). The offer is introduced following the judge's decision on the merits of the case pursuant to Rule 10.1(11). The offer is not filed with the registry or maintained on the court file.

Offers must be served on the other party within 30 days after the settlement conference to be effective for the imposition of a penalty. This 30-day period may be extended by application to a

judge. If served outside the 30 day time limit, the offer is still valid but a penalty may not be imposed; see Rule 10.1(9).

An offer may be accepted in Form 19, which should be served on the party who made the offer within 28 days of service of the offer; see Rule 10.1(3).

If accepted, the party that made the offer usually files the offer and acceptance at the registry and the terms of the offer become a payment order under Rule 10.1(4). Such orders are enforceable as any other order of the court.

If multiple defendants are sued by one claimant, that claimant must make their offer jointly to all the defendants. Likewise, multiple defendants must make a joint offer to the claimant. If there are multiple claimants, a separate offer to settle may be made by or to each of them.

Offers to settle are disclosed to the court only after the judge has given a final decision.

Small claims forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

1.4-9 - Trial, Evidence & Experts

Trial

If the claim cannot be resolved at the settlement conference, by mediation, or through offers to settle, the matter will proceed to trial. At trial the hearing judge may award judgment to either party, dismiss the claim, or make other orders.

The trial will be heard at the registry where the settlement conference was held unless a judge orders otherwise; see Rule 7(19) (Place of the trial). This is not necessarily the same registry where the claim was filed.

According to Rule 17(20) (How the parties may be represented) a party must appear in person at trial and may be represented in court by a lawyer, articled student, or:

- if the party is a company, by a director, officer, or authorized employee of the company;
- if the party is a partnership, by a partner or authorized employee; or
- if the party is using a business name, by the owner of the business or any authorized employee.

According to Rule 17(19) (Settlements involving young persons) if a party is a litigation guardian, they must be represented by a solicitor, and may not settle without the consent of the Public Guardian and Trustee of B.C.

Since the court is a court of record for Provincial Court proceedings, the trial proceedings will be recorded, and transcripts may be obtained from an authorized transcription service provider. A list of the authorized transcription firms is maintained by the Court Services Headquarters and distributed to each region. Tape recordings are not provided to the parties or available for listening purposes; parties need to order a transcript. If a party disputes the accuracy of the transcript, they should contact the transcription firm manager and request the tape to be checked.

Evidence at Trial

The trial judge has conduct over evidence at trial, and may conduct a formal or informal trial so long as the evidence is given under oath or affirmed. The rules of evidence commonly enforced in Supreme Court are not strictly followed in Small Claims Court. Accordingly, the judge may hear evidence by examination and cross-examination or by allowing the parties to explain their cases and respond to each other in a more informal manner, or in any other way the judge thinks is appropriate under Rule 10(1) (How evidence will be heard at trial) and (2) (Evidence to be sworn). However, you should be prepared if the judge decides to apply standard rules of evidence.

Any party who requires a witness to testify may issue a summons to the witness after the trial date is set. The party must offer the witness money for reasonable estimated travelling expenses under Rule 9(2) (Travelling expenses).

If summoned, the witness must attend court at the stated time and place, bringing any evidence specified in the summons. However, a witness may apply to a judge to cancel the summons. If the witness does not apply, the judge may issue a warrant for the arrest of a witness who fails to appear in court if the judge is satisfied that the summons was properly served on the witness, reasonable travelling costs were offered, and the presence of the witness is required.

A witness who is the subject of a warrant will be issued a notice of arrest before the warrant is executed. The witness will have an opportunity to appear voluntarily to avoid arrest; see Rule 9 (Witnesses) and Rule 14 (Warrant of Arrest for Not Attending Court).

Expert Evidence

If you plan to have expert opinion evidence, serve a summary of the expert's evidence on all other parties at least 30 days before the expert is called to give evidence, unless the judge grants

permission to hear that evidence under Rule 10(3) (Experts' evidence — advance notice of evidence required).

Instead of calling the expert, a party may introduce an expert's report stating their opinions if the party serves the report on all other parties at least 30 days before the report is introduced into evidence, or if the judge grants permission if 30 days' notice is not provided; see Rule 10(4) (Experts' reports must be given in advance).

A statement of the expert's qualifications in their report is proof that the expert has those qualifications according to Rule 10(5) (Experts' qualifications).

Experts may be called for cross examination on their reports if the receiving party serves a notice on the delivering party at least 14 days before the trial date requiring the expert to attend for cross examination; see Rule 10(6) (Experts may be called for cross-examination).

If a judge determines that calling the other party's expert for cross-examination was unnecessary, the judge may order the party who required the expert to attend to pay the costs of that attendance; see Rule 10(7) (Cost of calling other party's expert).

Repair estimates or value of property estimates are not considered expert evidence, but the party seeking to enter this evidence must give 14 days' notice of this evidence unless a judge orders otherwise under Rule 10(8) (Estimates).

1.4-10 - Trial Decision & Appeal

Trial Decision

The judge may render the decision either orally in court at the end of the trial, or later in writing.

The court clerk will record the result and any terms of the final order on a trial record. Copies are provided to the parties. The successful party may take any enforcement proceedings through the court on the order as recorded on the trial record.

After the decision is rendered, an offer to settle may be disclosed to the court. When deciding the amount of any penalty based on the offer to settle, the judge must consider:

- the difference between the amount awarded at trial and the amount of the offer;
- the interest of the parties in proceeding to trial to determine the credibility of witnesses or a point of law; and
- the time the offer was made.

In some cases, the judge will issue written decisions without the presence of the parties in court. If a party wishes to disclose an offer to settle after a written decision, the parties must either agree to attend before the same judge, or if that is not possible, make an application to set the matter down before the trial judge or some other judge.

Appeal

Under s. 5 of the *Small Claims Act* only final orders made after trial may be appealed to the Supreme Court of B.C. within 40 days of the final order. Start the appeal by filing a notice of appeal in Form 74 and paying $200 at the Supreme Court registry nearest where the order was made; see Part 2 - *Appeal*, sections 5 through 15 of the *Small Claims Act*.

There is no right of appeal for any other order of the Provincial Court. This effectively means that an interlocutory order is not subject to appeal.

Small claims forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

1.4-11 - Enforcement

Three kinds of orders referred to in the Small Claims Rules may require payment – consent orders, default orders, and payment orders:

- A consent order may be made at any stage during the proceeding where the parties can agree to terms of payment between them.
- A default order may be granted on application where a party fails to reply to a notice of claim or attend mediation or any other stage where their presence is required.
- A payment order is an order by court made at the end of a trial for one party to pay another.

If the debtor does not pay, the creditor has a number of options, including:

- a payment hearing;
- garnishing wages or bank accounts;
- seizure and sale of goods by the court bailiff;
- a default hearing, if a payment schedule was in effect; and
- registering the order at the LTO against land owned by the judgment debtor.

According to Rule 11(11) (How payment may be collected), to collect payment under a payment order, a creditor may:

- seek an order for seizure and sale;
- ask for a payment hearing;
- seek a garnishing order and enforcement of a writ of execution under s. 55 of the *Court Order Enforcement Act*;
- ask for a default hearing if the debtor is in default of a payment schedule; or
- enforce the order by any means permitted by law.

If a payment schedule is not set out in the original order the judgment creditor, a debtor, or a judge may set a payment hearing before a judge or justice of the peace to assess the debtor's ability to pay and determine how payment will be made under Rule 12(2) (Parties may request a payment hearing) and (3) (How a creditor asks for a payment hearing). Notice of Payment Hearing Form 13 is used by either the creditor or debtor to set down a payment hearing. The payment hearing need not be in the same location as the registry where the order was made.

At the payment hearing the court and the creditor may question the debtor about the debtor's ability to pay, including questions about employment, income, bank accounts, investments, goods and property owned, disposition of any assets since the claim arose, and debt obligations.

If a payment order is made and the debtor complies with that order, the creditor can take no further enforcement steps, without applying to a judge to cancel or change the payment schedule under Rule 11(6) (No collection while payments being made).

If the debtor does not comply with the payment order, the creditor may ask the debtor to be summoned before a judge to explain why. This is called a default hearing, which is initiated when the creditor submits a summons to default hearing Form 14 to the registry. The creditor forwards the summons to the sheriff or court bailiff to serve on the debtor. This procedure may be repeated from time to time if the debtor continues to be in default.

Garnishment is available upon application to a judge or registrar under the *Court Order Enforcement Act*; see Rule 11(11)(c).

At the hearing if the judge is not satisfied with the debtor's explanation as to why the payment schedule was not obeyed they may make a finding of contempt of court. The judge may also issue a warrant of imprisonment for the debtor for not more than 20 days.

Small claims forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

1.5 - Supreme Court

1.5-1 - Supreme Court Overview

The Supreme Court Civil Rules provide two key alternatives to a traditional trial as the means of resolving the dispute:

- Summary Judgment under Rule 9-6 and
- Summary Trial under Rule 9-7.

When planning Supreme Court litigation, consider these options, which may be suitable either before or after discovery.

A Supreme Court action is commenced by filing a notice of civil claim in Form 1 pursuant to Rule 2-1 (Choosing the Correct Form of Proceeding). Serve a copy of the filed notice of civil claim on the respondent pursuant to Part 4 (Service), see Rules 4-1 through 4-5.

Rule 15-1 (Fast Track Litigation) provides for fast track litigation proceedings to accelerate the litigation process, primarily by reducing the time available for examination for discovery and expediting the time within which trials are set.

Note that the time for delivering the response to civil claim is usually extended by opposing counsel, but communication is important before relying on that courtesy. If opposing counsel has agreed to extend the time for responding, confirm it in writing.

In some limited instances it will be appropriate to commence a Supreme Court case by petition or requisition, as set out in Rule 2-1 (Choosing the Correct Form of Proceeding) and Rule 17-1 (Requisitions) respectively.

Note that there is a 14-day time limit for responding to a notice to admit, Form 26. Failing to respond in time results in a deemed admission; see Rule 7-7(2) (Effect of notice to admit).

Within 35 days of the close of pleadings all parties must, pursuant to Rule 7-1 (Discovery and Inspection of Documents), serve their List of Documents in Form 22.

The party who files the notice of trial in Form 40 must also file a trial record under Rule 12-3 (Trial Record) containing the pleadings, including any particulars, and any order which affects the issues to be dealt with at trial, for example, an order that liability will be tried separately from quantum in a motor vehicle accident case.

To avoid losing the trial date, file the trial record and trial certificate not more than 28 days and not less than 14 days before trial Rule 12-3(3) (Filing and service of trial record).

Both parties must file a trial certificate in Form 42 that confirms they have completed all examinations for discovery and are ready to proceed.

Supreme Court Civil Rules forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

1.5-2 - Rule 15 - Fast Track Litigation

Rule 15-1 (Fast Track Litigation) is a fast track rule for proceedings that may be litigated in three days or less, where the claim is for $100,000 or less, or by consent. Rule 15-1 does not apply to family law proceedings.

Any party to a proceeding may trigger the fast track provisions under Rule 15-1 by issuing a notice of fast track action in Form 61.

The regular document discovery procedure under Rule 7-1 (Discovery and Inspection of Documents) applies to fast track litigation. Examinations for discovery are limited in fast track litigation. Each party may be examined for discovery by other parties for a total of 2 hours and such discovery must be completed no less than 14 days before the trial date.

Jury trials are not permitted in fast track proceedings: Rule 15-1(10).

Under Rule 15-1 parties may make the usual applications pursuant to Rule 7-1 to seek documents from the opposite party or third parties, but, according to Rule 15-1(7), applications supported by affidavit evidence are not permitted until a case planning conference is held.

Although this restriction does not apply only to fast track proceedings, it is worth noting that interrogatories, which are a type of written discovery questions regulated by Rule 7-3 (Discovery by Interrogatories), may only be used if the party to be examined consents or the court orders that the interrogatories be answered under Rule 7-3(1).

Rule 15-1 is sometimes used by plaintiffs who wish to prevent the defence from opting for jury trials in “low velocity impact” motor vehicle claims. If a party to a fast track proceeding applies for a trial date within four months after the date on which the rule becomes applicable, which may be when the notice of fast track action in Form 61 is filed, then the registry must provide a date for trial within four months of the application for a trial date; see Rule 15-1(13). In practice

the registry may provide a date after the four-month window if there are no available judges within the four-month period. If a party insists that the registry abide by the rule and set the trial within four months, the registry will do so with a warning that it is essentially double-booking trials and unless matters settle, some trials will get postponed.

Under Rule 15-1(7) a case planning conference must be held before any chambers applications supported by affidavit evidence can proceed. However, Rule 15-1(8) makes exceptions for:

- applications to remove the matter from Rule 15-1;
- applications under Rule 9-5 (striking pleadings), Rule 9-6 (summary judgment) or Rule 9-7 (summary trial);
- applications to add, remove or substitute a party; and
- applications by consent.

Note that Part 11 (Experts), concerning expert witnesses and testimony, applies to fast track litigation.

Also keep in mind that the tariff of costs for Rule 15-1 matters is capped pursuant to Rule 15-1(15). However, the court can take into account special circumstances, for example an offer to settle.

Supreme Court Civil Rules forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

1.5-3 - Jury Trials

A jury trial will typically last two days longer than a non-jury trial because of additional steps like jury selection and the judge's charge to the jury.

If you are considering a jury, analyze how the judge will likely charge the jury in your case by reviewing **CLEBC**'s *Civil Jury Instructions* (CIVJI).

The jury is the trier of fact but sifting through facts, weighing contingencies, and deciding on the weight to give evidence is heavily influenced by the judge's charge to the jury.

Jury trials increase the risk for both parties because the costs awarded in a jury trial may be more than in a judge alone trial. Also, since juries do not issue reasons for judgment, their awards can sometimes be difficult to appeal. Always conduct your first jury trial with the assistance of experienced counsel.

Both the plaintiff and defendant are entitled to request a jury trial; see Rule 12-6 (Jury Trials).

To obtain a jury trial, you must:

- Within 21 days of service of the notice of trial, and no later than 45 days before trial, deliver a notice requiring trial by jury in Form 47;
- Not later than 45 days before trial, pay the sheriff to gather members of the public to be empanelled; and
- After the trial commences, on days 2 through 10, pay a daily deposit of $800, in advance, otherwise the trial will not continue.

If the opposing party files a jury notice and fails to pay the fees, effectively abandoning the jury, the non-filing party cannot make use of the other party's jury notice, pay the fees and preserve the jury.

The filing party has no right to proceed without a jury once jury fees have been paid, but can apply for a ruling that the case is not suitable for a jury even after the jury fees have been paid: *Iskum v. Badali*, 2009 BCSC 1669.

Eight jurors are empanelled in a civil case. Each party is entitled to four challenges without cause in a two-party proceeding, which prevent a juror from sitting on the panel. Any number of jurors may be challenged for cause.

Review the *Jury Act* when preparing for a jury trial.

Prepare written opening and closing statements and expect the judge to review them in advance; even senior counsel are routinely ordered to edit their comments.

Application to strike the jury

If you do not want a jury to hear the case, consider an application to strike the jury under Rule 12-6(5) within seven days of delivery of the jury notice, or at any stage, because the issues relate to a matter enumerated in Rule 12-6(2).

The grounds for an application under Rule 12.6(5)(a), which is only available within seven days of delivery of the jury notice, are that:

- the issues require extensive examination of documents or accounts;
- the issues require a scientific or local investigation that cannot be made conveniently with a jury;
- the issues are of an intricate or complex character; or

- the extra time and cost involved would be disproportionate to the amount involved in the action, known as proportionality.

1.5-4 - Case Planning Conference

Case planning is addressed in Part 5 of the Supreme Court Civil Rules.

A case planning conference (CPC):

- can be requested by either party after the close of pleadings; see Rule 5-1(1) (Case planning conference may be requested), or
- may be held at the direction of the court; see Rule 5-1(2) (Case planning conference may be directed).

To request a CPC, file a notice of case planning conference in Form 19 after obtaining a date and time from the registry. Serve the notice on the parties at least 35 days in advance of the scheduled date for the first CPC. Subsequent CPCs may be held on shorter notice and notice must be served seven days ahead of the conference; see Rule 5-1(3) (Time for service of notice).

The process for filing a case plan proposal are set out in Rule 5-1(5) (Case plan proposal required). The party of record who requests a CPC must file a case plan proposal and serve it on the other parties within 14 days after serving a notice of the CPC under Rule 5-1(5)(a). Each other party of record must file its case plan proposal within 14 days after receiving the notice and serve a copy on all other parties of record; see Rule 5-1(5)(b). The contents of the case plan are specified in Rule 5-1(6) (Contents of case plan proposal) and must be included in the case plan proposal (Form 20).

While not mandatory, consider taking advantage of the benefits of the CPC.

The issue to be litigated, discoveries and experts can all be established at the CPC.

You may be able to establish the scope of document discovery or the length of oral discovery.

At the CPC, the judge or master may make orders regarding the conduct of the matter, including setting a timetable for steps, establishing limits for discovery, amending pleadings, setting witness lists, establishing issues for expert evidence, directing mediation or settlement conferences, and respecting offers to settle; see Rule 5-3 (Case Planning Conference Orders). The master or judge will not consider any application that is supported by affidavit evidence

under Rule 5-3(2) (Prohibited orders). If an order is made in a CPC and a party does not comply with the terms of the order, costs may be awarded against that party.

Supreme Court Civil Rules forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

1.5-5 - Discovery Process

Oral examination for discovery is often a decisive step in the litigation, and an unprepared client can destroy a case. A client can harm credibility by failing to answer the question asked, failing to recall past events relevant to the action, failing to adhere to what they recall, failing to grasp the importance of their response on key issues, and failing to keep their temper. It is important to instruct your clients how to present themselves properly at an examination for discovery.

Under the Rules of Court there is no requirement to file a demand for discovery of documents, but rather each party is automatically obliged to serve a list of documents within 35 days of the close of pleadings. Counsel should then obtain a copy of the opposing party's documents and have the client review all relevant documents prior to testifying at discovery. If the opposing party has not provided satisfactory document production, Rule 7-1 (Discovery and Inspection of Documents) provides several remedies including an order for further document disclosure or for an affidavit verifying a list of documents.

Oral discovery and document production are subject to the principle of proportionality, including restricting oral discovery for cases under Rule 15-1 (Fast Track Litigation). As well, the scope of documents producible has been reduced to eliminate the wide discovery traditionally available under prior cases, such as *Peruvian Guano*, where the test was possible relevance. Peruvian Guano, which previously set the standard for discovery, was decided more than a century ago and before the large quantities of documents that are standard today. Broad disclosure is now only available by special request pursuant to Rule 7-1(11). This change in the principles of disclosure emphasizes relevance and the parties' communication and cooperation regarding documents to be disclosed. The primary test for relevance of a document is whether the document could prove or disprove a material fact (see Rule 7-1(1)) and the secondary test is whether the documents sought "relate to any or all matters in question" (see Rule 7-1(11)).

Parties are encouraged to agree at an early stage regarding relevant matters, time periods, physical location of documents and proportionality.

Scheduling

The examination for discovery of an adverse party under Rule 7-2 (Examinations for Discovery) can take place without leave of the court up to 14 days before trial. However, it is not a good practice to leave discoveries that late. Discoveries should proceed after proper documentary disclosure.

In practice, most counsel set up discoveries at the same time as setting trial dates. A party can set up an examination for discovery on seven days' notice by serving the party or their representative with an appointment to examine for discovery in Form 23. Refer to Rule 7-2(13) for how to serve a party of record who is represented by a lawyer, note the Rule also references a person, corporations and minors. Conduct money is required in accordance with Schedule 3 of Appendix C as specified in Rule 7-2(13). Also, unless otherwise agreed, examination for discovery must take place at the office of an official reporter within 30 km of the registry nearest to the residence of the person being examined.

Supreme Court Civil Rules forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

Selecting Representatives for Discovery

When dealing with municipalities and corporations, remember that you have a range of possible representatives to examine for discovery. Rather than automatically accepting the name offered by the adverse party, investigate the appropriate person to be examined by looking at public information and documents disclosed. The party requesting the discovery has the right to select someone other than the person identified by the corporation or municipality. For example, a risk manager or chief inspector may be substituted for the mayor of a city government in a slip and fall case. The burden is on the corporation to bring an application, pursuant to Rule 7-2(5) (Examination of party that is not an individual) , if they wish to oppose the examination of the person selected by the examining party on the basis of prejudice. However, the courts are generally reluctant to override a party's choice of representative for discovery.

Representatives must inform themselves if the answers are not within their knowledge. However, if after discovery it seems that the person nominated was the wrong choice, you can apply under Rule 7-2(5) for a court order to change the representative.

Discovery often leads to disclosure of the names of witnesses and if witnesses refuse to provide responsive statements you can apply under Rule 7-5(1) (Order for examination) to examine them under oath.

Objecting to Questions

You may object to questions during discoveries. Common grounds for objection are lack of relevance, privilege, opinion evidence, or questions about prior criminal activity that do not relate to the matter.

If you object to a question, advise your client to not answer and ask the examiner to move to another question.

Remember, the place to resolve disputes over questions is in chambers, not in the discovery room. The common practice for counsel to state their objection on the record does not restrict them from changing that position in chambers.

Speaking to Client during Discovery

Speaking to the client during discovery should be restricted as described in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 1992 BCSC 1832.

Where discovery will last less than a day, counsel for the witness should refrain from having any discussion with the witness during a recess, in order to maintain the appearance of proper conduct.

Some limited discussion of evidence is acceptable between successive days of examinations. For example, you may discuss settlement options with your client in light of the evidence already presented. **However, advising the examinee about answers to give is improper.**

Generally, if you intend to discuss evidence with the examinee during a break in discovery you should disclose it to opposing counsel beforehand. If they object you may need to seek leave of the court. Counsel for the witness should not seek an adjournment during the discovery in order to discuss the witness's evidence.

1.5-6 - Interlocutory Applications

Part 8 of the Supreme Court Civil Rules governs applications by consent (Rule 8-3); without notice (Rule 8-4); where the matter is urgent (Rule 8-5); and by way of written submissions as directed by the case planning conference judge (Rule 8-6).

A party brings an application by filing and serving a notice of application, Form 32, and supporting affidavits. Different rules apply depending on the content and length of the application. Applications that will take longer than two hours must be scheduled through the Trial Division. Applications must be served either eight clear business days before the date set for the hearing, or 12 clear business days for summary trial applications under Rule 9-7 (Summary Trial).

According to Rule 8-1(1) "business day" means a day on which the court registries are open for business. An application response in Form 33 must be served by the application respondent within five business days of service of the application, or within eight business days for summary trial applications.

On all applications the applicant must file an application record, pursuant to Rule 8-1(15), by 4 p.m. on the business day that is one full business day before the hearing. If the respondent intends to set an application on the same day as the original application, the parties should prepare a joint application record.

The index to the application record must be served on the respondents no later than 4 p.m. on the business day that is one full business day before the date set for the hearing; see Rule 8-1(17).

Part 22 of the Supreme Court Civil Rules governs chambers proceedings, which include petition proceedings under Rule 16-1, requisition proceedings under Rule 17-1, applications to change or set aside orders, and applications for judgment under Rule 3-8 (default judgment), Rule 7-7(6) (application for order on admissions), Rule 9-6 (summary judgment), and Rule 9-7 (summary trial).

Supreme Court Civil Rules forms, along with other helpful guidance regarding the processes, are available on the BC government's website.

1.5-7 - Summary Trial

Parties can apply for a summary trial on affidavit evidence under Rule 9-7 (Summary Trial) .

Summary trial is not available where the issues are too complex or inappropriate for final judgment based on affidavit evidence alone. A conflict in the affidavit evidence, however, is not necessarily fatal to a summary trial if the conflict is not material or can be resolved through the affidavit evidence.

A leading case on suitability for summary trial is *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.*, 1989 BCCA 229.

You may apply in advance of the summary trial to determine whether the matter is suitable for summary trial.

1.5-8 - Mediation

Mandatory Supreme Court mediation may occur under three different regulations:

- Notice to Mediate Regulation, B.C. Reg. 127/98 under the *Insurance (Vehicle) Act*;
- Notice to Mediate (General) Regulation, B.C. Reg. 4/2001 under the *Law and Equity Act*; and
- Notice to Mediate (Residential Construction) Regulation, B.C. Reg. 152/99 under the *Homeowner Protection Act*.

Exemptions

According to s. 2 of the *Notice to Mediate (General) Regulation*, family law proceedings, *Judicial Review Procedure Act* proceedings, and claims for compensation for physical or sexual abuse are exempt from mandatory mediation.

Notice to Mediate

Some subtle differences exist in the Notice to Mediate Regulation under the *Insurance (Vehicle) Act* and the Notice to Mediate (General) Regulation under the *Law and Equity Act*:

Issue	Motor vehicle mediations	General mediations
When is notice to mediate sent?	No earlier than 60 days after close of pleadings and no later than 77 days before trial.	No earlier than 60 days after close of pleadings and no later than 120 days before trial.

Issue	Motor vehicle mediations	General mediations
When is appointment of mediator to be completed?	Within 10 days after delivery of the notice to mediate.	If there are four or fewer parties, within 14 days after delivery of the notice to mediate. If there are five or more parties, within 21 days after delivery.

In actions falling under the Notice to Mediate Regulation under the *Insurance (Vehicle) Act*, ICBC employs a staff of dispute resolution coordinators to arrange mediators and dates.

Why Mediate?

Mediation has several advantages.

- The mediation briefs force the parties to review their positions and reconsider their likelihood of success at trial.
- The parties, not just their lawyers, participate in negotiating the end to a dispute, which can lead to emotional resolution.
- Parties and their counsel have their positions tested in an informal atmosphere.
- Professional mediators, in caucus or in open session, force parties to look at the risks of proceeding and the benefits of early resolution.
- In complicated cases, pre-mediation sessions can ensure that the parties come prepared on the other party's points of concern.

If a notice to mediate is served as required by the regulation, attendance at mediation is mandatory and failing to attend may result in costs, striking the claim or defence, or other orders.

If you believe that the mandatory mediation will be a waste of time and resources, make an application to adjourn or exempt the matter from mediation.

Finding a Mediator

See the **Mediate BC** Directory of Civil Mediators to find a mediator from the Civil Roster.

Outside the Lower Mainland, finding a mediator who is a member of the Civil Roster can create practical problems and parties should anticipate delays beyond the timelines specified by the regulations.

Mediators who are not members of the Civil Roster can be appointed with the consent of both parties.

1.5-9 - Trial Preparation & Expert Witnesses

Trial Preparation

Some of the key steps in preparing for trial are to:

- Line up your experts early and diarize the reports for service.
- Determine what witnesses you need to prove your case.
- Subpoena any lay witnesses.
- Consider the order in which your witnesses should testify.
- Summarize the examination for discovery transcripts for quick reference at trial.
- Determine the documents you will need to enter as exhibits and consider seeking a document agreement with opposing counsel.
- Ask opposing counsel if they intend to call the party you examined for discovery so you can skip reading in that party's evidence and instead elicit the information in cross-examination. Be sure to advise the judge of this intention before you close your case if you are acting for the plaintiff.
- Consider an offer to settle pursuant to Rule 9-1, which if bettered at trial may increase your client's entitlement to costs.

Expert Witnesses

Part 11 of the Supreme Court Civil Rules deals with experts.

Expert evidence is opinion evidence on matters outside the ordinary experience and knowledge of a judge or jury and is commonplace in civil trials, including personal injury and valuation of real estate, businesses, and shares.

Ensure your experts do not intrude into the areas reserved for the trier of fact, which is known as encroaching on the ultimate issue. Applications to strike or edit expert reports that touch on the ultimate issue routinely succeed at trial.

Other grounds for objection to expert reports are:

- straying outside the qualifications of the witness;
- dressing up arguments as opinion; or
- opining on areas which are irrelevant, superfluous, of no assistance to the trial judge, or which touch on areas which the trial judge alone is to determine.

A party who objects to the admissibility of an expert opinion produced by the opposing party must do so either 21 days before trial, or before the trial management conference, whichever is earlier under Rule 11-6(10) (When objection not permitted).

A party who wishes the opposing party's expert witness to attend the trial for cross examination must make a demand within 21 days of being served with the expert's report under Rule 11-7(2) (When report stands as evidence).

Rule 11-2 (Duty of expert witnesses) and Rule 11-6 (Expert reports) set out requirements for the contents of expert reports, including:

- the qualifications of the expert;
- the facts and assumptions upon which the opinion is based;
- a list of material reviewed; and
- the name of the person primarily responsible for the content of the statement. If there is more than one person involved in the preparation of the report, the second individual must also be identified.

Judges frequently rule inadmissible reports that do not meet the formal requirements. Prepare a standard letter to inform experts about the requirements for admissibility and the role of the expert. Your letter of instruction is compellable at trial so ensure that your letter does not taint the report that follows.

At case planning conferences the parties must identify the expert evidence they will be tendering. Expert evidence that is not anticipated by an order made following a case planning conference may not be admissible at trial by Rule 11-1(2) (Case plan order).

Parties are encouraged to use joint experts by Rule 11-3 (Appointment of joint experts).

Your expert's report must be served on the other side at least 84 days before the trial under Rule 11-6(3) (Service of report).

Responding opinion evidence must be served 42 days before trial under Rule 11-6(4) (Service of responding report).

1 - References & Resources

Primary statutes

- *Civil Resolution Tribunal Act*, SBC 2012, c 25
- *Small Claims Act*, RSBC 1996, c 430
- Small Claims Rules, BC Reg 261/93
- Supreme Court Civil Rules, BC Reg 168/2009

Other relevant legislation

- *Builders Lien Act*, SBC 1997, c 45
- *Court Order Enforcement Act*, RSBC 1996, c 78
- *Freedom of Information and Protection of Privacy Act*, SBC 1997, c 45
- *Judicial Review Procedure Act*, RSBC 1996, c 241
- *Jury Act*, RSBC 1996, c 242
- Notice to Mediate Regulation, B.C. Reg. 127/98 under the *Insurance (Vehicle) Act*;
- Notice to Mediate (General) Regulation, B.C. Reg. 4/2001 under the *Law and Equity Act*; and
- Notice to Mediate (Residential Construction) Regulation, B.C. Reg. 152/99 under the *Homeowner Protection Act*.
- *Property Law Act*, RSBC 1996, c 377
- *Strata Property Act*, SBC 1998, c 43
- *Wills, Estates and Succession Act*, SBC 2009, c 13

Law Society of BC

- Practice Checklists Manual
- Law Society Rules, specifically those pertaining to client identification and verification
- Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources*:*
    - Sample retainer letters (including a general retainer agreement and a joint retainer**)** under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
    - Sample non-engagement letters under the heading *Client files*
    - Lawyers Sharing Space resource under the heading *Organizing your law office*
- Code of Professional Conduct for BC (*BC Code*), in particular:
    - rule 3.2-9 (Clients with diminished capacity) and the associated Commentary

    - section 3.4 (Conflicts)
        - rule 3.4-43 (Space sharing arrangements)
- Client capacity
    - Practice Advisor's - Frequently Asked Questions include an overview of the relevant obligations and resources regarding client capacity and undue influence
    - Additional resources to assist in navigating issues of client capacity are available in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website, including "Acting for a Client with Dementia", Spring 2015 Benchers' Bulletin.

Lawyers Indemnity Fund

- Limitations and deadlines

External resources

- Civil Resolution Tribunal website
- Mediate BC Directory of Civil Mediators maintains a Civil Roster of mediators
- The BC Law Institute (BCLI) has helpful resources including:
    - Report on Common-Law Tests of Capacity
    - Undue Influence Recognition & Prevention: A Guide for Legal Practitioners (December 2022), which includes this Undue Influence Recognition and Prevention: A Reference Aid
- Court Services Online
- The Provincial Court of British Columbia website includes helpful resources including areas for Small Claims Cases and Justice of the Peace Adjudicators
- The BC government's website includes:
    - Small claims forms, along with other helpful guidance regarding the processes
    - Supreme Court Civil Rules forms, along with other helpful guidance regarding the processes
- Small claims pilot - financial debt claims in Robson Square
- CLEBC's resources include:
    - *British Columbia Motor Vehicle Accident Claims Practice Manual*
    - *Civil Jury Instructions(CIVJI)*
    - *Civil Trial Handbook*
    - *Discovery Practice in British Columbia*
    - *Provincial Court Small Claims Handbook*

MODULE 2 – REAL ESTATE

2 - Introduction to the Real Estate Module

This module has been prepared to assist lawyers with a residential conveyancing practice. There are many nuances to the practice of real estate law, and it is beyond the scope of this module to cover all of the details.

References & Resources

The learning materials for this module refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*. For a summary of the key resources, see section ***2 - References & Resources*** at the end of the module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed *en masse* for update in 2012.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

2.1 Organizing your Real Estate Practice

2.1-1 - Law Office Economics

A real estate practice can be both rewarding and dangerous.

Before deciding whether you want to develop a client base in this type of law, consider:

- **Time management -** If real estate makes up 20 to 75 per cent of your law practice, you will have a difficult time balancing that part of your practice with the rest of your files. Real estate transactions often require you to be available for last minute emergencies.
- **Conveyancing requires anticipating problems, being highly organized and paying attention to detail.** You and your support staff should have these skills and should enjoy working with deadlines. Clients who are unable to move into their new home or who do not receive their net sale proceeds as a result of your errors will not be happy.
- **Competitive rates and narrow profit margins -** Many clients tend to shop around for the lowest price, resulting in a competitive market among lawyers and notaries. Profit margins can be small, as conveyances are often billed at a flat rate. An error that requires withdrawal and amendment of a document will often erase any profit. Hope that the profit that you make on your smooth files balances out the extra, unpaid time you spend on your rough ones.
- **The typical file has a short deadline.** If you miss that deadline the file becomes a liability trap. Stress is increased because you depend on information supplied by other people to meet timelines imposed without your input. In particular, if you have any input before the contract is firm and binding, advise your client and the realtor never to schedule the completion date of a sale and a purchase on the same day because of the impractical logistics of closing registrations and transferring funds within a couple banking hours.
- **Overhead and infrastructure requirements -** A real estate file generally takes up more bookkeeping time than any other type of practice. You will need more than one trust account and will have to keep track of funds deposited directly, funds coming in by way of bank draft and funds being transferred from other files.
- **Unexpected issues -** Expect to regularly deal with unexpected issues that go well beyond simply completing title and ensuring registration of an enforceable mortgage. Such issues include incorrect or incomplete mortgage instructions, last minute changes to contract dates, disagreements over realtor fees, strata fees, tax issues, vendor residence issues, holdbacks, and complicated banking arrangements.
- **Complexities -** A real estate practice requires you to consider a range of possibilities.

  - For example, if a client calls about the sale of their house, consider whether marriage breakdown is an issue. If it is, a written separation agreement may be required so you can disburse the monies correctly and you may be unable to act for both spouses. Many clients don't think about other important decisions, such as whether to be registered as joint tenants or as tenants in common, and whether their decisions have tax issues implications, such as if one of the purchasers is a parent who does not intend to live in the property, capital gains tax issues can arise on the subsequent sale.
  - Where multiple parties will occupy the property and share ownership, advise them to consider a co-ownership agreement, which sets out the rights and responsibilities of the co-owners, including the allocation of responsibility for mortgage payments, municipal property taxes, insurance, repairs and maintenance, and the equity entitlement to net sale proceeds on subsequent sale.
  - Be prepared to spend time on these issues, often without increasing your fees.
- **Education** - Also, anticipate that realtors do not always adequately educate their clients about issues that arise in a real estate transaction, particularly about the Property Transfer Tax and the cash balance of funds required to complete a purchase.
- **Pressure** - Combine deadlines and substantial sums of money with the need for people to have a roof over their heads, and you end up with considerable pressure on conveyancers to make deals complete on time and without error. Do not make the client's problems your problems by cutting corners.

Most residential real estate deals routinely require you to act in a situation that would be a conflict of interest if it were not for Appendix C - Real Property Transactions of the *BC Code*.

Unintentional breaches of conflict rules can lead to liability.

Often, when a deal goes wrong, it does so on the completion date.

You must be available to act quickly and to keep accurate written notes of all of your phone conversations, including time of call. Clients will generally expect you to be there for them in a crisis without considering paying more for your service. Remember that for many clients, purchasing a home is the most significant financial transaction of their lives and may be their only interaction with a lawyer.

2.1-2 - Conflicts of Interest & Mandatory Disclosure

Before you ever accept a real estate file, be well aware of your duty to assist your client to avoid foreseeable risk. Remember, liability in tort or breach of fiduciary duty does not require a contractual relationship and can even extend past the duty to your own client.

To act for a purchaser/borrower and a lender, or for a purchaser and a vendor, would be a classic conflict of interest if it were not for specific circumstances addressed in the *BC Code* (see section 3.4 (Conflicts)). Even when dealing with two purchasers who are not married, the discussion about whether to own property as joint tenants or tenants in common can result in a situation where one purchaser should be advised to obtain independent legal advice.

Conveyancers can be involved in transactions where potential conflicts turn into actual conflicts and litigation ensues. **Protect yourself.**

Many lawyers refuse to act simultaneously for both a purchaser and vendor, although the *BC Code* does allow it under some circumstances.

Ask yourself whether the few extra dollars that you will earn is worth the risk.

If you are acting for more than one party, it is imperative to know the *BC Code* provisions governing conflicts. *BC Code* section 3.4 and Appendix C - Real Property Transactions were written with real estate conveyancing in mind.

BC Code Appendix C, rule 2 sets out the basic guidelines for when you can act for parties with different interests. Generally, unless a transaction is a “simple conveyance”, you cannot act for parties with different interests, such as a purchaser and a vendor, or a purchaser/borrower and a lender.

BC Code Appendix C, rule 4 states that to determine whether a transaction is a simple conveyance, you must consider such factors as:

- the value of the property;
- the existence of non-financial charges on title; and
- the existence of liens and uncompleted construction.

You should not act for more than one party in any transaction that involves unusually expensive property or has any construction or possible lien complications. *BC Code* Appendix C, rule 4 does not offer much practical guidance as so many properties in British Columbia are valuable.

Even if you think you can meet the requirements of Appendix C, if the transaction feels as if it will be convoluted or problematic, don't represent all parties. *BC Code* Appendix C, rule 4 sets out some examples that may be treated as simple conveyances, but only so long as the provision does not exclude them. Note that rule 4, commentary 1(d) only allows you to represent a borrower and a lender when:

- there is no commercial element to the mortgage;
- the mortgage is on the borrower's residence; and
- the mortgage is given only to an institutional lender.

This precludes you from acting for both a borrower and a private lender, which would include lenders who are family members or any other non-institutional lender. *BC Code* Appendix C, rule 4 lists some transactions that are not simple conveyances:

- a transaction in which there is any commercial element;
- a conveyance included in a sale of a business;
- a transaction involving a building with more than three residential units;
- a transaction in which there is a mortgage back to the vendor;
- a transaction in which the lawyer's client is a developer, unless the sale is of completed residential building lot and the builders' lien period has expired; and
- a conveyance of a residential property with substantial improvements under construction.

BC Code Appendix C, rule 4 also precludes you from acting for more than one party in several more scenarios including some leasehold conveyances, some revolving mortgages, agreements for sale and marketing schemes where legal services are included in the price.

Even if a transaction fits into the parameters of *BC Code* Appendix C, rule 3 requires you to comply with the obligations set out in *BC Code* rules 3.4-5 to 3.4-9 (Joint retainers). You must get both clients' written consent to represent them in circumstances that might, in the future, give rise to divided loyalties.

Mandatory Disclosure

Mortgage instructions from the lender often include the lender's consent for you to act for the purchaser. However, if this is not clear in the instructions, or if the lender has not already given your firm a blanket consent to act for purchasers, obtain a written consent from the lender as well.

The Law Society has a **sample joint retainer letter** in the Support and Resources for Lawyers > Practice Resources area of the website.

2.1-3 - Practical Strategies

Being on top of your game in a real estate practice requires pre-emptive thinking. A good way to start is to always:

- Read the contract and speak with your client as soon as possible so that you can understand what you are expected to do.
- Be clear and document all your communications.
- Clarify the scope of your retainer in writing.
- Ensure that you haven't inadvertently changed any terms of the contract of purchase and sale.
- Ensure that multiple clients for whom you act understand the transaction.
- Identify, and act on, the need for independent legal advice.
- Don't be afraid to call a colleague if you aren't sure what to do.
- Participate in continuing professional development to stay current.

2.1-4 - Land Title Office Forms

All land title forms should be completed in accordance with the detailed instructions in **CLEBC**'s Land Title Electronic Forms Guidebook, also known as the "Green Book".

If you fill out a form incorrectly, or use the wrong form, your document could be rejected and closing delayed.

2.2 - Special Considerations

2.2-1 - Dealing with Unrepresented Parties

In some cases you will be asked to help an unrepresented vendor or covenantor to a mortgage, in order to avoid the expense of separate legal representation.

BC Code Appendix C - Real Property Transactions, rules 7 to 9 allow you to certify the signature of an opposite but unrepresented party provided that you:

- recommend independent legal representation;
- make it clear you are not acting for the unrepresented party; and
- only attend to the execution of the documents.

This can be a dangerous practice because people do not always understand your explanation and may consider you to be their lawyer, even though you made it clear in writing and verbally that you are not. If there is an unexpected result, a casual encounter may lead to a claim of negligence or breach of fiduciary duty. Purchaser's lawyers have been held liable for the losses of unrepresented vendors when the lawyer should have known the vendor was relying on them, and the vendor was not referred for independent legal advice; see, for example, *Tracy v. Atkins*, 1979 (BCCA).

If you deal with unrepresented parties who won't get independent legal advice, have them sign a waiver.

The waiver is more likely to be enforceable if you raise seeking independent legal advice well before the appointment for the unrepresented party to sign the mortgage; see *May v. Dunster*, 1996 (BCSC).

There are several potential traps for the unwary, including:

- **Acting for a covenantor to a mortgage where your clients are the purchaser/borrower and the institutional lender.** As outlined above, covenantors can in the right circumstances be unrepresented parties, if you obtain a waiver and advise properly on the option to seek independent legal advice, but you cannot represent them as an additional client when you already represent the borrower and the lender.
- **Acting for multiple parties who are family members, even if you comply with the provisions of the *BC Code*.** Typically, you will be asked to act for a purchaser and a vendor of property who are family members. You must explore the reasons for the conveyance and the parameters of family dynamics. Find out whether other family members might view the conveyance as an unfair benefit to one party, whether the conveyance triggers unanticipated early capital gains on a property is not the principal residence of the vendor, or whether it is the principal residence of the vendor but not of the other family member taking joint title, in which case a sale could trigger a capital gain on the interest that would otherwise have been sheltered.
- **Acting in a capacity where elderly people are guaranteeing a loan or transferring a property, and you have not been alert to signs of undue influence, duress, or lack of capacity.**

2.2-2 - Elderly Transferor

At some point in your career as a real estate lawyer you will be asked to transfer a family home from an elderly parent to one or more of their children for inadequate consideration. This consideration may be worded as, for example, "$1.00 plus mutual love and affection". This is rarely as straightforward as the potential clients suggest. You must ensure that the parent receives independent legal advice, has the capacity to make such a decision, and is not being unduly influenced.

Assessing capacity

Assessing capacity can be a difficult task. People who appear to understand what they are doing may lack the ability to make complex decisions. Difficult capacity issues can arise where an adult child represents a parent who speaks little English, but the parent assures the lawyer that they understand the full legal implications of the proposed transaction.

Capacity

Be sure to review *BC Code* rule 3.2-9 - Clients with diminished capacity and the associated Commentary.

An overview of the relevant obligations and resources regarding client capacity and undue influence is covered in these Practice Advisor's - Frequently Asked Questions.

Additional resources to assist in navigating issues of client capacity are available in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website, including:

- Practical guidance on acting for clients with diminished capacity can be found in "Acting for a Client with Dementia", Spring 2015 Benchers' Bulletin.

The BC Law Institute (BCLI) has helpful resources including:

- Tests for capacity are analyzed and evaluated in this Report on Common-Law Tests of Capacity
- Guidance regarding circumstances involving potential undue influence in this Undue Influence Recognition & Prevention: A Guide for Legal Practitioners (December 2022), which includes this Undue Influence Recognition and Prevention: A Reference Aid

2.2-3 - First Nations Lands & Leasehold Titles

These topics are beyond the scope of this module. They are listed here as a reminder that you should, upon being contacted by a potential client, review the details of the transaction and determine whether you have the knowledge to deal with any issues that may arise.

Conveyances of First Nations lands have strict procedural requirements dictated in part by the *Indian Act* and in part by guidelines adopted by the individual bands.

Certain properties in British Columbia, including residential and strata title properties, are held by their "owner-occupiers" by way of a leasehold interest rather than by fee simple title. Such lands include property located on First Nations lands and leasehold strata titles owned by universities or governmental bodies such as the provincial Crown or a municipality. The number of leasehold titles is increasing. For example, a substantial development near Simon Fraser University is all leasehold title and many developments on the Saanich Peninsula are leasehold titles.

Conveyances of Leasehold Strata Titles

Conveyances of leasehold strata titles are governed by the *Strata Property Act*. Many ground leases for leasehold strata developments contain rent escalation or review clauses that take effect at different periods during the term of the lease. These clauses may substantially affect the rent payable by a purchaser and, therefore, the fair market value of the property. Although ground leases are usually lengthy documents and expensive to copy, lawyers should advise the client to obtain and review full copies of the ground lease in order to determine liability for rent. See *Rieger v. Croft & Finlay*, 1992 (BCSC), which held that the lawyer had a duty to obtain a copy of the head lease and extract essential terms, including the years remaining to rent and the manner by which the rent would vary over time.

Conveyances of Leasehold Titles

Conveyances of leasehold properties are completed by forms of assignments that are normally attached as schedules to the applicable ground lease. Usually such assignments require the signatures of the vendor, the purchaser, and the registered owner of the property. The assignment of leasehold title, which substitutes for the transfer in fee simple, is registered in the Land Title Office using a Form C. Lending on leasehold title requires different notations on the Form B mortgage. You may be able to obtain a copy of the last assignment of leasehold title from the Land Title Office. It will provide you with a possible precedent and some information on the history of the property.

2.2-4 - Undertakings

Most conveyances involve undertakings. When you give your undertaking, you are making a personal obligation to act, or to refrain from acting, in a certain manner.

Norfolk v. Aikens, 1989 (BCCA) has clarified some of the undertakings that often arise in conveyancing. However, sometimes the parties agree to different undertakings, so ensure that the other lawyer is still following proper principles and complying with the terms of the purchase agreement.

The party who gives an undertaking cannot amend it. Only the party to whom the undertaking was given may agree to amend it.

Here are some practical rules for undertakings:

- **Never give an undertaking when some lesser form of communication will do.**
- **Never give an undertaking or let an undertaking be imposed upon you that you can't fulfill.** Think through the consequences of what you are promising to do, and if you are not the party in complete control of a situation you can only, for example, undertake to request that something be done by someone else. Think through all of the steps involved. For example, if payment of the purchase price depends on money coming from a lender, you can only undertake to pay if you actually receive that money from the lender. In short, never give an undertaking that requires prior performance by someone other than you.
- **Do not give verbal undertakings.** Reduce them to writing.
- **If an unacceptable undertaking is imposed upon you, be quick to reject it and seek to have it amended.** If you do not raise your objection to the undertaking, the passage of time may leave you in a situation where you are bound to comply, see *Wynndel Box & Lumber Company v. Zlotnik*, 1992 (BCCA).
- **Draft carefully.** Draft your undertaking precisely and never use or accept undertakings with vague wording such as the "usual terms" or the "usual undertakings".

See *BC Code* rule 5.1-6 - Undertakings and rule 7.2-11 - Undertakings and trust conditions.

2.2-5 - Shady Deals

Beware of deals where receipts are produced for surprise down payments without any evidence of deposit in a realtor's or solicitor's trust account.

- These may be situations where the price has been grossed up to make it appear that the property is more valuable or that the down payment is greater to circumvent lending rules.

Beware also of the practice of "lenders" issuing fake certified cheques.

- Always ask for bank drafts or for the money to be directly deposited into your account by the lending institution.
- If you receive a certified cheque, the Law Society recommends that you have the funds verified by your own bank.

Beware of the possibility of people misrepresenting who they are, for example, a girlfriend posing as a wife and then mortgaging the family home.

- Always make a photocopy of your client's photo identification in the form of valid passports and drivers' licenses.
- Also consider verifying the validity of a couple's marital status by requesting a copy of their marriage certificate.

Beware of situations where the client's instructions change.

- See the **Lawyers Indemnity Fund**'s Fraud Alerts, including situations in which lawyers' offices received fraudulent instructions to re-direct monies held in trust on closing.
- If you receive a change of instructions immediately prior to pay out, take additional steps to ensure the instructions are legitimate.

2.3 - File Organization

2.3-1 - Why is file organization important?

A real estate practice is paper intensive and requires organization.

The life of a real estate file is short – it frequently goes from file opening to completion within a few weeks.

The best way to stay on top of your workload is to organize your real estate files consistently and use checklists.

There are some suggestions from real estate practitioners on the following pages.

2.3-2 - Documents

- Two-hole punch all documents in the file. Your file should not contain loose papers.
- Protect draft letters and attachments by a paperclip to their envelope so you can easily determine that there is still a letter to be completed and sent.
- Do not sign and staple a letter until you have reviewed it and all attachments, so you can quickly determine whether there is still work to be done.

2.3-3 - Outside Front Cover

The outside front cover of a paper file should include the following elements:

- **File Label:** In addition to the client's name, current address, and phone/email information, the file label should include the address of the property and the name of any lender, if any. An example is - Purchase of 2050 Zebra Cove, Kelowna, B.C. and Mortgage in favour of the Royal Bank of Canada.
- **Checklist:** Attaching a file checklist to the front of the file is a quick reference during the life of the file.
- **Contacts:** The front cover is a good place to jot down the names and contact numbers of the "opposing" lawyer (and their conveyancer), the realtor, the mortgage broker and the mortgage center contact person.

- **Bring forward dates:** The upper right-hand corner of the front cover is a good place to mark down your bring forward dates. The last entry in that column should be an "OK to Close the File" notation with your initials.

2.3-4 - Inside Covers

Inside Front Cover

Here are the documents you should keep on the inside front cover of your paper file:

- **File Opening Sheet**
  - Collect important information from the client at your first contact.

- **In/Out Statement**
  - Money coming into your trust account should always equal money out.
  - Every file should have in/out statement and don't sign any cheques until they are noted on the in/out statement.
  - More importantly, never write a cheque or call your client with final cash to close figures unless all of the numbers add up.
  - Ensure that your staff knows to advise you immediately if there is a problem with the balancing of the ins and outs.

- **Financial information**
  - Note the name of the financial institution where the money was deposited and date of deposit on the in/out statement.
  - If you maintain numerous trust accounts, it is easy to mistakenly deposit the money into one account and try to withdraw it from another, especially when you are trying to coordinate a sale and a purchase for the same client.

- **Tax Information Sheet**
  - Create a document your staff can use to obtain tax and homeowner grant information. Modify your document to reflect local taxes, such as garbage pick-up fees.

Searches

- Get into the habit of filing all of your searches on the inside cover of your file. That way, you will always know where to look for them.

Disbursements and Account

- Get into the habit of filing all of your disbursement sheets like courier slips and a copy of your account on the inside cover.

Inside Back Cover

Affix all of your correspondence for the sale or purchase to the inside back cover.

Do not put anything relating to the mortgage here.

2.3-5 - Mortgage

The lending aspect of the purchase transaction is essentially a separate transaction.

Keep all of the documents relating to the loan or mortgage in an identifiably separate paper file.

On the front of your mortgage file, write your file number, the client's name, and the lender's name, so that it can always be reconnected with the main purchase file if it somehow gets lost in the shuffle.

For more information, see section ***2.5 - Mortgage File*****,** below.

2.3-6 - Closed Files

Storing closed files can be a costly endeavour.

Review the Law Society article Closed Files – Retention and Disposition to ensure that you are disposing of real estate files in a manner that fulfills your obligations and minimizes your risk.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society's website includes the following resources:

- Closed Files: Retention and Disposition
- Closing a file: What documents to keep and for how long (Winter 2017 *Benchers' Bulletin*)
- Ownership of Documents in a Client's File

2.4A - Purchaser's File

2.4A-1 - Introduction to Purchase File

The key to a successful real estate practice is to use retainer letters, questionnaires, and checklists consistently.

At the outset, define the scope of your services in writing, including both the services that you will perform *and the services that you will not perform* so your client does not have unrealistic expectations.

If your retainer letter excludes non-financial encumbrances, it does not relieve you of your obligation to:

- determine whether a lender requires you to review the non-financial encumbrances and
- discuss the nature of any non-financial encumbrances with your client.

Many clients care about the amount of their bill but do not understand potential problems. Describing the services that you will perform will prevent misunderstandings. Always keep notes of conversations with clients and confirm important instructions by letter.

The Law Society has **sample retainer letters** in the Support and Resources for Lawyers > Practice Resources area of the website.

2.4A-2 - Contract of Purchase and Sale

Familiarize yourself with the terms of your client's contract and diarize all important dates, including any subject removal dates.

- Often you will receive the contract after subjects have been removed, but confirm that fact if there is any doubt.
- Ascertain whether you have all documents referred to in the contract, such as addenda, disclosure statements, or tenancy agreements.

Check the contract for the vendor's declaration about Canadian residency. If there are non-residency issues, alert the vendor's lawyer immediately and impose undertakings to address the issue.

Typical closing procedures allow the purchaser to file the transfer and new mortgage and wait for the proceeds of the new mortgage before paying the purchase price. In turn, the vendor can wait for the purchase price before paying off financial encumbrances on title.

The **Canadian Bar Association BC Branch's Standard Undertakings** formalize these undertakings (login to the CBABC website to access).

2.4A-3 - Land Titles Office Searches

Always conduct your title searches as soon as possible as they may reveal issues that require immediate attention.

All land title offices are now computerized and almost all titles to land are computerized. To initiate a search, you need a legal description, which includes a parcel identifier number (PID). Once you have the PID you can obtain a computerized printout of the title using the myLTSA system.

When reviewing the computer printout of the title, consider:

- **Whether the title and the plan match.** You may have a split title, with another owner registered against another portion of the title, or an older house may straddle two parcels of land. 'Transfers' may be noted toward the bottom of the title, meaning that a portion of the land included in the legal description has been transferred. Clarify what your client is intending to buy.
- **Legal Notations** sometimes reveal financial encumbrances like personal property registrations by elevator companies that the vendor's lawyer needs to discharge. This information will affect the undertakings you require from the vendor's lawyer.
- **Pending Applications** are listed at the end of the search. Determine the nature of the application and obtain a copy, if appropriate.

- The **Certificate of Duplicate Indefeasible Title** may not be in the Land Title Office and must be returned in order to register a transfer or a mortgage against the title.
- **Corrections** may affect priorities on title.
- **Miscellaneous Notes** must be checked separately and may contain information about rights of way that impinge on title, or reservations such as those in favour of the Agricultural Land Reserve.

Strata Properties

Strata properties require both:

- additional searches from the Land Title Office; and
- additional forms completed by the property manager or strata corporation.

When your client is purchasing a strata property, also review the following documents from the Land Title Office:

- Title for the common property, because financial encumbrances registered against common title must be discharged; and
- Strata plan general index listing dates of registration of the strata bylaws and any revisions. Confirm that your client has reviewed the most recent bylaws.

2.4A-4 - Additional Searches and Information

Be sure to conduct the following searches:

- A property tax and utility search at the municipality noted on the title.
- A corporate registry search if the vendor is a corporation. If the corporation is not in good standing, the property may have escheated to the Crown and you will have to contact the provincial Escheat Office at 250.356.8819.

Strata Property

If a strata property is involved, obtain from the property manager or Strata Corporation:

- Form B Information Certificate, as required under s. 59 of the *Strata Property Act*, unless there is an up-to-date one attached to any disclosure statement.
- Form F Certificate of Payment, under s. 115(1) of the *Strata Property Act*.

- The name and phone number of the insurance agent who carries insurance for the strata corporation to obtain an insurance binder, which is required by most lenders.

If the other lawyer or notary is from a different city, you might find that there are differences in your real estate practices, such as who is responsible for obtaining the Form B and Form F and who is responsible for getting funds to the vendor's lawyer. Some lawyers agree to abide by the practice followed in the jurisdiction where the property is located, while others do not. Discuss these possible discrepancies with the other lawyer as soon as you get the file.

Other Searches

Although not part of a typical real estate conveyance, you may have to conduct other searches and investigations, such as zoning, environmental, and heritage designation searches.

Refer to **CLEBC**'s BC Real Estate Practice Manual for a full description of other searches that may be required.

Interim Report

If you have not previously confirmed client instructions to waive certain searches, send an interim report on title to your client. It should set out what you have found and review the searches and investigations that you do not plan to undertake. Note that some lenders require you to review all encumbrances on title, despite the purchaser's instructions, so you may still have to obtain copies in order to satisfy that requirement.

Encumbrances

When you meet with your client, determine whether the vendor or their realtor has provided a copy of the encumbrances registered against title. Discussing these encumbrances with your client ensures that they understand both the nature of the documents and the additional costs required to obtain them.

2.4B - Purchaser – Other Considerations

2.4B-1 - New Construction

If your client has come to you before entering into a contract for new construction, there are a number of provisions you should either advise them to insist upon or negotiate for the client.

New construction issues include:

- There is normally a provision for a walk-through but no mechanism, such as a hold-back, to ensure that deficiencies are fixed. Advise your client to try to negotiate a hold-back or negotiate a written list of deficiencies with a definite date by which the deficiencies will be repaired.
- Review the *Builders Lien Act*. For non-strata properties, the holdback is 10%. Remind your client that the builder's lien holdback is not a deficiency holdback but is for the benefit of subcontractors and material suppliers who might not get paid by the general contractor. Review the title search printout to see if any liens have been filed and to determine when the lien filing period will end. If the holdback period has not yet expired, determine if a holdback was actually retained and find out where it is.
- In the case of a new strata lot purchased from a developer, s. 88 of the *Strata Property Act* makes a special provision for a holdback. For strata lots, the holdback is 7% of the gross purchase price ending on the earlier of:
    - the time for filing liens has expired; or
    - 55 days after the lot is conveyed.
- Ensure that the contract provides for a final occupancy permit. Your client's institutional lender will not advance funds without it.

2.4B-2 - Marketing Subdivisions and Strata Lots

If your client is buying from a developer who is marketing "development property", the client must receive a disclosure statement that was prepared and filed by the developer with the Superintendent of Real Estate.

Development property is defined by s. 1 of the *Real Estate Development Marketing Act* including, among other things, subdivisions with five or more lots, and five or more strata lots in a stratified building.

Each prospective purchaser must receive the disclosure statement prior to signing the purchase contract, and the purchaser, under s. 21 of that Act, has a right of rescission for seven days after the later of signing the contract or the receipt of a disclosure statement, or any new or amended disclosure statement.

2.4B-3 - Additional Strata Lot Issues

Strata minutes

- Ensure that the purchaser has reviewed at least five years of the available minutes of the meetings of the strata corporation.
- Realtors in some locations may only provide only two years' worth of minutes.
- If the minutes are dropped off at your office, do not let your client assume you will review them without additional charge unless that service is part of your standard fee.

How will outstanding special assessments be paid?

- Without agreement, the vendor is responsible only for amounts payable before closing under s. 109 of the *Strata Property Act*.

Is the strata corporation in the midst of litigation?

- This should be disclosed on the Form B.
- If so, who pays future assessments to fund the litigation and how will any proceeds be distributed?
- In particular, should an assignment of proceeds be included in the conveyance?

Does the purchaser intend to rent the strata lot?

- If so, do the by-laws allow it?
- If the strata lot is currently rented, has the purchaser confirmed whether the rental complies with the by-laws?
- Has the purchaser reviewed the Form J-Rental Disclosure Statement filed by the owner-developer?
- Warn the purchaser that future bylaw amendments may preclude rentals.

Strata bylaws

- Do the strata bylaws contain restrictions, such as a minimum owner's age or a prohibition on pets?

Strata parking and storage lockers can be tricky given the variety of ways that developers can allocate them.

- Not all allocation techniques will necessarily survive closing.

2.4B-4 - Tenants in Possession

Always ascertain whether tenants occupy the property and whether the vendor has given them adequate notice to vacate.

Although this module does not cover the *Residential Tenancy Act*, be familiar with that statute to ensure compliance and that your clients are protected.

2.4C - Purchaser – Documents

2.4C-1 - Documents Prepared by the Purchaser's Lawyer

The purchaser's lawyer must prepare these documents:

- **Letter sending documents and requiring undertakings.** Note that if you are dealing with new construction, you may also need to obtain a copy of the New Home Warranty and Occupancy Certificate from the vendor's lawyer.
- **Form A Transfer.** Always double check the PID and legal description or your transfer may be rejected by the Land Title Office. Use a Form D and Form E if more space or signatures are required.
- **Vendor's statement of adjustments and additional notes.**
- **GST certificate.** Make sure that you use the correct one.
- **Residence declaration of the vendor** required under s. 116 of the *Income Tax Act* if it isn't included in your notes to the vendor's statement of adjustments.
- For new construction, you may also need to send an **unsigned copy of GST 190 Rebate Application** for the vendor's lawyer to review before the purchaser signs it.
- For strata properties, you may also need to send a **Form B and Form F strata documents** if the area where you practise does not require you to get them signed directly by the strata council or property manager; and an assignment of parking stall and storage locker.

Practice Point

Send the documents to the vendor's lawyer at least one week prior to the completion date so that they have time to review them and discuss any problems with you before meeting with their client.

2.4C-2 - Documents to be signed by the Purchaser

Your client must sign these documents:

- **Have your client initial your copy of the plan showing the location of their lot and give the original plan to your client for their records.**
- **Purchaser's statements of adjustments.**
- **Property Transfer Tax form.** If you are using the PTT Exemption form, give a copy of the instructions for completion to the purchaser.
- **Mortgage documents, if any.** See section ***2.5 - Mortgage File***, below, for more information.

Practice Point

Try to schedule an appointment with your client at least three to seven days prior to the completion date. That way, if a problem arises, which is not uncommon when a mortgage is involved, there is time to work out a solution.

2.4C-3 - Purchaser's Statement of Adjustments (PSA)

Review the financial information with your client, who may not appreciate the amount required to complete the purchase.

Practice Point

Once you have prepared and approved the PSA, ask your conveyancer to call the purchaser and provide them with the mathematical calculations, ideally a day or two before you meet with your

client. That will give them time to think about the math and to review it with the co-purchasers without feeling pressured.

There are generally two ways to prepare a PSA.

- One is to first list the debits in a column, then add up the numbers to show the client how much they need to complete their purchase and, immediately below, list the credits in the same column to show the purchaser where that money is coming from.
- The second form of PSA does the same math but uses two columns.

Decide which format makes the most sense to you and make it a standard form in your office.

2.4C-4 - PSA - Debit Column

Here are some items typically listed in the debit column of a purchaser's statement of adjustments:

Calculating the Purchase Price

The first item to list on the PSA is the purchase price.

If the purchase is GST-exempt, list the stated price from the contract, which will then be used to calculate the Property Transfer Tax.

If GST is due on the purchase, identify it as a separate item on the statement of adjustments, because the Property Transfer Tax is not paid on the GST portion of the price and it is important for everyone to agree on the actual purchase price.

Calculating the GST on the PSA

GST on new or substantially renovated housing

Generally, a purchaser must pay GST on all new residential housing and substantially renovated residential housing. See the definition of *substantial renovation* in Canada Revenue Guide RC4028.

The purchaser pays GST on the full purchase price of the new or renovated housing, including the land and the cost of related services.

Although it is the purchaser's responsibility to pay GST in these circumstances, it is typically the vendor's responsibility to collect and remit it.

GST exempt – Used residential housing

GST is not generally payable on used residential housing, provided it has not been substantially renovated and is not being sold by a developer. A purchaser who is buying used residential housing should obtain a certificate from the vendor confirming the sale is not subject to GST.

CLEBC's BC Real Estate Practice Manual has a variety of GST certificates for the various circumstances that might apply to a real estate purchase.

GST and the New Housing Rebate

The purchaser may be eligible to claim a GST new housing rebate, if the property is for the purchaser's use or the use of a relative as defined in s. 251 of the *Income Tax Act* as a primary place of residence. The rebate is equal to a percentage of the GST paid on property costing less than a set value.

Calculations around the GST were initially premised on Canada Revenue Agency paying the rebate to the purchaser after closing, which meant the purchaser had to pay the full GST and then claim a rebate which was not received for several months. In order to avoid this and give the purchaser an immediate rebate, the practice is now that the vendor credits the purchaser with the amount of the rebate on the statement of adjustments, and the purchaser pays only the net GST after the rebate is deducted. The vendor then remits the net GST and claims a credit equal to the rebate.

If the purchaser is eligible to claim a rebate on the GST and the contract price includes GST, different formulas apply to calculate the GST and GST rebate depending on the value of the property.

See the **Canada Revenue Agency (CRA)** webpage on the GST New Housing Rebate for more information including current limits and calculations.

Commonly, vendors offer houses or strata lots at a "GST-included price", which means that the price has been determined by the vendor, net of the rebate. If the purchase price includes GST, but is net of the rebate, it is usually expressed in the agreement as "subject to an assignment of the rebate".

You should calculate property transfer tax on the price of the property without the GST. Convert the GST-included price to a net of GST price. The GST/HST Memoranda Series provides a summary of the calculations for a 5% GST.

If the property is acquired as residential rental property, the purchaser may qualify for a GST rebate (GST RRPR) that would ultimately give the same rebate break that purchasers of owner-occupied property had under the GST new housing rebate. The primary difference between the GST RRPR and the new housing rebate is that a developer may credit the new housing rebate to a purchaser at completion and take an assignment of the purchaser's rebate, giving the purchaser an "immediate" rebate. If claiming the GST RRPR, the purchaser must pay the GST up front, and then apply for the rebate separately.

For more information, see the **CRA** webpage about the GST/HST new residential rental property rebate.

Calculating the Property Transfer Tax (PTT) on the PSA

The property transfer tax is 1% on the first $200,000 and 2% on the balance. While the math is not complex, you still need to consider whether PTT is payable for each purchaser being registered on title.

PTT Exemption Rules

PTT exemption rules change with some frequency. It is important for you and your conveyancer to review all bulletins relating to the tax and to keep one another informed of changes.

The Lawyers Indemnity Fund has dealt with claims in which lawyers misunderstood the operation of property transfer tax.

Review the **BC government**'s Property Transfer Tax webpage.

If you are unsure about the operation of the Act or its regulations and policies, consult with a senior staff member of the Branch or request an advance ruling.

PTT Exemption - First Time Home Buyers

If the purchasers qualify as a first-time home buyer, they might be exempt from paying tax. In order for the property to qualify for exemption:

- the fair market value of the land plus improvements is not more than a specific qualifying; see the BC government's Property Transfer Tax webpage for current value limitations;
- the land is 0.5 hectares (1.24 acres) or smaller;
- the property must be acquired for use as the purchaser's principal residence and the purchaser must occupy and use the property as their principal residence to a date no earlier than the first anniversary of the registration date of the transfer; and
- the purchaser must be an individual who is a first-time home buyer and who:
    - has not previously held a registered interest in a principal residence anywhere,
    - is a permanent resident or citizen of Canada, and
    - has resided in BC for 12 consecutive months immediately prior to the date of registration of the transfer or filed at least two income tax returns as a B.C. resident in the last six years.

The penalty for falsely obtaining the exemption is double the tax that should have been paid.

If there is more than one purchaser, consider the PTT exemption for each. For example if a purchaser who qualifies for the exemption purchases a 99% interest in the property, while the purchaser who must pay the tax purchases a 1% interest, the amount of tax will be significantly less than if each purchaser acquired 50%.

PTT on Foreign Entities

There is an additional 15% PTT on residential property transfers to foreign entities. The tax is calculated in the same manner as PTT and there is an additional form to file at the Land Title Office (FIN 532).

Review the **BC government**'s Additional property transfer tax for foreign entities and taxable trustees webpage.

Practice Point

Peter and Susan ask you to represent them on the purchase of their first home. Both qualify for the PTT exemption. You should first discuss the way the PTT works so that they can consider all of the possibilities and provide you with instructions. The additional tax applies only to specified areas of BC, which are listed on the **BC government**'s Property Transfer Tax webpage.

To clarify whether your purchaser is considered a foreign entity, please refer to the Glossary for property taxes.

If only Susan is registered on title, then she will use up her ability to ever claim the PTT exemption, but Peter will still be able to use his. So, if they are thinking of moving up in a few years, they may want to leave Peter off of the title on this purchase so that he can claim the exemption on their next purchase. But there are complications. If Susan dies, then Peter would have to apply for probate and the reverse would happen with their second house. If they separate, Peter should file a Certificate of Pending Litigation against the title in order to register his claim to it, and the reverse would happen with their second house. Ensure that the lender will allow Peter to be registered as a covenantor only on the mortgage. This isn't usually a problem, but you may have to get the lender to revise the paperwork.

Peter and Susan will have to consider whether they are in a housing market where moving up would put them in a price range that was beyond the price limits for the exemption in any event.

Other PTT Exemptions

There is a variety of different exemptions from the property purchase tax.

Review the **BC government**'s Property transfer tax exemptions webpage for a complete list.

Two additional exemptions to note are:

Related Individuals

A purchaser taking title from a related individual may be exempt from the property transfer tax. A related individual is a parent or grandparent, a spouse or a child. Siblings are included if the property is a family farm. A two-year common law relationship, including same-sex spouses, qualifies as a spouse.

One of the individuals must reside in the property as a principal residence for at least six months prior to the transfer. A person cannot be related to themself, so be careful with property purchase tax planning that involves trusts, particularly if the settlor and one of the beneficiaries are the same person.

New Home Purchases

Buying new homes with a fair market value of less than a specific value may be eligible for an exemption from property transfer tax. As with the first-time buyer exemption, the purchaser must be a Canadian citizen or permanent resident and intend to reside in the home as their principal residence.

Calculating the Property Taxes on the PSA

The property tax entry on the PSA can be either a credit or a debit, depending on who will be paying the property taxes.

Generally, if the sale takes place before July 1st, the purchaser will pay the taxes for that year, so record the property tax adjustment as a credit to the purchaser.

If the sale takes place after July 1st, the property taxes should be paid, so record the adjustment as a debit to the purchaser.

If the sale occurs in June, you and the other lawyer must discuss tax payment and whether it should be a credit or a debit to the purchaser.

Until the tax notice is issued between late April and early June, the actual amount of property tax is not known. In this situation, the conveyancer typically calculates the adjustment using the tax assessment for the previous year, generally increased by 5% in some parts of BC and by 10% in others. Taxes in most municipalities are due mid-year, but actually cover January 1 to December 31 of that year.

In Vancouver, advance taxes equal to one-half the amount of the previous year are billed and payable by the owner in February; and the final payment is made mid-year. If the vendor has paid the amount of the advance taxes in February but not the taxes billed for the full year, the vendor should either receive a credit for the full amount of the advance taxes paid and a debit for its pro rata share of taxes for the year, or the vendor's lawyer should be put on undertakings to pay the further taxes. In some jurisdictions, owners can prepay a portion of their property taxes by January.

Home Owner Grant & Property Taxes in Rural Areas

If the home is owner-occupied, the homeowner grant is a provincial program that allows residents to reduce their taxes by a maximum amount. It cannot reduce the amount payable to below a specific amount and may be prorated or eliminated for homes within specific assessed values, depending on where the home is located. For those either 65 or older or disabled, there is a basic grant amount, which is reduced or eliminated depending on the value and location of the home.

The BC Homeowner Grant webpage provides current details on grants including amounts.

For property that is not located in a city, town, district or village, see the **BC government**'s Property taxes in rural areas webpage for important information.

Note that "utility charges", are often paid with the taxes but can be paid earlier in the year in some areas like Vancouver. As well, many municipalities include special levies or local improvement charges with the taxes. Be very careful to read tax notices and tax search results, as some tax notices are not clear about such levies.

Calculating the Strata Fees on the PSA

An owner of a strata title property must pay a monthly strata maintenance fee to the strata corporation for costs such as building, insurance, outdoor and common area maintenance on the first of the month for that month's expenses. Strata managers sometimes request that the purchaser pay the first month maintenance through their solicitor's office to allow them time to set up a method of payment with the new owner. Strata managers also charge a move-in fee, which is usually grossed up to include a move-out fee. All these amounts will be shown as a debit to the purchaser on the statement of adjustments.

If, on the statement of adjustments, the vendor is credited with paying the strata fees for the month during which the purchase takes place, some property managers will want the purchaser's lawyer to assure them that the cheque will not be returned NSF. You should impose an undertaking on the vendor's lawyer to ensure that the cheque for the strata fees clears the bank and, if it doesn't, then to pay the fees to the property manager.

Calculating the Legal Fees and Disbursements on the PSA

Some lawyers include their legal fees and estimated disbursements in the statement of adjustments to ensure that they are paid. If you do this, you should also include GST and PST. Don't forget the Trust Administration Fee (TAF), currently $15, plus taxes, payable to the Law Society for each distinct client matter. If you are not familiar with the TAF, refer to the Practice Management Course available through the Law Society's Practice Management Course.

The PSA is a good opportunity for your client to see what their purchase is actually going to cost them, so it makes sense to include your fees at this stage.

The sum of all of the above figures is the TOTAL DEBITS.

2.4C-5 - PSA - Credit Column

Here are some items typically listed in the credit column of a purchaser's statement of adjustments:

Calculating the Deposit on the PSA

The purchaser's realtor usually keeps the purchaser's deposit. Adjust the full amount of the deposit as a credit to the purchaser. If the deposit exceeds the amount of that realtor's commission plus taxes, the realty office will usually send the excess deposit to the purchaser's lawyer.

Calculating the Property Taxes on the PSA

See the discussion above, in section ***2.4-4 - PSA - Debit Column*** to ensure that you have properly recorded the property taxes as either a credit or a debit.

Calculating the Mortgage Funds on the PSA

Note that the principal amount of the mortgage may not be the exact amount that is sent to your office. Break out the deductions on the purchaser's statement of adjustments so that the purchaser can understand the math behind the amount you require as the cash to close.

The sum of all of the above figures is the TOTAL CREDITS.
The difference between the TOTAL DEBITS and the TOTAL CREDITS is the Cash to Close.

Cash to Close

When you call your client to schedule an appointment, you should have already prepared the purchaser's statement of adjustments to know how much cash to close your client will have to bring with them, usually by way of bank draft.

Ensure that your client knows that you need the cash to close no later than the morning of the day before closing so that you have time to deposit it into your trust account.

Notes to the PSA

Every purchaser's statement of adjustments should have a "notes" page, if only for your client to give you permission to transfer additional money and collect it back if there is an error or omission on the PSA.

2.4C-6 - Vendor's Statement of Adjustments

The purchaser's lawyer also prepares the vendor's statement of adjustments.

If you are using the "one column" version of the VSA, it is common to set out the credits first as vendors like to see how much money they are getting and the debits below.

Generally, whatever was a debit to the purchaser is now a credit to the vendor and vice versa.

Consider the following:

Purchase Price

- This figure should be the same as in the PSA.

Property Taxes

- This figure should be the same as in the PSA, but again, it's only a credit to the vendor if it was a debit to the purchaser.

Strata Fees

- This figure should be the same as in the PSA.

The sum of all of the above figures is the TOTAL CREDITS.

Deposit

- This figure should be the same as in the PSA and should include the Vendors liability for real estate commission.

This figure, plus the property tax adjustment (if it is a debit) is the TOTAL DEBITS.

Builders' Lien Holdback

- Although a builders' lien holdback is generally held by the vendor's lawyer on trust conditions, so is not actually deducted on the VSA, the VSA is a good spot to remind both the vendor and their lawyer that there is a holdback.

The difference between the TOTAL CREDITS and TOTAL DEBITS is the amount to be paid to the vendor's lawyer in trust.

Notes to the VSA

There is always a notes page to the VSA.

Non-Resident Vendor Declaration

The vendor's residency should be confirmed, either by a statutory declaration or by a note in the vendor's statement of adjustments.

If the vendor is not a resident of Canada, the vendor must provide a clearance certificate under section 116 of the *Income Tax Act*. If a certificate is not provided, deduct 25% of the

purchase price of the property from the vendor's sale proceeds and hold it pending production of the certificate. The purchaser must remit this holdback to the CRA within 30 days after the end of the month in which the property was acquired, unless the deadline is extended by the CRA.

Entitlement to Information in the Notes

Some vendors' lawyers will delete entire paragraphs in the notes. They take the position that you are not entitled to amend the contract by adding information that was not agreed upon in the contract. Although the notes are not generally intended to modify the contract, you might want to ask for that information with that risk in mind and state that fact in the notes.

2.4D - Purchaser – Next Steps

2.4D-1 - Submitting Documents for Registration

Now that e-filing is compulsory when registering land title documents, see **CLEBC**'s British Columbia Real Estate Practice Manual.

Here is a brief overview of the process.

Electronic Filing System Procedure

Section 5(1) of the *Property Law Act* states, "A person transferring land in fee simple must deliver to the transferee a transfer registrable under the *Land Title Act*".

This means that the vendor must deliver to the purchaser a registrable *Land Title Act* Form A Transfer. In practice, the purchaser's lawyer or notary usually prepares the Form A Transfer for execution by the vendor.

The usual steps in the process are:

1. The purchaser's lawyer or notary conducts a search of the vendor's title.
2. The next step is to obtain and complete a **Form A Transfer and Property Transfer Tax Return** through my LTSA.
    (a) Once completed you can save the forms on your desktop and lock them.
    (b) The forms are then assigned a version control number.

3. The purchaser's lawyer or notary transmits the electronic Form a Transfer to the vendor's lawyer or notary for review.
    (a) If changes are necessary, the document can be unlocked and amended.
    (b) A new version control number is assigned, making it necessary to have the changes consented to by the purchaser's lawyer or notary.
4. The vendor's lawyer or notary prints a copy of the Form a Transfer and has the vendor sign a paper copy before an officer.
5. The vendor's lawyer or notary incorporates their electronic signature, which is based on a digital signing certificate obtained from the Law Society of British Columbia, into the electronic Form a Transfer. The digital signature is a certification by the lawyer or notary that:
    (a) a true copy of the electronic instrument has been executed and witnessed in accordance with Part 5 of the *Land Title Act*; and
    (b) the true copy is in the possession of the person who incorporated their electronic signature.
6. If a lawyer or notary responsible for execution of the Form a Transfer is not EFS-enabled, the electronic Form a Transfer document may be emailed, or a paper copy can be printed and faxed or couriered to the lawyer or notary responsible for execution.
    (a) Once a paper copy of the document is executed by the transferee and witnessed in accordance with Part 5 of the *Land Title Act*, it can then be sent back to the originating EFS-enabled lawyer or notary.
    (b) The originating lawyer or notary may then apply their digital signature to the electronic document.
    (c) Applying a digital signature is a certification by the signatory that they have in their possession a signed paper copy, or a copy of a signed paper copy of the electronic document.
7. The vendor's lawyer or notary can then electronically forward the Form a Transfer to the purchaser's lawyer or notary. *Any alteration or change to an electronic instrument after it is digitally signed will operate to invalidate the electronic signature.*
8. Once an electronic signature is incorporated into the Form a Transfer, any party can submit it online.
    (a) It may be that the Form a Transfer and a mortgage are submitted by the purchaser's lawyer or notary, the lawyer or notary for the mortgagee, or the agent of either.
    (b) The forms may be submitted on a date prior to the closing date on a hold or deferred to a specified date.
    (c) If submitted on a hold, the Form a Transfer is only formally submitted for registration and received by the land title office once the hold is released.

9. When the Form a Transfer is received by the land title office, the electronic signature is verified, the submitter's account is debited for registration fees, and property transfer tax is paid by an electronic funds transfer from the submitter's designated account.
10. **The application is then electronically marked up.**
    (a) After mark-up, an email is automatically sent to the purchaser's lawyer or notary (if the box to receive notice of registration is checked), advising that the application is marked up and providing the pending number.

From this point forward, from a land title perspective everything remains as it was previously.

The electronic Form a Transfer is converted to image, reviewed by an examiner and registered.

If a client wishes to obtain a copy of the document, they will receive an image that is an exact copy of the electronic form that was submitted.

It is possible to submit documents anytime the electronic filing system is available.

Electronic Filing Using Juricert

Juricert is the certification authority operated by the Law Society to reduce the risk of title fraud and to ensure the integrity and security of the *Land Title Act*'s electronic filing system.

Juricert provides lawyers with a password-protected digital signature to file land title documents electronically.

Each lawyer is under an obligation to maintain the security of their digital signature.

If you are using Juricert to file your documents you cannot not allow anyone, including other lawyers and people under your supervision, access to your password (Law Society Rule 3-96.1 (Electronic submission of documents)), as that would allow anyone with your password to apply your digital signature to documents for registration.

If you fail to protect the security of your digital signature you will lose your ability to file documents electronically and you may be subject to discipline by the Law Society (see Law Society Rule 3-64(8) (Withdrawal from trust) and *BC Code* rule 6.1-5 (Electronic registration of documents)).

If you realize that someone has used your digital signature inappropriately, report it to the Law Society immediately.

2.4D-2 - Mortgage Discharge

As the purchaser's lawyer, bring your file forward about 50 days after completion and send a reminder to the vendor's lawyer/notary/lender if you haven't yet received confirmation that the mortgage is discharged.

Continue to bring the file forward daily if you don't have confirmation.

After 60 days you must report to the Law Society under Law Society Rule 3-96 (Report of failure to cancel mortgage). See the Law Society Discipline Advisory, August 20, 2015 "Reporting a mortgage discharge failure to the Law Society is mandatory".

The Mortgage Discharge Reporting Form is available on the Law Society's website.

Never rely solely upon the other lawyer/notary/lender to remember to provide you with discharge particulars in time.

Practice Point

Flag the letter containing the undertakings that you have imposed upon the vendor's lawyer. That way, you will be able to quickly refer to it at the 50th day and 59th day post-completion in order to determine whether all of the undertakings have been fulfilled.

2.5 - Mortgage File

2.5-1 - Acting for Multiple Parties

Keep your mortgage documents separate from your purchase documents, even if they relate to the same file. Think of your mortgage file as a "file within a file" when you are representing both the lender and the purchaser on a residential conveyance.

BC Code Appendix C, rule 2 sets out the basic principle for acting for parties with different interests. Unless a transaction is a "simple conveyance", you cannot act for parties with different interests, such as a purchaser and a vendor, or a purchaser/borrower and a lender.

When you prepare the mortgage in a simple conveyance, you are acting on behalf of both the borrower and the lender. Before acting, explain the concept of divided loyalties and obtain the written consent of both clients. Ensure that the lender provides you with a similar consent, which is typically given as blanket consent by the major lending institutions and consequently does not require an individual consent for each file.

The main principle that allows you to represent both clients is the fact that you are under an obligation to report matters that may be of importance to either party. Remember if you discover a fact that would affect the lender's willingness to lend, you must disclose. The reverse also applies.

Your Annual Trust Report for the Law Society asks whether you represented clients as borrower or lender in a private mortgage transaction where the lender is not a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business. Keep a record of any such mortgages in your Trust Report file and ensure that independent legal advice was provided where required.

2.5-2 - Reviewing Mortgage Instructions

Typically, you will receive lengthy mortgage instructions that also require you to download forms from the lender's website. Some useful proactive risk management steps when acting for a lender are:

- Read every provision of the mortgage instructions carefully. Some lenders want to approve the mortgage you prepare before they will advance funds and some won't. Look for inconsistencies like: mortgage documents that don't match. Also highlight all financial information such as the amount of loan, term, or interest rate, as well as anything that is unusual, such as:
    - a request for a statutory declaration stating that the purchaser does not intend to rent out any portion of the property; or
    - a statement from you that you are not aware of any secondary financing.
- Ensure that your conveyancing staff is familiar with the mortgage instructions and communicates inconsistencies and unusual requests to you.
- Mortgage instructions often contain inconsistencies and require a phone call with the mortgage representative to sort it out. Don't hesitate to call. Be sure to confirm any revised instructions in writing.

Practice Point

Make a note of the representative's name and phone number in your file.

Interest rate commitments are not very elastic. If the purchaser is buying a new home that allows the vendor to move the completion date or cannot provide an occupancy certificate, the interest rate may change. Keep the client informed of these difficulties. Diarize the expiry date of the commitment letter so that your client is aware the financing may be in peril if extensions are granted on the closing date.

This is also a good time to look at the solicitor's opinion letter. Ensure that you are not being asked to guarantee or insure the success of a transaction. The opinions will frequently require you to state that you have complied with the lender's instructions.

It was common for lenders to instruct the lawyer to certify that the building being purchased complied with municipal zoning by-laws, but this practice has become rare due to title insurance. You cannot sign the solicitor's opinion letter if you were not able to follow any of those instructions.

Get the lender's permission to delete any provision in their instructions. Confirm that permission in writing immediately and ensure that your letter includes the name of the individual who gave the permission. If you are relying on information provided to you by others, qualify your opinion accordingly. Explain the extent to which you are able to give assurances and indicate the basis for those assurances and the limited reliance to be placed on them.

2.5-3 - Survey Certificate v. Title Insurance

After reviewing the mortgage instructions, consider the need for a survey or title insurance. A survey will show the location of the building on the property. Title insurance transfers risk to the insurer for defects in title and other defects like encroachments. Applicants for title insurance may have to answer questions about the state of title or whether the survey plan, if available, shows any defects. Where counsel are involved in providing such assurances in the title insurance application they may face liability due to errors.

On most transactions, institutional lenders require as a condition of lending title insurance, an up-to-date survey certificate or old survey updated by statutory declaration. Title insurance is often cheaper than a survey on a single-family residence, but it generally only applies to the mortgage being insured. Even when a survey is not required, as in the purchase of a strata lot, lenders may require title insurance. In many cases, the lender will require either title insurance or written

confirmation that the building on the property complies with all bylaws. As it is generally impossible to provide such confirmation, title insurance becomes the only option.

Even if a lender doesn't require title insurance, it may be valuable when there is an unusual easement, encroachment, zoning or other title problem. Policies may include coverage under "covered title risks", such as:

- someone else owning an interest in the title;
- someone else having the right to limit the use of the land;
- a defective title;
- a document upon which the title is based being invalid because it is not properly signed, sealed, delivered or registered;
- someone else claiming rights affecting title arising from fraud, duress, incompetence or incapacity; or
- a lien or charge on title because of a mortgage, judgment, or charge by a condominium corporation.

Review the policy to be sure there are no exceptions or other conditions to coverage. Warn your client that any claim they make under the policy will be subject to scrutiny by the insurer and coverage will be denied. If it is unclear whether the policy covers your client's situation, ask the insurer. In some cases a special endorsement may be underwritten for an increased premium.

Section 25.1 of the *Land Title Act* provides that a *bona fide* third party for value has certainty of title where the transaction involves a forged transfer. The party who lost the interest by fraud will be compensated by the assurance fund under the land title regime. Also, if a party is deprived of title partially as a result of an administrative error and partially due to the client's own error, contributory negligence applies and the client can recover the portion of the loss caused by the registrar. This section of the Act makes some aspects of title insurance, especially for fraud and forgery, less valuable but depending on the facts, review the language of the Act to ensure your client's situation is covered.

For further discussion of title insurance, see the **CLEBC**'s BC Real Estate Practice Manual and BC Mortgages Practice Manual.

2.5-4 - Lender's Loan Documents

The lender will generally provide you with or ask you to download a series of documents, ranging from the commitment letter to the borrower's application for mortgage insurance. You should have a system for organizing the documents. In addition to the originals, make two

copies, so the borrower can keep one and you can keep the other. The lender will probably want one original set of signed documents for its records.

Practice Point

It's a good idea to keep a separate information file for each lender with their procedures and requirements so that you don't have to remember every detail and new staff can quickly access the information.

This file is also a good place to keep copies of that lender's mortgage terms, so you don't need to download them every time you need them.

Some lenders will let you know in advance if there is a charge to deposit the mortgage money directly into your trust account, while others do not.

Knowing this at the start of a file can help you to prepare your own account accurately.

If you are caught short, you will likely have to reduce your own account, rather than chase your client for the small shortfall.

2.5-5 - Mortgage Documents

Documents

You must prepare or download from the lender's website some of the documents for the mortgage. These typically include:

- the conflict/consent letter;
- the Form B Mortgage;
- one of three types of mortgage terms, - prescribed, filed or express;
- an acknowledgement of receipt of mortgage terms to be signed by the borrower and any covenantor/guarantor;
- an indemnity to be signed by each covenantor/guarantor; and
- an irrevocable direction to pay directed to both the lender and to your firm.

Form B Mortgage

The Form B Mortgage should be completed by following the detailed instructions in the Green Book, otherwise known as **CLEBC**'s Land Title Electronic Forms Guidebook.

You will need the following information:

- **Borrower:** Each person who will be a registered owner of the property at the time of registering the mortgage must be included as a borrower. Any covenantor/guarantor should also be listed here.
- **Lender:** Where instructions are given by an institutional lender, the correct name and address of the lender is usually set out in the mortgage instructions. Where instructions come from a private lender, this information must be confirmed with the client.
- **Description of the Property:** The civic address and legal description of the property should be included in the lender's instructions. Since the legal description is the description required for granting and registering the mortgage, confirm that the legal description corresponds to the civic address.
- **Financial Terms:** The bulk of the financial information will be included in Item 5 of Form B. Most institutional lender's websites include instructions on completing the Form B financial terms and how to reflect the rates. Be sure to clarify with the lender if any of these instructions are unclear:
    - The lender's instructions should state the principal amount of the mortgage, the interest rate, and the interest calculation period. For a conventional mortgage loan, the instructions will include the interest adjustment date, the amount, frequency and payment dates for regular installments of principal and interest, and the maturity date.
    - Items 5(e), (f) and (l) all relate to payment provisions. Institutional lenders often give borrowers the option of making mortgage payments monthly, weekly or bi-weekly. This option may be included in the mortgage Form B but is also frequently provided for in a side agreement between lender and borrower.
    - If the mortgage is repayable by blended payments of principal and interest, s. 6 of the *Interest Act* (Canada) requires that the mortgage states the rate of interest chargeable, calculated yearly or half-yearly, not in advance. If this is not done as required, under s. 6 no interest is chargeable or recoverable. Most conventional blended mortgage loans provide for interest to be calculated half-yearly, not in advance. But some mortgage loans provide for interest to be calculated on some other basis, for example, monthly, not in advance, or by rates floating with prime. Given s. 6 of the Act, the lender's lawyer must specify the half-yearly equivalent interest in Item 5, or in an attached schedule set out in Form E. You should require your lender client to determine the equivalent effective interest rate calculated yearly or half-yearly, so that the appropriate statement can be made in Item 5 of the mortgage. Use a Form E schedule for the more complicated rates. Attach the table of equivalent rates prepared by the lender by stating "See Schedule" in Item 5, and then setting out the table of equivalent rates in the attached Form E.

- **Prepayment Provisions:** A closed mortgage may not be repaid before the maturity. In an open mortgage the principal sum may be completely repaid at any time up to the maturity date, usually without a penalty. A closed mortgage may include prepayment privileges, such as the right to increase the monthly mortgage payment or make an occasional lump sum payment of a portion of the outstanding principal. Particularly in the competitive residential mortgage market, lenders have become very creative in the variety of prepayment privileges offered. These should be noted in the lender's instructions. The mortgage should include the relevant prepayment rights or restrictions in either the Item 9(b) filed or 9(c) express terms, or in an additional term set out in Item 10.
- **Mortgage Terms:** The applicable filed standard mortgage terms, if used by the lender for the loan, should be referred to by number in the lender's instructions and you must complete Item 9(b) including the D.F. Number. You also must make sure that a copy of the filed standard mortgage terms is delivered to the borrower before or when the mortgage is executed. Obtain an acknowledgement of receipt of mortgage terms.

2.5-6 - Mortgage Terms

Prescribed Standard Mortgage Terms

Section 227 of the *Land Title Act* sets the prescribed terms by regulation. The prescribed terms provide a readily available set of mortgage terms for any lender that does not want to file a set of its own mortgage terms. The prescribed terms are designed for residential mortgages, but lenders may also find them useful for commercial loans by adding provisions that are unique to the particular mortgage.

Filed Standard Mortgage Terms

Section 228 of the *Land Title Act* allows a lender to file a set of standard mortgage terms, including provisions that the lender specifically wants included in all or most of its mortgages. For example, the lender may want payments under the mortgage to be received by its office before 1:00 p.m., otherwise the borrower will be charged an additional day's interest. A lender that wishes to file standard mortgage terms under s. 228, applies to the registrar, who has them filed in each Land Title Office under the same number. Once a filing number has been assigned by the Land Title Office, whenever the lender wants to make use of its standard terms, it refers to the filing number at Item 9 of Form B. Generally, for a residential mortgage involving an institutional lender, the mortgage will consist of a Form B and the standard mortgage terms the lender has already filed with the Land Title Office.

Express Mortgage Terms

Section 225(5)(c) of the *Land Title Act* express terms to be attached as Part 2 to the Form B mortgage. Such terms will be applicable only to that mortgage. Since express terms are "custom terms" that apply only to one mortgage transaction, the use of Item 10 is not permitted when express terms are used. Both the prescribed standard mortgage terms and filed standard mortgage terms may be varied with the use of Item 10 of Form B, and if space is insufficient a Form E Schedule is generally used.

Acknowledgement of Receipt of Mortgage Terms

Each borrower and covenantor/guarantor must sign an acknowledgement of receipt of mortgage terms. Some lenders will have their own version and others will expect you to prepare it. See the section on covenantors/guarantors, below. Your covenantor/guarantor might require independent legal advice. The fact that you prepared the document does not mean that you should attend to its execution.

Indemnity to be signed by any Covenantor/Guarantor

Some lenders will have their own Indemnity and Acknowledgement form and others will expect you to prepare it. Still others will have the covenantor/guarantor sign the last page of their File Standard Mortgage Terms with the necessary wording incorporated into the terms. See section ***2.5-7 - Covenantors and Guarantors*** of this module, below. Your covenantor/guarantor might require independent legal advice. The fact that you prepared this document does not suggest that you should attend to its execution.

Irrevocable Direction to Pay

A Direction to Pay instructs the lender and your firm about the way in which the mortgage proceeds are to be allocated. This is a good place to include all deductions from the principal amount of the loan like CHMC and appraisal fees, and to mention the fact that funds will be automatically withdrawn from the borrower's account to take into account the fact that the mortgage funds are usually advanced days before the Interest Adjustment Date.

2.5-7 - Covenantors and Guarantors

The lender may require someone other than the registered owner of the property to be liable to repay the mortgage loan and observe the mortgage obligations. These persons are described as covenantors or guarantors.

A prudent lender will insist on independent legal advice (ILA) for a guarantor or covenantor who does not derive benefit from the loan transaction. In most cases, an ILA requirement is set out in the mortgage commitment. If it is not, discuss the issue with the lender and get clear written instructions, or confirm the lender's verbal instructions in writing. More difficult situations arise where the lender is not aware of the need for ILA; for example, where there may be actual or presumed undue influence.

The decision to require ILA should be the lenders and yours, although the lender will frequently rely upon you before making its decision.

If the lender does not require ILA, confirm that fact and the subsequent risk to the lender in writing.

You may refuse to act for the covenantor/guarantor and you should do so without hesitation if your legal instincts tell you that you could be at risk.

If you are thinking about acting as a witness for execution purposes only, don't forget that you must still comply with *BC Code* Appendix C - Real Property Transactions, rules 7 to 9.

2.5-8 - Mortgagee's Request for Notification

Section 60 of the *Strata Property Act* and s. 4.5 of the Strata Property Regulation allow the mortgagee, or its agent, to notify the strata of its request for notices of annual and special general meetings and of any amounts owing.

2.6 - Vendor's File

2.6-1 - Introduction to Sale File

Even though the purchaser's lawyer prepares most of the documents and, in comparison to a purchase file, there may be relatively little work to do, a number of issues must be addressed by the vendor's lawyer.

Use checklists wherever possible.

The **Law Society**'s Practice Checklists Manual provides some helpful resources.

2.6-2 - Will the Vendor be Available to Sign Documents?

Find out immediately whether the vendor will be available to execute the sale documents.

If a Power of Attorney will be used to sign the documents, obtain the original and register it at the Land Title Office as soon as possible.

Don't wait until the last minute because the attorney might tell you that they have the original but bring in a copy. **Anticipate these types of misunderstandings, as they happen frequently in real estate transactions.**

By registering the Power of Attorney beforehand, you know that it has been accepted by the Land Title Office and you will have the filing number.

Lenders or clients often mistake a certified true copy for the original Power of Attorney or assume that it will be sufficient to support a transfer of title. Ensure that, if a client brings in an original document required for registration, you verify it is so, in case your client has misplaced the original and needs additional time to obtain it.

Practice Point

If a client tells you that they will be using a Power of Attorney to sign the sale documents, don't wait until the last minute to review it because the attorney might think that they have the original, when it is actually only a copy.

In order to minimize the possibility of a last-minute crisis, obtain the original and register it at the Land Title Office as soon as possible.

2.6-3 - Non-Resident Vendor

If you are acting for a non-resident vendor, your client will need a taxation Clearance Certificate. Refer your client to an accountant who can help with this issue.

Do not leave verification of the vendor's residency to the last minute.

If you don't have a Clearance Certificate and need a portion of the purchase price to discharge a mortgage, you will be placed on an undertaking to discharge the mortgage and maintain any non-resident holdback.

A shortfall could cause you to breach your undertaking.

2.6-4 - Private Lenders

If the lender is not an institutional lender, and particularly if the private lender is an individual, two issues arise.

- First, ask the private lender to provide you with a payout statement and per diem rate as soon as possible as your client and the lender may disagree on that issue.
- Second, obtain the signed registrable discharge prior to paying out the mortgage, on your undertaking not to deal with the discharge document until you have sufficient funds in your trust account to pay out the mortgage.

The discharge must be notarized, so sending it to the private lender well in advance of the completion date gives that lender time to execute the document.

If you pay out the private mortgage without this document in hand, you may well find that you have to report yourself to the Law Society because you were not able to discharge the mortgage within the 60 day limitation.

See the Law Society Discipline Advisory, April 2, 2019 "Private lending" for important cautions.

After 60 days you must report to the Law Society under Law Society Rule 3-96 (Report of failure to cancel mortgage). See the Law Society Discipline Advisory, August 20, 2015 "Reporting a mortgage discharge failure to the Law Society is mandatory".

The Mortgage Discharge Reporting Form is available on the Law Society's website.

2.6-5 - Irrevocable Direction to Pay

Prepare an irrevocable direction to pay, which will generally include:

SUMMARY OF MONIES IN

The sum of the net sale proceeds sent to you by the purchaser's lawyer and any excess real estate deposit, if any.

SUMMARY OF MONIES OUT

This may include one or more of the following:

Payout/Discharge Statement

The payout or discharge document comes from the holders of all financial encumbrances: mortgages, liens, judgments, and so on. The standard form contract requires the vendor to discharge the financial encumbrances after receipt of the purchase price and requires the purchaser's lawyer to place the vendor's lawyer on appropriate undertakings.

The payout statement from the lender should include a *per diem* rate in case funds don't reach the lender/chargeholder on the completion date, for example, if they are in another city or the funds arrive late. Multiply the *per diem* rate by the number of days between the payout statement and the actual date that the lender will receive their funds. Because you can't control the time of day when the sale proceeds will be received by your office, assume that the payout date will be the completion date plus one, or more if the completion date is on a Friday, and base your direction to pay on those figures.

If the mortgage is a line of credit mortgage, update the payout statement on the completion date to ensure that no additional funds were withdrawn by the client since the statement was first prepared and to ensure there are no other changes to the payout amount. On your direction to pay, simply state the payout amount based on the figures you have and indicate that you will insert the final figure, subject to verification, on the completion date. If you communicate to your

client what you are going to do, the client will not be taken by surprise if the payout amount changes between signing and the payout date.

If the sale is taking place as a result of relationship breakdown, ensure that you are only acting for one party. Send the other party for independent legal advice. Tell the purchaser's lawyer that you will require documents earlier than usual so that both parties have a chance to review the documents with their own lawyers.

It is common for parties who are separating to want you to pay out other debts, such as credit cards, unsecured lines of credit, or utility bills.

Take the following steps when you are asked to pay out debts:

- Obtain copies of the most recent statements your client has, like a credit card statement, so you can insert the account number on the direction to pay. Don't assume that you will receive a clear financial picture. One spouse may be expecting you to pay out the VISA account and the other may be expecting you to pay out the MasterCard. Ensure that all instructions are clearly set out in the direction to pay.
- Confirm whether your client wants the account closed or paid down to zero. Normally, a client who is separating from their spouse wants the account closed, but that might cancel out consumer points accumulated through the card. Again, include your client's instructions in the direction to pay.

Real Estate Commissions

The real estate licensee retained to list the vendor's property is the listing agent. The licensee who works with the buyer is the selling or buyer's agent. Multiple listing agreements authorize the listing agent to offer a share of the commission to the selling agent. This two-cheque system is common, so a vendor's statement of adjustments authorizes separate payment of the commission to the listing and selling agent.

Since vendors generally sign a listing contract with their agent only, they are sometimes confused by the breakdown of the real estate commission between the listing and selling agents. If you are representing a vendor, it can be helpful to create a separate box at the end of the vendor's direction to pay showing the total commission paid, plus total GST, then separating out the amount that each realtor charged.

Legal Fees and Disbursements

Some lawyers include their legal fees and estimated disbursements in the direction to pay to ensure that they are paid. If you do this, also include GST and PST. Don't forget the Trust Administration Fee (TAF), plus taxes, payable to the Law Society for each trust transaction.

For more information about the Trust Administration Fee (TAF), refer to the following resources:

- the Law Society's **Practice Management Course**, see **Module 3 - Trust Filing and Trust Applications**, section ***3.2 - Trust Administration Fee***
- the Trust Accounting area of the Law Society's website, which includes links to various resources, webinars and the Trust Accounting Handbook, see *Chapter 4 - Trust Administration Fee*, p. 51.

Some lawyers over-estimate their legal fees and disbursements and then refund to their client once their account is finalized.

Whichever approach you take, the direction to pay is the opportunity for your client to see the actual cost of the sale, so it makes good sense to include your fees at this stage. It is better to have the discussion about fees directly with your client.

2.6-6 - Meeting with Your Client

When you meet with your client, review the documents sent to you by the purchaser's lawyer:

- Form A Transfer;
- vendor's statement of adjustments;
- GST certificate;
- residence declaration of the vendor;
- unsigned copy of GST 190 E Rebate Application for new construction;
- Form B and Form F strata documents; if applicable;
- assignment of parking stall and storage locker, if applicable; and
- irrevocable direction to pay.

Remember to obtain your client's new address.

Also remind your client that some lending institutions place a hold on uncertified cheques, even a lawyer's trust cheque, so they should contact their bank if they have any concerns.

2.6-7 - Completion Date

If all goes well, you will receive funds from the purchaser's lawyer on the completion date. If you haven't received funds by 2:00 pm, call the other lawyer to find out what is happening. This ensures that any issues are resolved while the Land Title Office is still open.

Once the funds have arrived, you should immediately pay out all monies, except your account, in accordance with the direction to pay. If the funds are directly deposited into your trust account, verify that they are actually in your account by phoning your bank or checking online.

Your payout to the mortgage holder should include a Form C Discharge and a copy of the mortgage payout statement.

See the Land Title Forms webpage on the **BC Land Title & Survey Authority (LTSA)** website to download electronic copies of forms including the Form C Discharge.

- Now is the time to send your client a final reporting letter and a copy of your account.

2.7 - Post-Completion Date Matters

- Bring forward your file to approximately 45 days post-completion in order to deal with any discharges from lenders you have not yet received.

Law Society Rules 3-95 and 3-96 require a lawyer to report to the Law Society the failure of another lawyer to register a discharge of mortgage at the Land Title Office within 60 days of closing.

Some lenders are slow to provide discharges, but no adverse inference is drawn if you have not obtained a discharge within the 60 days, so long as you have followed up diligently by making the required payment and there is no evidence you breached an undertaking.

- Be sure to follow up regularly and advise your client and the other lawyer of any unanticipated delays.

- Once you receive the mortgage discharge, register it at the Land Title Office and report to the purchaser's lawyer.

2.8 - Collapsing Deal

Deals collapse for a variety of reasons.

Your job is to preserve:

- the right of the purchaser to claim for specific performance and the fullest amount of damages,

OR

- the right of the vendor to claim the deposit and further damages.

Often you don't find out that the deal will not complete until quite late in the transaction. It may not become clear until the vendor's lawyer fails to return the transfer and other documentation, or you receive a call from the purchaser's lawyer to say there will be no money flowing.

Given the tight timelines, this can be the day before or the day of completion. You should have standard letters ready to customize for such a contingency. At the beginning of a collapsing deal, it often appears that the deal will complete eventually. **Send a letter in any event to preserve your client's rights.**

Even in the case of an anticipatory breach where the party has clearly indicated their intention not to complete, the party seeking to keep the contract alive must take care to establish that they are ready, willing, and able to complete at the time fixed for completion.

One of the essential clauses of every contract of purchase and sale is that time is of the essence and courts do enforce it strictly.

- In *Tannery Park Development Corporation v. Georgilas Investments Ltd.*, 2006 BCCA 569, the purchaser was negotiating with its lender on the terms of an undertaking, with the knowledge of the vendor, until just prior to 5 p.m. on the date of completion. As a result, the lawyers missed the 3 p.m. deadline to register their documents at the Land Title Office. The Court of Appeal reversed a trial ruling and upheld the default of a $200,000 deposit. The court remarked that the proposition that these experienced

solicitors had any expectation at any time that the registrar would accept documents for registration after 3 p.m. was untenable.

- The extended hours of e-filing alleviate timing concerns but be aware that the standard form contract still specifies a time by which closing must occur.

Beware of the helpful realtor. A party's failure to perform on time will only constitute a breach if time is of the essence in the agreement. The realtors, thinking they are being helpful, will call each other and "arrange" for the deal to complete later and may not see the necessity of a written extension.

Remember that if, 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; see *Whittal v. Kour*, 1969 (BCCA).

An extension of time must be in writing and must restate that time remains of the essence for the new dates; see *Ambassador Industries Ltd. v. Kastens*, 2001 BCSC 484.

Agreement to an Extension

If the parties agree to an extension, ask the realtors to document the extension, reiterating that time is of the essence. If they do not, you will need instructions from your client to act as their agent and write a letter to the other side or their lawyer setting out the new date and reinstituting that time is of the essence.

2 - References & Resources

Primary statutes

- *Builders Lien Act*, SBC 1997, c 45
- *Income Tax Act*, RSBC 1996, c 215
- *Income Tax Act*, RSC 1985, c 1 (5th Supp.)
- *Land Title Act*, RSBC 1996, c 250
- *Property Law Act*, RSBC 1996, c 377
- *Real Estate Development Marketing Act*, SBC 2004, c 41
- *Residential Tenancy Act*, SBC 2002, c 78
- *Strata Property Act*, SBC 1998, c 43
    - Strata Property Regulation, BC Reg. 43/2000

Other relevant legislation

- *Indian Act*, RSC 1985, c I-5
- *Interest Act*, RSC 1985, c I-15

Law Society of BC

- Practice Checklists Manual
- Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources*:*
    - under the heading *Client files*
        - Closed Files: Retention and Disposition
        - Closing a file: What documents to keep and for how long (Winter 2017 *Benchers' Bulletin*)
        - Ownership of Documents in a Client's File
        - Sample non-engagement letters
    - Lawyers Sharing Space under the heading *Organizing your law office*
    - Sample retainer letters (including a general retainer agreement and a joint retainer**)** under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- Law Society Discipline Advisories:
    - "Private lending" (April 2, 2019)
    - "Reporting a mortgage discharge failure to the Law Society is mandatory" (August 20, 2015)
- Law Society's Mortgage Discharge Reporting Form
- Law Society Rules, in particular:
    - Rule 3-64(8) (Withdrawal from trust)
    - Rules 3-95 (Definitions) and 3-96 (Report of failure to cancel mortgage)
    - Rule 3-96.1 (Electronic submission of documents)
- Code of Professional Conduct for BC (*BC Code*), in particular:
    - rule 3.2-9 (Clients with diminished capacity) and the associated Commentary
    - section 3.4 (Conflicts) and Appendix C - Real Property Transactions
    - rule 5.1-6 (Undertakings) and rule 7.2-11 (Undertakings and trust conditions)
    - rule 6.1-5 (Electronic registration of documents)
- Client capacity
    - Practice Advisor's - Frequently Asked Questions include an overview of the relevant obligations and resources regarding client capacity and undue influence
    - Additional resources to assist in navigating issues of client capacity are available in the Support and Resources for Lawyers > Practice Resources area of the Law

Society's website under the heading *Capacity*, including "Acting for a Client with Dementia", Spring 2015 Benchers' Bulletin.

- Trust Administration Fee (TAF)
  - The Law Society's Practice Management Course, see **Module 3 - Trust Filing and Trust Applications**, section ***3.2 - Trust Administration Fee***
  - The Trust Accounting area of the Law Society's website, includes links to various resources, webinars and the Trust Accounting Handbook, see *Chapter 4 - Trust Administration Fee*, p. 51

Lawyers Indemnity Fund

- Fraud Alerts

External resources

- BC Land Title & Survey Authority (LTSA) website my LTSA includes the Land Title Forms webpage
- BC government resources include webpages on the following topics:
  - Additional property transfer tax for foreign entities and taxable trustees
  - BC Homeowner Grant
  - Glossary for property taxes
  - Property taxes in rural areas
  - Property Transfer Tax
  - Property transfer tax exemptions
- BC Law Institute (BCLI) has helpful resources including:
  - Report on Common-Law Tests of Capacity
  - Undue Influence Recognition & Prevention: A Guide for Legal Practitioners (December 2022), which includes this Undue Influence Recognition and Prevention: A Reference Aid
- Canada Revenue Agency resources include webpages on the following topics:
  - Canada Revenue Guide RC4028
  - GST/HST Memoranda Series
  - GST/HST new residential rental property rebate
  - GST New Housing Rebate
  - GST 190 Rebate Application
- Canadian Bar Association BC Branch's Standard Undertakings (login to the CBABC website to access)
- CLEBC's resources include:
  - BC Mortgages Practice Manual
  - BC Real Estate Practice Manual

    - Land Title Electronic Forms Guidebook, also known as the "Green Book".
- Juricert and see also Law Society Rule 3-96.1 (Electronic submission of documents), Rule 3-64(8) (Withdrawal from trust) and *BC Code* rule 6.1-5 (Electronic registration of documents).

MODULE 3 – BUSINESS LAW

3 - Introduction to the Business Law Module

Peter and Paul come into your office. They have developed an app that will make them millions, but before marketing it, they want you to tell them how to set up a business structure that will work for them both now and in the future.

Clara Keene calls your office. She is tired of the cold Alberta winters and wants to move to the BC coast. She wants to buy into an ongoing business and has been offered a minority interest in Keen to Clean, a local cleaning company, for $100,000. She wants to know if this is a good offer and how to go about finalizing the deal.

Dr. Jones calls your office. She has been a doctor in another province for many years and already has a company. She wants to move westward in order to be closer to her elderly parents and wants you to do whatever may be required in order to transfer her company to BC.

These are some of the types of business transactions that are likely to cross your desk. Each file will have its own unusual set of circumstances and you should always consider whether you have the skills and experience required to accept the file. There are many nuances in the practice of corporate and commercial law, and it is beyond the scope of this module to cover the details of transactions that involve complicated issues.

References & Resources

The learning materials for this module refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*. For a summary of the key resources, see section ***3 - References & Resources*** at the end of the module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed *en masse* for update in 2011.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

3.1 - Who is Your Client?

You will often be asked to act on a joint retainer for more than one party. This is your opportunity to consider two important issues:

- the risk that you will be assuming if you act for more than one party, remembering that a company is its own legal entity and is separate from its shareholders; and
- getting paid for the work that you will be doing. There isn't much point in representing an empty shell company if you are going to end up as its first unpaid creditor.

Joint representation can be a liability trap. Imagine the potential conflicts arising with issues such as:

- Unequal contributions to capital, for example Paul has the idea but Peter is the only one with the financial means to bring the idea to the market.
- Personal guarantees for credit lines or equipment. The lender isn't likely to chase Paul when it is Peter who has the deep pockets.
- Casting votes for the president and what to do if there is a tie.

- Decisions to designate the beneficiaries of insurance policies. For example, Peter wants to designate his wife who will then step into his shoes if he dies, but Paul doesn't ever want to be in business with her and wants to designate the company as the beneficiary so that it can buy back Peter's shares.

Some corporate lawyers inform the shareholders that they will agree to act for the company only. They will require instructions from the individuals creating the company, but once given, their primary responsibility is to the company. Keep in mind that your client the company may be dependent upon the financial support of its shareholders and it may be appropriate to obtain guarantees for your fees and disbursements from the shareholders, even though you are not acting for them personally.

If you decide to expand the scope of your representation to include more than one party, you must have informed client consent. *BC Code* rules 3.4.5 to 3.4-9 (Joint retainers) require the clients to acknowledge, preferably in writing, that they understand:

- You must withdraw from acting when a conflict of interest arises;
- You cannot treat information obtained from one client as confidential from the other, and any information that may be relevant to their joint enterprise or to the other, will be disclosed unless contrary instructions are received, in which case you must withdraw from the joint representation; and
- You require permission, in advance, to act as a "peace-maker" on internal disputes, and if you are unable to make peace, you cannot represent either party unless you have advance permission to continue to represent the continuing client. Without such instructions, you must cease acting for both clients once the dispute arises.

Remember that in a typical two-shareholder company, there are three relationships that can give rise to potential conflicts for you as counsel – the relationship between the two shareholders, and the two distinct relationships between the shareholders and the company.

The Law Society has a **sample joint retainer letter** in the Support and Resources for Lawyers > Practice Resources area of the website. **Take joint representation seriously.**

Failing to make complete disclosure can vitiate client consent and can cause you to breach your duty to the clients.

Be careful about allowing unrepresented parties to sit in your office while your client gives you instructions. Doing so creates the risk of the unrepresented party also thinking of you as their lawyer. Don't wait for the parties to identify their role in the transaction, as they will frequently assume that you already know as much as they do about the matter at hand, even if none of them

has ever told you anything about it. In order to avoid the possibility of confusion about your role, consider refusing to act as host for negotiation meetings, ensuring your role as lawyer is clear.

If you are involved in the preliminary negotiations, do not meet with the vendor and the purchaser to draft an offer, letter of intent or agreement to buy a business without first making clear to the parties:

- who you represent and who you do not represent;
- that any material issues discussed will be reduced to writing, including restating who you are representing; and
- that the non-client should obtain independent legal advice before finalizing any documentation.

It is always good practice to have the non-client acknowledge specifically in writing that you are not acting for them. A second alternative is to provide them with a letter that states clearly that you are not representing them. If you must witness the non-client's signature to any document you should mark the document "witnessed as to execution only, no legal advice sought nor given" – but even that step should only be taken after carefully considering the risks and benefits of doing so. If something goes wrong, "I was just trying to be helpful" is not likely to be an effective defense to a claim or complaint against you.

Also be on the lookout for evolving conflicts. For example, if shareholders of an existing or new enterprise who at one time had an agreement then begin to disagree over the merits of a proposed course of action, you may find yourself prevented from acting for any of them. This is particularly so if you have not set up the initial retainer to comply with *BC Code* rule 3.4.

Think twice before deciding to represent more than one party. Sometimes, it's just simpler for everyone if you make it clear that you will only represent the company. This also allows you to avoid the "[insert your name] always did like you best!" argument among shareholders.

3.2 - Business Structure

3.2-1 - Selecting a Business Structure

Determining the best business structure for your client is often a collaborative process among the client, the client's accountant and you. Remind your client of the accountant's important role when you are consulted for advice. If you can, arrange with your own accountant to be able to call with your own questions to confirm the accuracy of any advice that you give.

There are five most common business structure choices for a small business, and all are outlined in the next section.

- ***3.2-2 - Sole Proprietorship***
- ***3.2-3 - General Partnership***
- ***3.2-4 - Limited Partnership***
- ***3.2-5 - Limited Liability Partnership***
- ***3.2-6 - Corporation***

3.2-2 - Sole Proprietorship

This structure arises as a matter of law when your client starts carrying on business in their personal capacity and generally requires very little legal work. However, operating as a proprietor exposes your client and their personal assets to all of the risks and liabilities of the business.

A sole proprietorship may be perfect for a client who doesn't need to limit liability to customers and who wants relative simplicity with respect to taxes. Since a company is a separate legal entity it will have to file its own income tax return. This can be a costly process.

There are generally two aspects to limited liability:

- The first is the client's wish to reduce or eliminate possible liability for the unpaid debts of the business. However, since lenders, landlords and suppliers often insist upon personal guarantees from small business owners, a business structure created to limit liability may offer little practical protection from the most significant liabilities the business is likely to face.
- The second aspect is the client's wish to eliminate liability for injury or damage to others or their property. Insurance would address this risk so encourage your client to discuss the prospective business with a competent insurance broker, particularly if the business will have employees, is open to the public, or use vehicles for business purposes.

A sole proprietorship can be a good way to start when a business' profitability is uncertain, because the individual proprietor may deduct reasonable start-up losses from other income. Since a corporation is a separate legal entity, losses incurred by the company may never be deductible if the company never has any income.

The *Partnership Act* obligates your client to register the name of their proprietorship with the Corporate Registry in Victoria if:

- the business involves trading, manufacturing, or mining, and
- the name is other than their own name, or if the name is their own name with the addition of "and Company" or some other word or phrase indicating a plurality of members in the business.

Even if the business does not involve trading, manufacturing or mining, it can be useful to register the proprietorship for other purposes, such as documenting when the trade name was first used for trademark purposes.

3.2-3 - General Partnership

A general partnership is a business operated by two or more partners willing to pool assets and liabilities in common. This structure occurs as a matter of law and it can work well for low risk ventures. Generally speaking, all of the partners in a general partnership are jointly and severally liable for the debts and obligations of the partnership. Section 7 of the *Partnership Act* provides that acts of every partner who does anything in the usual course of the business of the partnership binds the firm and all partners, effectively, an act or omission of partner A can create liability for partners B and C.

The *Partnership Act* applies to all persons carrying on business in common with a view to profit, unless they have agreed otherwise or are precluded from being partners by reason of s. 3 or s. 4 of the Act.

Section 21 of the *Partnership Act* allows such persons to vary the rights, duties and liabilities imposed by the Act, and you should familiarize yourself with these provisions if you are advising clients on a partnership.

Although the *Partnership Act* does create basic rights and remedies for partners, the general presumption is that all partners will share equally in the revenues and expenses and in many, if not most, partnerships this will not be the case. A formal partnership agreement will determine the partners' rights, interests and obligations and deal with issues such as admission and expulsion of partners, and so on.

There is a useful checklist for drafting partnership agreements in **CLEBC**'s 2009 "Understanding and Working with Limited Liability Partnerships", Working with Partnerships.

A general partnership is not usually treated as a separate legal entity for income tax purposes. The general partnership must be registered under s. 81 of the *Partnership Act*.

3.2-4 - Limited Partnership

A limited partnership is available only where permitted by the *Partnership Act*. It involves:

- the operation, management, and control of a business venture by a general partner, who bears unlimited liability for the risks of operation, and
- the investment by passive limited partners, whose liability is limited to the amount of their contribution to the partnership through the acquisition of units or other capital investments in the partnership.

Part 3 of the *Partnership Act* covers the formation of a limited partnership.

Section 64 of the *Partnership Act* provides that a limited partner is not liable as a general partner unless they take part in the active management of the business. In practice, a limited partnership structure will be of limited value where all the partners intend to have an active role in operating the partnership.

Further information on limited partnerships is available in **CLEBC**'s 2009 "Understanding and Working with Limited Liability Partnerships", Working with Partnerships.

3.2-5 - Limited Liability Partnership

A limited liability partnership (LLP) is a relatively new structure in British Columbia. An LLP is particularly useful for professional partnerships because of its unique feature of insulating each partner from liability for the negligence of the other partners.

Under Part 6 of the *Partnership Act* a general partnership or limited partnership can become an LLP by registering under the Act. Once properly registered, an LLP offers each partner protection from liability for the acts or omissions of another partner beyond each partner's interest in the partnership. If one partner commits an act or omission, the assets of the partnership remain at risk for any consequential liability, as do the personal assets of the partner who committed the act or omission. However, the personal assets of the innocent partners are not exposed to liability unless the innocent partners were involved or acquiesced in the act or omission of the other partner.

The provisions of the *Partnership Act* that remove the limited liability of limited partners if they are involved in the management and operation of the partnership, do not apply to the LLP. All

partners are therefore free to participate in operating the LLP. Involvement or acquiescence in the act or omission giving rise to liability is the only relevant factor affecting a partner's limitation of liability.

The partners of an LLP get the same income tax treatment as the partners of a general partnership.

Further information on LLPs is available in **CLEBC**'s 2009 "Understanding and Working with Limited Liability Partnerships", Working with Partnerships.

3.2-6 - Corporation

The most common business structure in British Columbia is a company incorporated under the *Business Corporations Act* (BCA). Where your client anticipates operating in multiple provinces, a federal corporation formed under the *Canada Business Corporations Act* may be the best option. In most cases a company will have a limited number of shareholders, often referred to as a closely-held company. Companies with significant numbers of shareholders or those that intend to offer their securities to the public are beyond the scope of this module.

A corporation is considered to be a separate legal entity from its shareholders. Where a company operates a business, the company bears liability for the business instead of the shareholders, except to the extent that they owe money or property for the issue price of their shares.

There are several advantages to a corporate structure, including:

- **Immortality.** A company continues to exist without interruption even if all its shareholders change and even if, for a period of time, it has no shareholders.
- **Limited liability.** A corporate structure limits shareholders' personal liability for most debts, claims and obligations of the company. There are several important exceptions, most notably for specific statutory claims like income taxes. Directors and officers of the company who are often, if not always, shareholders will have personal liability for company obligations. Lenders, major suppliers, and landlords often insist on personal guarantees from company principals, which eliminates the limited liability advantage of a corporation to the extent of the guarantee. However, insulation from customer claims, trade debts and many other third-party claims may still be available.
- **Transferability of shares.** Transferring proprietorship or partnership interests can be cumbersome, but the mechanics of transferring a shareholder's interest in a company are straightforward.

- **Raising capital.** This can sometimes be more easily accomplished by selling shares than trying to raise partnership contributions, given the liability protection available to shareholders.
- **Tax treatment.** The tax treatment of companies is constantly changing, so consult an accountant on the structure and tax rates. Some corporations receive preferential income tax treatment according to the nature of their business or the residence of their controlling shareholders, but there can also be less desirable tax treatment for business losses.

The Law Society's Professional Legal Training Course (PLTC) practice materials provide a basic summary of tax issues relating to corporations.

- **Timing and control over personal income recognition.** A corporate structure allows a degree of control over the amount and timing of income recognition in the hands of shareholders, such as control over when dividends or management fee payments are declared and the amounts to be declared. The structure may permit income-splitting among shareholders that is not otherwise available in a partnership or proprietorship structure.
- **Rights of shareholders.** The laws protecting shareholder rights are well developed.
- **Speed of formation.** Once a corporate name has been approved by the corporate registry, the company can be formed instantaneously by electronic filing.

For more information about the primary income tax implications of earning income through a proprietorship, partnership or incorporation, see **CLEBC**'s:

- 2005 "Impact of Tax Issues on Business Structures", Private Companies: Structuring the Entrepreneur
- 2010 "Basics of Corporate Taxation and Distributions", Tax Driven Transactions.

Tax issues are always evolving, and appropriate accounting and tax advice is essential.

For further information, see section ***3.3 - Incorporation Processes***, below.

3.3 - Incorporation Processes

3.3-1 - Initial Considerations

Getting Started

Once you have complete instructions from your client, you can incorporate the company online.

Most lawyers find it convenient to open a BC Online account, which will permit full access to all government online services and automatic billing for registry and other fees.

Choosing a Name

The first step in the incorporation process is often selecting a name for the company. Usually the client will select multiple name options, as the name reservation process allows three options for a single fee, while submitting names one at a time results in multiple name reservation fees. It is possible to incorporate a company without first reserving a name by using its incorporation number with "BC Ltd." as its name and then changing the name at a later date.

Before submitting the client's name choices to the registry, search the proposed names in the Canadian trademarks database. Also conduct a broad Internet search for existing similar business names or trademarks, which may result in the proposed name being rejected or cause future intellectual property issues for the client.

Compliance with all Incorporation Requirements

Sometimes the trickiest part of representing a client is knowing what else needs to be done. For example, if Dr. House, a medical doctor with a corporation in Alberta known as "Dr. G. House, Professional Corporation", wants to move to BC, she will have to obtain the prior written consent of the College of Physicians & Surgeons of BC. Pursuant to the provisions of the *Health Professions Act*, her professional corporation will have to be continued into BC and its name will have to be changed to reflect the policy requirements of the BC College, and in particular its Bylaws, which currently permit only corporate names that meet certain criteria, for example "Dr. G. House Inc.".

3.3-2 - Share Structure, Articles & Shareholders' Agreement

Establishing the Share Structure

You will often consult with an accountant about the share structure about the types and characteristics of shares, including common shares, preferred shares, rights of redemption, rights of retraction, voting rights, as well as the number of shares to issue. As this can be a complicated process, you may also need to consult with a tax lawyer.

Drafting the Articles

The Articles of a company are its basic constitution and set out the mechanics for calling and holding meetings, powers of the directors, and so on. If the share structure involves multiple classes of shares, the special rights and restrictions attached to those classes of shares will be set out in the Articles. A set of standard Articles is set out in Table 1 of the Business Corporations Regulation and those can be adopted as a company's Articles.

A precedent for a more comprehensive set of Articles, as well as samples of special rights and restrictions for various types of share classes, is available in **CLEBC**'s British Columbia Company Law Practice Manual.

Shareholders' Agreement

When dealing with a closely-held company with more than one shareholder, you should advise the shareholders to consider a shareholders' agreement. If you are on a joint retainer from all the shareholders to draft the agreement, recommend that each of the individual shareholders have the agreement reviewed by an independent lawyer before signing. If you are on a retainer from only one of the shareholders to draft the shareholders' agreement, clearly advise the others you are not acting for them and that each should seek independent legal advice.

A shareholders' agreement can be an effective tool to set out the details of how a business will be run. Properly drafted, a shareholders' agreement can provide clarity for the shareholders around issues such as the roles that each will play in the business, how profits and costs will be shared, how disputes will be resolved and what rights the estate of a deceased shareholder and the remaining shareholders will have in the event of death or disability. Normally the company will be a party to a shareholders' agreement along with the shareholders because the agreement

typically has provisions which impose obligations between each shareholder and the company as well as among the shareholders themselves. Examples of such provisions are confidentiality and non-competition covenants, obligations on the company to repurchase shares in the event of the death or disability of a shareholder, and so on. If the shares of an operating company are themselves held by other holding companies, consider also adding the principals of the holding companies as parties to the shareholders' agreement.

Shareholders' agreements are important documents so they must be drafted very carefully. Clients will often ask for a simple shareholders' agreement and they may initially balk at the cost that a proper, comprehensive agreement entails. It can be helpful to ask them if they have considered these issues that keep many litigators busy:

- A shareholder is frozen out of participation in management, contrary to expectations.
- Two shareholders cannot get along, but neither can push the other out.
- The entrepreneur shareholder wants to take a new direction.
- The founding parent or siblings cannot get along and have a lot of emotional baggage.
- Marriage breakup resulting in a claim to the shares by the shareholder's spouse.
- A new shareholder enters the company by inheritance.
- A shareholder becomes the odd man out with others ganging up on them.
- Someone is steering business to a different entity.

The honeymoon phase of a new business venture is the best time to ask crucial questions concerning the nature of the business, including:

- how long it will continue;
- the work and participation commitments of the parties, for example, who will manage and run the business on a day-to-day basis;
- who will be a full-time employee and how they will be paid;
- the expected capital contributions from each party and whether funds will be advanced as shareholder loans or as capital, such as subscription price for shares;
- the sharing of responsibility or no responsibility for pledges of personal credit;
- what issues require approval of all the shareholders regardless of their voting rights;
- how money will be distributed; and
- how to unwind the company if the honeymoon turns into a divorce.

Note that the *Business Corporations Act* (BCA) provides that certain provisions governing the conduct of a company's affairs must be included in the Articles of the company if they are to be effective. Examples include:

- s. 172 (requirements for quorum at a general meeting);

- s. 125 (directors' share qualification provision);
- s. 140(1) (directors' meetings held by telephone); and
- s. 77 (right to redeem or purchase the company's shares).

A shareholders' agreement should always contain a provision requiring the shareholders to amend the Articles so that the Articles are consistent with the shareholders' agreement in the event of an inconsistency or conflict between the documents.

It is useful to have a dispute resolution mechanism in a shareholders' agreement, even if it is only a shotgun buyout clause. For example, shareholder Group A demands to end the business relationship. They tell Group B "We will buy your shares for XXX amount." Alternatively, Group B can counter with "No. We will buy YOUR shares for that same amount." A purpose of this counter-offer option is to ensure that those attempting to buy out the other party will offer a fair price, if not a premium. Such a mechanism will separate the feuding shareholders and provide compensation for the departing shareholder. To the extent possible, the mechanism of unwinding should require the recalcitrant shareholder to do as little as possible to make it work.

Company law material is available online and a comprehensive precedent agreement is also available in **CLEBC**'s British Columbia Company Law Practice Manual.

3.3-3 - Preparing post-incorporation documents

Hitting "submit" on the corporate registry website may serve to incorporate the company, but it must still be organized.

Organization refers to the process of preparing the resolutions and share certificates to issue shares, appoint officers, determine the year-end and address various other basic corporate issues.

A good description of a typical set of post-incorporation organizational documents can be found in the Company Law chapter of the PLTC practice materials and precedent documents are published in **CLEBC**'s British Columbia Company Law Practice Manual.

3.3-4 - Registered & Records Office Agreement

If your office will be the registered and records office for the newly-incorporated company, prepare a Registered and Records Office Retainer Agreement that allows you to change the registered and records offices addresses to a different location than your office when you are no

longer retained or instructed by your client. **If you don't, you will find yourself in the unhappy position of not knowing what to do when it is time to file the yearly annual report.** You can't do nothing and run the risk of the company eventually being struck, with all of its assets escheating to the Crown.

You shouldn't file documents that may not contain correct information.

Always require your client to maintain contact with you and provide the necessary funds to you, at least annually.

Also ensure that you obtain an executed resolution and notice of change of address to file if you find it necessary to terminate the retainer.

3.3-5 - Annual Meeting & Reporting Requirements

Every company must call and hold an annual meeting of its shareholders each year, unless a formal meeting is waived and written consent resolutions in lieu of a meeting are signed.

- The annual meeting must comply with the time lines in *s. 182 of the Business Corporations Act* (BCA), and the Directors must provide the information, including financial statements, set out in s. 185 of the BCA.
- In addition, every company must file an annual report each year within two months after the anniversary of its incorporation or registration in British Columbia.

If annual reports are not filed, then approximately two years after failing to file, the registrar will dissolve the company resulting, eventually, in the escheat of its assets to the Crown.

There may be differing deadlines where annual meetings or annual consent resolutions in lieu are tied to the fiscal year-end, while annual report filings are tied to the incorporation or registration date. In that case, it may be necessary to send two separate packages of corporate maintenance material to the client each year. The Registered and Records Office Retainer Agreement should emphasize that you will not be responsible for filing the annual reports nor for any consequences from the failure to do so, unless your client pays your fees for preparing and filing the annual report.

It’s a good idea to keep separate diary cards for all the companies in your care.

- Sort the cards according to the months in which the annual resolutions and annual reports are due, and on the first day of each month bring forward the files that will require action that month.
- Don't return the files to your filing cabinet until the annual resolutions have been signed and returned by the client and the annual report filed.
- Don't rely on the registrar of companies to send you the reminder.

3.4 - Buying a Business

3.4-1 - Buy Assets Sell Shares (BASS)

After your client has chosen a business structure, you may be asked to draft an agreement to buy an existing business. How the purchase is structured will have immediate cost consequences and will influence how the ongoing business operates.

The interests of a purchaser and a vendor naturally diverge for many issues in buying and selling a business. There is a general rule is known as Buy Assets Sell Shares (BASS). Generally, purchasers want to buy assets and vendors want to sell shares.

There are exceptions to the BASS rule, and you must always take the nuances of your client’s particular transaction into account. For example, if the business being sold predominantly owns real property, the purchaser may want to buy shares to avoid the property transfer tax, which may make assuming the liabilities of a share purchase worth the risk.

Usually, a vendor wants to sell shares to take advantage of the capital gains exemptions available on the sale of shares, but the exemptions are not available in all circumstances so obtain tax advice to confirm an exemption is available in your client’s circumstances. Purchasers often want to buy assets in order to avoid the risk that follows shares in a company. Buying assets also allows the amount paid for the assets to be allocated among them and depreciated for tax purposes over the life of the assets. Even very valuable assets may have been significantly depreciated by a vendor and the purchaser will inherit the depreciated value for tax purposes even if the price reflects a higher actual value. An asset purchase also allows the purchaser to acquire only part of the vendor’s assets if some assets in the vendor company are not essential to the business.

Purchasing shares means that the buyer is buying the company, including all of its rights and benefits as well as its faults. Liabilities may include ongoing or potential litigation, income tax and other tax liabilities, product liabilities and many other obligations.

The different tax and liability implications for a purchase of assets versus a purchase of shares means that negotiating the structure of the transaction often happens along with negotiating the purchase price. Given the vendor's better end position with a share sale, the purchaser may be able to negotiate a lower purchase price for shares than they might for assets as a way of offsetting the lost future depreciation, deductions, and potential liabilities associated with the company.

Other factors will also influence the choice of structure for the sale. For example, a purchase of shares may be desirable to a purchaser where the nature of the business is such that transferring its assets will pose practical challenges – a trucking company with a fleet of vehicles and operating licenses in several jurisdictions may be much more attractive as a share purchase that can be implemented with few simple resolutions when the alternative is a multitude of individual vehicle transfers, applications for new operating licenses in several jurisdictions, and so on.

For further information on whether a business acquisition should be done by a share purchase or asset purchase, please refer to **CLEBC**'s Buying and Selling a Business – Annotated Precedents. Excerpts from Chapter 1 are included in this module.

3.4-2 - Allocation of Purchase Price

In an asset purchase, the purchaser will generally want to allocate the highest price to the depreciable assets and the vendor will want to allocate the highest price to the non-depreciable assets. A common example of this happens in a commercial real estate sale. The vendor wants most of the price allocated to the land, while the purchaser wants most allocated to the building.

If the portion of the purchase price allocated to particular assets exceeds the depreciated value for those assets on the vendor's books, the vendor may have to pay recapture income tax. Accordingly, the vendor will usually want to keep the purchase price allocation to each asset under the depreciated value carried on the vendor's books, while the purchaser will want to keep the price allocation high for the assets with the most favourable depreciation rates. Again, these competing objectives can affect the negotiated purchase price.

Goods and Services Tax (GST) is payable on equipment, leasehold improvements, inventory and goodwill. In many cases the parties may agree to a joint election pursuant to s. 167(1) of the Federal *Excise Tax Act* if the sale is of all or substantially all of the assets of a business, thus

avoiding the need to pay the tax at closing. In order to qualify for this election both parties must be GST registrants at the time of closing. If the purchaser is a newly-formed company, ensure that it has registered for GST purposes. The vendor will most often already be a registrant in order to carry on the business, however, where the vendor is not registered for GST as in a dental practice, the section 167(1) election is not available. If any assets are excluded from the purchase, obtain tax advice regarding whether the GST election will still be available, as Canada Revenue Agency has policies regarding what constitutes "substantially all" of the assets. Also consider those assets that are subject to Provincial Sales Tax (PST).

It is generally advisable that a share purchase agreement identify, ideally with the input of a financial advisor, the allocation of the purchase price among the various classes of assets or shares.

Parties frequently don't consider these issues, so pay immediate attention to these issues if you become involved after the agreement has been signed.

3.4-3 - Preliminary Investigations

The purchaser will usually seek representations and warranties on matters such as the financial strength of the business, accuracy of financial statements, major contracts pertaining to the business, and the ability to assign major assets, such as leases of land or licenses. Even in a share sale, leases and licenses are often not assumable without the landlord or licensee approving the new shareholders.

However, even extensive representations and warranties do not take the place of careful due diligence. A purchaser, together with their lawyer and accountant, should always conduct independent searches and investigations of the target company or business and its assets in order to independently assess the financial strength of the business being purchased. Ideally your client will consult you prior to entering into a binding agreement so you have an opportunity to discuss the overall approach to the transaction with your client. The sale of a business may also involve third party interests your client can identify with you at the outset. For example, the purchaser may need to deal with third party agencies or settle claims on the assets by a former creditor or even the separated spouse of an individual vendor who claims the business is a family asset.

Here is a list of some of the business and legal issues to consider at the preliminary stage:

- The purchaser and their accountant should review the vendor's current financial statements from the last 120 days.

- Assess whether a significant portion of the sales are with a small group of customers or suppliers. Ensure that these contracts will be continued after sale, which may require meeting with those before closing to advise them of the impending change of ownership and to address any questions.
- Document the vendor's promises as representations in the agreement regarding future sales, profitability, gross margins, cash flow, capital expenditures and warranties regarding management commitments, contractual arrangements and legal actions. Be particularly cautious of businesses being sold at a high price for immigration purposes. If the final agreement contains an entire agreement clause, it may preclude the purchasers from enforcing pre-contractual or oral promises and representations against the vendor after the transaction has closed, so include language to extend the life of those promises and representations past closing.
- Consider whether part of the transaction purchase price should be paid over time, conditional on the business achieving certain sales or profit forecasts or staying free from unexpected liabilities.
- Clarify profit and sales definitions and similar financial terms at an early stage in the negotiations.
- Familiarize yourself with the physical plant of the subject business and with the accountants, lenders, and other advisors of the vendor's business.
- Consider consents to obtain from government or others who should be contacted early in the negotiations so their response will not delay closing. Make key consents a condition precedent to the transaction closing.
- Carefully review important employment contracts, including collective bargaining agreements. If there are collective agreements, successorship rules may apply so the agreement will follow the deal and bind the new purchaser, even if the transaction is an asset sale.

You may be asked to put together a letter of intent or memorandum of understanding on a rush basis. This type of document usually sets out the general parameters of the proposed transaction but further work is required before a deal can be finalized. For example, the parties may need to settle definitive documents, complete due diligence, obtain financing or determine whether the purchaser will be able to merge its technology with that of the seller.

Have your client decide beforehand whether the letter or memorandum is intended to create a binding contract or whether it is simply meant to indicate the parties' desire to continue bargaining in good faith. If the document is intended to be a binding agreement, be careful not to make it non-binding by stating that it be followed by a more formal agreement. Alternatively, if the document will not be binding as an agreement to purchase, there may be aspects of the document that your client does wish to be binding, such as confidentiality obligations, stand still agreements and the like, particularly where the purchaser and vendor are existing competitors

and the due diligence process will necessarily involve access to information that is competitively valuable. Careful drafting is key in such situations.

Ideally, the parties will seek legal advice about the structure of the transaction early in their negotiations. However, even if the parties have a signed contract without conditions precedent, ensure that your client understands the rights and obligations under the contract, discuss any areas which are unclear or potentially unfavorable and assess the prospects for renegotiation of those areas. Typical issues would include failing to allocate the purchase price advantageously from a tax point of view and failing to consider whether employees will be terminated prior to closing to reduce the amount of severance your client would pay if the employees' work did not meet your client's expectations.

Keep in mind as you advise your client and negotiate the purchase agreement that purchase and sale transactions involve balancing interests and risks. Both sides have interests to protect that may conflict and there are inherent risks involved in any business venture. It is unreasonable for a purchaser to expect that the vendor will assume all the purchaser's risks of the business post-closing, as it is for a vendor to expect to obtain full value for the business without taking responsibility for the representations on which the price was based. Your role as counsel will be to ensure that to the extent possible, the final transaction represents a fair balance of the rights and interests of your client versus those of the other parties. It is not to ensure that your client bears no risk and the other parties bear all of the risk. Second, ensure that your client understands the balance of rights and benefits that has been struck. Remember that unlike litigation, the successful closing of a purchase and sale transaction should be a win-win situation for all parties, not winner takes all.

3.4-4 - Searches

Due diligence allows the parties and their advisors to confirm the current state of affairs of a business and to learn as much as possible about a target business before committing funds to buy it. Sometimes clients have done considerable due diligence themselves and come to you anxious to close the deal as quickly as possible. Others have not conducted any due diligence. Ideally the purchase agreement will provide for a reasonable due diligence period during which the purchaser can get out of the deal if all is not as represented.

Ensure that you confirm in writing your advice to conduct due diligence. Don't forget to list the possible pitfalls to what seems to be a simple purchase, such as:

- the corporate vendor's legal right to sell should be confirmed by reviewing the company minute book, and searching the Registrar of Companies and Bankruptcy office;

- liens on the assets by government agencies, to be confirmed by requesting clearance certificates from those agencies;
- liens on, or other potential claims to, the assets by other creditors, to be confirmed by land searches, PPSA searches and court registry searches for litigation proceedings and judgments; and
- issues affecting the goodwill of the business. This is an important factor if your client is purchasing the shares of a company or hoping to continue to operate the business under the same name, to be confirmed by searches at Better Business Bureau and civic/municipal/provincial offices, among others.

If the nature of the business extends operations to other provinces, it may be necessary to engage local counsel to conduct searches in those other provinces.

This list does not cover all the issues that your client may encounter and possible places to conduct searches.

An invaluable resource is **CLEBC**'s Due Diligence Deskbook, which contains a comprehensive description of potential searches in asset and share transactions, as well as sample precedent search letters and contact information.

Discuss with your client the searches that you recommend, given the nature of the business and whether the transaction is for assets or shares. Remember that several provincial statutes provide liens for unpaid wages, assessments, and taxes that follow the assets and take priority over other charges or interests. Arrive at a practical list, bearing in mind the limitations of time and your client's budget. Beware of excuses for not conducting searches before the anticipated closing of a transaction – a business may seem too attractive to delay closing because of price or a perceived lack of blemishes before searches. If the client wants you to omit or limit the due diligence, particularly statutory searches, confirm your advice and your client's instructions in writing.

If possible, negotiate sufficient time to conduct these searches or provide for a reasonable holdback of a portion of the purchase price. Failing to conduct statutory lien searches and confirm basic representations about the business may constitute professional negligence.

When considering due diligence searches, determine the appropriate jurisdictions in which to proceed. In a share acquisition, conduct searches in each jurisdiction in which the company is carrying on business. In an asset transaction, conduct searches in the jurisdictions in which the assets are located.

This is also a good point to negotiate sufficient time to deal with the assignment of any leases, particularly the business' premises. Sometimes this process can require weeks of negotiations,

particularly if the seller expects to be released from any further obligations or if the purchaser has a less-than-stellar credit rating.

The searches conducted for either an asset or a share purchase are generally the same, but there are additional concerns in a share purchase sale, for example, the status of the shares and general company liabilities.

Compare the list of searches in the Law Society's Practice Checklists Manual:

- **Asset Purchase Procedure Checklist**
- **Share Purchase Procedure Checklist**

Here is an abbreviated list of the most common searches conducted by the purchaser's lawyer. Many of the most common searches can be performed for you by registry agent companies:

Corporate Registry to:

- obtain the current Notice of Articles and annual report information,
- determine whether the company had any previous names,
- determine whether the company was ever struck off and subsequently restored; and
- determine who the directors and officers are.

BC Online gives you quick access to most of this information.

Personal Property Registry for notices of certain encumbrances on personal property.

If any serial numbered goods, motor vehicles, aircraft and the like are included in the purchase, or are owned by the target company in a share purchase, search the appropriate vehicle information number or serial number.

BC Online allows quick searches of the personal property registry database, but remember that many encumbrances, such as statutory liens, do not require registration under the PPSA.

Real Estate Title Searches, including:

- **Land Title and Survey Authority of BC** for charges on title of land and for copies of leases. BC Online gives you quick access to most of these documents.
- **Indian and Northern Affairs Canada** if the vendor leases all or part of the land used in the business and the land is situated on a reserve.

Records office for review of target company minute book for share purchase agreements:

Examine all registers and determine if there are any deficiencies regarding:

- Directors
- Shareholders
- Transfer or allotment of shares

Examine share registers, share certificates, waivers of pre-emptive rights, if any. These may be relevant in older companies that were formed under the former Company Act, where formal waivers of pre-emptive rights were an often-overlooked technical requirement. Also examine resolutions authorizing issuance, transfer, and buy back of shares to determine if shares are validly allotted, issued, fully paid, transferred and redeemed.

For older companies that were formed under the former *Company Act*, examine the documents related to the transition of the company under the *Business Corporations Act* to assess whether the requisite formalities were complied with and whether or not the pre-existing company provisions continue to apply to the company.

Examine cancelled share certificates. Can they be located? Are they properly endorsed? If transferred from an estate, have the appropriate tax releases been obtained? If there are recent transfers from spouses, consider the *Family Law Act*.

Civic/municipal/provincial offices for arrears of business taxes, licensing bylaw violations, land taxes, zoning or restrictive bylaws.

WorkSafe BC for outstanding payroll assessments and investigations. This is important, as it is not uncommon for certain types of businesses to owe money to WorkSafe BC or to be under investigation because a worker was injured.

Canada Revenue Agency for corporate income taxes, GST, and employer remittances. If the vendor or target company does not submit the request in writing, then the purchaser's written request for a "comfort letter" must include the vendor's or target's business identification numbers and be accompanied by the vendor's or target's written consent, which must be signed by a current director of the company who must provide their her social insurance number for identification. The response can take a month or more.

Insurance agent to confirm placement of adequate insurance.

Office of the Superintendent of Bankruptcy Canada to ensure that the company is not an undischarged bankrupt.

***Bank Act* Registry**. Depending on the business, searches can be carried out by contacting the *Bank Act* Section 427 Registry.

Courthouse and sheriff's office for writs of execution or other attachment proceedings. In addition to the courthouses, contact the bailiff service in the relevant jurisdiction.

Court registry for litigation commenced and judgments registered.

Employment Standards Branch to search for certificates for unpaid wages and pending investigations or orders.

Human Rights Tribunal for pending complaints against the target company. Also search the judgment database of the Human Rights Tribunal for past decisions involving a target company or vendor that may relate to the business.

Customs collection for customs liens if an import/export business.

Insurance Corporation of British Columbia for vehicle ownership information if the business owns vehicles.

Ministry of Small Business and Revenue for arrears of provincial sales taxes and, in limited cases, outstanding corporation capital taxes. General corporations have not been subject to the corporation capital tax for several years, but banks, trust companies, and credit unions continue to be liable above certain threshold amounts.

Searches for special assets such as the Office of the Gold Commissioner for certain mineral claims or leases.

Credit and complaint searches, including Dun and Bradstreet, Better Business Bureau, and credit bureau. This can be a useful search if the business is being purchased as a going concern through a share purchase.

Waste Management under the *Environmental Management Act*. Use BC Online to access the BC Contaminated Sites Registry, and where the assets being purchased include land or the target company owns land, search the property description to identify existing investigations, such as pollution abatement orders.

Don’t forget the potential impact of the *Family Law Act* relating to claims to the assets or shares by a spouse, the *Investment Canada Act*, the *Competition Act* relating to mergers and notifiable transactions, and other relevant legislation, upon the transaction.

Refer to **CLEBC**'s Due Diligence Deskbook for examples of sample search letters. For some of these searches you will need the written consent of the vendor to release the search results to you.

3.4-5 - Asset Purchase Agreement

Checklists are extremely helpful in commercial transactions.

Refer to the **Asset Purchase Agreement Drafting Checklist** in the Law Society's Practice Checklist Manual.

Note the sample assumes that statutory lien searches were done and the results reviewed. Whether or not all the search results have been received, it is always desirable to negotiate a holdback of a portion of the purchase price for a minimum of 30 to 60 days pending completion of the searches. This will permit the purchaser to determine whether or not any undisclosed liabilities or misrepresentations exist and, if so, to adjust the purchase price as necessary. Where the purchase price is based upon assumptions about future cash flow or profitability, the amount of the holdback should allow for the potential impact on the purchase price if cash flow is less than projected.

3.4-6 - Share Purchase Agreement

Checklists are extremely helpful in commercial transactions.

Refer to the **Share Purchase Agreement Drafting Checklist** in the Law Society's Practice Checklist Manual.

As with the Asset Purchase Agreement, the checklist assumes that statutory lien searches are concluded, and the results have been reviewed. Similar considerations about the desirability of a holdback from the purchase price apply to share purchase agreements as well.

3.4-7 - Collapsing Deal

Deals collapse for a variety of reasons. If it happens, your client will want to know if the contract is enforceable by them if they wish to enforce the deal, or against them if they are trying to get out of it.

Direct your mind to whether the contract is firm and binding with no terms left to be settled. Sometimes the parties have reached only an agreement in principle with certain key

elements left to be settled. In such a case, confirm your client's intentions and, where possible, shore up any component that is meant to be presently binding. Often, commercial realtors or business agents provide financing clauses that are uncertain for lack of specificity or fail to remove conditions in a timely fashion, leaving the enforceability of the rest of the agreement in jeopardy.

Tendering is a party's timely attempt to perform its obligations, either to pay the money or to transfer property, under a contract where time is of the essence. Tendering provides evidence that the party is ready, willing and able to perform those obligations when they must perform them. It is essential if your client wishes to seek the remedy of specific performance, except in the case of a specific repudiation. Tendering must be made personally on the other party, unless the contract specifically provides or allows otherwise.

Take care when advising your client about what they can and cannot do as a transaction approaches closing. Courts have found, for example, that failure to disclose significant information to the other party in a timely fashion can eliminate the other party's obligation to tender by a particular deadline. A vendor may be precluded from relying upon a time of the essence clause when it has not acted in good faith in performing the contract.

Remember, when a deal begins to collapse, it often appears that the problems will be worked out. **Tender in any event to preserve your client's rights.**

Even in the case of an anticipatory breach where one party has clearly indicated an intention not to complete, the party seeking to keep the contract alive must take care to establish readiness, willingness, and ability to complete at the time fixed for completion.

3.4-8 - Legal Opinions

Often in commercial transactions, lawyers are required to provide written legal opinions to other parties as a condition of closing. The opinion can assist the lender to decide whether or not to advance funds to finance, or the purchaser or vendor whether to proceed to close the transaction.

Whether giving or requesting the opinion, here are some suggestions:

- Settle the form early to avoid a last-minute crunch.
- Do not insist upon receiving opinions which are unreasonable or to refuse to provide opinions which are reasonable in the circumstances.
- Do not create unwarranted assumptions that make a qualified opinion look "clean".
- Do not rely on the veracity of certificates from third parties that cause you concern.

- Do prepare a memorandum to file which backs up the opinions you have given. This will provide those who come later with a fixed record of the investigations and procedures to evidence the standard of care.

3.5 - Financing the Purchase

3.5-1 - Types of Security

Often business purchase transactions are difficult to finance through conventional institutional lenders. As a result, vendors of businesses who wish to maximize value for their assets or shares must often provide some or all of the financing themselves, by deferring a portion of the price or by vendor financing. Vendor financing can be beneficial for both the purchaser and the vendor. The purchaser has the benefit of obtaining financing that they may not be able to get from institutional lenders.

If the purchase agreement permits, the set-offs from financing repayment may give the purchaser a remedy for undisclosed liabilities and vendor misrepresentations. The vendor benefits from getting full value for the assets or shares with interest often at rates above conventional lending rates and, depending on the type of security, and being able to foreclose against known assets in the event of default. If you represent the vendor-financier, recommend that your client seek tax advice. For example, if a transaction is not properly structured, a vendor may be liable to pay capital gains tax in respect of the sale prior to actually receiving all the sale proceeds, as the financing is repaid over time. There may be various ways to structure the transaction in order to ensure the most beneficial tax result.

Whether the purchaser obtains conventional financing, the vendor provides financing or a combination of both, the purchaser's obligation to repay the financing will almost invariably involve security, using one or more of:

- a general security agreement (GSA) against personal property of the company or of the purchaser;
- an escrow agreement under which the subject shares are held in escrow until the purchase price is paid;
- a personal guarantee by the principal of the purchaser or another party, such as a relative; or
- a mortgage against any real property owned by the purchaser.

Part of the negotiation of the vendor security will involve settling the priority that vendor security will have in relation to bank security that the purchaser or business may also require for operational purposes.

3.5-2 - Chattel Security (General or Specific Security Arrangement)

The most common form of security in business purchase transactions is a security agreement, which used to be called a chattel mortgage or debenture. Security agreements can be either general, charging all of the personal property of the grantor, or specific, charging particular assets such as vehicles and valuable pieces of equipment. Under the *Personal Property Security Act*, a financing statement must be registered in the Personal Property Registry relating to any security agreement. PPR registration is done to protect the vendor's interest in the personal property of the grantor and the priority of the charge, unless the secured party has physical possession of the relevant chattels.

Security agreements can be structured to secure only a specific obligation such as a promissory note for the balance of the purchase price delivered on closing or they can secure all of the purchaser's obligations to the vendor, present and future, direct or indirect. Where a security agreement secures all obligations, it generally does not specify a principal amount.

Where both conventional bank financing and vendor financing are involved in a transaction, generally the bank will insist upon its security ranking first and may require the unpaid vendor to sign a priority agreement under which the vendor's security is postponed to the bank. In these situations, take care to ensure that there are limits on the amount of credit that the bank can secure ahead of the vendor and that the vendor retains the ability to take steps to enforce its security should default occur.

3.5-3 - Escrow Agreement

Using an escrow of shares as security for the unpaid purchase price can allow the vendor to take back the shares of the company in the event of default. Until default happens, the purchaser has all rights of ownership, including the right to receive dividends and to vote. The shares of the company are registered in the name of the purchaser and the share certificate is then endorsed in blank for transfer and placed with a third party, called the escrowholder, who holds the share certificate in trust on certain conditions. Often the solicitor for the vendor acts as escrowholder. The escrowholder is directed to hand over the shares unconditionally to the purchaser when the obligations to the vendor are satisfied. In the event of a default, the escrowholder must follow

certain procedures before delivering the shares to the unpaid vendor as the vendor's property. Escrow is often seen as weak security because of the potential that the purchaser will ruin the business while under its control and leave little for the vendor to repossess. However, in some industries, such as taxi licenses, escrow is regarded as a standard and satisfactory security method.

Where the solicitor for one of the parties is acting as escrowholder, the escrow agreement must allow the solicitor to continue to act for their client in the event of a default and to be able to interplead the shares into court if there are competing claims to them. Other recommended terms include:

- promises by the purchaser and the company not to sell, mortgage or dispose of the shares or company assets, other than inventory in the course of business, without the consent of the vendor;
- borrowing restrictions;
- dividend restrictions;
- salary restrictions;
- loan or guarantee restrictions;
- management restrictions; and
- allowing the books to remain open for the vendor to monitor the company's financial status.

Since the escrow agreement creates, in substance, a security interest in the subject shares, it must be registered under the *Personal Property Security Act* as a security agreement to preserve the secured party's rights.

Since in escrow agreements both the vendor and purchaser have claims to the subject shares, two financing statements should be registered.

- The first statement lists the vendor as the secured party, and the purchaser and escrowholder as debtors.
- The second names the purchaser as secured party and the vendor and the escrowholder as debtors, with the collateral description in both describing the shares and share certificate numbers.

3.5-4 - Personal or Corporate Guarantee

Where the purchaser of the business is a newly-incorporated company, vendors will usually want a personal guarantee from the principal of the purchaser company. If the principal is also of

limited means, additional personal guarantees from other parties, such as relatives of the principal, may also be required.

In a share purchase transaction, the target company whose shares are being purchased may also provide a guarantee of the purchase price, which can then be secured by the target company granting a real estate mortgage or security agreement over its own assets. This structure can provide vendors of shares with some assurance that the company will not be gutted of assets before the full purchase price is paid.

Vendors who are asked to accept personal guarantees should look critically at the guaranteeing party and ensure that there is value to support the guarantee. For example, the principal of the purchaser may provide a personal net worth statement that lists a residence as an asset, but when you search the title to the property you discover that it is in fact registered in the name of the principal's spouse or jointly with their spouse, so the property may be of limited value in enforcement proceedings. In this case it may be necessary to insist upon a further guarantee from the spouse and possible registered security over the real estate.

The enforceability of personal guarantees can be limited by a number of factors, including personal bankruptcy of the guaranteeing party.

If you are acting for the purchaser or a principal who is being asked to provide the guarantee, ensure that your client understands all the implications of granting the guarantee for their other assets in the event the guarantee is called upon. In particular, ensure your client understands that their obligation will often not be limited to their proportionate interest in the business and that the secured party will be entitled to pursue your client for the full amount owing, even where there are other shareholders or guarantors of the same debt. Where possible, try to negotiate limits on the amount recoverable under the guarantee in order to ensure that the guarantor with the deepest pockets is not singled out for liability.

3.5-5 - Mortgage against Real Property

Mortgages may be used in several circumstances:

- a purchaser can provide security by way of a mortgage over real estate owned by the purchaser, such as his or her residence;
- where land is owned by the target company or is among the assets being purchased, a mortgage over that land can be granted by the purchaser; or

- where land is owned by the target company in a share purchase transaction, a mortgage of that land can be collateral security in support of a guarantee by the target company of the unpaid balance of the purchase price.

3 - References & Resources

Primary statutes

- *Business Corporations Act*
  - Business Corporations Regulation, see Table 1
- *Partnership Act*

Other relevant legislation

- *Bank Act*
- *Environmental Management Act*
- *Competition Act*
- *Federal Excise Tax Act*
- *Family Law Act*
- *Health Professions Act*
- *Investment Canada Act*
- *Personal Property Security Act*

Law Society of BC

- Practice Checklists Manual includes the following:
  - *Asset Purchase Procedure Checklist*
  - *Asset Purchase Agreement Drafting Checklist*
  - *Share Purchase Procedure Checklist*
  - *Share Purchase Agreement Drafting Checklist*
- Professional Legal Training Course (PLTC) practice materials, e.g. Company Law
- Support and Resources for Lawyers > Practice Resources area of the Law Society's website provides various resources including a sample joint retainer letter under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- Code of Professional Conduct for BC (*BC* Code), in particular rules 3.4.5 to 3.4-9 (Joint retainers)

External resources

- BC Online
- CLEBC**'s** resources include:
    - British Columbia Company Law Practice Manual
    - Buying and Selling a Business – Annotated Precedents
    - Due Diligence Deskbook
    - 2009 "Understanding and Working with Limited Liability Partnerships", Working with Partnerships includes a useful checklist for drafting partnership agreements as well as information on limited partnerships and limited liability partnerships.
    - 2005 "Impact of Tax Issues on Business Structures", Private Companies: Structuring the Entrepreneur
    - 2010 "Basics of Corporate Taxation and Distributions", Tax Driven Transactions
- Registries
    - Provincial corporate registry
    - Federal corporate registry
    - Personal Property Registry

MODULE 4 – FAMILY LAW

4 - Introduction to the Family Law Module

This module provides a basic overview of the *Family Law Act* and the *Divorce Act*.

IMPORTANT - PLEASE READ

Changes to the *Divorce Act* came into force on March 1, 2021. Changes to federal support enforcement laws are in progress. These changes flow from the passing of Bill C-78, *An Act to Amend the Divorce Act (and other acts)*.

For more information, see the following Government of Canada resources:

- Changes to family laws
- Legislative Background

At this time, these learning materials have not been updated to reflect the changes associated with these amendments.

Family law has undergone significant changes over the past several years, and more changes are expected. It is important to verify that your legal knowledge and resources are current. For example, note these changes:

- the *Family Relations Act* (the "FRA"), the main provincial legislation on family relations since 1972, was replaced by the *Family Law Act* on March 18, 2013;
- the Supreme Court Family Rules ("SCFR") (introduced in July 2010) and the Provincial Court (Family) Rules have been amended to accommodate the Family Law Act, and they continue to be modified (the Provincial Government is currently overhauling the Provincial Court Family Rules);
- the child support tables in the Child Support Guidelines were updated on November 22, 2017 (lawyers should use the 2011 tables to calculate support for a period before that date);
- An Act Respecting First Nations, Inuit and Métis Children, Youth and Families, affirms and recognizes the jurisdiction of Indigenous Peoples over child and family services and aims to keep Indigenous children and youth connected to their families, communities, and culture.

- Bill C-78, An Act to Amend the *Divorce Act* (and other acts) (please see IMPORTANT - PLEASE READ in red box above).
- Bill 26, the *Child, Family and Community Service Amendment Act*, came into force October 1, 2018 and April 1, 2019.

You are strongly encouraged to attend any of the education programs on family law, including those offered by the Continuing Legal Education Society of British Columbia ("CLEBC"), the Trial Lawyers Association of British Columbia ("TLABC") or the Canadian Bar Association ("CBA").

We will do our best to keep this module up to date as the law develops, but you should ensure to research the current law when faced with a situation involving family law.

References & Resources

The learning materials for this module refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*. For a summary of the key resources, see section ***4 - References & Resources*** at the end of the module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed *en masse* for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

4.1 - Organizing your Family Law Practice

4.1-1 - Your Responsibilities

By accepting a family law client, you are engaging in a matter that can be significantly different than other legal practice areas.

For a good overview, see the following resources:
- Law Society's Professional Legal Training Course's Professionalism: Practice Management
- Lawyers Indemnity Fund's Practice Management & Wellness: Risks and Tips

You have a professional responsibility to ensure that your client is professionally and pragmatically guided through an often emotional and sometimes traumatic event. In addition to providing advice regarding legal remedies, you will likely need to assist with the underlying emotional issues by referring clients to doctors, counselors, psychologists, and other professionals who can assist. You may have to engage in discussions about how to protect a client from harm through police involvement or applying for a restraining order. You will have discussions with your client about the various dispute resolution processes, such as mediation, collaborative family law, arbitration, and parenting coordination. Your client will likely express a need to feel supported by you. You will have to consider the extent of your ability to assist clients with the non-legal issues and have a list of other professionals on hand to support your clients. These additional issues make the practice of family law both rewarding and challenging.

To help your client understand basic issues that arise in family law, you could refer the client to the following resources:
- the Ministry of Justice's Family Justice website,
- the Legal Services Society's Family Law website, or
- John-Paul Boyd's public legal education wikibook, JP Boyd on Family Law.

As with all other areas of law, you must be organized to effectively manage your family law practice. You can do so by considering the following points:

- anticipate issues;
- note limitation periods and deadlines;
- be responsive to your client's needs;
- delegate where practicable, cost effective, or necessary in order to be responsive;
- discuss and, where appropriate, promote dispute resolution processes other than litigation;

- keep a written record of all communications;
- regularly attend continuing legal education seminars on family law or find other ways of keeping up to date with developments in the law, such as following the recently released decisions on the BC Superior Courts website or CanLii; and
- establish relationships with fellow family law practitioners you can consult with from time to time and attend gatherings of local practitioners.

You must ask yourself if you are the type of person who has the ability, interest, compassion, and commitment to practice family law.

For more information, refer to the Report of the Family Law Task Force: Best Practice Guidelines for Lawyers Practising Family Law, dated July 15, 2011 (the "Guidelines") prepared on behalf of the Family Law Task Force, Law Society of British Columbia. The Guidelines, while described as an "aspirational standard" and not as an enforceable code of conduct, suggest how lawyers should conduct themselves.

In addition to the usual process and challenges involved in a litigation file, your client is likely to be highly stressed, unsure of the way to proceed, and worried about their emotional and financial future. Extra time, clarity, and good communication are required.

Your client may have no understanding of the relevant legal issues. On the other hand, your client may think they know what the relevant legal issues are, based upon information they have received from friends, relatives, or even from Google. It is your responsibility to explain what the legal issues are and how they, and the circumstances of the client, influence the range of likely outcomes. It is also very important to explain that the judge or master deciding the case might take a different view from your assessment and opinions.

Setting Expectations, Documenting Advice and Confirming (and Reconfirming) Instructions

The start of a family law file is a good time to discuss your client's expectations as well as the difficulties that may be encountered in meeting those expectations. Seek clear instructions on the approach that you will take, including:

- the approach to take at the outset;
- the dispute resolution process to be used; and
- a time to review this strategy.

If, after receiving your advice on all options, your client wishes to litigate, you should make clear to the client the likely timeframe and the financial and emotional costs of litigation. Even after providing this explanation, it is likely that your client may not fully appreciate the costs, the

possibility of losing, or the difficulty of re-establishing a non-adversarial relationship with their spouse once the litigation is complete.

To assist your client, set out the issues, approaches and likely consequences in writing. This will allow the client to take their time to consider what approach to take. Once the client has provided their instructions, confirm those instructions in writing. You want to avoid the situation where your client has regrets about choosing the litigation path. The client is likely to blame you for poor advice at the outset. You can mitigate this possibility by setting everything out in writing.

As the file moves forward, be sure to reconfirm your instructions in writing on a regular basis. This will be particularly important in situations where a non-adversarial process appears to have stalled, where the cost of litigation is increasing, or where your client has instructed you to proceed in a manner that is contrary to your advice. It is important to always keep your client informed about the process and ensure that they understand each step along the way.

If there is any part of practicing family law that you generally do not engage in, such as attending court, ensure that your client understands this from the outset. Some lawyers will try to settle files, but then pass the file to another lawyer in the event litigation is necessary.

Your client must be informed of these potential limitations at the outset.

4.1-2 - Support Staff Responsibilities

Support staff act only under the supervision of a lawyer. Chapter 6 of the *Code of Professional Conduct for British Columbia* sets out rules for what legal assistants are permitted and not permitted to do. An assistant may interview clients and witnesses to gather information. They may not provide legal advice or handle substantive legal issues.

Subject always to the lawyer's review, the legal assistant may do the following:

- organize documents and files;
- schedule appointments, including coordination of discovery and trial dates; maintain bring-forward systems;
- draft correspondence related to routine administration;
- prepare lists of documents, pleadings and other court documents;
- attend to document filings; and
- draft statements of account.

Maintain an Ongoing Index of Documents

Be prepared for a high volume of documents to be exchanged between parties. It is crucial that you maintain a system to keep the documents organized and accessible. It is often most useful to organize documents in binders, sorted by date and by subject matter. Be sure to maintain an ongoing index of the documents. Your assistant should be responsible for keeping the documents organized. You should maintain a separate pleadings binder and your assistant should ensure the binder is always kept up to date with an index.

Provide your Client with Copies of All Correspondence

As with any file, ensure that your support staff sends copies of all correspondence, including emails, to your client. This keeps your client informed regarding the status of their file and prevents misunderstandings as the file progresses.

4.1-3 - Avoid Career Limiting Errors

Family law is one of the areas of law where clients are more inclined to make complaints against their lawyers. The following tips may help you avoid such issues.

1. Avoid a reactionary practice

   Family law is not generally a field that allows you to juggle too many high conflict files at one time. Each file will have a unique, and usually complicated, set of facts that require your thoughtful care and attention. Do not open a new family law file just to set it aside when another one comes along. Many family law files require attention to detail on a regular basis and over a long period of time. A happy client will appreciate the care that you put into their file. You want to avoid situations where your client is asking why you did not follow their instructions in a timely manner. You also do not want to be surprised by short notice court applications that could have been avoided with the appropriate attention to the file. While emergencies often arise in family law files, you can reduce their frequency by keeping on top of your files and managing client expectations.

2. Confirm verbal decisions in writing

   Remember that your client is under stress and possibly under a time constraint, particularly when it comes to financial matters. This client may not appreciate everything

that you say and even if they do, they may not have processed the information in the way you intended. It is imperative to confirm all instructions in writing, particularly where the instructions involve significant legal expense or a change in the client's position.

Whenever possible, provide the client a reasonable amount of time to consider your written advice and provide instructions. Where decisions are made quickly by necessity, confirm the discussion in writing as quickly as possible.

3. Avoid delay

Act as soon as possible after a decision has been made. Failing to finalize and enter a court order, for example, will lead to complications if there is a change of lawyers. Also, it is not unusual for two lawyers to disagree on the court's decision, requiring a return to court to resolve the matter. The process will be easier if the issue is fresh. It is your duty to enter a court order even if you are no longer solicitor of record, so a delay in doing so while you are the solicitor of record might mean that you will be doing this work without payment at a later date.

4. Send interim reporting letters and accounts

Not only will this approach assist you in defending yourself in the event that a complaint is made against you, it will also force you to think strategically about your client's case as you make recommendations in your reporting letter. It is an opportunity to remind your client that their instructions may not lead to the result they expect. This will allow the client the chance to reconsider their course of action. It also creates a written record of your advice to not take a course of action.

A client may decide to change lawyers after reading your opinion about their chances of success. Sometimes, a client may decide that your approach is not the approach they wish to take. This is most common with clients who seek only to litigate and who do not wish to make any attempts to settle. This is not a statement on your ability as a lawyer, but rather a situation where you are not a good "fit". Clients in family law files are revealing intimate details about their lives and they must feel comfortable with the lawyer and the approach. Some clients are simply difficult to deal with and both of you may have to consider whether to continue together. For more resources regarding difficult clients, refer to the Practice Management Course.

The cost of your legal services may become an issue at some point in the file. To avoid conflict with your clients over this issue, it is good practice to bill family files monthly and always after any major event such as a court appearance or mediation. Where major events on a file are upcoming, be sure to advise the client of the potential cost in advance

and seek a retainer for the estimated amount. This eliminates any misunderstandings or the potential shock on the part of the client when they receive your bill.

4.2 - Initial Client Contact

4.2-1 - Telephone Calls

You may decide not to open a file on a matter if the first contact is made by telephone because the caller may never become a client. However, you should maintain a general file for one-off calls and meetings and keep notes of those conversations in addition to logging the individuals in your conflicts system. You can do this however way you wish (digital or analog). It is generally advisable to provide a letter or email to the caller or person with whom you have met, who does not retain you, to confirm the nature of the discussion, the advice given or not given, plus a clear statement that you are not retained.

The Law Society has a **sample non-engagement letter** in the Support and Resources for Lawyers > Practice Resources area of the website.

Following this practice will help you when the individual calls you back some time later and expects you to remember the telephone conversation. It also helps prevent conflicts in the event the individual's spouse call you for advice.

If you are also a mediator, ensure that you make a note of whether you were having a discussion with the client in your role as mediator or whether you were giving legal advice.

Once you give legal advice, you are no longer neutral and cannot later act as a mediator.

4.2-2 - The First Meeting

Discuss your fees before the first meeting. Some clients expect to obtain the first consultation without charge. If you do provide free consultations, set out the limits of that consultation at the outset. If you charge for the first meeting, be clear about your hourly rate and that the client will be charged for your time at the first meeting.

Section 8 of the *Family Law Act* requires lawyers to screen for family violence and then, based on that screening, to advise clients as to the advisability of various methods of dispute resolution.

You must ensure that you are familiar with the various methods of dispute resolution and you have an obligation to explain those methods to your client.

Items to Address in First Meeting

It is useful to use a checklist to ensure you have covered the following issues:

- the existence of previous agreements and previous orders;
- the presence of jurisdictional issues which may impact on the jurisdiction of British Columbia courts;
- any limitation periods, especially those on the cusp of expiry;
- the need to involve third parties in any litigation; and
- the presence of family violence.

Most first meetings will cover these issues:

- child custody, residence, and access (under the *Divorce Act*);
- parenting time, guardianship, and contact with children (under the *Family Law Act*);
- child support and spousal support;
- division of property and debt, for married and unmarried spouses;
- divorce, for married couples; and
- the means of resolving the client's legal issues, including negotiation, mediation, collaborative processes, arbitration, and litigation.

Questionnaires

Using a standard questionnaire will help you be confident and comfortable when meeting a new client.

The Law Society's Practice Checklists Manual **Family Practice Interview** is a helpful resource.

It is good practice to provide the questionnaire to your client in advance of the meeting and ask them to return it to you by email. This allows you the time to consider some of the issues before the client comes to meet with you in person. This saves time and allows you to consult resources in advance to ensure you are providing appropriate advice.

Advice and Next Steps

The initial meeting is an opportunity for you to advise your client of various ways to approach their situation. The options can range from your client coming to an agreement with their partner directly and then having it turned into a formal agreement, negotiations with the assistance of counsel (whether collaborative or general), mediation, arbitration, or litigation. Most clients prefer to avoid the emotional and financial expense of court proceedings and appreciate learning about the other available options.

Before the meeting ends, confirm next steps. Does the client wish to retain you? Do they need time to consider? Are they simply seeking summary advice? Confirm whether you have been retained or whether the first meeting was simply for advice purposes. If you have been retained, open a new file, and send out your initial letter as soon as possible. If you are not retained or the client does not follow up to confirm the retainer, send a follow-up letter to the client summarizing the advice given and confirming that you are not retained.

The Law Society has **sample non-engagement letters** in the Support and Resources for Lawyers > Practice Resources area of the website.

When you are retained, you will usually conclude a first meeting with a list of tasks for the client to complete. If they have not already been provided at the first meeting, ask your client to obtain and provide the following classes of documents:

- copies of all pleadings and orders if an action has been started, plus copies of all pleadings and orders from any previous Family Law actions;
- copies of the client's file from previous counsel, if applicable; copies of any relevant agreements;
- the client's three most recent income tax returns with all schedules attached and the three notices of assessment that were issued for those tax years; recent RRSP/RRIF/LIF/LIRA account statements;
- bank statements and credit card statements for the last three years;
- real property assessments for all properties in issue, including BC Assessments;
- life insurance policies and cash surrender values, if any;
- details of beneficiaries for life insurance, RRSPs and RRIFs;
- recent annual pension statements of all pension plans from current and previous employment and pension plan booklets;
- documents relating to advances/gifts/loans from parents or relatives; and
- details of monies in RESPs for children.

Retainers and Reasonable Expectations

It is very important to discuss the terms of your retainer, hourly rate, any limits of work to be done and required retainer funds. Follow up by sending the client a written agreement or letter setting out the terms of the retainer.

Some clients may be eager to sign the retainer right away. However, they should be encouraged to take it home, review it, and call back with any questions. Make sure you receive a signed retainer agreement before beginning work on the file.

It is also important to explain to your legal aid clients what limits are placed on your services by the Legal Services Society tariff guidelines. They will be able to make better use of your time and services if they know what services you are able to provide.

Your retainer letter should set out reasonable expectations for returning calls, billing, and other communication issues.

The Law Society has **sample retainer letters** in the Support and Resources for Lawyers > Practice Resources area of the website.

4.2-3 - Special Duties of Counsel

Duties under the *Divorce Act*

Unless clearly inappropriate, section 7.7 of the *Divorce Act* imposes an obligation on a lawyer in a divorce proceeding to discuss with the client whether there is a possibility of reconciliation of the spouses, and to inform the client about marriage counselling and guidance facilities that may be available to assist the spouses in reconciling.

You must also discuss the advisability of mediating matters relating to support and the care of any children of the marriage and inform the client of any facilities that can assist the parties in negotiation.

When preparing a Notice of Family Claim or Counterclaim seeking a divorce, you must sign a declaration that you have complied with section 7.7. This declaration is included in the court forms.

Duties under the *Family Law Act*

The *Family Law Act* contains a similar provision at section 8, along with a requirement to consider issues of domestic violence. In particular, the provision requires family dispute resolution professionals (which includes lawyers) to screen for family violence and to assess whether certain dispute resolution processes are appropriate.

As a lawyer, you must advise parties of the processes, services and facilities available to clients to ensure that your client is making informed decisions about the range of options available for resolving family law disputes and to maximize opportunities for early, cooperative settlement in order to reduce the emotional and financial costs of separation. Counsel must advise the party that agreements and orders concerning children must be made in the best interests of the child only (section 8(3)).

When preparing a notice of family claim with claims made under the *Family Law Act*, you must sign a declaration that you have complied with section 8(2). This declaration is included in the court forms.

4.3 - Family Law Case Procedures

4.3-1 - Which Statute Applies?

In British Columbia, the *Divorce Act* and the *Family Law Act* govern most family law matters.

The applicable legislation will depend on the marital status of the parties, the nature of the issues to be resolved, and the court selected to hear any litigation.

The *Divorce Act* is a federal statute dealing with the issues of divorce and corollary relief, namely custody, access, child support and spousal support. The *Divorce Act* only applies to married couples or formerly married couples. It is important to note that the Supreme Court may grant leave for someone who is not a spouse to apply for custody of, or access to, a child of married parents (the *Divorce Act*, section 16(3)).

The *Family Law Act* is a provincial statute that came into force on March 18, 2013, repealing and replacing the *Family Relations Act*. However, pursuant to section 252 of the *Family Law Act*, the *Family Relations Act* will continue to apply to property disputes that were commenced under the *Family Relations Act* prior to the coming into force of the *Family Law Act* and to disputes over property agreements between married spouses that were made when the *Family Relations Act* was in force.

The *Family Law Act* deals with:

- parentage, including the parentage of children conceived through assisted reproduction;
- guardianship and, for guardians, parental responsibilities and parenting time;
- contact, for persons who are not guardians;
- child support;
- spousal support;
- division of property for married and unmarried spouses; and
- protection orders.

Both married and unmarried parties may invoke the *Family Law Act*.

Unmarried persons who have lived together in a marriage-like relationship for at least two years are "spouses" as defined by section 3(1) of the *Family Law Act*. They have property rights under Parts 5 and 6 of the *Family Law Act*. They can also use the *Family Law Act* to make claims for spousal support, child support, and the care of children.

Persons who have not cohabited for two years but have a child together are considered spouses for the purposes of child support, spousal support and the care of children, per section 3(1) of the *Family Law Act*. Those individuals may not utilize the provisions under Parts 5 and 6 of the *Family Law Act* related to property and pension division.

Unmarried persons who either never lived together or lived together for less than two years, and have no children together, are not spouses. They are not entitled to claim spousal support. Their claims against each other are generally limited to property claims under principles of unjust enrichment.

4.3-2 - Choice of Forum

Jurisdiction

Both the Supreme Court of British Columbia and the Provincial Court of British Columbia have jurisdiction to deal with family law matters. The Supreme Court is a court of general and inherent jurisdiction. It may deal with all issues that may arise in the family law context, including:

- claims under the *Divorce Act*;
- claims under the *Family Law Act*, and other related provincial legislation, such as the *Partition of Property Act* and the *Land Title Act*;

- claims brought in equity;
- claims brought under the common law, including the law of trusts, tort law and contract law; and
- claims resting on the court's *parens patriae* jurisdiction.

Orders for divorce or the division of property can only be made by the Supreme Court.

The Provincial Court has jurisdiction to hear all matters under the *Family Law Act* except for those set out at section 193 (parentage, property and debt matters, pension matters, and matters related to children's property). The Provincial Court has jurisdiction to deal with matters involving child support, spousal support, parentage, guardianship, parenting time, contact and protection orders. It may not deal with property division between married or unmarried parties. The Provincial Court does not have jurisdiction under the *Divorce Act*.

Advantages and Disadvantages

There are various advantages and disadvantages to proceeding in the Provincial Court and the Supreme Court.

In general, Supreme Court proceedings are more expensive and paper intensive. There are more steps required in the litigation process, but the court is in the position to make decisions more quickly through the chambers process.

In contrast, Provincial Court proceedings are more "consumer-friendly" and pre-printed court forms are available. It is somewhat easier for a self-represented party to navigate through the Provincial Court system. There are minimal filing fees, but there are often significant delays in having matters reach a stage where a hearing is held, and a decision is rendered.

Disclosure

Some mechanisms for disclosure under the Supreme Court Family Rules are not available in the Provincial Court under the Provincial Court Family Rules, including the examination for discovery of a party before trial, the examination of persons out of province, and the pre-trial examination of witnesses.

These disclosure mechanisms may be essential for determining the issues at hand, including property disputes, and determining a party's income for the purposes of support payments. Therefore, counsel must carefully consider whether the additional discovery mechanisms available in Supreme Court make that court the better choice for a case.

Contempt of Court and Enforcement

The Supreme Court has the power to punish for contempt when an order of this court is breached. The Provincial Court also has the power to punish for contempt, but only in the limited circumstances set out in the *Provincial Court Act*, or when the contempt occurs "in the face of the court" - for instance, breach of a court order in front of the judge, or failure to deposit a document with the court: see, for example, *G.A.C. v. I.C.*, 2006 BCPC 380; *Provincial Court Act*, section 27.2, for applicable legislation.

The enforcement mechanisms available under the *Family Law Act* are available to both courts for the matters that are under their jurisdiction.

4.4 - Information Returns & Record-keeping

4.4-1 - Introduction to Agreements

The *Family Law Act* encourages out-of-court resolution of disputes using agreements. Section 6 of the *Family Law Act* provides that parties can enter into an agreement to resolve existing family law disputes or future family law disputes. Such an agreement is binding whether or not there is consideration, the involvement of a family dispute resolution professional, or the agreement is filed with a court (see section 6(3) and (4)).

There are two essential resources for family law practitioners who draft agreements:

- **CLEBC**'s Family Law Agreements – Annotated Precedents
- the following from the Law Society's Practice Checklists Manual:
    - **Family Law Agreement Procedure**;
    - **Separation Agreement Drafting**; and
    - **Marriage Agreement Drafting**.

The **Family Law Agreement Procedure** provides a useful checklist to assist in gathering information from the client and the procedure to follow in generating drafts and advising the client on signing.

The **Marriage Agreement Drafting** checklist can be used to assist in drafting pre and post marriage agreements as well as cohabitation agreements.

The **Separation Agreement Drafting** checklist addresses the typical clauses and considerations that are found in many separation agreements.

4.4-2 - Marriage & Cohabitation Agreements

People seek cohabitation and marriage agreements for a variety of reasons. Often, one party is coming into the relationship with a large asset base or a business. They wish to protect those assets or business in the event of a relationship breakdown. A party may have received a large inheritance and wish to ensure the inheritance does not go to anyone outside of the immediate family. The agreements are most common where parties are forming unions later in life, and/or after having survived the dissolution of a previous long-term relationship.

Cohabitation or marriage agreements may deal with only one asset, such as a family home or business, or with all assets owned or acquired by the parties. The agreements are necessary where parties wish to take themselves out of the statutory or common law regime in place at the time.

Currently, many unmarried couples seek to enter into cohabitation agreements once they learn they are subject to the same property regime as married couples under the *Family Law Act*. You should ensure that you are in a position to provide the appropriate legal advice regarding the provisions of the *Family Law Act* so that unmarried couples can make appropriate decisions as to whether to enter into a cohabitation agreement or be governed by the terms in the *Family Law Act*.

You cannot represent both parties to a cohabitation or marriage agreement, even if they are prepared to consent to the arrangement. Given the different interests of the parties in this transaction, *BC Code* section 3.4 (Conflicts) makes it clear that you would be in conflict by acting for both parties. You may only act for one party. Refer the other party to independent legal counsel.

It may be the case that the parties have come to the terms of the agreement together and wish to have it set out formally. In that case, you should only be retained by one of the parties and seek instructions only from that individual. You must provide legal advice regarding the effect of the agreement on your client. The other party should receive that same type of advice from a different lawyer.

There may be circumstances where a cohabitation or marriage agreement is intended to protect family money and future inheritances, and a party's family members may wish to direct the content of the agreement. Nothing prohibits you from drawing a contract on the instructions of someone who is not a party to the agreement, however in such cases the potential for a conflict exists and both parties to the agreement must be referred to independent counsel as you do not represent the interests of either party.

Setting Aside Cohabitation and Marriage Agreements

Cohabitation and marriage agreements can be reviewed and overturned by the court in certain circumstances, such as where the agreement is objectively unreasonable, or if the agreement was entered into through undue influence, duress, or coercion. Cohabitation agreements will be closely reviewed where they purport to deal with custody or waive child support obligations.

The *Family Law Act* has made it more difficult to set aside cohabitation and marriage agreements.

- Section 92 confirms that spouses may make property agreements dividing property and/or debt and choose a different valuation method than what is set out in the *Family Law Act*.
- In deciding whether to set aside an agreement respecting property and/or debt, the court is required to consider section 93. Section 93 considers procedural fairness and whether the substance of the agreement is "significantly unfair".
- There is current case law that explains what "significantly unfair" means. For a summary of case law dealing with setting aside agreements see *Nicholl v Nicholl*, 2020 BCCA 173.

Property Division

The *Family Law Act* applies to both married and unmarried spouses when dealing with property division. Note that whether your client was married will have important implications on time limitations for advancing property claims. Pursuant to section 198, a married spouse has two years from divorce (or court order declaring the marriage a nullity) to bring a property claim, whereas unmarried spouses have two years from the date of separation.

4.4-3 - Separation Agreements

Separation agreements address issues at the breakdown of a relationship. They are formal written agreements that can finalize all outstanding issues between the parties. The *Family Law Act* contains several specific directives regarding the status of agreements made about specific subjects:

- sections 44, 50 and 58 deal with agreements about guardianship, parental responsibilities and spending time with children;
- sections 92 and 93 deal with property division and the courts authority to set aside agreements about property;

- section 127 deals with agreements about pension division;
- section 148 deals with agreements about child support; and
- sections 163 and 164 deal with agreements about spousal support.

Parenting Arrangements

An agreement respecting parenting arrangements is binding only if it is made after separation or when parties are about to separate, to take effect on separation: see section 44(2). However, an agreement respecting parenting arrangements or contact must be set aside if the court believes that the agreement is not in the child's best interests: see sections 44(4) and 58(4); also see *A (M.) v O. (E.)*, 2018 BCSC 1269. In addition to parenting arrangements, spouses can make agreements on the division, exclusion or valuation of property and debt. Under the *Family Law Act*, both married and unmarried spouses can make agreements on property, debt, and pension division. Spouses may also agree that CPP unadjusted pensionable earnings will not be divided by the spouses: see section 127.

Child Support

Similarly to parenting arrangements, agreements for child support are binding only if made after separation: see section 148 of the *Family Law Act*. However, it is important to note that parents cannot contract out of paying child support. Child support is the right of the child. Although the terms of the agreement are relevant, an agreement cannot bind the court in regard to child support: see for instance *Galpin v. Galpin*, 2018 BCSC 1572 at para. 31. It is important to also note that if a judge is not satisfied that a child is being financially supported by both parents, they will not grant the parties' divorce in a desk order divorce process.

Spousal Support

A separation agreement can also deal with spousal support. Clauses can include when spousal support will change, and when spousal support ends.

4.4-4 - Setting Aside an Agreement

If the agreement is written, signed by each spouse, and witnessed by at least one other person (the same person can witness each signature), then the court has limited jurisdiction and

discretion to set aside the agreement or replace the agreement; see section 164 of the *Family Law Act*. ***But it is possible.***

Section 93 provides the basis on which an agreement for property and debt may be set aside.

There are two grounds on which an agreement can be set aside:

- there is a **defect in the process of making the agreement** (see section 93(3) for the specific factors that must be taken into consideration); or
- there is **significant unfairness in the agreement** (see section 93(5) for the specific factors that must be taken into consideration).

Defect in the Process of Making the Agreement

When it comes finding a defect in the process of making the agreement, the court will look at whether any of the following circumstances existed when the parties entered the agreement, including:

- a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
- a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
- a spouse did not understand the nature or consequences of the agreement; and
- other circumstances that would, under the common law, cause all or part of a contract to be voidable.

See section 93(3) for the specific factors that must be taken into consideration.

The case law is quite clear in this regard. Parties to an agreement have a duty to disclose their assets:

- *Rick v. Brandsema*, 2009 SCC 10 where the court emphasized the importance of disclosure at paras. 47 and 48;
- *Morgan v. Morgan*, 2010 BCSC 1116 wherein, at para. 20, the court set aside the parties' agreement on the basis of "informational exploitation" due to the husband's failure to fully disclose details of his pension.

It is important that you also review the case law respecting fraudulent misrepresentation, for instance, see *Lamontagne v. Andersen*, 2005 BCSC 343.

Other cases where separation agreements have been aside include:

- *McAdie v. McAdie*, 2019 BCSC 578 in which the court set aside the parties' separation agreement as a result of the husband's deliberate non-disclosure resulting in the wife being in a position of vulnerability and ignorance not cured by independent legal advice;
- *B.L.S. v. D.J.S.*, 2019 BCSC 846 where the court set aside a separation agreement on the grounds of failure to provide adequate financial disclosure. In the separation agreement, the husband had mentioned corporate holdings with no assigned values.

Significant Unfairness in the Agreement

In determining significant unfairness, the court will consider the following:

- the length of time that has passed since the agreement was made;
- the intention of the spouses, in making the agreement, to achieve certainty;
- the degree to which the spouses relied on the terms of the agreement.

See section 93(5) for the specific factors that must be taken into consideration.

Application of Considerations to other Agreements

The above considerations can be applied in all family law agreements, not just separation agreements.

For instance, in *Asselin v. Roy*, 2013 BCSC 1681, the court held that the parties' cohabitation agreement was significantly unfair, because of the length of time that had passed since it was signed, as well as the fact that the claimant had contributed her excluded property to the respondent's property.

4.4-5 - Best Practices in Drafting an Agreement

When drafting an agreement, there are a number of matters to consider including the following:

- Take time drafting the recitals to set out the background facts. The basic background facts usually include facts about the length of the parties' relationship, their age, health, employment status and income, and their significant assets and liabilities.
- Comprehensively list assets and liabilities. There are various approaches to recording assets and liabilities, for instance:

  - listing them in lengthy recitals;
  - listing them in separate schedules attached to the agreement;
  - attaching the parties sworn financial statements; or
  - sometimes a single schedule is used to reflect all of the assets and liabilities of the parties
- Ensure there is some reasonable estimate of value for the significant assets and liabilities set out in the schedules or the recitals and specify the date that is applicable to the value.
- Consider any tax implications for the disposition or transfer of assets. Where tax issues arise consider seeking advice from a tax expert.
- Clearly state the limitations of operation of the agreement. For instance, if the agreement provides for variation or review of spousal support, try to address the basis for support and any review or variation clearly.
- Use definitions and use them consistently.
- Use clear and plain language.

4.5 - Divorce

4.5-1 - Jurisdiction: Ordinary Residence

Pursuant to section 3 of the *Divorce Act*, the court can grant a divorce only when at least one of the spouses has been ordinarily resident in the province for at least one year prior to the commencement of the divorce proceeding.

REMINDER

Changes to the *Divorce Act* came into force on March 1, 2021. Changes to federal support enforcement laws are in progress. These changes flow from the passing of Bill C-78, *An Act to Amend the Divorce Act (and other acts)*.

At this time, these learning materials have not been updated to reflect the changes associated with these amendments. For more information, see ***4 - Introduction to the Family Law Module***.

Although the courts have tended to be liberal when interpreting "ordinary residence," mere residence for one year may not be sufficient if the Court's jurisdiction is challenged.

In assessing ordinary residence, the court will look for an intention to continue a regular and customary mode of life in the province: see, for example, *Jadavji v. Jadavji*, 2001 BCSC 1027.

4.5-2 - Grounds for Divorce

The grounds for divorce are set out in section 8 of the *Divorce Act*. The sole ground is marriage breakdown, which may be established upon proof of one of the following:

- the spouses have lived separate and apart for at least one year before the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding (do note that the spouses can resume cohabitation for the purpose of attempting reconciliation for no more than a total of 90 days (consecutive or not) during that year without having to start the one-year separation period afresh);
- the respondent spouse has committed adultery; or
- the respondent spouse has treated the claimant spouse with such physical or mental cruelty that continued cohabitation is intolerable.

The term ***"separate and apart"*** has been interpreted to include circumstances where the parties continue to reside under the same roof following marriage breakdown. This is increasingly commonplace as parties cannot afford to maintain two separate residences pending property division and support agreements or orders.

Adultery can be proven by an admission in affidavits, interrogatories or examinations for discovery of the party said to have committed adultery, by evidence at trial, or by the evidence of other witnesses of circumstances that would lead the court to conclude that adultery had occurred.

Physical or mental cruelty requires proof of acts of a grave and weighty nature, usually by evidence from a physician, psychiatrist, or psychologist.

It is unusual for parties to obtain a divorce on the grounds of adultery and cruelty because of the type of proof that is required. Most wait until they have been separated and apart for a year and obtain the divorce at that point. If you have a client who wants to go ahead with obtaining a divorce on the grounds of adultery or cruelty, you should provide advice regarding the necessity or utility of using those grounds. The courts have granted divorces based on cruelty where the parties had not been separated for at least one year: see, for example, *Paheerding v. Palihati*, 2009 BCSC 557 and *Kaler v. Dhanda*, 2002 BCCA 631.

Where the parties have been separated for more than one year, the court has discretion to decline to hear evidence of adultery or cruelty if such would tend to stigmatize a party or be contrary to the best interests of the children, and will grant the divorce on the basis of separation: see, for

example, *McPhail v. McPhail*, 2001 BCCA 250 and *Aquilini v. Aquilini*, 2013 BCSC 217, which extended the reasoning in McPhail on adultery.

Parties may deal with all matters other than divorce prior to the one-year period and the matter of whether there is a divorce or not has no bearing.

Divorce proceedings can be commenced at any time, even immediately after separation, if the claimant has ordinarily resided in the province for at least the preceding year. The actual divorce order will not be granted until the parties have been separated for one year or meet the other requirements under the *Divorce Act* regarding adultery or cruelty.

The *Divorce Act* imposes a duty on the court to satisfy itself that reasonable arrangements have been made for the support of the children of the marriage (section 11(1)(b)) before making a divorce order. In the absence of proof of reasonable arrangements, the court must stay the divorce until such arrangements have been made. The court will not permit parents to ignore or avoid addressing child support issues as child support is the right of the child. If child support cannot be paid or the payor cannot be located or is beyond the reach of the court, that information must be provided to the court and if the judge is satisfied that there is no viable means of pursuing child support, a divorce most likely will be granted.

In appropriate circumstances, it is possible to resolve all corollary and property issues (or, if circumstances do not permit resolution of all issues, at least child support) by way of a separation agreement and then apply for divorce on an uncontested basis.

4.5-3 - Desk Order Divorce

Pursuant to the *Divorce Act* and the Supreme Court Family Rules (SCFR) where only a divorce is sought or all other orders will be proceeding by consent or are unopposed, one or both parties may apply for a divorce through the desk order process.

There are two types of desk order processes:

- The first is the “joint” process under SCFR 2-2, in which both parties apply for the order together.
- The second is the “sole” process where the action is an “undefended family law case” as defined by SCFR 1-1(1) and the process for which is set out in SCFR 10-10.

In both cases, the divorce order and any other orders are made without an oral hearing.

4.5-4 - The Joint Process

Because of the obvious potential for conflicts of interest, you cannot act for both parties in the joint divorce process unless:

- all relief sought is by consent; and
- both parties have received independent legal advice in relation to the matter, see EC October 2002, item 2.

Generally, the process is as follows:

- **The parties file the following at the court registry:**
  - Notice of Joint Family Claim in Form F1 under SCFR 2-2
  - a completed federal Registration of Divorce Proceeding form, and
  - the original, government-issued marriage certificate.

NOTE: The parties are listed in the style of cause as Claimant 1 and Claimant 2.

NOTE: If your client was married in BC, they can order a new "original" marriage certificate from Vital Statistics if your client no longer has their copy.

NOTE: If the marriage certificate is in a language other than English, file it with a translator's affidavit translating the certificate into English.

- **The parties also file the following documents:**
  - Requisition for the order sought in Form F35;
  - Draft final order in Form F52;
  - Certificate of Registrar in Form F36;
  - Affidavits in support of the order sought in Form F38, at least one of which must be sworn after the filing of the Notice of Joint Family Claim; and
  - If there are children of the marriage, a Child Support Affidavit in Form F37 must also be filed, whether the proposed order includes a term for the payment of child support or not.

The time it takes for the final order to be processed depends on the registry it is filed in. When processed, the registry will enter the divorce order as endorsed by the judge. Most clients are satisfied with a certified copy of the divorce order, but you may also order a certificate of divorce (there is an additional cost for this document). The certificate of divorce can be ordered 31 days after the final order is signed by the judge.

Be sure to review *BC Code* section 3.4 (Conflicts) including rules 3.4-5 to 3.4-9 (Joint retainers).

The Law Society has a **sample joint retainer letter** in the Support and Resources for Lawyers > Practice Resources area of the website.

4.5-5 - The Sole Process

The sole desk order divorce process begins as a normal Divorce Action but concludes with the divorce order, with or without corollary relief, being pronounced in default. "Corollary relief" refers to any orders sought in a Divorce Action apart from the divorce order itself.

The sole divorce process is used in one or more of the following circumstances:

- there are no other legal matters outstanding between the parties other than a divorce (the parties have no assets, no children and there are no support issues);
- all other legal matters between the parties have been resolved (by an agreement, an order of the Provincial Court or an order of a foreign court);
- the other spouse is aware of the client's intentions and either consents or acquiesces to the claim; or,
- the whereabouts of the other spouse are unknown.

A contested Supreme Court action may also be resolved by consent by desk order where settlement has been reached on all matters. In such cases, any pleadings in defence or counterclaim must be withdrawn or discontinued for the action to qualify as an "undefended family law case" under SCFR 1-1(1), see also SCFR 10-10.

The desk order divorce procedure is as follows:

- File the Notice of Family Claim in Form F3 under SCFR 4-1 and the original, government-issued marriage certificate as usual, and complete the federal Registration of Divorce Proceeding form at the court registry.

NOTE: If your client was married in BC, they can order a new "original" marriage certificate from Vital Statistics if your client no longer has their copy.

NOTE: If the marriage certificate is in a language other than English, file it with a translator's affidavit translating the certificate into English.

- Have the Notice of Family Claim personally served on the respondent.

NOTE: If the respondent cannot be located, you will have to apply for an order for substituted service.

- Finalize the Affidavit of Personal Service in Form F15 (or Affidavit of Substituted Service).
- Wait until the time period for filing the response has expired, 30 days in the case of personal service or such other period as the court may have stipulated in an order for substituted service.
- Prepare and file the following documents:
    - Requisition for the order sought in Form F35;
    - Draft final order in Form F52;
    - Proof that the matter is undefended, usually by a Requisition in Form F17 asking the registry to search for any filed response to family claim or counterclaim;
    - Certificate of Registrar in Form F36;
    - Affidavit in support of the order sought in Form F38;
        - *NOTE: This affidavit must be sworn within 30 days of the date the application for the order is filed.*
    - Proof of service, usually either the Affidavit of Personal Service or Affidavit of Substituted Service; and
    - If there are children of the marriage, a Child Support Affidavit in Form F37 must also be filed, whether the proposed order includes a term for the payment of child support or not.

The time it takes for the final order to be processed depends on the registry it is filed in. When processed, the registry will enter the divorce order as endorsed by the judge. Most clients are satisfied with a certified copy of the divorce order, but you may also order a certificate of divorce (there is an additional cost for this document). The certificate of divorce can be ordered 31 days after the final order is signed by the judge.

Review the Supreme Court of BC Practice Direction FPD-17, effective 2021/03/01, which provides instructions on several aspects of the desk order.

The Legal Services Society website has a summary of the process, as well as blank forms.

4.6 - Parenting Arrangements & Care of Children

4.6-1 - *Divorce Act* or *Family Law Act*?

Parenting arrangements and the care of children may be governed by both the *Divorce Act* and the *Family Law Act*.

REMINDER

Changes to the *Divorce Act* came into force on March 1, 2021. Changes to federal support enforcement laws are in progress. These changes flow from the passing of Bill C-78, *An Act to Amend the Divorce Act (and other acts)*.

At this time, these learning materials have not been updated to reflect the changes associated with these amendments. For more information, see ***4 - Introduction to the Family Law Module***.

The *Divorce Act* and the *Family Law Act* have different frameworks and use different terminology:

- the *Divorce Act* uses the terms "custody" and "access" for parenting arrangements;
- the *Family Law Act* uses the terms "guardianship", "parental responsibilities", "parenting time" and "contact".

The *Divorce Act* addresses parenting arrangements as corollary relief to a divorce. Accordingly, it applies when the parties are married and a claim is made for a divorce, or when the parties have already been divorced. As a result, in the case of married parents (or formerly married parents who have been divorced under the *Divorce Act*), both the *Divorce Act* and the *Family Law Act* may apply.

Part 4 of the *Family Law Act* applies whether or not the parties were married.

The *Divorce Act* and *Family Law Act* have been described as "not easily and conveniently compatible": see *Hansen v. Mantei-Hansen*, 2013 BCSC 876.

Because of the doctrine of paramountcy, if an order is silent about which act it is made under, it is presumed to have been made under the *Divorce Act*: see *C.K.B.M. v. G.M.*, 2013 BCSC 836. Paramountcy only applies when the two statutes are in conflict: see *Hansen v. Mantei-Hansen*, 2013 BCSC 876; *B.D.M. v. A.E.M.*, 2014 BCSC 453; and *N.U. v. G.S.B.*, 2015 BCSC 105.

The court can therefore make orders under the *Divorce Act* that are supplemented by orders under the *Family Law Act*. Accordingly, it is important to understand how each of these statutes operates. You should clearly explain the applicable statute(s) to your client and identify the applicable legislation when you draft any order or agreement.

Custody and Guardianship

The concepts of custody and guardianship are often confused and are indeed confusing: see *Anson v. Anson*, (1987), 10 B.C.L.R. (2d) 357 (Co. Ct.) for a discussion of custody and guardianship.

Guardianship

For the most part, the concept of guardianship concerns matters relating to the parenting of children and includes the right to direct the child's health, education, schooling or religion, and to be consulted and obtain information from third parties related to those matters. Unless otherwise specified, someone with guardianship is a guardian of both the person of the child and the estate of the child.

Custody

Custody usually connotes legal rights over the child as well as physical day-to-day care and control of the child.

The court has broad discretion to allocate the incidents of custody and guardianship between parents having the best interests of the children in mind.

4.6-2 - Children & the *Family Law Act*

The *Family Law Act* replaced the concepts of custody and guardianship that existed under the *Family Relations Act* with a re-conceptualized model of guardianship under which persons who are guardians exercise “parental responsibilities” and have “parenting time” with a child. Persons who are not guardians, including parents who are not guardians, will have “contact” with the child.

The regime for care and time with a child is set out at Part 4 of the *Family Law Act.*

Parenting Arrangements under the *Family Law Act*

The *Family Law Act* provides the parties and the court with flexibility in creating arrangements that work for all the parties, and of course are in the best interests of the children.

The core principle of the *Family Law Act* is that in making an agreement or order respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only: see section 37. The section lists various items to be considered, including the child's health and emotional well-being, the history of the child's care, the child's need for stability, the ability of each person seeking time with the child to exercise their responsibilities, the ability of the parents to cooperate, and the impact of family violence on the child.

Section 64 allows the court to order that a person not remove a child from a specified geographical area.

Guardianship under the *Family Law Act*

A guardian is legally responsible for their child's care and upbringing.

Section 39 sets out that cohabiting parents are presumed to each be a guardian of their child both during the relationship and after separation. If a parent did not cohabit with a child, they are only a guardian if they regularly care for the child, through agreement or court order or in certain assisted reproduction circumstances.

A person who is not a parent of a child can only become a guardian by way of court order and by reference to the provisions in sections 50 and 51. Case law has been developing about what constitutes "regularly" caring for the child and should be carefully reviewed when advising about whether a parent is a guardian. Note that "parent" under section 39 only refers to biological parents and does not apply to stepparents.

Parental Responsibilities under the *Family Law Act*

Under section 40 only a guardian may exercise "parental responsibilities" and have "parenting time" with a child. Unless an order or agreement provides otherwise, each guardian of a child may exercise all the parental responsibilities in relation to the child, in consultation with the other guardians, unless consultation would be unreasonable or inappropriate.

Parental responsibilities are set out at section 41. The section sets out a long list of responsibilities that a guardian must exercise in the best interests of their children, and includes such items as day to day care, where the child will reside, who the child will associate with, making decisions regarding education, culture and religion, make medical and dental decisions, and to exercise any other responsibilities reasonably necessary to nurture the child's development.

Section 42 confirms that the guardian has responsibility for making day to day decisions for the child during their parenting time.

Section 43 confirms that a guardian must exercise their parental responsibilities in the best interests of the child.

Contact with a Child under the *Family Law Act*

Contact refers to a child's time with someone who is not a guardian. It replaces the concept of access and a contact person does not have parental responsibilities for the child.

Section 58 sets out specific rules about agreements between guardians and non-guardians regarding contact and notes that the agreement must be in the best interests of the child.

Section 59 allows the court to make orders respecting contact, including the specific ability to order that the transfer of the child be supervised or that the entire time period of contact be supervised by another person.

As always, any order made must be in the best interests of the child.

4.6-3 - Parentage: Paternity & Assisted Reproduction

Parentage

Part 3 of the *Family Law Act* provides a comprehensive framework for determining parentage of children for all purposes, except for the *Adoption Act*. It is relevant to birth registration under the *Vital Statistics Act*, to guardianship and parenting provisions of the *Family Law Act* and to issues of inheritance. The provisions specifically address children conceived through assisted reproduction.

Conception without Assisted Reproduction

Presumptions

Section 26(1) of the *Family Law Act* sets out that the parents of a child are presumed to be the birth mother and the biological father. The presumption of paternity for male persons is set out at section 26(2). If more than one person can be presumed to be the biological father by reference to the factors set out at section 26(2), then there is no presumption of who is the biological father.

Parentage Tests

In the event that there is a dispute or uncertainty as to whether a person is or is not a parent, the court may make a declaration of parentage under section 31(1).

Section 33(2) allows the court to order a person, including a child, to provide a tissue sample or a blood sample for the purpose of conducting parentage tests. The Supreme Court may make a declaration of parentage under any circumstances, while the Provincial Court may only make a determination of parentage where it is necessary to resolve a dispute in its own jurisdiction.

Conception with Assisted Reproduction

Parentage where there is assisted reproduction is considered in sections 27 to 30 of the *Family Law Act*. These sections represent a shift away from biology as the determinant of legal parentage toward social and intentional parentage. The focus is on the birth mother, and the person who is married to, or in a marriage like relationship with her.

- Section 27 sets out the general rule for determining parentage. A child's parents are the birth mother and the person married to or in a marriage like relationship with the birth mother at the time of conception.
- Section 28 deals with assisted reproduction after the death of one of the parties who provided the reproductive material but died before conception.
- Section 29 deals with situations where a surrogate is used.
- Section 30 considers circumstances where parties have made agreements regarding parentage prior to the conception of the child.

4.6-4 - Relocation with a Child

The *Family Law Act* specifically considers circumstances where one parent wishes to move to another location with the child. Notably, it deals differently with relocation depending on whether the parties have an existing written agreement or order respecting parenting arrangements for the child.

If there is no written agreement or orders, section 46 applies: see *Walker v. Maxwell*, 2015 BCCA 282.

If there is an existing agreement or order respecting parenting arrangements Division 6 of Part 4 applies to the relocation case, more specifically, section 65. Under Division 6 the evidentiary burden on the parent wishing to relocate is much higher: see *Fotsch v. Begin*, 2015 BCCA 403.

When a guardian plans to relocate, with or without the child, the guardian must give 60 days' notice to all other guardians and persons having contact with the child: see section 66(1). After notice of relocation is given, the guardians and persons having contact with a child must use best efforts to resolve any issues relating to the relocation.

Sections 67 to 71 set out the steps to be taken when a guardian provides notice of an intended move. The parties must try to agree and cooperate, but if that is not successful, the party who objects to the move must, within 30 days of receiving the notice, file an application with the court for an order to prohibit the relocation. If such an application is made the relocating parent must convince the court:

- that the proposed relocation is made in good faith;
- that the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, those entitled to contact or have a significant role in the child's life; and
- if the guardian opposing the relocation has nearly equal parenting time, then the relocating parent must also show that the relocation is in the child's best interest.

If you are faced with a file that concerns relocation, you should conduct thorough research regarding developments in the law. There is now a great deal of case law on this issue.

4.6-5 - Custody & Access Reports

The *Family Law Act* and the rules of the Supreme Court and Provincial Court provide for the evidence of expert witnesses in family matters to assist the court.

Section 211 of the *Family Law Act* provides the court with the power to appoint a person to assess one or more of the needs of a child, the views of a child and the ability and willingness of a party to a family law dispute to meet the needs of the child.

- The person appointed by the court must be a family justice counselor, a social worker, or other person approved by the court, which includes psychologists or registered clinical counselors.
- The purpose of the report is to assist the court in its determination of what is in the best interests of the child, particularly where the positions of the parties and their views of the evidence are sharply divergent.
- The court also has the power to allocate the fees relating to an assessment between the parties.
- Reports prepared by psychologists will cost at least $5,000 and often as high as $10,000.

It is critical that the expert be neutral and unbiased. Where the parties cannot agree that a section 211 report should be prepared, either party may apply to the court. The threshold for ordering a section 211 report is low, particularly where the emotional well-being of the children is in issue.

Experts preparing custody and access reports have special standing as the court's own expert (rather than the expert of a party) and are expected to be non-partisan.

Views of the Child Report

For children older than five, a less expensive route may be to request a "views of the child" report prepared by a psychologist or even by a layperson, such as a lawyer with special training in interviewing children. This can be a simple way to give the court access to the child's views, without having to involve the child in a protracted and stressful process.

Views of the child reports prepared by psychologists will offer expert evidence about the strength and consistency of the child's views, while reports prepared by laypersons will simply repeat the child's views without offering opinion or commentary.

Judicial Interview

In certain situations, judges may interview older children, with or without counsel being present, but a court official will at all times be present during such sessions: see *LEG v. AG*, 2002 BCSC 1455 and *BJG v. DLG*, 2010 YKSC 44.

Filing and Serving Section 211 Reports

SCFR 13-1(1) and (2) sets out the procedure for filing and serving reports made under section 211 as well as the notice required to cross-examine the author of a section 211 report.

4.7 - Child Support

4.7-1 - *Divorce Act* or *Family Law Act*?

Child support may be claimed under the *Divorce Act* or the *Family Law Act*, or under both where the parties are married. Orders for child support may be made pursuant to section 15.1 of the *Divorce Act* or section 149 of the *Family Law Act*.

REMINDER

Changes to the *Divorce Act* came into force on March 1, 2021. Changes to federal support enforcement laws are in progress. These changes flow from the passing of Bill C-78, *An Act to Amend the Divorce Act (and other acts)*.

At this time, these learning materials have not been updated to reflect the changes associated with these amendments. For more information, see ***4 - Introduction to the Family Law Module***.

Divorce Act Provisions

Under section 15.1 either spouse may apply for an order that child support be paid for the benefit of any or all children of the marriage.

As set out in section 2 a "child of the marriage" is a child of the two spouses or former spouses who at the material time is under the age of majority and who has not withdrawn from their

charge, or is the age of majority or over but unable by reason of illness, disability, or other cause to withdraw from their charge.

"Other cause" has been interpreted liberally to include adult children attending post-secondary school as well as those suffering from a disability.

Spouses who stand in the place of a parent are also subject to an order for child support under section 2(2).

Family Law Act Provisions

Section 146 defines the terms "child", "guardian", "parent" and "stepparent". For the purposes of the child support sections, a guardian does not include a guardian who is not a parent and whose only parental responsibility is respecting the child's legal and financial interests.

Section 147 defines when there is a duty to provide support for a child and specifically addresses guardians who are not parents and stepparents. Section 147 also addresses situations where children under the age of 19 are no longer dependent on their parents and where child support is or is not payable.

The court may make orders for child support pursuant to section 149 upon the application of a child's parent or guardian, the child or a person acting on behalf of the child, or the Ministry responsible for social assistance. This section also limits the application of an order against a stepparent.

Section 150 notes that the amount of child support must be determined in accordance with the Child Support Guidelines (see the next section of these materials, ***4.7-2 - Amount of Child Support***).

Section 152 describes the circumstances under which the court may change, suspend, or terminate an order respecting child support. It expressly provides for retroactive variation of child support orders and the order may be made if there has been a change in circumstances, if new evidence has become available that was not available during a previous hearing, or if evidence of a lack of financial disclosure by a party was discovered after the last order was made.

4.7-2 - Amount of Child Support

The amount of child support payable under an order or agreement must, in general, conform to the provisions of the Federal Child Support Guidelines ("CSG"). The CSG includes tables setting out the amount of child support payable by province, indexed to the payor's income and the number of children support is being paid for.

The CSG came into effect on May 1, 1997 and was amended on May 1, 2006, December 31, 2011, and November 22, 2017 to update the support tables. The amount of support payable according to income changed with each update. It is important to consider the correct tables when calculating any retroactive child support.

Both the *Divorce Act* and the *Family Law Act* require that orders for child support be given priority over spousal support orders. People other than a child's parents can make applications for child support under the *Family Law Act* if they are caring for the child, such as grandparents who have custody of their grandchildren, or other persons who have been granted guardianship of a child. In addition to the child's natural parents, an adoptive or stepparent, including more than one stepparent in some cases, can be responsible for child support.

The *Family Law Act* ranks the child support obligations of payors by their relationship to the child.

- Parents bear the primary responsibility for the support of a child.
- The obligation of non-parent guardians, such as stepparents, is secondary to that of parents and it extends only so far as may be reasonable considering the length of time that the step-parent lived with the child and the child's standard of living during that period.

2017 Child Support Table Look-up

The CSG tables determine child support based on the income of the payor and the number of children: see 2017 Child Support Table Look-up on the Department of Justice website.

There is no discretion with respect to the quantum of child support payments unless:

- the child is 19 or older (section 3);
- one or more siblings live with each parent (split custody, section 8)
- the child spends 40% or more of their time with the payor (shared custody, section 9);
- the payor's income is in excess of $150,000 per year (section 4);
- the payor is a person other than a parent (section 5); or
- the payment of the table amount would cause "undue hardship" to either the payor or the recipient (section 10).

4.7-3 - CSG & Custody: Split or Shared

Split Custody

When the parents have split custody, section 8 of the CSG fixes the amount of support payable as the set-off from the higher-earning parent's table amount for the number of children in the recipient's care and the lesser-earning parent's table amount for the number of children in the payor's care.

Shared Custody

Parents have shared custody when the payor has the children for at least 40% of their time: see *Green v. Green*, 2000 BCCA 310.

When parents have shared custody, determinations of the amount payable are made with reference to the three part test in section 9 of the CSG. The court first considers the amount payable pursuant to a set off, and then goes on to factor in the potential increased costs of a shared custody arrangement and the condition, means and needs and other circumstances of each parent and each child. It is important to understand that the "40% rule" does not necessarily result in an automatic reduction to the table amount of child support: see *Contino v. Leonelli-Contino*, 2005 SCC 63. It is only a factor that may be relied upon by the court to reduce the table amount to an amount that the court considers appropriate in the circumstances.

The first step is to consider the set off amount. This is done by determining the annual guideline income of each parent and considering the amount payable by each parent if they were paying the full amount of child support. These amounts are then set off from each other to determine the amount payable by one parent to the other. However, the court must then consider the increased costs of shared custody. It may be that the straight set off leaves one parent in a financially superior position to the other parent. The court tries to avoid very different standards of living between the two homes when the children are residing in the two homes on a roughly equal basis. Too many people stop at the first step and do not consider the next two steps. Be sure to consider all three parts of the section.

4.7-4 - Special & Extraordinary Expenses

In addition to the CSG table amount paid by the payor, the court has the discretion under section 7 of the CSG to award an additional amount to cover special or extraordinary expenses related to the child.

"Special or extraordinary expenses" are defined in section 7 of the CSG, and what qualifies as a special and extraordinary expense will change depending on the income available to the family and the needs of the children. Where an expense is found to be a special and extraordinary expense, the parties will contribute to the net cost of the expense, after deducting any subsidies or contributions from the child, in proportion to their incomes. For example:

Payor's income	$30,000
Recipient's income	$20,000
Total family income available to children	$50,000
Payor's income ÷ total family income x 100	0.6 x 100
Payor's proportionate share	60%

Where spousal support is also payable, the proportionate share of special and extraordinary expenses will change to consider those payments. Software exists that will assist you with performing both child support and spousal support obligations.

Much of the activity in litigating child support obligations has focused on determining what expenses fall within the category of special and extraordinary expenses. For example, ballet lessons, music lessons, martial arts classes, school tutoring programs, and language classes have all been the subject of determinations by the court. It is very important to determine just what kinds of such expenses were incurred by the parents when they were living together. If certain activities were beyond the budget of the family prior to separation, it is not likely they will be justified after separation. Expenses normally incurred prior to separation will usually continue after.

4.7-5 - Determination of Income

Gathering Financial Information to Determine Income

The first step in determining income is gathering the relevant financial information.

- Section 21 of the CSG sets out extensive requirements for disclosure of income information.
- Note that the SCFR set out additional disclosure requirements.

Under section 21(1) of the CSG, a spouse who is applying for child support and whose income information is necessary to determine the amount of the maintenance order must include the following documents with the application:

- personal income tax returns for the three most recent taxation years;
- notices of assessment and re-assessment for the three most recent taxation years;
- where the parent is an employee, the most recent detailed statement of earnings;
- where the parent receives income from employment insurance, social assistance, a pension, workers' compensation, disability payments, or any other source, the most recent statement of income indicating the total amount of income or a letter from the appropriate authority;
- where the parent is self-employed, the financial statements for the three most recent taxation years of the business or professional practice and a statement showing all salaries, wages, management fees, and benefits paid to persons with whom the spouse does not deal at arm's length;
- where the parent is a partner in a partnership, confirmation of the spouse's income, draw from, and capital in the partnership for the three most recent taxation years;
- where the parent controls a corporation, the financial statements of the corporation and subsidiaries for the three most recent taxation years, and a statement showing a breakdown of all salaries and payments to persons with whom the corporation does not deal at arm's length; and
- where the parent is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements.

A parent who is served with an application for child support and whose income information is necessary to determine the amount of the order must provide the court and the other parent with the documents set out above: see section 21(2) of the CSG.

When a spouse fails to comply with the obligation in section 21, the court may "draw an adverse inference against the spouse who failed to comply and impute income ... in such amount as it considers appropriate": see section 23 of the CSG.

Predicting Annual Income

The income of a party for the purposes of child support is frequently at issue. Where a party simply has one employer and receives a T4 slip at the end of the year, the exercise is relatively simple. However, where a party has several sources of income, such as self-employment income, dividends, interest income, rental income and employment income, the calculation can become complicated. The CSG provide some tools to assist in the calculation.

A party's guideline income is presumptively the party's actual current income from all sources. However, where a party's income is complicated or varies from year to year, it is common to accept the party's income in the most recent complete tax year as their guideline income. The court may average a party's historic income under section 17 where the party's income fluctuates, or impute income to a party under section 18 where the party is self-employed or paid through a closely-held company, or section 19 where the party is underemployed, intentionally underemployed or could be using capital assets to generate additional income but is not.

In the absence of complete income tax returns and other financial information, the court looks to other evidence, including circumstantial evidence, for the purpose of imputing income: *Poursadeghian v. Hashemi-Dahaj*, 2010 BCCA 453 at paragraph 23. For example, issues involving the imputation of income and parents who are self-employed or work through their own companies arise because legitimate deductions made pursuant to the *Income Tax Act* are not necessarily allowed for the purpose of calculating guideline income. Line 150 of the party's most recent income tax return, the presumptive starting point under section 16 of the CSG, may not provide an adequate description of the parent's income. Often companies pay for many items that otherwise are personal expenditures or benefits. If such payments are not added back to the person's income, that person's annual income will be unrealistically low for the purpose of applying the child support guidelines. You should always consider engaging the services of an accountant when dealing with a self-employed party to obtain a realistic view of that party's income.

Deductibility of Legal Fees

The party receiving child support is entitled to claim a tax deduction for that portion of their legal fees incurred to obtain or enforce an agreement or order for child support. The taxpayer must have paid the fees before they can be claimed. Legal fees incurred in defending a claim for child support are not deductible.

Where the deduction is claimed, the client will ask the lawyer to provide a letter stating the amount of legal fees that were incurred for those purposes from the lawyer's accounts that year. Therefore, the time-keeping records of the lawyer are very important, especially if the deduction is audited by the Canada Revenue Agency.

4.8 - Spousal Support

4.8-1 - General Principles

The general principles governing spousal support are consistent between the *Divorce Act* and *Family Law Act*.

REMINDER

Changes to the *Divorce Act* came into force on March 1, 2021. Changes to federal support enforcement laws are in progress. These changes flow from the passing of Bill C-78, *An Act to Amend the Divorce Act (and other acts)*.

At this time, these learning materials have not been updated to reflect the changes associated with these amendments. For more information, see ***4 - Introduction to the Family Law Module***.

A party's entitlement to receive spousal support is always an initial threshold issue that must be addressed before considering the amount and duration of an order or agreement for spousal support.

Where a party is entitled to receive spousal support, support can be paid by:

- a limited number of periodic payments;
- a single lump-sum payment;
- a combination of periodic payments and lump-sum payments;
- an indefinite number of periodic payments subject to review upon the occurrence of one or more prescribed events (such as the recipient's remarriage, employment, or receipt of pension benefits) or the passage of a defined amount of time; or
- permanent periodic payments.

The *Family Law Act* links the division of family assets and the payment of spousal support in a manner unique to British Columbia. Section 95(3), as it relates to unequal division of family assets, specifically considers the extent to which the financial means and earning capacity of

spouses have been affected by the responsibilities and other circumstances of the relationship and if, on making a determination respecting spousal support, the objectives of spousal support have not been met.

Previously, under the *Family Relations Act*, the court was required to consider property division first and then consider spousal support. Section 95(3) of the *Family Law Act* appears to say that they are considered together, or that spousal support is considered first. We can expect the court to consider this question as it may be a departure from the previous method of considering reapportionment and spousal support.

4.8-2 - Entitlement under the *Divorce Act*

The jurisdiction to award spousal support under the *Divorce Act* is set out in section 15.2.

"Spouses" entitled to apply for support are defined as persons who are or were married to each other. Only the British Columbia Supreme Court has the jurisdiction to make spousal support orders under the *Divorce Act*.

The court may make a spousal support order if one of the spouses is ordinarily resident in British Columbia at the commencement of the proceeding or both spouses accept jurisdiction of the court: see section 4(1). The court has discretion to award lump sum payments or periodic payments for a defined or indefinite period, or on other terms it thinks just.

When making a spousal support order under the *Divorce Act*, the court is obliged to take into consideration the conditions, means, needs and other circumstances of each spouse including the length of time the spouses cohabited, the functions they performed while cohabiting, and any order, agreement, or arrangement relating to support of either spouse.

The objectives of the spousal support order are set out in section 15.2(6):

> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

According to the Supreme Court of Canada in the leading cases of *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, the objective of the spousal support provisions of the *Divorce Act* is "to promote the equitable sharing of the economic consequences of marriage and marriage breakdown".

In *Moge*, the court described three bases for entitlement to spousal support:

- contractual, where the parties have a marriage or separation agreement imposing an obligation to pay support;
- compensatory, where a spouse has given up economic opportunities as a result of the marriage; and
- non-compensatory or needs-based support, where a spouse is unable to support themself after marriage breakdown and the other spouse has the means to provide support.

Compensatory Support

Under the compensatory model, the court will consider compensation for a spouse who has given up economic opportunities during or as a result of the marriage, such as a spouse who abandoned a career to raise children or live with the other spouse. Because compensatory claims are meant to address economic loss, a compensatory obligation to pay spousal support may survive the recipient's financial independence and re-partnering.

Non-Compensatory or Needs-Based Support

The needs-based model is based entirely on the needs of the recipient and the ability of the payor to provide support. The court will determine what effect the marriage had on impairing or improving each spouse's economic prospects and capacity for self-sufficiency.

The standard of living enjoyed during a relationship is primarily relevant in the case of long marriages. In *Moge*, the court stated that the marriage should be regarded as a joint endeavour such that the longer the marriage, the greater will be the presumptive claim to equal standards of living upon its dissolution.

The principles behind compensatory and non-compensatory support were comprehensively reviewed and summarized in *Chutter v. Chutter*, 2008 BCCA 507 at paras. 50 to 61 (reconsideration denied 2009 BCCA 177, leave to appeal refused 2009 CanLII 27232 (SCC)); see also *Lee v. Lee*, 2014 BCCA 383.

Note that agreements limiting spousal support may not be conclusive of the issue.

In *Miglin v. Miglin*, 2003 SCC 24, the court held that a final agreement was not in substantial compliance with the overall objectives of the *Divorce Act* for spousal support where it was not made with the intention to achieve certainty and finality, a party's capacity to contract was impaired, and full disclosure had not been made. In certain circumstances, usually limited to contractual defences, consent orders may also be open to review by the court.

4.8-3 - Entitlement under the *Family Law Act*

Both the Supreme Court and the Provincial Court have jurisdiction to award spousal support.

Section 160 of the *Family Law Act* confirms that the starting point for determining spousal support is entitlement. A person can be entitled to spousal support after consideration of the factors set out at section 161. (*NOTE: The factors read virtually the same as those set out at section 15.1 of the Divorce Act.)*

> 161. In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:
>
> (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
> (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
> (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses; and
> (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Once a party is found to be entitled to spousal support, section 162 sets out the factors to consider when determining the amount and duration of spousal support based on the conditions, means, needs and other circumstances of each spouse. The factors set out in this section are similar to those in the *Divorce Act* and so the case law set out in section *4.8-2 - Entitlement under the Divorce Act* should be considered.

Only spouses may apply for spousal support under the *Family Law Act*. Section 3 defines "spouse" as including the following (for the purposes of spousal support):

- married spouses;
- persons cohabiting in marriage-like relationships for at least two years; and
- persons cohabiting in marriage-like relationships for less than two years who have had a child together.

The "marriage-like" quality of a relationship is central to establishing the entitlement of unmarried persons. Simply living together does not constitute living in a marriage-like relationship. There are many cases in a family law and estate law context that resulted in a finding that the parties were not living in a marriage-like relationship even though they were living together: see for example, *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (C.A.). On the other hand, even where the parties were not living together they can still be held to be in a marriage-like relationship: see *L.E. v. D.J.*, 2011 BCSC 671. In *Yake v. Chamberlain*, 2014 BCSC 1582 (Master), on an application for interim support, the court concluded that the parties had been in a marriage-like relationship for approximately 13 years, notwithstanding the respondent's argument that their relationship was more in the nature of boyfriend-girlfriend, given their separate residences for many of the years and his need for solitary time that meant long periods apart.

Under section 170 of the *Family Law Act*, the court may make an order for spousal support for a lump sum payment, or for periodic payments for a defined or indefinite period of time. This section also provides the court with the authority to make orders to secure support though a life insurance policy and to order that spousal support is binding on the estate of the payor.

4.8-4 - Choices & Obligations

Choice of Law

Although married spouses can seek spousal support under both the *Divorce Act* and the *Family Law Act*, the court will only order spousal support under one act. Where the court has concurrent jurisdiction under both Acts, it is preferable to obtain an order under the *Divorce Act* because the *Family Law Act* is subordinate to the *Divorce Act* as a result of the doctrine of paramountcy: see *Yu v. Jordan*, 2012 BCCA 367.

- The making of a support order under the *Divorce Act* will preclude the making of an order under the *Family Law Act*.

- The making of an order under the *Family Law Act* will not, however, preclude the making of an order under the *Divorce Act*.

In any event, in claims where married spouses seek spousal support under both the *Divorce Act* and the *Family Law Act* support orders are typically granted under the *Divorce Act*, unless the parties request otherwise: see *Domirti v. Domirti*, 2010 BCCA 472 at para. 7.

Self Sufficiency

Each party has a general obligation to make efforts to become independent and self-sufficient as soon as practicable: see *Leskun v. Leskun*, 2006 SCC 25. Each case will be decided by applying the applicable legislation to the specific circumstances of the case.

- The criteria are set out in section 15.2 of the *Divorce Act*.
- In the *Family Law Act*, the relevant considerations are set out in section 161 and mirror the provisions in the *Divorce Act*.

In general, the court will take into consideration the length of the marriage, the roles of spouses in the marriage, the needs of minor or dependent children, express or implied agreements between spouses regarding support, parties' incomes and economic circumstances, economic advantages and disadvantages, and the parties' respective earning capacities.

4.8-5 - Spousal Support Advisory Guidelines

The Spousal Support Advisory Guidelines ("SSAG") is an academic paper published by the federal Department of Justice in a final form in July 2008.

The SSAG does not deal with entitlement to support. Its aim is to assist in the calculation of quantum and duration where entitlement to spousal support is established. Many practitioners jump to using the SSAG to determine quantum without first considering entitlement. Be sure to consider entitlement pursuant to the criteria set out in *Moge* and based on the particular facts of the case.

The SSAG has two main formulae for calculating spousal support: the "without child support" formula and the "with child support" formula. Both formulas use income sharing as the method for determining the spousal support amount. The formulae generate a range of results for both quantum and duration, either or both of which may be subject to a number of exceptions.

The SSAG has gained wide acceptance in British Columbia and has been described by our Court of Appeal as a "useful tool" in determining spousal support: see *Chutter v. Chutter*, 2008 BCCA 507 at para. 100.

In 2006, the BC Court of Appeal in *Redpath v. Redpath*, 2006 BCCA 338 held that a failure to consider the SSAG where the award made is substantially higher or lower than the range suggested by the SSAG in either quantum or duration, without exceptional circumstances to explain the difference, could be grounds for an appeal.

Important points:

- **Unlike the CSG, the SSAG has no legislative or regulatory effect and is purely advisory**. However, the court will often expect counsel to provide SSAG calculations in support of their submissions whenever spousal support is at issue, and in most cases the amount of spousal support order is coincident with the ranges produced by the SSAG formulae.
- **The SSAG does not deal with the issue of entitlement to spousal support.** Therefore, do not consider the SSAG calculations until the issue of entitlement has been resolved. In most cases, the formulae will produce results for quantum and duration but the fact that results are generated does not establish an entitlement.

4.8-6 - Additional Considerations: Interim Support, Income Tax and Deducting Legal Fees

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Interim Spousal Support

Different considerations arise on an application for spousal support depending on whether the order sought is interim or final. On an interim application, the court will generally only consider whether the applicant has *prima facie* need for support and the respondent's ability to pay.

Income Tax Implications

Periodic spousal support payments made pursuant to a written agreement or court order are deductible from the taxable income of the paying spouse but are taxable income in the hands of the recipient. The recipient must pay income tax on the spousal support payments received as if it were any other kind of income.

Periodic spousal support that has been paid prior to the execution of a separation agreement can be made retroactively taxable and deductible if the separation agreement confirms that the payments have been made. The parties can capture such payments from the beginning of the year immediately preceding the date of the separation agreement.

Lump-sum spousal support payments are neither taxable for the recipient nor deductible for the payor. Spousal support calculators will take this fact into consideration when calculating potential lump payments.

Deductibility of Legal Fees

The party *receiving* spousal support is entitled to claim a tax deduction for that portion of their legal fees incurred to obtain or enforce an agreement or order for spousal support. The taxpayer must have paid the fees before they can be claimed.

Note: Legal fees incurred in *defending* a claim for spousal support are not deductible.

Where the deduction is claimed, the client will ask the lawyer to provide a letter to confirm the percentage of the fees that were incurred for those purposes as most often these types of services are a portion of the lawyer's accounts. Therefore, the time-keeping records of the lawyer are very important, especially if the matter is audited by the Canada Revenue Agency.

4.9 - Pension Division - Part 5, *Family Law Act*

4.9-1 - Introduction to Part 5 - Property Division (*Family Law Act*)

The statutory provisions governing the division of property between married and unmarried spouses are set out in Parts 5 and 6 of the *Family Law Act*.

- Part 5 deals with the division of property, including real property, personal property and financial assets.
- Part 6 deals with the division of pensions. For more information, see section ***4.10 - Pension Division - Part 6, Family Law Act*** later in this module.

The *Divorce Act* does not provide for the division of property. Only the Supreme Court of British Columbia has jurisdiction to make orders for division of property.

Part 5 addresses two kinds of assets:

- family property, defined in section 84; and
- excluded property, as defined in section 85.

The allocation of family debts is addressed in section 86.

Generally, property brought into the relationship by a spouse, plus certain property acquired during the relationship such as inheritances, court awards and insurance proceeds, described as "excluded property," will presumptively remain the property of the owning spouse. Property acquired during the relationship, described as "family property," will presumptively be divided equally between spouses, along with the growth in value of each spouses' excluded.

The division of some assets, such as recreational property, rental property, corporate interests, and investment accounts, may give rise to significant tax issues. Always ensure that your client has obtained the appropriate tax advice before assets are divided.

Couples who are unmarried and have cohabited for less than two years, whether or not they have a child, **are specifically excluded from the operation of Parts 5 and 6 of the *Family Law Act*.** If property claims arise between these parties, the law applicable to the division of property between multiple owners will apply to jointly-owned property, and the principles of equity and trust law may apply in respect of property owned only by one party.

4.9-2 - Limitation

Pursuant to section 198(2) of the *Family Law Act*, proceedings for the division of property or allocation of debt must be brought within two years of a date of divorce or nullity for married spouses or within two years of the date of separation for unmarried spouses.

Under section 198(5), the running of time limits "is suspended during any period in which persons are engaged in family dispute resolution with a family dispute resolution professional" or "a prescribed process."

Family dispute resolution is defined in section 1 as including:

- the services of a family justice counsellor;
- mediation;
- collaborative settlement processes; and
- arbitration.

Second, the parties have to be engaged in one of these processes with a *family dispute resolution professional*. This term is defined in section 1 as including:

1. family justice counsellor;
2. unmarried spouses;
3. lawyers;
4. mediators who meet the training requirements set out in the Family Law Act Regulations; and
5. arbitrators who meet the training requirements set out in the Family Law Act Regulations.

The court, in *Shutiak v. Sperring*, 2015 BCSC 2344, seems to accept that if one party is working with a dispute resolution professional that may be sufficient to suspend the running of time pursuant to section 198(5).

4.9-3 - Property & Debt

Family Property

Family Property is all real property and personal property *other than excluded property*. As set out in section 84, it includes property acquired by either spouse after the date of cohabitation and includes the increase in value of excluded property after the date of cohabitation.

Pursuant to section 84(2) and (3), family property specifically includes the following:

(a) a share or interest in a corporation, partnership, association, organization, business or venture;
(b) property owing to a spouse as a refund (including an income tax refund) or in return for the provision of a good or service;
(c) bank accounts;
(d) annuities, pensions, retirement savings plans or income plan; and
(e) certain trust property.

Increase in value of excluded property

The extent of the exclusion is limited by section 84(2)(g) which provides that the growth in the value of excluded property that occurred since the later of the commencement of the relationship or the acquisition of the property is family property. That growth is therefore subject to the provisions for division of family property.

Excluded Property

Pursuant to section 85, excluded property generally includes the following:

- pre and post relationship property;
- gifts to one spouse from a third party;
- inheritances to one spouse;
- settlements or damage awards, except that part meant to compensate both spouses or to replace wages;
- non-property-related insurance proceeds, except that part meant to compensate both spouses or replace wages; and
- some kinds of trust property.

Section 85(2) places the burden to prove that the property is excluded on the spouse seeking to have the property excluded. The standard of proof is the civil standard of proof on the balance of probabilities. The case that addresses the issue is *Asselin v. Roy*, 2013 BCSC 1681. The discussion of excluded property begins at paragraph 187. The case emphasizes the importance of the burden on the person seeking to have property excluded. The case stands for the proposition that if there is no evidence of the continued existence of the alleged excluded property, it will not be excluded. This case is worth reviewing as a starting point along with the statutory sections.

Family Debt

Family debt is defined at section 86. It includes all financial obligations incurred by a spouse during their relationship, from the date of cohabitation to the date of separation.

Debts incurred after the date of separation are not family debts unless they are incurred for the purpose of maintaining family property.

Family debts are subject to equal division pursuant to section 81. This section means that the purpose of the debt during the relationship is irrelevant, except where one spouse can prove that equal division of the family debt would be significantly unfair under section 95.

4.9-4 - Triggering Event, Valuation and Reapportionment in the *Family Law Act*

Triggering Event

There is now only one triggering event set out by section 81 (Equal entitlement and responsibility) namely the separation date. At separation, each spouse has the right to an undivided half interest in all family property as a tenant in common and is equally responsible for family debt.

Valuation

The *Family Law Act* contains a specific provision regarding valuation of assets. Section 87 (Valuing family property and family debt) sets out that the value of family property must be based on its fair market value and that the value must be determined as of the date an agreement dividing the property and debt is made, or the date of trial.

Reapportionment

Reapportionment of family property is considered at section 95 (Unequal division by order). The section changes the threshold from whether it would be "unfair" not to do so to whether it would be "significantly unfair" not to do so.

Section 95(2) sets out several factors that the court may consider. The list is not an exhaustive list and section 95(2)(i) allows the court to consider any other fact that may lead to significant unfairness. This means that, while the threshold for unequal division is higher, the factors that can be considered are extensive.

In *Singh v. Singh*, 2020 BCCA 21, the Court of Appeal reiterated at paragraph 134:

The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division."

The Court of Appeal also established that section 95(2)(i), "any other factor," refers to "a limited class, namely, the economic characteristics of a spousal relationship," rather than including any factor without limitation (para. 138).

4.9-5 - Family Property or Excluded Property?

An important issue raised by the provisions of the *Family Law Act* is whether excluded property becomes family property if the owner spouse transfers it to the other spouse or into the joint names of the spouses (for instance, if the owner of excluded funds uses them to purchase a family home that is registered in the names of both parties).

You should carefully review the case law on this issue because it has not been decided categorically: see *McManus v. McManus*, 2019 BCSC 123 at para. 50.

Remmem v. Remmem, 2014 BCSC 1552 dealt with the issue of excluded property and depreciation. The court considered the proper approach to the exclusion of property which has depreciated since one spouse brought it into the relationship. The court found that it is the asset itself that is excluded as opposed to the value of the asset at the time the relationship began. As such, where the excluded property has depreciated, the depreciated asset is excluded. The spouse cannot look to other property to make up for the difference between the value at the commencement of the relationship and the depreciated value of the property at the time of separation. Importantly, the court found that transferring excluded property into joint names does not cause the property to lose its character as excluded property. The court also considered the definition of "significantly unfair" under section 95 of the *Family Law Act* and found as follows at paragraph 44:

Significantly is understood to mean more than a regular impact — something weighty, meaningful, or compelling.

This case discusses many aspects of the *Family Law Act* and considers both excluded property and reapportionment and is worth reviewing as one of the cases that includes a comprehensive discussion of property division.

There are now conflicting lines of authority regarding the issue of whether transferring excluded property into joint names causes the property to lose its character as excluded property. In *Wells v. Campbell*, 2015 BCSC 3 the husband brought a home on Hornby Island into the relationship. The wife, however, came into the relationship with assets of nominal value. In 2008, the husband transferred the Hornby Island property into joint tenancy. The husband sought to have the Hornby Island property excluded and the wife sought to have it divided equally. The court found that the transfer of the Hornby Island property into joint names constituted a gift to the wife. This meant that the character of the property as excluded was lost and the Hornby Island property became family property as opposed to excluded property. The court found that excluded property

relates to property which was held by a spouse prior to the relationship and in which an interest in title was not transferred to the other during the relationship.

In *V.J.F. v. S.K.W.*, 2015 BCSC 593, the court considered the findings in *Remmem* and *Wells v. Campbell.* The issue in this case related to a $2 million payment the husband received from the estate of his employer after his employer died. The court found that, when the husband received the money, it was excluded property as it was in the form of an inheritance or gift. The money was then used to purchase a property in Vancouver and to pay off debt on family property. The property in Vancouver was registered solely in the name of the wife. The court found that the *Family Law Act* does not prohibit gifts between spouses and that when excluded property owned by one spouse is comingled with funds derived from family property to purchase an asset that is placed solely into the name of the other spouse in order to immunize it from potential creditors, the exclusion is lost because the disposing spouse gifted it to the other.

The Court of Appeal released its decision in *V.J.F. v. S.K.W*, 2016 BCCA 186 on April 28, 2016. The Court dismissed the husband's appeal and found that the $2 million that the husband had transferred into the wife's name was family property. The court found that the *Family Law Act* scheme does not constitute a "complete code" that "descends as between the spouses" and eliminate common law and equitable principles relating to property. Rather, the scheme builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses. There were some distinguishing facts in this case, and it did not address various outstanding questions, including the fact that it appears to create a different regime for married spouses as compared to non-married spouses, as well as what happens when excluded property is placed into joint names.

Despite the above case law, in late 2016 and 2017 several cases were released that find that placing excluded property into joint names does not cause the property to lose its excluded status if it can be traced: see *Kalmiakov v. Shylova*, 2016 BCSC 2095 and *Lahdekorpi v. Lahdekorpi*, 2016 BCSC 2143, which distinguished *V.J.F. v. S.K.W.* on its facts.

In *H.C.F. v. D.T.F.*, 2017 BCSC 1226, the Supreme Court held that the presumption of advancement has no place under the *Family Law Act.* Subsequent Supreme Court of BC decisions have also declined to apply the presumption of advancement, on various grounds: see *C.J.B. v. A.R.B.*, 2017 BCSC 1682 and *McManus v. McManus*, 2019 BCSC 123.

A recent Court of Appeal case respecting this issue is *Venables v. Venables*, 2019 BCCA 281. In this case the Court of Appeal determined that a home that the spouse acquired prior to the relationship lost its excluded status after the spouse transferred it into the spouses' joint names. But note, the Court divided the property unequally in recognition of the spouse's pre-relationship ownership.

Due to the uncertainties in this area of law, when you advise a client about potential property division in the event of separation, pay special attention to ensure the client understands the risk of losing the excluded status of property and of the benefits of addressing this issue in a written agreement.

4.9-6 - Tax Consequences

The division of certain assets can result in significant income tax consequences, such as for investments, corporations, or real property subject to capital gains.

Payment of dividends or share transfers can also attract income tax.

It is important to be able to recognize these situations and seek the assistance of trusted accountants or tax lawyers.

Do not overlook your obligation to obtain tax advice from a qualified expert regarding the disposition of assets; the consequences can be significant and costly.

Do not rely upon the client telling you, “My accountant says it is okay.”

4.9-7 - Non-Spouses & Property Claims

Parties who are not spouses, and persons who have lived together for less than two years, even if they have a child together, are excluded from the provisions of the *Family Law Act* in Part 5 (Property Division) and Part 6 (Pension Division). As a result, a party has no automatic entitlement to property owned only by the other party, and only the joint ownership of an asset vests any presumptive property rights.

Where non spouses both own an asset, the law that applies is that which applies to any situation in which more than one person owns a piece of property, such as the *Partition of Property Act* or the *Strata Property Act*, the law of contract and the principles of equity.

Where only one party owns an asset, the non-owning party must establish an entitlement under the law of trusts. Barring the unlikely existence of an express trust, most non-owners must prove that the owner was unjustly enriched in some manner by their contributions and, having proved the enrichment, seek the imposition of a constructive trust over the property where the claim cannot be readily satisfied.

The primary cases on unjust enrichment and constructive trust are *Pettkus v. Becker*, [1980] 2 SCR 834 and *Peter v. Beblow*, [1993] 1 SCR 980, but the law is most recently reviewed and summarized in the Supreme Court of Canada's decision *Kerr v. Baranow*, 2011 SCC 10. In a nutshell, to establish unjust enrichment, the non-owner must prove that:

(a) the owner received a benefit from the direct or indirect contributions of the non-owner (such as a free renovation);
(b) the non-owner suffered some sort of material loss corresponding to the deprivation (such as the wages the non-owner would have received performing the renovation for someone else); and,
(c) there is no juristic reason for the benefit or the deprivation (such as a contract).

Where unjust enrichment is proven, the court will seek to remedy the enrichment by requiring the owner to pay a monetary award. Where the owner cannot satisfy the monetary award, the court will impose a trust over the subject property in favour of the non-owner.

Unjust enrichment can be time-consuming and costly to prove.

It will likely rarely result in the equal sharing that is presumed in the *Family Law Act*.

In a case where the relationship is less than two years, the party seeking an interest in the other's property will have to produce clear evidence of unjust enrichment to have a hope of any substantial award.

4.10 - Pension Division - Part 6, *Family Law Act*

4.10-1 - Introduction to Part 6 - Pension Division (*Family Law Act*)

The statutory provisions governing the division of property between married and unmarried spouses are set out in Parts 5 and 6 of the *Family Law Act*.

- Part 5 deals with the division of property, including real property, personal property and financial assets. For more information, see section ***4.9 - Property Division - Part 5, Family Law Act*** later in this module.
- Part 6 deals with the division of pensions.

Under Part 6 of the *Family Law Act* and the provincial *Pension Benefits Standards Act*, the court may order a pension plan administrator to split the accumulated benefits of a pension plan member.

Canada's *Pension Benefits Standards Act* makes federal pensions subject to provincial legislation regarding property division on marriage breakdown.

The *Divorce Act* does not provide for the division of property. Only the Supreme Court of British Columbia has jurisdiction to make orders for division of property.

Only spouses may seek the division of pensions under Part 6. Couples who are unmarried and have cohabited for less than two years, whether or not they have a child, are specifically excluded from the operation of Part 6 of the *Family Law Act*.

Assessing the Pension

Part 6 divides the different types of plans into categories:

- Division 2 deals with division of benefits in local plans, including defined benefit plans, defined contribution plans, hybrid plans and matured plans.
- Division 3 deals with division of annuities, benefits under a supplemental pension plan, benefits for individuals, disability benefits and benefits in an extraprovincial plan.
- Division 4 deals with survivor benefits.

Section 127 allows parties to agree that a non-member may receive more than 50% of a member's pension and that parties can agree to waive an entitlement in each other's CPP credits.

Since enforcement difficulties may arise with pension plans that are not governed by provincial legislation, you should be aware and advise your clients about problems in satisfying the client's share of such a pension and of remedies such as seeking a compensation payment or other appropriate measures.

Very few lawyers understand how pension plans operate and how to assess their value. Whenever the present value of pension benefits needs to be ascertained, obtain such valuation from a qualified pension actuary. A pension expert is often necessary to explain how pension plans operate and recommend effective means of division.

A pension may be a family's most valuable asset. Pension plans are highly variable and may have unusual characteristics.

Find out the answers to the following questions:

- Does the plan charge a fee to divide the pension?
- Can the plan member retire early?
- Does the spouse start collecting their share of the pension when the member does?

- What happens when the plan member dies?
- Can the pension be rolled over into a locked-in RRSP or another retirement savings vehicle, like a LIF or a LIRA account?

The **BC Law Institute** has some useful resources on the topic, including:

- Questions and Answers About Pension Division on the Breakdown of a Relationship in British Columbia (the "Pension Q&A"); and
- Consultation Paper on Pension Division: A Review of Part 6 of the *Family Law Act*, prepared by BCLI's Pension Division Review Project Committee.

4.10-2 - Local Plans

The first step is to determine what kind of local plan is relevant.

A “local plan” is defined in section 110 of the *Family Law Act*.

The location of the head office of the employer or of the pension administrator’s office does not determine whether the plan is “local.”

Defined Benefit Plan

The most common form of pension plan is a “defined benefit” plan. This type of plan is calculated on a formula that is not related to the employee’s contributions. The employer’s contributions are not fixed but are flexible, to take advantage of changing circumstances such as inflation, interest rate adjustments and so forth.

These plans are divided by making the non-member spouse a limited member of the plan. When the member retires or becomes eligible to retire, the limited member will receive a separate pension. Alternatively, the limited member may direct the plan to transfer the limited member’s share to a locked-in retirement savings account.

Section 115 provides that the spouse may receive their proportionate share of the benefits by a separate pension or by receiving the commuted value of the benefits. The separate pension or transfer of the commuted value may occur no earlier than the earliest date that the member could elect to commence their pension. This means that the spouse can receive the benefit of the pension before their ex-spouse retires. The usual age for these types of plans to elect to commence a pension is 55. However, you should check with the pension provider to be sure.

For further information on defined benefit plans please see Chapter 2 of the BCLI's Pension Q&A.

Defined Contribution Plan

A "defined contribution" plan is a retirement savings account to which the member, employer, or both have contributed and appreciates over time. The accumulated value of the plan is available to the member upon retirement to purchase an annuity, a retirement income fund, or another retirement vehicle, or to draw from as income.

Defined contribution plans are divided by rolling over the non-member's share to a locked-in retirement savings account.

Section 114 provides for the transfer of the non-member's interest in the pension to the non-member, or with the agreement of the pension administrator, to become a limited member of the pension.

For further information on defined contribution plans please see Chapter 3 of the BCLI's Pension Q&A.

Hybrid Plan

A "hybrid" plan is a plan where benefits are determined by a combination of a defined contribution provision and a benefit formula provision, or where there is an option to choose between these provisions at pension commencement.

Section 116 provides that hybrid plans may be divided as if all the benefits were in a defined contribution plan or a defined benefit plan with the consent of the administrator. If there is no consent, each part of the plan will be divided according to sections 114 and 115.

Matured Plan

Matured local plans are divided according to section 117. It allows the non-member to receive their monthly share of the pension. If the member dies first, the non-member receives the survivor benefits payable under the pension.

4.10-3 - Division of Other Benefits

Disability Benefits

Section 122 of the *Family Law Act* specifically allows disability benefits to be paid and addresses situations where an agreement or court order provides for dividing disability benefits payable under a pension plan. There is no age limit for when a former spouse is entitled to receive a share of disability benefits.

For further information on disability benefits please see Chapter 9 of the BCLI's Pension Q&A.

Extraprovincial Plans

Extraprovincial plans are defined as all plans that are not local plans.

Section 123 provides for the application of the pension division rules set out in the legislation governing the plan. However, if there are no rules, or if the rules provide for a result that is inconsistent with the policies advanced by the *Family Law Act*, the benefits can be divided so that the spouse receives a share of the income stream when the member's pension commences.

For further information on extraprovincial plans please see Chapter 7 of the BCLI's Pension Q&A.

4.10-4 - Plans Exempt from Part 6

The division of some pension plans is based on legislation other than the *Family Law Act*.

When the pension plan of a federal government employee has been created by a specific federal statute the division is governed by the federal *Pension Benefits Division Act*, Schedule II. Such statutes include:

- *Public Service Superannuation Act*,
- *Canadian Forces Superannuation Act*,
- *Royal Canadian Mounted Police Superannuation Act*.

Schedule II provides a complete code for the division of such pensions on marriage breakdown and does not allow division under provincial property laws.

4.10-5 - Canadian Pension Plan Credits

CPP retirement benefits are authorized by the Canada Pension Plan and are available to anyone who has made at least one pensionable contribution during their working career.

Equalizing Benefits

Married spouses and persons qualifying as "common-law partners" under the *Family Law Act* may apply to have the pensionable credits accumulating during the period of their cohabitation equalized between them. Spouses may apply on the making of a divorce order or declaration of nullity, or earlier upon the one-year anniversary of their separation.

Common-law partners may apply upon the first anniversary of their separation and must apply within four years of separation, following which the former partner's consent is required.

See Form ISP1901 - Application for Canada Pension Plan Credit Split (upon separation or divorce) on the Service Canada website for an application kit and information sheet to do this.

Note that a fee is required to split the pension credits.

Election not to Equalize

The splitting of CPP credits is mandatory upon the application of a spouse or a common-law partner within the prescribed time periods.

The Canada Pension Plan provides that the minister is not bound by the directions of an order or written agreement as to the division (or not) of pensionable credits, **unless provincial legislation expressly permits parties to elect not to equalize their pensionable credits.**

BC is one of the few provinces with such legislation, in that section 127 of the *Family Law Act* specifically states that an agreement may provide that, despite the Canada Pension Plan, unadjusted pensionable earnings will not be divided between the spouses.

See *Canada Pension Plan*, section 55.2(3) for language to be used in agreements.

4.10-6 - Dividing the Pension

The division of local plans is managed by the administrator of the plan. The administrator may have specific requirements for the wording of the order or agreement and should be consulted as a matter of course whenever a pension is among the family assets.

It can be useful to telephone the pension provider with any questions you have about the division of the pension. They are accustomed to such questions and can generally provide you with the answers you require.

The *Division of Pensions Regulation*, BC Reg. 348/2012 outlines the formulae for determining the non-member spouse's share of a local plan. The Regulation excludes contributions made prior to marriage, however the parties may, by order or agreement, include all or part of any pre-marriage contributions in the benefit split: see for example *Mailhot v. Mailhot*, 1988 CanLII 179 (BCCA).

The division of pensions can be complicated, and you should read Part 6 very carefully whenever you are required to deal with the division of a pension.

You should consider consulting or retaining counsel expert in pensions to assist.

4.11 - Litigating Family Law Disputes

4.11-1 - Jurisdiction, Pleadings & Service

Jurisdiction

Family law disputes are litigated in both the Provincial Court and the Supreme Court. Each court has its own rules for family law matters, and you must be mindful of the jurisdictional limitations of the Provincial Court. This section will discuss matters before the Supreme Court.

Pleadings

Various provisions of the Supreme Court Family Rules apply to the procedures required when commencing a legal action in a family matter. The required forms of pleadings are as follows:

- notice of family claim in Form F3;
- response to family claim in Form F4;
- counterclaim in Form F5; and
- response to a counterclaim in Form F6.

Service

The notice of family claim must be personally served under SCFR 4-1(2) (Service).

If personal service cannot be effected, apply for an order for substituted service under SCFR 6-44 (Alternative service methods). Email is often approved by the court as a method of substituted service where you can prove that the party has made use of the email address recently. A newspaper advertisement, if that is the route you wish to take, must be in Form F11.

4.11-2 - Judicial Case Conferences

All parties to contested family law proceedings must attend a judicial case conference ("JCC") pursuant to SCFR 7-1. The purpose of the JCC is to canvass areas of agreement and the unresolved issues between the parties at an early stage and to schedule dates for production of documents, interim applications and trials, and, where practicable, to attempt settlement of the matters in dispute. If your client is anxious to finalize matters, you may want to use the JCC to set a trial date as soon as possible. Be realistic about the time estimate for trial.

Under SCFR 7-1 the parties to a proceeding cannot deliver an application for interim relief until the JCC has been conducted, subject to certain exceptions. Under SCFR 7-1(3), the following applications can be heard before a JCC:

- an application restraining disposition of any property at issue;
- an application for a consent order;
- an application without notice;
- an application to change, suspend or terminate a final order;
- an application to set aside or replace the whole or any part of an agreement; and
- an application to change or set aside the determination of a parenting coordinator.

A party may on application be relieved of the JCC requirement altogether under SCFR 7-1(4) if:

- it is premature to require the parties to attend a JCC;
- it is impracticable or unfair to require the party to prevent an application from being heard before a JCC;
- a proposed application is urgent;
- delaying the hearing of a proposed application or requiring the party to attend a JCC is or might be dangerous to the health or safety of any person; or
- the court considers it appropriate that the party be relieved from the requirement.

A JCC is set by booking a date with the court registry and by filing a notice of judicial case conference in Form F19, with the booking party's financial statement in Form F8.

Notice of the JCC must be served on all parties at least 30 days before the date of the JCC. In busy registries, it can take a while before a JCC date can be obtained and this may lead to difficult choices being made regarding applications for interim relief.

Do not avoid the JCC unless necessary. It is an opportunity to sit down with a judge or master to discuss the matters at issue, to identify the real stumbling blocks to settlement, and which issues may be resolved by consent with the assistance of the judge or master. The court offers subsequent JCCs if the first one was useful. A JCC is also a good opportunity to "meet" the other party and to gain a better understanding of their position. At times, the judge or master may opine regarding the likely outcome of the litigation.

Similar to this process, the Provincial Court may require family litigants to participate in a family case conference before proceeding to a hearing where custody, access or guardianship are at issue.

4.11-3 - Examinations for Discovery & Notice to Admit

The document disclosure and examination for discovery procedures assist counsel in obtaining admissions and facts that have the potential to make or break a claim or defence. SCFR Part 9 (Procedures for Obtaining Information and Documents) addresses these and other procedures.

Examinations for discovery are available under SCFR 9-2 by delivering an appointment to discover in Form F21.

- Identify the issues and do your legal research before the discovery to know what facts and admissions are relevant to the issues.
- As in all civil actions in the Supreme Court, parties must produce a list of documents, Form F20, under SCFR 9-1 (Discovery and Inspection of Documents). Therefore, make sure that you prepare and exchange documents and experts' evidence before holding examinations for discovery.
- You can demand additional documents at the examination.
- Examinations for discovery are limited to five hours for each party adverse in interest, but this limit may be extended by consent of the party or by court order (SCFR 9-2(2)).

Admissions may be sought under SCFR 9-6 by delivery of a notice to admit in Form F24.

- Admissions, properly used, can significantly shorten the trial process, and the time required to prepare for trial, by obtaining critical admissions of fact and the authenticity of documents in advance of the trial itself.

4.11-4 - Interim Relief Applications

The Supreme Court has jurisdiction over all matters in interim applications; the Provincial Court may only hear interim applications on those matters that are within its jurisdiction. Chambers applications are common for the following types of relief in family law matters:

- **a financial restraining order**; see section 91 of the *Family Law Act* which can be used to protect real property and personal property (including chattels);
- **a protection order**; see Part 9 of the *Family Law Act*;
- **exclusive occupancy of the family residence**; see section 90 of the *Family Law Act* which provides for the exclusive occupancy of a family residence by one spouse, or the exclusive use of property stored there by one spouse;
- **interim custody and access, or guardianship, parenting time and contact**; in the *Divorce Act*, see section 16.1(2) of with respect to interim parenting orders, and section 16.5 with respect to interim contact orders, in the *Family Law Act* see sections 45 and 52, with respect to orders allocating parental responsibilities, parenting time and contact (whether interim or final) as well as section 216 with respect to interim orders; and
- **interim child support and spousal support**; in the *Family Law Act*, see sections 149, 165, and 216, and in the *Divorce Act*, see sections 15.1, 15.2 and 15.3.

While the orders made in these applications are interlocutory in nature and are not binding on the trial judge, they often influence settlement discussions, trial preparation and final outcomes.

In Supreme Court proceedings, interim applications are made in chambers. SCFR 10-1 to 10-9 govern these applications. A party makes an interim application by filing and serving a notice of application in SCFR Form F31, with supporting affidavit material (Form F30).

Notice of Application

Under SCFR 10-6(3), the notice of application filed by the applicant must:

- describe the orders sought, or attach a draft order;
- summarize the factual basis of the application;
- set out the statutory provision or rule relied upon and any legal argument on which the orders sought should be granted;
- list affidavits and other documents relied upon;
- set out the applicant's time estimate for the hearing;
- set out the date and time for the hearing of the application (subject to subrules (4) and (5) regarding applications longer than two hours and the dates the court hears particular applications);
- set out the place for the hearing in accordance with SCFR 10-2, which is normally the registry in which the underlying action is brought; and
- provide the data collection information required in the appendix to the form.

See *Dupre v. Patterson*, 2013 BCSC 1561 for what the notices of application and application responses should contain. Note the court's statement in that case that "Counsel who come to court with application materials that do not comply risk having their applications at least adjourned, with potential cost consequences, until proper materials are filed" (at para. 56).

Application Response

A party may respond to a notice of application by filing an application response together with the original of every affidavit and of every document the responding person intends to refer to (that has not already been filed and served on the other party). The responding party must also serve on the applicant two copies of the filed application response, the filed affidavits and other documents, and, on a summary trial application, any notice that the application respondent is required to give under SCFR 11-3(9).

An application response must be in SCFR Form F32; it cannot exceed 10 pages. Under SCFR 10-6(9), it must:

- set out the application respondent's position on each order sought;
- summarize the factual and the legal basis on which the orders sought should not be granted;
- list the affidavit and other materials relied upon in opposition to the relief sought; and
- set out the application respondent's time estimate.

Refer to the **Law Society's Practice Refresher Course (Civil Litigation)** for more information about the types of pleadings that you will be required to prepare.

If you expect to be in chambers frequently, you should consider developing a standard notice of application with a variety of potential requests for relief and an affidavit that can be customized as necessary for individual clients. Your clients' supporting affidavits will not be as generic. Unless another approach is obvious, it is always a good idea to consider setting out the affidavit by topic and in chronological order within each topic.

4.11-5 - Emergency Applications

For urgent matters, applications may be made for relief from SCFR 7-1 to allow a hearing prior to the JCC. The application may be made by filing a requisition Form F17 supported by a letter signed by counsel or a third party setting out the reasons why the order is sought (SCFR 7-1(5)(6)). The requisition requires the applicant to indicate whether leave is sought to deliver a notice of application, affidavits in support, and schedule a hearing of the application. The court may then require further material, require that party or counsel appear in person to speak to the application, make or refuse the order requested, or make any other order considered appropriate.

In the absence of urgency, the court will not usually deal with matters of custody, guardianship, access or support until a JCC has been held.

If the order for relief from SCFR 7-1 is made, the application for urgent relief sought will proceed by notice of application and affidavit in support with an oral hearing in chambers pursuant to SCFR 10-2 through 10-6. It is possible to have the urgent application heard at the same time as the application for relief from SCFR 7-1. In that case you would be seeking an order for short leave, seeking to have the usual time for delivery of materials and hearing of the matter abridged. Absent compelling and urgent circumstances, the court will be reluctant to grant short leave.

After-hours emergency applications

After-hours emergency applications by telephone made personally to a judge or master are also available under SCFR 22-6, but they are still subject to SCFR 7-1. This may be arranged during business hours by contacting registry staff to schedule the application. A designated on-call registry staff person can be contacted after-hours and on weekends to make arrangements. The procedure may be different in each registry.

4.12 - Resolving Family Law Disputes

4.12-1 - Introduction to Resolving Family Law Disputes Without Litigation

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Family law disputes can be resolved in a variety of ways. In addition to litigation, the parties may attempt:

- negotiation, with or without the involvement of counsel;
- mediation, with or without the involvement of counsel;
- collaborative processes, with counsel and potentially with the assistance of experts such as divorce coaches, financial planners, and child psychologists; or
- arbitration, with or without the involvement of counsel.

Adequate disclosure is an essential prerequisite to the success of any dispute resolution process and the durability of the resolution obtained.

The *Family Law Act* specifically addresses alternative dispute resolution and contains many provisions to encourage parties to resolve their disputes out of court.

- Section 224 (Orders respecting dispute resolution, counselling and programs) allows to court to order parties to enter into alternative dispute resolution.
- Section 198 (Time limits) provides for a suspension in certain limitation periods during the period where parties are engaging in alternative dispute resolution.

4.12-2 - Financial Disclosure

SCFR 5-1 requires Supreme Court litigants to execute a financial statement, Form F8, whenever support or the division of family assets is at issue. The form is commonly used as a means of disclosure in family law files and is more thorough and easier to use than the Provincial Court equivalent, Form 4. Even if the parties want to settle matters without going to court, or using the joint application procedure, both parties should be asked to provide a Form F8 financial statement in order to ensure that there has been full and complete financial disclosure before negotiations begin. Do not ignore the question about assets that were disposed of within the previous two years – it can sometimes reveal previously unknown assets.

The Form F8 financial statement provides a good starting point to ensure that you have asked all the questions that are important when seeking full financial disclosure. Where property division is at issue and the Form F8 financial statement is not used, ensure that your client provides you with:

- a list of all assets and liabilities in the client's name (including those held jointly with other persons and assets held in trust by other persons for the benefit of the client);
- a list of all assets and liabilities in the name of the other party (with the same additional inclusion as for your client); and
- a list of all assets and liabilities in the parties' names jointly.

Family law cases are sometimes won and lost on the adequacy of financial disclosure. Have your client work on their financial statement as soon as possible. It usually takes clients some time to fill out Form F8. It also takes time to gather all the required financial documents listed on the financial statement. Sometimes these documents must be requested from other persons or from Canada Revenue Agency. If some of the usual attachments are not available, you can prepare and file a financial statement without them, although you should provide the other party with an explanation and an approximate date the documents are expected.

Remind your client that their duty to provide disclosure is ongoing and continuous. It is not fulfilled with the filing of the first financial statement.

You may also want to ask your client to sign authorizations allowing you to obtain the necessary documents directly from third parties, but take care to ensure that there is no confusion about whose responsibility it is to obtain these documents.

Do not rely solely upon the information reported in the opposing party's financial statement.

Obtain and review source documents such as personal T1 income tax returns, T-slips and schedules, bank statements, investment statements, corporate financial statements and corporate T2 tax returns.

4.12-3 - Mediation

Mediation can be used to resolve all or some of the matters at issue, if both parties are willing to employ the procedure and are willing to compromise their positions, at least in some respects. The exception is that a party to a family law proceeding at the BC Supreme Court may compel mediation by serving on the other party a Notice to Mediate pursuant to the *Notice to Mediate (Family) Regulation* of the *Law and Equity Act*. Either way, mediation may not be suitable where the parties' relationship was marked by family violence or where there is a significant imbalance of real or perceived power between the parties, unless the mediator has special training or skill in dealing with such issues.

Mediators are neutral. They do not give legal advice, do not make or impose decisions on the parties, and do not take sides in the mediation. Their role is to facilitate settlement discussions between the parties. Although emotions will run high from time to time, with the assistance of a skilled mediator, parties can often work out arrangements that resolve their dispute without the necessity of litigation. In mediation, parties take control and ownership of their solutions rather than having a third party, such as a judge or arbitrator, impose a solution upon them.

The mediation process usually involves a pre-mediation meeting with each of the parties to identify issues and assess whether the case is suitable for mediation. Fear of violence or an existing restraining order would indicate that mediation is not appropriate. Sometimes, the mediator will schedule more than one mediation session.

Mediation can take place with or without counsel present. Each case will dictate the appropriateness of having counsel present or not. If your client decides they want to attend mediation without you as counsel, you should make yourself available to provide legal advice. Alternatively, advise the client not to agree to anything final until they have been able to consult you for legal advice.

Mediation is generally far less expensive than paying counsel to prepare and attend trial. Frequently, the parties agree to share the cost of mediation.

The *Family Law Act* includes mediation among the recognized "family dispute resolution" processes to which the court can refer parties.

Refer to the Mediate BC website for a list of family law mediators.

In addition, see the discussion in *C.C.R. v. T.A.R.*, 2014 BCSC 620 about best practices in mediation and the problems (including litigation) that can arise in their absence.

4.12-4 - Collaborative Family Law

The collaborative family law process is a form of intensive negotiation that attempts to address the emotional dimensions of separation along with the legal issues, and which requires the parties and their lawyers commit to finding a resolution without litigation. Collaborative practitioners are qualified family law mediators, have extensive additional training in collaborative processes, and will be affiliated with a multidisciplinary practice group composed of collaborative lawyers, psychologists, and counselors.

Lawyers and clients engaging in the collaborative process first sign an agreement that they are not to resort to litigation. If court becomes inevitable, the lawyers must withdraw. There are a series of four-way meetings between the parties and their counsel, directed at identifying the problems that need to be addressed for each party and discussing solutions. Divorce coaches, financial planners and child specialists often assist in identifying concerns and issues, facilitating communication, developing co-parenting skills or strategies, and addressing emotional issues. When a dispute is resolved, the settlement may be recorded as either a separation agreement or consent order, although separation agreements are the more common option.

The collaborative process is generally less costly and more satisfying to willing participants than litigation, although it is generally more expensive than negotiation and mediation. It can be an efficient and practical means of resolving your client's concerns.

The *Family Law Act* includes collaborative processes among the recognized "family dispute resolution" processes to which the court can refer parties.

BC Collaborative Roster Society: www.bccollaborativerostersociety.com

Local collaborative law groups can be located on the internet:

- Vancouver: www.collaborativedivorcebc.com
- Victoria: www.collaborativefamilylawgroup.com
- Other local groups are active throughout the province.

Additional resources on collaborative law can be located at the BC Courthouse Library website in the Practice Portal for Family Law.

4.12-5 - Arbitration

Arbitration is another alternative to litigation. It is presently the least used of the alternative dispute resolution mechanisms, but can provide a quick, final, and private resolution to family law disputes.

In arbitration, the parties to a dispute agree that a neutral third-party, an arbitrator, will hear their evidence and arguments, and make an award finally resolving all or part of their dispute. In addition to selecting the arbitrator the parties believe is best suited to the matters at issue, the parties can choose the rules of process, procedure and evidence which will be followed during the arbitration process.

It is important to remember that arbitration is not a form of counselling, mediation, or assisted negotiation. It is a formal, quasi-judicial procedure that observes the principles of fundamental justice and due process and requires the strict impartiality of the arbitrator.

See *McMillan v. McMillan*, 2015 BCSC 2177 in which the court considers and discusses the test on appeal and the standard of review respecting the decision of an arbitrator pursuant to the *Family Law Act*.

The decision was upheld by the BC Court of Appeal and a useful discussion is included in *McMillan v. McMillan*, 2016 BCCA 441.

4.12-6 - Parenting Coordination

Parenting coordination is a process in which the parties agree or are ordered to retain a neutral parenting coordinator to assist them in carrying out a parenting plan established by court order or a separation agreement: see section 15 of the *Family Law Act*.

In many situations, typically high-conflict situations, disputes between parents may arise over parenting decisions, children's activities and schooling, access, and special problems involving illness, employment, holidays, and vacations. Parenting coordinators are retained to deal with such issues for lengthy terms ranging from six months to two years. On whether or not to appoint

a parenting coordinator see, for example, *Robertson v. Vega Soto*, 2019 BCSC 1140 and *Hart v. Hart*, 2019 BCSC 885.

Parenting coordination is addressed specifically at sections 14 to 19 of the *Family Law Act*. Parenting coordination can be ordered by the court over the objections of one or both of the parties. For an example of selecting a parenting coordinator when the parties cannot agree on one see *I.J.G.P.G. v K.M.*, 2018 BCSC 2468.

Parenting coordinators attempt to resolve disputes by helping the parties reach consensus through a mediation-like process. Where consensus cannot be reached or a resolution must be reached on short or no-notice, parenting coordinators may make determinations resolving the dispute in an arbitration-like process.

Parenting coordinators' determinations are binding on the parties, although they may have the decisions reviewed pursuant to section 19 of the *Family Law Act*. The court has released a decision regarding the standard of review pursuant to section 19. In *Law v. Cheng*, 2017 BCSC 328, the court found that a determination by a parenting coordinator should be accorded the same deference as an arbitration award and subject to review on the same standard of reasonableness.

Parenting coordinators do not have the authority to substantially change the terms of a parenting plan, alter custody, or make long-term adjustments of access. For an example of a case that discusses the scope of a parenting coordinator's decision-making authority see *F.J.V. v. W.K.S.*, 2019 BCCA 67.

While the services of parenting coordinators can be expensive, in many situations, especially where there is high emotional conflict, the expense is less than the cost of ongoing court applications.

For further information, including a list of qualified BC parenting coordinators, see www.bcparentingcoordinators.com.

4 - References & Resources

Primary statutes

- *Divorce Act*, RSC 1985, c 3 (2nd Supp)
- *Family Law Act*, SBC 2011, c 25
- *Child Support Guidelines*, SOR/97-175
- Provincial Court (Family) Rules, BC Reg 417/98

- Supreme Court Family Rules, BC Reg 169/2009

Other relevant legislation

- *Adoption Act*, RSBC 1996, c 5
- *Land Title Act*, RSBC 1996, c 250
- *Law and Equity Act*, RSBC 1996, c 253
    - *Notice to Mediate (Family) Regulation*, BC Reg. 296/2007
- *Partition of Property Act*, RSBC 1996, c 347
- Pensions
    - *Canada Pension Plan*, RSC 1985, c C-8
    - *Pension Benefits Standards Act*, 1985, RSC 1985, c 32 (2nd Supp.)
    - *Pension Benefits Standards Act*, SBC 2012, c 30
    - *Division of Pensions Regulation*, BC Reg. 348/2012
- *Provincial Court Act*, RSBC 1996, c 379
- *Strata Property Act*, SBC 1998, c 43
- *Vital Statistics Act*, RSBC 1996, c 479

Law Society of BC materials

- Professional Legal Training Course's Professionalism: Practice Management
- The Law Society Practice Checklists Manual including:
    - Family Practice Interview
    - Family Law Agreement Procedure
    - Separation Agreement Drafting
    - Marriage Agreement Drafting
- Report of the Family Law Task Force: Best Practice Guidelines for Lawyers Practising Family Law, dated July 15, 2011 (the "Guidelines") prepared on behalf of the Family Law Task Force, Law Society of British Columbia.
- Support and Resources for Lawyers > Practice Resources area of the Law Society's website
    - Sample retainer letters (including a general retainer agreement and a joint retainer) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
    - Sample non-engagement letters under the heading *Client files*

Lawyers Indemnity Fund

- Practice Management & Wellness: Risks and Tips

External resources

- Ministry of Justice's Family Justice website
- Legal Services Society's Family Law website
- John-Paul Boyd's public legal education wikibook, JP Boyd on Family Law
- CLEBC's Family Law Agreements – Annotated Precedents
- The Department of Justice website includes the 2017 Child Support Table Look-up

- The Mediate BC website maintains a list of family law mediators.

- Collaborative family law
    - The BC Collaborative Roster Society: www.bccollaborativerostersociety.com
    - Vancouver: www.collaborativedivorcebc.com
    - Victoria: www.collaborativefamilylawgroup.com
    - Other local groups are active throughout the province.
    - Additional resources on collaborative law can be located at the BC Courthouse Library website in the Practice Portal for Family Law.
- The www.bcparentingcoordinators.com website maintains a list of qualified BC parenting coordinators.
- Pensions
    - The Service Canada website has the Form ISP1901 - Application for Canada Pension Plan Credit Split (upon separation or divorce) including an application kit and information sheet on the process.
    - BC Law Institute (BCLI) has some useful resources on the topic, including:
        - Questions and Answers About Pension Division on the Breakdown of a Relationship in British Columbia (the "Pension Q&A")
        - Consultation Paper on Pension Division: A Review of Part 6 of the *Family Law Act*, prepared by BCLI's Pension Division Review Project Committee.

MODULE 5 – WILLS & ESTATES

5 - Introduction to the Wills & Estates Module

Estate planning is a difficult and challenging part of a lawyer's practice. Preparing the will may be only one component, but it is fundamental to most estate plans. You need to understand a broad range of legal principles. You should have a working knowledge of the common law on wills and estates, and knowledge of relevant provincial and federal statutes.

It is important to note that wills and estates practice has undergone significant changes since the *Wills, Estates and Succession Act* ("*WESA*") came into force in 2014. Upon *WESA* coming into force, the *Estate Administration Act*, *the Probate Recognition Act*, the *Wills Act*, and the *Wills Variation Act* were repealed and replaced. See *WESA*'s transitional provisions at Part 7 to confirm if it applies where the will-maker died, a will was made, or probate was granted prior to *WESA* coming into force in March 2014.

Personal estate planning does not stop with a will. In addition to a will there are two other main documents clients may want as part of their estate planning:

- a Power of Attorney, and
- a Representation Agreement.

Additional documents that may be included in end of life planning are:

- an Advance Directive, and
- a Nomination of Committee.

Some of the main legislation is covered in this module, as they relate to or explain the reasons for certain requirements in wills and estates. However, as you start working in this field it is recommended that you become familiar with the following legislation:

- *Family Law Act*, especially the sections relating to the appointment of guardians;
- *Adoption Act*;
- *Income Tax Act*, respecting tax treatment of estate property on death and on transfer as well as consequences of leaving an outright gift to a disabled beneficiary, for instance;
- *Representation Agreement Act*;
- *Power of Attorney Act*;

- *Insurance Act*, including section 130 respecting the Simultaneous Death and Payment of Life Insurance;
- *Adult Guardianship Act*, in case the client wants to execute a committeeship designation;
- *Public Guardian and Trustee Act*;
- *Health Care (Consent) and Care Facility (Admission) Act*;
- *Survivorship and Presumption of Death Act*; and
- *Indian Act*.

Use skill and care in your wills and estates practice, from gathering information from the will-maker, to giving advice, and to preparing or drafting the final documents. The form, content and execution of the will are all vitally important. The *Code of Professional Conduct for BC* (the "*BC Code*") section 3.1 - Competence summarizes the level of knowledge and skill that a lawyer must have before engaging in a particular area of practice.

A lawyer may be liable if the will-maker's wishes are not contained in the will or if any portion of the will fails due to a foreseeable error causing loss to the estate or the prospective beneficiaries. The lawyer may be liable to the beneficiaries who were intended to receive under the will or to the estate.

Common Errors

Here are some common errors in drafting and preparing wills:

- Using precedents incorrectly;
- Delays;
- Failing to follow the will-maker's instructions;
- Failing to ascertain ownership of property;
- Failing to ascertain beneficiary designations under RRSPs, RIFs and insurance policies;
- Failing to ascertain correct names;
- Taking instructions from the will-maker that are too complicated and lead to unworkable distributions; and
- Failing to ascertain if any beneficiary is disabled.

It is appropriate to discuss all relevant methods to accomplish the will-maker's goals, including creating trusts and discussing tax treatment of assets before and upon death. If a client has a large estate and you are not comfortable with your knowledge of estate and tax planning, consider referring the client to someone with specialized knowledge in this area.

While your practice may be restricted to preparing wills, you must also be aware of matters that will facilitate probate. For example, you may decide to take an affidavit from a witness where there are unusual circumstances with the will-maker's signature, such as the will-maker is blind

or signs with a mark. Familiarize yourself with probate procedure so you are aware of simple formatting issues, such as leaving enough room on the face of the will for an exhibit stamp to be placed later for the affidavit in support of the application for an estate grant.

References & Resources

The learning materials for this module refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*. For a summary of the key resources, see section ***5 - References & Resources*** at the end of the module.

General knowledge of the law of estates administration will enhance your wills practice skills.

Do make sure you review the Law Society's Practice Checklists Manual which includes the following checklists:

- **Will Procedure**;
- **Will-Maker Interview**; and
- **Will Drafting**.

You may also want to look at the Lawyers Indemnity Fund's Wills and Estates: Risks and Tips resource.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed *en masse* for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

5.1 - Meeting the Client

5.1-1 - Initial Client Contact

The first step in preparing a will is to meet with your client to obtain information to advise on, draft and execute the will.

Typically, the client, a family member or friend will contact you to inquire about making a will. They will often ask about the fee, as many clients like to shop around for the best rate. Because clients often ask for a quote, many lawyers charge a flat fee. This is one area where notaries may practice, so be prepared to discuss the advantages of lawyer services, such as extended education and experience. Also, there are limitations on notaries in preparing wills. A notary cannot draw or supervise the execution of a will that creates a trust that continues past the age of majority; see s. 18(b)(iii) of the *Notaries Act*.

Some lawyers prefer to send a questionnaire for the client to complete before the initial meeting. Others prefer to meet with the client in person to gather the necessary information and take instructions. In either case, always check for possible conflicts prior to the first meeting and explain the need to review personal data and relevant documents.

If spouses wish to retain you to prepare wills for both of them, you must follow the Joint Retainer rules in the *BC Code*; see below under ***5.3-1 - Preparing Mirror or Mutual Wills*.**

The will-maker is your client, regardless of who first contacted you about preparing the will. Your focus must remain on the client's needs and wishes throughout the will-making process.

Although your support staff may be responsible for many duties in your office, it is your responsibility to be actively involved in the will-making process, which includes:

- meeting with your client to obtain instructions;
- reviewing search reports;
- reviewing documents before signing; and
- attending at execution of documents.

As a result of misinformation or lay advice, clients often hold many misconceptions about how their estate should or must be divided. Your role at the initial stage is to make the client comfortable, obtain the necessary information, and determine the client's needs.

The initial client contact often will be in your office. Occasionally, due to disability, transportation, illness or urgency issues, the initial contact may be in the home or hospital room of your client. It is not unusual to be called into a hospital to meet a client who has a terminal illness and wishes to finalize their testamentary affairs. Find out when the will is required. If the client is ill or plans to travel, prepare the will immediately. Even if the client is in good health, act expeditiously in case the client becomes incapable or unexpectedly dies.

When discussing your client's needs, consider the client's express wishes and the need for supporting documents such as a power of attorney, a representation agreement, a trust agreement, a marriage agreement, or a property co-ownership agreement. Different laws may apply if your client is Indigenous or holds property located outside of British Columbia; see for example sections 42 through 50 of the *Indian Act*. This module does not address these issues in detail, but you should become familiar with both topics if you plan to practice in the area.

The Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources*:*

- **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- **Sample non-engagement letters** under the heading *Client files*

5.1-2 - Who May Be Present?

You should take the client's instructions yourself because they are your client and should be the source of your instruction and the recipient of your confidential legal advice.

Sometimes a family member or a friend may be helping your client. *Be cautious about including anyone else in the interview as there may be conflict problems or issues of undue influence.*

It is appropriate to meet with your client alone.

- If the will-maker insists on having others present, you may decline to continue if you feel it is inappropriate for anyone else to be present.
- When spouses, partners, children, or friends are present with the will-maker and you will represent the will-maker only, advise the will-maker and the others that you represent only the will-maker.

- Minimally, advise the will-maker in private of the rights and obligations relating to solicitor-client confidentiality to satisfy yourself that the will-maker can make a fully informed decision to include others in the discussions.
- If the will-maker wishes to include others in otherwise confidential discussions, confirm in the presence of all who are permitted to be present that everything said by the will-maker and all of your advice will be heard by the others. This caution may persuade the will-maker to ask the others to leave the room.

5.1-3 - Using Checklists

Checklists or questionnaires are incredibly important, particularly so in focussing your client on the information that must be provided and to ensuring that no information is missed.

The Law Society's Practice Checklist Manual has checklists on:

- **Will Procedure**;
- **Will-Maker Interview**; and
- **Will Drafting**.

At a minimum, you will need to gather information about:

- the will-maker's spouse, former spouse, common-law spouse and any companions;
- divorce orders, family court orders, any other court orders that might impact the estate;
- marriage, separation or co-habitation agreements, which are relevant because they may include clauses binding the will-maker's estate;
- the will-maker's children, including estranged children, children from prior relationships and adopted children;
- all other beneficiaries; and
- the will-maker's choice of executors and if applicable, guardians.

Your client should provide the full legal names of their spouse, children, and beneficiaries. This will help you to properly identify the beneficiaries in the will and later it may assist the executor of the estate for giving notices under Part 25 (Estates) of the Supreme Court Civil Rules ("SCCR") and Part 6 (Variation of Wills) of *WESA*. The ages of the beneficiaries are important because you may need to consider guardians or trustees for minors.

You also need to know about financial dealings between the will-maker and their family members and beneficiaries, such as loans, gifts, or co-ownership agreements for property. Such information may lead to a reapportionment of interests in the estate, discussions about assets

passing outside the estate, or possible wills variation claims that may arise if a family member is being left out. Note your discussions about such issues in a detailed memorandum to the file and possibly confirm the details in a reporting letter to the client.

You need to know if there are any dependants or beneficiaries with special needs or disabilities who may require financial assistance from the estate or for whom special gifts must be created to avoid disentitling them to government benefits. More discussion of this topic is in ***5.4B-3 - Gifts to a Beneficiary with a Disability*** later in this module.

Obtain details of other relatives who might be entitled to notice of an application for a grant under SCCR 25-2 (Notice Must Be Provided). Working out a family tree can be helpful to understand who may require notice upon the death of the will-maker.

5.1-4 - Reviewing the Client's Assets

Using a checklist as a guide, review all assets with your client. This review serves two purposes:

- it helps you and your client understand what may be available to the estate for distribution upon death; and
- it helps you ascertain whether the client has sufficient knowledge of their estate to satisfy the test for testamentary capacity.

You should be aware of all property and financial assets including real estate, investments, RRSPs and RRIFs, business assets, partnerships, shareholders' agreements, buy-sell agreements, impending inheritances, and insurance policies. You may realize after discovering more about the extent of a client's estate that they require some in-depth tax or other business planning, or that the will requires specific clauses to facilitate the transition of business interests.

This is a good time to discuss whether an asset falls within or outside the estate. Many clients do not appreciate the distinction between estate and non-estate assets. It is important to have a full discussion of the various strategies that may be used to avoid probate, and the corresponding fees with clients, particularly when you are dealing with spouses. Sometimes avoiding probate makes good sense, while other times, it does not.

You should explain the effect of land held as joint tenants and the right of survivorship versus land held as tenants in common. Your advice will depend greatly upon the facts. Spouses with children from prior relationships may not want to be registered as joint tenants, as this could result in the children of the person who dies first being disinherited. The same logic applies to joint bank accounts.

Find out if the client has named beneficiaries for some assets like RRSPs and life insurance policies so you can engage in a meaningful discussion about distribution. Clients often change the beneficiary designation on a life insurance policy at this point to distribute their estate more fairly. In addition, discuss the tax advantage of naming a spouse as the beneficiary of an RRSP or RRIF, which is not available if the beneficiary is not a spouse of the deceased. Death benefits associated with pension plans can have the same tax advantage.

While ascertaining your client's assets, make note of assets that are located outside of British Columbia. Your client may require additional wills for assets located in other jurisdictions and you may need to coordinate the will that you prepare with the ones prepared in other jurisdictions. Ensure that the will you prepare does not revoke a will made in another jurisdiction through broad language at the beginning of the will.

If your client has a blended family, think about potential claims under Division 6 (Variation of Wills) of Part 4 of *WESA*, particularly if your client wants to leave a significantly greater benefit to the new spouse than to a child of a prior relationship. If this is the case, discuss with the client how their moral and legal obligations to their spouses and children can be met through assets flowing both through the estate and outside of the estate. Lawyers should be familiar with the case law in wills variation actions and be able to give appropriate legal advice to the client.

Always remember to ask your client about ongoing financial obligations. If, under a separation agreement, your client has agreed to maintain a life insurance policy to cover child support benefits, your client may not be free to change the beneficiary of that policy and may need to purchase another life insurance policy. Many clients do not remember these important details and may give you incorrect information. It is important to obtain copies of any separation agreements, court orders, and other documents that may be relevant to your client's estate so you can provide thorough advice.

Read *Serbina v Frejd*, 2016 BCSC 33, where the court criticized a lawyer's approach in receiving instructions from the deceased in preparing her will.

- There was no effort to inquire about the deceased's mental faculties, and no determination on whether the deceased could identify the assets that comprised her estate (without coaching from the beneficiary).
- There was also no exploration by the lawyer to inquire about the deceased's assertions that she had become estranged from her children.
- Furthermore, the lawyer did not discover or have any understanding as to who would have a claim upon the deceased's estate and no inquiry was made in that respect.
- Finally, the lawyer received and acted upon instructions regarding the deceased's will directly from the beneficiary.

- Upon consideration by the court, it was found that the deceased did not have the requisite testamentary capacity and the will was found to be invalid.

5.2 - Capacity

5.2-1 - Introduction to Capacity

Certain legal requirements must be fulfilled for a will to be valid.

The primary requirements relate to the ability of a person to make a will: the person's mental competency, or testamentary capacity, and legal age.

The other requirements relate to the document itself and deal with the form of the will.

Be sure to review *BC Code* rule 3.2-9 - Clients with diminished capacity and the associated Commentary.

An overview of the relevant obligations and resources regarding client capacity and undue influence is covered in these Practice Advisor's - Frequently Asked Questions.

Additional resources to assist in navigating issues of client capacity are available in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website, including:

- Practical guidance on acting for clients with diminished capacity can be found in "Acting for a Client with Dementia", Spring 2015 Benchers' Bulletin

The **BC Law Institute (BCLI)** has helpful resources including:

- Tests for capacity are analyzed and evaluated in this Report on Common-Law Tests of Capacity
- Guidance regarding circumstances involving potential undue influence in this Undue Influence Recognition and Prevention: A Guide for Legal Practitioners (2023), which includes this Undue Influence Recognition and Prevention: A Reference Aid

5.2-2 - Testamentary Capacity

At the time of making a will, the will-maker must understand that at their death, the will shall be a legally binding document and that the assets will be distributed as set out in it. In other words, the will-maker must have the testamentary capacity or mental ability recognized by law to make a will. Section 36(1) (Who can make a will) of *WESA* simply provides that "[a] person who is 16 years of age or older and who is mentally capable of doing so may make a will." There is no definition of what is "mentally capable". A will may be declared invalid if it can be shown that there was a lack of testamentary capacity. For instance, the will-maker may not have testamentary capacity if at the time of making the will, the will-maker:

- suffered from delusions affecting their powers of reason or judgment; or
- had reduced mental ability due to dementia or advanced old age; or
- suffered from a physical or emotional illness which affected mental capacity.

Sometimes it is not apparent whether clients have the necessary capacity to make a will. Most experienced solicitors will be attuned to some of the red flags that give rise to these concerns, such as:

- when a spouse, family member or friend makes the appointment and attends the initial and subsequent meeting;
- when the client does not have a clear understanding of why they are meeting with you; or
- when the client exhibits obvious signs of confusion.

Frequently cited, the case of *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 at paragraphs 565 and 567 sets out a general statement of the test for capacity to make a will:

> *It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effect; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.…*
>
> *In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, the persons who are the object of his bounty, the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a*

> *lawyer and comprehend its provisions in legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed and the disposition of his property in its simple forms.*

The test in *Banks v Goodfellow* has been reviewed and clarified by several Canadian courts. Another excellent resource for common law tests of capacity is the British Columbia Law Institute's (BCLI) Report on Common-Law Tests of Capacity. In addition, *Laszlo v. Lawton*, 2013 BCSC 305 provides a helpful review of case law involving testamentary capacity.

The test to determine whether a will-maker has testamentary capacity is a legal test, and not a medical test. The onus is on the solicitor drafting the will to competently evaluate whether the will-maker is capable of disposing their estate. *Bull Estate v Bull*, 2015 BCSC 136 is a British Columbia decision that reinforces the longstanding provisions of testamentary capacity:

- The test for testamentary capacity is not onerous;
- Sufficient mental capacity to make a will may exist despite the presence of cognitive deterioration;
- A will-maker may have sufficient mental capacity even if their ability to manage other aspects of their lives is impaired;
- Having imperfect or impaired memory will not negate testamentary capacity unless it is so severe as to leave no disposing memory;
- A disposing memory is one able to comprehend, of its own volition, the essential elements of will making, property, objects, just claims to consideration, revoking of disposition and the like;
- Testamentary capacity is a legal, and not a medical question, and therefore medical opinions, though valuable, are not determinative of testamentary capacity;
- Simply leaving an estate in a manner that some think is unkind will not negate testamentary capacity; and
- A delusion is more than getting the facts wrong, a delusion is a persistent belief in facts no rational person would hold to be true.

There are many ways to gather information needed to assess capacity. It is important you gain the client's trust, especially if the client is a vulnerable adult. Such an interview cannot be rushed.

See the **Will-Maker Interview Practice Checklist** in the Practice Checklists Manual on the Law Society website for the type of questions you should ask a client.

It is imperative that you keep detailed file notes, and this is especially true when dealing with a vulnerable client. Your notes should not only include the questions asked and the answers the client gave you, but also your general observations of the client. (Just to be clear, a simple note to file in the order of "assets discussed" or "legislative provisions discussed" is not enough for any purpose.)

If you think there are capacity issues or that someone may challenge the will on this ground, you may suggest obtaining a medical opinion to support the client's capacity. The client's doctor or a qualified physician should be asked to prepare a report on the client's capacity to make a will to be kept on file for future reference. Ideally, this report will be contemporaneous with the date of the will. The report should address the following issues:

- Any medical conditions or medications that could possibly affect your client's ability to make sound decisions;
- The doctor's assessment of your client's ability to act competently with respect to their financial affairs;
- The doctor's assessment of your client's ability to provide instructions to you; and
- The possibility that your client suffers from any disorder, delusion, or other medical condition that could influence their decision-making abilities, particularly those dealing with the nature and extent of their assets, as well as decisions relating to their disposition.

5.2-3 - Understanding & Preventing Undue Influence

Lawyers must be able to recognize when they are dealing with a vulnerable will-maker and there are suspicious circumstances. Vulnerable will-makers can be the victim of undue influence perpetrated by a family member, caregiver, neighbour or newly acquired friend. Circumstances that courts have been found to be suspicious include:

- involvement of beneficiaries in will preparation;
- lack of control of personal affairs by the will-maker;
- drastic changes in the personal affairs of the will-maker;
- isolation from friends and family;
- drastic changes in the testamentary plan of the will-maker; and
- physical, psychological or financial dependency on the beneficiaries.

Proving undue influence is difficult, however, and depends on the unique circumstances of the case. Section 52 (Undue influence) of *WESA* is an onus provision with respect to gifts in a will. It provides that in will-challenge litigation, once a position of dominance or potential of dominance

is established, the onus shifts to the recipient to prove the gift was not the product of undue influence.

In *Stewart v. McLean*, 2010 BCSC 64, the court summarized the legal approach to the question of whether the presumption of undue influence has been rebutted:

> [97] To rebut the presumption of undue influence, the defendant must show that the donor gave the gift as a result of her own "full, free and informed thought": *Geffen* at 379. A defendant could establish this by showing:
>
> (a) no actual influence was used in the particular transaction or the lack of opportunity to influence the donor (*Geffen* at 379; *Longmuir* at para. 121);
>
> (b) the donor had independent advice or the opportunity to obtain independent advice (*Geffen* at 379; *Longmuir* at para. 121);
>
> (c) the donor had the ability to resist any such influence (*Calbick v. Warne*, 2009 BCSC 1222 at para. 64);
>
> (d) the donor knew and appreciated what she was doing (*Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29, 125 D.L.R. (4th) 431); or undue delay in prosecuting the claim, acquiescence or confirmation by the deceased (*Longmuir* at para. 76).

Another relevant factor may be the magnitude of the benefit or disadvantage (Geffen at 379; Longmuir at para. 121).

A most recent case which sited section 52 of the *WESA* is *Trudeau v. Turpin Estate*, 2019 BCSC 150. Despite citing section 52, it cited *Stewart v McLean* and focused on the common law statement at paragraph 109:

Undue influence is influence which overbears the will of the person influenced so that what he or she does is not his or her own act.

The court goes on to find that the facts failed to establish that the Defendant exercised domination over the willmaker given the testator was a very "strongwilled" and "domineering" woman.

It is important to note that it is not enough to show that a person had the ability to unduly influence the willmaker. The evidence must show that the power was actually exercised, and the will is a product of that power. As stated in *Halliday v. Halliday Estate*, 2019 BCSC 554:

The exercise of significant advice or persuasion on the willmaker, or an attempt to appeal to the willmaker, or the mere desire of the willmaker to gratify the wishes of another, will not amount to undue influence.

While proving undue influence depends on the specific facts of a case, on the wills and estates planning side, exploring all of the possibilities with your client and being mindful of the potential for dominance over your client may assist in avoiding your client being a victim. Or, on the other hand, your notes can support and document the true intentions of your client to see a will or gift upheld.

The **BC Law Institute (BCLI)** has helpful resources including:

- Undue Influence Recognition & Prevention: A Guide for Legal Practitioners (December 2022), which includes this Undue Influence Recognition and Prevention: A Reference Aid

5.3 - Other Preliminary Considerations

5.3-1 - Preparing Mirror or Mutual Wills

You will often be asked to meet with your client's spouse, who intends to make a mirror will. If you intend to prepare wills for both spouses, it would be under a joint retainer. It is important to review *BC Code* rules 3.4-5 to 3.4-9 before entering into a joint retainer. Amongst other requirements, you must first inform both parties that there is no information received in connection with the matter from one client can be treated as confidential so far as the other is concerned.

You should also review Commentary [2] to *BC Code* rule 3.4-5 for guidance when representing two or more clients on a wills file. In particular, note that there is a specific obligation to make the clients aware of the impact of one of the clients subsequently communicating new instructions.

Whenever you represent two or more clients, include in your file a memorandum that details the nature of the representation and the explanation that you gave to your clients. Ensure your retainer agreement reflects these details as well. It is not enough to simply make a brief note such as "conflicts discussed" in your file. Some practitioners avoid acting for spouses to prepare mirror wills because they can be complicated, especially where blended families are involved. One spouse may need legal advice independent from the other.

The Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:

- **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- **Sample non-engagement letters** under the heading *Client files*

Section 55 (How to revoke a will) of *WESA* provides that a valid will is no longer revoked by a subsequent marriage of the will-maker.

- Depending on application of the transition provisions of *WESA*, section 15 of the *Wills Act* may no longer apply to automatically invalidate a will upon the subsequent marriage of the will-maker.
- In addition, the new spouse may have a claim pursuant to Division 6 (Variation of Wills) of Part 4 of *WESA* to vary the will.
- **This is a complex area and a full discussion is not possible within the context of this module.**

Note that a **mutual will** (which is different from a mirror will) is revocable notwithstanding a covenant not to alter. However, the mutual wills may give rise to a constructive trust that cannot be revoked. The constructive trust arises from the agreement within the mutual wills not to alter or revoke the provision without the other's consent.

The law on mutual wills is complicated and many lawyers are reluctant to recommend the use of mutual wills.

Subsequent Instructions

If you take instructions from spouses or partners to create mirror or mutual wills, be very careful about when and how you can take subsequent instructions from one of the spouses. Commentary [2] to *BC Code* rule 3.4-5 requires that you decline to act unless you fit within one of the specifically defined exceptions.

5.3-2 - Ancillary Documents

Clients may need other documents like a Power of Attorney, representation agreement, or *inter vivos* property transfer.

A Power of Attorney authorizes the person appointed as attorney to make legal and financial decisions for the grantor, depending on the language used in the document. It is important for the

grantor to understand that unless the Power of Attorney is a ‘springing’ one, or the language is qualified, the Power of Attorney is effective immediately, may be used even if the grantor is competent, and terminates upon the death of the grantor.

A Power of Attorney may be general in nature or be limited to a specific issue, such as allowing the attorney to deal with the sale of a property, but specific language is required for the Land Title Office. You should obtain full information about what powers the client wishes to grant the attorney.

Become familiar with the *Power of Attorney Act*, which requires specific language in the document and has rules for signing by the grantor and the attorney.

Many practitioners also use trusts to achieve their clients’ estate planning objectives. These trusts can be *inter vivos* or testamentary in nature. A thorough discussion of trusts is not within the scope of this module.

5.3-3 - Post-Interview Registry Searches

Land Titles Office

If real property is involved, consider whether a title search is advised.

Look for:

- **The owner’s name as it appears on title.** Sometimes title is registered in a name that is a variation of the will-maker’s legal name, which should be included in the will. If the client has used a different name when registering documents in the Land Title Office an issue will arise at the time of probate if it is not dealt with now.
- **How the property is registered - in joint tenancy or tenancy in common.** If property is held in joint tenancy it will automatically pass outside the estate to the surviving owner.
- **Charges against the property.** If a mortgage is registered against the property, find out if the mortgage is life insured. If not, make sure the will-maker understands that the value of the beneficiary’s gift will be reduced by the outstanding principal balance on the mortgage at the time of death.

Corporate Registry

In some cases it is practical to conduct searches of the provincial and federal corporate registries to determine:

- the correct names of companies with which the will-maker is involved;
- the correct names of charity beneficiaries;
- whether the companies or charitable societies are in good standing;
- any discrepancies in the information provided by the client; and
- the existence of any shareholder agreements that might affect the rights of the will-maker to make a testamentary gift of company shares.

Personal Property and *Security Act* Searches

It may be practical to search the Personal Property Registry to determine if there are any security arrangements affecting estate assets, such as vehicles, boats, or other personal property.

Other Registries

Other registries to search may include the Shipping Registry for boat registration, the Mobile Home Registry and the Indian Lands Registry.

Note that if you are dealing with lands in the Indian Lands Registry, the system is very different than the land titles system and some interests are not transferable by way of an estate in the usual course. Be aware of issues involving Indigenous clients or matters involving Indigenous interests.

The **CLEBC** has Practice points on indigenous law issues.

5.4A - Will Drafting - Essentials

5.4A-1 - Introduction to Drafting the Will

You do not have to “re-invent the wheel” every time you draft a will. Precedent clauses for wills are very helpful to enhance the efficiency of your practice.

However, as with all precedents, exercise caution and be alive to changes in the law and better ways to express the will-maker’s wishes.

Every will is unique, so bring to bear your own skill and knowledge to accomplish your task.

IMPORTANT NOTE

Subsequent sections of this module provide potential example clauses that might be helpful to reference in the course of drafting a will. In these clauses, the terms "executor and trustee" have been used interchangeably with "Trustee."

Usually the words “executor” and “trustee” are used to mean one and the same thing. It is a good idea to include a definition in the will that states that trustee means both the executor of the will and the trustee of the estate. In other words, the word trustee defines the personal representative in both the role of the executor and the role of the trustee.

For more information, see section ***5.4C - Will Drafting - Executor & Trustee*** including ***5.4C-1 - Powers of Executor & Trustee*** later in this module.

5.4A-2 - Revocation

The revocation clause revokes or cancels previous wills and codicils.

One potential example of such a clause might be:

I revoke all former [British Columbia] wills and codicils made by me.

This clause should always be inserted even when you are advised that the client has never made a previous will.

This revocation does not revoke a beneficiary designation in an RRSP or insurance policy.

5.4A-3 - Appointment of Executor & Alternate Executor

Although appointing an executor is fundamental, many wills neglect to appoint an alternate.

Without an alternate, the estate must be managed by an administrator under the terms of the will. An administrator is the person who applies to and is appointed by the court to take charge of an estate when there is no valid will, or if there is a will and no executor is named, or the named executor is not able to act. When seeking probate, the 'administrator with will annexed' must have the consent of all parties who otherwise would qualify to be appointed administrator. This step slows the process and adds further expense.

Therefore, your client should be prepared to select an executor and an alternate if their first choice dies or becomes unable or unwilling to act. Your skill and knowledge in explaining the duties and responsibilities of the executor will be very helpful. Be prepared to discuss the advantages and disadvantages of an individual executor, as opposed to co-executors and institutional executors like trust or investment companies.

An individual executor may be preferable to multiple executors for logistical reasons. It may be difficult to get joint executors together to deal with estate matters or they may not agree on matters as they arise, causing delay in distributing the estate. An individual can be a trusted family member or friend who will use care and attention when dealing with the estate. Many will-makers are relieved to know that the executor's fees will be paid to someone that they know and trust.

Institutional Executors

On the other hand, institutional executors may be appropriate in some circumstances, such as where:

- the nature and complexity of the estate assets requires the skill and expertise of a trust company;
- the duties of an administrator are likely to be too onerous for a lay individual;
- assets will be held over many years and require continuity;
- the will-maker wants the security of management with protection against default;

- conflict between family members is anticipated; or
- family members or friends cannot be relied upon to carry out their executorship duties.

One potential example of such a clause might be:

I appoint, [relationship to will-maker], [name of executor], to be my executor and trustee. I hope that [name of executor] assumes the burden of administering my estate, including taking custody of the assets and maintaining the accounts and records. If [name of executor] predeceases me, is unable or unwilling to act, or continue to act, or requests to be discharged, then I appoint my [relationship to will-maker], [alternate executor], to be my executor and trustee.

5.4A-4 - Appointment of Guardians

The will-maker must consider what to do when a minor child or incompetent dependent survives the will-maker's death.

Where one parent is left alive following the death of the will-maker, guardianship reverts to the remaining parent. If both parents die, an appointment of guardianship may be necessary. The guardian is appointed to look after the children's care, education and upbringing and has all the rights, duties and responsibilities of a parent; see Division 3 (Guardianship) of Part 4 of the *Family Law Act*.

Try to avoid naming a couple to act as guardians. Clients often mention both people out politeness to their friends. Ask your client: W*hat would happen if that relationship ended? Which person would actually be the client's first choice of guardian?*

If your client is separated from their spouse, determine whether they continue to share guardianship, under a court order or separation agreement. In such case, the guardianship appointment made by your client may not take effect if the surviving parent continues to be a guardian.

One potential example of such a clause might be:

If my spouse, [name of spouse], predeceases me, or if [spouse's pronoun] survives me but dies without making any provision for guardianship of our infant children, then I appoint, [name and address of guardian], to be the guardian of my children [names of children], during their minority.

5.4A-5 - Survival Clause

A survival clause is one in which the beneficiary only becomes entitled to an interest in the will if they survive the will-maker.

Usually, the period of survival is specified. Note that section 10 of *WESA* creates a five-day survival rule, although a longer time frame may be specified in the will.

The length of time chosen should reflect a reasonable balance between anticipated survival of a beneficiary and delay in administering the estate caused by waiting for the qualification period to terminate.

As you can see, the usual qualification period is thirty (30) days. This is because, if the will does not contain a long qualification period before entitlement and the beneficiary passes away after the qualification period the entitlement will vest in the beneficiary's estate. This requires that probate be granted for both estates with the attendant applications and double probate fees. This may also have the consequence of having the will-maker's estate be distributed to unintended beneficiaries.

Discuss the qualification period with the will-maker and the potential consequences of having a short qualification period as opposed to a longer one.

One potential example of such a clause might be:

I direct my executor and trustee to pay the residue of my estate to my spouse, [spouse's name], for [spouse's pronoun] own use absolutely, if [spouse's pronoun] shall survive me for thirty (30) days

Another potential example of such a clause might be:

I direct my executor and trustee as follows:

(a) To give the residue of my estate to my spouse, [spouse's name], if [spouse's pronoun] survives me for thirty (30) days;

(b) If [spouse's name], does not survive me for thirty (30) days, to divide the residue of my estate into as many equal shares as there are of my children who are alive at my death, except if any child of mine has died before me and one or more of their children are alive at my death, then that deceased child will be considered alive for the purposes of this division and I direct my Trustee to divide that share equally among those children of that deceased child.

5.4A-6 - "Total Failure", "Catch-All" & "Fail-Safe" Clauses

It is critical when drafting the will that you ensure that the whole estate has been dealt with and there is no plausible scenario that would create an undistributed portion of the estate. An undistributed portion falls under the rules of intestacy in Part 3 (When a Person Dies Without a Will) of *WESA* which may be contrary to the will-maker's wishes.

As legal advisor put your mind to possible scenarios that may arise on the death of your client that might affect their distribution scheme. You must plan for those contingencies, even if remote.

Clauses called "total failure, catch-all or fail-safe clauses" deal with any part of the residue of the estate that does not vest in a beneficiary.

One potential example of such a clause might be:

If [spouse's name] fails to survive me for thirty (30) days ("Failure Date") and any trust herein fails to vest in anyone, then any part of my estate as then remains shall be divided in equal shares among such of my grandchildren as are alive on the Failure Date, except that if any of my aforesaid grandchildren are not alive on the failure date leaving a child or children alive on the Failure Date, then that deceased grandchild shall be considered alive for the purposes of the division and the share created for that deceased grandchild shall be divided equally among their child or children alive on the Failure Date.

Of course, this is just one example. Each client will have their own wishes based on their own circumstances.

Although this sample clause uses thirty (30) days, it may be that the gift to the spouse is longer or shorter based on what is in the will. **Be sure to be consistent in your drafting.**

As well, if the grandchildren were already included as a gift-over in an earlier gift to children, you might ask your client to consider siblings or other relatives or charities. The will-maker may have residual beneficiaries in mind other than grandchildren.

5.4B - Will Drafting - Gifts

5.4B-1 - Gifts Generally

Lawyers are frequently asked to advise their clients on what is an appropriate gift or what would be an appropriate way to divide the estate. It is appropriate, and often necessary, for you to discuss:

- **The intestacy provisions of *WESA*.**
  - Part 3 (When a Person Dies Without a Will) of *WESA* specify how the assets are distributed on an intestacy among spouses, issue, and in some cases other immediate family members.
- **The wills variation provisions *WESA*.**
  - Division 6 (Variation of Wills) of Part 4 of *WESA* provides that the court may intervene in the disposition of an estate when the will-maker has failed to make adequate provision for the proper maintenance and support of a spouse or child.
- **Presumptions of advancements and resulting trusts.**
  - You may need to discuss with the will-maker whether past actions arguably might amount to gifting an asset to a spouse, child, or other beneficiary that effectively removes the asset from the estate of the will-maker. For example, a will-maker may have provided money to one child for a down payment on real estate or may have opened a joint bank account with only one child. Siblings may believe this should be part of the recipient's inheritance if equal amounts were not given to all children. If the money was a loan, the will-maker may want to forgive it in the will, or if it was a gift, the will-maker may want to specifically exclude it from the calculation of the recipient's share of the estate. Refer to the decisions of *Madsen Estate v. Saylor*, 2007 SCC 18 and *Pecore v. Pecore*, 2007 SCC 17, which discuss joint bank accounts between a parent and one child.
  - The presumption of advancement applies to minor children only.
  - A resulting trust is created when adult children are involved. The surviving child must rebut the trust to take the proceeds in the joint account through the right of survivorship.
- ***Inter vivos* loans or gifts.**
  - Gifting portions of the estate during a will-maker's lifetime can, in some cases, avoid probate fees and remove the asset from the will-maker's estate. However, in some instances such as gifting real property, the probate fees saved can pale in comparison to immediate income tax implications.

- Be careful to explain to the client that gifting removes control of the asset from the will-maker and may cause family conflict during the client's lifetime.
- All *inter vivos* gifts or loans of any significance should be carefully considered in the broader context of income tax, family dynamics, and the state of the law at the time regarding presumptions of advancement and resulting trust.

Although you should advise the client of the possible legal ramifications of their decisions, your discussion should focus on what the client wants. Remember that a solicitor's role is to give advice and take instructions from their client.

If a client makes a decision that is contrary to your best advice, document your advice in your file and in a letter to your client.

5.4B-2 - Gifts to Minor Beneficiaries

Parents are often concerned about providing for their minor children should they die before the children come of age. The age of majority is the earliest that beneficiaries may take their share which is 19 years of age in British Columbia.

Parents sometimes feel that the age of majority is still too young for their children to manage an inheritance. The solution is to postpone the transfer of the beneficiary's share of the estate assets to a later date or to transfer a smaller portion of the beneficiary's share at one age and the remainder later. Clauses may be drafted to specify an age when the will-maker thinks the beneficiary will be more settled in life, more mature, or better able to manage the inheritance.

Since a trust is created, take care to avoid the rule in *Saunders v. Vautier* (1841), 4 Beav. 115. This rule allows beneficiaries to terminate the period of postponement so that they can get their trust funds earlier where:

- all of the beneficiaries including contingent beneficiaries are over the age of majority;
- none of the beneficiaries are under any legal disability; and
- all beneficiaries consent to the termination.

If all three conditions are present, the trust created in the will by the holding clause may be terminated and all of the trust property distributed to the beneficiaries contrary to the intentions of the will-maker.

Creating a contingent class of beneficiaries is commonly done to avoid the rule. The contingent class will include minors who will not meet the first criteria in the rule, or any group of persons who are not likely to be ascertained before the intended postponement date.

For example, the clause may state that in the event a beneficiary dies before the specified age, their interest will be divided equally among their issue, per stirpes. If the intended beneficiary is young and unlikely to have children of his own for some time, the term "issue" creates a class of contingent beneficiaries that may not be ascertainable when the will takes effect on the death of the will-maker. Since the unascertained beneficiaries cannot fulfill the criteria to trigger the rule in *Saunders v. Vautier*, the primary beneficiaries cannot wind up the trust created in the will and receive their assets earlier than the will-maker intended.

Do not use terms such as 'issue' or '*per stirpes*' unless you understand what they mean. It is always better to use plain language wherever possible to explain concepts in a will.

- Per stirpes specifies that each branch of the deceased person's family receive an equal share of the estate, regardless of how many people are in that branch.
- 'Issue' means descendants so is not confined to children or grandchildren.

Per stirpes affects the way an estate is distributed. The estate is divided among classes or groups of distributees who take the share that their deceased ancestor would have taken if they had survived.

Per capita denotes distribution equally to all persons standing in equal degree to the deceased.

Including a holding or trust clause creates an ongoing trust. If the will-maker does not name a separate trustee to manage the share of the underage beneficiary, the responsibility falls to the executor as trustee of the estate.

A further issue involving gifts to minor children or other legally disabled beneficiaries is that postponement of fulfilling the gift impairs the executor's ability to wind up the estate because the outstanding gift, held in trust, must wait for the minor child or incompetent person to qualify; see Part 8 (Children's Property) of the *Family Law Act*, which sets out rules for delivery of children's property to guardians or trustees.

One way to deal with this is to confer discretion on the trustee to pay or transfer the interest of the minor child or incompetent beneficiary to a lawful parent or guardian of the beneficiary.

One potential example of such a clause might be:

I authorize my executor and trustee to make any payments for any person under the age of nineteen (19) years to a lawful parent or guardian of such person whose receipt shall be sufficient discharge to my Trustee.

Another way to deal with this is to consider expressly conferring power on the trustee to apply the income and encroach upon the capital of the trust for the benefit of the beneficiary. Without such a clause the trustee has limited powers.

The trustee's powers are set out in sections 24 and 25 of the *Trustee Act*.

Section 24 allows the use of "income" for a minor beneficiary's maintenance and education, but there is no allowance to encroach on capital.

Section 25 allows the trustee to apply to court for an order permitting the sale of capital assets to provide for the beneficiary's maintenance and education where the income is insufficient.

It is therefore preferable when drafting a will to confer wider powers on the trustee. Moreover, conferring wide discretion on the trustee provides maximum flexibility to cope with the needs of the beneficiary without going to court.

One potential example of such a clause might be:

If any person should become entitled to any share in my estate before attaining the age of nineteen (19) years, the share of such person shall be held and kept invested by my Trustee and the income and capital or so much thereof as my Trustee in their absolute discretion considers necessary or advisable shall be used for the benefit of such person until they attain the age of nineteen (19) years.

Familiarize yourself with the range of available clauses to accommodate the needs of your clients.

One current source is **CLEBC**'s Wills and Personal Planning Precedents: An Annotated Guide.

5.4B-3 - Gifts to a Beneficiary with a Disability

Occasionally, you may be asked to draft a clause to accommodate a beneficiary with a disability. Take care about the type of gift to create, whether a guardian should be appointed, and consider whether to discuss a Power of Attorney or representation agreement. Although you are not acting for the beneficiary, you may want your client to know the options available to the beneficiary.

It is very important to consider government benefits that the beneficiary is currently receiving or will be receiving in the future. Generally, to avoid disqualifying the beneficiary from these benefits, do not grant outright dispositions of property or money. Rather, they should be the subject of a discretionary trust crafted so the beneficiary cannot call for anything under the trust or collapse it.

For more information, see the following resources:

- Plan Institute provides resources and workshops for wills, trusts and estate planning
- BC government's Disability Assistance materials includes resources on Disability Assistance and Trusts and transferring assets into a trust or Registered Disability Savings Plan (RDSP)

5.4B-4 - Gifting a Specific Item

It is important that the description of the items of property being gifted is in sufficient detail to distinguish them from the rest of the will-maker's property.

One potential example of such a clause might be:

I direct my executor and trustee:

- *To deliver to [name of beneficiary] [list of objects given]; and*
- *To deliver to [name of beneficiary] [list of objects given].*

It is important to advise the will-maker that if the specific gift does not exist at the date of death, or it has been disposed of, the gift fails, or adeems. For example, if the will-maker leaves a specific ring to a beneficiary, but then makes an *inter vivos* gift of it to someone else, the will beneficiary does not receive the ring.

5.4B-5 - Gifting to Charitable Organizations

It is important that if the will-maker wishes to leave a gift to a charitable organization that the proper name and registration number of the charity is noted in the will.

One potential example of such a clause might be:

I direct my executor and trustee to pay without interest, to the following charities as are in existence at my death:

- *The amount of $_____ to [name and registration number of charity];*
- *The amount of $_____ to [name and registration number of charity].*

Note that if you are preparing mirror wills for spouses, you should get instructions whether the charitable gifts are to be given only once, under the will of the second to die, or whether both wills are to give the charitable gifts.

5.4B-6 - Gifting the Residue of the Estate

The residue of the estate is what is left once the debts have been paid and the specific gifts have been distributed. The clause disposing of the balance of the estate is referred to as the residue clause.

There should always be at least two levels of distribution.

If any beneficiary named in the first level pre-deceases the will-maker, a second level of distribution should be provided in the will. You should be familiar with section 46 of *WESA* and able to advise your client about this issue.

Potential examples of a first level residue clause might be:

Residue to one beneficiary

To give the residue of my estate to [my spouse], [full name of beneficiary or spouse], if [spouse's pronoun] survives me for a period of thirty (30) days.

Residue to different beneficiaries in equal shares

To divide the residue of my estate into equal shares so there shall be one share for each of the following beneficiaries who survive me for a period of thirty (30) days and to pay such shares as follows:

- *One share to [name of beneficiary];*
- *One share to [name of beneficiary].*

Potential examples of a second level residue clause might be:

Residue equally to adult children then grandchildren

If [my spouse] does not survive me for thirty (30) days, to divide the residue of my estate in equal shares between/among my children alive at my death, except if any child of mine dies before me and leaves one or more of their children alive at my death, an equal share will be created for that deceased child and will be divided equally between/among those of their children who are alive at my death.

Residue divided equally among a class of adult beneficiaries

If [my spouse] does not survive me for thirty (30) days, to divide the reside of my estate into as many equal shares as I have [relationship, e.g. children/siblings] who are alive at my death, except if either/any of my [children/siblings] dies before me and leaves one or more of their children alive at my death, an equal share will also be created for that deceased [child/sibling].

5.4C - Will Drafting - Executor & Trustee

5.4C-1 - Powers of Executor & Trustee

Usually the words “executor” and “trustee” are used to mean one and the same thing. It is a good idea to include a definition in the will that states that trustee means both the executor of the will and the trustee of the estate. In other words, the word trustee defines the personal representative in both the role of the executor and the role of the trustee.

5.4C-2 - Discretionary Power to Keep & Convert

Unless expressly conferred in the will, the executor has a duty to sell speculative, wasting, or hazardous assets as soon as practicable and to re-invest the proceeds of sale in approved investments as set out in sections 15.1-17.1 of the *Trustee Act*.

In some cases, it may be desirable for the executor to retain items *in specie* from the estate, meaning the assets are retained in their individual or specific form and not converted, for example, into cash. Executors have the greatest flexibility when they are granted the express power to keep or retain assets in their original form, to convert any assets at their discretion, and be relieved of liability for making such decisions. It allows them the freedom to take advantage of market conditions or the wishes of the beneficiaries.

One potential example of such a clause might be:

When my executor and trustee administers my estate, my Trustee:

(a) may convert my estate, or any part of it, into money or any other form of property or security, and decide how, when and on what terms;
(b) may keep my estate, or any part of it, in the form it is in at my death and for so long as my Trustee decides, even for the duration of the trusts in this will. This power applies even if:

- *the property is not an investment authorized under this will;*
- *a debt is owing on the property;*
- *the property does not produce income; and,*

(c) may invest my estate, or any part of it, in any form or property or security in which a prudent investor might invest.

5.4C-3 - Discretionary Power to Allocate Assets *in Specie*

Consider the executor's express power to allocate assets. This gives the executor the power to say which assets each beneficiary is to receive and to fix asset value to calculate the division scheme set out in the will. It gives the executor freedom to choose without exposure to liability for unpopular choices.

While the executor may never be entirely free of criticism, they may at least be exempt from liability for making hard choices. This power may encourage an executor to fulfill their duties, particularly when there is animosity amongst the beneficiaries.

One potential example of such a clause might be:

My executor and trustee may allocate the assets of my estate in such form and such share or interest created in my will in such manner and at such valuation as my Trustee considers appropriate in [Trustee's pronoun] absolute discretion. Any value my Trustee may fix shall be binding on all persons concerned.

5.4C-4 - Power to Carry on Business

If your client owns or operates a business, or may own one in the future, consider a clause conferring power on the executor to carry on the business. There is no statutory authority in either *WESA* or the *Trustee Act* for such power so without express authority, the executor may only preserve the business as long as reasonably necessary to sell it as a going concern.

One potential example of such a clause might be:

Without limiting the general powers and directions given to my Trustee I AUTHORIZE MY Trustee (who shall not be personally liable for any loss occasioned thereby)

(a) to carry on any business or businesses that I may own or be interested in at my death and either alone or in partnership with any persons who may be a partner or partners therein for the time being for such length of time as my Trustee in their discretion may consider to be in the best interests of my estate, and my Trustee shall be indemnified out of my estate for any loss, liability, costs or expenses suffered or incurred by reason of carrying on such business and shall have authority to do all things necessary or advisable for the carrying on of any such business or businesses;

(b) to join in or take any action in connection with any investment or interest or business or businesses which I own at my death, and to exercise any rights, powers and privileges which at any time may exist or arise in connection with any such investment or interest or business to the same extent and as fully as I could if I were alive and sole owner and holder of such investment or interest or business.

Adjust the scope of this power to suit your client's requirements.

5.4C-5 - Power to Deal with Real Estate

It is important to confer specific power on an appointed trustee to retain or purchase real estate. Real estate may not be an appropriate investment on an objective test, so it is critical that you specifically confer the power to the trustee to retain or purchase real estate for the trust. This allows the trustee to retain or replace a residence for the use of a disabled beneficiary.

Further, consider that your client may own real estate in the future, if not when making the will. The real estate in question is often the family home, which may be owned jointly with a spouse. If the title is registered in joint tenancy, the will-maker's interest will pass outside the estate by the right of survivorship. The surviving spouse need only go to the appropriate land registry with a death certificate and the proper transfer form.

If the will-maker's interest in real property is registered as tenancy in common or solely in the name of the will-maker, the interest in the property passes to the estate. In such cases, the executors should have the power and flexibility to deal with the property as they deem appropriate. For example, it may be preferable to delay the sale of the property to make improvements or take advantage of tax or market conditions.

One potential example of such a clause might be:

If any real or leasehold property forms part of my estate, my Trustee may lease such property on such terms and may expend funds out of the income or capital of my estate for repairs or improvements as my Trustee considers appropriate in their absolute discretion. My Trustee may grant any options and may renew any mortgage or borrow money on any real estate or any mortgage and may pay off any mortgage that exists on the date of my death as [Trustee's pronoun] consider appropriate in their absolute discretion.

Make the will-maker aware of the far-reaching scope of powers being conferred on the executor. Absent express power, the executor is limited to either seeking court authority under section 11 (Power to spend money on repairs and improvements) of the *Trustee Act* to use estate funds for real estate or obtaining consent of all the beneficiaries, which may not be possible due to the legal disability of a minor or disabled beneficiary.

5.4C-6 - Executor's Remuneration

Unless expressly provided in the will, sections 88 (Setting remuneration of trustees and guardians) and 89 (Application for remuneration) of the *Trustee Act* govern the fees a personal representative can charge.

The general rule is that, absent an express clause, there is a presumption that a gift in the will to an executor is *in lieu* of compensation for acting as executor. This presumption arises only when the trustee is entitled to a specified gift and not to a portion of the residue.

It is important to discuss with the will-maker whether they want their executor to have both a fee and a gift under the will. If so, make it clear so there is no conflict later between the beneficiaries and the executor.

One potential example of such a clause might be:

My Trustee may claim remuneration for acting as Trustee in addition to any gift or benefit I give to my trustee in this will or any codicil to it.

In addition to the above clause, it is prudent to also discuss with the will-maker how much remuneration they wish the executor to have. Inform the will-maker of the percentages an executor is entitled to under section 88 of the *Trustee Act*.

If the executor is a professional, such as a lawyer or accountant, who will bring their professional skill and knowledge to bear in exercising their duties as executor, the will-maker should consider whether additional professional fees may be charged to the estate for those services. This is a "charging clause".

One potential example of such a clause might be:

If any Trustee is a lawyer, accountant, stockbroker or other professional person, my Trustee or their firm may charge all usual professional fees and other charges for services rendered by my Trustee or their firm in the course of the administration of my estate.

See *BC Code* rules 3.4-37 to 3.4-39 (Testamentary instruments and gifts) as well as the associated Annotation EC April 2013 regarding placing a charging clause in a client's will.

Note that the ability to charge for professional services is considered a benefit under the will, which can be lost if that executor is one of the attesting witnesses to the will; see section 43 (Gifts to witnesses) of *WESA*.

5.5 - Essential Next Steps

5.5-1 - Approval of Draft by Client

Many lawyers send a copy of the will in draft form to their client for approval before execution.

If you do so:

- Make sure the will is clearly marked as a 'draft' and not for signature.
- Follow-up with the client to ensure they received it and understand and approve the draft.
- Ensure that the entire will has been read by the will-maker and all clauses explained.
- Ensure that any questions that the will-maker has have been addressed and clarified to ensure that the will-maker knows and understands the entire contents of the will.
- Plan to meet with the client to execute the will.

Be cautious of section 58 (Court order curing deficiencies) of *WESA*, which allows the court to declare that records, documents, or markings or writings on a will or document represent the testamentary intentions of a person, even where they do not comply with the will-execution provisions of *WESA*.

5.5-2 - Signing of the Will

You should meet with the client to review the will before execution. Meeting your client alone is particularly critical if the client was accompanied by someone else when you met to take instructions.

The rules for execution of wills are set out in section 37 (How to make a valid will) of *WESA*.

- Two adult witnesses are required.
- Each witness must sign in the other's presence and in the presence of the will-maker who must see the witnesses sign.

- This means that, all three people must see each other sign.

It is customary that each page of the will, as well as any changes, deletions or additions made prior to the signature, is initialed by the will-maker and the witnesses.

The witnesses must be of the age of majority, which is 19 years old, and cannot be beneficiaries or spouses of beneficiaries named in the will. If, by any chance, a beneficiary is a witness, that beneficiary's gift under the will becomes void; see section 43 (Gifts to witnesses) of *WESA*. Note, however, that pursuant to section 43(4) of *WESA*, such gifts may be given effect subject to a successful court application.

Also note that witnesses do not need to read the contents of the will. They need only witness the will-maker's signature.

One potential example of such a clause might be:

We were both present, at the request of [will-maker], when [will-maker's pronoun] signed this will. We then signed as witnesses in [will-maker's pronoun] presence and in the presence of each other.

5.5-3 - Codicils

A codicil is a written addition, amendment, or change to a will that is executed in the same manner as the original will.

These days it is just as easy to create a new will with the required changes rather than a codicil that modifies an existing will, unless the will is part of a complicated estate plan.

However, there are circumstances where it may be preferable to proceed by way of a codicil. For example:

- if the will-maker is only changing the names of the executor or alternate executor.
- if the will-maker's capacity is in question a new will may fail; whereas, if the codicil fails, the underlying will may survive, and intestacy may be avoided.

Codicils are identified in the order of their creation, i.e. #1, 2, 3 and so on.

Precedent forms for codicils may be found in **CLEBC**'s Wills and Personal Planning Precedents: An Annotated Guide.

5.5-4 - Wills Notice

A Wills Notice can be filed with the BC Wills Registry for a will and a codicil.

Even though there is a charge for filing the notice, explain to your clients that without filing such a notice the existence of their most recent will may be difficult to locate. What this means is that following a client's death, it will be more difficult to administer the deceased's estate.

Do note that a separate Wills Notice must be submitted for every event, such as:

- Execution of a new will;
- Revocation of a will;
- Execution of a codicil; or
- Revocation of a codicil.

5.5-5 - Wills Storage

Some lawyers prefer that the client keep the original will, while others prefer to store them in their office.

Office retention provides safe storage and ensures that you will be contacted if your client dies. If you keep wills at your office, ensure that you have a secure location, such as a vault or fireproof locking cabinet. If you change offices or leave practice, notify every client and the Law Society where the wills are stored.

The *BC Code* provides ethical guidance relevant to file management, storage and disposal procedures in section 3.5 (Preservation of clients' property). "Property" includes original documents such as wills. You must care for a client's property as a careful and prudent owner would when dealing with property and observe all relevant rules and law about the preservation of a client's property entrusted to the lawyer (*BC Code* rule 3.5-2). You are responsible for maintaining the safety and confidentiality of the client files in your possession and you should take all reasonable steps to ensure the privacy and safekeeping of client information.

The Law Society sets out in its publication Closed Files – Retention and Disposition that, when creating a closed file records policy, a law firm should consider the types of files the lawyers handle. For example, wills files should typically not be destroyed for a minimum of 100 years after the will was executed, unless 10 years have passed since the deceased's will was probated.

For more information, see the following resources in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website under the heading *Client files*:

- Closed Files: Retention and Disposition
- Closing a file: What documents to keep and for how long (Winter 2017 *Benchers' Bulletin*)
- Ownership of Documents in a Client's File

Because of the long retention of wills files, it is strongly suggested that the lawyer return original wills to clients for safekeeping after execution.

Long-term storage of original wills can become a major problem for sole practitioners and small firms, particularly when the lawyers want to retire.

Retain copies of everything else in the file: a copy of the executed will, successive drafts, notes, copies of previous wills, and correspondence. Wills files must be treated differently from other files, since they contain evidence of matters such as testamentary capacity and intention and document the lawyer's work. Once a will has been probated, it is suggested that the file should be retained for 10 years after final distribution of the estate and any trusts are fully administered.

Refer to Law Society Rule 3-87 (Disposition of files, trust money and other documents and valuables) regarding the disposition of files, trust money, and other documents and valuables.

5 - References & Resources

Primary statutes

- *Wills, Estates and Succession Act* (the "*WESA*"), SBC 2009, c 13
    - Upon *WESA* coming into force in 2014, the *Estate Administration Act, the Probate Recognition Act*, the *Wills Act*, and the *Wills Variation Act* were repealed and replaced.
- *Notaries Act*, RSBC 1996, c 334
- *Trustee Act*, RSBC 1996, c 464
- The Supreme Court Civil Rules ("SCCR"), BC Reg. 168/2009 in particular, Part 25 (Estates)

Other relevant legislation

- *Adoption Act*, RSBC 1996, c 5
- *Adult Guardianship Act*, RSBC 1996, c 6

- *Family Law Act*, SBC 2011, c 25
- *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181
- *Income Tax Act*, RSBC 1996, c 215
- *Income Tax Act*, RSC 1985, c 1 (5th Supp.)
- *Indian Act*, RSC 1985, c I-5
- *Insurance Act*, RSBC 2012, c 1
- *Power of Attorney Act*, RSBC 1996, c 370
- *Public Guardian and Trustee Act*, RSBC 1996, c 383
- *Representation Agreement Act*, RSBC 1996, c 405
- *Survivorship and Presumption of Death Act*, RSBC 1996, c 444

Law Society of BC

- Practice Checklists Manual which includes the following:
  - Will Procedure;
  - Will-Maker Interview; and
  - Will Drafting.
- Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:
  - under the heading *Client files*
    - Closed Files: Retention and Disposition
    - Closing a file: What documents to keep and for how long (Winter 2017 *Benchers' Bulletin*)
    - Ownership of Documents in a Client's File
    - Sample non-engagement letters
  - Sample retainer letters (including a general retainer agreement and a joint retainer) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- Code of Professional Conduct for BC (*BC Code*), in particular:
  - rule 3.2-9 (Clients with diminished capacity) and the associated Commentary
  - rules 3.4-5 to 3.4-9 (Joint retainers), including Commentary [2] regarding declining to act for spouses after a joint retainer, except in specifically defined circumstances.
  - rules 3.4-37 to 3.4-39 (Testamentary instruments and gifts) as well as the associated Annotation EC April 2013 regarding placing a charging clause in a client's will.
- Client capacity
  - Practice Advisor's - Frequently Asked Questions include an overview of the relevant obligations and resources regarding client capacity

  - Additional resources to assist in navigating issues of client capacity are available in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website under the heading *Capacity*, including "Acting for a Client with Dementia", Spring 2015 Benchers' Bulletin.

Lawyers Indemnity Fund

- Wills and Estates: Risks and Tips

External resources

- CLEBC's resources including:
  - Wills and Personal Planning Precedents: An Annotated Guide
  - Practice points on indigenous law issues
- The BC Law Institute (BCLI) has helpful resources including:
  - Tests for capacity are analyzed and evaluated in this Report on Common-Law Tests of Capacity
  - Undue Influence Recognition & Prevention: A Guide for Legal Practitioners (December 2022), which includes this Undue Influence Recognition and Prevention: A Reference Aid
- Plan Institute provides resources and workshops for wills, trusts and estate planning
- The BC government's Disability Assistance materials includes resources on Disability Assistance and Trusts and transferring assets into a trust or Registered Disability Savings Plan (RDSP)
- Registries
  - BC Wills Registry
  - Provincial corporate registry
  - Federal corporate registry
  - Personal Property Registry
  - Shipping Registry (for boat registration)
  - Mobile Home Registry
  - Indian Lands Registry

MODULE 6 – PROBATE & ADMINISTRATION

6 - Introduction to the Probate & Administration Module

Probate is the court-based procedure used to establish the validity of the will, if one exists, and to appoint the personal representative who will then have the authority to act on behalf of the deceased's estate and deal with the winding up and distribution of the estate.

This module discusses the practices and procedures involved in obtaining a grant of probate and letters of administration.

The primary statutes affecting probate and estate administration in British Columbia are:

- *Wills, Estates and Succession Act*, SBC 2009, c. 13 ("*WESA*") – do note that the practice of wills and estates has undergone significant changes since the coming into force of *WESA* in 2014;
- *Trustee Act*, RSBC 1996, c. 464;
- Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "SCCR") – specifically Part 25 and Appendix A.1 respecting probate forms.

The personal representative appointed in a will has traditionally been called an executor, although *WESA* does not use that term. The personal representative is also a trustee of the estate. As a trustee, the personal representative must adhere to the provisions of the *Trustee Act*. There may also be separate or additional trustees appointed under the will for a specific purpose, such as acting for an infant or a disabled beneficiary.

If there is a will but it fails to appoint an executor, or alternate executor, or if the chosen executor resigns the role, the person seeking appointment as the personal representative is known as the administrator with will annexed. The administrator is typically one of the persons entitled to share in the estate and therefore has a vested interest in seeing that the estate is well managed.

When a person in British Columbia dies without a will, or with a will that only partially disposes of the estate, that person is said to have died intestate, or partially intestate, and the probate process results in the granting of letters of administration to the personal representative. The

personal representative will be appointed as administrator of the estate. As to who can be the administrator, the court will give priority as set out in section 130 (Priority among applicants — intestate estate) of *WESA* for appointment as the administrator.

References & Resources

The learning materials for this module refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*. For a summary of the key resources, see section ***6 - References & Resources*** at the end of the module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed *en masse* for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

6.1 - Meeting the Client

Conflicts of Interest

The first issue when you meet an estate client is to ensure that you do not put yourself in a position of conflict. Your client is generally the party contacting you. If a beneficiary contacts you for advice, you should decline to do so until you have determined whether or not you will be

acting for the personal representative, otherwise you may not be able to act later for the personal representative. If the proposed personal representative contacts you as the executor appointed in a will or the person seeking to be the administrator on intestacy, that person will be your client, not the estate.

Retainers

After you have ensured that no conflicts arise as a result of acting for the personal representative, meet with your client and establish your retainer.

Ascertain the scope of your retainer at the outset. For example, the retainer may be limited to obtaining probate or letters of administration, leaving all other duties to the personal representative. Alternatively, you may be retained to perform more of the executor's duties, from obtaining probate to transferring assets, ensuring the payment of taxes and expenses, attending to final distribution and formal winding-up of the estate with passing of accounts

Joint Retainers

If two or more co-executors are named in a will, or if two or more persons wish to apply for letters of administration, they may request that you represent them jointly. You should explain the duties and obligations of lawyers in relation to joint retainer agreements: see rules 3.4-5 to 3.4-9 of the *BC Code* and obtain the written consent of all the clients. This consent should be included in the retainer agreement.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources*:*

- **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- **Sample non-engagement letters** under the heading *Client files*

Gathering Information

Checklists, both for you and your client, are the most effective ways to gather information.

The Law Society's Practice Checklists Manual provides the following checklists respecting meeting clients for the first time in probate and administration matters, including:

- **Client Identification and Verification Procedure;**
- **Probate and Administration Procedure; and**

- **Probate and Administration Interview.**

It is a good idea to use these checklists to design a list of information that you would like the client to obtain before the first meeting.

For more details about what information to gather, see the following sections of this module:

- ***6.2-2 - Estate Assets & Liabilities***
- ***6.2-3 - Find All Essential Documents & Property***
- ***6.3-1 - Preparing a List of Assets & Liabilities of the Estate***

6.2 - The Personal Representatives Duties

6.2-1 - Preliminary Duties

The personal representative must carry out a variety of duties in administering an estate.

A useful booklet for people who have been appointed as executor in a will can be found on the People's Law School website.

Make funeral arrangements and dispose of remains

Section 5 (Control of disposition of human remains or cremated remains) of the *Cremation, Interment and Funeral Services Act* sets out a hierarchy of persons entitled to control the disposition of remains. The personal representative named in the will is the primary authority designated to control remains. In practice, it is usually the family who decides.

Although the written preference of the personal representative is binding, the preference of others such as a spouse may be considered about consent to an organ donation under section 5 (Consent by spouse or others for use of body after death) of the *Human Tissue Gift Act*, or if the intended disposition of the remains would be unreasonable, impracticable, or create a hardship.

Review the wills and codicils, if any

Check the will and codicils for any alterations or erasures and to ensure that it was properly executed according to section 37 (How to make a valid will) of *WESA*. Note that section 37(2) of *WESA* may provide some leeway to the formal requirements of execution of a will, including permitting the court to make an order curing deficiencies pursuant to section 58 (Court order curing deficiencies).

Review all gifts in the testamentary documents to ascertain if any are void, revoked, or lapsed. For example, under section 56 (Revocation of gifts) of *WESA*, a gift to a spouse may be void if there was a judicial separation or the marriage was dissolved after the will was written. Under section 43 (Gifts to witnesses) of *WESA*, a gift in the will to an attesting witness or to the spouse of an attesting witness may be void. Note that section 43 of *WESA* provides that upon application the court may declare that a gift to a witness or the spouse of a witness is not void if the court is satisfied that the will-maker intended to make the gift to the person even though the person was a witness to the will.

Identify beneficiaries and next of kin

The personal representative must ascertain, identify, and seek contact information for beneficiaries and next of kin. This is important to prepare and deliver the notice required by section 121 (Notice of proposed application for grant of probate or administration) of *WESA*. The personal representative should also ascertain whether there are designated beneficiaries on financial accounts including Registered Retirement Savings Plans (“RRSPs”) and Tax Free Savings Accounts (“TFSAs”).

Obtain a complete list of names, addresses, and ages of children to identify minors, and the deceased’s spouse’s name and address. Note that the definition of “spouse” in section 2 (When a person is a spouse under this Act) of *WESA* includes a common-law spouse of more than two years.

6.2-2 - Estate Assets & Liabilities

Care and management of the estate assets

Personal representatives must take steps to safeguard and preserve the deceased's assets. This means they cannot make personal use of the estate assets, such as driving vehicles or accessing funds for their own use.

If you are acting for the personal representative, advise your client to take the following steps regarding the care and management of the estate assets:

- Conduct a physical search for cash, securities, jewellery, important documents, and other valuables and arrange for their safekeeping.
- If the deceased’s home is vacant, secure it and advise others like the apartment manager or police that the home is vacant. If possible, arrange to check the residence personally or hire a security firm to do so.
- Notify insurers and make sure there is adequate and proper insurance in place for property, vehicles, and valuables, including inquiring whether it is necessary to obtain a vacancy coverage if the home is vacant. Check for insurance expiry dates.
- Advise utility and telephone companies.
- If the deceased owned a business, make interim management arrangements. Sometimes sole proprietorships or small private corporations have value only as going concerns, so it is important to secure effective management to continue operations until the business can be sold. Leases and other business obligations may also have to be met.
- Notify the deceased's banks and financial institutions. It can be helpful to develop a relationship with the bank manager to facilitate the payment of fees or obligations related to the estate before probate or letters of administration is granted. For example, the deceased may have ongoing obligations under a lease or guarantee that have to be paid. The bank may also release money for funeral and probate fee expenses prior to the grant of probate.
- Redirect mail, if necessary. Canada Post requires a notary-certified copy of the death certificate. It also requires a statutory declaration and an application form, both provided by Canada Post.
- Plan to pay all the deceased’s ongoing periodic obligations such as payments for mortgages, leases, or other contracts. Alternatively, arrange to postpone payments until the estate can raise sufficient funds.
- Check leases and tenancies. Plan to collect all rents, mortgages, and other periodic payments owed to the estate. Also, give tenants notice of termination, if necessary, and notice about where to send rent payments.

- Prepare a complete inventory of the estate assets, including personal effects, furnishings, artwork, jewellery and all other tangible and intangible assets.
- Contact Service Canada to apply for Canada Pension Plan (CPP) death benefits that may be due to the estate. You can find Form ISP1200 - Canada Pension Plan Death Benefit, Application Kit on the Service Canada Forms website. Be aware of time limitations for taking this step.
- Review the last cheques written by the deceased to make sure there are no irregularities.
- Secure the deceased's digital assets and make a list of usernames and passwords for social media, banking, investments, and other online accounts.

Pay debts and other liabilities

The personal representative should review the deceased's debts and liabilities, such as mortgages, leases, and income and property taxes, check due dates, and decide how these liabilities should be paid.

The personal representative may be held personally liable for debts of the deceased that are not discharged. However, this liability is only to the extent of the assets that come into the personal representative's hands. For example, if a personal representative takes in $100,000 of estate assets and distributes them without fully ascertaining the debts owed by the deceased, the personal representative may be held personally liable for up to $100,000 of unpaid debt.

Careful personal representatives will advertise for persons who may have a claim against the estate. This protects against later claims of which they were not aware.

6.2-3 - Find All Essential Documents & Property

Search the safety deposit box

If the deceased held a safety deposit box, the personal representative must go to the institution to search the contents. Where the deceased was the sole owner, a bank employee will accompany the personal representative to open the box and make a list of the contents. If the original will is found in the box, the bank should deliver the will to the person named as executor. Otherwise, the bank will not allow removal of items from the box until a grant of probate or letters of administration is obtained.

If the safety deposit box is owned jointly, the custodians may not allow entry without the presence of the co-owner or their personal representative.

Locate documents

The personal representative should gather the following documents to go ahead with the application for probate or letters of administration:

- Original will, codicils and any documents incorporated in the will by reference. The personal representative should also search for documents that constitute a later will or testamentary disposition.
- Death certificate from the Director of Vital Statistics.
- Birth certificate.
- Marriage certificate, if any.
- Wills Notice search for all names used by the deceased.
- Land Title search if deceased is believed to own real property.
- Income tax returns and Notices of Assessment for previous year to ensure taxes have been filed up to date.
- CPP death benefit information.
- Life insurance information, if any.
- Details of bank and investment accounts, including RRSP and Registered Retirement Income Funds ("RRIFs").
- Separation agreements, if any.
- Court orders or judgments, if any.

6.2-4 - Financial: Banking, Records & Taxes

Make banking arrangements

The personal representative may be able to open an estate account. Some bank managers will not open estate accounts until probate or letters of administration are granted. Others will arrange for the deceased's account to be used for limited purposes, such as funeral expenses, probate fees, or for pre-existing payment obligations.

Keep financial records

The personal representative has a duty to keep records and be ready to account to the estate beneficiaries. A personal representative's records should particularize estate income and expenses as they are incurred. In addition to keeping proper accounts, the personal representative must be always ready to account fully, on reasonable notice, to the beneficiaries about their administration of the estate. From the time the personal representative starts to act, they must keep all related receipts, invoices and bills in a secure location.

The personal representative is entitled to reimbursement from the estate for all reasonable expenses incurred in managing the estate. The personal representative should record all the time they spent to do their job as executor. Keep a diary of the steps they take as executor or administrator: telephone calls made, interviews attended, mail sent or received, time spent, and so on.

However, there is still the risk that pre-grant expenses may not be reimbursed, for example where there are limited funds in the estate, where beneficiaries successfully challenge the necessity of an expense, or where a personal representative named in the will incurs some expenses but later renounces the executorship in favour of another person. The person who later obtains a grant of probate may take the position that the initial expenses were excessive or unnecessary and refuse to reimburse the original party named in the will. In this case, accurate records are needed to prove the original party's claim.

File income tax returns

The personal representative must arrange to prepare and file income tax returns. Three main tax returns are needed:

- one for the year before the death, if the deceased had not filed a return and if tax is payable;
- one for the year of death; and
- one for the tax year of the estate administration.

The personal representative should contact an accountant to discuss the tax liabilities of the deceased and their responsibilities as executor. The accountant can file the returns.

6.3 - Gathering Information

6.3-1 - Preparing a List of Assets & Liabilities of the Estate

A detailed inventory of assets and liabilities will form the foundation for information to be listed in the disclosure statement that accompanies the application for a grant of probate or letters of administration.

The inventory should include the accurate value of all the deceased's assets and liabilities.

You should have a list of all assets that will be passing into the estate and those that pass outside of the estate, such as joint tenancy interests in real estate, vehicles and other personal property, RRSPs, and RRIFs, and so on.

Always take care in describing debts of the estate in the inventory. If the value of a debt is disputed or not ascertained, it should be included in the inventory and ultimately in the probate disclosure statement as "not yet determined".

Probate Fees are calculated on the gross value before deduction of expenses.

In an administration application, consent is required from all creditors whose debts are not discharged prior to the application.

6.3-2 - Listing the Assets & Liabilities of the Estate

ASSETS

1. **Securities, Stocks, and Bond**

    (a) List all securities, stocks or bonds owned by deceased.
    (b) Include the names, account numbers, and maturity dates of the securities; expiry dates of warrants and conversion rights; the transfer agents for stocks and bonds; and dates of issue of stock certificates.
    (c) If possible, ask the deceased's broker for their market value at the date of death.

2. Bank Accounts

(a) List all banks where the deceased had accounts or loans. *Include the account numbers.*
(b) For each account, ask the bank for the balance as of the date of death, including any accrued but unposted interest.
(c) Collect any bank books or statements of account and get the bank to update them to the date of death.
(d) Remember that accounts may include term deposits, GICs, TFSAs, RRSPs, and RRIFs.

3. Cheques or Refunds

(a) List any cheques or refunds owing to the deceased which have not been received or deposited.
    (i) This includes pay cheques, pension cheques and any repayments or refunds owing to the deceased.
    (ii) It also includes cheques or income owing from deferred profit sharing plans, dividends, and interest.

4. Life Insurance Policies

(a) List life insurance policies that have the deceased's estate as the beneficiary.

5. Real Estate

(a) List all real estate which the deceased owned alone or with others, unless the property was owned in joint tenancy.
(b) List any mortgages and agreements for sale which the deceased owned.
(c) Provide the full addresses and legal descriptions of all property.
(d) Record the value as of the latest tax assessment notices on property owned by the deceased, or have the property appraised as at the date of death.

6. Business Assets or Shares

(a) List any business assets or shares in a company owned by the deceased.
(b) Provide description of asset or shares, account numbers, etc.
(c) If possible, get these assets or shares valued as of the date of death.

7. **Debtors**

   (a) Identify all people or businesses who owed money to the deceased.
   (b) Give any details you can about the nature of the debt and the amount owing.

8. **Other Assets**

   (a) List any other assets such as cars, boats, household goods, jewelry, cameras and other personal effects.
   (b) When listing cars and boats, provide make, model, year, and VIN numbers.
   (c) For other assets, such as household goods, jewelry and camera, describe them briefly, including available serial numbers. Include their estimated values.

LIABILITIES

1. **Outstanding Debts and Liabilities**

   (a) List all outstanding debts and liabilities.
   (b) For both secured and unsecured debt, provide the bank and account numbers, as well as the debt owing.

2. **Agreements or Court Orders**

   (a) List any agreements or court orders involving the deceased.
   (b) These might include:
      (i) divorce order,
      (ii) maintenance orders,
      (iii) marriage agreements,
      (iv) guarantees,
      (v) buy-sell agreements,
      (vi) partnership agreements,
      (vii) leases,
      (viii) employment contracts, or
      (ix) insurance the deceased owned on the life of another.

What happens if the personal representative does not have asset and liability information?

Often a personal representative faces barriers in obtaining information respecting assets and liabilities due to privacy concerns. *Financial institutions will not hand over information unless there is proof of probate or letters of administration granted.*

Under *WESA*, an applicant may file an application for an estate grant without submitting an affidavit of assets and liabilities at the same time; see Rule 25-4 (Procedure After Filing Application Materials for Estate Grant) of the SCCR. The applicant can apply for an Authorization to Obtain Estate Information under Rule 25-4(1) by using Form P18.

If the application material filed under Rule 25-3 (Application for Estate Grant) does not include the affidavit of assets and liabilities, the registrar must issue an authorization to obtain estate information in Form P18. This form can then be presented to third parties to reassure them that the applicant is entitled to the deceased's information.

Rule 25-8 (Effect of Authorization to Obtain Estate Information or Authorization to Obtain Resealing Information) imposes a 30-day deadline for providing information and provides the court with power to penalize for refusal to do so.

For more information and links to downloadable forms, visit the **BC government**'s Supreme Court Civil Rules - probate forms website.

6.3-3 - Valuation

Questions always arise as to when and how to value the assets properly.

The date of death is the relevant date for valuation. Other dates may be relevant for other purposes, such as calculating capital gains.

Real Estate

An acceptable valuation for real estate is the most recent notice of assessment from the BC Assessment Authority. Alternatively, you may engage a real estate appraisal service to professionally appraise the value. In either case, when reporting the asset in the disclosure statement, state what method was used to value the property. For example, if the value is as per the BC Assessment Authority then state "Value derived from the 2021 BC Assessment Authority".

The notice of assessment value is likely to be lower than an appraised value, although these should be scrutinized bearing in mind current market conditions. If you use the lower value, thinking the estate may save money by not incurring the expense of a professional appraiser or by paying lower probate fees, you may encounter tax problems later. If the property is sold at a higher price, the difference between the reported value and the actual sale price yields a much larger gain, which could be taxable as a capital gain for the period after the residence ceases to

be the primary residence of the deceased. **In short, be aware of creating increased tax burden when selecting the method to value assets.**

Always recommend that your client seek the advice of a tax accountant when making decisions that affect the dates and values of assets. If this becomes an issue, you can file a supplementary affidavit and pay additional probate fees.

Other Personal Property

It may be difficult to value other personal property, such as coin collections, artwork, antiques, jewellery motor vehicles and firearms. In such cases, professional appraisers like auction appraisers or merchants can be consulted for evaluation.

Duty to Assess Probate Fees Properly

The applicant for probate has a duty to be accurate so the court can properly assess probate fees. The personal representative also owes a duty of fairness to the beneficiaries.

If any tax consequences arise from the transfer, disposition, or realization of estate assets, there must be an accurate baseline from which to assess taxes.

6.4 - Grant Applications - Probate & Letters of Administration

6.4-1 - Introduction to Grant Applications & Jurisdiction

This portion of the module deals with the procedure and documents required for a grant of probate or letters of administration to residents of British Columbia.

There are some procedural differences between:

- a grant of probate,
- letters of administration with will annexed, and
- letters of administration without will annexed.

We have highlighted those differences.

For procedures for grants to non-residents, refer to **CLEBC**'s British Columbia Probate and Estate Administration Practice Manual.

Jurisdiction

The Supreme Court of British Columbia has exclusive jurisdiction to grant probate under its general jurisdiction in all civil and criminal matters as stated in the *Supreme Court Act*, and by the definition of "court" in the *Wills, Estates and Succession Act* ("*WESA*"). Its jurisdiction extends to granting probate and administration where the deceased was domiciled in British Columbia or had assets in British Columbia at the date of death: see section 129 (Grant of probate or administration) of *WESA* .

Part 25 (Estates) of the SCCR sets out the procedure for probate matters before the court.

An exception to this exclusive jurisdiction arises where the deceased's estate must be handled pursuant to the Descent of Property provisions of the *Indian Act*.

For further reading, see the Estate services for First Nations page of the **Government of Canada**'s website.

6.4-2 - Making the Application

An application for probate or administration may be made at any registry of the Supreme Court. In most cases, probate is first applied for in the jurisdiction in which the deceased was domiciled.

Although the deceased's place of residence is a good indicator of domicile, it alone is not sufficient to create domicile.

Choice is also a factor in determining domicile.

If the deceased chose to reside in a new jurisdiction with the intention to reside permanently or indefinitely in that new jurisdiction, the will may first have to be probated in the new jurisdiction. For example, a will-maker may have retired and moved from British Columbia to a retirement community in Costa Rica. If the will-maker returns to British Columbia for medical treatment and dies while in BC, you will have to decide on the deceased's domicile and whether the move out of Canada was an abandonment of British Columbia as the place of domicile. If so, the estate will have to be probated first in the jurisdiction of domicile and resealed afterwards in British Columbia, to deal with the deceased's local assets.

This is a complicated area of law and you should obtain advice from an experienced lawyer.

6.4-3 - Estate Grants Process: Notice, Documents Required & Submission

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Rule 25-3 (Application for Estate Grant) of the SCCR sets out the procedures for an application for probate or letters of administration.

Notice of Proposed Application in Relation to Estate

Section 121 (Notice of proposed application for grant of probate or administration) of *WESA* requires notice, in accordance with Rule 25-2 (Notice Must Be Provided) of the SCCR, of an intended application for probate of a will or an application for letters of administration with or without a will to be mailed or delivered to each person, other than the applicant, who to the best of the applicant's knowledge is:

- a beneficiary of the estate under the will; or
- entitled on an intestacy, or partial intestacy.

To send the notice, the personal representative must determine who at law is required to receive notice. Ensure the addresses are residential addresses and not merely post boxes or rural route addresses. Note that Rule 25-2(6) (No delivery by e-mail, fax or other electronic means without acknowledgement) of the SCCR permits electronic notice provided that the recipients acknowledge receipt of notice.

When sending the Notice in Form P1, include all testamentary documents including copies of the will and codicil. If any persons who are entitled to notice cannot be found, a summary application may be made to dispense with the notice requirement for that person.

If a beneficiary is an infant, the notice must be given both to the lawful parent or guardian and also to the Public Guardian and Trustee of British Columbia under Rule 25-2(8) (If person to whom notice is to be delivered is a minor).

If the beneficiary has a mental disorder and there is a committee appointed, notice must go to the committee and to the Public Guardian and Trustee under Rule 25-2(10) (If person to whom notice is to be delivered is a mentally incompetent person) and Rule 25-2(11) (How notice may be delivered to a mentally incompetent person).

Whenever notice is required to the Public Guardian and Trustee, Rule 25-2(13) (Notice to Public Guardian and Trustee) requires that the notice list the names and addresses of all beneficiaries along with all documents filed with the court in respect of the application. Usually, you will be sending the notice to the Public Guardian and Trustee prior to filing the application at the probate

registry, similarly to the notice you are giving to beneficiaries. A review fee must accompany the notice, payable to the Public Guardian and Trustee of British Columbia.

For more information, visit the website of the Public Guardian and Trustee of British Columbia.

The registry requires the client to swear that notice was sent to the Public Guardian and Trustee. It does not require that the Public Guardian and Trustee has acknowledged receipt or approved the application.

Pursuant to Rule 25-2(2.1) (When application may be made), 21 days must pass after giving notice before applying for a grant of probate. This provides any interested parties an opportunity to oppose the application by filing a notice of dispute.

A notice of dispute may be filed against the granting of probate or administration under Rule 25-10 (Notices of Dispute). Filing of a notice of dispute has the effect of putting a halt on the application process for up to one year. The notice of dispute may be removed either by consent of the party filing it or by court order. A person must not file more than one notice of dispute but may apply to the court to have it renewed.

For a discussion on notices of dispute, see **CLEBC**'s British Columbia Probate & Estate Administration Practice Manual.

Submission for Estate Grant

After the 21 days are up, the Submission for Estate Grant in Form P2 (the "Submission") is to be filed, which sets out what is requested from the registry and the material filed in support of the application.

The documents to be filed with the Submission include:

(a) Two copies of the Certificate of Wills Notice search

This certificate, obtained from the Director of Vital Statistics, must include all the names used by the deceased, including those in which the deceased held real and personal property. Both pages of the Certificate of Wills Notice Search must be filed with the application, even if the search was negative. Keep photocopies for your own file.

(b) Affidavits of Delivery

One of more affidavits of delivery in Form P9 should be sworn by each person who delivered the Notice.

(c) The originally signed version of the will plus two exact copies of the will

The originally-signed version of the will if that original exists or, if that original does not exist, a copy of the will. If a copy of the will is being submitted, see Part 3, section 4, of Form P2, which requires the applicant to state why the original will is not available.

Do not remove staples from original documents for photocopying or for any other purpose. If you remove staples you will need to file an additional affidavit with your client's application explaining why and when the removal occurred.

For example, if you are presented with an original will or codicil with the staples removed and the executor found the original will this way, you will have to file an additional affidavit. The affidavit must state that the will was found in this condition and, if possible, compare it to a copy of the will obtained when it was executed. The purpose is to show that no changes were made to the will.

(d) Affidavit of applicant

The applicant's affidavit must be made in Forms P3 through P7, depending on the type of estate grant requested.

If there is a will and there are no issues, the applicant may use the short form affidavit in Form P3.

If there are issues with the will that require further explanation, such as specifics regarding execution or the attestation clause, the applicant may use the long form affidavit in Form P4, which is intended to replace supplemental affidavits that might otherwise be required.

The affidavits require the applicants to swear that they believe the original will and codicil are the original last will and codicil, and that they have read the Submission for Estate Grant and other documents referred to and believe them to be correct and complete. If there are no other wills shown by the Wills Notice search, no further proof is required by the registrar that the executor has made further searches for any later wills; see Rule 25-3(6)(b).

(e) Affidavits in Support of Application

If there are two or more applicants, an affidavit in support of the application in Form P8 from each applicant who has not sworn the affidavit referred in subparagraph (d).

(f) Affidavits of Assets and Liabilities

The Affidavit of Assets and Liabilities is commonly known as the disclosure statement and must be completed in Form P10; see Rule 25-3(2)(g).

Note that this affidavit may or may not be submitted with the originating documents, depending on whether an authorization to obtain estate information is required. If applicants have not obtained all the required information, they may prepare and file an Authorization to Obtain Estate Information in Form P18.

Pursuant to section 122 (Application for grant of probate or administration – disclosure) of *WESA* the disclosure statement must disclose all assets and liabilities of the deceased that pass to the deceased's personal representative on the deceased's death, irrespective of their nature, location and value. This includes all:

(a) interests in real estate including beneficial interests; and
(b) personal property including: tangible assets such as vehicles, boats, furniture, antiques, jewellery and personal effects, and intangible assets such as bank accounts, investments, company shares, RRSPs and RIFs where the estate is the beneficiary.

You do not need to show on the disclosure statement assets that do not pass to the personal representative, such as:

(a) assets with designated beneficiaries other than the estate such as RRSPs, RIFs, TFSAs and insurance policies,
(b) real estate held in joint tenancy,
(c) joint bank accounts, or
(d) any other property or asset where the deceased’s interest passes to the joint tenant on death by operation of the right of survivorship.

Note that under *WESA* applicants can file an affidavit of assets and liabilities of the estate after they have filed the rest of their application documents.

(ii) Additional or Supplementary Documents

Other documents that must be filed with the Submission may include:

(a) an Affidavit of Translator in Form P12, if any documents are not in the English language;
(b) an Affidavit of Interlineation, Erasure, Obliteration or Other Alteration in Form P16; or
(c) Notice of Renunciation in Form P17 if any executor has renounced executorship.

For more information and links to downloadable forms, visit the **BC government**'s Supreme Court Civil Rules - probate forms website.

See also Appendix A.1 - List of Probate Forms in the Supreme Court Civil Rules (SCCR).

6.4-4 - Registry Procedures

In the Vancouver, Victoria and New Westminster registries, applications for most grants of probate and administration are done without a court hearing by desk order, if the registrar deems that the filed documents are in order.

The procedure for probate is as follows

- file the Submission for Estate Grant with all the supporting documents;
- pay the court filing fee – the basic fee for commencing the application is $200;
- wait for a notice from the registry:
    - if the application is accepted, you will be advised of the probate fee payable before the grant will be issued; or
    - if the application is rejected you will be advised of any necessary corrections or further information required before re-submission.

When the application has been vetted and approved by the registry, it is typically sent to a master or judge who signs a list of approved applications. The signed list becomes the order approving the grants. The registrar then prepares and executes the grant. In some registries, the registrar approves the application, and both the file and grant are submitted to the judge or master for signature.

6.4-5 - Probate Fees

As with all court applications, there is a filing fee of $200 for commencing the application.

If the value of the estate is less than $25,000, no probate fees are payable to the registry.

For estates with assets located within British Columbia having gross values of $25,000 or greater, a formula is set out in the *Probate Fee Act* and the Supreme Court Civil Rules.

Section 2 (Probate fee) of the *Probate Fee Act* provides the probate fee formula as follows:

- $6 for each $1,000 or part of $1,000 of the value of the estate in excess of $25,000, up to $50,000, plus
- $14 for each $1,000 or part of $1,000 of the value of the estate in excess of $50,000.

Section 1 (Definitions) of the *Probate Fee Act* defines "value of the assets" for the purpose of calculating the probate fees. There are different considerations that apply to "real and tangible personal property" and "intangible personal property". The differences are beyond the scope of this module.

Please refer to the **CLEBC**'s BC Probate & Estate Administration Practice Manual for more information.

Before making the application, determine the source of funds to pay the probate fee. Banks, investment companies and other financial institutions will normally release funds from the deceased's account to pay the probate fees. This is usually accomplished by sending a copy of the approved probate fee from the registry along with a request for a draft, payable to the Minister of Finance. If the bank will not release the funds, the applicant or a beneficiary will have to lend money to the estate to enable the grant to proceed.

6.4-6 - Other Special Grants

Section 150 (Proceedings by and against estate) of *WESA* allows a person to commence or continue an action or proceeding against a person, whether or not a personal representative has been appointed.

Where a person dies leaving a will that does not dispose of all their estate, section 133 (Administration of partial intestacy) of *WESA* operates so that the grant of probate or administration with will annexed operates as a grant of the part of the estate not disposed of by the will.

There are also special or limited administration appointments which may be made in special circumstances, pursuant to section 132 (Special circumstances) of *WESA*. These may include:

- **Administration *Ad Colligenda Bona***: applies where delay in the appointment of an administrator requires someone to step up to be appointed on a limited basis to deal with the assets and protect the estate. The court may appoint an Administrator *Ad Colligenda Bona*, conferring whatever powers are deemed to be necessary in the circumstances.
- **Administration *Pendente Lite***: applies where there is a challenge to the validity of a will or a grant of probate, the court may appoint an Administrator *Pendente Lite* to deal with

the estate assets while the challenge is pending; see section 103 (Administration pending legal proceedings) of *WESA*.

- **Administration *de Bonis Non***: applies where the appointed administrator dies leaving part of the estate still to be administered, the court may grant a new personal representative the powers necessary to complete the administration.

6.4-7 - Posting Security

Section 128 (Security for administration of estates) of *WESA* deals with the security requirements for applicants for administration of estates where a minor or mentally incapable person has an interest, or if the court so orders. In general, there is no need for bonding if all the parties who may be beneficially interested in the estate have consented in writing to dispense with it.

If all parties do not, or cannot sign a waiver, the applicant may need to obtain a bond as part of the order granting letters of administration. Bonds can be expensive, depending on the value of the assets in the estate. Occasionally, you may have an unwilling beneficiary who will not consent to the appointment of an administrator without posting a bond.

Where a minor or mentally incapable person has an interest, the Public Guardian and Trustee will file a letter with recommendations as to the amount of the bond and any other requirements. The court is not bound by the recommendations, but usually incorporates them into the order granting administration.

Bonds can be obtained through bonding companies, and arrangements can be made through an insurance broker. The bonds typically carry an annual charge and a minimum fee is payable in advance. The fee is charged against the estate, so if your client pays in advance for the bond, they will be reimbursed by the estate.

Applications regarding security may be made according to Rule 25-14(1)(j)-(l) of the SCCR.

6.4-8 - Other Applications

Court rectification and construction of wills

The Supreme Court has jurisdiction to rectify a will prior to granting probate. The court also has jurisdiction to interpret or construe the will after granting probate.

WESA has expanded the court's ability beyond the common law to rectify a will so that the will carries out the will-maker's intentions where there is an accidental slip, misunderstanding of the will-maker's instructions, or a failure to carry out the will-maker's instructions.

Under section 59 (Rectification of will) of *WESA*, the application for rectification of the will must be made no later than 180 days from the date of the representation grant, unless the court grants leave to apply after that time.

For more details and procedures concerning these applications, see the following **CLEBC** materials:

- Chapter 18 of the British Columbia Probate & Estate Administration Practice Manual and
- Chapter 13 of the *Wills, Estates and Succession Act* Transition Guide.

Advice and directions

Where issues arise in the course of administering an estate that are not related to construction or rectification, section 86 (Application for directions) of the *Trustee Act* and Rule 2-1(2) (Commencing proceedings by petition or requisition) of the SCCR provide a remedy to the executor to seek directions and advice from the court.

Dispute resolution

Co-executors must act unanimously. Majority does not rule when there are multiple executors unless there is an express clause to that effect in the will.

The court will only intervene on application when there is a true deadlock.

However, the court will only act to compel the execution of the trusts and not to substitute its discretion in place of the executors or trustees.

If you are faced with a deadlock, you should thoroughly research the case law on the court's jurisdiction before applying to the court.

A trustee may be removed by the court on application pursuant to section 30 (Removal of trustees on application) of the *Trustee Act*. Some reasons for removal include:

- the continued administration of the trust has become impossible;

- the executor's or trustee's duties and personal interests conflict;
- the trustee's conduct has endangered the estate assets;
- the trustee becomes bankrupt;
- the trustee is convicted of a criminal offence; or
- the trustee changed residence outside of the jurisdiction.

6.5 - Financial & Tax Considerations

6.5-1 - Transferring Assets

The Executor's Year

Generally, the executor cannot be compelled to distribute the estate before one year from the date of obtaining the grant of probate or administration has expired. Therefore, it has become the custom to allow executors at least one year to gather in the assets and settle the affairs of the estate. This is called the executor's year.

Further, under section 69 (Registration of title) of *WESA*, title to property transferred to a beneficiary cannot be registered without the consent of the beneficiaries or the court's approval before the expiry of 210 days from the grant of probate.

Legislation Affecting Transfers

Will Variation Claims

Division 6 (Variation of Wills) of Part 4 of *WESA* allows a spouse or a child of the deceased to commence an action where the will fails to provide adequately for their maintenance and support.

Section 61 (Time limit and service) of *WESA* sets the limitation period at 180 days from the date the representation grant is issued and requires service of the Notice of Civil Claim on the executor of the will within 30 days of the filing of the Notice of Civil Claim.

There is always the possibility that a spouse or child has filed but not served a Notice of Civil Claim, so consider searching the court registries and the Land Title Office for a Certificate of Pending Litigation. Explain this to your clients and seek instructions.

Income Tax Act

A personal representative is personally liable to the extent of the assets in the estate for all unpaid taxes, interest, and penalties under *Income Tax Act;* see subsection 159(1) (Person acting for another) and subsection 159(3) (Personal liability). Therefore, the personal representative should postpone distribution of the estate assets until they are certain of the amount of taxes, interest, and penalties owing. This is usually accomplished by obtaining a certificate from Canada Revenue Agency certifying that all taxes, interest and penalties that have been assessed have been paid or arrangements for payment have been secured. This certificate is commonly referred to as a tax clearance certificate; see subsection 159(2) (Certificate before distribution).

Alternatively, the personal representative may determine what the tax liability will be and hold back sufficient funds to pay taxes, while making interim distributions to the beneficiaries. The clearance certificate is still required but distribution can be moved forward for the benefit of the beneficiaries.

If proceeding in this manner, personal representatives should obtain written confirmation of the tax liability from the estate tax advisor to justify the holdback amount. The personal representative should also obtain a signed indemnity agreement from the beneficiaries to reimburse for unexpected taxes, for example required in a Notice of Assessment issued by CRA. There is risk in distributing based on a holdback, as the executor may be liable to pay taxes owing when there are insufficient estate assets remaining.

Income tax filings are discussed later in this module, see section *6.5-3 - Tax consequences*.

Other Transfers

Under section 155 (Distribution of estate) of *WESA*, a personal representative must not distribute the estate within the 210 days following the issuance of a representation grant except with the consent of all the beneficiaries and intestate successors entitled to the estate or by order of the court.

Transfer Procedures

Once the grant of probate or administration has been obtained, the process of transmission and transfer of assets may begin, subject to the limitations set out above.

Court certified copies of the grant and the disclosure document (this is the statement of the assets and liabilities of the deceased that is filed with the Affidavit of Assets and Liabilities) statement of assets, liabilities are required for transmission and transfer of registered assets such as real

property, stocks, vehicles and so on. The registry will provide both upon request, usually in Submission when filing your application for the grant.

However, certified copies can be obtained from the court for a fee.

Please refer to the **CLEBC**'s BC Probate & Estate Administration Practice Manual for more information including:

- The documents and procedures for transmitting or transferring various types of assets to the personal representative and ultimately to the beneficiaries.
- Specific information about the transmission and transfer of interests in real property in estate matters.
- Tables summarizing the documents required for various asset transfers.

When transferring real property consult with a conveyancing lawyer.

Once the property is registered in the name of the personal representative as executor or administrator of the estate of the deceased, the personal representative can then transfer the property on sale or directly to beneficiaries according to the will.

6.5-2 - Dealing with Creditors

General Duties Owed to Creditors

The personal representative has the following duties to creditors:

- to ascertain the liabilities of the estate and retain sufficient assets from the estate to pay those liabilities before distributing the balance of the estate;
- to perform all contracts made by the deceased that are enforceable against the deceased's estate; and
- to pay the liabilities with due diligence in accordance with the terms of the will.

Types of Claims

Claims against the estate usually take the following forms:

Liabilities incurred by the deceased

The estate is responsible to pay all of the just debts incurred by the deceased. If the creditor commences an action before the debtor's death, the style of cause can be amended to reflect the name of the personal representative. If an action in debt is commenced after the debtor's death, the personal representative should be named as the defendant; see Rule 20-3(10) (Representation of beneficiaries by trustees) of the SCCR.

Liabilities arising from death

The most common expense under this heading is funeral and reception expenses, for which personal representatives are personally liable. They are entitled to reimbursement from the estate.

Liabilities for administering the estate

These expenses will include professional services of lawyers, accountants and others necessary to assist the personal representatives to fulfill their obligations under the will.

Defences to Creditors

The personal representative is entitled to deny liability on any grounds that were available to the deceased. As well, the personal representative may plead plene administravit in partial or complete defence of a claim, even if the creditor's claim is valid. This means that the deceased has insufficient assets at the date of death or that the estate has been duly administered and no longer has any or sufficient assets.

Creditors and Debtors as Executors and Beneficiaries

Creditor as Beneficiary

Subsection 53(3) (Common law presumptions abrogated) of *WESA* states that where a creditor of the will-maker is made a beneficiary, it will no longer be presumed that a debt owed by a will-maker is satisfied by a legacy to that person. Subject to a contrary intention in the will, the

personal representative, if satisfied of the validity of the claim, will be required to pay the legacy as well as the debt.

Debtor as Beneficiary

If a beneficiary is a debtor of the deceased, there is no presumption that the debt was forgiven. But an express provision to that effect in the will may forgive the debt. If not forgiven, the debt may be set off against the gift.

Creditor as Executor

A personal representative who is a creditor of the deceased is entitled to retain full payment from the estate for the debt unless there is a valid defence to the debt that the deceased could have maintained if alive.

Debtor as Executor

If the debt existed before the will-maker's death, the appointment of the debtor as an executor extinguishes the debt. However, the executor remains liable to account as if the debt had been collected.

Compromising Claims

Either by express authority in a will or under the general authority given to personal representatives in section 142 (Personal representatives — general authority) of *WESA*, a personal representative may be given the power to compromise a claim against the estate.

At common law, an administrator also has authority to compromise a claim: see *Pennington v. Healy* (1883) 149 E.R. 455 (Ex.). However, the risk remains that a beneficiary may object to the necessity of compromising a claim afterward when the accounts are being passed. If you anticipate a dispute of this nature you should record your advice and opinion to the personal representative about the projected costs of continuing a claim and the delay in distribution of the estate.

Section 150 (Proceedings by and against estate) of *WESA* permits proceedings to be commenced or continued whether or not a personal representative has been appointed for the deceased. The personal representative or the deceased person may be named as defendant or respondent.

6.5-3 - Tax Consequences

Income Tax

The basic income tax filing obligations are:

- to file a return for any year prior to the current year where the deceased has not filed and tax is payable. The return must be filed within 6 months of the date of death;
- to file for the current year by the later of 6 months from the date of death or April 30th in the year following death; and
- to file a Trust Information Return within 90 days of the end of each fiscal period of the estate.

It is a good idea to contact tax preparation consultants to assist with the preparation and filing of all tax returns.

Before final distribution of the estate, obtain a tax clearance certificate from the Canada Revenue Agency.

Beneficiary Obligations

Beneficiaries must include in their income for each year any portion of the income from the estate that is payable to them in the year. An amount is deemed to be payable if it is actually paid or if the beneficiary is entitled to enforce payment from the trust. The estate can deduct the amount payable so there will not be double taxation on the income.

It is a good idea to consult with an accountant respecting income tax obligation for beneficiaries.

Spouses and Spousal Trusts

The rules regarding the deemed realization of capital gains and recapture on death are modified when capital property owned by the deceased passes to a spouse or a spousal trust. *Income Tax Act* section 70(6) provides for a rollover of the cost base of the capital property from the deceased to the spouse or spousal trust, and taxes deferred on the gain.

Farm Property

Section 70 of the *Income Tax Act* also contains rollover provisions for family farms, farm partnerships and shares in family farm corporations allowing for deferral of taxes on the deemed gain.

It is a good idea to consult with an accountant for further information and advice.

6.5-4 - Executor's Accounts

Executor's Duty

The executor must account to all persons who have an interest in the estate.

At common law, the executor is required to keep proper books and be ready at all times to account. In many cases, no formal passing of accounts takes place because the beneficiaries are satisfied to receive their share and waive their right to a formal passing of accounts.

Personal representatives must give anyone to whom they owe a duty to account such information as that party reasonably requires. For example, a residual beneficiary is entitled to a complete accounting because the residue of the estate is affected by all financial activities of the estate while a legatee who is entitled to a cash gift before the residual estate is distributed is only entitled to know that there are sufficient assets to pay their legacy.

Requirement to Pass Accounts

Section 99 (Passing of trustee's accounts) of the *Trustee Act* provides that a trustee must pass accounts within two years from the date of the grant and thereafter as instructed by the court unless all beneficiaries consent. A person beneficially interested in the estate may require passing annually and if personal representatives fail to account, they may be required to attend court to explain why they have not passed the accounts.

The personal representative can avoid the necessity of passing accounts if all beneficiaries consent. However, this option may not be available to the personal representative if any beneficiary is under a legal disability or is an infant. In that case the accounts must be passed in court. Rule 25-13 (Remuneration and Passing of Accounts) of the SCCR describes the application process and the directions the court may give on such an application.

Rule 25-13 also prescribes the form for estate accounts. This includes statements of assets and liabilities, capital transactions, income transactions, proposed remuneration, and distribution of the estate.

6.5-5 - Remuneration of Personal Representative

General Principles

At common law, personal representatives may not profit from their office unless specifically authorized by the terms of the will or trust. The common law rule has been altered by section 88 (Setting remuneration of trustees and guardians) of the *Trustee Act*, which provides for remuneration to a personal representative. Under this statute, entitlement to fees is based on the aggregate value and annual care allowance when the will is silent as to executor's fees.

There is a presumption at law that if a legacy is given to an executor in the will, that legacy is intended to be in lieu of remuneration. However, if the gift is a residual bequest, this presumption does not apply and the executor is entitled to both the residual gift and remuneration. The will may expressly state that the executor may take both a legacy and an executor's fee, which removes the presumption. Review the will to determine the basis for the executor's remuneration.

If the amount of remuneration is not fixed by the terms of the will or by agreement, section 88 of the *Trustee Act* sets out the following rules for remuneration:

- a fee not exceeding 5% of the gross aggregate value of the capital of the estate, such as the realized value of the original assets without deduction of the value of any mortgages against assets and the value at the date of distribution of any assets distributed in their original form;
- a fee not exceeding 5% of the income earned during the administration; and
- annual care and management fee not exceeding 0.4% of the average market value of the assets.

In an estate of average complexity, the court will allow less than the maximum, typically 3% of the aggregate value plus a care and management fee.

When evaluating entitlement value for executor fees, courts have considered the following criteria:

- the size of the estate;

- the care and responsibility involved;
- the time occupied in the administration of the estate;
- the skill and ability displayed; and
- the success achieved in the result.

Procedures

It is preferable to have the beneficiaries approve the fees.

Where this is not possible, such as where the beneficiaries are infants or under a disability, apply for court approval of fees under section 89 (Application for remuneration) of the *Trustee Act* or on the passing of accounts under Rule 25-13 (Remuneration and Passing of Accounts) of the SCCR.

Any costs incurred in seeking court approval are assessed as special costs and are payable from the estate

6 - References & Resources

Primary statutes

- *Wills, Estates and Succession Act*, SBC 2009, c. 13 ("WESA") – do note that the practice of wills and estates has undergone significant changes since the coming into force of *WESA* in 2014
- *Trustee Act*, RSBC 1996, c. 464
- Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "SCCR") – specifically Part 25 (Estates) and Appendix A.1 - List of Probate Forms
    - For more information and links to downloadable forms, visit the BC government's Supreme Court Civil Rules - probate forms website.

Other relevant legislation

- *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35
- *Human Tissue Gift Act*, RSBC 1996, c 211
- *Income Tax Act*, RSBC 1996, c 215
- *Income Tax Act*, RSC 1985, c 1 (5th Supp.)
- *Indian Act*, RSC 1985, c I-5, see the Descent of Property provisions

  - For more information, see the Estate services for First Nations page of the Government of Canada's website.
- *Probate Fee Act*, SBC 1999, c 4

Law Society of BC

- Professional Legal Training Course (PLTC) - Solicitors: Wills
- Practice Checklists Manual provides the following checklists respecting meeting clients for the first time in probate and administration matters, including:
  - Client Identification and Verification Procedure
  - Probate and Administration Procedure
  - Probate and Administration Interview
- Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources*:*
  - Sample retainer letters (including a general retainer agreement and a joint retainer) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
  - Sample non-engagement letters under the heading *Client files*

External resources

- CLEBC**'s** resources include:
  - British Columbia Probate & Estate Administration Practice Manual
  - *Wills, Estates and Succession Act* Transition Guide
  - *Estate File Organization and Management* (2008)
- The BC government has some helpful information including:
  - Supreme Court Civil Rules - probate forms
  - Probating a Will
- The Public Guardian and Trustee of British Columbia website.
- The Government of Canada**'s** information about Estate services for First Nations
- Service Canada has information about how to apply for Canada Pension Plan (CPP) death benefits that may be due to the estate.
  - The Service Canada Forms website provides links to relevant forms and applications (e.g. Form ISP1200 - Canada Pension Plan Death Benefit, Application Kit).
- The People's Law School has a useful booklet for people who have been appointed as executor in a will.
- Executor Guide for British Columbia provided by the Heritage Trust Company
- *MacDonell, Sheard and Hull on Probate Practice*, 5th ed. Toronto: Carswell, 2016.
- *Tristram and Coote's Probate Practice*, 27th ed. LexisNexis Butterworths, 1989.