

Question 15 – Discharge of Mortgage Difficulties

1. Are you having any difficulty getting discharge statements for mortgages?

Results:

55% of respondents indicated having issues obtaining discharge statements from institutional lenders and 35% from both institutional and private lenders.

Working Group (WG) Comment:

The Working Group is aware of discussions with the Canadian Bankers Association in which the bankers have indicated that the pandemic negatively affected their ability to process requests for discharges. Some banks are looking at their processes and some announcements are pending. Lawyers are noting that they or their staff are spending inordinate amounts of time on hold trying to get discharges or updates. Many report not getting statements until either late on the day of closing or only after, which complicates matters for the clients and their lawyers.

Some commented having less issues with private mortgages as you are usually dealing with a lawyer and they understand what is required and the time concerns.

2. How do you escalate the matter if you are having difficulties?

Results:

Respondents indicated they escalate their request for discharge statements as follows:

- a. 24 % - phone call
- b. 21% - written request
- c. 16% - asking client to follow up with lender directly
- d. 12% - calling the broker/bank mortgage specialist
- e. 10% - Canadian Bankers Association/LSO escalation process
- f. 8% - attending at the branch/calling branch manager
- g. 6% - reach out to colleagues who have internal contact
- h. 3% - searching social media for bank related contacts
- i. 0% - public shaming on social media
- j. 0% - other

WG Comment:

The Working Group is advised by bankers that the Canadian Bankers Association/LSO escalation process list which was created to follow up on missing

discharges of mortgages is equally available for non-responses to request for discharge statements.

The WG is aware of discussions with bankers to confirm a protocol as to when and where to request discharge statements and of a list being created to indicate, for the various financial institution, how to best make the request for discharges. The WG will post such a list once it is available.

3. Despite your best efforts, what do you do if you have not received a discharge statement by the end of the closing date?

Results:

Respondents who did not receive a discharge statement on the closing date indicated that they then:

- a. agreed to an extension
 - if acting for purchasers – 46%
 - if acting for vendors – 54%
- b. agreed to holdback of all proceeds until they get statement
 - if acting for purchasers – 40%
 - if acting for vendors – 60%
- c. tendered
 - if acting for purchasers – 71%
 - if acting for vendors – 29%
- d. completed an escrow closing with possession
 - if acting for purchasers – 58%
 - if acting for vendors – 43%
- e. closed
 - if acting for purchasers – 41%
 - if acting for vendors – 59%
- f. other
 - if acting for purchasers – 44%
 - if acting for vendors – 56%

WG Comment:

This is a difficult situation for all and one dependent on the circumstances and the instructions of the clients. However, most real estate lawyers and clients typically want to find a solution to preserve the transaction and find the least disruptive solution to move forward.

The WG has a Lawyer's Delayed Closing Escrow Agreement in its standard documents that can assist in such a situation.

4. When do you advise the other side that you have not received a discharge statement?

Results:

Respondents indicated that they advise the other side of the yet undelivered discharge statement:

- a. 40% on the day of closing
- b. 31% the day before closing
- c. 26% prewarn of possible issue days ahead
- d. 1% at 5 pm of day of closing
- e. 1% other

WG Comment:

The WG is pleased to see that most lawyers advise the other side of a possible issue for closing. In a real estate transaction, most issues are solvable with enough time to address the issue. The standard practice has always been to obtain a copy of the discharge statement to ensure that the vendor has sufficient funds to discharge the mortgage on the lands being acquired by the purchaser and being charged by the lender funding the purchase. How can one accept an undertaking from the other side that you do not know if they can fulfill the undertaking to discharge the mortgage? The LSO guidance requires that the purchaser's lawyer deliver a certified cheque to the vendor's lawyer in the correct amount, out of the closing proceed, to obtain the discharge of mortgage. Although the use of certified cheques has declined, it remains a good practice to obtain the discharge statement to ensure there are sufficient funds out of the closing proceeds. Not too long ago, it would happen that vendors did not have enough closing proceeds to discharge the mortgage and alternative arrangements had to be resorted to. This situation could happen in the future depending on the value of the properties and the amounts that are secured with a mortgage. Today with collateral security, a vendor could have borrowed more than the value of a property and the lender wanting payment in full on the sale of the vendor's most significant asset.

5. Do you have any problem getting a discharge statement or a postponement for a Notice of Security Interest (NOSI)?

Results:

82% of the respondents indicated they had problems obtaining a discharge statement or a postponement for a NOSI.

WG Comment:

The WG understands from the comments received that many NOSIs are registered and then assigned to a different company or the company simply disappears. The Director of Titles has indicated that he wishes to take action on these types of registrations in that they will need to clearly identify which asset (chattel or fixture) they secure. This could result in a reduction of NOSIs registered or make it easier to identify which supplier to contact.

6. If you do not get a discharge statement, what do you do?

Results:

Respondents indicated that if no discharge statement is available for a NOSI, they:

- a. agree to an extension
 - 50% if acting for purchaser or vendor
- b. agree to holdback of all proceeds until they get the statement
 - 46% if acting for purchaser
 - 54% if acting for vendor
- c. tender
 - 60% if acting for purchaser
 - 40% if acting for vendor
- d. close in escrow with possession
 - 53% if acting for purchaser
 - 47% if acting for vendor
- e. close
 - 46% if acting for purchaser
 - 54% if acting for vendor
- f. other
 - 40% if acting for purchaser
 - 60% if acting for vendor

WG Comment:

The WG acknowledges this is a difficult issue for everyone and that individual circumstances dictate how to proceed. The lesser value of these encumbrances would reduce the anxiety level but they remain problematic.

7. Have you had any assistance or coverage from a title insurer?

Results:

85% of the respondents indicated that they got no assistance or coverage from the title insurers. Some indicated getting coverage for the lender but not the purchaser.

8. What is your escalation process for a NOSI?

Results:

The respondents indicated that their escalation involved:

- a. 62% - called the company
- b. 16% - got the client involved
- c. 15% - faxed a request
- d. 0% - Called the lawyer who registered the NOSI; called the government or the ombudsman (company or government); called any lawyer connected to the company on social media or publicly shamed the company on social media.

WG Comment:

The WG suggests that the clients be involved at the earliest opportunity for them to understand the issue and for the vendors to locate any documentation relating to the NOSI, be it the original installation/security agreement or any statement they received that sets out the outstanding balance. It might also be wise to involve the real estate agents in the transaction. They will not want to see their transaction's closing jeopardized and may have some information about any NOSI.

9. Do you charge additional fees for difficulties incurred in obtaining a discharge statement?

Results:

76% of respondents indicated that they do not charge clients any additional charges for the extra efforts to obtain a discharge statement.

WG Comment:

To start, lawyers should be indicating with their quote of fees and disbursement that an extra charge is possible if their lender does not provide a discharge statement in a timely fashion, based on lawyers making a timely request for the discharge. The WG sees this as a lost opportunity in an ever-difficult market. Clients expect and demand the lowest cost, but they should understand that they are responsible for their decisions and situation. Lawyers should not be expected to absorb an inordinate amount of time required to deal with difficult situations. Some leeway is understandable, but the number of grievances raised by lawyers indicates that they feel it is not right for them to be burdened with this additional time commitment (without getting compensated for it). We think if lawyers pass on the cost, clients will add their voice to resolve these issues. Many respondents did comment that they do not, but that they should charge extra fees.