

PART F: DUTIES OF THE MORTGAGEE'S LAWYER ON REFINANCINGS

Following are the essential steps to be taken, and conditions to be satisfied, by the Mortgagee's Lawyer in a mortgage refinancing (outside the context of a transaction of purchase and sale) involving the issuance of a Solicitor's Opinion and the release of mortgage proceeds before the Mortgage has been registered.

Before Closing

1. Conduct a Title Search

- a) Confirm that Title information (as to registered ownership, legal description and Registrations) conforms to the terms of the Mortgage Commitment and all other available information. If there is any issue as to whether the Title encompasses all but only the Land agreed to be mortgaged, conduct further investigations by review of registered plans and Building Location Certificate, discussions with the Mortgagor and Mortgagee and, if necessary, consultation with a Manitoba Land Surveyor.
- b) Obtain a copy of all Registrations which may constitute Permitted Registrations.
- c) If Title is not encumbered by a Mortgage, determine whether the Duplicate Title is on deposit at the Land Titles Office. If not, obtain the Duplicate Title from the Mortgagor. If the Duplicate Title has been lost or destroyed, prepare the form of affidavit prescribed by the Land Titles Office for attachment to the Mortgage. Ensure that the affidavit is properly sworn by all registered owners of the Land.
- d) Confirm that the Mortgage will not require subdivision approval (i.e. that the Land to be mortgaged is either all of the land legally described on the Title or the whole of a lot on a plan of subdivision, or is otherwise capable of being mortgaged without subdivision approval), and that no other consents or governmental approvals are required.

2. Analyze all Registrations against the terms of the Mortgage Commitment

- a) Classify each Registration as either:
 - (i) a Permitted Registration, which will remain on title; or
 - (ii) a Non-Permitted Registration, which must be discharged on or before Closing.

- b) Confirm with the Mortgagee the classification of any Registration which is not clearly either a Permitted Registration or a Non-Permitted Registration.

3. Settle the Terms of Discharge for all Non-Permitted Registrations

- a) Before Closing, obtain a registrable Discharge (on satisfactory conditions) of each non-monetary Non-Permitted Registration.
- b) For each monetary Non-Permitted Registration to be paid-out on or before Closing, obtain a pay-out statement specifying the balance required to obtain a Discharge. Verify that the Mortgage proceeds will be sufficient to satisfy all pay-out requirements. If not, arrange to obtain from the Mortgagor the excess funds necessary to obtain all required Discharges.
- c) Where encumbrancers are Institutional Lenders, ensure pay-out statements are:
 - (i) current;
 - (ii) in writing;
 - (iii) clear and unequivocal; and
 - (v) addressed to the party or Lawyer who will be relying on them.
- d) Where encumbrancers are other than Institutional Lenders, arrange either:
 - (i) to receive the Discharge, or to have the Discharge unconditionally delivered to another Lawyer, before Closing, in trust on the undertaking that the Discharge shall be registered when the agreed pay-out amount has been delivered to the encumbrancer, but not before; or
 - (ii) for the Mortgagor to obtain interim financing to pay-out and obtain a Discharge before Closing.

4. Other Investigations

- a) Realty taxes – Confirm the status of realty taxes. Ensure that sufficient Mortgage proceeds or other funds will be available to satisfy all outstanding arrears and penalties.
- b) Identity and Marital Status - Inquire as to the full legal name of each Mortgagor. If the Land is homestead, identify the Spouse or Common-Law Partner of each Mortgagor. Take all steps required by the prevailing standard of care (including the scrutiny and copying of identification documents) to verify the identity of each Mortgagor and the Spouse or Common-Law Partner of each Mortgagor.

c) Corporate Status – If the Mortgagor is a corporation, confirm with the Companies Office that the Mortgagor, if a Manitoba corporation, is currently in existence or, if an extra-provincial corporation, is currently registered in that office.

5. Building Location Certificate and Zoning Memorandum

a) Obtain from the Mortgagor any available Building Location Certificate and Zoning Memorandum for the Land.

b) Carefully review the most current Building Location Certificate and Zoning Memorandum. Compare the legal description in the Building Location Certificate to that in the Title to confirm that the Title encompasses all but only the Land.

c) If the most recent Building Location Certificate is not current, obtain from the Mortgagor a description and sketch of any changes to buildings or improvements on the Lands since the date of the Building Location Certificate.

d) If the Mortgagor indicates that there have been changes to the Land since the date of the Building Location Certificate, which changes clearly create a Survey Defect, report such information to the Mortgagee and obtain either its instructions to obtain a current Building Location Certificate and Zoning Memorandum or confirmation that it accepts the potential Survey Defect. If the latter, qualify the form of Solicitor's Opinion, to confirm the Mortgagee's acceptance of the potential Survey Defect.

e) If the Building Location Certificate or Zoning Memorandum discloses a Survey Defect:

(i) make arrangements, so far as possible, to remedy or ameliorate the Survey Defect;

(ii) advise the Mortgagee of the nature and effect of the Survey Defect, and of the arrangements made to remedy or ameliorate the Survey Defect;

(iii) obtain the Mortgagee's acceptance of the Survey Defect, as so remedied or ameliorated; and

(iv) qualify the form of Solicitor's Opinion, to confirm the Mortgagee's acceptance of the Survey Defect.

Note: Under this Protocol, the Lawyer need not obtain a current Building Location Certificate and Zoning Memorandum in order to satisfy the Mortgagee's requirements. Upon complying with the Protocol, the Lawyer can reasonably hold the opinion that: (a) there are no Survey Defects (other than those known to the Mortgagee) which will have an adverse effect on the Mortgagee's security; and (b) a current Building Location Certificate and Zoning Memorandum need not be obtained because they are not necessary for the Mortgagee's purposes.

In the unlikely event that the Mortgagee sustains actual loss due to an unknown Survey Defect which would have been disclosed by an up-to-date Building Location Certificate and Zoning Memorandum, the Mortgagee will have a claim against the Lawyer for such loss. The Lawyer will, in turn, refer such claim to the Lawyer's professional liability insurer, for resolution. In those circumstances, no deductible will be payable by the insured Lawyer and no payment will be considered as a "Paid Claim" for purposes of future surcharges or graduated deductibles, provided that the Lawyer has adhered to the practices prescribed by the Protocol.

Two critical points must be remembered:

1. The Lawyer must not assume responsibility for any loss resulting from a **known** Survey Defect. Where an existing Building Location Certificate or Zoning Memorandum discloses a Survey Defect, or where the Mortgagor has identified changes to the Land since the date of the Building Location Certificate which clearly create a Survey Defect, the Lawyer's opinion to the Mortgagee must be qualified to confirm the Mortgagee's acceptance of such Survey Defect, actual or potential.
 2. Even if a Survey Defect is disclosed by an existing Building Location Certificate or Zoning Memorandum, it is not necessary to obtain a further, **current** Building Location Certificate and Zoning Memorandum, absent knowledge of changes to the Land which have clearly created additional Survey Defects. Again, the Mortgagee must accept the known Survey Defects, but the Lawyer can opine that no further Building Location Certificate or Zoning Memorandum is required for the Mortgagee's purposes.
5. Prepare Closing Documents

Prepare:

- a) the Registration Details Application, ensuring that all required information is contained in the form and that Title number references are current and complete;
- b) the Mortgage:

- (i) ensuring that the description of the Mortgagor conforms, to the letter, with the Title particulars;
 - (ii) where the current name of the Mortgagor deviates from the name shown on the Title (due to a change in marital status or otherwise), ensure that the appropriate evidence of the change is supplied in Box 7 of the Mortgage and that the necessary attachments are provided.
- c) the Mortgagor's Declaration as to Possession, to be made in duplicate and executed in accordance with Section 72 of *The Real Property Act*, including a declaration:
- (i) of identity (referencing full legal name);
 - (ii) of marital status;
 - (iii) of the status of homestead rights in the Land;
 - (iv) acknowledging the authority of the Lawyer to do all things necessary to complete the transaction, including the making of any necessary amendments to correct the Mortgage;
 - (v) that the Mortgagor knows of no registered or unregistered claims affecting the Land (whether in the nature of a lease, option to purchase, easement, encroachment, right-of-way, judgment, order, execution, builder's lien, charge, mortgage, encumbrance, bankruptcy claim, agreement for sale, or otherwise), other than the Permitted Registrations and any Non-Permitted Registrations which the Lawyer undertakes to discharge;
 - (vi) that there has been no work done, services provided, or materials supplied to the Land within the preceding 40 days or, if such is not the case, that there are no outstanding accounts for such work, services or materials; and
 - (vii) that there are no outstanding taxes or other lienable accounts owing to the Municipality except for the current period.
- d) the Order to Pay authorizing the pay-out of all Non-Permitted Registrations and all realty tax arrears and penalties to the Closing date; and
- e) the Solicitor's Opinion.

6. Review all Documents

Prior to Closing, carefully review the Mortgage and other documents to ensure that:

- a) all required information (including *The Homesteads Act* evidence and consents) has been inserted;
- b) the names on all documents conform precisely to the Title search;
- c) the legal description on all documents conforms precisely to the Title search;
- d) the Registration numbers on all documents conform precisely to the Title search;
- e) any corrections, additions or deletions in the documents are legible and have been initialled;
- f) the documents are completely and properly executed, dated and witnessed;
- g) the names of all signatories and witnesses are properly set out; and
- h) affidavits of subscribing witness are attached, and the names, offices and addresses of witnessing officers are inserted, where required.

8. Arrange Funding of the Mortgage

- a) Review the Mortgagee's Instructions to Solicitor, to ensure that all instructions can be complied with and that all conditions (other than registration of the Mortgage and the Discharges of the Non-Permitted Registrations) can be satisfied on or before Closing.

Note: An essential element of the Solicitor's Opinion is the statement that the solicitor has acted "*in accordance with [the Mortgagee's] instructions.*" As on any file, but particularly under the Protocol, those instructions will define the Lawyer's retainer. It is intended that the Solicitor's Opinion will replace the "solicitor's preliminary report" to the Mortgagee. Therefore, that more detailed "preliminary report" will no longer be available to limit the Lawyer's responsibilities, or to qualify the Lawyer's opinion, before the Mortgage proceeds are advanced. It is imperative, then, that the Lawyer carefully review each element of the Mortgagee's instructions – whether contained in standard form "instructions to solicitors," any documents referred to in the instructions, or any other correspondence from the Mortgagee - to identify any aspects with which the Lawyer is unable to wholly comply.

In any instance where a qualification to the Mortgagee's instructions is necessary, for example (but without limitation):

- where there is a Non-Permitted Registration which the Mortgagor is unable to discharge;

- where a Survey Defect is disclosed by a Building Location Certificate, Zoning Memorandum, or otherwise;
- where the instructions prescribe a form of “solicitor’s report” or opinion which requires any amendment or qualification; or
- where the Mortgagee’s instructions contain any other direction with which the Lawyer cannot strictly comply,

the Lawyer must disclose the same to the Mortgagee and obtain the Mortgagee’s agreement to the necessary modification of the instructions. Each such modification must be confirmed, either by letter to the Mortgagee prior to issuance of the Solicitor’s Opinion or by appropriate qualification of the Solicitor’s Opinion.

Where the Mortgagee’s instructions mandate that a current Building Location Certificate and Zoning Memorandum be obtained, an appropriate modification of those instructions might be to the effect that the Lawyer may dispense with obtaining a current Building Location Certificate and Zoning Memorandum, provided that the Lawyer has complied with this Protocol and is of the opinion that: (a) there are no Survey Defects (other than those known to the Mortgagee) which will have an adverse effect on the Mortgagee’s security; and (b) a current Building Location Certificate and Zoning Memorandum need not be obtained because they are not necessary for the Mortgagee’s purposes.

- b) Obtain a Title search (whether in verbal, electronic or paper form), effective as of the Closing date, which evidences that the Title is subject to no Registrations other than the Permitted Registrations and the expected Non-Permitted Registrations. Immediately thereafter, issue to the Mortgagee the Solicitor’s Opinion, in such manner and together with such other documents or assurances as are required by the Mortgagee in order to cause the Mortgagee to advance mortgage proceeds to the Lawyer on Closing.
- c) Forthwith pay-out all Non-Permitted Registrations and, within a reasonable period, obtain and submit to the Land Titles Office for registration Discharges of all Non-Permitted Registrations, together with the required filing fees.
- d) Forthwith pay all outstanding realty tax arrears and penalties affecting the Land.
- e) Forthwith (and within 2 business days), forward the Mortgage (and Duplicate Title, if applicable), together with the Registration Details Application and the related fees, to the Land Titles Office for registration.

f) If the Mortgage is held up or rejected by the Land Titles Office due to a defect in the Mortgage, forthwith attend at the Land Titles Office or take such other steps as are prescribed by the Land Titles Office in order to remedy such defect (whether as agent or otherwise), pay any related rejection fee, and re-submit the Mortgage for registration.