

2007 Mortgage Payout Protocol

Resources and Practice Aids

October 2010

Lawyers' Insurance Association of Nova Scotia

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These resources and practice aids are provided to you to assist in your practice but do not establish, report or create the standard of care for lawyers. They are not meant to be used as is. The material provided is not a complete analysis of the topic and each lawyer should complete their own appropriate legal research and modify documents to reflect the facts and agreement in each situation.

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Mortgage Payout Regulations Approved Effective September 30, 2007

On June 22, 2007, Council approved regulations 8.2.4 to 8.2.8 as additions to Part 8 of the *Legal Profession Act*, S.N.S. 2004, c.28. These amendments incorporated the new Mortgage Payout Protocol and take effect September 30th, 2007. Attached to this notice is:

- Correspondence to members dated August 29, 2007 from Society President Catherine S. Walker QC
- a copy of the new regulations 8.2.4 to 8.2.8;
- a copy of s. 60, Land Registration Administration Regulation 28 and Form 15 of the *Land Registration Act*;
- a copy of a sample statutory declaration and demand letter required to be filed with the Form 15;
- sample clauses for amendment to the standard form of authorization and directions, as well as sample clauses to be included in letters to clients, and a sample undertaking to buyer's lawyers on closing;
- sample declaration for a lawyer to provide in the event that a client directs that their mortgage information cannot be released to the buyer's lawyer

Lawyers may adapt the samples clauses or language to their own particular practice.

Additional Resources, relating to mortgage payout are noted below:

Mortgage Release Contact Information (July 2006),
www.lians.ca/pdfdocs/MortgageReleaseInfo2.pdf compiled by Deborah E. Gillis QC,
Risk and Practice Management Advisor; Lawyers Insurance Association of Nova Scotia

The Legal Ethics and Professional Conduct Handbook, online: Nova Scotia Barristers' Society, www.nsbs.org/legaethics/toc.htm; Legal Profession Act, S.N.S. 2004, c.28; Commentary [13.6 – 13.9](#) & [14](#)

Practice Standards for Real Property Transactions in Nova Scotia (online):
Lawyers' Insurance Association of Nova Scotia, <https://www.lians.ca/standards/real-estate-standards/34-discharge-mortgages>

Elevating Undertakings to the Top Floor (February 2006) by Deborah E. Gillis QC,
Risk and Practice Management Advisor; Lawyers Insurance Association of Nova Scotia
– in particular reference to undertakings and escrow conditions as outlined on page 8.



NOVA SCOTIA
BARRISTERS' SOCIETY

August 29, 2007

Dear Member:

Re: Mortgage Protocol Regulation- effective September 30th, 2007

On September 30th, 2007, a new MANDATORY MORTGAGE PROTOCOL will come into effect. The purpose of this letter is to review briefly the background of the process, to highlight for you resources that are available and provide some sample precedents that may be of value in implementing this new process in your office. Please review the enclosed material carefully.

Over the past year and a half, Council, through the work of the Real Estate Task Force, has grappled with the complex issues involving mortgage defalcation experience across the country, the environment involving undertakings relating to mortgage payouts, and the timeliness, or lack of timeliness of both securing and recording releases of mortgages. It was the consensus of the members of the Real Estate Task Force that there is a relationship between the somewhat comfortable, but perhaps casual environment that has evolved with regard to the timeliness, or lack thereof, in the fulfillment of these undertakings, and the considerable period of time that could pass by before a mortgage defalcation is discovered.

At issue in all of these discussions is the appropriate role for the Society, as regulator, in any regulation or set of rules that might emanate from the discussions of the concerns raised.

You will recall that last year, Council approved in principle the reinstatement of the 'split cheques' practice, which was in effect in Nova Scotia and New Brunswick in the late 70's and currently still in effect in New Brunswick. Members responded to this proposal objecting to it, both from a practical perspective of the ability to carry it out due to physical limitations of location and manner of transmittal of funds, and from a privacy of information perspective.

Due to these concerns, an opinion was sought. It considered the reason for the release of the information, namely the fulfillment of due diligence, and concluded it was likely that the release of information did not contravene privacy rules, notwithstanding the objection of the client. Further it opined that if there was a clear requirement authorizing the release of the information, that would further ensure no privacy rules were violated. Of note, the public interest benefit would permit the release of such information in the limited environment of solicitors exchange of information. However, members still were concerned about preserving where possible a client's right to withhold the information, so the regulation has taken that concern into account. The new regulations provide a client may direct that their solicitor in a transaction is not authorized to release the specific information relating to the mortgage against the property that is being sold to the buyer's lawyer. However, in cases where this occurs, the seller's lawyer must then provide a declaration that the monies have been paid out, and specifics of the transmittal of funds, with some mortgage particulars so that due diligence is still fulfilled.

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The revised protocol takes advantage of the provisions of the *Land Registration Act* reversing the onus to lenders once a mortgage has been paid out, and requiring them to apply to court to maintain a security interest, notwithstanding the payout by the solicitor's office. These provisions, set out in s.60 of the *Land Registration Act*, and by process in Administration Regulation 28, allows a simple procedure to be followed if a release is not forthcoming after payout.

On June 22, 2007, Council approved regulations 8.2.4 to 8.2.8 as additions to Part 8 of the *Legal Profession Act*. These amendments incorporated the new Mortgage Payout Protocol and take effect September 30th, 2007. Enclosed with this letter is:

- ▶ a copy of the new regulations 8.2.4 to 8.2.8;
- ▶ a copy of s. 60, Land Registration Administration Regulation 28 and Form 15 of the *Land Registration Act*;
- ▶ a copy of a sample statutory declaration and demand letter required to be filed with the Form 15;
- ▶ sample clauses for amendment to the standard form of authorization and directions, as well as sample clauses to be included in letters to clients, and a sample undertaking to buyer's lawyers on closing;
- ▶ sample declaration for a lawyer to provide in the event that a client directs that their mortgage information cannot be released to the buyer's lawyer

Lawyers may adapt the samples clauses or language to their own particular practice, but we felt it was important to provide you with some tools to assist your understanding of the new protocol. Further resources, linking you to other sources of information are at the end of this letter as well.

I would like to thank you for taking the time to provide your thoughts and input into this issue. Your contributions have broadened the discussion, and improved the resulting product.

We have heard much in the media lately about the environment in which regulation of our profession takes place, and a recent author has stated his view that, as regulators, we are not diligent enough in protecting the public interest, and rather focus our efforts on tenaciously hanging on to our right to self govern for its own sake. I disagree. No one likes rules for the sake of rules, but rules that clarify and streamline the environment within which we practice, so that it is clear to others how we carry out the good work we do, can only further strengthen the integrity of how we do what we do every day.

Regards,



Catherine S. Walker, QC
President

Subregulations 8.2.4 to 8.2.8

8.2.4 In subregulations 8.2.5 to 8.2.8,

- (a) “closing date” means the earlier of the following, as applicable:
 - (i) the date agreed to by the parties,
 - (ii) the date funds are advanced in a transaction,
 - (iii) the date of recording or registering a mortgage that replaces another mortgage;
- (b) “security interest” means a security interest as defined in the *Land Registration Act*.

General duty to remove security interest - in parcel register

8.2.5 A practicing lawyer or law firm that pays out, or causes to be paid out, in full or in part, a mortgage recorded in a parcel register under the *Land Registration Act* shall take the steps required in subregulations 8.2.7 or 8.2.8, as applicable, to remove the security interest from the parcel register no later than 180 days from the closing date of the transaction.

General duty to remove security interest - not in parcel register

8.2.6 A practicing lawyer or law firm that pays out, or causes to be paid out, in full or in part, a mortgage not recorded in a parcel register shall take the steps required in subregulations 8.2.7 or 8.2.8, as applicable, to remove the security interest from the registry as soon as reasonably possible after the closing date of the transaction.

Steps to remove security interest - purchase and sale transaction

8.2.7 A practicing lawyer or law firm that is acting for the seller and pays out, or causes to be paid out, in full or in part, a mortgage in a purchase and sale transaction shall take all of the following steps on the closing date of the transaction:

- (a) provide to the buyer’s lawyer either
 - (i) a copy of the mortgage payout statement, and confirmation of the transmittal of the payout proceeds by either providing a copy of the transmittal letter or the electronic transmittal, or
 - (ii) if the client of the lawyer or law firm reasonably refuses to authorize the lawyer or law firm to provide a copy of the mortgage payout statement and confirmation of the transmittal of the mortgage proceeds, a statutory declaration signed by the lawyer or a lawyer on behalf of the law firm, that identifies the parcel, provides the mortgage number and provides the mortgagee’s address, and states that sufficient funds have been transmitted to payout the mortgage; and
- (b) provide to the buyer’s lawyer an undertaking to
 - (i) release the security interest, no later than by the time required in subregulations 8.2.5 or 8.2.6, as applicable,
 - (ii) in the case where the security interest is recorded in a parcel register under the *Land Registration Act* and it is apparent that the security interest will not be released within the time required in subregulation 8.2.5, complete all prescribed steps in accordance with Section 60 of the *Land Registration Act*, and the *Land Registration Administration Regulations*, to require the Registrar to cancel the security interest, no later than by the time required in subregulation 8.2.5.

Steps to remove security interest - transaction other than purchase and sale transaction

8.2.8 A practicing lawyer or law firm that is acting in a transaction, other than a purchase and sale transaction, that requires the recording in the parcel register or the registering in the registry, of a mortgage to replace or amend a previously recorded or registered security interest, or that requires the certification or opinion as to the priority of a security interest recorded in the parcel register or registered in the registry that replaces or amends a previously recorded or registered security interest, shall take all of the following steps on the closing date of the transaction:

- (a) place in their file either
 - (i) a copy of the mortgage payout statement, if one is provided to the lawyer or law firm, and confirmation of the transmittal of the payout proceeds, by means of either a copy of the transmittal letter or the electronic transmittal, or confirmation that the payout has been effected, by means of written evidence; or
 - (ii) a copy of a statutory declaration identifying the parcel, providing the mortgage number, providing the mortgagee's address, and stating that sufficient funds have been transmitted to pay out the mortgage;
 - (iii) release the previously recorded or registered security interest that the newly placed mortgage replaced, no later than by the time prescribed in subregulations 8.2.5 or 8.2.6, as applicable; and
- (b) in the case where the security interest is recorded in a parcel register under the *Land Registration Act* and it is apparent that the security interest will not be released within the time required in subregulation 8.2.5, complete all prescribed steps in accordance with Section 60 of the *Land Registration Act*, and the *Land Registration Administration Regulations*, to require the Registrar to cancel the security interest, no later than by the time required in subregulation 8.2.5.

Discharge of security interests

60 (1) Where there are reasonable and probable grounds to believe that

- (a) all of the obligations under the security interest have been performed;**
- (b) the holder of the security interest has agreed to release all or part of the collateral;**
- (c) the security interest does not affect the parcel in the register; or**
- (d) no security interest exists,**

the debtor named in the security interest, a person who has or had a registered interest in the parcel to which the security interest purportedly relates or the solicitor of the debtor or the person with the registered interest may serve a written demand on the holder of the security interest, by registered mail or as otherwise prescribed by regulation, requiring the holder to discharge the interest so far as it relates to the parcel or to discharge the interest so far as it relates to the collateral agreed to be released or not included in the security interest.

(2) Where the secured party fails to comply with a demand made pursuant to subsection (1) within thirty days after it is served, the person making the demand may require the registrar to cancel or amend the recording in accordance with the demand upon proof of service of the demand.

(2A) repealed 2004, c. 38, s. 19.

(3) Notwithstanding subsection (2), a registrar shall not cancel or amend a recording if an order of the court is provided by the secured party permitting the continuance of the recording on such terms as may be specified in the order.

(4) An order pursuant to subsection (3) shall be recorded.

(5) After having been served with a demand pursuant to subsection (1), a secured party may apply to the court and the court may order the continuance of the registration as if the demand had not been made on such terms as the court thinks just or may order the discharge or amendment of the security interest.

(6) No fee or expense may be charged by a secured party for compliance with a demand pursuant to subsection (1) unless the charge was agreed to by the parties before the demand was given. 2001, c. 6, s. 60; 2002, c. 19, s. 24; 2004, c. 38, s. 19.

Effect of condition and covenants

Notice to cancel or amend a recorded interest

- 28 (1)** A notice in Form 15 to a registrar to cancel or amend the recording of a security interest under subsection 60(2) of the Act must be submitted together with
- (a) a statutory declaration that outlines to the registrar's satisfaction the reasonable and probable grounds that were used as a basis for the demand to cancel or amend the recording of the security interest; and
 - (b) proof that the demand was served on the security interest holder in accordance with Section 30.
- (2)** A notice in Form 15A to a registrar to cancel the recording of a recorded interest or judgment under Section 63 of the Act must be submitted together with
- (a) an affidavit that complies with subsection 63(2) of the Act; and
 - (b) proof that the demand was served on the interest holder in accordance with Section 30.

Proof of service

29 The service of any document may be proved by an affidavit, which must state

- (a) by whom the document was served;
- (b) the day of the week and the date on which it was served;
- (c) where it was served; and
- (d) how service was effected,

and a copy of any document served must be attached as an exhibit to the affidavit.

Service of notice

- 30 (1)** Unless otherwise provided in the Act or these regulations, all notices required by the Act or these regulations to be sent must be sent by any means that affords proof of delivery.
- (2)** If the name or address of a person to whom a notice must be sent is not known, the Registrar General may provide directions for substituted service of any notice required by the Act or these regulations

Form 15

Purpose: to give notice to the registrar to cancel the recording of a security interest

(Instrument code: 831)

For Office Use

Registration district: _____

Submitter's user number: _____

Submitter's name: _____

Large dashed box for office use.

In the matter of Parcel Identification Number (PID)

PID	
PID	

(Expand box for additional PIDs, maximum 9 PIDs per form.)

Take notice that *(select one)*

- the debtor named in the security interest, particulars of which are set out on this form ("the security interest")
- a person who has or had a registered interest in the above-noted PID(s) to which the security interest purportedly relates

has served notice on the holder(s) of the security interest to discharge or amend the interest insofar as it relates to the above-noted PID(s).

And further take notice that the following documentation is attached to this form:

- (a) a statutory declaration that outlines the reasonable and probable grounds that were used as a basis for the demand to amend or cancel the recording of the security interest;
- (b) a copy of the written demand on the holder(s) of the security interest which clearly sets out the obligations under Section 60 of the *Land Registration Act* requiring the interest holder(s) to take action to continue the recording of the interest;
- (c) proof of service of the demand in accordance with Section 60 of the *Land Registration Act*.

And further take notice that 30 days have passed since the service of the demand upon the holder(s) of the security interest and there has been no compliance with the demand.

Therefore the undersigned requires the registrar to cancel the security interest as instructed on this form:

Instrument type	
Interest holder and type to be removed <i>Note: include qualifier (e.g., estate of, executor, trustee, personal representative) if applicable</i>	

Reference to related instrument in parcel register

(insert document/instrument number/year; include book/page if applicable)

Certificate of Legal Effect:

I certify that, in my professional opinion, it is appropriate to make the changes to the parcel register(s) as instructed on this form.

Dated at _____, in the County of _____, Province of Nova Scotia,

_____, 2 _____.

Signature of authorized lawyer

Name: _____

Address: _____

Phone: _____

E-mail: _____

Fax: _____

[Address of Sender]

BY REGISTERED MAIL

[Name and Address of Financial Institution]

ATTENTION: The Manager

To Whom it May Concern:

Re: **Demand for Cancellation of Security Interest Pursuant to Section 60 of the *Land Registration Act***
Mortgagor:
PID:
Address of Property:
Mortgage Reference Number:
Recording Particulars:

Our office forwarded funds to your attention on *[enter date of transmittal]* to discharge the above referenced security interest. The security interest remains unreleased and we have yet to receive a discharge from you. Pursuant to Section 60 of the *Land Registration Act*, I hereby require you, as holder of the security interest noted above to discharge such interest so far as it relates to the parcel or parcels identified above, or to apply to the Supreme Court of Nova Scotia to obtain an Order for the continuance of the registration pursuant to Section 60(3) of said *Act*.

Should you fail to comply with this demand within thirty (30) days after it is served, I intend to file a Form 15 as prescribed by the Land Registration Administration Regulations with the appropriate Land Registration Office requiring the Registrar to cancel the recording of the security interest.

Yours truly,
[sender's name]

PROVINCE OF NOVA SCOTIA
COUNTY OF *[enter county name]*

IN THE MATTER OF: *The Canada Evidence Act*

- and-

IN THE MATTER OF: Cancellation of a Security Interest in the
parcel register of PID *[enter PID number]*
pursuant to the provisions of Section 60 of the
Land Registration Act

STATUTORY DECLARATION

*I, [enter name], of [enter place name], in the County of [enter county name],
Province of Nova Scotia, do solemnly declare as follows:*

1. *I am the solicitor for [enter party name], the [choose one of the owner of a registered interest in the above-noted parcel/the debtor named in the security interest referred to subsequently herein].*
2. *The parcel register includes a recorded security interest, the particulars of which are as follows:*
 - PID:*
 - Document Type: [mortgage/debenture/assignment of rents and leases]*
 - Mortgagor:*
 - Document Number:*
 - Book:*
 - Page:*
 - Year:*
3. *I have reasonable and probable grounds to believe that there is a basis to demand the cancellation of the security interest pursuant to Section 60(1) of the *Land Registration Act*. In particular, I caused the mortgage to be paid out, using funds in my law firm's trust account, on [enter payout date].*
4. *Attached hereto as Exhibit "A" is a true copy of the transmittal letter sending funds to the security interest holder.*
5. *A Demand for Cancellation of Security Interest was sent by registered mail to the security interest holder on [enter date of demand].*
6. *Attached hereto as Exhibit "B" is a true copy of the Demand Notice.*

7. Attached hereto as Exhibit "C" is a true copy of the document evidencing the posting of the Demand Notice by registered mail.

AND I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the *Canada Evidence Act*.

DECLARED before me, at *[enter place]*,)
in the County of *[enter county name]*,)
Province of Nova Scotia,)
this *[day #]* day of *[enter month and year]*)
)
)
)
_____)
A Barrister or Commissioner of the)
Supreme Court of Nova Scotia)

[enter name of solicitor]

**Sample Clauses for Regulation 8 pursuant to the *Legal Profession Act*
Mortgage Payout Protocol**

Initial Letter to Sale Client:

As part of your sale it will be necessary to payout, record, or ensure discharges are recorded for all mortgages recorded against the property. Regulations enacted pursuant to the Legal Profession Act, S.N.S., 2004, c. 28, require that we/I must provide verification of any payout for current mortgages to the buyer's lawyer. This will involve providing, with your consent, the following documentation to the buyer's lawyer:

1. A copy of your mortgage payout statement; and
2. Confirmation of the transmittal of payout proceeds to the lender

We/I enclose with this correspondence an Authorization and Direction to Pay which authorizes us to act on your behalf and confirms our authority to provide this necessary information to the buyer's lawyer. Please sign and return this document to me as soon as possible.

Clause in Retainer/Authorization letter:

We/I authorize you to provide to the Solicitor for the Buyer the following documentation relating to any outstanding mortgages registered against the property:

1. A copy of payout statement as received from the lender; and
2. Confirmation of the transmittal of payout proceeds to the lender

Initial Letter to Buyer's Lawyer:

We/I have been advised that there is one Mortgage against the property in favour of (name of financial institution). We/I will order the applicable payout statement. On closing we/I will pay out the mortgage encumbering the property. In accordance with Regulation 8 made pursuant to the *Legal Profession Act*, I will, on closing, undertake to do the following no later than 180 days from the closing date:

1. record the release of the security interest in the parcel register; or
2. if it is apparent the security interest will not be released within that time, complete all prescribed steps in accordance with Section 60 of the *Land Registration Act*, and the *Land Registration Administration Regulations*, to require the Registrar to cancel the security interest.

On closing, we/I will also provide you with verification of the mortgage payout by providing you with the following documentation relating to the mortgage:

- *1. A copy of payout statement as received from the lender; and
2. Confirmation of the transmittal of payout proceeds to the lender.

If my/our client(s) will not authorize the release of this documentation, I/we will provide you with a statutory declaration from myself (or another lawyer in my firm), providing the client's mortgage number, the mortgagee's address, and my/our confirmation that sufficient funds have been transmitted to pay out the mortgage.

(*where authorized by your client)

Undertaking to Buyer's Lawyer on Closing:

I undertake to payout the mortgage encumbering the Property in favour of (name of financial institution) and, in accordance with Regulation 8 made pursuant to the *Legal Profession Act*, I undertake to do the following no later than 180 days from the closing date:

1. release the security interest; or
2. if it is apparent the security interest will not be released within that time, complete all prescribed steps in accordance with Section 60 of the *Land Registration Act*, and the *Land Registration Administration Regulations*, to require the Registrar to cancel the security interest.

Further, in accordance with Regulation 8, I enclose a copy of the payout statement received from the lender, and on closing I will provide a copy of my transmittal letter confirming the mortgage payout.

OR

Also, I will, on closing, provide you with my statutory declaration confirming the client's mortgage number, the mortgagee's address, as well as confirmation that sufficient funds have been transmitted by me or my firm, to pay out the mortgage.

(*where authorized by your client)

PROVINCE OF NOVA SCOTIA
COUNTY OF *[enter county name]*

IN THE MATTER OF:

The *Canada Evidence Act*

-and-

IN THE MATTER OF:

Confirmation of Payout of a Security Interest
registered against property located at

in the County of _____,
Province of Nova Scotia, (PID# _____)

STATUTORY DECLARATION

I, *[enter name]*, of *[enter place name]*, in the County of *[enter county name]*,
Province of Nova Scotia, do solemnly declare as follows:

1. I am the solicitor for *[enter party name]*, the *[choose one of the owner of a registered interest in the above-noted parcel/the debtor named in the security interest referred to subsequently herein]*.
2. The parcel register includes a recorded security interest, the particulars of which are as follows:
PID:
Document Type: *[mortgage/debenture/assignment of rents and leases]*
Mortgagor:
Document Number:
Book:
Page:
Year:
3. And do verily believe that the mortgage# for the security interest registered against the property is _____.
4. THAT I have examined the payout statement and have caused funds from the purchase monies sufficient to payout the mortgage, to be paid as follows:

Method of transmission:
Method of delivery of funds:
Payee:
Address of Payee:

AND I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the *Canada Evidence Act*.

DECLARED before me, at *[enter place]*,)
in the County of *[enter county name]*)
Province of Nova Scotia,)
this *[day #]* day of *[enter month and year]*)

_____)
A Barrister or Commissioner of the)
Supreme Court of Nova Scotia)

_____)
[enter name of solicitor]