



NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM TO COUNCIL

From: Lawrence Rubin

Date: November 23, 2018

Subject: Professional Standards – Real Estate– Standard 3.4 Discharge of Mortgages

DATE November 23, 2018	Council	Introduction
	Council	Approval

Recommendation/Motion:

This is the introduction to Council of a revised standard 3.4 – Discharge of Mortgages - by the Professional Standards (Real Estate) Committee. Following introduction, the Committee will communicate this proposed revised Standard to the membership for review and consultation. The Committee will review any comments received and then present the final form, amended if necessary, to Council for approval.

Executive Summary:

One of the Committee's mandates is to review and update existing standards as appropriate and necessary so that the standard aligns with current practice. In this regard, the Committee has determined that the current Discharge of Mortgages standard as approved by Council on November 22, 2002, requires updating to align with current practice and legislation, in particular the *Land Registration Act*.

The revised standard provides guidance and assistance with respect to identification of the parcels that are to be the subject of the release and the appropriate completion of recording of the release.

Existing Standard	Proposed Standard	Rationale
<p data-bbox="201 313 743 337">STANDARD 3.4 DISCHARGE OF MORTGAGES</p> <p data-bbox="201 386 743 553">A lawyer must examine all mortgages recorded affecting a parcel. A lawyer must, in a timely fashion, obtain and record discharges for those mortgages being discharged.¹</p> <hr/> <p data-bbox="201 597 359 621">FOOTNOTES</p> <p data-bbox="201 634 705 802">¹ Regulations made pursuant to the <i>Legal Profession Act</i>, S.N.S. 2004, c. 28, s. 8.2.4 - 8.2.8. See also <u>2007 Mortgage Payout Protocol</u> available on LIANS website.</p> <p data-bbox="201 846 743 1013">² Undischarged mortgages: <i>Real Property Act</i>, R.S.N.S. 1989, c. 385, s. 28(2) and <i>Limitation of Actions Act</i>, R.S.N.S. 1989, c. 258. See also <i>Land Registration Act</i>, S.N.S. 2001, c. 6, ss. 40(1), 51(4) and 60.</p>	<p data-bbox="772 313 1314 337">STANDARD 3.4 DISCHARGE OF MORTGAGE</p> <p data-bbox="772 386 1314 483">A lawyer who is preparing a release of mortgage or recording a release of mortgage must:</p> <p data-bbox="772 527 1314 699">a) Confirm with the client and document instructions to release all parcels (if more than one) to be released including any parcels created by subdivision subsequent to recording of the mortgage;</p> <p data-bbox="772 743 1314 878">b) Determine if the discharge enables release of all parcels intended and authorized to be released, if the mortgage attaches to more than one parcel;</p> <p data-bbox="772 922 1314 1057">c) Determine if there is a related instrument such as an amendment, assignment of rents, or postponement or a textual qualification, which ought to be released/removed;</p> <p data-bbox="772 1101 1314 1235">d) Ensure that any release by a corporate Releasor is given under seal, failing which the Release must set out the authority of the person executing the Release¹;</p> <p data-bbox="772 1279 1314 1382">e) Confirm the recording of the power of attorney if the document is executed pursuant to such authority.</p>	<p data-bbox="1346 313 1887 662">In discussing the standards, the Committee determined that the current Discharge of Mortgages standard as approved by Council on November 22, 2002, requires updating to align with current practice and legislation. The revised standard is intended to give guidance and assistance with respect to identification of parcels to be released and the appropriate completion of recording of the release.</p>

f) Ensure, when recording a Release, that the name of the Commissioner or other authorized person before whom it is sworn or signed, is typed, stamped, or printed legibly below the signature of such person²;

g) Ensure the accuracy of the information contained in Form 27, bearing in mind the fact that the Form contains a certificate of legal effect.

A lawyer who has given an undertaking for the release of a mortgage must ensure that this is done in a timely manner, either by obtaining and recording a release or by effecting removal pursuant to s.60 of the Land Registration Act.³

ADDITIONAL RESOURCES

Mortgage Discharge Escalation Contact List, LIANS website

Form 27 Checklist

PRACTICE NOTES

Removal pursuant to Land Registration Act
s.60

Where there are reasonable and probable grounds to believe that all of the obligations have been performed, the security interest holder has agreed to the release, the security interest does not affect the parcel, or no security interest exists, a written demand may be served upon the holder of the security interest and if that holder does not comply with the demand within thirty days

following service, the Registrar may be required to cancel or amend the recording.

Land Registration Act s.40

An unreleased security interest in a residential mortgage that is more than forty years old and that has not been amended or supplemented by an instrument recorded during the preceding forty years is not an interest to be included in a parcel register and should not be included in the Application for Registration when migrating. If the mortgage is dated less than forty years ago at the time of migration or if it has been revised or supplemented by a document less than forty years ago, it must be included in the Application for Registration but once the forty year period has elapsed, it can be removed by operation of law.

Real Property Limitations Act s.24(2)

If a period of more than twenty years has elapsed from the maturity date set out in the mortgage or any registered or recorded renewal thereof, the mortgage does not constitute an interest in the parcel and does not need to be included in the application for registration. If it already exists in the parcel register, it can be removed by operation of law. It should be noted that the application of this provision is not limited to residential mortgages and, unlike s.40(1) of the Land Registration Act, the time period for this remedy is twenty years as opposed to forty years.

FOOTNOTES

Footnotes

¹ Land Registration Act, S.N.S 2001 c.6 ss79 and 83

² Land Registration Administration Regulation 5(10)

³ Regulations made pursuant to the *Legal Profession Act*, S.N.S. 2004, c.28, 8.2.6-8.2.10.
See also 2007 Mortgage Payout Protocol available on LIANS website