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MORTGAGE FRAUD AND DISCHARGE ISSUES

Sidney H. Troister
Torkin Manes Cohen & Arbus LLP

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INTRODUCTION

[1] Mortgage fraud has become a hot topic in lending and real estate conveyancing circles recently. It takes many forms including the "Oklahoma" flip at inflated values, identity theft, impersonation and imposter fraud, and real property theft. It is said to cost hundreds of millions of dollars, much of which is absorbed by CMHC, title insurers and lending institutions, all as the cost of doing business.

[2] One fraud that seems to have received significant notoriety, particularly in Western Canada, involves the fraud of Martin Keith Wirick, a lawyer in British Columbia. It is his fraud, or the type of fraud in which he participated, and the suggestions for change to prevent it in the future, that is the focus of this paper.

[3] In 2002, the Law Society of British Columbia began addressing the fraud of Martin Keith Wirick, arising from his role in the failure to discharge mortgages required in connection with real estate transactions. According to the Law Society of British Columbia's Bencher's Bulletin (July-August 2003), as of August 1, 2003, the Law Society had received 521 claims totaling $73.4 million. 71 claims had been dealt with resulting in payments of $12.3 million. The decision of ***Wirick (Re)*** of the British Columbia Supreme Court (In Bankruptcy)[1] indicates that Mr. Wirick breached his undertakings as many as 300 times. The trustee in bankruptcy estimated improper disbursements by Mr. Wirick of more than $50 million.

[4] Mr. Wirick's continuous failure to discharge mortgages as required under agreements of purchase and sale and in accordance with undertakings that he gave to do so, has achieved such attention probably because of the extent of the failure and the value of the losses arising from that failure. His brand of fraud, however, is by no means new.

THE BASIC FACTUAL CONTEXT

[5] The fact situations in each transaction are very simple. It is only the amounts involved and the number of transactions in which the failure occurred that makes the Wirick breaches so significant.

[6] The frauds arose in transactions that followed the following scenario or a variation of it.

[7] Mr. Wirick's client, Tarsem Singh Gill, either personally or through a company or nominee, would purchase a property. Mr. Gill would either give a new mortgage to finance the purchase or construction or assume a mortgage that was then registered on title. Mr. Gill then sold the property in what would typically involve an all cash transaction for the new purchaser. In all cases, the transaction closed with the closing funds being paid in trust to Mr. Gill's lawyer, Mr. Wirick. Mr. Wirick would give to the new purchaser or his lawyer a personal undertaking to obtain and register a discharge of the mortgage that was not to be assumed by the purchaser and it was expected that Mr. Wirick would use the funds in his trust account to do so.

[8] Simply, the closing funds were to be paid to Mr. Wirick in trust and Mr. Wirick was to use those funds to pay and satisfy the mortgage which Mr. Gill had outstanding on title. Once paid, the mortgagee would deliver a discharge of mortgage which Mr. Wirick would register, thereby satisfying his undertaking.

[9] Instead, Mr. Wirick, upon the instructions of Mr. Gill, gave the funds to Mr. Gill on what we understand to have been his expectation that Mr. Gill would provide additional monies later to look after the costs of obtaining the necessary discharge. Mr. Gill did not provide those additional funds and the mortgage remained unpaid and an encumbrance on the purchaser's property.

[10] In another scenario, but following a similar pattern, Mr. Gill refinanced properties that he already owned and Mr. Wirick again did not use part of the mortgage proceeds to discharge the existing prior mortgages but instead gave the funds to Mr. Gill and expected funds to be provided subsequently in order to discharge those existing mortgages.

[11] In all cases, Mr. Wirick gave an undertaking to the solicitor acting on behalf of the purchaser or the new mortgagee, to obtain and register a discharge of the existing mortgage.

[12] Mr. Gill appears to have prevented his scheme from being detected by using part of the funds he received from Mr. Wirick to service the mortgages which should have been discharged or to pay off and discharge mortgages from earlier transactions. As a

result, the mortgage that should have been discharged would still be performing and in good standing and similarly, the new mortgage was also performing and in good standing since it was kept current by Mr. Gill or, when the property was sold, by the innocent purchaser. It was only after several hundred such transactions and claims totaling an astounding $73,400,000.00 that the fraud and breach of solicitors' undertakings were disclosed.

[13] In the fallout from the Wirick affair, there appears to have been at least some suggestion that this problem would never have arisen had lenders been required to provide discharges of mortgages in a timely fashion. That, of course, assumes that the lenders actually received discharge funds and that their delay caused the problem. My analysis is that lenders failing to deliver discharges in a timely fashion was not the root cause of the problem that occurred in Wirick but rather, it was the conveyancing practice as conducted in British Columbia that was, in substantial measure, the cause of the problem.

THE DUTY OF LAWYERS

[14] At least in Ontario, where I am most familiar, and I would suspect in every other province in Canada, including British Columbia, when a lawyer is retained to act on the purchase of property, or to act on a refinancing of a mortgage on property, his or her obligation, among other things, is to certify or give an opinion to the buyer or the lender on the state and quality of the title to the property and the state of outstanding encumbrances. It is fundamental to the lawyer's retainer that the lawyer's duty is to ensure the purchaser or lender client gets what they bargained for, most typically by ensuring compliance with the terms of an agreement of purchase and sale or a mortgage commitment.

[15] Invariably, such agreements of purchase and sale or mortgage commitments stipulate that title will be free of other encumbrances or that a mortgage will be a first charge on the land.

[16] As an example, in Ontario, the typical agreement of purchase and sale provides that the vendor is required to provide, on or before closing, title free and clear of all encumbrances except those encumbrances which are intended to be assumed or which the

agreement of purchase and sale specifically provides that title will be subject to. Similarly, the British Columbia form requires title free and clear of encumbrances except as provided in the agreement. Often real estate agents add to the agreement of purchase and sale a specific provision that the vendor will discharge all other mortgages, liens or encumbrances on or before closing at his or her own expense. When acting for a lender, a lawyer will give an opinion on title and confirm the priority position of the mortgage, e.g. that it is a first or second mortgage on title.

[17] While the above obligations seem relatively straight forward, they are problematic from a practical point of view. Often, the vendor's or borrower's title is not free and clear and there are existing mortgages that must be discharged in accordance with the agreement of purchase and sale on or before closing. However, that is a requirement which cannot be regularly satisfied. For example, assuming an all cash purchase transaction of $100,000.00 where the vendor's property is subject to a mortgage of $60,000.00, the vendor has $40,000.00 of equity in the property and presumably does not have $60,000.00 of spare cash available to discharge that $60,000.00 mortgage on or before closing. Obviously, the vendor intends to use $60,000.00 out of the $100,000.00 sale proceeds that he receives on closing in order to discharge the $60,000.00 mortgage. Thus, the vendor is unable, in most cases, to have a registerable discharge available at closing as required by the terms of the agreement of purchase and sale. Institutional lenders in particular will not release a discharge of mortgage, even in escrow, until they have received all monies owing under the mortgage and are satisfied that the mortgage should, in fact, be discharged.

[18] The practical reality is that in the typical purchase, sale or mortgage transaction, one of the fundamental terms of the agreement of purchase and sale or mortgage commitment, i.e. to provide good title free and clear of encumbrances, on or before closing, cannot be fulfilled.

[19] Throughout the country, a practice developed that is clearly not consistent with the terms of any agreement of purchase and sale or mortgage commitment. Notwithstanding the terms of such agreements, a lawyer would receive the closing funds, give a personal undertaking to obtain and register a discharge of mortgage within a reasonable time after closing and, in accordance with a mortgage discharge statement provided by the lender, use those closing funds to pay to the lender the amount required to obtain the discharge. The discharge would be delivered some weeks or months after payment and would be registered on title. The buyer or lender would ultimately get what

they bargained for but title would not have been clear of such mortgage on or before closing.

THE PROBLEM WITH UNDERTAKINGS TO DISCHARGE

[20] Three problems arose from that practice. The first is a recognition that closing real estate transactions in accordance with such undertakings was contrary to the terms of the basic agreement of purchase and sale. Notwithstanding that the practice among lawyers was to close transactions without having discharges available at closing, and to give undertakings to obtain discharges later, the typical agreement of purchase and sale mandated that title should be free and clear of outstanding encumbrances on closing and as a result, a discharge of mortgage must be available at closing. There was a conflict between contractual terms and how the contract would be performed practically.

[21] In ***Fong v. Weinper***,[2] a purchaser attempted to avoid its obligations to close a transaction because a lawyer, acting for the vendor, attended at closing and rather than having a discharge of mortgage available, presented a solicitor's undertaking to discharge the mortgage after closing. The court stated that without an agreement between the parties that would deviate from the terms of the agreement of purchase and sale, the purchaser was entitled in accordance with his agreement to free and clear title on closing. If a discharge was not available, the vendor was in breach of the agreement of purchase and sale and the purchaser had no obligation to close. The standard of practice did not alter the purchaser's right to strict compliance with the terms of the agreement of purchase and sale.

[22] A second problem that arose came to the fore in Ontario in about 1981. At that time, a developer was completing condominium unit sale transactions where, in accordance with the agreement of purchase and sale, purchasers were required to pay the full purchase price to the vendor and would receive a vendor's undertaking (not its solicitor's undertaking) to register a partial discharge of the vendor's blanket construction mortgage after closing as against the purchaser's unit. Typically, the vendor would then pay out the blanket mortgage to obtain a release or discharge of the blanket mortgage as it related to the purchased unit out of its general bank account. The vendor, rather than the vendor's lawyer, gave an undertaking to obtain and register a discharge.

[23] Between the date of closing when the builder received the net sale proceeds and the time when the builder intended to pay to its mortgage lender the amounts required for partial discharges of the blanket mortgage, the builder went into receivership. The funds in the bank account became funds available for all creditors and were not impressed with any trust for either the purchaser or the mortgage lender. The mortgage lender, still owed on his blanket mortgage and the mortgage now in default, sought to enforce its mortgage against those purchasers who had purchased their units and acquired title but who did not have partial mortgage discharges for the blanket mortgage.

[24] In the claims that followed, it was argued that the purchasers' lawyers had a duty to the purchasers to advise them of the risk of paying closing funds to the vendor without any assurance from the lender that a discharge would be provided. Regardless of the merits of the argument that the purchasers had agreed to the manner in which the closing funds were to be paid, the risk associated with closing a transaction and not ensuring that a lender received the funds necessary to discharge its mortgage became apparent.

[25] A third problem arises that parallels the Wirick case and that involves the lawyer as thief. Ontario, and perhaps other provinces, has encountered situations where, as in Wirick, a vendor's lawyer gave an undertaking to discharge a mortgage but rather than sending funds to the lender, the lawyer misappropriated the closing proceeds. The vendor's lawyer did not forward the funds to the lender and the mortgage discharge was never provided. In those cases, it was the lawyer for the vendor who misappropriated the funds earmarked for the lender. His vendor client received his net proceeds of sale. It was only the purchaser's title that remained encumbered by the unpaid vendor's mortgage.

[26] The repercussions of such a fraud or misappropriation typically are as follows: The purchaser's or new lender's title is still subject to a mortgage that should have been discharged. The purchaser or new lender has entrusted its money to their lawyer who was retained to ensure that the client got what he had contracted for. However, the lawyer did not ensure that the agreement of purchase and sale or commitment was performed in accordance with its terms, i.e. title was not clear of prior mortgages and the money is gone. The purchaser's or lender's lawyer is arguably negligent in the provision of services to his client.

[27] The purchaser's or lender's lawyer will have obtained a personal undertaking from the vendor or the vendor's lawyer to pay off the mortgage and deliver and register a discharge. However, the vendor is insolvent and the vendor's lawyer is without funds

and so the client's lawyer cannot enforce performance of the undertaking. The purchaser who depended on his lawyer for good title (and not to lose his money) makes a claim against his lawyer. The purchaser's lawyer reports a claim to his insurer to indemnify with respect to the negligence claim. The purchaser's lawyer's insurer pays the mortgage to indemnify the lawyer for his negligence.

[28] Whether Mr. Wirick was a dupe of his client and did not benefit from the fraud is irrelevant. In all of these examples of loss, including those involving Mr. Wirick, it is the purchaser or lender that sustained the loss and the question is who had the duty of care to that client?

[29] The Law Society of British Columbia has paid many of the Wirick claims through its Special Compensation Fund. I would suspect that it paid the Wirick claims not as insurer for Wirick, but because of his fraud. It is curious but not necessarily relevant that the lawyers who accepted Mr. Wirick's undertaking were not regarded as negligent in failing to protect their clients' contractual rights. Perhaps the Law Society and the purchasers' lawyers' insurer may have made a policy decision given the number of similar claims to consider the real estate practice in British Columbia of giving and receiving solicitors' undertakings as acceptable and within a reasonable standard of care. Perhaps in other jurisdictions, the lawyers for the various purchasers would have been sued for negligence for accepting the undertaking and not securing or ensuring performance. Stated differently, each purchaser entrusted his money to his lawyer. His lawyer's duty was to ensure that no one stole or misappropriated it. As the Ontario court in ***Fong v. Weinper*** concluded, a standard of practice should not trump contractual rights except with a client's written authority.

THE TWO CHEQUE SYSTEM

[30] Ontario responded quite quickly to the 1981 events referred to above and established the two cheque system for mortgage discharges which continues to the present time. Together with amendments made to the standard form of agreement of purchase and sale used in Ontario, it goes a long way in preventing the other issues that arise with discharges of mortgages. As will be noted, some other provinces have done the same to avoid the same problem. British Columbia, unfortunately, did not have that practice in place and that is perhaps, in part, what permitted Mr. Wirick to use funds in his trust account improperly and contrary to his own undertaking.

[31] The two cheque system works as follows. Using the same example indicated above, on a $100,000.00 transaction where there is a $60,000.00 mortgage that is to be discharged, for example by ABC Bank, the vendor's lawyer obtains a mortgage discharge statement from ABC Bank indicating the amount it requires to satisfy the mortgage debt. Instead of delivering one cheque to the vendor's lawyer, the purchaser's lawyer delivers two cheques, one payable to ABC Bank directly in the sum of, in our example, $60,000.00, with the balance of $40,000.00 payable to the vendor or as the vendor directs. The lawyer for the purchaser still obtains the vendor's lawyer's undertaking to obtain and register the discharge but in this case, the funds are made payable to ABC Bank directly. Instead of the vendor's lawyer drawing his own cheque to the Bank, the vendor's lawyer forwards the purchaser's cheque to the Bank. This procedure prevents the funds required to discharge the mortgage from being deposited in the lawyer's trust account and being misused or being paid directly to the vendor for his own personal use. It is not the vendor's lawyer that controls the recipient of the funds, but the purchaser's lawyer.

[32] Ontario went further and, in response to ***Fong v. Weinper***, revised its standard form of agreement of purchase and sale. Solicitor's undertakings to obtain and register discharges of mortgage are permitted where the lender is an institutional lender such as a bank, trust company, insurance company, or the like. Thus, the agreement of purchase and sale is now consistent with the reality of practice. A discharge need not be produced on closing.[3]

[33] In the case of private or non-institutional mortgage situations, where, for example, a lender is an individual or a private lending company and not an institutional lender, the discharge must be available at closing. The practice in Ontario has developed such that lenders will release the discharge on private mortgages in escrow to the vendor's lawyer, or other arrangements will be made so that the discharge of a private mortgage is, in fact, available at the closing. In that case, one need not worry about the inability to obtain a private discharge after closing, the death of a mortgagee between closing and the time they would otherwise have issued the discharge, accounting amendments that result in a shortfall or request for additional funds, etc.

[34] The British Columbia Real Estate Association form of agreement of purchase and sale has also dealt with the ***Fong v. Weinper*** issue by requiring the purchaser to accept that payment of closing funds will be made by the vendors' lawyers in accordance with the British Columbia CBA Standard Undertakings and that a discharge need not be

produced on closing. The CBA Standard Undertakings makes no distinction between institutional and private lenders.[4]

THE CANADIAN PRACTICE

[35] As noted above, some provinces have now revised their forms of agreements of purchase and sale to reflect the right to give undertakings instead of producing discharges on or before closing. That at least solves the ***Fong v. Weinper*** issue.

[36] According to our research, the two cheque system that might have prevented the Wirick type of fraud has not been widely embraced in Canada. It may well be that other provinces have not experienced this type of fraud and as a result, there is no apprehended need to fix that which is not broken.

[37] In New Brunswick, there is a two cheque system similar to the Ontario practice. There is no specified time limit for registering the discharge of the mortgage.

[38] Prince Edward Island, Manitoba and Nova Scotia do not use a two cheque system. They appear to operate with one cheque paid to the vendor's solicitor, in trust, with reliance on the vendor's solicitor's undertaking to discharge the mortgage.

[39] Alberta also relies on solicitors' undertakings and a single cheque. According to the Real Estate Practice Conveyancing Report prepared by The South Alberta Real Property Subsection of the Canadian Bar Association

> "While it is recognized that there is a risk involved in undertaking to discharge existing encumbrances, it is recommended that vendor's solicitors continue to do so, as any other proposed solution (such as having the purchaser's lawyer provide the undertaking to the new mortgagee or attempt to obtain the informed consent of all parties to a situation where potentially an existing mortgage may not be discharged) are, in the committee's view, unworkable."

[40] Section 75 of ***The Law of Property Act*** (Alberta) requires a mortgagee, within 30 days of being paid in full, to furnish a discharge of the mortgage to the mortgagor.

Failure to do so makes the mortgagee liable to being charged with an offence and a fine of not more than $500.00. Anecdotally, I am not aware of any charges or the extent of compliance, particularly by financial institutions.

[41] I have not canvassed standard forms of agreements of purchase and sale in other jurisdictions to determine if this practice of accepting undertakings is consistent with the terms of such agreements. Even so, the practice and good faith reliance among lawyers to perform undertakings seems well entrenched in most provinces. Anecdotally, local practice in some communities in Ontario does not seem to abide by the two cheque system, notwithstanding the terms of agreements of purchase and sale regularly used in Ontario or practice bulletins issued by the Law Society of Upper Canada. The lawyers rely on mutual trust and good faith, notwithstanding client's contractual rights and mandated guidelines.

[42] In Manitoba, trust letters are exchanged between the vendor's lawyer and purchaser's lawyer. Mortgage proceeds are forwarded to the vendor's lawyer 10 days after closing when all other documents have been registered.

[43] After Wirick, the Conveyancing Practices Task Force of the Law Society of British Columbia attempted to institute a two cheque system but it apparently met with resistance from the Bar. It was not pursued. Instead, reliance continues to be placed on the vendor's solicitor's undertaking to discharge the mortgage and the procedure arising from the Task Force referred to as CBA Standard Undertakings. Within 2 days of receipt of trust cheques, vendors' solicitors must furnish proof that the mortgage was paid out by providing to the purchaser's lawyer a copy of the pay out statement, a copy of the front of the cheque payable to the lending institution, proof of delivery to the lending institution of the funds and a copy of the letter addressed to the lending institution which accompanied the cheque. The lawyer is required to register the discharge within 60 days and if the lawyer fails to do so, the purchaser's lawyer is required to advise the Law Society of the institution's failure to provide the discharge.

[44] The British Columbia system, as well as the systems in all but Ontario and New Brunswick, is still not designed to prevent misappropriation. A purchaser's money is still delivered to a vendor's lawyer in trust without any assurance that the funds will reach the lender. Lawyers, perhaps without their client's knowledge, pay their client's money to other lawyers and rely on the assumption that lawyers will be honest in their dealings with one another and will comply with their undertakings. A 30 day or 60 day requirement that the discharge be registered assists only in limiting the extent of fraud

rather than preventing it. Simply put, the British Columbia whistle would have been blown earlier on Wirick had he been obliged to ensure that the discharge was registered within a specified time. One must, however, ask the question: why didn't the purchasers' lawyers follow up in ensuring that the undertakings given by Wirick were complied with in a timely fashion? Clearly, there were a large number of lawyers who were not following up with Mr. Wirick to confirm his timely performance of his undertakings and ensuring that the funds with which they had been entrusted to ensure were paid to the lender were protected. Where were the purchasers' lawyers in ensuring that their clients' expectations of good title were realized within a reasonable time after closing?

[45] British Columbia has taken an approach different from that in Ontario by requiring the vendor's lawyer to provide evidence that the payment has been made within 5 days in order to short circuit any major and recurring fraud. In British Columbia, they have not otherwise changed the process of giving and accepting undertakings.

LEGISLATION REQUIRED?

[46] Is there a problem that requires uniform legislation? In my view, there is no need for legislation. Wirick was a fairly isolated case that proved to be very expensive to the Law Society of British Columbia because of Mr. Gill's ability to keep all of his lenders current while he misappropriated millions. Of course, the practice of paying discharge funds to lawyers' trust accounts and reliance on undertakings depends on good faith dealings and honesty among lawyers that is open to abuse. Further similar claims can occur. What is interesting is that most of the law societies or bar associations fail to recognize that clients' contractual rights and the protection and safeguarding of clients' money should supercede lawyers' own convenience. Lawyers' convenience seems to have taken precedence over the best practice for protecting clients' rights and money.

[47] It is suggested that one solution to the problem is to require banks to deliver discharges within a timely and stated period following payment. That appears, in my view, to deflect responsibility for what occurred in Wirick. Before banks can be accountable for delivering discharges, they have to receive the discharge funds. That is the responsibility of the lawyers and as I indicated at the outset, it is where the system broke down in Wirick. Uniform legislation imposed on banks to deliver discharges quickly would never had prevented the Wirick frauds or any of the frauds discussed in this report from occurring[5]

[48] Most of the provinces do not seem to have encountered fraud of a similar nature or extent involving breach of solicitor's undertaking that has led them to impose other measures to protect them and their insurers. Lawyers seem to operate on the basis of their undertakings and satisfying their obligations to pay discharge amounts to lending institutions without major incident. Ontario and New Brunswick have taken a step to provide even better security to ensure that mortgage proceeds reach their intended destination by invoking the two cheque system.

[49] The system, whether the two cheque system or the undertaking system, at least at this time, appears to be working although the possibility of a recurrence of a Wirick type fraud, perhaps not on such a scale, remains in many of the jurisdictions. However, the exposure or risk may be regarded as remote or isolated enough not to force a change in conveyancing practice.

[50] In my view, the conveyancing practices across Canada are local in nature and the real estate bars place a great deal of reliance on the mutuality of obligation amongst lawyers which, except in rare cases (but costly ones), seems well-placed.

[51] In no province does it appear that funds targeted to be used for discharging mortgages are paid to the vendors themselves. The funds invariably are directed to the solicitors with the result that the risk of fraud arises in the event of a dishonest lawyer misappropriating trust funds rather than using them for discharge purposes.

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[1] [2004] B.C.J. No. 1773

[2] [1973] 2 O.R. 760 35 D.L.R. (3d) 244; see also ***Bunn v. Lock*** (1987), 61 O.R. (2d) 772 (C.A.); ***Garfreed Construction Co. Ltd. v. Blue Orchid Holdings Ltd.*** (1976), 15 O.R. (2d) 22.

[3] The Ontario Real Estate Association standard form provision for discharges of mortgages provides as follows:

> "Buyer shall not call for the production of any title deed, abstract, survey or other evidence of title to the property except such as are in the possession or control of Seller. If requested by Buyer, Seller will deliver any sketch or survey of the property within Seller's control to Buyer as soon as possible and prior to the Requisition Date. If a discharge of any Charge/Mortgage held by a corporation incorporated pursuant to the

> Trust and Loan Companies Act (Canada), Chartered Bank, Trust, Credit Union, Caisse Populaire or Insurance Company and which is not to be assumed by Buyer on completion, is not available in registrable form on completion, Buyer agrees to accept Seller's lawyer's personal undertaking to obtain, out of the closing funds, a discharge in registrable form and to register same on title within a reasonable period of time after completion, provided that on or before completion Seller shall provide to Buyer a mortgage statement prepared by the mortgagee setting out the balance required to obtain the discharge, together with a direction executed by Seller directing payment to the mortgagee of the amount required to obtain the discharge out of the balance due on completion."

[4]The British Columbia Real Estate Association standard form provision for discharges of mortgages provides as follows:

> "If the Seller has existing financial charges to be cleared from title, the Seller, while still required to clear such charges, may wait to pay and discharge existing financial charges until immediately after receipt of the Purchase Price, but in this event, the Seller agrees that payment of the Purchase Price shall be made by the Buyer's Lawyer or Notary to the Seller's Lawyer or Notary, on the CBA Standard Undertakings to pay out and discharge the financial charges, and remit the balance, if any, to the Seller."

[5] There are other issues regarding financial institutions giving discharges of mortgages that can be problematic. Obviously, some institutions take longer than others to process and deliver discharges. Electronic registration systems have created new procedures for registration and at issue is whether vendors' lawyers can electronically register discharges for lenders or whether the lenders need to control that process themselves. Accounting issues arise on occasion. A discharge statement may indicate a balance payable but a mortgage payment may be discovered to be N.S.F., whereby the lender, after the fact, insists on further funds to satisfy the account. Amounts owing on mortgages given to secure lines of credit can vary daily and lenders may inadvertently advance funds on a line of credit after releasing a discharge statement that the lawyers otherwise rely on. The lenders typically refuse to release a discharge without the balance being paid, usually after the deal has closed, when the purchaser is in possession and the vendor has received his closing funds and disappeared. Banks, typically, rely on the "E & O E" qualification to protect themselves against management or system errors putting purchasers and lawyers at risk of a requirement for further funds.

These types of concerns are too broad for consideration in this paper.