

B. COMMON PITFALLS OF PAYOUT STATEMENTS [§9.4]

I. TAX ACCOUNTS [§9.5]

The lender may maintain a tax account in addition to the mortgage account, where one-twelfth of the estimated annual tax bill is collected each month to enable the lender to pay the taxes when due. Institutional lenders will usually reflect this information in their payout statements. It is less common for an individual or corporate lender to maintain a tax account.

2. PER DIEM INTEREST [§9.6]

Since payout statements usually stipulate a payout amount as of a mortgage payment date (for example, the first day of the month), it will be necessary to add daily interest payable on the mortgage up to the date payment is or will actually be made, if that date is after the date specified on the payout statement. Normally, payout statements identify a daily amount of interest payable after the date specified in the payout statement (see “Holdbacks” in this chapter).

Note any provisions of the mortgage stipulating the time when funds must be received by the lender in order to be credited to that day. Some mortgages now contain a provision that monies must be received before 12:00 noon in order to be credited as a payment received on that date.

Particular attention should be given to the location of the lender—that is, where payment can be made to stop the interest clock from running. Do not send monies to Toronto if a local branch will accept payout. You should also know what the hours of operation of the lender are.

Note the source of funds to be used to pay out the mortgage. Do not rely on the timely receipt of funds in calculating per diem interest. Funds often arrive late due to client and courier delays, failure by clients to obtain certified cheques or bank drafts, and problems in closing concurrent transactions.

3. UNMADE PAYMENTS [§9.7]

Payout statements always specify the outstanding balance of the mortgage on a particular date and usually include the caution “provided that all regular payments are made by the mortgagor to the date of payout”. Therefore, the borrower must provide evidence that

all payments have been made in order to avoid any shortfall. See also “Holdbacks” in this chapter.

4. PREPAYMENT PENALTIES [§9.8]

Unless an “open mortgage” is being paid out, there is generally some form of prepayment penalty provided for in the mortgage. Determine the exact nature of these penalties, and take them into account when calculating the amount required to pay out the mortgage. If the mortgage is due, consider whether the lender can demand a prepayment penalty in light of s. 8 of the *Interest Act*, R.S.C. 1985, c. I-15. For further discussion, see “Section 8—No Fine, etc. Allowed on Payments in Arrears” in chapter 2.

5. “E. & O.E.” ON PAYOUT STATEMENTS [§9.9]

A certified payout statement from the lender may bear the endorsement “E. & O.E.” (errors and omissions excepted) by which the lender purports to reserve the right to adjust the stated amount required to secure a discharge if there were errors or omissions in preparing the statement. Even if the payout statement does not bear this endorsement, the lender may take the position that additional money is required to be paid by the borrower/vendor, and litigation may be the only recourse. The *Property Law Act*, R.S.B.C. 1996, c. 377, s. 33(1)(c), obligates a lender to deliver a registrable discharge only “if the mortgagor is entitled to a discharge ...”, which may be of little assistance to the lawyer in satisfying their undertaking to the purchaser’s or lender’s lawyer. See “Discharges—Institutional Lenders” in chapter 8 and *Cherrington v. Montreal Trust Co. of Canada*, 1990 CanLII 2227 (BC SC).

6. B.C. GOVERNMENT SECOND MORTGAGES [§9.10]

At present, there are no outstanding mortgages held with BMO Bank of Montreal (since July 2014), and the portfolio no longer exists. However, for investigation purposes, you may contact:

BMO Bank of Montreal
BC Second Mortgages
865 Harrington Court
Burlington, ON L7N 3P3

Toll-free: 1-888-694-2244

C. HOLDBACKS [§9.11]

The holding back of a reasonable amount of money is a practical method of providing some protection against some of these common pitfalls. Clients will generally accept this practice provided that holdback monies are quickly returned when they are no longer needed.

When a lender provides a payout figure that is “conditional” upon the next regular payment being made, the last payment cheque clearing the borrower’s bank account, or otherwise, it is recommended that the lawyer hold back the amount of the next payment, last payment, or whatever the amount of the “condition” until the borrower provides evidence of the condition having been fulfilled. A note of the holdback should be entered into the lawyer’s diary system to ensure prompt follow up.

D. CLIENT CONFIRMATION [§9.12]

Confirm the amount of the payout with the client. Never assume that the client has volunteered all information about their dealings with the lender or that the information provided by the lender is accurate. For example, if the loans department of a large institutional lender neglects to inform its administration department of, say, amended terms of payout as stipulated in loan documents, a payout statement from the administration department may be inaccurate.

E. DISCHARGE FEES AND PREPARATION OF DISCHARGE [§9.13]

Most, if not all, mortgages include a provision indicating that the mortgage will be discharged at the borrower’s expense. The discharge fees payable vary in amount and generally include the preparation of the actual discharge. However, some institutions call this an “execution fee” and require the borrower’s lawyer to prepare the discharge.

The discharge fees are usually shown by the lender in the calculation of the payout figure on the payout statement. There is also usually a note as to who is to prepare the discharge. If the payout statement is silent on either of these items, the necessary inquiries should be made.