

TAB 19



## THE SIX-MINUTE REAL ESTATE LAWYER 2013

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### Three and Four Way DRA's: What are they and When Do We Need Them?

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## **THREE and FOUR WAY DRA'S: WHAT ARE THEY AND WHEN DO WE USE THEM?**

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Historically, Agreements of Purchase and Sale pre 1980 had a provision that read “Provided that title is good and free from all encumbrances ...” (see TREB form attached as Appendix A from 1974).

There were no exceptions for institutional mortgages or for easements and like matters which are found in the current Ontario Real Estate Association (“**OREA**”) form of Agreement of Purchase and Sale (the “**OREA Agreement**”).

Notwithstanding this provision that title was to be clear on closing, the longstanding practice was that purchaser’s solicitors accepted the personal undertakings of the Vendor’s solicitor to obtain and register a discharge of outstanding mortgages post-closing.

In the case of *Fong v. Weinper*<sup>1</sup> the Purchaser’s lawyer requisitioned the registration on or before closing of a discharge of an outstanding mortgage in favour of an institution, Canada Permanent Mortgage Corporation (now TD Canada Trust). The Vendor’s solicitor proposed to provide a personal undertaking to the Purchaser to discharge post-closing. The Agreement of Purchase and Sale had the provision referred to above and the Purchaser’s lawyer refused to close the transaction due to the failure of the Vendor to produce a discharge of the outstanding mortgage on closing, contrary to the contractual provision in the TREB form. The Court held

With thanks to our articling student Ladislav Kovac for his research and assistance in preparation of this paper.

<sup>1</sup> [1973] OJ No 1956 (HC)

that the requisition was valid and the Purchaser need not close the transaction. This decision was followed in the case of *Garfreed Construction Co. Ltd. v. Blue Orchard Holdings Ltd. et al.*<sup>2</sup>

In the 1980s cases such as these resulted in revisions to the standard real estate agent's form of agreement, the OREA Agreement. As a result of this change institutional mortgages no longer had to be discharged on closing, provided a mortgage statement, a direction re funds to pay off the mortgage in accordance with the institution's payout statement and a personal undertaking of the Vendor's solicitor to obtain and register a discharge of the outstanding mortgage were obtained. With respect to discharge of private mortgages, the contractual obligation to have discharges available on closing remained intact.

Notwithstanding such contractual obligations, there are still some lawyers who accept solicitors' personal undertakings to discharge private outstanding mortgages post-closing and do not ensure that on closing the private lender's solicitor has in his/her possession a signed E-reg Acknowledgment and Direction from the private lender authorizing the discharge of the mortgage. At the other extreme, there are solicitors who insist that the private mortgages be discharged prior to the closing of their transactions whether in respect of a purchase and sale transaction or a mortgage transaction (collectively the "**Transaction**"). They take the position that if the discharge does not occur prior to the closing of the Transaction their client does not have clear title at the time of closing. They forward funds received on the Transaction to the private lender's solicitor and not only do they not establish escrow terms but insist that the discharge of the private mortgage be registered upon receipt of the discharge funds. Once the existing private mortgage is discharged they proceed to close the Transaction. Once the mortgage

<sup>2</sup> [1976] OJ No 2377 (HC)

is discharged the payout funds will not be returned even if the sub-search or execution search discloses new encumbrances or executions. They have used funds which by the terms of the DRA between purchaser and vendor's respective lawyers were subject to escrow terms, yet they were released to private lender's lawyer contrary to such escrow terms. This could prove costly if an execution or a new registration is revealed when they proceed with the registrations required in the Transaction.

I recently encountered a situation where we were acting for a private lender who was being paid off. Certified funds were delivered to our office in accordance with our discharge statement, payable to the mortgagee with no cover letter or explanation as to who was delivering the funds. It turned out to be the purchaser's lawyer who delivered the funds directly to us. I had previously been requested by the Vendor's solicitor to discharge the mortgage immediately upon receipt of the funds required to payout the mortgage and to provide a receipted Discharge of the outstanding mortgage, which we did. These funds were delivered prior to the closing of the purchase transaction.

Several hours later, we received a call advising that there were outstanding executions and could we return the payout funds as there were insufficient funds from the sale transaction to pay the same. I advised I would seek instructions from our client and if he was amenable then we would contact the registrar to see if they would delete the registration of the discharge and allow the mortgage to remain intact. Much to my surprise the registrar agreed to the said request. However there were two subsequent mortgagees who were not prepared to return the funds and their mortgages were also discharged. The parties I understand proceeded to close the purchase and

sale transaction subject to the executions against the Vendor. Thereafter I learned that the purchase was financed by a private lender who in accordance with the Law Society of Upper Canada's ("LSUC") Rules of Professional Conduct ("Rules") retained separate counsel. In this instance we have a number of lawyers that did not take the necessary steps to ensure that payout of private loan and the discharge thereof was handled in a manner which would not prejudice the closing of the purchase and sale and loan transactions. This, I understand, has resulted in claims to LawPro .

The solicitors involved in that matter and others seem to be under the impression that the LSUC Rules require the discharges of private mortgages be registered prior to the registration of a Transfer in a purchase and sale transaction and prior to the registration of a Charge in a loan transaction. This is in fact not the case.

The Adviser Supplement, September 19, 1992 issued by LSUC provides

"The Practice Advisory Service makes the following recommendations:

...D. Discharges of Private Mortgages

... subject to any provision in the Agreement of Purchase and Sale which may affect the purchaser's right to demand clear title on closing, the purchaser's solicitor should require the production and registration of a discharge on or before closing."

This requires the discharge to be available on closing and does not stipulate the order of registration or whether the discharge should be registered independent of the purchase and sale transaction or as part thereof and subject to the terms of the DRA.

With the advent of electronic registration, a joint committee of the LSUC and the Ontario Bar Association (the “**Joint Committee**”) was established and they issued an interim report on April 12, 2002<sup>3</sup>.

The recommendation was consistent with the 1992 Adviser Supplement that subject to the provisions of the Agreement of Purchase and Sale, “...lawyers should not give or accept personal undertakings respecting [private] discharge after closing.”<sup>4</sup>

Electronic registration was predicated on escrow closings occurring subject to the terms of escrow arrangements which were incorporated into a Document Registration Agreement (“**DRA**”) as recommended by the Joint Committee.

In order to ensure that the use of the DRA become standard practice, the Joint Committee had a provision to this effect incorporated in the most commonly used form of Agreement of Purchase and Sale, namely, the OREA Agreement.

“Accordingly the following wording was inserted in the OREA form:

<sup>3</sup> LSUC & OBA Joint Committee on Electronic Registration of Title Documents: Interim Report to the Professional Development and Competence Committee, April 12, 2002 (“**April 2002 Recommendations**”)

<sup>4</sup> Ibid Guideline 5, Appendix C, page 12

11. **Closing Arrangements:** *Where each of the Seller and Buyer retain a lawyer to complete the agreement of purchaser and sale of the Property, and where the transaction will be completed by electronic registration pursuant to Part III of the Land Registration Reform Act, R.S.O. 1990, Chapter L4 and the Electronic Registration Act, S.O. 1991, Chapter 44, and any amendments thereto, the Seller and Buyer acknowledge and agree that the exchange of closing funds, non-registerable documents and other items (the “Requisite Deliveries”) and the release thereof to the Seller and Buyer will (a) not occur at the same time as the registration of the transfer/deed (and any other documents intended to be registered in connection with the completion of this transaction) and (b) be subject to conditions whereby the lawyer(s) receiving any of the Requisite Deliveries will be required to hold same in trust and not release same except in accordance with the terms of a Document Registration Agreement between the said lawyers, the form of which is as recommended from time to time by the Law Society of Upper Canada. Unless otherwise agreed to by the lawyers, such exchange of the requisite deliveries will occur in the applicable Land Titles Office or such other location agreeable to both lawyers.”<sup>5</sup>*

The identical or very similar provision is in use in the current OREA Agreement. This provision makes reference to the Seller and Buyer’s lawyer utilizing the DRA but not to any other party such as a lender’s lawyer or a private lender’s lawyer in respect of a discharge.

The April 2002 Recommendations provide “Although the recommended form of DRA refers to “Purchaser’s solicitor” and “Vendor’s solicitor”, it is not intended that the agreement would be limited to purchase and sale transactions. **Lawyers representing mortgagees, guarantors or others involved in real estate transactions may be necessary parties to such agreement with respect to funds and documents... Appropriate additions or amendments to the recommended form may be made to accommodate those additional parties and the further obligations involved.** <sup>6</sup> [Emphasis added]

<sup>5</sup> LSUC & OBA Joint Committee on Electronic Registration of Title Documents: Interim Report to the Professional Development and Competence Committee, April 12, 2002, page 8

<sup>6</sup> Ibid, Guideline 5, Appendix C, page 11

In respect of private mortgages the Joint Committee April 2002 Recommendations contemplated the use of the DRA “...the vendor’s solicitor could include a Discharge of Mortgage in the DRA as one of the documents to be registered on closing...”.<sup>7</sup>

As noted, the OREA Agreement does not include provisions for a lender’s lawyer if the purchaser’s lawyer is not acting for the lender.

The LSUC Rules, Rule 2.04 (11) and (12) does not permit a lawyer to act for both lender and borrower unless the lender is an institution and under certain other limited exceptions. This could introduce a third lawyer to the transaction but as the OREA Agreement does not make provision for a private lender’s lawyer to be party to the DRA, I find that many, if not most, vendor’s lawyers refuse to include the lender’s lawyer as a party to the DRA pointing to the provisions of the OREA clause. A three way DRA would be appropriate for this type of transaction and is so contemplated by the April 2002 Recommendations.

If in a purchase transaction there is an outstanding private mortgage which is to be discharged on closing, a three way DRA with the lawyer for the private mortgagee being a party should be utilized. If there is both a new private mortgage (or an institutional lender who is not using the purchaser’s solicitor) and an existing private mortgage to be discharged, each having their own solicitors, then a four way DRA should be utilized, see Appendix B for precedent attached.

<sup>7</sup> Ibid, Guideline 5, Appendix C, page 13



In the attached DRA I have suggested that the discharge be registered last and that is to avoid clerical error in case all the instruments are not put into a folder, as they should be, and registered in unison.

From my experience, it seems that the Bar rarely use three and four way DRA's even in instances where it is called for and the title of this paper should have been **THREE and FOUR WAY DRA'S: WHAT ARE THEY AND WHEN SHOULD WE USE THEM?** I hope it is self-evident that three and four way DRA's should be used in all instances when there is an independent lender's lawyer involved or a lawyer acting for a private mortgagee and that the Bar will adopt this practice. It is also hoped that the OREA Agreement is amended to provide for three and four way DRA's. In commercial agreements of purchase and sale that I am involved in I include such provisions in the DRA clause.



Sold for

# APPENDIX "A" TORONTO REAL ESTATE BOARD AGREEMENT OF PURCHASE AND SALE

The undersigned \_\_\_\_\_  
(herein called "Purchaser") having inspected the real property hereby agrees to and with \_\_\_\_\_  
(herein called "Vendor")  
through \_\_\_\_\_ Agent for the Vendor,  
to purchase all and singular the premises on the EAST side of LISGAR STREET  
in the CITY of TORONTO and known as Dwelling  
having a frontage of about 17ft. more or less by a depth of about 132 ft. more  
or less serviced by a lane at the rear (herein called "the real property") and a garage.

at the sale price of FORTY EIGHT THOUSAND ----- Dollars (\$ 48,000.00)  
of lawful money of Canada, payable Cash TWO THOUSAND FIVE HUNDRED ----- Dollars (\$ 2,500.00)  
to the Agent for the Vendor as a deposit to be held by such Agent pending completion or other termination of this agreement and to be credited on  
account of purchase money on closing, and the Purchaser agrees to  
pay a further sum of Five Thousand Five  
Hundred Dollars (\$5,500.00) in cash or by certified cheque to the Vendor on  
closing subject to the usual adjustments.

Vendor agrees to take back a first mortgage for the balance of the purchase  
price repayable One Hundred Fifty Dollars (\$150.00) quarter-yearly off the  
principal sum plus interest at the rate of 10% (Ten per cent) per annum and  
having a period of Seven (7) years to run. Said mortgage, shall contain a  
clause allowing the Purchaser the privilege of paying any additional amount  
of the principal sum in whole or in part, at any time or times without notice  
or bonus.

Vendor agrees to discharge any ~~other~~ existing mortgages, liens, or encumbrances  
registered against the property, at his own expense, on or before date of  
closing.

Purchase price to include: All electric light fixtures attached to the ceilings  
and walls, gas burner and equipment complete, hot water tank (if property of  
Vendor) T.V. tower, all the existing storms and screens, vine presser, two  
fridges, two stoves, two kitchen tables, two beds and all the standard fixtures  
now attached to the property and belonging to the Vendor.

In the event that the Vendor is a non-resident person pursuant to the provisions  
of the Income Tax Act, the Vendor shall prior to closing furnish a certificate  
from the Minister of National Revenue in the prescribed limit pursuant to  
Section 116 of the Income Tax Act.

Vacant possession of the entire premises to be given to the Purchaser on  
the closing date of the deal.

Tenancy if any As above.

PROVIDED the title is good and free from all encumbrances except as aforesaid and except as to any registered restrictions or covenants that run  
with the land providing that such are complied with. The Purchaser is not to call for the production of any title deed, abstract, survey or other evidence  
of title except such as are in the possession of the Vendor. The Purchaser is to be allowed Twenty days from the date of acceptance hereof  
to examine the title at his own expense. If within that time any valid objection to title is made in writing to the Vendor which the Vendor shall be unable or  
unwilling to remove and which the Purchaser will not waive this agreement shall, notwithstanding any intermediate acts or negotiations in respect of such  
objections, be null and void and the deposit shall be returned by the Vendor without interest and he and the Agent shall not be liable for any costs or dam-  
ages. Save as to any valid objection so made within such time the Purchaser shall be conclusively deemed to have accepted the title of the Vendor to the  
real property. This transaction of purchase and sale is to be completed on or before the 19th day of April, 19 74  
on which date vacant possession of the real property is to be given to the Purchaser unless otherwise provided herein.

UNEARNED Fire Insurance Premiums, Rentals, Mortgage Interest, Taxes, Local Improvement, Water and Assessment Rates, Fuel, to be apportioned and  
allowed to date above fixed for completion of sale.  
This offer, when accepted, shall constitute a binding contract of purchase and sale and time shall in all respects be of the essence hereof. It is agreed  
that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby other than as  
expressed herein in writing. All buildings and equipment upon the real property shall be and remain at the risk of the Vendor until closing. Pending com-  
pletion of the sale, the Vendor will hold all insurance policies and the proceeds thereof in trust for the parties as their interests may appear and in event of  
damage to the said premises the Purchaser may either have the proceeds of the insurance and complete the purchase, or may cancel the agreement and have  
all monies theretofore paid returned without interest. Deed or transfer to be prepared at the expense of the Vendor and mortgage at the expense of the Pur-  
chaser. If Vendor is a trustee, deed or transfer is to contain trustee covenants only and mortgage is to be on Vendor's usual long form.  
Any tender of documents or money hereunder may be made upon the Vendor or the Purchaser or any party acting for him and money may be tendered  
by negotiable cheque certified by a chartered bank or trust company.  
This offer and its acceptance is to be read with all changes of gender or number required by the context.

This offer shall be irrevocable by the Purchaser until one minute before midnight the 18th day of March, 19 74, after  
which time, if not accepted, this offer shall be null and void and deposit returned to the Purchaser without interest.

DATED at Toronto, Ont. this 16 day of March, A.D. 19 74

SIGNED, SEALED AND DELIVERED  
in the presence of:

IN WITNESS whereof I have hereunto set my hand and seal.

(Purchaser)

(Purchaser)

The undersigned accepts the above offer and agrees with the Agent above named in consideration for his services in procuring the said offer, to pay  
him on the date above fixed for completion, a commission of Six % of an amount equal to the above mentioned sale price, which commission may  
be deducted from the deposit. I hereby irrevocably instruct my Solicitor to pay direct to the said Agent any unpaid balance of commission from the pro-  
ceeds of the sale.

DATED at Toronto, Ont. this \_\_\_\_\_ day of March, A.D. 19 74

IN WITNESS whereof I have hereunto set my hand and seal.

SIGNED, SEALED AND DELIVERED  
in the presence of:

(Vendor)

(Vendor)

**APPENDIX “B”**

**DOCUMENT REGISTRATION AGREEMENT**

**BETWEEN:**

(hereinafter referred to as the “**Purchaser’s Solicitor**”)

**AND:**

(hereinafter referred to as the “**Vendor’s Solicitor**”)

**AND:**

(hereinafter referred to as the “**Lender’s Solicitor**”)

**AND:**

(hereinafter referred to as the “**Private Lender’s Solicitor**”)

**RE:** \* (the “**Purchaser**”) purchase from \* (the “**Vendor**”) of \*, \*, Ontario (the “**Property**”) pursuant to an agreement of purchase and sale dated \*\* 201\*, as amended from time to time (the “**Purchase Agreement**”), scheduled to be completed on \*, 201\* (the “**Closing Date**”);

**AND RE:** Purchaser first mortgage loan to \*\* (the “**Lender**”) secured by first charge against the Property

**AND RE:** \*\* Discharge of Mortgage No. \*\* registered on \* 201\*, in the principal sum of \$\*.00 on the Property in favour of \*\* (the “**Private Lender**”);

**FOR GOOD AND VALUABLE CONSIDERATION** (the receipt and sufficiency of which is hereby expressly acknowledged), the parties hereto hereby undertake and agree as follows:

Holding Deliveries In  
Escrow

1. Each of the Vendor’s Solicitor, the Purchaser’s Solicitor, the Lender’s Solicitor and the Private Lender’s Solicitor shall hold all funds and closing documentation exchanged between them (the “**Requisite Deliveries**”) in escrow, and *shall* not release or otherwise deal with same except in accordance with the terms of this Agreement. Each of the Vendor’s Solicitor, the Purchaser’s Solicitor, the Lender’s Solicitor and the Private Lender’s Solicitor have been authorized by their respective clients to enter into this Agreement. Once the Requisite Deliveries can be released in accordance with the terms of this Agreement, any monies representing payout funds for mortgages to be discharged shall be forwarded promptly to the appropriate mortgage lender.<sup>1</sup>

<sup>1</sup>Solicitors should continue to refer to the Law Society of Upper Canada practice guidelines relating to recommended procedures to follow for the discharge of mortgages.

Advising of  
Concerns with  
Deliveries

2. Each of the parties hereto shall notify the other as soon as reasonably possible following their respective receipt of the Requisite Deliveries (as applicable) of any defect(s) with respect to same.

Selecting Solicitor  
Responsible for  
Registration

3. The Purchaser's Solicitor shall be responsible for the registration of the following Electronic Documents:
  - a. Transfer/Deed of Land in favour of the Purchaser in respect of the Property;
  - b. Charge/Mortgage of Land in favour of the Lender in respect of the Property;
  - c. Assignment of Rents in favour of the Lender in respect of the Property;
  - d. Discharge of Charge in favour of the Private Lender in respect of Instrument No. \*;

For the purposes of this Agreement, the solicitor responsible for such registration shall be referred to as the "Registering Solicitor" and the other solicitors shall be referred to as the "Non-Registering Solicitor"

Responsibility of  
Non-Registering  
Solicitor

4. The Non-Registering Solicitor shall, upon his/her receipt and approval of the Requisite Deliveries (as applicable), electronically release for registration the Electronic Documents and shall thereafter be entitled to release the Requisite Deliveries from escrow forthwith following the earlier of:

and

Release of Requisite  
Deliveries by Non-  
Registering Solicitor

- a) the registration of the Electronic Documents;
- b) the closing time specified in the Purchase Agreement unless a specific time has been inserted as follows [\_\_\_\_\_ a.m/p.m. on the Closing Date] (the "**Release Deadline**"), and provided that notice under paragraph 7 below has not been received; or
- c) receipt of notification from the Registering Solicitor of the registration of the Electronic Documents.

Responsibility of  
Registering Solicitor

5. The Registering Solicitor shall, subject to paragraph 7 below, on the Closing Date, following his/her receipt and approval of the Requisite Deliveries (as applicable), register the documents listed in Schedule "A" annexed hereto (referred to in this agreement as the "Electronic Documents") in the stated order of priority therein set out, as soon as reasonably possible once same have been released for registration by the Non-Registering Solicitor, and immediately thereafter notify the Non-Registering Solicitor of the registration particulars thereof by telephone or telefax (or other method as agreed between the parties).

Release of Requisite  
Deliveries by  
Registering Solicitor

6. Upon registration of the Electronic Documents and notification of the Non-Registering solicitor in accordance with paragraph 5 above, the Non-Registering Solicitor and the Registering Solicitor shall each be entitled to forthwith release the Requisite Deliveries from escrow.

Returning Deliveries  
where Non-  
registration

7. Any of the parties hereto may notify the other party that he/she does not wish to proceed with the registration<sup>2</sup> of the Electronic Documents, and provided that such notice is received by the other party before the release of the Requisite Deliveries pursuant to this Agreement and before the registration of the Electronic Documents, then each of the parties hereto shall forthwith return to the other party their respective Requisite Deliveries.

Counterparts &  
Gender

8. This Agreement may be signed in counterparts, and shall be read with all changes of gender and/or number as may be required by the context.

Purchase  
Agreement Prevails  
if Conflict or  
Inconsistency

9. Nothing contained in this Agreement shall be read or construed as altering the respective rights and obligations of the Purchaser and the Vendor as more particularly set out in the Purchase Agreement, and in the event of any conflict or inconsistency between the provisions of this Agreement and the Purchase Agreement, then the latter shall prevail.

Telefaxing  
Deliveries &  
Providing Originals if  
Requested

10. This Agreement (or any counterpart hereof), and any of the closing documents hereinbefore contemplated, may be exchanged by telefax or similar system reproducing the original, provided that all such documents have been properly executed by the appropriate parties. The party transmitting any such document(s) shall also provide the original executed version(s) of same to the recipient within 2 business days after the Closing Date, unless the recipient has indicated that he/she does not require such original copies.

Dated this                      day of \*, 201\*.

Name/Firm Name of Vendor's Solicitor

Name/Firm Name of Purchaser's Solicitor

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(Signature)

(Signature)

Dated this                      day of \*\*, 201\*.

Name/Firm Name of Lender's Solicitor

Name/Firm Name of Private Lender's Solicitor

	Joseph Fried Meyer, Wassenaar & Banach LLP Royal Bank Building 5001 Yonge St., Suite 301 Toronto, ON M2N 6P6 PH: 416 223-9191 ext. 230
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<sup>2</sup> For the purpose of this Agreement, the term "registration" shall mean the issuance of registration number(s) in respect of the Electronic Documents by the appropriate Land Registry Office.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Signature)

**SCHEDULE 'A'**  
**ELECTRONIC DOCUMENTS**

1. Transfer/Deed of Land in favour of the Purchaser in respect of the Property;
2. First Charge/Mortgage of Land in favour of the Lender in respect of the Property;
3. Assignment of Rents in favour of the Lender in respect of the Property;
4. Discharge of Charge in favour of the Vendor in respect of Instrument No. \*;