

Ontario Private Mortgages: Law Society of Upper Canada Requirements

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The Law Society of Upper Canada (LSUC) requires Ontario lawyers to keep and provide detailed transaction records when acting for lenders on loans secured or to be secured by a charge on real property in Ontario.

In particular, LSUC By-Law 9 **requires** the lender's lawyer to:

- obtain a signed investment authority from the lender (Form 9D – copy attached),
- provide a specific form of report to the lender following closing (Form 9E – copy attached), and
- if the mortgage is syndicated in any way, ensure there is a signed trust declaration and that a copy of that declaration and the Form 9E is provided to every lender participating in the loan.

Forms 9D and 9E

Form 9D requires a significant amount of information to be completed and acknowledged by the lender, including all the usual loan terms as well as loan to value ratio, property value and how it was determined, details of any trust or syndication arrangements, and details of all fees, holdbacks and commissions. If there are multiple persons contributing to the mortgage fund they all must execute the form, and under the “know your client” guidelines they all must sign in front of a lawyer and go through the now mandatory identification process imposed by the LSUC when monies are changing hands.

Form 9E does not have to be signed by the lender. It is a form of report that is mandated over and above any other reporting standards required by the lender or the law firm in question, and a copy must be prepared and signed by the lender's lawyer and provided to all lenders. As well as the usual summary of mortgage terms this report requires the lawyer to set out details of all fees, holdbacks and commissions, details of any collateral security, and details regarding all other encumbrances.

These are not forms that can typically be completed or finalized by a law clerk, and as such they require extensive input from the lawyers working on the file.

The result of all of this is increased formality and cost, which is often what clients are trying to avoid in private mortgage transactions, especially if the loan is syndicated in any way.

However the rules are mandatory with very limited exceptions. These forms **must** be used with respect to **all** real property mortgages unless one of the following six exceptions applies:

- the lender (1) is a bank listed in Schedule I or II to the Bank Act (Canada), a licensed insurer, a registered loan or trust corporation, a subsidiary of any of them, a pension fund, or any other entity that lends money in the ordinary course of its business; *and* (2) has entered a loan agreement with the borrower and has signed a written commitment setting out the terms of the prospective charge; *and* (3) has given the lawyer a copy of the written commitment before the advance of money to or on behalf of the borrower;
- the lender and borrower are not at "arm's length", with "arm's length" and "related" persons as defined in the *Income Tax Act (Canada)*;
- the borrower is an employee of the lender or of a corporate entity related to the lender;
- the lender has executed the "Investor/Lender Disclosure Statement for Brokered Transactions", approved by the Superintendent under subsection 54(1) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, and has given the lawyer written instructions, relating to the particular transaction, to accept the executed form as proof of the loan;
- the total amount advanced by the lender does not exceed \$6,000; or
- the lender is selling real property to the borrower and the charge represents part of the purchase price (i.e. a vendor take back mortgage).

Syndicated Loans

When there is more than one entity loaning the money, or when the mortgage is syndicated prior to the advance of funds, LSUC By-Law 9 section 24 has additional requirements:

- there must be an original declaration of trust;
- the lender's lawyer must keep a copy and must provide a copy to all loan participants;
- the lawyer must obtain a Form 9D from each mortgage participant;
- the lawyer must provide a copy of Form 9E to each mortgage participant.

There are no exceptions to these requirements.

Material Changes

By-Law 9 also has requirements related to the following changes or acts after the loan is advanced:

- a change in priority of the mortgage that reduces its priority e.g. a subordination;

- a change to a higher priority mortgage that reduces the security of the subject mortgage;
- any release of the collateral or other security held for the loan e.g. when the loan is discharged; and
- any release of any person liable on the covenant to pay contained in the mortgage e.g. the original borrower or a guarantor.

When these changes apply the By-Law requires the lenders lawyer to obtain a new and completed Form 9D from each lender and provide a new and signed Form 9E to each lender, unless one of the original six exceptions applies.

Also, if the lender's lawyer participates in a transaction that substitutes a new charge or acknowledgement of indebtedness, the lawyer must obtain and maintain a copy of the lender's (or lenders', if syndicated) signed consent, unless one of the original six exceptions applies.

Conclusion

Satisfying these requirements can be expensive and time consuming, and for these reasons it is often recommended that "private" mortgages should be avoided except when dealing with (i) corporate lenders who are in the business of lending money and not through syndication; (ii) a mortgage arranged by a licensed mortgage broker who provides the documentation required under the *Mortgage Brokerages, Lenders and Administrators Act*; or (iii) mortgages among related persons not dealing at arm's length.

Form 9D

Investment Authority – Signed by Lender(s)

(Note to lawyer: This form is required in a private mortgage transaction whether or not the mortgage was arranged by you. Please have your client complete every point on this form, with “n/a” being noted if the point is not applicable. This form may be entered on a word processor. For the definition of mortgage broker and other terms found in the clause of the Lawyers' Professional Indemnity Company Policy found at the bottom of this form, please refer to the policy.)

To: *(Specify name of lawyer or law firm.)*

I *(or we)* instruct you to act on my *(or our)* behalf, on my *(or our)* mortgage investment *(or investments)* of *(specify amount)*, the details, conditions and disclosures of which are set out below.

A. Details about the investment:

1. Name and address of borrower *(or borrowers)*: *(specify)*
2. Name and address of guarantor *(or guarantors)* *(if any)*: *(specify)*
3. Legal description and municipal address of real property: *(specify)*
4. Type of property: *(specify, e.g., residence, vacant land, etc.)*
5. (a) Principal amount of mortgage or charge: *(specify)*
5. (b) Amount of loan to be advanced by me *(or us)*: *(specify)*
6. Rank of mortgage or charge is first *(or specify other rank)*.

7. My (or our) investment of (specify amount) represents (specify percentage) of the total loan to the borrower (or borrowers).

8. (a) I am (or we are) satisfied that the approximate value of the property is (specify amount).

8. (b) I (or we) used the following means to determine the approximate value of the property: (specify).

8. (c) Including my (or our) mortgage amount, the percentage of the value of the property that is mortgaged (or /encumbered) is (specify percentage).

9. (a) The term of loan is (specify term of loan in months, years, etc.).

9. (b) The due date of loan is (specify date).

9. (c) The loan is amortized over (specify number of years).

10. The interest rate is (specify interest rate) calculated semi-annually, not in advance (or specify how interest rate is calculated).

11. Particulars of amounts and due dates (monthly, quarterly, etc.) of payments of principal and interest: (specify)

12. Particulars and amounts of any bonus or holdback or any other special terms: (specify)

13. (a) The mortgage is to be registered in the name (or names) of (specify name or names).

13. (b) After completion of the mortgage transaction, a collection or administration fee of (specify amount) per instalment is payable by the investor (or investors) (or borrower) (or borrowers) to (specify recipient of fee).

13. (c) If the mortgage is held in trust, the dates on which payments are to be made by the trustee (if applicable) to me (or us) are: (specify dates)

14. Particulars of disbursements made for legal, brokerage or other fees or commissions in connection with the placement of the loan, including the names of recipients and amounts paid, are: (specify)

B. Conditions:

1. *(Instructions: Clauses (a) and (b) below refer to information which each investor may require from the lawyer. If you require the information referred to in a clause, initial the clause.)*

The information which I (or we) require from you as my (or our) lawyer before you complete the transaction and make the advance is as follows:

(a) If my (or our) investment will be in a position other than a first mortgage or charge, details, including amounts, of all existing encumbrances outstanding.

(b) If the mortgage or charge is a syndicated mortgage, and a prospectus is necessary, a copy of the prospectus. We acknowledge and accept that you as my (or our) lawyer express no opinion as to the necessity for or validity of a prospectus.

2. *(Instructions: Each investor to complete and initial clause (a) and, if clause (a) is answered in the affirmative, to complete (if necessary) and initial clause (b) and to initial clause (c).)*

(a) I (or we) instruct you to obtain a current and independent appraisal of the subject property and provide it to me (or us) before you complete this mortgage transaction. *(Specify yes or no.)*

(b) The appraisal is to be paid by me (or us) or *(specify name of person who is to pay for appraisal)*.

(c) I (or we) have been advised and accept that you as my (or our) lawyer do not express an opinion as to the validity of the appraisal.

C. Disclosure:

1. I (or we) acknowledge being advised by you as my (or our) lawyer that you do not have any direct or indirect interest in the borrower (or borrowers). *(Specify yes or no and indicate the*

date on which the lawyer advised you that he or she has no direct or indirect interest in the borrower or borrowers.)

(If the lawyer has an interest in the borrower or borrowers, he or she is unable to act for you on this loan (Rule 2.06 of the Rules of Professional Conduct).

(Warning:

1. You are cautioned that the responsibility for assessing the financial merits of the mortgage investment rests with the investor or investors at all times. The lawyer's responsibility is limited to ensuring the mortgage is legally registered on title in accordance with the investor's or investors' instructions. The lawyer is not permitted to personally guarantee the obligations of the borrower or borrowers nor the suitability of the property as security for the mortgage investment.

2. Any loss you may suffer on this mortgage investment will not be insured under the lawyer's professional liability policy if the lawyer has acted as a mortgage broker or has helped to arrange it.)*

I (or we) hereby acknowledge receipt of a copy of this form prior to the advance of funds to or on behalf of the borrower (or borrowers). I (or we) further acknowledge having read and understood the above warnings.

Investor (or Investors):

(Specify full name of the investor (or full names of the investors) and specify the investor's (or each investor's) address.)

(Signature of the investor (or of each investor))

(Date of signature)

**(Pursuant to clause (g) of Part III of the Professional Liability Insurance Policy for Lawyers, the policy does not apply "to any CLAIM directly or indirectly arising as a result of the INSURED acting as a MORTGAGE BROKER or as an intermediary arranging any financial transaction usual to mortgage lending; or to any CLAIM arising from circumstances where the INSURED has provided PROFESSIONAL SERVICES in conjunction with the above".)*

Form 9E

Report On The Investment

(Note to lawyer: In all private mortgage transactions, whether or not the mortgage was arranged by you, you must complete this form, or, alternatively, you must complete a reporting letter which includes responses to all numbered items in this form. If you complete this form, you must complete every numbered item on this form, with "n/a" being entered if the numbered item is not applicable. If you complete a reporting letter, you must respond to all numbered items in this form in your reporting letter. If a numbered item is not applicable, you must include it in your reporting letter and indicate that it is not applicable. After completion, an original of this form, or the reporting letter, must be delivered forthwith to each lender. This form may be entered on a word processor. For the definition of mortgage broker and other terms found in the clause of the Lawyers' Professional Indemnity Company Policy found at the bottom of this form, please refer to the policy.)

To: *(Specify name and address of investor.)*

A. Details about the investment:

1. Name and address of borrower *(or borrowers): (specify)*
2. Name and address of guarantor *(or guarantors) (if any): (specify)*
3. Legal description and municipal address of real property: *(specify)*
4. Type of property: *(specify, e.g., residence, vacant land, etc.)*
5. (a) Principal amount of mortgage or charge: *(specify)*
5. (b) Amount of loan advanced by you: *(specify)*

6. Rank of mortgage or charge is first (*or specify other rank*).

7. Your investment of (*specify amount*) represents (*specify percentage*) of the total of this loan to the borrower (*or borrowers*).

8. Date principal advanced: (*specify*)

9. (a) The term of loan is (*specify term of loan in months, years, etc.*).

9. (b) The due date of the loan is (*specify date*).

9. (c) The loan is amortized over (*specify number of years*).

10. The interest rate is (*specify interest rate*) calculated semi-annually, not in advance (*or specify how interest rate is calculated*).

11. Particulars of amounts and due dates (*monthly, quarterly, etc.*) of payments of principal and interest: (*specify*)

12. Particulars and amounts of any bonus or holdback or any other special terms: (*specify*)

13. Details of any existing encumbrances, including rank on title, balances outstanding, mortgagee name and maturity dates: (*specify*)

14. In those instances in which the mortgage or charge is a collateral security, or if the mortgage or charge is collaterally secured, the details of other security are: (*specify*)

15. (a) Particulars of disbursements made for legal, brokerage or other fees or commissions in connection with the placement of the loan, including the names of recipients and amounts paid, are: (*specify*)

15. (b) Alternatively, I have advised I cannot confirm what independent commissions or fees are being charged to the borrower.

16. Registration number, date of registration and land registry office location: (*specify*)

17. Insurance particulars (*where relevant*): (*specify*)

B. Conditions And Disclosure:

In accordance with your Form 9D [Investment Authority] request for information and disclosures prior to the advance of your money, I advise that I have previously provided you with the requested information and disclosures as follows:

1. Particulars of existing encumbrances outstanding: (*Specify yes or no, and if yes, specify date on which particulars were provided.*)

2. In the case of a syndicated mortgage where a prospectus was required, a copy of the prospectus: (*Specify yes or no, and if yes, specify date on which prospectus was provided.*)

I advised and you acknowledged that I gave no opinion as to the necessity or validity of a prospectus.

3. Independent appraisal: (*Specify yes or no, and if yes, specify date on which independent appraisal was provided.*)

I advised and you acknowledged that I gave no opinion as to the necessity or validity of an appraisal.

4. Any loss you may suffer on this mortgage investment will not be insured under the lawyers' professional liability policy if the lawyer has acted as a mortgage broker or has helped to arrange it.*

I advised and you acknowledged having read and understood this warning.

(Warning: You are cautioned that the responsibility for assessing the financial merits of the mortgage investment rests with the investor at all times. The lawyer's responsibility is limited to ensuring the mortgage is legally registered on title in accordance with the investor's instructions. The lawyer is not permitted to personally guarantee the obligations of the borrower or borrowers nor the suitability of the property as security for the mortgage investment.)

(Name of lawyer or law firm)

(Address of lawyer or law firm)

(Signature of lawyer)

(Date of signature)

**(Pursuant to clause (g) of Part III of the Professional Liability Insurance Policy for Lawyers, the policy does not apply “to any CLAIM directly or indirectly arising as a result of the INSURED acting as a MORTGAGE BROKER or as an intermediary arranging any financial transaction usual to mortgage lending; or to any CLAIM arising from circumstances where the INSURED has provided PROFESSIONAL SERVICES in conjunction with the above”.)*

I advised and you acknowledged that I gave no opinion as to the necessity or validity of an appraisal.

4. Any loss you may suffer on this mortgage investment will not be insured under the lawyers' professional liability policy if the lawyer has acted as a mortgage broker or has helped to arrange it.*

I advised and you acknowledged having read and understood this warning.

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