



## A LOT FROM THE DOT

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### Do NOT Discharge the Mortgage Before Transferring Under Power of Sale!

As the Director of Titles, I am seeing an unusual number of power of sale transfers where the parties decide it would be a good idea to first discharge the relevant mortgage pursuant to which the Transfer Power of Sale is being issued. It is not clear to me why the parties think that discharging the mortgage before selling under power of sale is a good idea, but I am crystal clear as to the consequences of such a strategy – once the defaulting mortgage is discharged, so too is the ability to ever transfer under power of sale based on that mortgage. In power of sale transfer, one never discharges the supporting mortgage!

We have seen quite a few scenarios where a discharge has been registered immediately prior to the Transfer Power of Sale. We do not know where this line of thinking is coming from, but if the mortgage is discharged, that discharge will be certified, but any Transfer Power of Sale based on that mortgage will be withdrawn (as will any subsequent documents that are based on that Transfer Power of Sale, like a new charge by the new transferee). Thus, the title stays in the name of the defaulting borrower, but the mortgage is now discharged from the title!

Furthermore, there is, to my knowledge, no easy fix. Most often, we see repair counsel (after all, this would definitely be reportable to LawPro so it is almost always repair counsel whom we see trying to fix these botched power of sales), immediately registering a Caution-Land, preserving, for the next 60 days, the lender's right to call for a charge (i.e. the one that was inadvertently discharged), then obtaining a vesting order in favour of the ultimate purchaser (as if the Transfer Power of Sale had been certified) and vesting-out those encumbrances that otherwise would have been vested-out by the Transfer Power of Sale.

The Caution-Land is only good for 60 days and permission is required to register a second Caution-Land on the same facts (which permission is rarely granted), so the parties must act quickly to fix these botched sales under power of sale. While trite, it is always better to avoid the fix by getting it right the first time – do not discharge the mortgage under which you are trying to sell under power of sale!