



# **Mortgage Enforcement in Nova Scotia**

## **Foreclosure: Timeframes and Procedure**

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## FORECLOSURE PROCEDURE AND STRATEGY

Proceedings for foreclosure and sale may be commenced in Nova Scotia when a default has occurred under a mortgage over real property. In most cases, a mortgage contains a provision that if payments are not made at the time required in the mortgage, or if there has been a breach of some other covenant in the mortgage, the entire amount secured by the mortgage becomes due and payable at the option of the Bank. As a general rule, upon default in payment of the moneys secured by a mortgage, a bank will commence a foreclosure proceeding. In Nova Scotia the procedure for foreclosure and sale is governed by the *Civil Procedure Rules*, which give the Supreme Court of Nova Scotia the authority to direct a sale of the mortgaged property on such terms as the Court thinks fit.

What follows is a thumbnail sketch of the various steps in a foreclosure proceeding as well as an outline of the information required for each of these steps.

### ***DEMAND LETTER***

After the bank has exhausted its efforts with the delinquent mortgagor, it is often appropriate to have a solicitor forward a demand letter. The demand letter is a formal request of the bank that the mortgagor bring the mortgage up to date. It is an effective way of showing a mortgagor that the bank is serious, and it may lead to a resolution of the matter without the cost or necessity of actually commencing a foreclosure action. Although the demand letter will typically require that the mortgagor pay the outstanding arrears or mortgage balance, the bank may also require that the mortgagor provide proof of valid property insurance and proof that the property taxes are current. A demand letter should provide a specific date by which the mortgagor is to make the required arrangements to satisfy the mortgagee.

## **COMMENCING THE FORECLOSURE PROCEEDING**

If a delinquent mortgagor does not respond in an acceptable manner to a formal demand letter, the bank may wish to proceed to commence an action for foreclosure and sale.

In order to commence the foreclosure action there is certain information required for the drafting of the Statement of Claim and further information is required to ultimately obtain the Order from the Court for foreclosure.

The following information must be provided by the bank to the solicitor:

- mortgage;
- civic number of property foreclosed upon;
- current whereabouts of mortgagors (home address, phone number, employment, and any other information relevant to locating the mortgagors);
- per diem interest rate;
- total due and owing as of a specified date;
- date of last payment on mortgage;
- if applicable, copies of renewal agreements or assumption agreements;
- if applicable, copies of any invoices relating to any charges incurred under the mortgage such as property maintenance or insurance costs;

## **MOTION FOR ORDER FOR FORECLOSURE AND SALE**

Under the *Civil Procedure Rules*, foreclosure proceedings can proceed by way of Notice of Action or Notice of Application. Almost all foreclosures proceed by way of Notice of Action. A Practice

Memorandum issued by the Supreme Court, outlines a simplified procedure which can be used for a majority of foreclosure proceedings. The procedure is outlined below.

Fifteen (15) business days after all defendants (the mortgagors and any guarantors who are being sued) have been personally served with the copy of the Statement of Claim (or served through substituted service (see p. 8)), the bank may proceed with an *ex parte* motion to obtain an Order for foreclosure and sale. The number of days to file following service is increased to thirty (30) days if delivery is made elsewhere in Canada, and forty-five (45) days if delivery is made anywhere else. This Order is the Court's authorization to proceed with a Foreclosure sale of the property being foreclosed on.

In order to obtain an Order for foreclosure and sale, the Court must be provided with the documentation listed below. If the mortgagor does not file a defence within the time limits mentioned above, notice need not be given to the mortgagor of the motion and the motion may proceed *ex parte*. If the mortgagor does file a defence a motion for summary judgment may be made (see p. 6 for further discussion). The following is a list of what must be provided in the event no defence is filed:

**(1) Affidavit of Counsel**

The affidavit of counsel attaches a certificate listing all the encumbrances against the property registered subsequent to the Deed into the defendants. The *Civil Procedure Rules* require that notice of the foreclosure sale be provided to all subsequent encumbrancers. The *Rules* also require that no Order for foreclosure and sale may be issued without the written consent of all prior encumbrancers.

**(2) Affidavit of Mortgage Officer**

The Court requires an affidavit from one of the lending institution's officers outlining the details of the Mortgagor's account. The affidavit outlines the dates which the statement covers, the amount owed and the number of payments that the Mortgagor is in arrears.

The Mortgage Officer's affidavit must also contain a Summary of the Bank's Account with copies of the bank's account statements. The Summary of Account shows:

- the principal amount advanced as of the date of the mortgage or last renewal;
- the total of all interest and charges incurred to a specified date;
- the total of all payments to a specified date;
- the amount of principal and interest outstanding as of the specified date;
- the balance of the tax account;
- the total amount claimed;
- other charges.

**(3) Order for Foreclosure and Sale**

The Order for foreclosure and sale granted by the Court states the total amount owed by the defendants, as well as the principal amount upon which interest is to be calculated. The Order includes the rate of interest and the date from which the per diem interest begins. The Order also requires that a Notice of Public Auction be sent to the Defendants and all subsequent encumbrancers. Rather than provide a full legal description to the property, the Notice provides an abbreviated description with a lot and plan reference, as well as street name and civic number. The Order will also require that notice of the public auction be advertised in the newspaper two (2) times, in a newspaper where the property is situate. The Order will also grant the right to proceed to deficiency judgment should the proceeds of the sale not be sufficient to pay out the Mortgagor's obligations.

**(4) Affidavit of Service**

An affidavit must be filed confirming that the Notice of Action and Statement of Claim were personally served on the mortgagors or provided to the mortgagors in a manner complying with a substituted service order (discussed below).

The Court requires that the Notice of Action and Statement of Claim be personally served (or served through substituted service if personal service is not possible or impractical) on the defendants (the mortgagor and any guarantors). Once personal service has been effected, the defendant has either 15, 30, or 45 days depending on whether they are served in Nova Scotia, elsewhere in Canada, or outside of Canada, respectively, to file a defence. If the defendants fail to file a defence or do not request to receive further notice within this time limit, they lose the right to notice of the motion for foreclosure and sale. If there is more than one defendant, each defendant must be served individually with the Notice of Action and Statement of Claim and an affidavit of service is required for each defendant.

On hearing the motion in Chambers, the Court will review and consider the evidence that the mortgagee has provided in support of its request for the Order for foreclosure and sale. The Court may have questions and request that additional information be provided before it will grant the Order.

In the event the defendant does file a Notice of Defence, the bank will no longer be able to proceed by way of *Ex Parte* motion for foreclosure and sale. Depending on the information provided in the accompanying Statement of Defence and any evidence provided, the bank may make a motion for Summary Judgment for an Order for foreclosure and sale. On a motion for summary judgment, the bank claims that the defence filed raises no genuine issue for trial and so the judge should dismiss the defence and grant the Order for foreclosure without further litigation.

As you can appreciate, in any case where the defendant files a Notice of Defence the length of the proceeding to obtain an Order for foreclosure and sale is increased. This is a result of time spent reviewing the defence and the potential merits thereof, as well as preparing the necessary documents to file in response to the defence. The length of the proceeding may

be further increased if the motion is required to be heard in special chambers as opposed to regular chambers.

***FORECLOSURE SALE***

Once an order for foreclosure and sale is granted, a date is scheduled for the foreclosure sale with an Auctioneer or Sheriff to be held in the County in which the land is located. Currently, foreclosure sales are more typically carried out by an Auctioneer, who is a lawyer appointed by the court. Because of the time restrictions on the placing of advertising, the sale date is usually about 30 days after the date of the order for foreclosure and sale.

Once the date has been arranged, notice of the sale must be sent by registered mail to each of the subsequent encumbrancers on the Certificate re *Land Registration Act*. The Mortgagors and any Guarantor(s) must be given notice by regular mail and the notice of sale must be advertised two times in the newspaper.

Often a bank will have their solicitor or an agent attend at the sale for the purpose of bidding on the property. In order to obtain bidding instructions it is important to have an idea of what the property is worth and a realistic expectation as to how much you would be able to "net" in reselling the property. Typically, an appraisal (drive-by if occupied by mortgagor) is obtained to determine the property value.

Prior to attending at the sale, the solicitor will confirm the amount of any outstanding property taxes and Auctioneer's fees. This will be the opening bid at the sale and will be taken out of the proceeds of the sale. If there are other interested buyers at the sale, the solicitor for the bank will normally bid in increments up to the amount of their bidding instructions.

The amounts that you will be entitled to recover from the proceeds of the foreclosure sale include:

- Amount due as per the order for foreclosure and sale
- Per diem interest up to the date of sale
- **Taxed** lawyer's fees and disbursements
- Allowable protective disbursements (expenses of the mortgagee incurred in securing and maintaining the mortgaged premises)
- Auctioneer's fees and taxes paid at sale

If the property is purchased by the bank (for an amount less than what is owed to the bank), then a cheque for Auctioneer's fees and taxes must be given to the Auctioneer at that time. If the property is purchased by an independent bidder at the sale, then the purchaser must provide the Auctioneer with a non-refundable certified cheque for 10% of the bid and must provide the remaining balance within 15 business days of the sale.

The proceeds of the sale are then distributed to the bank as allowed under the order for foreclosure and sale, and any surplus is disbursed as outlined at p.9. If the bank purchases the property and then sells it or has it appraised for something less than the bank is owed, then an application for deficiency judgment may be made by the bank (see below).

After the foreclosure sale your solicitor will have his fees and disbursements taxed by a Taxing Master for the Province of Nova Scotia and will also provide the necessary documentation for an Order confirming the foreclosure sale. In an application for an Order confirming the sale, the solicitor must outline the various steps that took place in the foreclosure proceeding and convince the court that the proper procedures were followed.



**DEFICIENCY JUDGMENT**

Where the amount realized from the sale of the mortgaged property is insufficient to pay the amount due to the bank, the *Civil Procedure Rules* allow the bank to proceed with a claim for an Order for payment of the shortfall unless the mortgagor is bankrupt.

In order to obtain a Deficiency Judgment the bank must apply to the Court after giving ten business days' notice to the Mortgagors and Guarantors of the motion by way of personal service. The bank must provide the Court with an affidavit outlining the total amount of the bank's claim, including any protective disbursements (protective disbursements include all costs reasonably and necessarily incurred to protect or conserve the property and, among other things, may include inspections, utilities, winterizing charges and appraisal fees).

The bank must provide the Court with proof that the disbursements claimed were actually incurred and this is usually done by way of including copies of the receipts in the Affidavit. It is also necessary to assure the Court that the amount that the property was sold for was at or near its fair market value, and therefore an independent appraisal of the property must be attached to the Affidavit.

If the Court is satisfied with the documentation provided by the bank, an Order for Deficiency Judgment will be granted in an amount representing the difference between the amount owed to the bank under the Order for foreclosure and sale plus legal fees and protective disbursements, and the amount realized upon the sale of the property.

It should be noted that a motion for Deficiency Judgment must be made within six (6) months from the date of the foreclosure sale.

***PAYOUT OF SURPLUS FUNDS***

There may be circumstances where the amount realized on the foreclosure sale of the property is in excess of the amount claimed by the bank. Any surplus funds are to be held in trust by the Court. If there are no subsequent encumbrancers, the surplus funds will be paid to the mortgagors. However, where there are subsequent encumbrancers these parties are entitled to apply to the Court for an Order to distribute the surplus funds among the subsequent encumbrancers according to their priorities.

When making a motion to the Court to obtain payment of surplus funds, the party applying for the funds must provide the Court with the following affidavit evidence:

- the date that the foreclosure sale was held;
- the amount of surplus funds that are being held by the Court;
- a copy of the Certificate of Title upon which the subsequent encumbrancer is basing their claim;
- the date that the Order for foreclosure and sale was granted;
- a copy of the Order confirming the foreclosure sale;
- a certified copy of the Mortgage under which the subsequent encumbrancer is claiming to be entitled to surplus funds; and
- the amount due and owing under the applicant's mortgage.

Notice of this motion must be sent by registered mail to all the subsequent encumbrancers listed on the Certificate of Title. Once the Court grants the Order for payment of the surplus funds, the Order itself is filed with the Prothonotary's Office and the Prothonotary will then forward a cheque for the surplus funds to the applicant.

## ***VACANT POSSESSION***

In some cases a Mortgagor may refuse to leave the mortgaged property after the foreclosure sale has been held. It may be necessary for the successful purchaser of the property to make an application for the Sheriff to deliver possession of the property. This application is made to the Supreme Court.

The purchasers must write to the individuals in possession of the property advising them of the results of the foreclosure sale and informing them that they must vacate the premises by a given date. The letter should also advise them to remove all of their belongings from the home as the foreclosure proceeding does not give the purchaser any ownership in those belongings.

If the individual does not vacate the premises as requested, a motion for an order to deliver up possession of the property pursuant to Civil Procedure Rule 72.09 can be made. This order must be served on the occupant and if the occupant does not comply with the order, then the Sheriff's office should be contacted and the Sheriff will attend at the property to physically remove the occupant.

## ***AVOIDING FORECLOSURE***

In most cases, mortgagees would prefer to work with the mortgagor to avoid having to go through a costly and time consuming foreclosure procedure. If a mortgagor wants to prevent a foreclosure sale from taken place, it is crucial to contact the mortgagee as soon as possible to explore if any options are available to redeem the mortgage or arrange to pay out the mortgage debt. Depending on the circumstances, a mortgagee may be willing to give a reasonable amount of time for the mortgage to be brought current or paid out.

Often a mortgagor will attempt to sell the property rather than letting it go to foreclosure. Most lenders will be more than happy to allow the private sale to take place provided that the sale is firm and that sufficient funds will be available to pay out the mortgage in full. In the event that there are insufficient funds available, some lenders may consent to the private sale as long as the property is being sold for fair market value and the sale deductions are reasonable. If the net proceeds of sale are insufficient to pay out the mortgage, the mortgagee may require that the mortgagor consent to a judgment for the shortfall.