



## ISSUES RELATING TO FINANCE

### CANADA - ALBERTA Blake, Cassels & Graydon LLP

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1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage/charge or an encumbrance is the instrument that secures a lien on real property in Alberta. A debenture can also be utilized where the debenture meets the requirements of a mortgage.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

There is no mortgage registration tax in Alberta. A registration fee of 0.02% of the principal amount of the mortgage (or the fair market value of the real property, if such value is less than the principal amount) is charged to register a mortgage.

3. **Describe manner in which a lien secured by real property is foreclosed.**

Where a borrower has defaulted, and the lender has given reasonable notice to the borrower, the lender has a variety of remedies to choose from. In practice, the options available to the lender in Alberta are to:

- a) sell the mortgaged property to a third party pursuant to a court order made in a judicial sale action (Order Confirming Sale and Vesting Title);

- b) obtain title to the mortgaged property by means of (i) a foreclosure action (Final Order for Foreclosure), (ii) a direct sale to the lender (Order for Sale to the Mortgagee or “Rice Order”), or (iii) accepting a voluntary transfer of the mortgaged property from the borrower;
- c) take possession or control of the mortgaged property (i) by court order, (ii) through a receiver appointed by the lender pursuant to the provisions in the mortgage, or (iii) through a court-appointed receiver or interim receiver; or
- d) obtain judgment for the payment of the debt secured by the mortgage against the guarantor of the mortgage. Note: see section 8 regarding limitations on the ability of the lender to recover a judgment on the debt secured by the mortgage.

In cases where an Order for Sale, Order for Foreclosure or a Rice Order may be obtained, there is a statutory redemption period in Alberta for *National Housing Act* mortgages or for mortgages granted to individuals. In general, this time period is 6 months (1 year in the case of farm land), however this time period may be varied by the court. During this period, the mortgagor has the opportunity to redeem the mortgage by paying the arrears in full. If this period expires without the mortgagor repaying the arrears, the court may then make the appropriate order.

Where a lender opts to sell the property under a judicial sale, the lender is empowered to convey the mortgaged property to a purchaser free and clear of the interest of the borrower and any other person having an interest in the mortgaged property subsequent in priority to that of the lender. In addition, where a foreclosure action is chosen, the title can be vested in the lender free of all subsequent encumbrances. However, where the borrower voluntarily transfers the title to the property to the lender, the subsequent priority interests are not extinguished.

**4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

Both judicial sales and foreclosure actions are often expensive, due to the need for several court appearances.

**5. What is the customary time period for foreclosing a lien on real property?**

Enforcement of mortgages in Alberta through the court system requires many interlocutory steps, and depending on the facts, can take several months to two years to complete. One key determinant in how long it may take to foreclose is whether there is a need for a statutory redemption period.

**6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

In Alberta, in order to be the registered holder of a mortgage of real property, a foreign bank or corporate lender must either be registered as an extra-provincial corporation or other qualified corporate entity in the Province of Alberta, or be registered with the Office of the Superintendent of Financial Institutions of Canada as a foreign bank or foreign bank branch.

Foreign banks and their affiliates may not “carry on business” as deposit-taking institutions in Canada without complying with Canadian regulatory requirements.



**7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

Section 347 of the Criminal Code (Canada) prohibits interest that is more than 60% per annum. “Interest” is defined as including the aggregate of all charges and expenses, including a fee, fine, penalty, commission or other similar charge or expense, paid or payable for the advancing of a credit but does not include such items as insurance charges, overdraft charges or amounts on account of property taxes.

The Interest Act (Canada) contains four provisions which may have applications in certain circumstances:

(a) section 4 – whenever interest is, by written contract other than a mortgage or hypothec on real property, made payable at a rate per day, week, month or any rate for any period less than a year, no interest beyond 5% per annum is chargeable unless the contract contains an express statement of the yearly rate to which the other rate is equivalent. Where interest is based on a 360-day year or some other period of less than a year, a statement setting out the equivalent annual rate is commonly included in the mortgage loan documentation to ensure compliance with this requirement.

(b) section 6 – requires that where payments of principal and interest are “blended” (i.e. where a set amount is payable each month with the interest component decreasing as the principal component increases), the mortgage loan documentation must state the interest chargeable on principal calculated yearly or half-yearly, not in advance. Failure to do so results in no interest at all being chargeable.

(c) section 8 – states that no fine, penalty or rate of interest shall be stipulated in respect of any arrears of principal or interest secured by a mortgage on real property that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears. This section applies to mortgage loans where, for example, the interest rate is stated to be increased upon the occurrence of a default in the payment of principal or interest. This section is not limited to increases in interest, but includes fines and penalties, such as a “bonus” of three months’ interest following default. Despite section 8, lenders are allowed to assess late payment charges if such amounts are administrative charges which represent a fair and reasonable pre-estimate of the additional administrative costs incurred by the lender upon default. Generally, amounts determined on a percentage basis are more likely to be considered a penalty than amounts expressed as a flat dollar amount.

(d) section 10 – provides that mortgages made by persons or entities other than corporations may be prepaid at any time after five years of the date of the mortgage, with the payment of three months’ interest, notwithstanding the stated term of the mortgage.

**8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

In Alberta, the lender may not recover a judgment for the payment of money based on the covenant to pay contained in the mortgage, unless the mortgage is a National Housing Act mortgage, the mortgagor is a corporation, or the mortgage is a high-ratio mortgage which is insured by a licensed insurer of mortgages in Alberta.

