



ISSUES RELATING TO FINANCE

CANADA - NOVA SCOTIA

McInnes Cooper

CONTACT INFORMATION

Wayne R. Marryatt

Purdy's Wharf Tower II

1300-1969 Upper Water Street

PO Box 730

Halifax Nova Scotia

Canada B3J 2V1

Tel 902.444.8484 (direct dial) | Fax 902.425.6350

Email: wayne.marryatt@mcinnescooper.com

Web Site: www.mcinnescooper.com

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 or debenture incorporating a mortgage are generally the instruments used to create a security interest in real property to secure indebtedness in Nova Scotia. A deed of trust may also be utilized in circumstances where the security interest secures the issuance of bonds or debentures.

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 Nova Scotia. Fees to register a mortgage are not based on the mortgage amount or property value.

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

Following default by the borrower and after having given reasonable notice to the borrower, the lender has a variety of remedies from which to choose. The lender may:



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- a) obtain a court order for foreclosure, sale and possession and have the property sold at public auction conducted by the sheriff, or where the court orders by sale to a person who has made an offer to the lender.
- b) obtain title to the mortgaged property by means of (i) being the successful bidder at the auction sale, or (ii) accepting a voluntary transfer of the mortgaged property from the borrower;
- c) take possession or control of the mortgaged property (i) privately, (ii) by court order, (iii) through a receiver appointed by the lender pursuant to the provisions in the mortgage or (iv) through a court appointed receiver or interim receiver;
- d) obtain a judgment for the payment of the debt secured by the mortgage against (i) the borrower and/or any guarantor, or (ii) if there has been a change of ownership and the mortgage has been assumed, the current owner of the mortgaged property;
- e) obtain a judgment for any deficiency balance which remains outstanding following the foreclosure sale.

There is no private power of sale remedy in Nova Scotia. At the conclusion of a foreclosure, sale and possession action, the purchaser at the sale becomes the owner of the mortgaged property and all persons holding an interest in the mortgaged property subsequent in priority to that of the lender lose their interest in the mortgaged property. A voluntary transfer of the mortgaged property from the borrower to the lender does not extinguish the interest of a person holding an interest in the mortgaged property subsequent in priority to that of the lender.

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

A foreclosure and sale action requires at least two court attendances and attendance at the sale resulting in significant costs of enforcement to the lender. Our *Costs and Fees Act* provides guidance to the judge in terms of the costs which may be recovered from the borrower. Such costs are within the judge's discretion to award.

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

If the foreclosure and sale action is uncontested, the process may be completed in approximately two to three months. A contested foreclosure and sale action, on the other hand, may take up to two years to complete.

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 Nova Scotia, in order to carry on a business involving lending on the security of real estate, a person or entity must be registered as a mortgage broker under the Mortgage Brokers and Lenders Registration Act. In order to become registered, the lender must maintain an office in Nova Scotia. Foreign banks and their affiliates may not “carry on business” 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 increase 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.

The *Interest on Judgments Act* (Nova Scotia) provides that every judgment debt shall bear interest at 5% per annum. This would include any deficiency judgment or judgment for overdue installments.

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

There are no such laws in Nova Scotia but caution should be exercised and independent legal advice should be required in certain circumstances.