



ISSUES RELATING TO FINANCE

CANADA - ONTARIO 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 is the instrument that secures a lien on real property in Ontario. A deed of trust may also be utilized in circumstances where the lien 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 Ontario.

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:

- (a) sell the mortgaged property pursuant to (i) the private power of sale provisions contained in the mortgage, or (ii) a court order made in a judicial sale action;
- (b) obtain title to the mortgaged property by means of (i) a foreclosure action, 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, the current owner of the mortgaged property.

When a lender exercises its rights under of a power of sale or 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. At the conclusion of a foreclosure action, the lender 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 sale under a power of sale is relatively inexpensive, whereas a judicial sale or foreclosure action may require several court attendances which increase the costs of enforcement to the lender.

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

If the private power of sale remedy is selected, the process may be completed in approximately six months. A contested foreclosure or judicial sale, 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 Ontario, 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 brokerage legislation. 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 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.

None in Ontario.