



ISSUES RELATING TO FINANCE

CANADA - QUEBEC Blake, Cassels & Graydon LLP

CONTACT INFORMATION:

James Papadimitriou

Blake, Cassels & Graydon LLP
600, boul. de Maisonneuve West
Suite 2200, Montreal, Qc, Canada H3A 3J2
Tel: 1.514. 982.4002 / Fax: 1.514.982.4099

james.papadimitriou@blakes.com

www.blakes.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 hypothec is the instrument that secures a lien on real or immovable property in Quebec. A deed of hypothec and issued bonds (similar to a trust deed) may also be utilized in circumstances where the lien secures the issuance of bonds or debentures or is in favor of an agent.

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 Quebec.

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

Following default by the borrower and after having given the prescribed 60 day prior notice to the borrower, the lender has the four hypothecary remedies prescribed by the Civil Code of Quebec from which to choose. The lender may:

- (a) sell the hypothecated property pursuant to a court order made in a judicial sale action;
- (b) sell the hypothecated property privately themselves by private agreement, a call for tenders or by public auction;
- (c) obtain title to the hypothecated property by means of (i) an action in taking payment, or (ii) accepting a voluntary surrender of the hypothecated property from the borrower; or

(d) take possession of the hypothecated property for purposes of administration.

In addition, the lender may obtain a judgment for the payment of the debt secured by the hypothec against (i) the borrower and/or any guarantor, or (ii) if there has been a change of ownership, the current owner of the hypothecated property.

When a lender exercises its rights under judicial sale, the sale purges the property of all hypothecs. At the conclusion of a foreclosure (i.e. taking in payment) action, the lender becomes the owner of the hypothecated property and all persons holding an interest in the hypothecated property subsequent in priority to that of the lender lose their interest in the hypothecated property (other than construction lienholders and for the syndicate of co-owners lien). A voluntary taking in payment of the hypothecated property from the borrower to the lender also extinguishes the interest of a person holding an interest in the hypothecated 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 by the creditor is relatively inexpensive, whereas a judicial sale or foreclosure (taking in payment) action may require several court attendances which increase the costs of enforcement to the lender. Where a foreclosure (i.e. taking in payment) is exercised court approval is required to proceed if the debtor has discharged more than one-half of the debt (unless the debtor has voluntarily surrendered the property); a subsequent creditor or the debtor may also require the creditor to proceed by sale instead of foreclosure.

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 Quebec, in order to carry on a business involving lending on the security of real estate, a person or entity that engages in mortgage loans for others must be registered as a mortgage broker under the Mortgage Brokers' Act (Quebec). This will not apply to lenders that are lending their own money. 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 Quebec other than financial assistance restrictions on Quebec incorporated entities.