

SUPREME COURT OF NOVA SCOTIA

Practice Memorandum #1

Foreclosure Procedures

I. General

1.1 Authority

Reference is made to the Civil Procedure Rules and, in particular, rules 72, 23, 35.12 and 94. See also the *Judicature Act*, R.S.N.S. 1989, c. 240, s. 42 regarding discontinuance of foreclosure proceedings.

1.2 Purpose

The Judges of the Supreme Court have approved a simplified procedure which can be used in most proceedings for foreclosure. Although Civil Procedure Rule 72.02 provides a mortgagee may claim foreclosure, sale, and possession by filing a Notice of Application, the simplified procedure allows the claim to proceed by action rather than application.

1.3 Subject

The subject of this Memorandum is a simplified procedure providing for the remedy of foreclosure, sale, and possession by way of action. There are other well established foreclosure remedies, such as sales ordered in the course of a receivership. There are less established foreclosure remedies the Court has occasionally ordered, such as sale by completion of a mortgagor's agreement of purchase and sale. Some of the comments in this Memorandum may provide guidance in respect of other foreclosure remedies.

1.4 Choice of Procedures

Counsel may choose to use:

- (a) The simplified procedure – an action using only the forms attached to this Practice Memorandum; or
- (b) An alternative procedure – an action using the same forms, deviating as may be considered necessary, and submitting a memorandum explaining and justifying each and every deviation; or
- (c) An application.

II. Actions for Foreclosure, Sale, and Possession

2.1 Authority

Reference is made to Civil Procedure Rules 23, 35.12, 72.01 to 72.10 inclusive.

2.2 The Simplified Procedure

The simplified procedure is expected to be suitable for the majority of actions for foreclosure, sale, and possession. The attached forms are mandatory if the simplified procedure is followed.

2.3 The simplified procedure is unlikely to be suitable in actions involving:

- (a) collateral mortgages, including mortgages which secure future liabilities, such as, lines of credit, credit cards or other future debts;
- (b) complex securities such as debentures;
- (c) claims pursuant to guarantees that are not contained in the mortgage itself; and
- (d) claims for less than foreclosure, sale, and possession.

2.4 The Alternative Procedure

- (a) The alternative procedure must be used where, apart from the exceptions permitted in the use of the simplified procedure, there is any variation or amendment in the forms.

(By way of example only, in actions for foreclosure, sale, and possession, where the mortgage being foreclosed is subject to a prior mortgage, the Order will only be granted where the consent of the holders of all prior mortgages is filed, or the Court, on notice to the holders of the prior mortgages, waives the necessity for such consent. In such a circumstance, the forms applicable to the simplified procedure will have to be varied to incorporate the consent or the motion to waive. To the extent the forms are varied, there must be an accompanying memorandum filed explaining and justifying each deviation.)

- (b) When the alternative procedure is used, a memorandum explaining and justifying all deviations from the standard forms must be filed. If a memorandum is not filed, the motion will be refused.

(c) Claims for approval of protective disbursements and other charges will require an accompanying memorandum. The supporting documentation for recovery of protective disbursements and other charges, as set out in the Notice of Action, must also be filed at the time of filing the motion. Where the claim includes reimbursement for protective disbursements and other charges, the plaintiff's solicitor shall also disclose for inspection originals or true copies of all invoices or receipts relating to the claim and, upon the finalizing of the motion, the plaintiff's solicitor shall retrieve from the file the invoices or receipts disclosed in the motion. See section 3.7 for comments on recoverable protective disbursements, which comments apply equally to orders for foreclosure.

2.5 Documentation

The documentation required in all actions:

(a) A Notice of Action with attached Statement of Claim – may be in the attached form (based on Forms 4.02(A) and 4.02(B)). The Notice of Action must be served and filed in accordance with Civil Procedure Rule 31. The sum to be inserted in paragraph 5(a) of the Statement of Claim shall be the total outstanding as of the specified date minus the interest claimed in paragraph 4(b) of the Statement of Claim. No claim for a deficiency should be made against a bankrupt mortgagor.

(b) Affidavit of Service – must be filed no later than two days before the hearing.

(c) Notice of motion - may be in the attached form. The Notice must recite the Civil Procedure Rule on which the plaintiff is relying in making the motion.

(d) Affidavit by or on behalf of the mortgagee – may be in the form attached and may be signed by the mortgagee or by an authorized representative on behalf of the mortgagee. The statement of account attached as an exhibit must commence with the latest of either the date of the mortgage, or the last renewal, or the last assumption of the mortgage and end on a date within 22 days of the date the Notice of Action is filed. The summary statement of account included with the statement must include all charges and payments contained in the statement of account and shall be unqualified, that is, it shall not contain any reference to “E & OE” or Errors and Omissions Excepted, or like meaning words. The affidavit should indicate how all amounts in the summary statement are derived from information in the statement of account (including 2. Interest accrued and paid, 4. Principal payments made, 5. Principal outstanding, and 6. Interest outstanding). To facilitate cross-referencing, amounts appearing in the summary statement must be evident from and should be highlighted in the statement of account. The affidavit shall set out the number of months the mortgage is in arrears as of the date of the affidavit and shall also provide

particulars of any payments or other arrangements made since the action was commenced.

(e) Affidavit of Solicitor – may be in the form attached. The certificate of title may be in the form attached but the certificate and particulars must date back to at least the date of the deed or conveyance to the original mortgagor. Where the plaintiff or the plaintiff’s solicitor has knowledge of any mortgage or other encumbrance in priority to the date of the deed or conveyance to the original mortgagor, the particulars shall include full disclosure of such mortgage or other encumbrance and the certificate shall be amended accordingly. If the parcel has been registered pursuant to the *Land Registration Act*, alternate clause 4 in the form attached is to be used. If a mortgagor has made an assignment in bankruptcy, a true copy of the assignment is to be exhibited to the solicitor’s affidavit. The certificate of title is to be dated no more than ten days before the hearing of the motion.

(f) A plaintiff who proposes that the foreclosure auction be conducted by a lawyer must file an affidavit of the lawyer demonstrating his or her suitability. The affidavit must include statements that the lawyer's firm has not represented any party to the proceeding with respect to the mortgaged property or the mortgage under enforcement, that the firm does not represent the plaintiff in regard to enforcement of any mortgage or secured debt, and does not represent any other party in any capacity.

(g) Order for Foreclosure – may be in the form attached. The order must incorporate by reference the Instructions for Conduct of Foreclosure Auction in the form attached to this Practice Memorandum or with such variations or deviations, together with the accompanying memorandum, as the circumstances may require. The order shall provide the sale is to be held at a courthouse in the county in which the lands being foreclosed are located, unless the court orders otherwise.

Not all counties have active courthouses any more. The order will have to specify a courthouse where the lands are in Victoria, Guysborough, or Queens, or any other county in which the sole courthouse is closed in future.

The Order should not provide for recovery of interest on an amount which already includes interest accrued after the date referred to in paragraph 5(a) of the Statement of Claim. Interest from that date to the date of the Order on the sum specified in paragraph 5(a) of the Statement of Claim is included in the amount settled in paragraph 1 of the Order, and should not be capitalized. To avoid recovery of “interest on interest” after the action is started, paragraph 1 of the Order should provide:

The amount due to the plaintiff on the mortgage under foreclosure is settled at \$ _____ with interest on \$ _____ [insert the amount upon which interest is claimed in paragraph 5(a) of the statement of claim] at the rate of _____ % a year from _____, 20__ up to:

(a) fifteen days after the day of sale by public auction, if the mortgagee purchases the property; or

(b) fifteen days after the day the balance of the purchase price is paid to the sheriff or other person conducting a sale by public auction, if a person other than the mortgagee purchases the property;

together with any other charges and protective disbursements, as approved by the court, and costs to be taxed.

The Order shall contain an abbreviated description of the lands which includes reference to the registration particulars of the mortgage being foreclosed. If available, the abbreviated description shall contain the civic number or the street or highway address of the lands, the PID number of the parcel and a statement whether the parcel has or has not been registered pursuant to the *Land Registration Act*. The abbreviated description, in any event, must contain sufficient particulars to enable the public to identify and locate the lands being foreclosed and sold. The description shall also contain a brief description of any known prior mortgage or other encumbrance, rights-of-way and easements, that either benefit or encumber the lands being foreclosed.

2.6 Some Advice

(a) Sometimes the abstract shows prior encumbrances or other interests prior to the mortgage under foreclosure without these having been provided for in the order for sale or in the advertisements. These and any known title defects must be brought to the attention of bidders. The order must make the sale subject to prior interests and the advertisement should mention such interests. As regards earlier mortgages not marked released but thought to have been repaid, the judge may require the order to provide that the sheriff shall not proceed without a recorded release. Where a life tenancy or a joint tenancy was determined by death, the judge may require production of a death certificate.

(b) Judges are of the view that residential properties are best advertised in local papers with good local circulation. Counsel are encouraged to investigate cost and circulation.

(c) In too many cases the summary cannot be reconciled with the accounting. If the mortgagee's affidavit does not fully explain how any amount in the summary statement is derived from information in the statement of account, or if any amount shown in the summary statement is not highlighted in the statement of account, counsel's memorandum must include a complete explanation of how the amount indicated in the summary statement was calculated. For the judge to have confidence in the summary, it must be possible to see where the summary figures came from in the detailed accounting. Further, it is necessary that the form of the summary follow that provided in the practice memorandum.

(d) All claims advanced on the motion for an order for sale must be claimed in the Statement of Claim. Sometimes protective disbursements have not been claimed. Sometimes a higher rate of interest is advanced. The Court will require amendment and further service.

(e) Foreclosure proceedings will conform with the rules respecting parties. Where a mortgagor is bankrupt, the trustee is a proper defendant and must be served in the usual way. Where the mortgagor is deceased, the proper party is the executor, administrator or court appointed representative, and the plaintiff must have a representative appointed if there is none. Also, where the equity has been conveyed, the mortgagor need not be a party unless a deficiency judgment is sought, but the new owner is not a subsequent encumbrancer within rule 94.10 and must be a defendant.

(f) Where more than one lot is mortgaged the order should clearly state which is to be sold or both. If both, whether together. If separate, in what order. Also, with separate sales the order should provide the sheriff with a clear direction for calculating the credit towards the second sale.

2.7 Notice of Public Auction

The plaintiff shall give notice of public auction, in the form attached:

(a) at least fifteen (15) days before the public auction by ordinary mail, postage prepaid, to the defendant at the address of the mortgaged premises and also, when that address is different from the last-known address, at the last-known address;

(b) at least fifteen (15) days before the public auction by delivery to Canada Post for transmission by registered mail to each subsequent encumbrancer appearing on the Certificate of a Solicitor at the last-known address of such encumbrancer or its solicitor; and

(c) by advertising the public auction by two (2) insertions, the first insertion at least fifteen (15) days prior to the sale and the second insertion not more than seven (7) days prior to the sale, in a newspaper sold within the county or counties in which the lands are located.

2.8 Sale Procedure

The sale by public auction shall be conducted in accordance with the Instructions for Conduct of Foreclosure Auction, or as close thereto as is possible in the circumstances.

2.9 Post-Sale Procedure:

After the sale by public auction, the plaintiff shall apply to the prothonotary for an order confirming the sale. In support of the motion, the plaintiff or the plaintiff's solicitor shall file an affidavit which may be in the form attached. The following items shall be exhibited to the affidavit:

- (a) a true copy of the plaintiff's certificate of taxation of costs;
- (b) the original or true copies of the tear sheets of the advertisements of public auction, showing the Notice of Sale, name of newspaper and dates of publication;
- (c) confirmation of delivery to Canada Post of the Notice to Subsequent Encumbrancer for transmission by registered mail to each subsequent encumbrancer, and a copy of the letter and Notice of Public Auction sent to defendants by ordinary mail;
- (d) a Sheriff's Report in the form attached, certified by the sheriff, deputy sheriff or authorized person who conducted the sale;
- (e) if the public auction was postponed, particulars of the postponement, and of any relevant Notice or advertisement.

2.10 Costs

Reference is made to Civil Procedure Rule 77 - Tariff E. Counsel will submit to the taxing authority a Bill of Costs and substantiate each item claimed as a disbursement.

2.11 Judgment

The plaintiff shall have judgment against each defendant liable on the covenants effective the day payment is made to the plaintiff or if no payment is made 15

days after the sale. Subsequently, interest is to be calculated under the *Interest on Judgments Act*. Enforcement of the judgment is stayed until the plaintiff establishes there is a deficiency and the court has determined the amount of the deficiency. Therefore, a Certificate of Judgment cannot be issued by the prothonotary nor recorded in the Land Registration Office until such amount has been determined.

III. Motions For Deficiency Judgment or Distribution of Surplus

3.1 Authority

Reference is made to Civil Procedure Rules 72.11, 72.12, 72.13 and 72.14

3.2 Purpose

The plaintiff's claim crystallizes in the Order of Foreclosure, Sale, and Possession. The order confirming sale confirms the provisions of the Order of Foreclosure, Sale, and Possession were carried out. It cannot confirm or otherwise deal with any claim the plaintiff may have which accrued after the date of the Order of Foreclosure, Sale, and Possession.

3.3 General Provisions

(a) The originals or true copies of all invoices or receipts from all independent suppliers of goods, materials, and services relating to the claim must be filed with the court for inspection. Where a property manager has been retained whose own personnel have provided goods, materials, and services in the management of the property under foreclosure, verification must be provided by affidavit stating who performed the work, their trade qualifications (if any), their hours of work, and hourly rates charged.

(b) The amount will be determined by adjusting the mortgage debt as settled in the Order for Foreclosure, Sale, and Possession. In addition to the amounts evidenced by the order and the Sheriff's Report, the Court will take into account interest to the date of default judgment, judgment interest after that date, taxation of costs, taxation of disbursements and allowable protective disbursements after the date the Notice of Action except those included in the amount settled by the Order for Foreclosure, Sale, and Possession. Particulars of protective disbursements and taxable disbursements are to be set out in an affidavit and must include sufficient detail to show work done or material provided, the necessity of work or material, the necessity of other kinds of charges and the recoverability of the charges.

(c) Notice of all motions, together with all supporting documentation, shall be given to the mortgagor and, where there is a surplus, to all subsequent encumbrancers disclosed in the certificate attached to the affidavit of the solicitor upon the application for foreclosure, sale, and possession, and on any subsequent encumbrancer disclosed in a sub-search to the date of filing of the Notice of Motion. Such service shall be effected by personal service or as otherwise ordered by the Court.

3.4 Claim for Surplus

(a) Each subsequent encumbrancer intending to make a claim to all or any part of the surplus is required, in advance of the motion, to file an affidavit in proof of its claim.

(b) The Court will order distribution of the surplus to encumbrancers according to their priorities.

3.5 Claim for Deficiency

(a) Motions for a deficiency judgment must be filed within six months of the sheriff's sale on ten days notice. A deficiency occurs where "the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, interest and disbursements as authorized by the mortgage instruments and costs". Where the mortgagor has so contracted and the mortgagee has so pled, the mortgagee has the right "to expend moneys to protect the property and to recover the same on a claim on the covenants so long as the expenditures were properly and reasonably incurred to realize the best price possible so as to minimize a claim for a deficiency against the mortgagor." (*Nova Scotia Savings and Loan Co. v. MacKay and MacCulloch* (1980), 41 N.S.R. (2d) 432 (S.C.-T.D.) at para. 16 quoted with approval in *Royal Bank of Canada v. Marjen Investments Ltd.* (1998), 164 N.S.R. (2d) 293 (C.A.) at para. 59.) The Court will allow only those items which: (a) are authorized by the mortgage; (b) were necessarily expended for the purpose of preserving and protecting the property; and (c) are demonstrated by evidence to have been necessary and reasonable, the specifics of which are set out in an affidavit of the mortgagee or its officer.

(b) The affidavit in support of the motion for deficiency judgment should contain the following: original appraisal report(s) and a copy of the sheriff's report, order confirming sale, certificate of taxation, evidence supporting protective disbursements as set out in paragraph 3.3 and 3.5 and a calculation of the amount of the deficiency.

(c) A mortgagee who wishes to have the hearing of a motion for a deficiency judgment adjourned must make a motion for an adjournment to a date certain, unless a judge permits a motion for an adjournment without day. The motion for an adjournment to a date certain may be made by correspondence that includes representations about the reasons for the request, any previous adjournments, when the mortgagee will be ready, the consent of the mortgagor if the notice of motion has been served, and a convenient time and date for the adjourned motion to be heard. If the reason for the adjournment is a need for substitute service, the representations should include an estimate of the time required to obtain and give effect to an order for substitute service. If it is because a sale has been agreed to, information on the time needed to close should be provided.

3.6 All amounts retained by the mortgagee's solicitor shall be supported by a solicitor's statement of account.

3.7 Commentary on Protective Disbursements

A claim for a protective disbursement must be supported by evidence and explained in a chambers memorandum. A claim for a protective disbursement will not be allowed unless the mortgagee provides for both the payment and its inclusion in the mortgage debt. The memorandum should refer to the term relied upon and if its meaning is in any way open to interpretation, the memorandum should provide a submission for interpretation mindful that the term is part of an adhesion contract. The affidavit on behalf of the mortgagee must contain sufficient detail so the Court can ascertain whether the disbursement is within the wording of the mortgage, whether the expenditure was necessary and whether the amount was reasonable. The following comments describe experiences of chambers judges in recent years, with the intention that this may provide some guidance as to claims that will likely be unsuccessful, claims that will require sound explanation and claims the amount of which will be closely scrutinized.

(a) Administrative Fees – Fees charged for efforts made by employees, such as on account of a missed payment or an NSF cheque or to inspect the mortgaged premises, have generally been rejected.

(b) Credit Reports, Trace Searches and Demand Letters – The cost of these has generally been refused. Disbursements for reports or searches may be taxable if they were incurred to effect service or used in a motion for substituted service.

(c) Appraisals and Surveys – Ordinarily one appraisal is allowed as a taxable disbursement on a deficiency judgment motion. Generally, judges have refused to allow the cost of appraisals or surveys obtained for the mortgagee's own purposes.

(d) House Sitting – Plaintiffs may expect close scrutiny of the cost and necessity, including frequency, of charges for mowing, snow removal, cleaning, maintenance, repairs and inspection. Commissions or flat fees, such as “weekly inspection” or “maintenance fee”, are not generally allowed unless the cost is, by evidence, tied to specific services and justified.

(e) Insurance – Premiums for policies insuring against fire and similar perils will only be allowed upon proof that the mortgagor’s policy was terminated. The mortgagee should also file with the court an undertaking that the balance will be credited against the mortgage debt if the policy is cancelled before its usual expiry. Premiums for liability policies are generally not allowed.

(f) Costs Associated with Environmental Concerns – In order for the cost of an environmental assessment or any remedial work to be allowed, there must be evidence establishing the need for the assessment or remedial work. The need to replace an oil tank must be proved before the cost of replacing the tank is allowed.

(g) Improvements – The need for and cost of making improvements, such as replacing a chimney or furnace or rebuilding a deck, will be closely scrutinized. There will be a presumption that an improvement made after appraisal increases the property’s value, and its cost will not usually be included in a deficiency judgment.

(h) Real Estate Commission – Some mortgagees receive a reduction in the amount of the real estate commission charged on sale of a property. The mortgagor is to receive the benefit of any such reduction. A mortgagee is only entitled to receive credit for the amount of the real estate commission actually paid.

3.8 Documentation

The documentation required on all motions is:

(a) Notice of Motion – The notice must refer to the Civil Procedure Rule being relied upon, and must enumerate which of the claims is being made. If there is a claim for a surplus, the notice must be directed to the respondents and all subsequent encumbrancers and it must include counsel’s certificate that all subsequent encumbrancers are listed.

(b) Affidavit by or on behalf of the mortgagee – The affidavit is to be of the mortgagee, an officer or employee of the mortgagee or the management company engaged by the mortgagee. It is not to be an affidavit of the mortgagee’s solicitor. There will be attached to this affidavit as exhibits all documents necessary to

establish each of the claims being made by the plaintiff. These shall include the following:

- (1) a statement showing the calculation of the plaintiff's claim for interest, the rate used and the per diem amount;
- (2) a listing of any protective disbursements claimed which were not already included in the Order of Foreclosure, Sale, and Possession and which are otherwise permitted by this Memorandum. The list shall itemize each disbursement by category and show the total amount claimed in each category. Information must be provided to demonstrate the necessity for incurring the protective disbursements, and;
- (3) statement showing details and calculation of any claim for judgment interest accruing after the date of judgment up to and including the date of motion, and in any event no longer than six months after the date of sale.

(c) Affidavit of Service.

3.9 Costs

Reference is made to Civil Procedure Rule 77 - Tariff E.

Upon this motion, counsel will submit a bill of costs covering all services and disbursements which are directly connected with the foreclosure proceeding, and be prepared to substantiate each item claimed as a disbursement. The Court will at this time tax the bill of costs by awarding an all-inclusive amount covering the Action for Foreclosure, Sale, and Possession, together with disbursements as substantiated. Alternatively, the Court may order disbursements to be taxed.

The Court will not approve disbursements which are in any way artificial. For example: legal accounts for searching or sub-searching title, attendance fees, office overhead charges and fees paid to another solicitor for work which is normally covered in the award of costs.

IV. Foreclosure of Collateral Mortgages, Including Mortgages for Future Debt

- 4.1 The principal difference between foreclosure of a collateral mortgage compared to foreclosure of a standard mortgage is that the foreclosure documentation will be required to set forth the particulars of the instrument to which the mortgage is collateral, and to establish that all conditions precedent to the enforcement of that instrument have been fulfilled.

- 4.2 Mortgagees wishing to foreclose a collateral mortgage may use the simple standardized Notice of Action, Statement of Claim and other documentation, but amended, especially in regard to paragraph 2, to disclose the nature and particulars of the collateral instrument and the steps which have been taken to fulfill the conditions precedent to enforcement.
- 4.3 The solicitor for the plaintiff is required to file an accompanying memorandum explaining and justifying each amendment to the standardized documentation.
- 4.4 If the mortgage secures debt instruments that may be entered into after the date of the mortgage, the brief should address the issue of priorities.
- 4.5 An alternative foreclosure procedure may also be available to creditors who hold collateral mortgages. A collateral mortgagee may first sue and obtain judgment for the amount owing upon the collateral security, and then move to foreclose the mortgage and sell the property. Since the mortgagee would already have a judgment for 100% of the amount owing, there would appear to be no reason why it should apply for a deficiency judgment. However, in case it might apply, the Order of Foreclosure, Sale, and Possession must include additional paragraphs such as the following:

IT IS ORDERED that seven (7) days' notice of the motion for settlement be given to the defendant in accordance with the Rules.

IT IS FURTHER ORDERED that on the motion for settlement, the plaintiff, as a condition of obtaining the order, shall satisfy the Court that the defendant has been given credit against the judgment entered against the defendant on the day of , 20 , for the fair value of the property.

In this regard, reference is made to *Credit Union Atlantic Limited v. Bonang* (1996), 145 N.S.R. (2d) 175 (C.A.).

Note, if this procedure is followed, costs will not be allowed on a motion for deficiency judgment.

Instructions for Conduct of Foreclosure Auction

Introduction

These are instructions to a sheriff, deputy sheriff, or lawyer who conducts a public auction under an order for foreclosure, sale, and possession. They are to be followed, unless an order provides otherwise.

Scheduling auction

Plaintiff's counsel and you will set a time and date for the auction. It is to be held in the courthouse in the county in which the lands are located or another courthouse specified in the order.

Order, descriptions, and notice

Plaintiff's counsel will deliver a certified copy of the order for foreclosure, sale, and possession to you. You must show it to anyone who inquires until you deliver a report about the auction and sale. Counsel will also supply you with six copies of the description of the lands to be auctioned, the notice of public auction, and a list of any moveables to be sold with the land. You must cause a copy of the notice to be posted in a public place at the courthouse where the sale is to be held, and replace it if it comes to your attention that the notice is removed before the sale.

Municipal taxes

You will obtain, directly or from plaintiff's counsel, a tax certificate showing the amount of municipal taxes that are a charge against the lands ahead of the mortgage under foreclosure.

Postponement of auction

You and plaintiff's counsel may change the time and date for the auction before a notice of the sale is given or an advertisement is posted or set for publication. The plaintiff may require the auction to be postponed after the notice is given or the advertisement is posted or set for publication. You and plaintiff's counsel will schedule a new time and date. If it is thirty days or less from the original date, the plaintiff need not deliver new notices or publish new advertisements, but you, your agent, plaintiff's counsel, or counsel's agent must make an announcement at the advertised time, date, and place about the new time and date. Otherwise, the requirements for notice and advertisement apply, and efforts should be made to inform potential bidders who may arrive at the original time and date.

Cancellation of auction

You must cancel the auction when you receive a certified copy of either a notice of discontinuance of the foreclosure proceeding or an order cancelling the auction.

Conduct of auction

At the time scheduled for the auction you will announce the auction by reading the notice of public auction. You will then read aloud or distribute the terms of sale, call for bids, note and solicit bids, give warning when you are about to knock the property down to the apparent highest bidder, and sell the lands, and any moveables that are included, to the highest bidder.

Terms of sale

You will read aloud, or deliver a copy of, the following terms at the time of the auction and before you call for bids:

- (1) The auctioneer will ignore a bid less than the sum of the auctioneer's fees, the cost of the tax certificate, and municipal taxes that form a charge on the lands ahead of the mortgage under foreclosure, which sum is referred to in these instructions as the minimum bid.
- (2) The purchaser must pay a deposit of ten percent of the sale price, or the amount of the minimum bid, whichever is greater to the auctioneer immediately after the auction.
- (3) The purchaser must pay the ten percent by cash, bank draft, solicitor's trust cheque, or cheque certified by a recognized financial institution.
- (4) The purchaser must pay the balance to the auctioneer no later than fifteen days after the sale.
- (5) The purchaser and the plaintiff may agree in writing to extend the deadline for payment of the balance to as many as thirty days after the sale.
- (6) In exchange for payment of the balance of the purchase price, the auctioneer will deliver to the purchaser a deed referencing the mortgage under foreclosure and its registration or recording details and conveying whatever interest in the lands the mortgagor had when the mortgage was made or afterwards. If moveables are included, the auctioneer will deliver a bill of sale describing them.
- (7) The deposit is forfeited if the purchaser fails to pay the balance of the purchase price by the deadline.
- (8) The sale is also governed by the terms of the order for foreclosure, sale, and possession, any other order pertaining to the auction or the sale, the published advertisement of the auction, and the laws about public auctions and foreclosure and sale.

Closing

You must complete the sale as provided in the order for foreclosure, sale, and possession, the terms of sale, and any further order, unless the plaintiff is the purchaser and the amount bid does not exceed the sum of the minimum bid and the amount of the mortgage debt settled by the order for foreclosure, sale, and possession. In that later circumstance, you may obtain only the amount of the minimum bid from the plaintiff, and distribute it to cover your fees, the cost of the tax certificate, and the municipal taxes. In all other cases, you must distribute the proceeds of sale first to the costs covered by the minimum bid, next to the plaintiff to cover the amount of the mortgage debt settled by the order for foreclosure, sale, and possession and any further order, and lastly to the prothonotary to await an order distributing surplus funds.

Failure to deliver deposit

You have discretion when the purchaser fails to deliver the deposit immediately after the sale. You may do one of the following:

- (1) terminate the sale, declare the auction over, and report to the court;
- (2) terminate the sale, ascertain that other potential bidders did not leave and that the second highest bidder stands by that bid, and continue the auction starting at the second highest bid;
- (3) if you are satisfied that the purchaser neglected to get the deposit in a required form and may be able to do so before any other potential bidders leave, give the purchaser a reasonable time to get the deposit in a required form, failing which you will exercise the first or second discretion.

Failure to pay balance

You must terminate the sale and report to the court when a purchaser fails to pay the balance of the purchase price before the deadline for closing.

Distribution of deposit after termination

You must distribute the deposit first to your fees and expenses, next to municipal taxes that form a charge ahead of the mortgage, and lastly to the mortgage debt when a sale is terminated because the purchaser fails to pay the balance of the purchase price.

New auction after termination

You and the plaintiff's counsel may schedule a new auction after you terminate a sale. The requirements in the order for foreclosure, sale, and possession for notice and advertising apply to the new auction, as do these instructions and any further order.

Supreme Court of Nova Scotia

Between: [complete the heading as required by Rule 82 - Administration of Civil Proceedings]

Plaintiff

and

Defendant

Notice of Action

To: [name each defendant]

Action has been started against you

The plaintiff takes action against you.

The plaintiff started the action by filing this notice with the court on the date certified by the prothonotary.

The plaintiff claims the relief described in the attached statement of claim. The claim is based on the grounds stated in the statement of claim.

Deadline for defending the action

To defend the action, you or your counsel must file a notice of defence with the court no more than the following number of days after the day this notice of action is delivered to you:

- 15 days if delivery is made in Nova Scotia
- 30 days if delivery is made elsewhere in Canada
- 45 days if delivery is made anywhere else.

Judgment against you if you do not defend

The court may grant an order for the relief claimed without further notice, unless you file the notice of defence before the deadline.

You may demand notice of steps in the action

If you do not have a defence to the claim or you do not choose to defend it you may, if you wish to have further notice, file a demand for notice.

If you file a demand for notice, the plaintiff must notify you before obtaining an order for the relief claimed and, unless the court orders otherwise, you will be entitled to notice of each other step in the action.

Rule 57 - Action for Damages Under \$100,000

This action is not within Rule 57, which does not apply to a claim for foreclosure, sale, and possession.

Filing and delivering documents

Any documents you file with the court must be filed at the office of the prothonotary
Street, Nova Scotia (telephone #).

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact Information

The plaintiff designates the following address:

Documents delivered to this address are considered received by the plaintiff on delivery. Further contact information is available from the prothonotary.

Proposed place of trial

The plaintiff proposes that, if you defend this action, the trial will be held in _____ ,
Nova Scotia.

Signature

Signed _____ , 20____

Signature of counsel
[name] as counsel for [name of
plaintiff]

Prothonotary's certificate

I certify that this notice of action, including the attached statement of claim, was filed with the
court on _____ , 20____ .

Prothonotary

[attach statement of claim]

Statement of Claim

1. The plaintiff is the mortgagee and the defendant [name] is the mortgagor of land located at _____, Nova Scotia [*and the defendant is the guarantor of the mortgage debt*].

2. Particulars of the mortgage are:

- (a) date:
- (b) name of mortgagor(s):
- (c) name of mortgagee(s):
- (d) amount secured:
- (e) description: schedule "A"
- (f) interest chargeable: _____ % a year, calculated [*half yearly, not in advance/monthly/annually as simple interest/other*]
- (g) recorded: Registry of Deeds, _____, Nova Scotia, in book at page _____ .
OR
recorded: Land Registration Office _____, Nova Scotia, identified as PID number _____ .

3. Particulars of the mortgage have been changed by the following subsequent relevant agreements:

<u>Agreement</u>	<u>Date</u>	<u>Amendment Effected</u>
(a)		
(b)		

4. Default in payment has been made under the terms of the mortgage and consequently the following amounts are due as of _____, 20__ :

(a) principal balance	\$ _____
(b) interest	\$ _____
(c) taxes debit or (credit)	\$ _____
(d) protective disbursements	\$ _____
(e) other	\$ _____
 Total outstanding	 \$ _____

5. The plaintiff claims against the defendant:

- (a) payment of the total outstanding, together with interest at the rate set out in the mortgage, as amended, on the sum of \$ _____, from _____, 20____ until the date of judgment;
- (b) charges and expenses incurred in connection with the lands and the mortgage, together with interest on these amounts at the rate set out in the mortgage, as amended, until the date of judgment;
- (c) interest on the amounts of any arrears from the date the payment or payments are due until the date of judgment;
- (d) costs;
- (e) in default of payment of the amounts claimed, an order for foreclosure, sale, and possession; and
- (f) judgment for the deficiency, if any, between the amount realized by sale under the order for foreclosure, sale, and possession and the aggregate of the sums claimed above.

6. The plaintiff claims foreclosure, sale, and possession against each defendant who has a right of redemption, or any other interests, in the lands.

[7. *The defendant, _____, guaranteed payment of money due to the plaintiff under the mortgage and the plaintiff claims against that defendant judgment for the amount guaranteed.*]

Signature

Signed _____, 20____

Signature

Print Name:

Supreme Court of Nova Scotia

Between: [copy standard heading]

Plaintiff

and

Defendant

Ex Parte Motion

Motion

[Name of plaintiff], the plaintiff in this proceeding, moves for an order for foreclosure, sale, and possession.

Evidence in Support of Motion

The evidence in support of the motion is as follows: affidavit of solicitor sworn on _____, 20____ and filed with this notice; affidavit by or on behalf of mortgagee sworn on _____, 20____ and filed with this notice; and affidavit of service [*sworn on _____, 20____ .to be filed later.*]

Reference

The moving party relies on Civil Procedure Rule 72.07.

Reason motion is *ex parte*

This motion is made without notice to any other person because the defendant is disentitled to notice under Rule 31 - Notice, and subsequent encumbrancers will be notified under Rule 35.12.

Hearing

The party making this motion will appear before the judge in chambers at the [Courthouse/Law Courts] , Street, Nova Scotia at [a.m./p.m.] on , 20 .

Signature

Signed , 20

Signature

Print Name:

Supreme Court of Nova Scotia

Between: [copy standard heading]

Plaintiff

and

Defendant

Affidavit of Counsel

I [make oath/affirm] and give evidence as follows:

- 1. I am the counsel for the plaintiff.
- 2. I have personal knowledge of the evidence [sworn to/affirmed] in this affidavit except where otherwise stated to be based on information or belief.
- 3. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.
- 4. The lands being foreclosed [are/are not] registered under the *Land Registration Act*. The lands being foreclosed are identified by PID .
- 5. Exhibit "A" is the Certificate of _____, a lawyer, dated _____, 20____, containing a list and particulars of all recorded instruments affecting the title of the lands being foreclosed since the date of the deed or conveyance to the original mortgagor.

OR

- 5. Exhibit "A" is a copy of the parcel register for the lands being foreclosed, which contains a list of all recorded or registered instruments affecting the lands being foreclosed as of _____, 20____ and Exhibit "B" is the Certificate of _____, a lawyer, dated _____, 20____, containing particulars of all instruments shown on Exhibit "A".

6. I have reviewed the summary statement of account in Exhibit "B" to the Affidavit of Agent of Mortgagee, and believe the plaintiff is entitled, pursuant to the mortgage, to claim the amounts listed in the summary.

[7. *Exhibit* is a copy of the demand letter sent to the defendants on _____, 20____.]

[8. *Exhibit* is a copy of the Assignment of Bankruptcy of the defendant [name].]

Sworn to/Affirmed before me)
on _____ 20____)
at _____,)
)
)
)

Signature of Authority
Print Name:
Official Capacity:

Certificate re *Registry Act*

I certify that listed below are the particulars of all instruments affecting title to the lands described in Schedule "A", recorded in the Registry of Deeds for the County where the lands are located, subsequent to the date of the deed to the original mortgagor.

Signature

Signed

, 20

Signature of Lawyer

Print Name:

Particulars

Certificate re *Land Registration Act*

I certify that listed below are the particulars of all recorded or registered instruments shown on the parcel register attached to my accompanying affidavit as Exhibit "A".

Signature

Signed

, 20

Signature of Lawyer

Print Name:

Particulars

Supreme Court of Nova Scotia

Between: [copy standard heading]

Plaintiff

and

Defendant

Affidavit of Mortgagee

I [make oath/affirm] and give evidence as follows:

1. I am the [title] of the mortgagee.
2. I have personal knowledge of the evidence [sworn to/affirmed] in this affidavit except where otherwise stated to be based on information or belief.
3. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.
4. I have read over the notice of action and statement of claim in this proceeding and say the contents are true.
5. By mortgage dated _____, 20____, and [recorded in the Registry of Deeds for _____, Nova Scotia, in Book _____ at Page _____/registered in the Land Registration Office for _____, Nova Scotia as No. _____] in the original principal amount of \$ _____, a certified copy of which mortgage is attached as Exhibit "A", the defendant, _____, mortgaged lands, which are at _____, Nova Scotia.
6. Exhibit "B" contains a statement detailing the dates and amounts of all charges and payments made on account of the mortgage since the _____, 20____, and a summary statement of account. Amounts shown in the summary statement are highlighted in the statement of account (if an amount in the summary statement does not appear in the statement of account, the affidavit must explain how it has been calculated,

with reference to information in the statement of account). I have reviewed all entries and calculations, and they are correct.

7. As of the date of this affidavit, the mortgage is _____ months in arrears.
8. The following payments and arrangements have been made since this action was commenced:

9. Exhibit "C" contains a listing and copies of all relevant agreements changing the terms of the mortgage.
10. Exhibit "D" contains a listing and particulars of all charges including protective disbursements made on account of the mortgage and shown on the summary statement of account in Exhibit "B". The originals or copies of invoices or receipts will be disclosed to the court and, upon request, to the defendant and the guarantor.

Sworn to/Affirmed before me)
on _____ 20)
at _____,)
)
)
)
)

Signature of Authority
Print Name:
Official Capacity:

Summary Statement of Account

Address of the mortgaged property:

As of this date, the following is a summary of the mortgage account:

- | | | |
|---------------------|---|----|
| 1. | principal amount as of _____ ,
20____ , [<i>the latest of date of mortgage, last
renewal, last assumption</i>] | \$ |
| 2. | interest accrued and paid since date in line 1 | \$ |
| 3. | other charges incurred since date in line 1 | \$ |
| 4. | principal payments made since date in line 1 | \$ |
| Amount Outstanding: | | |
| 5. | principal | \$ |
| 6. | interest | \$ |
| 7. | taxes [<i>debit/(credit)</i>] | \$ |
| 8. | other outstanding charges | \$ |
| 9. | amount claimed | \$ |

Signed _____ , 20____

Signature
Print Name:
Position with Mortgagee:

[Attach the detailed statement of account.
All information contained in this summary must be
verifiable by reference to the detailed statement of
account.]

Supreme Court of Nova Scotia

Between: [copy standard heading]

Plaintiff

and

Defendant

Order for Foreclosure, Sale, and Possession

Before the Honourable Justice [name or blank] in chambers

On the motion of [name] , the following is ordered:

1. The amount due to the plaintiff on the mortgage under foreclosure is settled at \$ with interest on \$ [insert the amount upon which interest is claimed in paragraph 5(a) of the statement of claim] at the rate of % a year from , 20 up to:

(a) fifteen days after the day of sale by public auction, if the mortgagee purchases the property; or

(b) fifteen days after the day the balance of the purchase price is paid to the sheriff or other person conducting a sale by public auction, if a person other than the mortgagee purchases the property;

together with any other charges and protective disbursements, as approved by the court, and costs to be taxed.

2. The sheriff shall, if requested by the plaintiff, take possession of the lands described in the mortgage and deliver possession to the plaintiff or a person designated by the plaintiff.

3. All the interest and equity of redemption of the [mortgagor/defendant name] and of all persons claiming through the [mortgagor/defendant name] in the lands described in the mortgage are forever barred and foreclosed, and shall be sold by the sheriff, the sheriff's nominee, or another person appointed by the court at a public auction conducted in accordance

with the Instructions for Conduct of Foreclosure Auction, which is incorporated by reference except only to the extent varied by this or further order of the court, unless before the time of sale the amount due, together with costs, are paid to the plaintiff. The sale is to be held at [a courthouse in the county in which the lands being foreclosed are located. / The courthouse at _____, Nova Scotia.]. Conveyance shall be by deed to the purchaser. The proceeds of the sale shall be applied to cover the expenses of the sale, with the balance paid to the plaintiff to the extent of the mortgage debt and any surplus paid to the prothonotary at the place of this proceeding.

4. The plaintiff shall give at least fifteen days notice of public auction to the defendant by ordinary mail and to each recorded subsequent encumbrancer by delivery to Canada Post for transmission by registered mail, and advertise the public auction by two insertions, the first in the _____ at least fifteen days before the day of sale, and the second in the _____, not more than seven days before the day of sale. The abbreviated description of the lands contained in Schedule “A” is approved for use in the notices and advertisements.

5. A subsequent encumbrancer is bound by the terms of this order when the notice to subsequent encumbrancer under Rule 35.12 is delivered to Canada Post in the time provided in paragraph 4. A subsequent encumbrancer may defend or contest this proceeding by making a motion in chambers before the date of the public auction.

6. The plaintiff shall record a true copy of this order in the parcel register for the lands described in the mortgage.

7. The plaintiff shall have judgment for the mortgage debt against the [name of each defendant liable on the covenants excluding any bankrupt defendant] effective as of the day payment of sale proceeds is made to the plaintiff or, if no payment is to be made, fifteen days after the day of the sale. Interest is to be calculated under the *Interest on Judgments Act* afterwards. Enforcement of the judgment is stayed until the plaintiff establishes that there is a deficiency and the court determines the amount of the deficiency. [Note: If all defendants are bankrupt, paragraph 7 shall be deleted.]

8. On or after a motion for confirmation of the sale, the plaintiff may make a motion to assess the amount of any deficiency, provided that no deficiency shall be claimed against a bankrupt. [Note: no deficiency is to be claimed against a bankrupt mortgagor.]

Issued _____, 20

Prothonotary

Supreme Court of Nova Scotia

Between: [copy standard heading]

Plaintiff

and

Defendant

Notice of Public Auction

To be sold at Public Auction under an order for foreclosure, sale, and possession, unless before the time of sale the amount due to the plaintiff on the mortgage under foreclosure, plus costs to be taxed, are paid:

Property: [insert authorized description]

A copy of the description of the property, as contained in the mortgage under foreclosure, is on file at the sheriff's office and may be inspected during business hours.

Date of Sale: , 20 .

Time of Sale: 12:00 o'clock noon local time.

Place of Sale: The [Law Courts/Courthouse] , , Nova Scotia.

Terms: Ten per cent (10%) deposit payable by cash, certified cheque, or solicitor's trust cheque at the time of sale, remainder within fifteen days upon delivery of deed.

Signed , 20

Auctioneer

Plaintiff's counsel and
designated address

Supreme Court of Nova Scotia

Between: [copy standard heading]

Plaintiff

and

Defendant

Affidavit of Counsel on Confirmation

I [make oath/affirm] and give evidence as follows:

1. I am counsel for the plaintiff.
2. I have personal knowledge of the evidence [sworn/affirmed] in this affidavit except where otherwise stated to be based on information or belief.
3. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.
4. As required by the order for foreclosure, sale, and possession dated _____, 20____, notice of the public auction was sent to the defendant by ordinary mail on _____, 20____, a true copy of which notice is attached as Exhibit "A".
5. Exhibit "B" contains true copies of confirmations of delivery to the subsequent encumbrancers of the notice of public auction in accordance with the order.
6. Exhibit "C" contains true copies of the notice of public auction as published in the _____, a newspaper published at _____, Nova Scotia on _____, 20____ and _____, 20____.
7. Exhibit "D" is a true copy of a certificate of taxation issued in the Small Claims Court of Nova Scotia on _____, 20____, in the amount of \$ _____.

8. Exhibit "E" is the sheriff's report for the sale of the mortgaged property which was held by the sheriff for _____ on _____, 20__.

Sworn to/Affirmed before me)
on _____ 20)
at _____,)
)
)
)
)

Signature of Authority
Print Name:
Official Capacity:
