



**The Law Society
of Manitoba**

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REAL ESTATE

Chapter 3

Mortgages

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A. INTRODUCTION

Mortgages charging real property are given by the mortgagor to the mortgagee to provide security in three types of situations:

- for an advance, present or future, of money or monies worth (goods, services) by the mortgagee to the mortgagor;
- for an existing indebtedness owing by the mortgagor to the mortgagee (e.g., the unpaid balance of the sale price of the real property sold by the mortgagee to mortgagor); and
- for a contingent liability incurred by the mortgagor by guaranteeing the indebtedness of a third-party debtor in favour of the mortgagee (Guarantee Mortgage).

The purpose of giving a mortgage on real property is security: if the mortgagor defaults in an obligation, the mortgagee may sell or foreclose the real property to satisfy the obligation.

Mortgages fall broadly into two classes:

1. Mortgages registered under the provisions of [The Real Property Act](#) or
2. Unregistered mortgages, commonly referred to as equitable mortgages.

1. Mortgage Registered Under *The Real Property Act*

The advantage that a mortgage registered under [The Real Property Act](#) has over an equitable mortgage is that the mortgagee of a registered mortgage can use the mortgage sale and foreclosure procedures conducted through the Land Titles Office under [sections 134-144 of The Real Property Act, RSM 1988, c. R30](#) whereas an equitable mortgagee must proceed through the court to realize on the security unless it is a signed mortgage which the financial institution has chosen not to register.

To acquire a mortgage registered under the provisions of [The Real Property Act](#), the mortgage documents must meet the minimum requirements of [The Real Property Act](#), both as to content and as to formalities of execution.

[Teranet Manitoba](#) is the private service provider that operates the Manitoba Land Titles Offices. The Registrar-General is responsible for exercising general oversight of Teranet Manitoba as the service provider and for ensuring that the land registration systems are provided by Teranet in accordance with Manitoba's legislation. The Registrar-General may make, amend and repeal rules of practice that relate to the land registration systems.

2. Equitable Mortgages

There is no prescribed form for equitable mortgages. All that is required is an expressed intention by the mortgagor to charge the real property in favour of the mortgagee.

The three most common forms of equitable mortgages are:

- an undertaking by the mortgagor to provide a legal, registrable mortgage upon demand from the mortgagee;
- an unregistered legal mortgage; and
- a hypothecation or pledge (and deposit) of the Duplicate Certificate of Title by the mortgagor in favour of the mortgagee.

All must contain [The Homesteads Act, SM 1992, c. 46](#) affidavits to be valid “mortgages.”

The holder of an equitable mortgage against real property may acquire priority of registration by filing a caveat against the land in the Land Titles Office, giving notice of the equitable mortgage.

3. Residential Mortgage Financing

The three main types of mortgages used in residential housing are:

a) *National Housing Act Mortgage*

A lending institution approved under the [National Housing Act, R.S.C., 1985, c. N-11](#) (including most insurance companies, trust companies and chartered banks) can make an NHA mortgage loan. The *National Housing Act* and its [regulations](#) as adjusted from time to time fix the maximum loan amount that a borrower can receive. The interest rate may be one-quarter of a percent less than the rate for conventional privately-insured mortgages.

b) *Conventional Mortgage*

Mortgage loans are usually made by the same lending institutions that make NHA mortgage loans. Conventional loans may not exceed 80 percent of the appraised value of the property. Lending institutions may only make a loan above 80 percent of the appraised value if the mortgage is insured ([section 418](#) of the [Bank Act, S.C. 1991, c. 46](#)).

c) *High Ratio Mortgage*

If the loan amount exceeds 80 percent of the property value, it is a high ratio mortgage. Lenders are required to place insurance on such mortgages. Genworth Financial Mortgage Insurance Company Canada and Canada Mortgage and Housing Corporation insure high ratio loans to protect the lender. The terms of the insurance and qualifications fluctuate over time and in relation to the particular property covered by the loan.

B. STATUTORY AND COMMON LAW RESTRICTIONS

Real property mortgage transactions are subject to the same statutory restrictions generally as contracts for the purchase and sale of land. Also, there are special statutory and common law restrictions on the terms of a mortgage that can be exacted by a mortgagee from a mortgagor. These are:

1. Calculating Interest

a) Section 6 of the Interest Act, R.S.C. 1985, c.I-15

Subject to the [Criminal Code, R.S.C., c.C-46, section 347](#), the parties to a mortgage are free to agree to any rate of interest, including a variable rate established by a formula set out in the mortgage. However, where the mortgage is retired by payments which are combined interest and principal, it must express the interest at a rate compounded half-yearly or yearly, not in advance, failing which no interest may be charged. [Section 6](#) of the [Interest Act, R.S.C., 1985, c. I-15](#) provides:

6. No interest recoverable in certain cases. - Whenever any principal money or interest secured by mortgage on real property. . . is, by the mortgage... ., made payable on a sinking fund plan, on any plan under which the payments of principal money and interest are blended or on any plan that involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced, unless the mortgage . . . contains a statement showing the amount of the principal money and the rate of interest chargeable on that money, calculated yearly or half-yearly, not in advance.

As a result of the severe consequences prescribed by section 6 of the *Interest Act*, it has become traditional in Canada in mortgages providing for amortization by equal monthly instalments of principal and interest to quote the interest rate as a certain percentage compounded half-yearly, not in advance. Even credit unions, which often draw their mortgages quoting a rate of interest compounded monthly, not in advance, also go on to state the equivalent rate of interest compounded half-yearly, not in advance.

b) The Compounding Period

The significance of the compounding period agreed to between the parties lies in the fact that the amount of interest paid by the mortgagor at a given rate will vary with the compounding period. The term “compounding of interest” refers to the point of time when interest is charged on the interest which has accrued.

When interest is calculated or paid more frequently than the agreed-upon compounding period the principle of reinvestment must be taken into account when

setting the rate of interest. This principle assumes and gives credit to the borrower for interest deemed earned at the contracted rate per annum by the lender on the interest payments made between the compounding dates.

The formula for converting rates per annum compounded half-yearly, not in advance, into an equivalent monthly rate that recognizes the principle of reinvestment is set out in [Re Miglinn and Castleholm Construction Ltd., 1974 CanLII 779, 50 D.L.R. \(3d\) 524 \(ON CA\) at 529](#). There are also published mortgage tables that give various monthly factors for various rates of interest.

For example, the monthly interest rate to be charged where the agreed per annum rate is 12% compounded half-yearly, not in advance, is .97588%, not 1%. The equivalent annual rate compounded monthly is $.97588 \times 12 = 11.71\%$. In other words, 12% compounded half-yearly, not in advance, is equivalent to 11.71% compounded monthly, not in advance.

c) Case Law

If an agreement regarding interest does not articulate a compounding period, it will be a matter of interpretation as to whether simple or compound interest was intended and as to the appropriate compounding period.

In [Morenish Land Development Ltd. v. Metropolitan Trust Co., 1981 CanLII 41, 13 B.L.R. 290 \(S.C.C.\)](#), the clause in the mortgage called for monthly payments of interest only “with interest at 19% per annum.” There was no reference in the mortgage to the compounding period nor to whether interest was payable in advance or not in advance. The Ontario Court of Appeal had held that interest was to be compounded annually, not in advance, and that because of the monthly interest payments the principle of reinvestment had to be invoked and the mortgagee was to receive less than 1/12th of the annual rate by way of monthly interest payments. This decision was reversed by the Supreme Court of Canada on the ground that the mortgage agreement implied that interest at the agreed rate was to be compounded monthly and that the principle of deemed reinvestment was accordingly not applicable.

Where interest and principal payments are combined the question arises as to when [section 6](#) of the [Interest Act, R.S.C., 1985, c. I-15](#) requires that a rate compounded half-yearly or yearly, not in advance, must be set out in the mortgage to avoid forfeiture of all interest.

In [Kilgoran Hotels et al. v. Samek et al., 1967 CanLII 19 \(SCC\), \[1968\] S.C.R. 3](#), the mortgage secured the sum of \$315,000.00 with interest of 6 1/2% per annum, compounded quarterly, not in advance, and repayable by quarterly payments of \$7,002.00 each to be applied first on account of interest and second on account of the principal.

The mortgagor contended that the quarterly payments of \$7,002.00 were blended payments within the meaning of [section 6](#) of the [Interest Act](#) and therefore since the mortgage did not contain a statement of the rate compounded half-yearly or yearly not in advance, no interest should be chargeable on the mortgage. The court held

that the term “blended” had a restricted meaning in section 6, that is, “mixed so as to be inseparable and indistinguishable.” As such section 6 was inapplicable to the mortgage in question because both the amount of principal and the rate of interest were clearly stated. There was no concealment. The calculation of interest at each quarterly payment could scarcely be simpler. There was therefore no requirement to quote a rate compounded half-yearly or yearly not in advance.

It should be noted that in this case the payment date and interest compounding dates coincided so that the rate of interest to be used was simply 1/4 of the annual rate without the need to invoke the principle of deemed reinvestment.

2. Section 8 of the *Interest Act*

A mortgage cannot require a bonus, penalty or higher rate of interest to be paid if there is default. [Section 8](#) of the [Interest Act](#) provides:

8 (1) *No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by 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.*

(2) *Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.*

3. The Unconscionable Transactions Relief Act, R.S.M. 1987, c.U20

The court has jurisdiction, as provided in [section 2](#) of [The Unconscionable Transactions Relief Act](#), to re-write the terms of any loan if the cost of the loan or any of the terms are found to be harsh and unconscionable at the time the loan is made.

2. *Where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances at the time the loan was made, the cost of the loan is excessive or that the transaction is harsh or unconscionable the court may,*

(a) re-open the transaction and take an account between the creditor and debtor;

(b) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;

(c) order the creditor to repay any such excess if it has been paid or allowed on account by the debtor;

(d) set aside either wholly or in part, or revise or alter, any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order him to indemnify the debtor.

4. Section 347 of the *Criminal Code*, R.S.C. 1985, c.C-46

The charging of a rate of interest in excess of 60% per annum is a criminal offence under [section 347](#) of the [Criminal Code of Canada](#). See [Nelson v. C.T.C. Mortgage Corp., 1984 CanLII 572, 16 D.L.R. \(4th\) 139 \(BC CA\)](#), affirmed [\[1986\] 1 S.C.R. 749](#).

The term “interest” is broadly defined to include the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense paid or payable for the advancing of credit under an agreement or arrangement. This is in contrast to the narrower definition of interest adopted by the courts for commercial purposes under the [Interest Act](#) (Canada) (See, for example, [Attorney General \(Ontario\) v. Barfried Enterprises, 1963 CanLII 15 \(SCC\), \[1963\] S.C.R. 570](#)).

5. Redemption

Equity gives the mortgagor the right to redeem the security; that is, to pay off and discharge the mortgage in the following circumstances:

- Subject to any express prepayment provisions, the right to redeem is available only after the date for repayment fixed by the terms of the mortgage. The right to redeem is lost by the sale of the real property under a power of sale or by foreclosure by contract, statute or court order.
- The right to redeem may be voluntarily surrendered by the mortgagor only in a transaction separate from the lending transaction and for valuable consideration. A mortgagee cannot effectively deprive the mortgagor of the right to redeem as part of the original lending transaction, for the principle is “once a mortgage, always a mortgage.”

However, if a mortgagee in connection with a *Real Property Act* mortgage takes a transfer of land from the mortgagor to be used in the event of default, the subsequent registration by the mortgagee of the transfer of land upon default is deemed to be an election by the mortgagee to take the real property in satisfaction of the mortgage, and the debt is extinguished.

6. Section 10 of the *Interest Act*

[Section 10](#) of the [Interest Act](#) (Canada) gives the mortgagor the right to prepay the mortgage in full with a bonus of three months’ interest before maturity if the mortgage is for a term of more than five years unless the mortgagor is a corporation. [Section 20\(6\)](#) of [The Mortgage Act](#) (Manitoba) has a similar provision. In [Potash v. Royal Trust Co., 1986 CanLII 34 \(SCC\), \[1986\] 2 S.C.R. 351](#) at para 41, the Supreme Court of Canada held as follows in connection with the relationship between mortgage renewal agreements and [section 10](#) of the [Interest Act](#):

1. *The purpose of section 10(1) of the Interest Act and section 20(6) of the Manitoba Mortgage Act is to ensure that mortgagors have the right to pay off their mortgages at the end of each five-year period. They cannot be “locked in” for more than five years.*
2. *Where the original term of a mortgage exceeds five years, the mortgagor has the right to pay it off at the end of five years in compliance with the section.*
3. *Where the original term of the mortgage is for five years or less and the term is extended by agreement beyond the five-year period (the “date of the mortgage” remaining unchanged), the mortgagor has the right to pay it off at the end of five years.*
4. *Where a mortgagor elects not to exercise his right under section 10(1) but instead enters into an otherwise valid and enforceable renewal agreement which “deems” the date of the original mortgage to be the date of maturity of the existing loan, and the term of the renewal agreement does not itself exceed five years, he cannot prepay the mortgage.*
5. *When a mortgagor makes a conscious decision on the basis of full knowledge of his statutory right to repay at the end of a five-year period not to do so, he does not “contract out of” or “waive” his statutory right. He simply decides not to exercise it. If, however, he purports in a mortgage or renewal agreement to relinquish his right to pay off the mortgage at the end of any given five-year period, such a provision could not be enforced against him at the instance of the mortgagee. He would still be free to pay off the mortgage on compliance with the statute.*

7. Section 15 of *The Mortgage Act*

If a mortgagee commences proceedings for sale or foreclosure, by [section 15](#) of [The Mortgage Act, RSM 1987, c. M200](#) the mortgagor acquires the right, which subsists until the proceedings are terminated, to prepay in full the amount owing on the mortgage plus costs without obligation for any pre-payment penalty or bonus stipulated in the mortgage. [Rafnson v. Canada Permanent Trust Co., 1978 CanLII 2099 \(MB CA\), \[1978\] 3 W.W.R. 85.](#)

8. Relief Against Acceleration

[Section 14](#) of [The Mortgage Act](#) and [section 115](#) of [The Real Property Act, RSM 1988, c. R30](#) confer on the mortgagor the right to relief from the operation of an acceleration clause in a mortgage. The acceleration clause says that if the mortgagor defaults in any payment or the performance of any covenant the mortgagee may treat the entire balance of money secured under the mortgage as due. The relief provided is that if the mortgagor performs the covenant or pays any arrears due and any costs, at any time while the right of redemption exists, then the acceleration clause is inoperative and all proceedings to enforce the mortgagee’s rights under such a clause are terminated.

9. Section 36 of *The Law of Property Act*

Although a mortgage document usually reserves to the mortgagee the right to apply proceeds of fire insurance to pre-pay the amount owing on a mortgage, the mortgagor can apply under [section 36 of *The Law of Property Act, RSM 1987, c. L90*](#) to court for an order directing the application of the insurance proceeds to rebuild, restore or repair the building. It should be noted that there is a notice requirement and a 60-day limitation on the right to make this application. [Section 36 of *The Law of Property Act*](#) also overrides the right given to the mortgagee under [section 8 of *The Mortgage Act*](#) to require that the insurance proceeds be applied in or towards the discharge of the money due under the mortgage – see [section 8\(3\) of *The Mortgage Act*](#).

10. Section 25 of *The Mortgage Act*

Under [section 25 of *The Mortgage Act*](#), the mortgagor of a residential property or a property used for farming (section 25(8)) can request in writing that the mortgagee provide a statement of the debts secured by the mortgage once every 12 months, or as needed for payoff or sale, at no cost to the mortgagor. A notice of this right must be endorsed on the mortgage (section 25(6)). The details to be provided are set out in section 25(2) and a mortgagee who fails to comply with a request for a section 25 statement is subject to “suffer the reasonable costs incurred by the mortgagor” under subsection 25(5). Many mortgagees voluntarily and habitually provide an annual statement of account of the mortgage debt with the details required by section 25 which arrangement is addressed in subsection 25(7).

11. Section 4 of the *Interest Act*

[Section 4 of the *Interest Act*](#) of Canada provides that by the terms of any written agreement except mortgages on real estate, whenever any interest is made payable at a rate or percentage for any period less than a year, an express statement of the yearly rate must be set out in the agreement or else only five per cent per annum interest shall be chargeable, payable or recoverable on any part of the principal money. (See [V.K. Mason Construction Ltd. v. Bank of Nova Scotia, 1985 CanLII 608 \(SCC\), \[1985\] 1 S.C.R. 271](#); [I.A.C. Ltd. v. Guerrieri, 1982 CanLII 3304 \(ON CA\) 139 D.L.R. \(3d\) 352](#).)

But see [Mitsui & Co. v. Ocelot Industries Ltd., 1986 ABCA 39 \(CanLII\), 43 Alta.L.R. \(2d\) 189 \(Alta.C.A.\)](#), where the Alberta Court of Appeal held that [section 4 of the *Interest Act*](#) did not apply to a contract for the sale of goods which called for payment within 30 days of the invoice and interest at 1.5 per cent per month on overdue accounts. The court held that the term “interest” as used in the *Interest Act* refers to the charge imposed under an agreement to extend time for payment and not to interest imposed as damage for wrongfully withholding money.

12. Relief to Mortgagors and Guarantors

Persons who give mortgage security or personal guarantees in support of loans to others may be relieved by the court of their apparent obligations on the grounds of unconscionability, *non est factum*, or breach of fiduciary obligations. These grounds are not

effective where the creditor establishes that such party was fully informed or aware of the nature and effect of the document when it was executed, and, where fiduciary obligations exist between the creditor and the party (e.g., where the creditor assumes the role of financial advisor to the party), that such party has been made aware of all material risks known to the creditor.

The risk to the creditor of such defences succeeding can be largely eliminated by the creditor requiring guarantors or others who give mortgage security to obtain independent legal advice when executing a guarantee or mortgage. Because of the large volume of cases where mortgages and guarantees have been set aside on the above-noted grounds, it has become routine for financial institutions to require certificates of independent legal advice. It should be noted that neither the solicitor for the lender nor the solicitor for the borrower, nor any other solicitor of the same firm as either of these is “independent” for the purpose of giving an effective certificate of independent legal advice to the person who gives mortgage security or a personal guarantee in support of another’s loan. The precedents contain a sample certificate of independent legal advice.

C. REQUIREMENTS TO REGISTER A MORTGAGE

A sample completed mortgage is found in the precedents to this chapter.

It uses the form prescribed by the [regulations](#) to [The Real Property Act](#). This form must be used or the mortgage will be treated as an equitable mortgage and a caveat will have to be filed, or the mortgage will have to be fiat by the appropriate District Registrar before it can be registered as a legal mortgage. The District Registrar will fiat any document containing all of the necessary ingredients of a registrable legal mortgage, although not in the prescribed form (e.g., a debenture charging real property).

The form of mortgage approved by the Registrar General contains all of the basic ingredients for a valid and binding registrable legal mortgage. It omits, however, a number of clauses that are considered essential to an effective mortgage document. Note that there is no covenant to insure, no acceleration clause, no [section 6 Interest Act](#) clause, and none of the other boilerplate clauses except those implied by law.

The form prescribed is intended to incorporate by reference standard charge terms filed in the Land Titles Office. Under [section 96\(7\)](#) of [The Real Property Act](#) standard charge terms so filed at the Land Titles Office and incorporated by reference in the mortgage form are deemed to form part of the mortgage.

The mortgagor must receive a copy of the standard charge terms incorporated into the mortgage before the time the mortgage is executed. The mortgage form requires the mortgagor to acknowledge receipt of these items when executing the mortgage. Only one copy of the mortgage form should be executed. This avoids circulation of differently executed versions of the same mortgage. A copy of the registered mortgage can be requested from the Land Titles Office to be provided to the mortgagor and mortgagee. And remember, the mortgagor (and any covenantor) will have received a copy of the standard charge terms prior to execution of the original mortgage.

Many standard charge terms do not have a [section 6 Interest Act](#) clause. Where the agreed rate of interest is compounded other than half-yearly or yearly not in advance, a [section 6 Interest Act](#) Clause should be added, showing such equivalent rate(s) as reserved in the mortgage.

If the mortgagee does not have a set of standard charge mortgage terms, it is usually best to complete the prescribed form and insert only those additional terms that would be required to provide the terms of payment and additional promises that the mortgagor is required to make. Many lawyers have taken the time to develop a standard set of additional terms that can be inserted into the prescribed form. Another alternative would be to refer to standard charge mortgage terms that are on file in the Land Titles Office and include any necessary amendments in the Additional Provisions section of the Mortgage form.

Generally, the prescribed mortgage form contains all of the instructions needed to complete it. Each line and box of the form should be considered and completed if relevant. The following points should be kept in mind when completing the prescribed form:

- In Box 5 nothing needs to be completed. The boxes are optional and should only be completed if relevant. There are boxes for additional provisions where information may be added. Note that although a mortgage without a principal amount may bind the mortgagor and will be accepted for registration by Land Titles, it may not give good security vis-à-vis subsequent encumbrancers;
- Be sure to include appropriate Homestead evidence to address the rights and obligations under [The Homesteads Act, SM 1992, c. 46](#). Also note that appropriate evidence is needed to satisfy the requirements of [The Farm Lands Ownership Act, RSM 1987, c. F35](#);
- All encumbrances already affecting the title against which the mortgage is to be registered must be listed by registration number in Box 3. Further, if there is a prior mortgage to be registered in series with the mortgage that information must be inserted into the form by selecting “Registered prior in series” in Box 3 and choose mortgage from the drop-down list. [Section 72.7](#) of [The Real Property Act](#) states that all mortgages executed within Canada must be witnessed by a barrister or solicitor entitled to practise in the province or territory where the mortgage is executed (or by a notary in B.C. or Quebec). If the mortgagee is a financial institution, the signature of the mortgagor may be witnessed by an officer or employee of the financial institution or another designated person on behalf of the financial institution.

D. THE BUSINESS TERMS OF A MORTGAGE

1. Payment Clause

Examples of interest-only payments, a demand mortgage, and floating interest rate mortgage payment clauses are found in the sample mortgage clauses in the precedents. The mortgage may not always reflect the actual payment agreement between the parties. For example, a mortgage may be registered showing interest and payments greater than that agreed. This method is sometimes used when the rate and payments are not fixed until the mortgagee commences advancing money. The final rate and payments, lower than those set out in the mortgage, are confirmed by letter. Alternatively, the true arrangement between the mortgagor and mortgagee may be for a floating rate of interest not to exceed the rate set out in the mortgage. Again, this should be set out in a side letter. An agreement to make bi-weekly or weekly, instead of monthly, payments is often agreed to in a side agreement.

In connection with the drafting of the payment clause the following points should be noted:

a) Mortgages Amortized by Equal Consecutive Monthly Instalments of Principal and Interest

The first monthly payment in such case will be one month after the date of closing on a mortgage back to vendor, or one month after the commencement of the charging of interest (i.e. the date of advance, where the mortgage loan is for a cash advance).

Some mortgages provide for an interest adjustment date. That is the date to which interest only will be charged and usually deducted from the proceeds of advance. The regular monthly payments will commence one month following the interest adjustment date. The reason that the monthly payment commences one month after the date of advance or interest adjustment and not on the date of advance or interest adjustment date is that interest is charged in arrears and not in advance.

If the mortgage does not have a due date, check that the monthly payments to be inserted in the mortgage are sufficient to amortize the mortgage within the agreed time or within a reasonable time. If the mortgage payments are too small, then the mortgage may never be paid off or may grow indefinitely.

b) Mortgages with Floating Rates of Interest

The formula defining the rate of interest should indicate when rate changes are to be recorded under the mortgage (e.g., does the rate under the mortgage change at the same time as changes in the prime rate). If the changes in the rate under the mortgage are at other times (e.g., monthly or quarterly), then the clause should indicate the point of time in reference to the prime rate that is applicable when the rate under the mortgage changes. The mortgage must contain a definition of "prime rate." Insert the definition under Payment Details in Box 5 where it states "Prime is defined as".

To avoid uncertainty in interpreting the payment clause, it is useful to calculate and indicate the opening rate charged under the mortgage as of the date of the mortgage in reference to the then prime rate.

Where the monthly payments are equal and are applicable to combined principal and interest, the drafter should be careful to avoid contravening [section 6](#) of the [Interest Act](#) by making sure that the payment dates and the compounding period are identical. Also, the payment clause should indicate that the payments are applied first to interest and then to principal. This will bring the clause within the [Kilgoran](#) case cited earlier.

2. Prepayment Privilege

The mortgage arrangements may confer on the mortgagor the privilege of prepaying part or all of the mortgage money before the agreed due date without notice or bonus. This is known as an open mortgage. The privilege agreed to may have restrictions on it or there may be an agreed bonus of interest to be paid. The mortgagee's solicitor should not include such a clause unless it has been agreed to by the parties. Some mortgages allow non-cumulative payments equal to a percentage of the original principal amount on each anniversary of the date of the mortgage. Some mortgages allow the mortgagor to skip and/or to double-up on one payment per year during the term of the mortgage. The mortgage document can be as creative as the parties.

3. Payable on Sale

The mortgage may provide that in the event of sale of the real property the mortgagee may require the entire balance of the mortgage to be paid off. The clause may give the mortgagee an absolute discretion or a qualified discretion based on whether the purchaser is approved for assumption purposes. It should be noted that the mortgagee has no right to expect such a clause unless it has been agreed to. Such clauses are sometimes buried in the fine print in a printed mortgage form. It is the duty of the mortgagor's solicitor when perusing a mortgage or preparing a mortgage to delete this clause, unless it has been agreed to by the parties. (See [Jarvis Hotels Inc. v. R. & P. Metals Corporation Limited, 1982 CanLII 558, 17 B.L.R. 241 \(BC SC\)](#), where the court rectified a mortgage by deleting a sale clause in the printed form which was not a term included in the interim agreement). In the case of corporate mortgagors, the sale clause may be extended to the case where a change in control of the mortgagor takes place. See sample mortgage clauses. ("Control" must be defined in the mortgage.)

4. Covenant Clause

If repayment of a mortgage is agreed to by a person other than the mortgagor, that person is added as a party to the mortgage as covenantor and this can be selected in Box 5 of the mortgage form and a new signature page for the covenantor will be created. A precedent covenant clause is found in the precedents.

5. Joint Account Clause

If multiple mortgagees want, as between themselves, a right of survivorship in the event of the death of one of them, a survivorship clause can be added to the mortgage form by using words to the effect of “or the survivor” or “jointly” after the parties are listed in Box 4. The mortgage form allows you to select “The mortgagees hold the mortgage jointly” and allows for insertion of how the sharing of proceeds between the mortgagees is to occur. Words like “heirs and assigns” should be avoided as they suggest that the mortgage is not jointly held.

The effect of this sort of clause is that the Land Titles Office will permit the surviving mortgagee to deal with the mortgage upon proof of the death of the other mortgagee, without requiring transmission of the mortgage.

Such a clause is often used in vendor mortgages. Where a husband and wife who were joint tenants of a property they have sold are taking back a mortgage, they may want a right of survivorship clause in their mortgage. Such a clause should be suggested to them by the vendor’s solicitor and agreed to by the purchaser.

6. Division of Proceeds

Where there is more than one mortgagee, [section 96\(3\)](#) of [The Real Property Act](#) permits a mortgage document to specify the amount of the mortgage monies contributed by each mortgagee and to specify the amount of the proceeds from the mortgage each mortgagee is entitled to. This said, section 96(3) has the effect of prohibiting a mortgagee from being described as the owner of a fractional or undivided interest in the mortgage.

7. Revolving Account Clause

If the mortgage is given to secure a revolving account, this should be indicated in the Additional Provisions box in the mortgage so that neither the mortgagor nor the mortgagor’s creditors will be able to argue, pursuant to the rule in *Clayton’s case*, (1816), 1 Mer. 529, 35 ER 767 (Ch.), that the initial advance was paid off and that the mortgagee is unsecured as to subsequent advances.

8. Second Mortgage Clause

If a mortgagor defaults under the first mortgage, the second mortgagee can protect its position by paying the full amount owing under the first mortgage to the first mortgagee, and by having the first mortgage transferred in exchange.

However, the second mortgagee may not wish to advance the entire amount owing on the first mortgage. Instead the second mortgagee may wish to advance only enough to keep the first mortgage in good standing while foreclosing on the second mortgage. Such partial payments cannot be charged to the mortgagor nor added to the second mortgage without the mortgagor’s consent. ([Lapidus v. MacKrow \(1962\)](#), 37 W.W.R. 431 (B.C.S.C.); *Duel Investments Ltd. v. Wabick*, March 1, 1968, Man. Q.B., per Matas J.). A provision to effect this consent should be included in a second or subsequent mortgage.

9. Tax Prepayment Clause

As additional security the mortgagee may require that the mortgagor prepay on a monthly basis 1/12th of the annual property taxes, so that each June 30 the mortgagee will hold a sufficient fund to pay the taxes when due.

10. Fixture Clause

Where it is unclear whether components of the security are fixtures or chattels, the mortgagee may want to insert a “deemed fixture” clause in the mortgage. Such a clause is usually inserted with respect to appliances installed in apartments. The mortgagee may file a financing statement in the [Personal Property Registry](#) based upon the mortgage as a security agreement, or take a chattel mortgage to protect its position against third parties who would not be affected by the deeming provision. In farm mortgages, a deeming provision is ineffective by virtue of [section 35](#) of [The Law of Property Act](#). In such cases, a chattel mortgage should be taken as collateral security to cover areas of uncertainty such as mobile homes. Where chattel mortgages are taken, a financing statement must be registered.

11. Condominium Clauses

A standard mortgage form can be used in connection with mortgages on condominiums. Special clauses should be added including:

- (a) an assignment of voting rights, to give the mortgagee a say in major condominium decisions such as amendments to the declaration or plans or termination of the condominium;
- (b) a covenant to pay common expenses;
- (c) a covenant to insure according to the requirements of [The Condominium Act](#);
- (d) a covenant not to sell individual units, which is used if the mortgagee blankets all the units.

Sample clauses of this type are found in the precedents.

12. Blanketing Clause

In some cases, a mortgagee will take a second or subsequent mortgage as part of a transaction, and assume the obligation to pay prior encumbrances. Where a blanketing loan is to be made up partly of a cash advance and partly by assumption of an existing mortgage, the clause should make it clear that the mortgagor will be paying interest on the assumed mortgage from the date of assumption, not from the date the mortgagee makes the payments. If the blanketing mortgage is a mortgage back to a vendor, then the mortgagee vendor will already be liable for the prior mortgage and the function of the blanketing clause will be to indemnify the purchaser against the prior mortgage.

13. Consideration Clause

If the consideration for a mortgage is other than money lent (e.g., securing the unpaid balance of a purchase price or securing a contingent obligation) this fact should be set out in the mortgage. Alternatively, the true facts could be confirmed in an additional paragraph in the body of the mortgage. Failure to draft the mortgage in this manner will not invalidate the mortgage but might put the mortgagee to the trouble of proving the true consideration for the mortgage at a later date. Also, those provisions of the printed form which deal with the mortgagee's discretion in advancing money should be deleted, as no advance of money is contemplated under the mortgage.

E. THE BOILERPLATE TERMS OF A MORTGAGE

1. Usual Clauses

The following clauses are usually found in the printed form of an old memorandum of mortgage or in the standard charge terms, and cover in part what a mortgagee expects to get and a mortgagor is obliged to give under a mortgage. It should be noted that some mortgagees have drafted forms which express the boilerplate terms in simpler language than usually found in most mortgages. A sample of a set of plain language standard charge terms containing such clauses is found in the precedents.

- (a) Acceleration of payment in event of default (or sale);
- (b) Covenant to insure for fire and provide evidence of insurance. This covenant assures to the mortgagee the right to a mortgage clause pursuant to [section 133\(5\)](#) of [The Insurance Act, R.S.M. 1987, c.140](#). Pursuant to [section 133\(4\)](#), the mortgagee is prohibited from specifying the insurer with which the mortgagor must deal. The covenant to insure also entitles the mortgagee to place its own fire insurance at the expense of the mortgagor if the covenant is breached and deem the premiums to be charged by the mortgage. It also gives the mortgagee the right to apply the insurance monies to prepay the mortgage account in the event of fire, subject to the mortgagor's right to apply under [section 36\(1\)](#) of [The Law of Property Act, R.S.M. 1987, c.L90](#) to have the proceeds applied to repair the premises;
- (c) A clause entitling the mortgagee to collect rents and make leases in the event of default, thereby echoing the rights already conferred on a mortgagee by [section 114](#) of [The Real Property Act](#) and [section 38\(2\)-\(6\)](#) of [The Landlord and Tenant Act, R.S.M. 1987, c.L70](#);
- (d) A clause requiring the mortgagor to make repairs and not commit waste. Some mortgage forms also prohibit the mortgagor from making additions without consent. If this latter provision is inconsistent with the mortgagor's plans, the mortgagor's solicitor should have that provision deleted;
- (e) A clause requiring taxes to be paid when due;
- (f) A clause entitling the mortgagee to receive interest at the mortgage rate after default as well as before. This is a right that is not necessarily implied by law if it is not expressed;
- (g) A clause requiring the mortgagor to pay the mortgagee's legal costs for advancing the loan, dealing with default and discharging the mortgage.

2. Inappropriate Clauses

A printed mortgage form may also contain clauses that are inappropriate to the transaction for which they are supplied. The mortgagor's or mortgagee's solicitor should review the printed form and propose any changes to the form that will render the form consistent with the loan agreement. Some examples:

- The form may contain a contractual power of sale which is redundant because of the statutory power of sale under [section 134](#) of [The Real Property Act](#);
- The form may contain a clause giving the mortgagee the discretion not to advance money. If this clause is inconsistent with the loan commitment, it should be modified or deleted;
- Unwanted sale clauses, prepayment privileges, or realty tax prepayment clauses may be buried in the fine print and these should be watched for.

F. PRIORITIES

1. Status of Title

Priority of registration of a mortgage registered under [The Real Property Act](#) is certified by the Land Titles Office by a status of title, which is issued once for each mortgage (and any other document) upon acceptance of registration. If the status of title shows unwanted prior encumbrances this will usually be no surprise, because in registering the mortgage the registration numbers of all prior encumbrances will have been searched and endorsed on the mortgage. In fact, it is mandatory to indicate that the mortgage is subject to prior encumbrances on the form of mortgage, or the Land Titles Office will reject its registration.

2. Discharge or Postponement of Encumbrance

The desired registration priority is achieved by registering a discharge of the unwanted encumbrance or alternatively by registering a postponement, executed by the holder of the other encumbrance. A sample postponement is found in the precedents. The discharge or postponement can be verified by obtaining a certificate of status of the title following completion of registration.

3. Loss of Priority

A mortgagee who advances monies on a mortgage after registration having had actual notice of the registration of a subsequent encumbrance may lose priority pursuant to [section 17](#) of [The Mortgage Act, R.S.M. 1987, c. M200](#). Two sample cases where this problem can arise are as follows:

- If the purchaser of a property is financing by way of a first mortgage loan and a second mortgage back to the vendor, the second mortgage back to the vendor will usually be registered before the first mortgage is advanced. In such a case, the first mortgagee is protected against loss of priority through notice of the second mortgage, by obtaining from the second mortgagee when advancing the money, a consent to advance, a sample of which is found in the precedents.
- The purchase of newly constructed property will often be financed by a construction loan which will be partially advanced to the vendor after transfer of title to the purchaser. The mortgagee is protected against loss of priority on transfer of title to the purchaser by obtaining from the purchaser an assumption agreement in which the purchaser consents to the mortgagee advancing the balance of the mortgage money to the vendor. See the sample assumption agreement in the precedents and section 3.13 on Assumption Agreements.

4. Builders' Liens

In the case of builders' liens, the mortgagee can lose priority without even having notice of the registration of the lien. The mere registration of the lien prior to the advance of the mortgage money will deprive the mortgagee of the priority conferred by registration. Thus prior to advancing money on real property where construction has taken place a title search should be made and a search of the Unaccepted Builder's Lien List after the close of registrations at the Land Titles Office (an "after 3:00 p.m. search"). If there are no liens registered the funds should be advanced that day.

If a search reveals a builders' lien, then the mortgagee cannot safely advance any money until the lien is discharged. In such cases, there is loss of priority not only in favour of the registered lien, but in favour of all unregistered liens that have arisen at the time of the advance.

5. When the Advance Takes Place

In the case of mortgages given to secure contingent liabilities, the operative date for the "advance" is the date on which the liability is incurred, not the later date on which the mortgagee is called upon to advance money.

In the case of mortgage loans, the advance will be considered to have taken place, for priority purposes, only when the funds have left the control of the mortgagee or the mortgagee's solicitors.

G. CLOSING A MORTGAGE LOAN TRANSACTION

1. Considerations on Opening the File

The same general considerations as in the closing of a purchase and sale of real estate apply. Often the mortgage loan will be required to finance the closing of a purchase of real estate and the two closings will have to be coordinated.

The question sometimes arises as to whether the solicitor for the purchaser should also act for the mortgagee. This is a situation that may result in a conflict of interest. A solicitor undertaking to act for both parties on a loan will be unable to continue to act for either party if a conflict arises (the two parties should acknowledge this from the beginning) or should the mortgagee wish to take proceedings against the mortgagor. Also consider whether one or more parties require legal advice independent of borrower and lender. [Rule 3.4-12 of the Code of Professional Conduct](#) applies if you are acting for borrower and lender.

2. Searches

The scope of searches to be conducted by the solicitor for the mortgagee and the security documents to be prepared may be dictated by a loan agreement between the parties and will be by the instructions issued by the mortgagee to its solicitor. The solicitor will also have to ascertain their role in relation to any conditions of any loan agreement that must be satisfied before the loan is advanced.

3. Preparing for Closing

As a bare minimum, the mortgagee's solicitor will:

- (a) Prepare for execution by the mortgagor:
 - a *Real Property Act* mortgage to be executed. If the mortgagee is in the mortgage business, this document should be submitted to the mortgagee for approval before execution. If the mortgagee has its own special forms, the solicitor will usually be required to use them. The mortgagor(s) and convenator(s) should sign or initial each page;
 - An order for payment. This document authorizes the advance to be paid to persons other than the mortgagor;
 - A declaration as to possession.
- (b) Require production of a certified copy of a fire insurance policy or certificate or note of insurance, with loss payable to the mortgagee and mortgage clause attached;
- (c) Require a clear tax certificate, a satisfactory surveyor's certificate and a zoning memorandum, or alternatively title insurance if acceptable to the mortgagee.

In some situations, there will be additional requirements:

- (a) **Tenanted Property** - In connection with loans on tenanted property, it is usual to require a general assignment of lease(s) and rents and a chattel mortgage or security agreement on appliances as additional security. In order to perfect such security, registration of a financing statement under [The Personal Property Security Act, SM 1993, c. 14](#) is required, together with a search verifying that there are no prior competing registrations. If a search reveals prior registrations, a postponement will have to be obtained and registered.

A caveat with respect to a general assignment of rents cannot be filed against the land as this security does not confer an interest in land.

The function of the assignment of lease(s) is to prevent the lessor from altering the terms of the lease or obtaining a prepayment of rent without the consent of the mortgagee. The mortgagee should file a caveat in respect of its security interest in the lease (an interest in land). It is usual to also obtain estoppel certificates from the tenant(s) certifying that rent and all other charges are paid to date and that there are no outstanding defaults on the part of the tenant or landlord.

- (b) **Condominiums** - Since an assignment of insurance is not possible with respect to condominiums, the solicitor will obtain for the mortgagee a certificate indicating the coverage being maintained by the condominium corporation. The condominium owner/mortgagor should be required to carry insurance against the risk of the condominium corporation failing to insure, in addition to standard condominium insurance.

The mortgagee's solicitor will also prepare, have the mortgagee sign, forward to the condominium corporation, and obtain an acknowledgment of receipt of a notice of the mortgagee's interest. This is done to secure the mortgagee's right to receive notice of any important condominium proceedings. The mortgagee may also issue the borrower a general proxy which may be cancelled by the mortgagee if it wishes to attend the meeting personally. For an example see the precedents.

- (c) **Corporate Borrowers** - Although [The Corporations Act, RSM 1987, c. C225](#) permits a mortgagee to rely on the signatures of an actual or apparent officer or director as binding the corporation to the loan transaction, the mortgagee may choose to require additional evidence that the borrowing of money and issuing of security has been duly authorized. Certified copies of a directors' resolution and borrowing by-law may be required. Examples are found in the precedents.

- (d) **Second Mortgages** - As additional security the mortgagee will require:

- A copy of the prior security documents with confirmation by the solicitor that the terms are as represented;
- written confirmation from the prior mortgagee as to the balance owing and that the prior loan is in good standing.

4. Closing the Loan

Ideally, from the mortgagee's point of view, the mortgage money will not be advanced until the loan conditions have been met, the required security has been provided and registered, and all steps to secure priority are completed. Before the Western Law Societies Conveyancing Protocol was created in 2001 (and updated in March 2009 in Manitoba) [Conveyancing Protocol], the mortgagee would only advance the money when a copy of the registered mortgage was delivered, leaving it to trust conditions imposed on the mortgagee's solicitor to satisfy the balance of the requirements. The mortgagee's solicitor would impose trust conditions when releasing the money to the purchaser's solicitor.

Once the Conveyancing Protocol was created, if the parties agreed, the closing would take place in accord with the Conveyancing Protocol. Under the Conveyancing Protocol, a mortgagee would advance the money upon receiving the Solicitor's Report from the Purchaser's lawyer (in prescribed format as set out in the Conveyancing Protocol) so that the mortgage funds would be available to the Vendor's lawyer on closing and the trust conditions imposed on each side's lawyer would require that all the registrations be completed in accord with the Conveyancing Protocol.

Around about 2015, Title Insurance became popular for mortgagors in Manitoba. More commonly now, the mortgagor (borrower) purchases title insurance so that the mortgagee (lender) will advance the mortgage proceeds on the date of closing and rely on the Title Insurance's gap coverage policy for protection in the event of an intervening registration before the title has been transferred and the mortgage properly registered.

5. Mortgage Back to Vendor

A "mortgage back to a vendor" is given by a purchaser of real estate to secure part of the unpaid purchase price. There is no cash advance. Rather the mortgage is either collateral security for the unpaid vendor's lien, as in [*Lang v. MacMillan*, 1958 CanLII 355, 13 D.L.R. \(2d\) 778 \(ON SC\)](#), or in lieu of such lien, as in [*CMHC v. Co-operative College Residences*, 1975 CanLII 636, 71 D.L.R. \(3d\) 183 \(ON CA\)](#).

The mortgage document is usually prepared by the purchaser's solicitor and submitted to the vendor's solicitor for approval before closing.

The vendor's solicitor will:

- Before closing, check the form and content of the mortgage document and any collateral security to make sure that the vendor will be getting what is expressed or implied in the sale agreement.
- At closing, obtain evidence that the purchaser has provided adequate fire insurance with appropriate loss payable to the vendor as mortgagee and a mortgage clause attached.
- Through trust conditions imposed by the vendor's solicitor and accepted by the purchaser's solicitor, assure:

- that prior to delivery of possession, the purchaser and all convenators have executed all security documents;
- that the mortgage back is registered in series with the transfer of land and in the appropriate order with respect to the other encumbrances being registered; and
- that when registrations are complete, the vendor's solicitor confirms that the discharge of the vendor's mortgage has been completed and advises the purchaser's lawyer to obtain a status of title evidencing correct priority of registration.

H. DISCHARGING MORTGAGES

1. Procedure for Discharging a Mortgage

When the indebtedness or obligation(s) secured by a mortgage have been retired or fulfilled the mortgage may be discharged from the mortgagor's title by registering a discharge instrument executed by the mortgagee and completed as in the case of other land titles instruments.

Most mortgage forms obligate the mortgagor to pay the mortgagee's legal costs for preparing and attending on execution of a discharge of mortgage, and obligate the mortgagee to provide a discharge in exchange for full payment, including costs. *The Real Property Act* [Regulations](#) provide the maximum fee a mortgagee can charge to discharge a mortgage and the *Act* states that the discharge must be provided within 60 days of the date that all obligations under the mortgage have been met. A list of bank officials to contact in the event of delays in the discharge of mortgages can be found in the precedents.

If a solicitor is instructed to pay off and discharge a mortgage for a mortgagor, the solicitor should:

- have the client approve in writing any balance claimed by the mortgagee;
- recommend that the mortgagor obtain and check the mortgage statement for accuracy before approving payment, particularly in the case of private mortgages;
- in the case of private mortgages, endeavor to arrange for the mortgagee to attend on a solicitor, and forward the discharge monies in trust for a registrable discharge of mortgage. Alternatively, the private mortgagee should deliver the discharge in trust that it receives the funds.

2. Transfer of Mortgage

Instead of obtaining a discharge of mortgage, a mortgagor or subsequent encumbrancer entitled to redeem has the right to require the mortgagee to transfer the mortgage to any party in exchange for payment. See [section 6](#) of [The Mortgage Act](#). This situation most commonly arises when a mortgagor refinances with a different mortgagee.

3. Partial Discharge

If the mortgagee wishes to release part of the real property from the mortgage, you select "Partial Discharge" instead of the default selection of "Full Discharge" in Box 3 of the Discharge form. The covenant under the mortgage will remain enforceable with security against that portion of the real property that has not been released. For a release of part of a single parcel of land, the applicable subdivision controls must be complied with.

4. Court Applications

If the mortgagor encounters difficulty in obtaining a discharge of mortgage from the mortgagee, either because the mortgagee cannot be located or the mortgagee fails for any reason to provide a discharge of mortgage, the mortgagor may apply to court for an order discharging the mortgage or determining the balance owing, as provided in [section 105](#) of [The Real Property Act](#).

If a mortgage has become statute barred (no payment or acknowledgement of the mortgage for 10 years), the mortgagor may apply to court for an order declaring the mortgage to be statute barred and for an order directing the district registrar of the Land Titles Office to note on every title affected by the mortgage that it is extinguished as provided in [section 106](#) of [The Real Property Act](#).

5. Application to Registrar General

The Registrar-General, upon proof being made to his satisfaction that all moneys due and owing upon the mortgage have been fully satisfied, and that the mortgage should be discharged, may order the district registrar to cause an entry to be made in the register discharging the mortgage.

I. TRANSFER AND MORTGAGE OF MORTGAGE

1. Transfer of Mortgage

A transfer of mortgage may be registered to effect a sale, gift, devolution or pledging of a mortgage. An example of a transfer of mortgage is found in the precedents.

The following variables are available in completing a transfer of mortgage:

- the consideration for the transfer may be different than the amount owing on the mortgage;
- a right of survivorship may be provided as between two or more transferees;
- a provision for the division of the mortgage payments amongst the mortgagees may be provided;
- a provision may be inserted whereby the transferor guarantees to the transferee performance of the mortgagor's obligation.

The transferee of a mortgage acquires all of the rights of the mortgagee to the enforcement of the mortgage as provided in [section 101](#) of [The Real Property Act](#).

2. Mortgage of Mortgage

Subject to the right of redemption, a mortgage of a mortgage has the same effect as a transfer of mortgage. This might arise, for example, when a mortgagee (usually a private lender) wishes to use the mortgage as security for a loan.

As to the covenants under a mortgage of mortgage, there is some analogy to a second mortgage. The mortgagee of a mortgage is concerned with both the mortgagor of mortgage and the owner of the real property performing their covenants. A sample mortgage of mortgage is found in the precedents. A mortgage of mortgage is an option in the current smart mortgage form.

In any transaction involving a transfer or mortgage of mortgage, the solicitor is dealing not only with an interest in real estate, but also with a chose in action.

3. Protecting the Interests of the Transferee or Mortgagee

The following steps must be taken to protect the interests of a transferee or mortgagee of a mortgage in completing the conveyance.

- (a) Register the transfer or mortgage of mortgage in the same manner as you would a mortgage.
- (b) Notify the mortgagor in writing of the transfer or mortgage of mortgage and also of any new instructions regarding where payments are to be made. The mortgagee of mortgage may allow the mortgagor of mortgage

to continue to collect the payments on the mortgage until default. Obtain from the mortgagor an acknowledgment of receipt of notice and confirmation of balance owing on the mortgage to preclude any claims for set off.

- (c) If less than two years have elapsed from the advance of money on a mortgage, an acknowledgment from a debtor of the mortgage balance does not preclude the transaction from being attacked, after the mortgage is transferred, under [section 6 of *The Unconscionable Transactions Relief Act, R.S.M. 1987, c. U20*](#). The transferee is deemed to have notice of all circumstances surrounding the loan, unless the debtor acknowledges the following things before a lawyer at least 48 hours after the money has been wholly disbursed:
- the amount of money the debtor received from the money lent;
 - that the debtor is aware of the cost of the loan; and
 - that the debtor is aware of the manner and amounts in which, and the persons to whom, the loan was dispersed.
- (d) Have endorsed the interest of the transferee or mortgagee of mortgage on the fire insurance; obtain a certified copy of the insurance policy or note or certificate with mortgage clause attached.
- (e) Do all searches as in the case of a mortgage loan (i.e. taxes, survey, zoning, standing of prior encumbrances, etc.).
- (f) Search the [Personal Property Registry](#) and bankruptcy registers for creditors' claims that might have priority (e.g., general assignment of book debts). Obtain written acknowledgment of priority from any potentially competing claimants.

A search for executions is not necessary because under [section 7 of *The Executions Act, R.S.M. 1987, c.E160*](#), the mortgage document must be physically seized by the sheriff to effect execution. The priority conferred by section 5 upon delivery of the writ to the sheriff only applies to goods and chattels.

Only one mortgage of a mortgage can be registered as provided under [section 101\(6\) of *The Real Property Act*](#). A second mortgage could, however, be given by transfer of mortgage. The transferee must execute the mortgage of mortgage with the protection of a release of personal liability for the covenant on the mortgage of mortgage.

J. RENEWAL AND CORRECTION OF MORTGAGES

1. Registrable Memorandum of Agreement

Amendments to registered mortgages are typically made by a registrable Amending Agreement which is filed at the Land Titles Office, to extend the period for repayment of the mortgage on revised terms, to vary any provision of the mortgage or to correct an error made prior to execution. The consent of subsequent encumbrancers and an affidavit of the subscribing witness are required. Upon registration the mortgagee acquires registration priority for the amended terms equal to that of the original mortgage.

An amending agreement can add land to a registered mortgage (or other encumbrance). The materials contain a sample of this form of amending agreement.

2. Unregistered Agreements

Mortgage extensions, amendments and corrections may be made by unregistered written agreements between the mortgagor and mortgagee. Only if the amendment would prejudice a subsequent encumbrancer (as in the case of an agreed increase in interest) is consent and registration required to confer priority for the amended terms in favour of the mortgagee as against subsequent encumbrancers.

If a mortgagor and mortgagee agree to extend the terms of a mortgage at a rate of interest in excess of that registered, a subsequent encumbrancer whose rights arose prior to or without notice of the change is not affected by the change in terms and has priority over any claim by the mortgagee to the difference between the original and increased interest.

The first mortgagee will, in effect, become a third mortgagee, for the purposes of collecting the interest rate difference.

3. Registration of Caveat as a Means of Notice

Difficulties often arise in obtaining consents from subsequent registrants in order to preserve a mortgagee's priority with respect to the extended or amended terms of the agreement. Lenders may now register a caveat to provide valid notice of such agreements, although priority with respect to the amended terms is not preserved as against existing subsequent encumbrancers. Priorities will be obtained as against future registered encumbrancers. This middle of the road approach is open for discussion with lenders on a file by file basis.

If the mortgage has a clause allowing for extension of the mortgage at a higher rate of interest, a subsequent mortgagee who registers his or her encumbrance after an unregistered agreement to increase the rate of interest is made, may be subject to the unregistered agreed higher rate of interest.

K. *THE MORTGAGE BROKERS ACT* - REGISTRATION REQUIREMENTS

Persons other than financial institutions such as banks, credit unions and trust companies, who carry on the business of arranging mortgage investments, buying and selling mortgages or administering mortgages, are required, subject to certain limited exemptions, to be registered under [*The Mortgage Brokers Act, C.C.S.M. M20.*](#)

The purpose of the legislation is to provide disclosure to borrowers of the cost of borrowing and investor protection for those who invest in mortgages.

The earning of fees, commissions and other remuneration by persons who should be but are not registered under the act is prohibited and the borrower may recover any fees so paid.

L. LOAN AGREEMENTS

1. Ingredients of a Loan Agreement

Most loans on the security of a mortgage result from agreements between mortgagor and mortgagee. The main ingredients of a loan agreement are:

- the amount to be loaned;
- the conditions under which the advance will take place;
- the terms of repayment;
- the security to be given; and
- the cost of the loan (i.e., interest, fees, etc.).

2. The Borrower's Concerns

The function of a loan agreement as far as the borrower is concerned is to provide a legally binding commitment for the loan to take place, as the borrower may be making commitments to other parties in the expectation of having the proceeds of the loan. For example, the borrower may have purchased real property "subject to financing being arranged." Once a loan agreement is made, the financing condition will be satisfied and the borrower will be obligated to close the real estate transaction. At that stage of the transaction, all the borrower will have to rely on is the loan agreement. The borrower will have to be prepared to comply with the terms set out in the agreement and therefore should ensure that the terms proposed can be complied with when negotiating the loan.

It is unwise to accept an offer of financing that is conditional on the funds being advanced by the same date that the real estate purchase is scheduled to close. Such deadline does not allow for the fact that the transfer of land will ordinarily not be provided to the purchaser until the closing date. A further week or two, if not more, will be required to complete the registration of the mortgage. If the lender insists on a deadline for the advance to take place at all or to preserve an interest rate, then the borrower should allow at least a month after closing to be comfortable in closing the deal or, if this is not possible, should draw the funds to be held in his or her solicitor's trust account. It is becoming more common for banks to require funds be advanced on the closing date. Title insurance can be obtained in order to facilitate this requirement, or alternatively, the transaction can close by way of Protocol and all funds can be advanced on the date of closing. If funds are not drawn on the closing date, the borrower can lose its committed interest rate.

Another deadline often imposed in loan agreements that may be overlooked is the requirement that the offer of loan must be accepted within a prescribed time. To have a binding commitment, the borrower will have to return the signed acceptance to the lender within the deadline imposed in the offer.

3. The Lender's Concerns

From the lender's point of view, the loan agreement is important in spelling out the conditions that have to be met before the money will be advanced, as well as the terms to be exacted from the borrower. Any unusual terms must be set out in the loan agreement or they cannot be carried forward into the security documents (e.g., sale clause or tax prepayments). Furthermore, the loan agreement itself may set out various terms which are not mentioned in the security documents, but which are important to the lender. If this is the case, the loan agreement should expressly state that it will not merge in the security documents. For example:

- fees, costs, bonuses to be paid or deducted from loan proceeds; and
- any adjustments to the rate of interest and payments pending full advance of the money.

Also, the loan agreement will stipulate the security documents to be used or give the solicitor for the lender discretion in prescribing the documents.

The lender usually protects itself against a failure by the borrower to proceed with the loan by requiring payment of a deposit which, by the terms of the agreement, may or may not be refundable if the loan proceeds. Also, the borrower may have incurred an obligation to pay commission to a mortgage broker for having arranged the loan, which may be enforceable even if the loan does not proceed. Thus, the precise terms and conditions of the loan agreement can be very important in determining the rights of the parties if for some reason the loan does not proceed.

4. Breach of the Agreement

From the borrower's point of view, if the lender breaches an express obligation to advance the money, the sole remedy will be to sue for damages. Seeking specific performance will usually not be practical nor is it likely to be granted. Ordinarily, the borrower's damages would be measured by the difference between the contract cost of the loan and the cost of getting it elsewhere. In exceptional cases other damages might be awarded. (*Reid v. Garnet B. Hallowell Ltd.* (1978), 10 R.P.R. 308 (Ont. M.C.)). If the loan agreement or the mortgage itself gives the mortgagee the discretion whether to advance money or not, damages may not be recoverable. [*Adriatic Development Ltd. v. Canada Trustco Mortgage Company, 1983 CanLII 702 \(BC CA\), 2 D.L.R. \(4th\) 183 \(B.C.C.A.\)*](#).

M. ASSUMPTION AGREEMENTS

An assumption (of mortgage) agreement does not need to be signed by the purchasers of real property as the law deems the purchaser/transferee to be liable for all registered encumbrances against the purchased real property upon title issuing in their names (see [section 101\(2\)](#) of [The Real Property Act](#)).

However, an assumption agreement must be executed by the purchasers if there are unregistered amendments or side agreements to the subject mortgage to which the mortgagee wishes its new mortgagors to be bound. Read [sections 77.2 and 77.3](#) of [The Real Property Act](#) which provide, in part, for the release of a residential vendor/mortgagor within 3 months following the transfer of the mortgaged real property to the purchasers.