



The Law Society of Manitoba

INCORPORATED 1877 | INCORPORÉ EN 1877

REAL ESTATE

Chapter 4

Enforcement of Mortgage Security

February 25, 2020

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A. WHAT REMEDIES ARE AVAILABLE?

1. Mortgage Sale and Foreclosure Proceedings

When the owner of land which is subject to a real property mortgage (a “mortgagor”) fails to make a payment when due, or otherwise does not comply with his or her obligations under the mortgage, the party to whom the mortgage debt is owed (the “mortgagee”) has a number of options when considering how best to enforce the debt and realize upon its security.

The first and most common of these options is for the mortgagee to institute mortgage sale and foreclosure proceedings against the property. These remedies are provided for under the terms of virtually every mortgage in use in the province of Manitoba; as well, [The Real Property Act](#), R.S.M. 1988, c. R30 (sections 134 to 144) provides the basic rules governing mortgage sale and foreclosure proceedings.

Unlike in other jurisdictions, in Manitoba mortgage sale and foreclosure proceedings are not typically under the jurisdiction of the court. The proceedings are taken in the Land Titles Office for the land titles district in which the property is located and all applications are made to the district registrar thereof.

It should be noted that the mortgage sale and foreclosure proceedings as dictated under [The Real Property Act](#) apply only to land registered under that Act. Where the land in question is registered under [The Registry Act](#), R.S.M. 1987, c. R50 the court does have jurisdiction and Rule 64 of the Court of Queen’s Bench Rules will apply.

Briefly put, the mortgage sale and foreclosure remedies provided for under [The Real Property Act](#) allow the mortgagee to sell the subject property under power of sale with the hope of obtaining sale proceeds which will be sufficient to discharge the mortgage debt. If the mortgagee is unsuccessful in selling the property, it may ultimately take title to the property itself by way of foreclosure. The mortgagor then has no further rights either to the property or to any proceeds of sale from it.

2. Suing Under the Covenant

In addition to the mortgagee’s right to sell the property or to foreclose, the mortgagee also has the right to file a statement of claim against the mortgagor based upon the covenants contained in the mortgage. The typical mortgage contains a promise to pay to the mortgagee the amount borrowed from it (together with interest), as well as other promises on the part of the mortgagor. Accordingly, the mortgage debt can be sued upon in the same fashion as applies to any monetary debt.

Once the mortgagee has filed the statement of claim and served it upon the mortgagor, the mortgagee can then obtain judgment, assuming the mortgagor does not file a statement of defence. Once the mortgagee has a judgment, the usual remedies available to a judgment creditor are available. A mortgagee who takes title by way of foreclosure (as opposed to selling the property either at public auction or privately pursuant to the power of sale) loses the right to sue under the covenant and any judgment already obtained under an action on the covenant is extinguished.

3. Collection of Rent

If the property subject to the mortgage is not occupied by the mortgagor for personal use, it may be rented to others. In this event, the mortgagee will not want the mortgagor to have the benefit of the rents while the mortgagor is not making payments under the mortgage.

Accordingly, the mortgagee has the right, under [section 38\(2\) of The Landlord and Tenant Act, R.S.M. 1987, c. L70](#) to serve a notice on the tenants requiring that the rents be paid to the mortgagee, to the extent of the arrears of interest.

It should also be noted that a prudent mortgagee may have required the mortgagor to sign an assignment of rents as collateral security. This assignment would usually give the mortgagee even greater rights to collect rents.

If there is no tenant in occupation of the mortgaged property, [The Real Property Act](#) gives the mortgagee the power to enter into tenancy agreements with a view, again, to collecting the rents therefrom.

B. SELECTION OF THE APPROPRIATE REMEDY

1. Business and Legal Considerations

In determining which remedy will best serve the mortgagee, it is important to possess as many facts as possible regarding the mortgagor and, in particular, the financial position of the mortgagor. If, for instance, there appears to be ample equity in the property (that is, the value of the property exceeds the amount of the mortgage debt) it will likely be simplest and most effective to move quickly to mortgage sale. If, on the other hand, the amount of the mortgage debt appears to exceed the value of the property, mortgage sale and foreclosure proceedings may be futile and result in unnecessary expense to the mortgagee. This is especially true where the mortgagor has other resources from which to satisfy the mortgage debt.

2. Information Needed to Make an Assessment

First, an accurate mortgage balance is required. While most institutional mortgagees have this information available almost immediately by accessing their computers, some individual mortgagees may not even be aware of the balance outstanding under the loan. An up-to-date mortgage statement showing the amount of principal and accrued interest owing is required.

Second, the mortgagee will need to know the approximate value of the property. If the mortgagee is unable to make this assessment personally, it may be necessary to order an appraisal or otherwise seek the opinion of a real estate agent.

A physical inspection of the property is also in order. Most mortgagees will, on instituting proceedings, immediately have an inspection performed. While this inspection is often limited to an examination of the exterior appearance of the property, the mortgage document will typically give the mortgagee the right to enter on to the property for the purpose of inspecting its state of repair. Obviously, the condition of the property will impact on its value and also on the mortgagee's ability to obtain rents in the appropriate circumstances.

Where the property is subject to tenancies, the mortgagee should find out as many particulars of these tenancies as possible. The mortgagee will try to ascertain whether there are any written leases in effect, how long the various tenants have been in occupation, how much rent is paid periodically, whether the rents are up-to-date, whether the tenants have paid any security deposits to the mortgagor and other similar information.

In addition, an examination of the mortgagor's personal financial status is helpful. Many institutional mortgagees subscribe to one of the credit agencies and are able to obtain a credit report through this means. Unfortunately, many individual mortgagees will not have access to these credit agencies directly; however, law firms which subscribe to the credit agencies can be of assistance in obtaining information on behalf of clients.

3. Advantages and Disadvantages of the Various Remedies

The mortgage sale and foreclosure remedies through the Land Titles Office have the advantage of allowing a mortgagee to attempt to sell the mortgaged property to satisfy the debt. If successful, no court approvals are required and the mortgagee will recover the debt, any accrued interest and its costs. If the sale remedy is unsuccessful, however, and the mortgagee must resort to foreclosure, there are several disadvantages. Firstly, at least six months must pass from the date of default to the date of application for a final order of foreclosure. In the interim, the property may be deteriorating or decreasing in value and the mortgagee faces an increased cost. In addition, the legal costs involved in going right through to foreclosure can be substantial. On the other hand, in pursuing the mortgage sale and foreclosure remedies through the Land Titles Office, the mortgagee typically does not need to worry about a defence being raised by the mortgagor; there are no procedures in the Land Titles Office for a defence to be raised. The mortgagor must go to the Court of Queen's Bench should an issue arise.

The remedy of suing under the covenant has the advantage that it may result in a speedier realization of the debt if the mortgagor does not file a defence and has substantial assets apart from the mortgaged property. In such event, a default judgment can be obtained quickly and the various remedies of attachment and execution are available. On the negative side, the mortgagor can file a statement of defence and delay proceedings.

The remedy of collecting rents from the mortgaged property also has advantages and disadvantages. Obviously, the collection of rents represents an easy source of funds to be applied against the mortgage debt. The mortgagee may, however, be faced with having to fulfil the landlord's obligations, including repairing the mortgaged property or refunding a damage deposit which a tenant had previously paid to the mortgagor. In addition, there may be notice and accounting requirements imposed by the [Bankruptcy and Insolvency Act](#).

4. Farm Debt and Moratorium Legislation

Where the mortgage security includes farm land and other farm property, [The Family Farm Protection Act](#), R.S.M. 1987, c. F15 and the federal [Farm Debt Mediation Act](#), S.C. 1997, c. 21 affect the enforcement of the mortgage security. Under the latter Act, a farmer may invoke the protection of the administrators appointed by the Minister of Agriculture and Agri-Food and apply for a stay of proceedings (for up to 120 days) or for a review of the farmer's financial affairs. During a stay of proceedings, no action can be commenced. The [Farm Debt Mediation Act](#) also provides for a mediation process between the farmer and the secured creditors. Before any proceedings are commenced against the property of a farmer (note that this is not restricted to farm land but applies to all land owned by a farmer) the farmer must be served, at least fifteen business days in advance, with written notice of the secured creditor's intention to realize on its security and advised of the right to apply for a stay of proceedings.

[The Family Farm Protection Act](#) provides that the secured party must receive prior leave from the Court of Queen's Bench to enforce its security pertaining to farm land. Obviously, to the extent that the mortgage security deals with farm property, the mortgagee must comply with the provisions of the two Acts.

C. STEPS PRIOR TO COMMENCING ENFORCEMENT PROCEEDINGS

1. Taking Instructions

Typically, a mortgagee will give instructions to commence mortgage sale and foreclosure proceedings. Usually no mention is made of a suit under the covenant or any collection of rents. A lawyer receiving instructions from a mortgagee should not assume from this that the mortgagee only wishes the mortgage sale and foreclosure remedies to be pursued. The lawyer should discuss the availability of the alternative remedies with the mortgagee and seek specific instructions.

In order to assist the lawyer in commencing an action, the instructions should include the following information:

- a) Name and address of mortgagor;
- b) Legal description of mortgaged property;
- c) Current balance owing under the mortgage;
- d) Date of default under the mortgage;
- e) Number of and amount of instalments in arrears;
- f) Particulars of any non-monetary default;
- g) Whether the mortgage has matured, and if so, the balance owing on the date of maturity;
- h) Additional costs to be added to mortgage account; and
- i) The status of the real property taxes for the property.

2. Demand Letters

It is common practice for the mortgagee's lawyer to send a demand letter to the mortgagor prior to commencing any action. The demand letter should typically set out the nature of the default, what is required to remedy the default, and the time period within which such default must be remedied. There is no specific time which must be allowed to the mortgagor, but a grace period of up to seven days is not uncommon.

In addition, the demand letter may require the mortgagor to pay the solicitor's costs incurred in making the demand, although this item of costs is not listed in the Registrar General's tariff of costs under [section 143 of The Real Property Act](#). It is also prudent practice to point out to the mortgagor that, in the event that the default is not remedied, further proceedings will be instituted without notice to the mortgagor, and that all further costs incurred will be for the mortgagor's account subject to taxation under [section 143](#).

In certain circumstances, particularly where the mortgagor has had ample notice directly from the mortgagee that it intends to commence proceedings, a demand letter is not necessary.

3. Notice of Intention to Realize on Security

Where the mortgaged property constitutes all or substantially all of the property of an insolvent mortgagor and the property is used for commercial purposes and not, for example, as the mortgagor's principal residence, then the mortgagee must give a written notice to the mortgagor at least ten days prior to proceeding with the enforcement of the security. This notice of intention to realize on security may be sent with the demand letter. The notice should be served by registered mail, or as otherwise provided in the mortgage or other collateral security.

4. Searches

Once the notice period has expired, the lawyer should conduct a Land Titles Office search of the mortgaged property and obtain copies of any instruments registered against the title, particularly those registered subsequent to the mortgage under which proceedings are instituted.

The amount and status of real property taxes affecting the subject property should be obtained from the municipality in which the property is located. This information will be required in the course of the proceedings, as a municipality has a right of lien for unpaid taxes which can take priority over a registered mortgage.

If a suit under the covenant is being instituted, the lawyer should search the mortgagor's name in both the [Personal Property Registry](#) and the Bankruptcy Office.

If the mortgagor or any encumbrancer against the property is a corporate party, the lawyer should conduct a Companies Office search in order to ascertain the identity of the directors or attorney for service for such corporation.

5. Reviewing the Security

The lawyer should review the security document (most commonly a real property mortgage) both as to content and as to registration, to ensure that it is enforceable. If the mortgagee obtained collateral security (e.g., an assignment of rents) the lawyer should review the documents and examine their registration.

D. MORTGAGE SALE AND FORECLOSURE PROCEEDINGS

While the materials below are helpful and informative, final reference should be made to the [Registrar General's rules governing mortgage sale and foreclosure proceedings](#). These rules govern mortgage sale and foreclosure proceedings at Land Titles. Copies of the rules are available on the Teranet website under [Registrar-General Directives and Notices](#). [Ed. Note – rules regarding procedures during the COVID-19 Pandemic in 2020 can also be found there].

1. Timing of the Notice of Exercising Power of Sale (NEPS)

Once the mortgagor has defaulted under the mortgage and the default has continued for one month, the mortgagee is entitled to institute mortgage sale proceedings. This default may take a number of forms, including failure to pay realty taxes or insurance premiums, failure to keep the property in good repair and, most commonly, failure to pay an instalment of principal or interest when due.

If the default continues for one month, the mortgagee may institute proceedings by issuing and filing in the Land Titles Office a notice of exercising power of sale (“NEPS”). It should be noted that, in certain rare circumstances, the mortgage document itself may specify a longer period of default. Generally, however, only a default of one month must exist to institute mortgage sale proceedings.

Where the default alleged under the mortgage is a default other than in payment of realty taxes, principal, interest or insurance premiums, the mortgagee may not take further steps after issuing the NEPS without first obtaining an order from the Court of Queen’s Bench declaring that the mortgagee may proceed.

2. Drafting the NEPS

The NEPS should be drafted with care. Errors in the notice may give a mortgagor grounds to challenge the proceedings, in which case the mortgagee might have to discontinue proceedings and start from the beginning. If the error is not discovered until later in the proceedings such a mistake can be costly and time-consuming. Rules specify the form of NEPS which shall be utilized. It is suggested that the exact nature of the default be specified in the NEPS (i.e., whether the default consists of instalments in arrears, a matured mortgage, or, in the case of a demand mortgage, that demand has been made and the date of the demand). A schedule may be attached to the NEPS to particularize any other default under the mortgage.

3. Requirements of the NEPS

a) Signed by Mortgagee or Agent

The NEPS must be signed by the mortgagee or by its agent. It has been held that where a NEPS was not signed, it was invalid ([Re Botiuk](#) (1979), 11 R.P.R. 39 (Ont. C.A.)).

Where the notice is signed by an agent for the mortgagee, the capacity of the agent must be clearly indicated. In [Re Salciccia and Reid et al.](#) (1979), 5 R.P.R. 120 (Ont. High Ct.) the solicitor for the mortgagee had signed the notice without indicating his capacity. The court held that, as he had not signed “as solicitor and agent” for the mortgagee, the notice was invalid.

b) State the Amount Owning Under the Mortgage

The NEPS must state the amount owing under the mortgage as at a specified date, together with the interest rate to be calculated thereafter. Prior to preparing the NEPS it is important to obtain an accurate mortgage statement from the mortgagee indicating the amount of principal and accrued interest as at a certain date prior to issuing the NEPS, together with the interest rate which will be used to calculate interest thereafter. In the event that the mortgagee has incurred additional expenses which it wishes to add to the mortgage account (realty taxes, insurance premiums, inspection fees and the like) these may also be added to the mortgage balance. [Section 4 of The Mortgage Act, R.S.M. 1987, c.M200](#) may limit the recovery of inspection fees.

c) Parties Named in the NEPS

The NEPS will always be addressed to the current registered owners of the subject property, although the current owners may not be the same individuals who signed the mortgage.

In certain circumstances, the name of the mortgagee may be different from the name of the original mortgagee set out in the mortgage, due to a transfer of mortgage, amalgamation, or change of name. In such cases, the current name of the mortgagee is to be used.

4. Filing in the Land Titles Office

Once the NEPS has been prepared and signed, only one copy is required to be registered in the Land Titles Office for the land registration district in which the land is located. It is good practice to order a certified true copy of the NEPS which will set out the registration particulars.

5. Service

a) What is to be Served

A true copy of the NEPS must be served on each party required to be served. It is recommended, to register the NEPS as soon as possible, in order to fix with certainty, the persons required to be served.

Given that many errors in the NEPS are discovered when the document is examined by the staff at the Land Titles Offices, it is prudent to wait to serve the NEPS after it has been registered.

b) Who is to be Served

The NEPS must be served personally on the registered owner or owners of the property as well as on all other parties who appear to have an interest in the land registered subsequent to the registered mortgage under which the mortgage sale proceedings have been instituted.

Parties to be served may include subsequent encumbrancers, mortgagees, caveators and lien holders as well as judgment creditors. Any person or corporation whose interest was registered prior to the mortgage under which the mortgage sale proceedings have been instituted do not have to be served. Encumbrance holders whose interests are not extinguished by mortgage sale or foreclosure proceedings (see [section 141](#) of *The Real Property Act*) do not need to be served with the NEPS.

In addition, where the owner of the mortgaged land is an individual, his or her spouse or common-law partner must also be served with the NEPS, unless it can be established that the land is not the homestead of the registered owner. This requirement is to protect the potential homestead rights of a spouse or common-law partner. Accordingly, when the registered owner is to be served, the individual effecting service should inquire as to whether the individual has a spouse or common-law partner; if so, that person should also be served, unless the registered owner clearly indicates that the mortgaged property is not homestead (i.e., the registered owner and his or her spouse/common-law partner never resided in the subject property together during the course of their marriage/relationship).

Any party whose interest in the subject land was registered after registration of the NEPS do not have to be served as they are deemed to have notice of the mortgage sale proceedings. In [Caisse Populaire de Saint-Boniface Limitee v. Marcyniuk](#) (1979), 12 R.P.R. 94 (Man. C.A.), a second mortgagee sought to overturn sale proceedings under the first mortgage because it had not received notice. As the second mortgage was registered after the NEPS registered pursuant to the first mortgage, the court held that the first mortgagee was under no obligation to serve any notice on the second mortgagee. The registration of the NEPS has the effect of closing the list of subsequent encumbrancers which must be served. It should be noted, however, that upon application for an order for sale, the Land Titles Office may order that service

of the draft advertisement and subsequent documents be served upon parties whose interest is registered subsequent to the NEPS.

c) Manner of Service

All parties must be served personally. In the case of corporations, a search in the Companies Office should be conducted to ascertain the identity and address of a director, officer or attorney for service for the corporation. In the case of financial institutions, the Land Titles Office appears to accept service on a manager or assistant manager of the appropriate branch of the financial institution. Where personal service on a caveator or on a claimant under a judgment, lien or other instrument registered under [section 75](#) of *The Real Property Act* is required, personal service on the agent who signed the caveat or instrument against title at the address for service set out therein will not be accepted as personal service on the caveator or claimant. The caveator or claimant must be served personally. Where an owner of land is bankrupt and title to the land has not issued to the trustee in bankruptcy, the registered owner of the land must be served. Service upon a trustee in bankruptcy who is not the registered owner and who has not filed a caveat is optional.

Where personal service is impossible because the party requiring service is evading service, or has moved and cannot be located, application can be made to the Land Titles Office for an order for substitutional service. Such application is made by registering a Land Titles form of Request and accompanying affidavits. It may be necessary to also disclose in the affidavit the address of the mortgaged property itself and whether attempts were made to serve the mortgagor there (where this address is different from the mortgagor's). The Land Titles Office is requiring more exhaustive efforts to effect service, so the affidavit should be very detailed.

The Land Titles Office will typically order service substitutionally by mail, by publication of a notice in a local newspaper and by posting the Order and NEPS at the mortgaged premises. In all cases, service by mail will be deemed effective two days after mailing occurs. Be sure to take this into consideration in determining when the redemption period expires.

6. Certified Copy of Paper Title and Certified Status of Title

The Land Titles Office automatically issues a Certified Status of Title upon the registration of the NEPS. However, when the property is under the paper title system, you should order a certified copy of the title after registering the NEPS. In either case, the document will list all registrations against title to the property which will allow you to determine which parties must be served with the NEPS.

7. Order for Sale

a) Choosing Appropriate Next Step

In the vast majority of cases, where the NEPS has been served on all required parties and the default under the mortgage has not been remedied, the mortgagee will want to proceed to the next step, namely a sale of the property. The mortgagee may apply for sale by public auction, by private contract or by both modes of sale. It is good practice to apply for both modes. The following notes summarize the Land Titles Office procedure for mortgage sale proceedings.

b) When the Order for Sale is Available

The order for sale may be applied for where default under the mortgage has continued for one month after the date the last required party has been served with the NEPS. As [The Real Property Act section 135](#) uses the words “one month” instead of a number of days, it is prudent to assume that one month consists of 31 “clear” days. In addition, given the wording of [section 22\(3\)](#) of *The Interpretation Act*, SM 2000, c. 26 do not count the date of service, or the date of registration, as one of the 31 days.

c) Procedure to Obtain Order for Sale

An order for sale is obtained by registering a Request at the Land Titles Office. The Request must specify if the requested mode of sale is by public auction, private contract, or both. The following documents are attached as evidence:

- i. Certified status of title or certified copy of paper title (dated after the registration date of the NEPS);
- ii. Current continuing evidence of default. This evidence usually takes the form of an affidavit of the mortgagee or by an officer or employee of the mortgagee, which sets out when default occurred and states that default still continues. The affidavit of default should be dated at least 32 days after the day on which the last party required to be served was served with the NEPS;
- iii. Evidence of service of the NEPS. This evidence usually takes the form of an affidavit or affidavits of a process server. The affidavit should include evidence regarding [The Homesteads Act](#), SM 1992, c. 46 in the case of an individual mortgagor;
- iv. Auction advertisement, in duplicate (where sale by public auction is requested). The date and time of the sale and amount of the reserve bid may be left blank;

- v. Draft auction sale conditions (where sale by public auction is requested), in duplicate;
- vi. Statutory declaration based on personal knowledge, required under [section 142\(1\)](#) of *The Real Property Act* for the purposes of [The Family Farm Protection Act](#). It should indicate whether the [Farm Debt Mediation Act](#) applies to the proceedings or not. If the land subject to the mortgage is farm land within the meaning of *The Family Farm Protection Act*, a certified copy of the court order granting leave to the mortgagee to apply to the district registrar for the order for sale should be attached. If the *Farm Debt Mediation Act* applies to the proceedings, evidence must be included based on personal knowledge, that the mortgagee has given the farmer notice as required by the *Farm Debt Mediation Act*, that at least fifteen business days have passed since the notice was given and that the mortgagee has not received notice that a stay of proceedings is in effect under that Act.

d) Drafting the Advertisement

The auction sale advertisement submitted with the Request for order for sale by public auction must be approved by the Land Titles Office and, accordingly, care should be taken in its preparation. The advertisement shall include:

- i. Civic address of the property, or where the property is located in a rural area and a civic address may not be available, sufficient information by physical description or directions for locating the property, to allow interested parties an opportunity to locate and inspect the property;
- ii. Location of the auction sale. The location chosen should be convenient for parties residing at or near the land titles district in which the mortgaged property is located;
- iii. Certificate of title number;
- iv. A physical description of the property, highlighting as many features as possible in order to elicit interest, and including the type and use of the property (e.g., vacant land, single family residence, condominium unit, duplex, hotel, apartment block, farm land, shopping centre, etc.); for residential property, approximate square footage, number of bedrooms and presence of a garage; for farm land, total acreage and number of cultivated acres; reference to the existence of outstanding property taxes and/or prior mortgages, if applicable. Care should be taken not to make rash or inflated claims in connection with the property;

- v. A place to insert the amount of the reserve bid, (see 8. Establishing the Reserve Bid following this section) or, in the alternative, a statement that the reserve bid will be announced at the auction;
- vi. Name, address and phone number to contact to obtain a copy of the auction sale conditions or further information;
- vii. Any encumbrances that will remain on the title after title has issued to the new purchaser.

The advertisement may also include a statement as to whether the property will be available for viewing by the public prior to the auction.

e) Drafting the Conditions of Sale

See the Auction Sale Conditions form in the Forms and Precedents for this chapter. Care should be taken with respect to the completion of paragraph 2 of that form. Any taxes accruing after the date shown in paragraph 2, and any other encumbrances listed there will be the responsibility of the purchaser.

The interest rate payable on the balance of the purchase price, which is set out in the form in paragraph 8, shall not exceed the interest rate payable under the mortgage; however, the Land Titles Office may reduce the allowable interest rate where it is considered to be excessive.

f) Issue of Order for Sale

If the documentation submitted is satisfactory, the district registrar will grant an order for sale and approve the form of advertisement and auction sale conditions (in the case of sale by public auction). The order for sale (and approved advertisement and approved auction sale conditions if applicable) will be returned to you. Where the order allows an auction sale it will specify when and where the advertisement is to be published. Where the property is located in an urban area, the advertisement will normally have to be published in a local daily newspaper at least two weeks prior to the date of the sale. Where the property is situated in a rural area, the district registrar may specify publication of the advertisement in both a daily newspaper in the nearest urban centre and a local, weekly newspaper.

A copy of the order for sale and, where an auction sale has been ordered, the advertisement must be mailed by ordinary mail to each party upon whom the NEPS was served. In all cases where service is to be made by mail, the address shall be the registered address for service on record at the Land Titles Office as provided in [section 73](#) of *The Real Property Act*, and at the person's last known address, if different. Again, ensure that actual mailing takes place sixteen days before the auction date, as service by mail is deemed to have taken place two days after mailing takes place. In addition, the District Registrar of some land registration districts may require copies of the advertisement to be sent to all realtors in the area.

g) Complying with the Order for Sale

When you receive the order for sale, you should arrange a date and time with the auctioneer to allow sufficient time to comply with the service requirements.

Once the auction date is established, you should ensure that copies of the advertisement are delivered to the newspaper or newspapers before the deadline dates. When submitting the advertisement for publication, you should remember to request that the newspaper provide you with a tear sheet, as this will constitute the basis for an affidavit of publication.

You should also ensure that the advertisement and order for sale are mailed to all required parties within the time limit set forth in the order for sale. An affidavit of yourself or another member of your office regarding the circumstances of mailing will also be required.

Finally, when you advise the mortgagee that you have obtained an order for sale, you should request an up-to-date mortgage statement as at the date of the sale, including the principal, all accrued interest to the date of the sale and any additional expenses which the mortgagee wishes to add to the mortgage balance.

If the property is vacant, or if access to the property is available with the cooperation of the mortgagors, an appraisal should be obtained in order to establish fair market value of the property. This information will be utilized to establish the reserve bid. If there is reason to suspect that the value of the property is well below the mortgage balance, it is recommended that an appraisal or opinion of value be commissioned prior to filing the request for an order for sale, such that this information will be available to you and the mortgagee in time to establish the reserve bid for publication.

8. Establishing the Reserve Bid

A reserve bid must be established for the auction sale. Where the amount of the monies secured by the mortgage plus expenses occasioned by the sale is less than the fair market value of the land, the reserve bid shall be the monies secured by the mortgage plus expenses occasioned by the sale. Where the amount of the monies secured by the mortgage plus expenses occasioned by the sale is more than the fair market value of the land, the mortgagee may set the reserve bid at the monies secured by the mortgage plus expenses occasioned by the sale, or at a specific amount determined by the mortgagee that is less than the monies secured by the mortgage plus expenses occasioned by the sale, and is reasonable in the circumstances. The reserve bid cannot be more than the amount owing under the mortgage plus applicable costs.

9. The Sale – Public Auction

a) Procedure at Auction Sale

Prior to the date of the auction, a copy of the auction sale conditions shall be made available for public view at the place where the auction is scheduled to take place.

On the day of the auction, you should attend at the auction and deliver to the auctioneer the approved auction sale conditions, as well as the amount of the reserve bid, if the reserve was not disclosed in the conditions or in the advertisement. The amount of the reserve bid must be announced by the auctioneer at the start of the auction.

The auctioneer will also be required to read aloud the auction sale conditions to those in attendance at the sale, and thereafter will call for bids.

It is good practice for the mortgagee's solicitor to reiterate certain portions of the conditions of sale. It should be made very clear for example that the deposit on the purchase price as set forth in paragraph 7 of the Auction Sale Conditions form (*see the forms and precedents for this chapter*) is to be paid immediately upon completion of the bidding. You should stress that anyone interested in bidding should have cash or a certified cheque payable to the mortgagee's solicitor sufficient to pay such deposit.

It is not acceptable to allow the highest bidder time after completion of the auction to go to a bank to have a cheque certified, as there is always the possibility that this bidder will never return. In the event that any bidders are seriously interested but do not have certified cheques with them, it is better practice to adjourn the sale for a short while to allow the appropriate time to obtain a certified cheque or cash.

The auctioneer then calls for bids starting at the amount of the reserve, and the bidding proceeds as in any auction sale until the final bid is reached. If there are no bids, the sale is declared abortive. The highest bidder over the reserve will be declared to be the purchaser and the purchaser will complete an agreement of purchase and sale as discussed below.

b) Adjournments

An advertised auction sale may be adjourned no more than twice, so long as the combined length of the adjournments, if more than one, does not exceed six weeks from the original sale date. The new date and time for the auction must be announced publicly at the advertised time and place.

After the auction has been adjourned twice, or if the total length of any adjournments exceeds six weeks from the first scheduled date, an announcement must be made at the auction that the sale will be re-advertised. As well, the mortgagee must re-advertise in the same manner as the original advertisement at least fourteen days before the new auction date, and must serve the advertisement on all persons previously served with the NEPS, order for sale and previous auction sale

advertisement. This service must be effected at least fourteen days before the new auction date and is to be effected by ordinary mail at the address for service on record in the Land Titles Office and at the person's last known address, if different.

Where the auction actually takes place, whether it is abortive or successful, evidence relating to the number and length of auction sale adjournments must be provided. This evidence will be inserted in the completed auction sale conditions, in the section relating to declaration proving publication. The mortgage sale conditions will accompany an application for approval of private sale after abortive auction or application for final order of foreclosure as well as a transfer under power of sale and transmission to complete auction sale (in the event of an effective sale).

Where, in compliance with the foregoing rules, the sale advertisement was re-advertised, a copy of each advertisement is to be attached and the affidavit of service shall include evidence of the original service and all subsequent services.

c) Completion of the Sale

Where the auctioneer has declared the sale to be effective, the successful bidder and the mortgagee's solicitor will complete the agreement of purchase and sale contained in the auction sale conditions. The name of the successful bidder and the amount bid, together with the amount of the deposit paid are to be inserted, the agreement is to be dated, and both parties must sign. The mortgagee's solicitor may sign the agreement for purchase and sale as solicitor and agent for the vendor.

The auction sale conditions have typically provided for a deposit of 20% of the purchase price at the time of auction with the balance of the purchase money to be paid within 30 days from the date of sale. It should be noted, however, that the 20% deposit is not a fixed requirement, and a mortgagee may require a smaller or larger deposit at its discretion, subject to Land Titles approval.

Following the sale, the mortgagee's solicitor will provide the purchaser's lawyer with a statement of adjustments indicating the sale price, the amount of the deposit and the balance owing (together with accrued interest thereon at the rate specified in the auction sale conditions from the date of the auction to the date of closing) together with the vendor's legal fees, the payment of which is the purchaser's responsibility, as set out in the auction sale conditions. The date of closing is generally within thirty days of the auction sale or as agreed upon between the parties.

On the date of closing the mortgagee's solicitor will provide the following:

1. Mortgagee's transfer of land with the following attached as schedules:

- a) Auction sale conditions and relative proofs duly completed;
- b) Affidavit of service by mailing of the order for sale and mortgage sale advertisement;
- c) Evidence of all adjournments or cancellations;
- d) Evidence of bona fides from the mortgagee and purchaser indicating that the mortgagee and purchaser are not connected in any way and are dealing at arm's length, and that the sale is bona fide and for valuable consideration;
- e) Evidence from the mortgagee, based on personal knowledge that the mortgage was in default when the auction was held.

2. Application for transmission for execution by purchaser.

The purchaser will be required to execute the transmission and then return it to the mortgagee's solicitor, together with the costs of registration and the vendor's legal fees as per the tariff. The purchaser's solicitor will normally complete registrations, although the mortgagee's solicitor can also do so.

Upon registration of the mortgagee's transfer and transmission application, title to the subject property will vest in the name of the purchaser free and clear of the mortgage under which the proceedings had been taken and free of any instruments registered subsequent to the mortgage (section 137, but with the exception of those encumbrances listed in section 141 of *The Real Property Act*). The title will, however, be subject to any instruments which were set forth on the conditions of sale and which were registered prior to the mortgage. In addition, the purchaser will be responsible for all realty taxes accruing after the date shown in paragraph 10 of the conditions of sale. You will note that no adjustment for taxes was made in the statement of adjustments.

d) Distribution of Sale Proceeds

Upon completion of the sale, the mortgagee's solicitor must dispose of the sale proceeds in accordance with [section 136\(3\)](#) of *The Real Property Act*. The priority of distribution, subject to the statutory lien provided by [section 103\(2\)](#) of *The Employment Standards Code*, S.M. 1998, c. 29, is as follows:

1. The expenses occasioned by the sale (fees in accordance with the tariff of costs pursuant to [section 143\(2\)](#) of *The Real Property Act*, together with the disbursements);
2. The monies then owing to the mortgagee;

3. The monies owing to subsequent mortgagees, encumbrancers or lien holders in the order of their priority; and
4. The surplus, if any, to be paid to the owner.

Where surplus monies are being paid to any person or any entity subsequent in interest to the mortgagee, it is good practice to obtain from this subsequent party a receipt and acknowledgment. This would not be required where any surplus monies were being distributed to the owner.

10. Private Sale

a) Procedure

After issuance of an order for sale by private contract, it is in order for the mortgagee to market the property in an attempt to solicit offers. Many mortgagees will list the property with a real estate broker. Any offer received and accepted is subject to further approval by the district registrar. It has become standard practice to include conditions in any private offer in the form of "Schedule A." (*See the forms and precedents for this chapter for a sample "Schedule A"*).

The order for sale must be obtained before the mortgagee may accept an offer to purchase. In addition, the order for sale must be served on all interested parties (that is, those parties previously served with NEPS and any others noted on the order for sale) by mail, at least sixteen days before the date on which a private offer is submitted to the district registrar for approval.

b) Approval of Sale Price Only

The mortgagee, at its option, may apply for an order approving only the sale price. This approval, which is valid for a period of six months after the date of the earliest valuation, relates to price only and is not an order allowing or approving the private sale.

The approval of sale price is obtained by registering with the district registrar a request, the fee, a copy of the agreement of purchase and sale and two valuations of fair market value. (*See this chapter's section 10)(d) below*). Submit either:

- the originals of the offer and valuations; or
- notarial copy of the offer and valuations.

The originals will be returned to you, and an order will issue.

c) Approval of Private Sale

If an order for sale by private contract has been obtained and served on all relevant parties, and if sixteen days have passed after service, the mortgagee may apply for approval of a private contract.

To apply for the district registrar's approval of a private contract, you should register the following, in series, in the Land Titles Office.

i. Request/transmission form with the following attached:

- Original or notarial copy of the offer to purchase;
- Two valuations of fair market value (*see this chapter's section 10(d) below*), or the order approving sale price if same has been obtained;
- A listing history from the listing agent indicating the efforts used to market the property, how many showings were held and the details of any offers that were received;
- Evidence of bona fides from each of the mortgagee and the purchaser indicating that:
 - (a) the mortgagee and the purchaser are not connected in any way;
 - (b) the mortgagee and the purchaser are dealing at arm's length;
 - (c) the proposed sale is *bona fide* and for valuable consideration;
- Evidence from the mortgagee, based on personal knowledge, that at the time of the registration of the application to approve the private sale, the mortgage is still in default;
- If the order for sale had authorized sale by either public auction or private auction, evidence as to whether the auction had been advertised or the advertisement served and, if the auction had been advertised or the advertisement served, evidence of service of notice that a private contract is being submitted to the district registrar for approval;
- If notice of application for order of foreclosure/final notice to redeem had issued (*see this chapter's section 11(c) below*), evidence as to whether same has been served;
- If the notice has been served, evidence shall be attached of service on all parties who were served with the notice of application for order of foreclosure/final notice to redeem, of a notice that a private contract is being submitted to the district registrar for approval;
- Final order of foreclosure if it had issued but had not yet been registered;
- Completed auction sale conditions, evidence of auction sale adjournments, if any, and evidence of publication and service of auction sales advertisement if an unsuccessful auction sale had been held;

- ii. Transfer under power of sale executed by the mortgagee;**
- iii. Transmission signed by the purchaser.**

It is important to note that the transferee shown in the transfer under power of sale must be the same party named in the offer to purchase, or the purchaser so named and the purchaser's spouse, provided evidence is given that the additional party is the spouse of the purchaser. An offer which allows for the nomination by the purchaser of another individual or corporation to take title or the assignment of the agreement of purchase and sale will not be allowed by the Land Titles Office. Where there is a requirement for mailing of the notice of intention to sell by private contract at any stage in the proceedings, mailing must be completed at least fourteen days prior to the registration of the application for approval of private sale.

d) Valuations

In any situation where approval of a private contract is requested, two independent valuations of the mortgaged property must be provided to the district registrar. One of these must be an appraisal, while the other may be an opinion of fair market value given by a qualified realtor.

Both the appraisal and the opinion of fair market value must be dated or updated no more than two months prior to the date of the private contract being submitted to the district registrar for approval, and within six months of the date the application for approval of sale price is submitted for registration. Each of the appraisal and the opinion of value must include:

- Statements that the party providing the opinion is independent from the mortgagee, from the listing or selling agent for the property, and from the party providing the other valuation;
- The qualifications of the party providing the opinion or appraisal, including the length of experience, the type of property being sold and the individual's familiarity with sales of that property type in the area where the property is located; and
- Confirmation that the party providing the opinion actually attended at the mortgage property.

Some appraisers have attempted to limit the circumstances in which the appraisals can be used by inserting conditions or restrictions in the appraisal itself. The district registrar of the Land Titles Office will examine the appraisal to ensure that there are no conditions or restrictions which would prevent the district registrar from using the appraisal or opinion of value for the purpose of approving a contract.

The qualifications required of the individual giving the appraisal will vary depending upon the type of property. For a commercial property, or any farm property, the appraiser must have the A.A.C.I. (Accredited Appraiser Canadian Institute) designation. For single family, duplex or individual condominium unit properties, the

appraiser may have the A.A.C.I. designation, or either the C.R.A. (Canadian Residential Appraiser) or M.V.A. (Market Value Appraiser) designation.

The district registrar retains the right to require additional evidence regarding value, or to vary the appraisal and opinion of value requirements to take into account special circumstances such as difficulty of obtaining appraisals or opinions in remote areas.

e) Issue of Title

Upon registration of the materials referred to in this chapter at section 10(c) above, title will vest in the name of the purchaser free and clear of the mortgage under which the mortgage sale proceedings had been undertaken, and free and clear of any encumbrances subsequent to that mortgage, other than those encumbrances listed in [section 141](#) of *The Real Property Act*. Land transfer tax, computed in the regular way, will be payable at the time the documents are submitted for registration, based on the value of the property as disclosed in the transfer.

Upon title issuing, the mortgagee's solicitor must attend to applying the purchase price to payment in the order as set out in [section 136\(3\)](#) of *The Real Property Act*. In the event that there is a shortfall and the sale proceeds are not sufficient to repay the mortgage in full, the mortgagee will be free to pursue its remedies against the mortgagor under the covenant contained in the mortgage.

11. Foreclosure

a) Application for Foreclosure/Final Notice to Redeem

Where the public auction sale has been held and proved abortive and the mortgagee has not been able to arrange for a private sale of the property or does not wish to sell the property privately, the next step in realizing on the mortgagee's security is to apply for an order of foreclosure. This application will ultimately result in title issuing to the subject property in the name of the mortgagee. Application can only be made where default under the mortgage has continued for six months and has not been remedied.

b) Documentation Required

The primary document is an application for foreclosure, to be executed by the mortgagee and registered in the Land Titles Office, together with the following documents:

1. Request;
2. Order for sale;
3. Auction sale conditions with relative proofs duly completed;
4. Affidavit of service of mailing of auction sale advertisement and order for sale;

5. Affidavit under [The Family Farm Protection Act](#) and the [Farm Debt Mediation Act](#);
6. Affidavit of continuing default.

The application for foreclosure/final notice to redeem contains a statement of all relative facts proved by statutory declaration and includes an affidavit of continued default. The relative proofs referred to in the auction sale conditions consist of the declaration of publication of the advertisement and the affidavit of the auctioneer.

c) Notice of Application for Final Order of Foreclosure

Upon registration of the documents referred to in the foregoing section, assuming that they are satisfactory, the district registrar will issue a notice of application for order of foreclosure/final notice to redeem. (*See the forms and precedents for this chapter*). The notice provides that it is to be personally served on all parties upon whom service of the NEPS was necessary. In addition, the notice of application for order of foreclosure/final notice to redeem may require service on parties who have acquired an interest in the property subsequent to the filing of the NEPS.

The same considerations regarding personal service apply to the notice of application for order of foreclosure/final notice to redeem as applied in connection with service of the NEPS.

One month after service of the notice of application for order of foreclosure/final notice to redeem on all interested parties, if the property has not been redeemed by the mortgagor's having cured the default, and if no other action has been instituted as stated in the notice, then the mortgagee may make an application to the district registrar for the issue of an order of foreclosure under [section 139\(2\)](#) of *The Real Property Act*. Such application shall be made by submitting the following documents:

1. Request;
2. Current evidence of continuing default;
3. Evidence of service of the notice of application for order of foreclosure/notice to redeem.

At this time, the Land Titles Office will review the material and issue an order of foreclosure. (*See the forms and precedents for this chapter*).

d) Registration of the Order of Foreclosure

When you receive the order of foreclosure, you must take the time to seek specific instructions from the mortgagee prior to submitting the order of foreclosure to the Land Titles Office for registration. The effect of registration of the order is to vest title to the subject property in the name of the mortgagee free from all right and equity of

redemption on the part of the mortgagor or on the part of any other party served with the notice of application for order of foreclosure/final notice to redeem.

Another effect of registering the order of foreclosure and having title vest in the name of the mortgagee is that [section 16](#) of *The Mortgage Act*, R.S.M. 1987, c. M200 will operate to prevent the mortgagee from taking any further action against the mortgagor under the covenant contained in the mortgage. Any judgment obtained under an action on the covenant is extinguished. Accordingly, should the property be worth less than the amount secured by the mortgage, and should the mortgagee be interested in pursuing the mortgagor for the deficiency, the order of foreclosure should not be registered unless the mortgagee has been fully apprised of its rights and has made an informed decision.

To register an order of foreclosure, the following documents must be registered in series:

1. the original order of foreclosure;
2. transmission form, signed by the mortgagee; and
3. evidence, based on personal knowledge, of continuing default.

e) Issue of Title in the Name of the Mortgagee

The Land Titles Office will issue a title in the name of the mortgagee almost immediately upon registration of the order of foreclosure. This title will not be subject to the mortgage under which the foreclosure proceedings had been taken, nor will it be subject to any encumbrances which had been registered subsequent to the mortgage. Title will, however, be subject to any encumbrances which had priority to the mortgage.

One exception to the foregoing is that party wall agreements, caveats filed in respect of utility rights of way (see [section 141](#) of *The Real Property Act* for a complete list), and the like will be brought forward onto the new title, regardless of when the registration took place.

Where a mortgagee takes title by foreclosure to property which is subject to a prior mortgage, the rights of the prior mortgagee would appear to be limited to mortgage sale and foreclosure remedies regarding the land, with no right to the prior mortgagee to sue the new registered owner by foreclosure on the basis of the implied covenant contained in [section 77](#) of *The Real Property Act*.

Section 77 of *The Real Property Act* generally provides that in every instrument transferring land for which a certificate of title has been issued subject to a mortgage, there shall be implied a covenant by the transferee that the transferee will pay the monies secured by the mortgage. In [Crown Trust Company v. E.J.W. Development Co. Ltd.](#), 1982 CanLII 4040, 20 Man.R. (2d) 299 (MB QB), the Manitoba Court of Queen's Bench held that the transmission of title into the name of a mortgagee pursuant to a

final order of foreclosure does not constitute an instrument of transfer under the terms of [section 77](#) of *The Real Property Act*, and accordingly a first mortgagee cannot sue a second mortgagee who has foreclosed on the property for the balance secured under the first mortgage. The first mortgagee's remedies are restricted to the mortgage sale and foreclosure proceedings.

f) Recovery of Possession of Mortgaged Land

The legal profession in Manitoba had always thought that it was only after the title to the property had issued in the name of the mortgagee that the mortgagee was entitled to insist upon vacant possession of the property. Until such time, it was believed, the mortgagor was entitled to remain in possession, notwithstanding that the mortgagor may not have made a payment to the mortgagee for many months. The Manitoba Court of Appeal held in *Royal Bank of Canada v. Omoerah* (1995), 102 Man. R. (2d) 319 [note that the decision is available on the Law Society Library Resources on *vlex*], however, that a mortgagee is entitled to possession by the mere fact of default.

An added complication may be that the mortgagor may have leased residential premises to a tenant. In such event, the provisions of [The Residential Tenancies Act](#), S.M. 1990-91, c. 11 may operate so as to give the tenant a continued right of tenure, notwithstanding the acquisition of title by the mortgagee. The following comments are therefore made assuming that the party in possession of the property has no such continued right of occupation.

Where the mortgagee requires vacant possession of the property, the mortgagee should serve a demand for possession upon any person or persons remaining in possession. This demand might also require that the mortgagor to allow immediate access for the purpose of inspecting the mortgaged property. (*See the forms and precedents for this chapter*).

If the property is not vacated within the time specified in the demand for possession, one of two routes may be followed. A statement of claim may be filed setting forth the circumstances of the case and asking the court for an order of possession of the land. This statement of claim is to be served upon the defendant in the ordinary fashion. (*See the forms and precedents for this chapter*).

Twenty days after service of the statement of claim, the mortgagee may obtain default judgment for possession (*see the forms and precedents for this chapter*) assuming that no defence has been entered. In the event that the mortgagee has filed an appropriate affidavit stating that the mortgagor was still in possession of the property when the statement of claim was issued, the judgment may also order costs against the defendant. The judgment is then to be served personally upon the mortgagor.

If the mortgagor remains in possession of the land, after service of the judgment, the mortgagee may file in the Court of Queen's Bench proof of service of the judgment, an affidavit of continued occupation and an order for possession. (*See the forms and precedents for this chapter*).

The foregoing procedure is appropriate where time is not particularly of the essence, or if it is anticipated that the mortgagor will make no move to defend the action or otherwise object. In this event, the order for possession can be obtained without a lawyer having to attend at any court hearings. The whole procedure is done by filing documents.

In most cases, however, particularly where possession prior to title is being sought, there is a pressing need to have the mortgagor removed from the premises. This is particularly so where you have reason to believe that the mortgagor may damage the property or resist removal. In this event, notice of application together with an affidavit setting out the circumstances should be filed and served. A court date can be obtained as early as five days after service of the notice of application, at which the lawyer can request an order for possession. If the mortgagor does not attend to object, in all likelihood the judge will grant the order. (*See the forms and precedents for this chapter*).

The order for possession should be provided to the Sheriff's Office. The sheriff will attend at the mortgaged premises and ensure that the mortgagor vacates. If the mortgagor does not leave voluntarily, the sheriff will use force, if necessary, enlisting the help of the local police department. The mortgagee may have to make arrangements for the belongings of the mortgagor to be removed from the mortgaged premises and stored at the mortgagee's expense. The costs of removing the mortgagor may accordingly be substantial, but there is often no other way to deal with this situation.

Once vacant possession is obtained, it is of course prudent to ensure that the mortgagee has the locks on the subject premises changed to ensure that the mortgagor does not re-enter.

12. Rights of a Mortgagor on Notice of Sale

a) Right to Redeem

Until the issue of title either in the name of the mortgagee pursuant to foreclosure, or in the name of a purchaser pursuant to a transfer under power of sale through sale by public auction or private sale proceedings, or by the "gavel coming down" at a public auction sale, a mortgagor has the right to redeem the property from mortgage sale and foreclosure proceedings by payment in full of all arrears existing to date under the mortgage, any other expenses paid by the mortgagee and the mortgagee's solicitor's costs set out in the [Tariff of Costs](#) in Mortgage Sale and Foreclosure Proceedings pursuant to Section 143(2) of *The Real Property Act* which can be found on the [Registrar-General Directives and Notices webpage](#). However, where the mortgage has matured, either before the proceedings have been instituted, or during the currency of the proceedings, the mortgagor can only redeem upon payment in full of the mortgage balance, other expenses and legal costs.

Where the mortgagor proposes to make a payment which is insufficient to pay the arrears and costs in full, the mortgagee may be tempted to accept such payment.

However, if a partial payment is applied on account of the arrears, the mortgagee faces the prospect of having to discontinue the mortgage sale proceedings, as the mortgagor could argue that the acceptance of the payment constituted an agreement to accept payments on a different basis than that originally negotiated. By applying payments on the arrears, the mortgagee has altered the state of the mortgage account. It has been suggested that, unless a mortgagor can determine the amount outstanding under the mortgage by reference to the NEPS itself, proceedings under the notice are invalid ([Re Botiuk 1979 CanLII 2060](#), 11 R.P.R. 39 (Ont. C.A.)).

A better course is for the mortgagee's solicitor to hold any partial payments in trust on the express understanding that this is being done as an accommodation to the mortgagor only and that no payment on arrears will be applied unless payment in full of arrears and costs is made. The mortgagor should be made to understand that the partial payment may be returned in the event that the balance of the arrears and costs is not paid.

b) Statutory Rights

In addition to a mortgagor's right to redeem the property from mortgage sale by curing a default in arrears of monthly payments, *The Mortgage Act* [section 15](#) also gives the mortgagor a right to pay the mortgage balance in full without paying any interest penalty or bonus, so long as the mortgagee has taken proceedings by sale or foreclosure. In some circumstances, particularly where a mortgage specifies a high rate of interest for a lengthy period of time and provides for substantial penalties on early payment, a mortgagor might be able to make substantial savings by allowing the mortgage to fall into arrears and inciting the mortgagee to institute mortgage sale proceedings. In such event, the mortgagor can pay off the mortgage loan in full without paying any interest penalty or bonus, upon payment of the mortgage balance, any accrued interest and the costs of the sale proceedings to date. If the mortgagor is careful, the costs of the sale proceedings can be far less than the potential amount of an interest penalty or bonus.

c) Taxation of Cost

Both *The Mortgage Act* and *The Real Property Act* give the mortgagor or any interested party the right to have a mortgagee's costs taxed where the mortgagor feels that the costs, either with respect to fees, or with respect to disbursements, are excessive. [Section 143](#) of *The Real Property Act* provides for a taxation of costs in sale proceedings governed under that *Act*. The taxation is conducted by the district registrar for the land titles district in which the land is situated. The district registrar shall be guided by the tariff of costs provided from time to time.

The Mortgage Act [section 23](#) provides for a taxation by a taxing officer of the Court of Queen's Bench. [Section 24](#) refers to taxation of a mortgagee's costs where sale proceedings involving a mortgage registered under *The Registry Act* (old system land) have been taken pursuant to the court rules.

d) Technical Defects

Technical defects in the NEPS such as failure to have the notice manually signed by the mortgagee or an agent, may at any time entitle the mortgagor or a subsequent encumbrancer to apply to the court for an order enjoining the proceedings. Injunctive relief being discretionary, it will always be up to the court to decide whether to grant relief or not. However, even where no prejudice has been suffered by the mortgagor and even where it is not disputed that the mortgagor is in default of its obligations, there may be cases where a mortgagee will be required to discontinue its proceedings and start all over again. While it would be rare that the mortgagee would lose the right to start proceedings again, the loss of time and the fact that the costs occasioned in the first proceedings would not be recoverable from the mortgagor, would be an aggravation to the mortgagee. If you are acting for the mortgagee, great care should be taken that all documents are completed and filed in an accurate fashion and that all requisite services are performed.

Conversely, if acting for a mortgagor or subsequent encumbrancer, you should be reviewing the steps taken by the mortgagee in order to ensure that no technical defects exist. If you do find that a document was filed in error or that a party requiring service was not served, this may give you grounds for an application to have the proceedings halted. It may be of great assistance to the mortgagor or subsequent encumbrancer to have additional time, either to arrange refinancing or to amass the funds required to redeem the mortgage from default. In the vast majority of cases, however, unless the technical defect existed in the original security document, a defect in the proceedings to realize on the security will not relieve against the obligation to pay or otherwise perform covenants under the mortgage.

e) Renegotiation of the Mortgage

It may be possible, once mortgage sale proceedings have been commenced, to renegotiate the terms of the mortgage. In some circumstances, a mortgagee will capitalize arrears and renew a mortgage at a different interest rate, depending upon the circumstances and the relative values of the property and the mortgage security. If such is the case, the agreement to renegotiate the mortgage terms should be clearly documented and the registration of a mortgage amending agreement is recommended.

Alternatively, where a mortgagee declines to renegotiate the terms, the mortgagor may still be able to negotiate a payment schedule whereby the mortgagee will agree to suspend the mortgage sale and foreclosure proceedings for a specified period of time during which the mortgagor will make regular payments on account of the arrears and costs. It should be remembered that many residential mortgages are the subject of mortgage insurance policies. In such event, the mortgagee's ability to renegotiate the mortgage terms or to grant a repayment schedule will depend upon approval by the mortgage insurer. If this is the case and you are acting for the mortgagee, care should be taken to make it perfectly clear to the mortgagor that any

proposal to renegotiate or set up a payment plan is subject to the approval of the mortgage insurer.

E. SUING UNDER THE COVENANT

1. Deciding Whether to Sue Under the Covenant

Where the amount secured by the mortgage approaches or even exceeds the value of the mortgaged property (for example, in a declining real estate market), the mortgagee may face a substantial loss on the loan, particularly when the time and costs of obtaining title to or selling the property are taken into account. In these circumstances, particularly where the mortgagor appears to have assets other than the mortgaged property, it may be better for the mortgagee to sue the mortgagor under the covenant. Most or all real property mortgages contain an acceleration clause whereby the whole principal and interest secured by the mortgage becomes due and payable upon default of a monthly payment. Accordingly, even if only one or two months of arrears exist, the mortgagee may sue for the entire balance.

In addition to the mortgagee's instructions, the requirements of any mortgage insurer must be taken into account.

2. Availability of Suit Under the Covenant

So long as the mortgage document contains the standard acceleration clause, a suit on the covenant can be instituted as soon as any default is made under the terms of the mortgage. This right to sue need not be exercised immediately; the statement of claim can be filed at any time after default (within the contractual limitation period).

It should be remembered that [section 16](#) of *The Mortgage Act* operates so as to preclude a mortgagee from suing under the covenant once the mortgagee has become the registered owner of the mortgaged property. While the most common method of becoming registered owner of the property is through foreclosure, there are other methods available to a mortgagee. If tax sale proceedings by the municipality have been instituted, for instance, a mortgagee may wish to protect its interest in the property by becoming a tax sale purchaser. In such event, it would appear that [section 16](#) of *The Mortgage Act* would operate to preclude the mortgagee from pursuing the mortgagor under the covenant. It would appear that the section would also operate to extinguish the mortgagee's rights under the covenant where the mortgagee purchases the property at mortgage sale from the prior mortgagee or accepts a transfer of land or quit claim from the registered owner.

It should be noted, however, that the mortgagor cannot extinguish the mortgagee's rights under the covenant by unilaterally transferring the property into the name of the mortgagee. Any such transfer into the mortgagee's name must be with the knowledge of the mortgagee and with its consent.

3. Documents to be Filed

A suit under the covenant is instituted by the preparation and filing of a statement of claim. *(See the forms and precedents for this chapter)*. A statement of claim sets forth the major terms of the mortgage, including the promise to pay, the acceleration clause and the provisions regarding interest.

The statement of claim should be served in the usual fashion and, upon expiry of the requisite number of days, judgment can be obtained.

4. Procedure After Judgment

Once judgment has been obtained, the usual post-judgment remedies available to any judgment creditor are open to the mortgagee. If the mortgagee is successful in selling the mortgaged property by mortgage sale, the proceeds of such sale, after deducting proper costs, are to be applied against the judgment debt. In addition, any other amounts available to the mortgagee to reduce the mortgage debt, including insurance proceeds in the event of damage to the mortgaged property or rents received from tenants, are to be credited against the judgment debt.

F. COLLECTION OF RENT

1. Collection of Rent Pursuant to Assignment of Rents

Where the mortgaged property is commercial in nature or where it consists of one or more residential units not intended for occupation by the mortgagor, the mortgagee may have obtained an assignment of rents from the mortgagor, as collateral security to the mortgage. Typically, a financing statement in connection with the assignment of rents should have been filed in the [Personal Property Registry](#). In addition, if the assignment of rents also contained an assignment of the mortgagor's rights under a lease as lessee, a caveat may have been registered in the Land Titles Office.

In such event, the assignment of rents will itself provide for the mechanism whereby the mortgagee may give notice to the tenants and collect rents.

Again, note should be made of the notice of accounting requirements of the [Bankruptcy and Insolvency Act](#), R.S.C., 1985, c. B-3, in connection with commercial properties.

2. Collection of Rents Otherwise Than Under an Assignment of Rents

Where no assignment of rents was specifically granted by the mortgagor, the mortgagee will still have the right to collect rents pursuant to [section 114](#) of *The Real Property Act* or [section 38\(2\)](#) of *The Landlord and Tenant Act*, RSM 1987, c. L70.

Under [section 114](#) of *The Real Property Act*, the mortgagee may enter into possession of the land and receive and take the rents thereof and, whether in or out of possession may make leases of the land. If the mortgagee takes rents from the land, the mortgagee may be deemed a mortgagee in possession.

Under [section 38\(2\)](#) of *The Landlord and Tenant Act*, the mortgagee, in addition to or concurrently with the exercise of any other remedy, may serve notice in writing on the tenant of the land requiring that the rent be paid to the mortgagee, to the extent of the interest due and all taxes or levies and insurance premiums or payments made to prior mortgagees which the mortgagee may have made. Where there are prior mortgages, this remedy can only be exercised with the previous consent in writing of all prior mortgagees or, in the absence of such consent, only while such prior mortgagee does not itself exercise its rights to recover the rent from the property. The rights under section 38 of *The Landlord and Tenant Act* do not extend to allow a mortgagee to collect rents to pay arrears of principal.

As the wording of [section 38\(2\)](#) of *The Landlord and Tenant Act* does not refer to the mortgagee going into possession of the land, serving notice under this subsection would not appear to make the mortgagee a mortgagee in possession.

3. Mortgagee in Possession

Depending on the circumstances under which a mortgagee is collecting rents, the mortgagee may be deemed to be a mortgagee in possession. As set out above, the collection of rents under [section 38\(2\)](#) of *The Landlord and Tenant Act* would not appear to include or require possession of the property, while collection of rents under [section 114](#) of *The Real Property Act* does, by the wording of the section, imply that the mortgagee will be in possession. Most assignments of rent specifically granted by mortgagors provide that the mortgagee will not be deemed to be a mortgagee in possession.

Whether in possession or not, a mortgagee who is collecting rents will obviously have to account to the mortgagor for any rents actually received. However, a mortgagee in possession will be accountable to the mortgagor and to subsequent mortgagees for its management of the mortgaged property. A failure to lease in circumstances where a lease should have been arranged might give rise to liability on the part of the mortgagee. In addition, the relationship of landlord and tenant may arise between the mortgagee and the tenants.

4. Documentation Required

Where the mortgagee wishes to collect rents pursuant to an assignment of rents, the security document itself will normally outline the documentation required. Where the mortgagee is relying on [section 38\(2\)](#) of *The Landlord and Tenant Act* or [section 114](#) of *The Real Property Act*, a written notice should be served on all tenants.

5. Residential Tenancies

Notwithstanding that a mortgagee may have been careful not to become a mortgagee in possession, the Director of Residential Tenancies will sometimes take the position that a mortgagee, by virtue of collecting rents from a residential tenancy, may acquire certain of the obligations of a landlord. These include the obligation to repair or maintain the rented property and the obligation to refund a security deposit to a departing tenant, notwithstanding that the mortgagee may never have received the deposit. Accordingly, the mortgagee should be aware that these possibilities exist prior to embarking on a course of collecting rents from residential tenants.

6. Application of Rents Received

Any rents received from a tenant, less expenses incurred such as management fees, security deposits, maintenance costs and the like, will have to be credited against the mortgage account. As has been alluded to previously, the most prudent course would be to have the net amount of rent collected either held in a solicitor's trust account or in a separate account on the understanding that it will be applied only upon satisfaction in full of all arrears and costs. The concern is, as always, that partial application against the mortgage debt may constitute a novation and may impair the mortgage sale proceedings.