

# Supreme Court of Nova Scotia Practice Memorandum #1

## #1 Foreclosure Procedures

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### I. General

#### 1.1 Authority

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

#### 1.2 Purpose

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

#### 1.3 Subject

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

#### 1.4 Choice of Procedures Counsel may choose to use:

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

c) An application.

## **I. Actions for Foreclosure, Sale, and Possession**

### 2.1 Authority

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

### 2.2 The Simplified Procedure

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

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

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

### 2.4 The Alternative Procedure

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

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

- b) When the alternative procedure is used, a memorandum explaining and justifying all deviations from the standard forms must be filed. If a memorandum is not filed, the motion will be refused.
- c) Claims for approval of protective disbursements and other charges will require an accompanying memorandum. The supporting documentation for recovery of protective disbursements and other charges, as set out in the Notice of Action, must also be filed at the time of filing the motion. Where the claim includes reimbursement for protective disbursements and other charges, the plaintiff's solicitor shall also disclose for inspection originals or true copies of all invoices or receipts relating to the claim and, upon the finalizing of the motion, the plaintiff's solicitor shall retrieve from the file the invoices or receipts disclosed in the motion. See section 3.7 for comments on recoverable protective disbursements, which comments apply equally to orders for foreclosure.

## 2.5 Documentation

The documentation required in all actions:

- a) A Notice of Action with attached Statement of Claim – may be in the attached form (based on Forms 4.02(A) and 4.02(B)). The Notice of Action must be served and filed in accordance with Civil Procedure Rule 31. The sum to be inserted in paragraph 5(a) of the Statement of Claim shall be the total outstanding as of the specified date minus the interest claimed in paragraph 4(b) of the Statement of Claim. No claim for a deficiency should be made against a bankrupt mortgagor.
- b) Affidavit of Service – must be filed no later than two days before the hearing.
- c) Notice of motion – may be in the attached form. The Notice must recite the Civil Procedure Rule on which the plaintiff is relying in making the motion.
- d) Affidavit by or on behalf of the mortgagee – may be in the form attached and may be signed by the mortgagee or by an authorized representative on behalf of the mortgagee. The statement of account attached as an exhibit must commence with the latest of either the date of the mortgage, or the last renewal, or the last assumption of the mortgage and end on a date within 22

days of the date the Notice of Action is filed. The summary statement of account included with the statement must include all charges and payments contained in the statement of account and shall be unqualified, that is, it shall not contain any reference to “E & OE” or Errors and Omissions Excepted, or like meaning words. The affidavit should indicate how all amounts in the summary statement are derived from information in the statement of account (including 2. Interest accrued and paid, 4. Principal payments made, 5. Principal outstanding, and 6. Interest outstanding). To facilitate cross-referencing, amounts appearing in the summary statement must be evident from and should be highlighted in the statement of account. The affidavit shall set out the number of months the mortgage is in arrears as of the date of the affidavit and shall also provide particulars of any payments or other arrangements made since the action was commenced.

- e) Affidavit of Solicitor – may be in the form attached. The certificate of title may be in the form attached but the certificate and particulars must date back to at least the date of the deed or conveyance to the original mortgagor. Where the plaintiff or the plaintiff’s solicitor has knowledge of any mortgage or other encumbrance in priority to the date of the deed or conveyance to the original mortgagor, the particulars shall include full disclosure of such mortgage or other encumbrance and the certificate shall be amended accordingly. If the parcel has been registered pursuant to the *Land Registration Act*, alternate clause 4 in the form attached is to be used. If a mortgagor has made an assignment in bankruptcy, a true copy of the assignment is to be exhibited to the solicitor’s affidavit. The certificate of title is to be dated no more than ten days before the hearing of the motion.
- f) A plaintiff who proposes that the foreclosure auction be conducted by a lawyer must file an affidavit of the lawyer demonstrating his or her suitability. The affidavit must include statements that the lawyer's firm has not represented any party to the proceeding with respect to the mortgaged property or the mortgage under enforcement, that the firm does not represent the plaintiff in regard to enforcement of any mortgage or secured debt, and does not represent any other party in any capacity.
- g) Order for Foreclosure – may be in the form attached. The order must incorporate by reference the Instructions for Conduct of Foreclosure Auction in the form attached to this Practice Memorandum or with such variations or deviations, together with the accompanying memorandum, as the circumstances may require. The order shall provide the sale is to be held at a

courthouse in the county in which the lands being foreclosed are located, unless the court orders otherwise.

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

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

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

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

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

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

benefit or encumber the lands being foreclosed.

## 2.6 Some Advice

- a) Sometimes the abstract shows prior encumbrances or other interests prior to the mortgage under foreclosure without these having been provided for in the order for sale or in the advertisements. These and any known title defects must be brought to the attention of bidders. The order must make the sale subject to prior interests and the advertisement should mention such interests. As regards earlier mortgages not marked released but thought to have been repaid, the judge may require the order to provide that the sheriff shall not proceed without a recorded release. Where a life tenancy or a joint tenancy was determined by death, the judge may require production of a death certificate.
- b) Judges are of the view that residential properties are best advertised in local papers with good local circulation. Counsel are encouraged to investigate cost and circulation.
- c) In too many cases the summary cannot be reconciled with the accounting. If the mortgagee's affidavit does not fully explain how any amount in the summary statement is derived from information in the statement of account, or if any amount shown in the summary statement is not highlighted in the statement of account, counsel's memorandum must include a complete explanation of how the amount indicated in the summary statement was calculated. For the judge to have confidence in the summary, it must be possible to see where the summary figures came from in the detailed accounting. Further, it is necessary that the form of the summary follow that provided in the practice memorandum.
- d) All claims advanced on the motion for an order for sale must be claimed in the Statement of Claim. Sometimes protective disbursements have not been claimed. Sometimes a higher rate of interest is advanced. The Court will require amendment and further service.
- e) Foreclosure proceedings will conform with the rules respecting parties. Where a mortgagor is bankrupt, the trustee is a proper defendant and must be served in the usual way. Where the mortgagor is deceased, the proper party is the executor, administrator or court appointed representative, and the plaintiff must have a representative appointed if there is none. Also, where

the equity has been conveyed, the mortgagor need not be a party unless a deficiency judgment is sought, but the new owner is not a subsequent encumbrancer within rule 94.10 and must be a defendant.

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

## 2.7 Notice of Public Auction

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

- a) at least fifteen (15) days before the public auction by ordinary mail, postage prepaid, to the defendant at the address of the mortgaged premises and also, when that address is different from the last-known address, at the last-known address;
- b) at least fifteen (15) days before the public auction by delivery to Canada Post for transmission by registered mail to each subsequent encumbrancer appearing on the Certificate of a Solicitor at the last-known address of such encumbrancer or its solicitor; and
- c) by advertising the public auction by two (2) insertions, the first insertion at least fifteen (15) days prior to the sale and the second insertion not more than seven (7) days prior to the sale, in a newspaper sold within the county or counties in which the lands are located.

## 2.8 Sale Procedure

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

## 2.9 Post-Sale Procedure

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

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

## 2.10 Costs

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

## 2.11 Judgment

The plaintiff shall have judgment against each defendant liable on the covenants effective the day payment is made to the plaintiff or if no payment is made 15 days after the sale. Subsequently, interest is to be calculated under the *Interest on Judgments Act*. Enforcement of the judgment is stayed until the plaintiff establishes there is a deficiency and the court has determined the amount of the deficiency. Therefore, a Certificate of Judgment cannot be issued by the prothonotary nor recorded in the Land Registration Office until such amount has been determined.

## **III. Motions For Deficiency Judgment or Distribution of Surplus**

### 3.1 Authority

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



### 3.2 Purpose

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

### 3.3 General Provisions

- a) The Rules now preclude recovery of protective disbursements incurred after the effective date of the default judgment, which is fifteen days after the auction or another event provided in Rule 72.11(3). An exception is made for direct expenses of resale, such as a real estate agent's commission. Legal fees on the resale are not recoverable, as they are included in taxed costs. See "...the rules of law which are to prevail in relation to remedies..." in *Judicature Act*, s. 46(b).
- b) The originals or true copies of all invoices or receipts from all independent suppliers of goods, materials, and services that are claimed and that were incurred before the effective date must be filed with the court for inspection. Where a property manager has been retained whose own personnel have provided goods, materials, and services in the management of the property under foreclosure, verification must be provided by affidavit stating who performed the work, their trade qualifications (if any), their hours of work, and hourly rates charged.
- c) The amount will be determined by adjusting the mortgage debt as settled in the Order for Foreclosure, Sale, and Possession. In addition to the amounts evidenced by the order and the Sheriff's Report, the Court will take into account interest to the date of default judgment, judgment interest after that date, taxation of costs, taxation of disbursements and allowable protective disbursements after the date the Notice of Action except those included in the amount settled by the Order for Foreclosure, Sale, and Possession. Particulars of protective disbursements and taxable disbursements are to be set out in an affidavit and must include sufficient detail to show work done or material provided, the necessity of work or material, the necessity of other kinds of charges and the recoverability of the charges.

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

### 3.4 Claim for Surplus

- a) Each subsequent encumbrancer intending to make a claim to all or any part of the surplus is required, in advance of the motion, to file an affidavit in proof of its claim.
- b) The Court will order distribution of the surplus to encumbrancers according to their priorities.

### 3.5 Claim for Deficiency

- a) Motions for a deficiency judgment must be filed within six months of the sheriff's sale on ten days notice. The Court will allow only those items which are authorized by the mortgage; were necessarily expended for the purpose of preserving and protecting the property before the effective date; and are demonstrated by evidence to have been necessary and reasonable, the specifics of which are set out in an affidavit of the mortgagee or its officer.
- b) The affidavit in support of the motion for deficiency judgment should contain the following: original appraisal report(s) and a copy of the sheriff's report, order confirming sale, certificate of taxation, evidence supporting protective disbursements as set out in paragraph 3.3 and 3.5 and a calculation of the amount of the deficiency.
- c) A mortgagee who wishes to have the hearing of a motion for a deficiency judgment adjourned must make a motion for an adjournment to a date certain, unless a judge permits a motion for an adjournment without day. The motion for an adjournment to a date certain may be made by correspondence that includes representations about the reasons for the request, any previous adjournments, when the mortgagee will be ready, the consent of the mortgagor if the notice of motion has been served, and a

convenient time and date for the adjourned motion to be heard. If the reason for the adjournment is a need for substitute service, the representations should include an estimate of the time required to obtain and give effect to an order for substitute service. If it is because a sale has been agreed to, information on the time needed to close should be provided.

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

### 3.7 Documentation

The documentation required on all motions is:

- a) Notice of Motion – The notice must refer to the Civil Procedure Rule being relied upon, and must enumerate which of the claims is being made. If there is a claim for a surplus, the notice must be directed to the respondents and all subsequent encumbrancers and it must include counsel's certificate that all subsequent encumbrancers are listed.
- b) Affidavit by or on behalf of the mortgagee – The affidavit is to be of the mortgagee, an officer or employee of the mortgagee or the management company engaged by the mortgagee. It is not to be an affidavit of the mortgagee's solicitor. There will be attached to this affidavit as exhibits all documents necessary to establish each of the claims being made by the plaintiff. These shall include the following:
  - 1) a statement showing the calculation of the plaintiff's claim for interest, the rate used and the per diem amount;
  - 2) a listing of any protective disbursements claimed which were not already included in the Order of Foreclosure, Sale, and Possession and which are otherwise permitted by this Memorandum. The list shall itemize each disbursement by category and show the total amount claimed in each category. Information must be provided to demonstrate the necessity for incurring the protective disbursements, and;
  - 3) statement showing details and calculation of any claim for judgment interest accruing after the date of judgment up to and including the date of motion, and in any event no longer than six months after the

date of sale.

c) Affidavit of Service.

### 3.8 Costs

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

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

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

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

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

4.2 Mortgagees wishing to foreclose a collateral mortgage may use the simple standardized Notice of Action, Statement of Claim and other documentation, but amended, especially in regard to paragraph 2, to disclose the nature and particulars of the collateral instrument and the steps which have been taken to fulfill the conditions precedent to enforcement.

4.3 The solicitor for the plaintiff is required to file an accompanying memorandum explaining and justifying each amendment to the standardized documentation.

4.4 If the mortgage secures debt instruments that may be entered into after the

date of the mortgage, the brief should address the issue of priorities.

4.5 An alternative foreclosure procedure may also be available to creditors who hold collateral mortgages. A collateral mortgagee may first sue and obtain judgment for the amount owing upon the collateral security, and then move to foreclose the mortgage and sell the property. Since the mortgagee would already have a judgment for 100% of the amount owing, there would appear to be no reason why it should apply for a deficiency judgment. However, in case it might apply, the Order of Foreclosure, Sale, and Possession must include additional paragraphs such as the following:

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

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

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

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

## **v. Simple Foreclosure**

5.1 For centuries, the practice was to sue for foreclosure or sale. See, for example, *The Nova Scotia Judicature Act, 1884*, R.S.N.S. 1884, c. 104, Order LI, r. 10 and r. 11 “a suit for foreclosure or sale” and Form No. 5 “sale, or foreclosure”. The alternative remedy “sale” eventually became “foreclosure and sale”, with the claim becoming “foreclosure or foreclosure and sale”. See, Cowan, C.J. 1978, “Foreclosures”, “Originating Notice (Action) and Statement of Claim” and *Practice Memorandum No. 13, Foreclosure Proceedings and Forms*, 1994. Although mortgagees sued for alternative remedies, the practice was to move for foreclosure and sale, not simple foreclosure.

5.2 Rule 72.15 of the *Nova Scotia Civil Procedure Rules, 2008* recognized “simple foreclosure” as an alternative remedy. Recently, mortgagees have chosen that route although it extinguishes the mortgage debt when the mortgagee can no

longer accommodate redemption, such as when the mortgagee sells the foreclosed property to an arms-length third person.

5.3 It seems that simple foreclosure is more attractive when the mortgagor is no longer liable on the promise of payment, such as in bankruptcy, or when the very circumstances that caused the default make the cost of obtaining a deficiency judgment wasteful, such as the mortgagor losing employment.

5.4 Rule 72 – Mortgages now provides specific direction on motions for simple foreclosure. This evolved from discussions in chambers between chambers judges and counsel who moved for simple foreclosure.

5.5 The remedy requires two steps. First, when granting an initial foreclosure order the court sets a deadline for redemption of a mortgaged property. Second, if the deadline passes and the property is not redeemed, the court grants a final foreclosure order that recognizes that rights of redemption are extinguished and the mortgagee owns the property outright.

5.6 Pattern forms for an initial foreclosure order and a final foreclosure order are attached to this Practice Memorandum. Deviations must be brought to the attention of the chambers judge.

5.7 Parties are referred to Rules 72.15, 72.16, and 72.17 for what needs to be proved on motions for simple foreclosure and what should be provided in the orders. Rule 35.12 on subsequent encumbrancers provides for notifying them in the usual way in cases of simple foreclosure. The form of notice has been amended to allow for simple foreclosure.

## **Instructions for Conduct of Foreclosure Auction**

### **Introduction**

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

### **Scheduling auction**

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

### **Order, descriptions, and notice**

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

### **Municipal taxes**

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

### **Postponement of auction**

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

### **Cancellation of auction**

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

### **Conduct of auction**

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

### **Terms of sale**

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

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

### **Closing**

You must complete the sale as provided in the order for foreclosure, sale, and possession, the terms of sale, and any further order, unless the plaintiff is the purchaser and the amount bid does not exceed the sum of the minimum bid and the amount of the mortgage debt settled by the order for foreclosure, sale, and possession. In that later circumstance, you may obtain only the amount of the



minimum bid from the plaintiff, and distribute it to cover your fees, the cost of the tax certificate, and the municipal taxes. In all other cases, you must distribute the proceeds of sale first to the costs covered by the minimum bid, next to the plaintiff to cover the amount of the mortgage debt settled by the order for foreclosure, sale, and possession and any further order, and lastly to the prothonotary to await an order distributing surplus funds.

### **Failure to deliver deposit**

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

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

### **Failure to pay balance**

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

### **Distribution of deposit after termination**

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

### **New auction after termination**

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