

Nova Scotia Civil Procedure Rules
Amendment (Mortgages)
December 11, 2020

The following Rules, Forms, and Practice Memorandum #1 – Foreclosure Procedures are amended as follows:

1. The period after Rule 8.02(1)(d) is changed to a semi-colon and the following Rule 8.02(1)(e) is added to Rule 8.02:
 - (e) the proceeding does not include an outstanding claim for enforcement of security, such as a claim for foreclosure, foreclosure and sale, or possession in relation to a mortgage loan.
2. The comma after the word “notification” in Rule 8.02(2)(a) is removed.
3. The period at the end of Rule 35.12(3)(f) is replaced with a semi-colon and the following Rules (g) and (h) are added to Rule 35.12:
 - (g) in a claim for simple foreclosure, notice of the amount at which the court has settled the mortgage debt;
 - (h) in a claim for simple foreclosure, notice that the subsequent encumbrancers may be entitled to redeem the property under foreclosure by paying the mortgage debt and information about how that may be done.
4. Rules 72.01(1) and (2) are replaced with the following:
 - (1) This Rule establishes procedures for the remedies of foreclosure, sale, and possession by auction or by private sale, simple foreclosure, redemption, and other remedies in relation to mortgages.
 - (2) For the purposes of regulating remedies under paragraph 46(b) of the *Judicature Act*, this Rule provides for the calculation of a deficiency judgment in a proceeding for foreclosure, sale, and possession, including charges that may be added to principal and interest and those that must be excluded.
 - (3) In this Rule 72, “simple foreclosure” and “order for simple foreclosure” mean both of the initial order for foreclosure and the final order for foreclosure provided in this Rule.

5. The phrase “or simple foreclosure” is added after the word “possession” in Rule 72.02.
6. The phrase “in accordance with” in Rule 72.03(3) is replaced with “or for simple foreclosure, under”.
7. Rule 72.04 is renumbered 72.04(1) and the phrase “, or for simple foreclosure,” is added after the word “possession”.
8. The following Rules 72.04(2), (3) and (4) are added to Rule 72.04:
 - (2) A judge may not order a sale subject to a prior mortgage unless the prior mortgagee provides a statement that satisfies the judge as to the amount owing on the prior mortgage and states the terms on which the prior mortgagee will forebear enforcing its mortgage, such as any of the following:
 - (a) the entire mortgage debt comes due on the closing of a sale under an order for foreclosure, sale, and possession;
 - (b) the entire debt comes due on a sale to a third party at arms-length from the foreclosing mortgagee;
 - (c) an ultimate purchaser, who is approved by the prior mortgagee, may assume the debt owing on the prior mortgage at the rate, and in the manner, provided in the prior mortgage.
 - (3) A judge who is satisfied that the amount of the debt owing on the prior mortgage has been proved may grant an order for foreclosure, sale, and possession that allows for payment of the prior mortgage debt out of the proceeds of sale in priority to the debt under foreclosure.
 - (4) A judge may grant an order for foreclosure, sale, and possession, or for simple foreclosure, that recognizes that the sale, or foreclosure, is subject to the prior mortgage.
9. The phrase “, or for simple foreclosure,” is added to Rule 72.05(1) after the word “possession”.
10. The title to Rule 72.07 is changed to “**Order for foreclosure, sale, and possession**”.
11. Rule 72.07(3) is repealed and Rules 72.07(4), (5), (6), and (7) are renumbered (3), (4), (5), and (6).

12. Rule 72.11(6) is renumbered (7) and the following new Rule 72.11(6) is added to Rule 72:
- (6) Reasonable expenses authorized by the mortgage and incurred before the effective date may be allowed, but not expenses incurred after the effective date except for either of the following kinds of expenses:
 - (a) direct expenses of a sale to a third party, such as a real estate agent's commission;
 - (b) expenses deducted on an accounting for income that results in a net credit against the mortgage debt, such as expenses of renting out mortgaged property that are deducted from gross rent to produce a credit to the mortgage debt.
13. Rule 72.13(1) is renumbered (4), and the words before the colon are replaced with the following:
- (4) The amount realized from the security, or the value of the secured property, must be ascertained in the applicable of the following circumstances
14. Rule 72.13(2) is renumbered (5), and the following new Rules 72.13(1), (2), and (3) are added to Rule 72.13:
- (1) A judge must calculate the deficiency by ascertaining the amount of the mortgage debt and ascertaining the applicable of the following credits, and subtracting the credits from the debt:
 - (a) the amount realized from the secured property, if it has been sold to an arms-length purchaser;
 - (b) the value of the secured property, if it is in the control of the plaintiff.
 - (2) The amount of the mortgage debt may be ascertained by including the following amounts, but no other amounts even if they are authorized by the mortgage instrument:
 - (a) outstanding principal;
 - (b) mortgage interest to the effective date of the default judgment;

- (c) interest under the *Interest on Judgments Act* after the effective date;
 - (d) reasonable expenses authorized by the mortgage instrument and incurred before the effective date.
- (3) The amount of the mortgage debt must not include either of the following:
- (a) expenses for protecting the property before the effective date that are not evidenced by an invoice or receipt for materials or work issued by the person who actually supplied the materials or did the work;
 - (b) expenses for protecting the property after the effective date.
15. Rule 72.16 is renumbered 72.18, and Rule 72.15 is replaced with the following Rules 72.15, 72.16 and 72.17:

Simple foreclosure

72.15 A judge may grant an initial order for foreclosure that sets the terms under which foreclosure occurs, including provisions for the hearing of a motion for a final order, and a judge may grant the final order giving effect to the foreclosure.

Initial foreclosure order

72.16(1) A judge who is satisfied on each of the following may grant an initial foreclosure order:

- (a) the mortgage instrument and the mortgage debt have been proved;
- (b) title to the mortgaged property has been adequately proved, such that the judge is reasonably sure that all interests in the property, and any title defects, are known;
- (c) necessary parties have been joined;
- (d) the defendant has been notified in accordance with Rule 31 – Notice, or as directed by the judge, and any party other than the defendant who should be notified has been adequately notified;
- (e) no defendant has defended the proceeding or a defence has been determined in favour of the plaintiff;

- (f) the amount proposed to be settled as due under the mortgage is no greater than the claim of which the defendant is notified.
- (2) The amount of the mortgage debt may be settled for simple foreclosure by a judge or by referring the taking of accounts to a referee.
 - (3) A judge who refers the taking of accounts because of a failure to provide a reliable statement of account, or a reliable summary, may order the moving party to pay the cost of the reference and not to charge it to the mortgage debt.
 - (4) The initial order for foreclosure must provide each of the following, unless the judge who grants the order directs otherwise:
 - (a) particulars of the mortgage including the parties, date of execution, registration details, and liability secured;
 - (b) a declaration that the mortgagor is in default of the term for payment or of some other term that justifies foreclosure;
 - (c) settlement of the amount due on the mortgage as proved by the plaintiff, but not greater than the amount claimed in pleadings of which the defendant has notice;
 - (d) a time, date, and place for hearing a motion for a final order for foreclosure, and a declaration that the equity of redemption in the mortgaged property will be foreclosed when a final order for foreclosure is issued;
 - (e) delivery of a notice of motion for a final foreclosure order to the defendant, and of a notice to subsequent encumbrancer to each subsequent encumbrancer, and of a notice as prescribed by the judge to such other person as the judge may direct;
 - (f) an abbreviated description of the mortgaged property to be attached to the notices;
 - (g) a requirement that the plaintiff record documents showing the mortgage debt is satisfied when the property is redeemed, or the plaintiff ceases to hold title in its own right or through an assignee who holds title pending sale.

Final foreclosure order

- 72.17(1)** A judge who is satisfied on each of the following may grant a final foreclosure order:
- (a) notice of the motion was delivered to the defendant as required by the initial order for foreclosure;
 - (b) a required notice to subsequent encumbrancer, and any other notice required by the initial order for foreclosure, have been delivered in the required manner;
 - (c) no defendant, and no subsequent encumbrancer, has defended the proceeding or any defence has been determined in favour of the plaintiff.
- (2)** The final order for foreclosure must provide each of the following, unless the judge who grants the order directs otherwise:
- (a) a declaration that the interest and equity of redemption of the defendant and of all persons claiming through the defendant, or the mortgagor if the mortgagor is not a defendant, in property described in the order are forever barred and foreclosed;
 - (b) a declaration that no prior interest, title defect, or cloud on title has been made apparent to the court or a declaration describing a prior interest, title defect, or cloud and stating that there are no others that have been made apparent;
 - (c) an order for possession of the foreclosed property;
 - (d) approval of a description suitable for an instrument by which the plaintiff, or its assignee, may convey the foreclosed property;
 - (e) a requirement that the plaintiff record the order in the parcel registry or under the *Registry Act*;
 - (f) a requirement that the plaintiff report to the court when it complies with its obligation to record documents showing the mortgage debt is satisfied immediately after the plaintiff, or its assignee, ceases to hold title to the foreclosed property.

16. The phrase “the sheriff” in the text under the title “**How foreclosure will happen**” in Form 35.12 is replaced with “*the sheriff*/name of appointed auctioneer”.
17. The following is added after the first paragraph under the title “**How foreclosure will happen**” in Form 35.12:

[OR]

The court settled the amount of the mortgage debt in an initial foreclosure order, a copy of which is available from the undersigned. The order also sets a deadline for a person to redeem the property by paying the mortgage debt. Your interest will be foreclosed if the debt remains unpaid after the deadline passes, unless you defend the claim, contest the claim, or redeem the property.

[Use the first unless the claim is for simple foreclosure.]

18. The following is added after the last paragraph in Form 35.12:

[Redemption

You may have a right to redeem the property under foreclosure by paying the mortgage debt. You may do so by contacting the undersigned, who will provide you with a copy of the order settling the amount of the mortgage and will give you directions for paying the mortgage debt before the deadline.

FOR SIMPLE FORECLOSURE ONLY]

19. The word “Sheriff’s” at the end of Form 35.12 is replaced with “*Sheriff’s/Appointed Auctioneer’s*”.
20. Paragraphs 3.3(a), (b), and (c) of the Practice Memorandum are re-lettered (b), (c), and (d) and the following paragraph 3.3(a) is added:
 - (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).
21. The phrase “relating to the claim” in paragraph 3.3(b), formerly 3.3(a), is replaced with “that are claimed and that were incurred before the effective date”.

22. The second, third, and fourth sentences in paragraph 3.5(a) are removed, the punctuation and letters “: (a)”, “(b)”, and “(c)” in the text of 3.5(a) are removed, and the phrase “before the effective date” is added after “preserving and protecting the property” and before the semi-colon.
23. Paragraph 3.7 is removed and paragraphs 3.8 and 3.9 are renumbered 3.7 and 3.8.
24. The following paragraph V is added to the Practice Memorandum:

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.
25. The attached forms “Initial Foreclosure Order” and “Final Foreclosure Order” are added to the Practice Memorandum.

Certificate

I, Deborah K. Smith, Chief Justice of the Supreme Court of Nova Scotia, certify that on December 11, 2020 a majority of the judges of the court made the foregoing amendments to the *Nova Scotia Civil Procedure Rules* and Practice Memorandum #1.

Signed December 16th, 2020

**Original Signed by
Deborah K. Smith, C.J.**

Deborah K. Smith
Chief Justice of the Supreme Court
of Nova Scotia

Supreme Court of Nova Scotia

Between: [copy standard heading]

Plaintiff

and

Defendant

Initial Foreclosure Order

Before the Honourable Justice [name or blank] in chambers

On the motion of the plaintiff, the following is ordered and declared:

1. The mortgage granted by [the defendant/name] to [the plaintiff/name] dated the day of _____, 20____ and [registered/recorded] in _____ on the _____ day of _____, 20____ [in/under] [book and page/parcel register] is in default.
2. The defendant, and any other person entitled to redeem the mortgage, may exercise their right of redemption by paying the amount due on the mortgage to the plaintiff before noon on _____ day, the _____ day of _____, 20____.
3. The amount due on the mortgage is settled at \$ _____ plus interest at the rate of _____ % a year from _____, 20____ until the date of redemption calculated [months/semi-annually/not in advance/other], plus any further protective disbursements or charges approved by the court, plus costs of \$ _____.
4. The right of the defendant, or any person claiming under the defendant, to redeem the mortgaged property is extinguished, unless a right of redemption is exercised before the deadline or a judge orders otherwise.
5. The plaintiff may make a motion, in anticipation that the right of redemption will expire, for a final foreclosure order declaring that all the right, title, interest, property, and demand of the defendant of, in, or to the mortgaged property, and of any person claiming by, through, or under the defendant, is forever barred and foreclosed.
6. The motion for a final foreclosure order must be made on _____ day, the _____ day of _____, 20____ at _____ o'clock in the [morning/afternoon] at the [Law Courts/Courthouse] in _____, unless a judge directs otherwise.
7. At least fifteen days before the day appointed by this order for the hearing of the motion for a final foreclosure order, the plaintiff shall deliver to Canada Post a notice of motion for delivery by ordinary mail to the last known address of the defendant and a notice of motion and a

notice to subsequent encumbrancer for delivery by registered mail to each subsequent encumbrancer.

8. The paragraph in the notice of motion titled “Evidence” may read:

Unless a judge directs otherwise, the evidence in support of the motion will be an affidavit of counsel filed two days before the hearing proving delivery, as required, to Canada Post of the notice of motion and notice to subsequent encumbrancer and proving that the mortgaged property has not been redeemed.

9. A subsequent encumbrancer is bound by the terms of this order when the notice of motion and notice to subsequent encumbrancer are delivered to Canada Post for transmission to the subsequent encumbrancer.

10. Notwithstanding this order, a subsequent encumbrancer may defend or contest the claim by filing a notice of defence or notice of contest before the deadline for redemption, or such other time as a judge allows.

11. In the event a notice of defence or notice of contest is filed, the plaintiff and the defending or contesting parties must appear at the time and place set for the motion for a final foreclosure order, and the judge may give directions for conduct of the proceeding.

12. In either of the following circumstances, the plaintiff must, as soon as is practicable, take all steps necessary to cause the public record, including the [parcel register/other] , to show that liability on the mortgage debt is extinguished:

(a) a person redeems the mortgaged property;

(b) the plaintiff, or an assignee holding the foreclosed property for the plaintiff, ceases to be able to accommodate redemption, such as the property having been sold to an arms-length third person.

Issued , 20

Prothonotary

Supreme Court of Nova Scotia

Between: [copy standard heading]

Plaintiff

and

Defendant

Final Foreclosure Order

Before the Honourable Justice [name or blank] in chambers

By an initial order for foreclosure dated the day of , 20 the court declared that a mortgage granted by [*the defendant*/name] to [*the plaintiff*/name] dated the day of , 20 and [*registered/recorded*] in on the day of 20 , [*in/under*] [book and page/parcel register] is in default.

And, by the same order, the court settled the amount of the mortgage debt, set a deadline for redemption, and required notice to the defendants and subsequent encumbrancers.

The mortgage was not redeemed, and the deadline passed.

On the motion of the plaintiff, the following is ordered and declared:

1. The initial foreclosure order and all subsequent proceedings under it are ratified and confirmed.
2. The right, title, interest, property and demand of [*the defendant*/other] of, in, and to the mortgaged property, and of all persons claiming by, through, or under [*the defendant*/other] are forever barred and foreclosed effective the date of this order.
3. The plaintiff must record a certified copy of this order in the [*parcel register*/other] for the mortgaged property.
4. The plaintiff must report to the court that it has taken all steps necessary to cause the public record to show that liability on the mortgage debt extinguished when the plaintiff ceased to be able to accommodate redemption.

5. The plaintiff is entitled to possession of the property.

Issued _____, 20

Prothonotary