FINAL REPORT

MORTGAGE FORECLOSURE AND SALE

Law Reform Commission of Nova Scotia
September 1998

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission.*

The Commissioners are:

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Dawn Russell, Co-President
David A. Cameron
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Law Reform Commission of Nova Scotia

To: The Honourable James A. Smith, M.D.
Minister of Justice

In accordance with section 12(3) of the *Law Reform Commission Act*, we are pleased to present the Commission's Final Report on Mortgage Foreclosure and Sale in Nova Scotia.

Gregory North, Q.C.
Co-President

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Theresa Forgeron
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Justice David MacAdam
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MORTGAGE FORECLOSURE AND SALE

SUMMARY

Background

A "mortgage" is taken out by individuals or businesses who wish to buy a home or commercial property and need extra money to help pay the purchase price. They usually borrow money from a bank or trust company. The party borrowing the money is known in law as the "mortgagor" (referred to here as the borrower). The party lending the money is known in law as the "mortgagee" (referred to here as the lender).

The borrower and lender enter into a legal agreement known as a mortgage. In exchange for the lender providing money to the borrower to buy the property, the borrower pledges the property as security for the loan. Once the full amount of the loan is paid, the borrower can claim back the property from the lender and the mortgage is considered to be at an end. If the borrower does not make payments under the mortgage (or defaults in some other way), the lender may "foreclose" on the property. In foreclosing, the lender takes steps to get ownership of the property. In Nova Scotia, the lender also gets the right to sell the property at public auction and use the sale proceeds to pay off the mortgage. This is known as "foreclosure and sale".

In 1996, the Law Reform Commission began to study mortgage foreclosure law and practice in Nova Scotia. The Commission was responding to concerns that the present system is cumbersome, expensive, inefficient and unfair. In order to more fully understand how the foreclosure system works in Nova Scotia, the Commission conducted a study of all foreclosure files opened in the Halifax County Sheriff's office over a two and one-half year period. Among other things, the study showed that the public auction did not often result in the property being sold to an independent third party. It also did not result in the property being sold for a price at or near its fair market value.

The Discussion Paper

In July 1997, the Commission released a Discussion Paper, *Mortgage Foreclosure and Sale*. In the Discussion Paper, the Commission suggested that the law relating to mortgage foreclosure and sale in Nova Scotia be reformed. The Commission considered various options in reforming the system. The Commission ultimately recommended that a "modified judicial sale" system be adopted. Under this system, the public auction would be abolished and replaced with a sale on the open market, depending on whether there is "equity" in the property at the time of foreclosure (a property is considered to have equity when its value is greater than the amount owed). The Commission also made other suggestions, including that the entire process be made clearer to borrowers with the introduction of a Notice of Default written in plain language.

The Commission received feedback on the Discussion Paper. While most commentators agreed

that the current system is not necessarily the best one, many did not like the system proposed by the Commission. They did not like its heavy reliance on appraisals (to determine whether there is equity in a property) and some also felt that the proposed system, while intending to simplify foreclosure, was in fact complicating it.

Power of sale

At the suggestion of many of the people who commented on the Discussion Paper, the Commission re-considered its views and studied more fully another way a lender may respond to a borrowers's default, known as "power of sale". It is the primary method used by lenders in Newfoundland, Prince Edward Island, New Brunswick and Ontario. Under power of sale, a lender may sell the property without the involvement of the court. The lender gets this right from the mortgage agreement and/or from provincial legislation. The process is much simpler than foreclosure and sale and is started by the lender sending a notice to the borrower instead of commencing an action. If the sale proceeds are inadequate to pay the mortgage debt and the costs incurred by the lender in selling the property, the lender may later sue the borrower.

After studying the system used in the other four power of sale provinces, the Commission concluded that power of sale is the best process and that it would answer many of the criticisms of the current system used in Nova Scotia. In this Final Report, the Commission is recommending that a power of sale system be adopted in Nova Scotia.

Recommendations for reform

The Commission recommends:

- A power of sale process be adopted in Nova Scotia that would allow property to be sold by private sale, tender or auction. Foreclosure should remain as an alternative to power of sale and be in full satisfaction of the debt.

- If the lender chooses to proceed by foreclosure, the borrower would have the right to apply to the court to request that power of sale be used instead. If the lender chooses power of sale, it should also be permitted to convert the process to foreclosure (with the borrower having the right to apply to the court to request that power of sale continue to be used).

- Borrowers should continue to have the right to "reinstate" a mortgage by paying outstanding arrears and costs. This right should be available once per year and should be included in any new mortgage or foreclosure legislation.

- Borrowers should also have the right to "redeem" a mortgage, by paying the full amount owing, at any time before the lender conveys the property to a third party purchaser. This

right should also be included in any new mortgage or foreclosure legislation.

- Other rights of borrowers should also be included in mortgage or foreclosure legislation or rules, including the right to assign the mortgage debt to a third party, the right to copies of title documents and appraisal reports in the lender's possession and the right to a written statement of the amount and nature of the default.

- The power of sale process should be started by the lender giving a plain language Notice of Default to the borrower, the current owner of the property, any guarantors and subsequent encumbrancers. Lenders would not be permitted to take any action for 30 days after the Notice of Default is given, unless such action was necessary to protect or preserve the property.

- Lenders should be required to advertise the property in a manner that is commercially reasonable, given the nature of the property. Advertising should be conducted for a minimum of four weeks to ensure adequate exposure to the property.

- In selling the property, lenders should be required to exercise a commercially reasonable standard of care. This would require the lender to obtain the highest possible sale price under existing market conditions and taking into account the fact the property is being disposed of at a forced sale.

- A lender in Nova Scotia should not be permitted to purchase property offered for sale under power of sale.

- If a lender initially tries to sell the property by tender or auction but it remains unsold, the lender should be permitted to either list the property for sale with a real estate agent under the power of sale or be permitted to foreclose on the property. Any foreclosure would be in full satisfaction of the debt. If the property remained unsold, the lender could apply to the court for directions as to how to dispose of the property.

- Deficiency judgments should continue to be available in Nova Scotia if the sale proceeds are inadequate to pay the mortgage debt and costs incurred by the lender as a result of the sale of the property.

- Lenders should be required, within 30 days of a sale, to advise borrowers that the property was sold and the price at which it was sold. If the lender wishes to claim a deficiency judgment, the lender must provide the borrower with an accounting. If the

lender does not provide the borrower with an accounting within 30 days of the sale, the borrower be able to require an accounting by applying to the court within 30 days from the date it was notified of the sale.

- After the property is sold, lenders should be required to apply to the court to claim a deficiency judgment. Borrowers can also apply to the court to require that the lender provide an accounting of the sale.

- Reform should be accomplished through legislation although amendments to the Civil Procedure Rules and Practice Memorandum may also be required.

SAISIE ET VENTE DE BIENS HYPOTHÉQUÉS

SOMMAIRE*

Cadre

Un "prêt hypothécaire" est contracté par des individus ou des entreprises désirant acquérir une résidence ou un bien de nature commerciale et qui nécessitent des fonds supplémentaires afin de contribuer au prix d'achat. Ces individus ou entreprises empruntent habituellement ces fonds de banques ou de compagnies de fiducie. En droit, la partie qui emprunte ces fonds est appelée "débiteur hypothécaire" (ci-après désignée l'emprunteur) alors que celle qui les prête est connue sous le nom de "créancier hypothécaire" (ci-après désignée le prêteur).

L'emprunteur et le prêteur signent un accord juridique que l'on désigne sous le nom d'hypothèque. En contrepartie des fonds prêtés par le prêteur pour permettre à l'emprunteur d'acquérir un bien, l'emprunteur nantit ce bien afin de garantir le prêt. Lorsque le prêt est entièrement payé, l'emprunteur peut réclamer le bien du prêteur et l'hypothèque est éteinte. Si l'emprunteur n'effectue pas les versements hypothécaires (ou se trouve en défaut de toute autre façon), le prêteur peut "saisir" le bien. En saisissant le bien, le prêteur entreprend un processus lui permettant de devenir propriétaire du bien. En Nouvelle-Ecosse, le prêteur possède aussi le droit de vendre le bien à l'enchère publique et d'utiliser le produit de la vente pour rembourser le prêt hypothécaire. Cette procédure s'appelle "saisie et vente de biens hypothéqués".

En 1996, la Commission de réforme du droit initia une étude sur le droit et la pratique des saisies et ventes de biens hypothéqués en Nouvelle-Ecosse. La Commission a entrepris cette action en réponse à l'opinion répandue que le système actuel est lourd, onéreux, inefficace et inéquitable. Afin de bien comprendre comment le système des saisies et ventes de biens hypothéqués fonctionne en Nouvelle-Ecosse, la Commission a examiné tous les dossiers de ce type ouverts dans les bureaux du Shérif du Comté d'Halifax depuis deux ans et demie. Entre autres, cette étude a démontré que lors d'une vente à l'enchère publique, le bien est rarement vendu à une tierce partie indépendante et n'est pas vendu pour un prix équivalent ou même proche de sa valeur marchande.

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* Traduit de l'anglais par Me Nathalie Bernard, LL.B. (Université Laval), LL.B. (Dalhousie University), LL.M (Dalhousie University).

Document de réflexion

En juillet 1997, la Commission a publié un Document de réflexion intitulé *Saisie et vente de biens hypothéqués* dans lequel elle suggérait que le droit relatif aux saisies et ventes de biens hypothéqués en Nouvelle-Ecosse fasse l'objet d'une réforme. La Commission a considéré plusieurs options de réforme du système et en fin de compte a recommandé l'adoption d'un système "de vente en justice modifiée". En vertu de ce système, la vente à l'enchère publique serait abolie et remplacée par une vente sur le marché libre dans le cas où un "capital" existe relativement au bien au moment de la saisie et vente (un capital existe lorsque la valeur du bien dépasse celle de la dette). La Commission a aussi fait d'autres suggestions, notamment celle que le processus dans toutes ses parties soit expliqué plus clairement aux emprunteurs à l'aide du nouveau mécanisme de l'Avis de défaut rédigé en termes simples.

La Commission reçut des commentaires sur son Document de réflexion. Même si la plupart de ceux et celles qui ont exprimé une opinion s'entendent pour dire que le système actuel n'est pas nécessairement le meilleur, plusieurs n'étaient pas d'accords avec le système proposé par la Commission. La proposition de recourir fréquemment aux évaluations (afin de déterminer si un capital existe ou non relativement au bien) déplaît et certains pensent même qu'en réalité, le système proposé dans le but de simplifier les saisies et ventes hypothécaire, les complique.

Pouvoir de vendre

Suivant la suggestion de plusieurs parmi ceux et celles qui ont exprimé une opinion sur le Document de réflexion, la Commission a réexaminé sa position et s'est penchée plus sérieusement sur une autre façon pour le prêteur de réagir au défaut de l'emprunteur: le "pouvoir de vendre". Il s'agit de la méthode principale utilisée par les prêteurs des provinces de Terre-Neuve, de l'Ile-du-Prince-Edouard, du Nouveau-Brunswick et de l'Ontario. En vertu de ce pouvoir de vendre, un prêteur peut vendre le bien sans recourir aux tribunaux. Ce droit de vendre est octroyé au prêteur en vertu des documents hypothécaires et/ou de la législation provinciale. Ce processus est bien plus simple que la saisie et la vente et est initié par l'envoi par le prêteur d'un avis à l'emprunteur au lieu d'une action en justice. Dans le cas où le produit de la vente serait insuffisant pour payer le prêt hypothécaire et les coûts reliés à la vente du bien encourus par le prêteur, ce dernier pourra plus tard poursuivre l'emprunteur.

Après l'examen du système en vigueur dans les quatre autres provinces utilisant le pouvoir de vendre, la Commission conclut que le pouvoir de vendre constitue la meilleure méthode et satisferait la plupart des critiques du système actuel en Nouvelle-Ecosse. Dans le présent Rapport final, la Commission recommande qu'un système de pouvoir de vendre soit adopté en Nouvelle-Ecosse.

Recommandations de réforme

La Commission recommande:

- qu'un système de pouvoir de vendre soit adopté en Nouvelle-Ecosse afin de permettre qu'un bien soit vendu par vente de gré à gré, par appel d'offres ou par vente à l'enchère. La saisie et vente devrait demeurer une alternative au pouvoir de vendre et devrait être considérée comme une cause d'extinction de la dette.

- que dans le cas où le prêteur choisirait de procéder par saisie et vente, l'emprunteur aurait le droit de demander au tribunal d'ordonner plutôt l'application du pouvoir de vendre . Dans le cas où le prêteur choisirait d'user de son pouvoir de vendre, il devrait avoir le droit de convertir ce pouvoir en saisie et vente de bien hypothéqué (tout en laissant à l'emprunteur le droit de demander au tribunal d'ordonner que le pouvoir de vendre continue d'être utilisé).

- que les emprunteurs conservent le droit de "rétablir" le prêt hypothécaire en payant les arriérés et coûts en souffrance. Ce droit devrait être disponible une fois par année et devrait être inclut dans toute nouvelle loi sur les hypothèques ou les saisies et ventes de biens hypothéqués.

- que les emprunteurs possèdent le droit "d'amortir" le prêt hypothécaire en payant la somme due en entier, en tout temps avant la vente du bien par le prêteur à un tiers. Ce droit devrait aussi être inclut dans toute nouvelle loi sur les hypothèques ou sur les saisies et ventes de biens hypothéqués.

- que d'autres droits des emprunteurs soient aussi inclus dans tous loi et règlement sur les hypothèques ou les saisies et ventes de biens hypothéqués, notamment le droit de céder la dette hypothécaire à un tiers, le droit d'obtenir des copies des documents hypothécaires et des rapports d'évaluation entre les mains du prêteur, et le droit à une déclaration écrite relative à la somme en souffrance et à la nature du défaut.

- que le processus d'exercice du pouvoir de vendre devrait commencer par le prêteur donnant Avis de défaut en termes simples, à l'emprunteur, le propriétaire actuel du bien, et à toutes cautions et autres créanciers. Les prêteurs ne devraient pas avoir le droit d'agir pendant une période de 30 jours à partir de l'Avis de défaut, à moins qu'il soit nécessaire d'agir afin de protéger ou préserver le bien.

- que les prêteurs aient l'obligation de faire la publicité du bien de façon raisonnable dans le contexte commercial en fonction de la nature du bien. La publicité devrait être faite durant une période minimale de quatre semaines afin que l'existence du bien soit adéquatement connue.

- que lors de la vente du bien, les prêteurs aient l'obligation d'agir de façon raisonnable dans le contexte commercial. Ceci implique que le prêteur doit obtenir le prix de vente le plus élevé possible en prenant en considération les conditions du marché à cette époque et le fait qu'il s'agisse d'une vente forcée.

- qu'en Nouvelle-Ecosse, un prêteur n'ait pas le droit d'acquérir un bien offert en vente par le biais de l'exercice du pouvoir de vendre.

- que dans le cas où le prêteur commencerait par une tentative de vente du bien par appel d'offres ou par vente à l'enchère et que l'effort se solderait par un échec, le prêteur devrait avoir le droit d'inscrire le bien en vente auprès d'un agent d'immeuble en vertu de son pouvoir de vendre ou de celui d'effectuer une saisie et vente du bien. Toute saisie et vente entraînerait l'extinction de la dette. Dans le cas où le bien demeurerait invendu, le prêteur pourrait demander au tribunal de lui donner des instructions quant à la vente du bien.

- que les jugements pour le déficit demeurent disponibles en Nouvelle-Ecosse dans le cas où le produit de la vente ne suffirait pas à rembourser la dette et les coûts encourus par le prêteur relativement à la vente du bien.

- que les prêteurs aient l'obligation, dans les 30 jours de la vente, de notifier les emprunteurs de la vente du bien et de son prix de vente. Si le prêteur désire demander un jugement pour le déficit, il doit fournir des comptes à l'emprunteur. Si le prêteur ne fournit pas de comptes à l'emprunteur dans les 30 jours de la vente, l'emprunteur pourra exiger ces comptes en déposant une demande devant le tribunal dans les 30 jours de la notification de la vente.

- que postérieurement à la vente du bien, les prêteurs doivent déposer une demande devant le tribunal afin d'obtenir un jugement pour le déficit. Les emprunteurs pourraient aussi demander au tribunal d'ordonner que le prêteur leur fournisse des comptes.

- que cette réforme soit accomplie par voie législative quoique des amendements au Code de procédure civile et de pratique pourraient aussi s'avérer nécessaires.

KI'KK KISNA KUTMOTAQN KOQA'TUKSIN TIJIW MINUI NTUI'SKASIK

SUMMARY*

Background

"Mortgage" emqatui'j wen tan tujiw ketu kpkwatelk wenji'kuom kisna maqamikew toqo mu tepnmaq suliewey. Apjiu weji maqatuij suliewey pankiktuk kisna trust kompani. Tan wen emqatuit tel nennut tplutaqniktuk "Mortgageor" (emqatuite'w) nuji maqatui'ket tel nennut tplutaqniktuk "Mortgagee" (emqatui'kete'w)

Emqatui'te'w aq emqatui'kete'w welte'tmitij tel nenmik mortgage. Wujit tan tel maqatuij, miamuj elui'tmasit emqatuite'w patui maqatuin wtmotaqn petepawtik tan emqatuij. Newt kaqapankit tan te'tuej', kisi apaji msntow wtmotaqn aq tl kaqiatew mortgage. Katu a, mu koqaji apankitmu a, kisi "ko'qa'lukutal" (foreclosure) tan wenl tetuatl. Ko'qa'tekej emqatui'kete'w kwelktow tan tli puktaqi alsuttew tan teplumup. Nopa Sko'sia, emqatui'kete'w asite'lmut ntuiskatmin koqowey tan teplumup public auctioniktuk aq tan suliewey i'ka'q lian mortgageiktuk. Wula tel nenmik "Foreclosure and Sale".

1996 ek, Law reform kmisn poqji iloqaptikis mortgage foreclosure law aq practice ula Nopa Sko'sia koqa'ltimk'ewey tplutaqn. Kmisn iloqaptikis tan tel pukuik koqowey aq wejitoqsip pukwelk mu weltenuk. Klaman me wuli nsitasultinew tan tel lukwek koqaltimkewey ula Nopa sko'sia, kmisn minui iloqaptisipnn msit koqaltimkewe'l wikatiknn pana'tasikl jipuktuk Kounty Sheriff's office'l, tapuipunqik jel aqatayik teli kpitaptimitisnn. Panuijkatmitis tan apjiw netuiskasik koqowey, mu piluey wen weji ntui'skmuksiksip koqowey. Aq teli tpiaq, mu tel tepawtik mesnasinuk tan petepawtik koqowey.

The Discussion Paper

Peskewiku's 1997ek, sea'toqsip kmisn Discussion Paper, Mortgage Foreclosure aq Sale. Ula wikatikn, kmisn we'jutkis la tplutaqn tan nujo't Mortgage Foreclosure aq Sale Nopa Sko'sia iljo'qatasin. Kmisn ml iloqaptikis tan tl kis iljo'qatew system. Kmisn klapis wejo'tkis na "modified judicial sale" system eywasitn. Wula piley system, tuaqtasis public auction aq awnaqa sale lias open marketiktuk, pa na tluemk e'tek "equity" ula propertiktuk tan tujiw welteskik koqaltimkewey. (property kekkunk equity tan tijiw attepawtik aq tan tetuek). Kmisn apj me ilutkisnn pilue'l suggestions, maw msit process me wuli nsitminew emqatuwultite'wk Notice of Default.

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* Mi'gmaw translation by Katherine Sorbey

Kmisn apaji msnmi'tis klusuaqn ula Discussion Paperiktuk. Pukwelkik mimajuinu'k teluesnik current system mu asama maw best, katu me nekaw aluaptimi'tiss tan kmisn kisut. Mu welte'tmitik lita'suatasin appraisalsal (wuji jijitasin equity ten propertyiktuk) aq e'ykik telua'tisn'k me aji mtupukuik kis sutasik nikey.

Power of Sale

Kmisn ili te'tkis koqowey, kis nmitu'titek tan teli asitemupnik Discussion Paperiktuk, nuku' elkwa'sinik "power of sale". Wula na "power of sale" e'wasik Newfoundland, Prince Edward Island, New Brunswick aq Ontario. Power of Saleiktuk, emqatui'kete'w kisi ntuisketew property keskmna'q lien kourtiktuk. Emqatui'kete'w weja'toq la right mortgage agreementiktuk/kisna provincial legislation. Me' naqamasiaq jel mu foreclosure aq sale pasik emqatui'kete'w kekinuatuatl tan tettatl tan ketu tla'tekej, mu mesikesik, mu tepianuk weja'toq ntuiskewe'tuk, na kisi sue'walatal tan tettatl.

Kisi mamuni iloqaptimititl newkl provinsl power of sale'l, kmisn welte't maw wula'sin power of sale Nopa Sko'sia. Wula Final Report, kmisn wejo't power of sale we'wasitn Nopa Sko'sia.

Recommendations for Reform

The Kmisn recommends:

- Power of sale we'wasitn Nopa Sko'sia tan asite'tew property ntui'skasin private saleiktuk, tenteriktuk, kisna auctioniktuk. Foreclosure kis siawtetow, e'wasitn nespiw aq wajui apankitasin tetuo'qn.

- Emqatui'kete'w Foreclosewij, emqatui'te'w kourtiktuk wjo'tmin Power of Sale majukwatasin. Emqatui'kete'w power of sale e'ywukk, kisi asite'lmuksin l'kwan foreclosure, katu emqatui'te'w koutiktuk asite'lmuksin siawi e'ywasin power of sale.

- Emqatuwultite'wk kukmninew right "reinstate'watunew" mortgage teli kpkije'k apankitmitij tan pemteskawekl tetuoqnn. Wula right ten tes newtipunqik aq wiaqten piley mortgage kisna foreclosure legisletion.

- Emqatuwultite'wk kuknminew right kisi "tewaqankitminew" mortgage tan pa tijiw keskmna'q emqatui'kete'w pilue'l netui'skmaq. Wula right wiaqtes piley mortgage kisna foreclosure legisletion.

- Ktikl rightsl wujit emqatuwultite'wk wiaqtes mortgageiktuk kisna foreclosure legisletioniktuk, maw rightsl kisi l'wi'kmuan pilue'l wenl mortgage'l tetuo'qnn, aq rightsl ku'knmin, nmitun wikatiknn tan emaqtui'kete'w kekkunkl tan tel tetuej aq tan tel pmteskawej.
- Power of sale process tan tli kpqutamkatus emqatui'kete'w iknmuas weli nsitmik Notice of Default emqatui'te'wl kisna tan wet naspultiliji. (30 days) nesiskaql na'kwekl ku'kns'

emqatuite'w kisi natalateken. Jipasij emqatui'kete'w wsumu'k'wetekelin emqatuite'wl natukoqowey tes tan kl'kess property.

- Emqatuikaqatite'wk miamuj advertisewatunew tan ketu ntui'sketutij. Advertisment muskutes ne'w ekntie'wimkl (4 weeks) klaman wul nmi'tasitew advertisement.

- Wjimsna'sis tan mawawtik suliewey wjit la property, tliaj no'q kikaji ntui'skasik.

- Emqatuikete'w ula Nopa Sko'sia mu asite'lmanes kpkwate'lmin ula property weji ntui'skasik power of saleiktuk.

- Emqatui'kete'w mu kisi ntuisketuk property nekm, na nuku real estate e'jental la'tuas nekml handtlewatulin power of sale kisna foreclosewilin. Foreclosure wji tepias kaqapankitmin tetuo'qn. Mu kisankuetasinuk property, emqatui'kete'w kourtiktuk aji pipanikesiss tan kis tla'tew nuku property.

- Nopa Sko'sia siaw ku'knss kisi ntutmuksin wen tan eskwi tetuej tan tujiw kaqankuetasik property toqo me eskwi tetuek.

- Emqatawi'kaqatite'wk tl tes kinuatuan emqatawultite'wk kisi ntui'skasikek propertiek aq tan pet tepawtikek (30 days) nesiska'ql nakwekl weja'tekmk kis se'likek. Ktu ankui ntutmaj emqatui'kete'w miamuj muskatuatal emqatuite'wl msit koqowey telpukuik. Mu emqatuite'w msnmuk aq nmituk koqowey, kekkunk (30 days) nesiska'ql nakwekl wejatekmk ekinua'tujek kisi ntui'skasik koqowey na kourtiktuk kwilutmin akkounting.

- Kisankuetasik property, emqatuikaqatite'wk miamuj appli'ewultinow kourtiktuk ujit eskwi tettuj. Emqatuwultite'wk elt nekmow kisi appli'ewultitaq kourtiktuk miamuj emqatuikete'wl muskatulij akkounting we'jiaq se'liktuk.

- Reform uji-sapa'sis legisletioniktuk, tlia pa nuta'q il wikasin Civil Prosisure Rules aq Practice Memorandum jiptuk ap nuta'tew.

I INTRODUCTION

1. The project

In 1996, the Law Reform Commission began to study mortgage foreclosure and sale in Nova Scotia. The Commission researched the law and practice in Nova Scotia and consulted with various individuals involved in the foreclosure system. In addition, the Commission conducted an empirical study of all foreclosure files opened in the Halifax County Sheriff's office over a two and one-half year period.

As a result of this work, the Commission concluded that the current mortgage foreclosure system in Nova Scotia does not work well and requires reform. Among other things, the Commission noted that the foreclosure process is not oriented toward achieving the best possible purchase price for the property. This works to the disadvantage of both the borrower and the lender. If the property is sold for less than the amount owed, the borrower may be required to pay any shortfall to the lender. The lender, on the other hand, will have to go to court to prove its right to any shortfall and if successful, attempt to collect it from the borrower.

The Commission's suggestions for reform were outlined in a Discussion Paper published in July 1997. The Commission proposed that foreclosed property no longer be sold by a Sheriff at public auction. Instead, the Commission suggested that foreclosed property be listed for sale with a real estate agent or conveyed immediately to the lender, depending on whether there is equity in the property. A property is considered to have equity if the property's value is higher than what is owed. The value of the property is determined by having the property appraised at the time of the foreclosure.

The Commission received a number of written and oral responses to the Discussion Paper. Overall, the feedback was critical of the Commission's proposed system, largely because of its heavy reliance on appraisals (to establish whether there is equity in a property) and because it appeared to complicate, rather than simplify, the process. Most commentators agreed with the Commission, however, that the current system is not the best system and should be reformed. Some commentators suggested that the Commission consider a system used in some other provinces, known as "power of sale". As a result of these suggestions, the Commission further studied power of sale. In this Final Report, the Commission recommends that a power of sale system be adopted in Nova Scotia.

In Part II of this paper, the mortgage foreclosure and sale system, as it currently exists in Nova Scotia, is reviewed. Part III contains an overview of the Discussion Paper and the feedback received by the Commission. In Part IV, the power of sale system is reviewed as it exists in the four Canadian provinces where it is used. Part V contains an outline of the Commission's recommendations and a discussion of the factors that led the Commission to make these recommendations. Part VI contains a list of the Commission's recommendations.

2. Legal language

This Final Report attempts to present legal information as clearly as possible so that people who do not have legal training can understand the Commission's recommendations. In some cases, however, the language relates to specific legal and technical concepts and the words used will not be familiar to everyone. This section provides definitions of words used in this Final Report.

Act - Law made by elected members of the legislature or parliament. Also referred to as "statutes" or "legislation" and includes regulations.

Affidavit - A written statement made by a person who signs the statement and either swears to or affirms the truthfulness of the statements made.

Arrears - Payments that are due but have not been paid.

Appraisal - A written estimate of the value of a property.

Borrower - The party borrowing money to help pay the purchase price of a property. The borrower is known in law as the mortgagor.

Common law - A body of law developed over the years by judges when making decisions in court. These decisions are relied upon by other judges in making decisions in other cases.

Convey - To transfer title to land.

Covenant - Agreements or promises contained in a mortgage.

Deed - A document which transfers or conveys title to land.

Default - Occurs when a borrower fails to do something it is required to do under the mortgage. The most common type of default is failure to make payments.

Deficiency judgment - A judgment applied for by the lender, as against the borrower, when the amount owing under a mortgage (plus costs) is not paid in full by the funds realized from selling the property.

Encumbrance - A claim attached to property. Includes mortgages and other charges such as liens and judgments.

Equity of redemption - A borrower's interest in property that is subject to a mortgage. The borrower has a right to regain full title to the property by paying the amount owing under the mortgage.

Foreclosure - Occurs when the borrower does not make payments under the mortgage

(or defaults in some other way) and the lender takes steps to get ownership of the property.

Foreclosure and sale - Occurs when the lender not only forecloses on the property but also gets the right to sell the property and use the sale proceeds to pay off a mortgage debt.

Law of Equity - A body of law which developed to relieve the harshness of the common law. It is seen as a more just or fair type of law. It provides solutions not normally available under the common law.

Legislation - Law made by elected members of the legislature or parliament. Also referred to as "statutes" or "acts" and includes regulations.

Lender - The party lending money to help the purchaser pay the purchase price of a property. The lender is known in law as the mortgagee.

Litigation - The legal process that takes place when a person or corporation sues another person or corporation.

Mortgage - A legal agreement or contract by which a borrower pledges property as security for a loan.

Mortgagee - The party lending money to help the purchaser pay the purchase price of a property. Referred to in this paper as the lender.

Mortgagor - The party borrowing money to help pay the purchase price of a property. Referred to in this paper as the borrower.

Real Property - Land and any permanent buildings on the land, such as a house. Also known as "realty". Referred to in this paper as property or land.

Right to redeem - The right of the borrower to regain full legal title to property after paying the amount owing under a mortgage.

Security - Property pledged under a mortgage to ensure the borrower will not default. If default occurs, the lender can take steps to get ownership of the property.

Sheriff - An official appointed by the government who has numerous duties, including conducting public auctions of foreclosed property.

Sheriff's Deed- A deed given by a Sheriff to the purchaser of property at a Sheriff's sale.

Sheriff's sale - A public auction of property conducted by a Sheriff, acting under the authority of the court, in order to sell a property and use the sale proceeds to pay off a mortgage debt.

Statute - Law made by elected members of the legislature or parliament. Also referred to as "legislation" or "acts" and includes regulations.

II THE SYSTEM IN NOVA SCOTIA

1. Overview

A "mortgage" is taken out by individuals or businesses who wish to buy a home or commercial property and need extra money to help pay the purchase price. They usually borrow the money from a bank or trust company. The party borrowing the money is known in law as the "mortgagor" but will be referred to here as the "borrower". The party lending the money is known as the "mortgagee" but will be referred to here as the "lender".

The borrower and lender enter into a legal agreement known as a "mortgage". In exchange for the lender providing money to the borrower to buy the property, the borrower pledges the property as security for the loan. The borrower is therefore said to "give" a mortgage. The property is thus transferred to the lender and the lender has "legal title" to the property. The borrower is left with the "equitable title" to the property, known as the "equity of redemption". This means that the borrower has the right, on paying the full amount of the loan, to claim back the property from the lender. This is known as the borrower's "right to redeem". If the borrower pays off the loan and redeems the property, the mortgage becomes null and void (i.e., is at an end). The borrower is then released from any further obligations under the mortgage and the lender has no further right to the property.

If, however, the borrower does not make the payments under the mortgage or defaults in some other way, the lender may "foreclose" on the property. This means that the borrower's right to redeem is extinguished or foreclosed. In foreclosing, the lender takes steps to obtain ownership of the property. In Nova Scotia, the lender also gets the right to sell the property and use the sale proceeds to pay off the mortgage. This is known as "foreclosure and sale". The property is sold at a public auction conducted by the local Sheriff acting under the authority of the Supreme Court of Nova Scotia.

In Nova Scotia, there is no specific act or statute dealing with mortgages or foreclosures. While parts of various provincial laws may impact on foreclosure,[1] there is no one piece of legislation that governs the entire process. Instead, it is governed largely by the Nova Scotia Civil Procedure Rules which are rules made by the judges of the Nova Scotia Court of Appeal and the Supreme Court of Nova Scotia.[2] These rules are supplemented by "Practice Memoranda and Directions" which provide guidance and direction to lawyers and others using

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[1] Such as the *Judicature Act*, R.S.N.S. 1989, c. 240, the *Real Property Act*, R.S.N.S. 1989, c. 385, the *Conveyancing Act*, R.S.N.S. 1989, c. 97, and the *Registry Act*, R.S.N.S. 1989, c. 392. See Law Reform Commission of Nova Scotia, *Mortgage Foreclosure and Sale*, Discussion Paper (Halifax: Law Reform Commission of Nova Scotia, July 1997) at 7-9 [hereinafter Discussion Paper].

[2] The Nova Scotia Civil Procedure Rules are made under the authority of the *Judicature Act*, *ibid*., ss. 2(h), 46-51 [hereinafter Rules]. Rules 12.04 and 47.08 to 47.13 are particularly relevant to mortgage foreclosure and sale, as outlined in the Discussion Paper, *supra* note 1 at 9-11.

the court.[3] In addition, much of the law in Nova Scotia regarding foreclosures is "judge made" or common law. The common law is made up of decisions made by judges when parties are unable to resolve a dispute and go before a court. These decisions then become precedents to be used by other judges in making decisions in other cases. As a result, the foreclosure system in Nova Scotia has largely developed without a review by the legislature.[4]

2. Steps in the process

The Nova Scotia system is commonly referred to as "mortgage foreclosure" or "mortgage foreclosure and sale". It is more accurate, however, to describe the Nova Scotia system as "judicial sale" because the property is sold under the supervision and authority of the judges of the Supreme Court of Nova Scotia. For purposes of this paper, the Nova Scotia system will be referred to as foreclosure or foreclosure and sale. The steps in the Nova Scotia system are outlined below.

(i) Default

Default occurs if the borrower fails to do something it is required to do under the mortgage. The most common type of default is failure to make payments. When default occurs, the lender is entitled, under the "acceleration clause" in the mortgage, to require the borrower to immediately pay the full balance of the mortgage debt (i.e., not just the amount in default, known as the "arrears"). The lender first sends the borrower a "demand letter", advising of the amount of the arrears and asking the borrower to bring the payments up to date. The lender usually warns that if the payments are not brought up to date, the lender will be requiring payment of the full amount due and will start an action against the borrower (i.e., will sue). The lender often gives the borrower a week or two to respond to the demand letter.

(ii) Starting an action

If there is no response to the demand letter, the lender often sues the borrower. This is done by starting an action in the Supreme Court of Nova Scotia using two documents: an Originating Notice (Action) and a Statement of Claim. The Originating Notice (Action) simply advises that the lender is making a claim against the borrower and that the borrower may dispute the claim by filing a "Defence" within ten days. In the Statement of Claim, the lender states the details of its claim against the borrower. The basic wording and format of the Statement of Claim to be used in foreclosure matters is set out in Practice Memorandum No. 13.

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[3] Practice Memorandum No. 13, titled "Foreclosure Proceedings", has been issued to provide guidance in foreclosure and sale matters. See the Discussion Paper, *supra* note 1 at 12.

[4] The Nova Scotia Court of Appeal, in *Royal Bank of Canada* v. *Marjen Investments Limited* (1998), 164 N.S.R. (2d) 293 at 312 (C.A.) raised the issue of whether judges can change the law by making rules: "Counsel did not address, and therefore we have not considered, whether the Supreme Court can, through its rule making capacity pursuant to the *Judicature Act*, effect a change to the common law".

It indicates the details of the mortgage, including the amount loaned, the property used to secure the mortgage, the interest rate and any subsequent agreements that have changed the initial mortgage. A detailed breakdown of the amount of money outstanding is also included. The lender then states what it is claiming, including payment of the principal and interest outstanding, payment of any expenses incurred by the lender as a result of the borrower's default and possession of the property. The lender also claims an Order for Deficiency Judgment should the proceeds from selling the property not be enough to pay the mortgage debt and the expenses incurred by the lender as a result of the default.

In a foreclosure action, the lender is known as the "Plaintiff" and the borrower is known as the "Defendant". The action must name both the original borrower and current owner of the property as Defendants. They are usually the same person (or company). There can, however, be two different people (or companies) if the property was sold and the new owner took over (or "assumed") the mortgage but the original borrower was not formally released from the mortgage.[5] As a result, the original borrower continues to be liable for any default under the mortgage. If someone guaranteed that the borrower would pay the mortgage debt (i.e., acted as a "guarantor"), that person is also served with the documents and is known as the "Defendant-Guarantor".

The Originating Notice (Action) and Statement of Claim must be filed with the Supreme Court of Nova Scotia. In order for the action to proceed, the documents must be personally served on the Defendants (including the Defendant-Guarantor). Once the Defendants have been personally served, they can either pay the money claimed, dispute the claim by preparing a Defence or do nothing. If they choose to dispute the lender's claim, they have ten days from the date they were personally served to file a Defence with the court. In a Defence, a borrower may claim, for example, that they did not sign the mortgage, or that they have not broken the terms of the mortgage, as claimed by the lender. In many cases, the borrower does nothing and the matter proceeds to the next stage.

(iii) Order for Foreclosure, Sale and Possession

The next step is for the lender to apply to the court for an Order for Foreclosure, Sale and Possession. Before this Order is granted, the borrower may apply to the court to have the mortgage "reinstated". Reinstatement is authorized by section 42 of the *Judicature Act*.[6] Section 42 allows the court to order that the foreclosure action be discontinued if the borrower pays all the arrears and the costs incurred by the lender as a result of the default. The borrower is therefore protected against the acceleration clause in the mortgage (which, as described above,

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[5] A "Release of Mortgage" is provided by a lender after a borrower pays the amount owing under a mortgage. Once it is registered at the Registry of Deeds, in accordance with the *Registry Act*, R.S.N.S. 1989, c. 392, the Release indicates that the lender no longer has an interest in the property and that the borrower has met all the conditions of the mortgage and is released from any further obligations under the mortgage.

[6] *Supra* note 1.

allows the lender to require that the borrower pay the full amount owing once the borrower defaults under the mortgage). The right to reinstatement is only permitted once during the term of a mortgage. Presumably, this is to deal with repeat defaulters and avoid abuse by borrowers. Any Order for reinstatement must be granted by the court *before* an Order for Foreclosure, Sale and Possession is granted.

Rule 12.04 sets out what is required of a lender seeking an Order for Foreclosure, Sale and Possession. This application is on an *ex parte* basis, meaning that the Defendants are not notified of the application in advance. The lender must prepare a number of documents and file them with the Supreme Court of Nova Scotia. The form and wording of most of these documents is also set out in Practice Memorandum No. 13. The lender must file an affidavit confirming that the Defendants were personally served with the Originating Notice (Action) and Statement of Claim and were allowed ten days to file a Defence (this is known as an Affidavit of Service). The lender must also prepare a Notice advising the court that an Order for Foreclosure, Sale and Possession is being sought under Rule 47. In addition, the lender must file two other affidavits. In the first affidavit, the lender provides a full history of all charges and payments to the mortgage account, as well as a copy of the original mortgage and any documents by which the original mortgage was renewed or amended (this is known as the Mortgagee's Affidavit). The second affidavit contains a Certificate listing any interests recorded against the property (such as liens, judgments or other mortgages) since the borrower became owner (this is known as the Solicitor's Affidavit). This enables the court to determine whether any other parties may be affected by the foreclosure.

The Order for Foreclosure, Sale and Possession, if granted by the court, sets out the amount owed by the borrower and gives the lender possession of the property. It states that the equity of redemption of the borrower will be "forever barred and foreclosed" unless the borrower pays the amount owing before the property is sold by the Sheriff. The borrower will then be prevented from paying the amount outstanding and claiming back (or redeeming) the property from the lender. The Order also states that the property will be sold at a public auction conducted by the Sheriff. Finally, the Order permits the lender to apply to the court, after the property is sold, to determine whether the borrower still owes any money to the lender. The court may find that a deficiency exists if the sale proceeds were not enough to cover the mortgage debt and the expenses incurred by the lender in the foreclosure. If that is the case, the lender will be entitled to an "Order for Deficiency Judgment".[7]

(iv) Sale by public auction

In Nova Scotia, property is sold by the Sheriff at public auction. The lender must notify others of the auction. The borrower and others with liens or judgments against the property (since the borrower became owner) must be notified at least 20 days before the auction. The lender must also advertise twice in a local newspaper (at least 20 days and not more than 10 days prior to the

[7] See Section V.5.(b), below.

auction). The procedure at the auction is governed largely by Rule 47 and the instructions attached to Practice Memorandum No. 13 entitled "Standard Procedure for Sheriff's Sales by Public Auction, Instructions to the Sheriff". Among other things, the instructions set out what the lender must pay to purchase the property, the deposit that must be paid by any purchaser, details of how the deed will be delivered to the purchaser and how the sale proceeds will be disbursed. The property is sold to the highest bidder at the auction. The purchaser must pay ten percent of the purchase price at the time of the auction and pay the balance within 20 days.

The lender's lawyer usually goes to the auction and may bid against other bidders in order to bid up the purchase price to an amount that will cover the amount owing and costs.[8] In Nova Scotia, if no one else purchases the property, or if the lender is the highest bidder, the lender is permitted to purchase the property for the "minimum permissible bid" (which is the sum of the Sheriff's fees[9] and outstanding property taxes). This is obviously much lower than the value of the property. The lender pays this amount even if the lender made a higher bid in an attempt to increase the purchase price.[10]

(v) Order confirming sale

Once the property is sold, the Sheriff prepares a Sheriff's Report. It sets out the details of the sale including the name of the purchaser, the purchase price, how the sale proceeds were distributed and indicates that the Sheriff has given the purchaser a deed to the property (known as the Sheriff's Deed). The lender's lawyer then applies to court for an Order confirming the sale. The lender must file a number of documents with the court including the Sheriff's Report and an affidavit stating that the auction was properly advertised and appropriate notice was given. This application is on an *ex parte* basis, meaning that other parties are not notified of the application in advance. As well, there is no formal hearing before a judge. Instead, the application is considered by a court official (known as the Prothonotary) outside the courtroom. If the Prothonotary is satisfied that the foreclosure was conducted properly, an Order is granted confirming that the sale has occurred and the foreclosure is complete.

(vi) Deficiency or surplus

If the property was sold at the auction to a third party, the lender pays the sale proceeds toward the debt and determines whether there is any shortfall. The lender is entitled to be paid not only

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[8] In some cases, the lender sets a "reserve bid" which is an amount that will cover the outstanding debt and costs. Bidders are not advised of the amount of the reserve bid but they are notified that a reverse bid exists. The property will not be sold unless there is a bid greater than the reserve bid.

[9] The Sheriff's fees are usually just over $1000.

[10] In many areas of Nova Scotia, "Deed Transfer Tax" must be paid to the municipality in order to transfer the deed to the property. This is calculated as a percentage of the purchase price. If the lender was the highest bidder, it may have to pay Deed Transfer Tax on the amount bid, not on the amount it actually paid (the minimum permissible bid).

principal and interest owing under the mortgage, but any costs it incurred in relation to the foreclosure, such as costs of managing and maintaining the property. If the lender believes there is a shortfall, it has six months to apply to the court to determine whether it is entitled to an Order for Deficiency Judgment. Prior to the application, the lender must file a number of documents with the court, including documents verifying the money it spent in foreclosing on the property. The lender must also show how it has calculated the deficiency. The borrower must be given at least ten days notice of the application and be provided with a copy of all the documents filed by the lender. At the application, the court will review the documents and determine whether to grant or deny an Order for Deficiency Judgment. In some cases, the court will grant an Order but in a different amount than requested by the lender.

If the property sold for more than the amount owed to the lender, a surplus may exist. The surplus is paid into court and those who feel they are entitled to the surplus (such as those with liens or judgments against the property) can apply to the court to determine their entitlement to the funds.

If the lender purchased the property at the auction, it then tries to sell the property by listing it with a real estate agent. Since the property has not been resold, the lender does not know whether the sale proceeds will be enough to pay the amounts owed under the mortgage and the costs of the foreclosure. The lender is still required, however, to apply for any deficiency judgment within six months of the date of the auction. This may be problematic if the property does not sell within six months. In that case, the lender may determine whether any deficiency exists by using appraised values as the "deemed sale price" of the property since the actual sale price is not yet known. If a deficiency is found to exist and an Order for Deficiency Judgement is granted by the court, it does not matter if the property is later sold at a different sale price. For example, if the property is later sold at a price higher than the amount owed so that there is actually a surplus, not a deficiency, there is no duty on the lender to pay this surplus back to the borrower. This obligation only arises if the surplus occurs as a result of a sale to a third party at the auction.

The next section of this paper provides an overview of the Discussion Paper, including a summary of the results of the Commission's empirical study of foreclosure files in the Halifax County Sheriff's office. This is followed by a review of the feedback received on the Commission's suggestions for reform, as contained in the Discussion Paper.

III THE DISCUSSION PAPER

1. Overview

In July 1997, the Commission released a Discussion Paper, *Mortgage Foreclosure and Sale*. In the Discussion Paper, the Commission noted that the primary goal of the current system is to ensure the property is sold and the money recovered for the benefit of both the lender and borrower. A secondary goal is to protect the borrower's interest, particularly in any equity it has built up, and in the context of any shortfall that may exist after the property is sold. The Commission recognized that borrowers and lenders have diverse interests that must be balanced. Borrowers must have reasonable access to credit in order to enable them to purchase property. Lenders, on the other hand, must be able to profitably provide such credit while having access to remedies should the borrower default.

In order to more fully understand how the foreclosure process is working in Nova Scotia, the Commission conducted a study of all foreclosure files opened in the Halifax County Sheriff's office over a two and one-half year period. The study showed that the auction conducted by the Sheriff did not often result in property being sold to an independent third party. In fact, an independent third party purchased the property in only 16% of the sales studied. In the remaining 84% of sales, the property was purchased by the lender.[11] The study also showed that the Sheriff's auction did not result in the property being sold at or near fair market value. Of the sales to independent third parties, almost 90% were for a purchase price above or just below the amount outstanding on the mortgage. Of the sales to lenders, almost 75% purchased for the minimum permissible bid.[12] Although the Sheriff's office does not record attendance at Sheriff's sales, it is not uncommon for the lender to be the only party attending and bidding at the Sheriff's auction.[13] The study also found that the sale proceeds from the Sheriff's sales did not often cover the amount owed by the borrower. Only 10% of all Sheriff's sales resulted in a surplus once the mortgage debt and all associated costs were paid. In fact, a surplus existed in only 1% of the sales to the lender and in 60% of the sales to third parties.

The Commission concluded that the Sheriff's sale is no longer an appropriate mechanism for the lender to realize on the security and achieve the best possible resale price for the property. This

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[11] The lender has the option of taking title in its own name or, within 20 days of the sale, requesting that the Sheriff's Deed be made out to a third party (this eliminates the need for the lender to pay Deed Transfer Tax). In 9% of the sales to lenders, the lender requested an assignment to a third party before the end of the 20 day period. Assuming the third party is not related to the lender, this means that 23% of all Sheriff's sales resulted in the property being sold to a third party. In the remaining 77% of sales, the property was conveyed to the lender.

[12] Which, as described above, is the sum of the Sheriff's fees and outstanding property taxes.

[13] J.T. Robertson, "The Problem of Price Adequacy in Foreclosure Sales" (1987) 66 Can. Bar Rev. 671 at 708 [hereinafter Robertson (1987)].

was recognized by the Nova Scotia Court of Appeal[14] when it stated that the Sheriff's auction often has a "dampening effect" on price because a potential purchaser is unlikely to have an opportunity to inspect the property and because the Sheriff's goal is not to obtain a price reflecting fair market value. The Court noted that in reality, Sheriff's sales at public auction are often not much like sales between willing sellers and willing buyers on the open market.[15]

The Commission also found that even though there was often a shortfall in the amount owed to lenders, lenders did not often attempt to recover it from the borrower. Of the foreclosure files studied, almost 90% resulted in a deficiency after the sale proceeds were taken into account. In these cases, the lender could make an application for an order for deficiency judgment to recover the shortfall from the borrower. In almost three-quarters of these cases, however, the lender did not make such an application. While the reasons for not proceeding are unknown, lenders may consider the cost of making such an application to be unjustified because the chances of collecting any money from the borrower are too low.[16] The Commission's study showed, however, that when a deficiency judgment was requested by the lender, the application was successful 85% of the time.

The Commission concluded that the current system is problematic for both borrowers and lenders. From a borrower's point of view, there are several problems. For one, the process is totally within the lender's control. Borrowers rarely retain a lawyer to represent them and virtually all applications for foreclosure and sale are undefended. For the most part, the process unfolds without the borrower's participation and in the absence of any significant information about their rights or about the foreclosure process itself. The borrower also continues to be responsible for interest and costs which accumulate after the lender starts the foreclosure process. Costs may be substantial if the property is on the market for a period of time but does not sell. As a result, after losing their property, borrowers may also have a judgment against them for any deficiency on the mortgage account. In Nova Scotia, a judgment is valid for twenty years. When recorded at the Registry of Deeds, a judgment affects a borrower's ability to deal in real property. It usually also affects a borrower's credit rating. Attempts to collect on the judgment can be made through the twenty year period.

The Commission concluded that problems also existed from the lender's point of view. Lenders have to go through a cumbersome, expensive procedure once default occurs. After suing the borrower and obtaining an Order for Foreclosure, Sale and Possession, the property is offered for sale by the Sheriff. Frequently there are no other bidders and no competitive bidding. The lender thus purchases the property at the Sheriff's sale for the minimum permissible bid. If the

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[14] *Canadian Imperial Bank of Commerce* v. *England's (R.) Warehouse Ltd.* (1996), 147 N.S.R. (2d) 321 (C.A.). See Discussion Paper, *supra* note 1 at 15.

[15] *Ibid*. at 335-6.

[16] If the borrower is a corporation, it may not have assets. If the borrower is an individual, he or she may have no assets and may consider declaring bankruptcy should a judgment be obtained.

property is a commercial or rental property, property managers are often hired to manage the property and collect rents. Appraisals are conducted to value the property. A real estate agent may be retained and the property offered for sale on the open market. If the property sells, the lender calculates whether a deficiency still exists on the mortgage account after crediting the sale proceeds. If there is a deficiency, the lender may apply to the court for a judgment against the borrower. If the property does not sell, the lender may determine whether a deficiency exists using appraised values as the "resale" value. Once it has a judgment, the lender can attempt to collect the amount owing from the borrower.

In response to a perception that the system was not working for borrowers or lenders, the Commission considered various options in reforming the system.[17] Under one option, the lender would be allowed to sell the property by private sale, after obtaining an Order for Foreclosure, Sale and Possession, but before the Sheriff's sale was conducted. The sale would require court approval which would be given if the court was satisfied that the purchase price covered the amount owed (or the lender agreed to accept it in full satisfaction of the dept) and that the purchase price represented the fair market value of the property or that the borrower (and other interested parties) consented to the sale. The Commission ultimately rejected this type of reform as it would leave the lender in control and not result in significant change from the current system. The Commission also considered private power of sale, the system used in Newfoundland, Prince Edward Island, New Brunswick and Ontario. This is more of a self- help remedy that does not involve the courts. Although there are different types of private power of sale, it generally allows the lender to sell the property after giving notice to the borrower. The Commission also rejected this method because the Commission was concerned that, among other things, it does not guarantee an adequate sale price and may not adequately protect borrowers because it largely proceeds without court involvement.

The Commission ultimately suggested that a modified judicial sale system be adopted in Nova Scotia.[18] As discussed above, a judicial sale is a sale made under an order of the court or one which is conducted under the supervision of the court. The Sheriff's auction in Nova Scotia is therefore part of a judicial sale system. The Commission recommended that the system continue to be overseen by the court but that the sale be conducted in a different manner. Specifically, the Commission recommended that the Sheriff's sale be abolished and replaced with a sale on the open market, depending on whether there is equity in the property at the time of foreclosure. A property is considered to have equity when its value (as determined by appraisal) is greater than the amount owed. A surplus is therefore considered to exist at the beginning of the process. If the appraised value is less than the amount owed, a deficiency is considered to exist. The Commission developed a system in which property with equity would be listed for sale with a real estate agent. If the property did not sell, the lender could either accept the property in full satisfaction of the debt or surrender the property to subsequent encumbrancers (in order of

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[17] For a discussion of the options reviewed by the Commission, see the Discussion Paper, *supra* note 1 at 26-32.

[18] See Appendix A for a list of the suggestions made in the Discussion Paper, *supra* note 1 at 23-37.

priority) and sue the borrower for the full amount owing. If, however, there was no equity in the property, a foreclosure order could be issued immediately and the lender could accept the property with a right to apply for a deficiency judgment based on the appraised value. If the lender did not wish to accept the property, it could surrender it to subsequent encumbrancers (in order of priority) and sue the borrower for the full amount owing.

The Commission also recommended that the mortgage foreclosure process be made clearer to borrowers. The Commission suggested that a plain language Notice of Default be provided to borrowers. Among other things, the Notice would outline the rights and obligations of the borrower, the steps necessary to remedy the default and advise that: (a) the mortgage could be reinstated by the borrower paying arrears and related expenses prior to the court order being granted; and, (b) the property could be redeemed by paying the total amount owed under the mortgage, prior to a sale to a third party.

The Commission suggested that lenders be allowed to purchase the property during the initial listing period, with the consent of the borrower and with court approval. A purchase at a value other than the appraised value would have to be agreed upon by the borrower. The Commission suggested that deficiency judgments continue to be available but invited comment on whether they should be limited in some way. Finally, the Commission suggested that reform be accomplished through legislation although it recognized that amendments may be required to the Civil Procedure Rules and Practice Memorandum.

2. Feedback

Eleven commentators provided the Commission with feedback on the Discussion Paper.[19] While the commentators agreed that the current system is not necessarily the best one, many did not like the system proposed by the Commission in the Discussion Paper. Some commentators felt there were elements of the current system that should be retained. Some commentators also made suggestions as to how the current system could be improved.

(i) Comments on the current system

Most of the commentators agreed that the current system is not necessarily the best system. One commentator agreed that the present system of sale by public auction does not achieve the best possible price because it is a "forced sale". Another commentator agreed that current practice does not always result in the highest or best value being obtained at a foreclosure sale. One commentator felt that the foreclosure process, as it currently exists in Nova Scotia, is no longer needed. He felt the court should not supervise the operation of a mortgage because a mortgage is simply a contract between a lender and borrower. The court does not supervise any other contract in this manner and should not supervise mortgage contracts.

[19] See Appendix B for a list of people and organizations who provided written and oral comments on the Discussion Paper, *supra* note 1.

One commentator disagreed with the Commission's conclusion that the current system of foreclosure and sale is unfairly balanced in favour of lenders and does not adequately protect borrowers. He emphasized that the lender has provided money to the borrower with the expectation of repayment in due course. Foreclosure can only occur when the borrower has breached the contract. On its face, this commentator suggested that the system is not unfair toward borrowers. This commentator agreed, however, that the present system of sale by public auction is inefficient as it does not achieve the best possible price because it is a "forced sale".

(ii) Elements of the current system that should be retained

Some commentators felt that there were certain aspects of the current procedure that should be retained. One of the primary advantages of the Sheriff's auction is that there is certainty because there is a fixed time of sale and a cutoff point (20 days after the Sheriff's auction) at which time the rights of the borrower cease. As a result, the borrower is required to vacate the property within 20 days of the Sheriff's auction. If the lender was the purchaser at the Sheriff's auction, it is then free to list the property for sale and has possession of the property in order to show it to prospective purchasers. This certainty is seen as desirable because some lenders complain of difficulty in gaining access to property in order to carry out maintenance work and conduct appraisals.

Some commentators questioned whether the Sheriff's auction should not be abolished but remain as an alternative. Another commentator suggested that it would be helpful to preserve the Sheriff's auction but give the lender the option to have the Sheriff act as a "receiver" of closed bids for the property by way of tender, after sufficient descriptive advertising. This would allow the Sheriff, as an officer of the court subject to court supervision, to remain involved and would serve to preserve judicial foreclosure and sale in Nova Scotia.

Some commentators also felt that lenders should continue to be permitted to become owners of the property if they deem that to be in the best interest of satisfying the mortgage debt and recovering the monies advanced. One commentator agreed with the Commission's comment that most lenders do not wish to own such properties and would prefer to satisfy the mortgage debt.

Most commentators felt strongly that deficiency judgments should continue to be available in Nova Scotia. It should be noted, however, that only one submission was received from a borrower. Generally, commentators felt that eliminating deficiency judgments would adversely impact credit in the province, particularly mortgage credit. They felt it would be unfair to deny deficiency judgments simply because a loan is secured by real estate, instead of some other type of security (or, in some cases, by no security at all). They felt that elimination of deficiency judgments would not promote fairness in the system and may result in a windfall to borrowers. Another commentator, however, said that at a bare minimum, lenders should be required to seek judicial approval of any deficiency judgment. The onus should be on the lender to satisfy the court that the lender acted reasonably, having regard to all the circumstances, including the fact that the deficiency judgment arises from a forced sale.

(iii) Comments on system proposed by the Commission

Many commentators did not favour the system proposed by the Commission in the Discussion Paper. One of the primary criticisms of the proposed system was its heavy reliance upon appraisals to determine the process to be used and the rights of the parties. The Canadian Bar Association Real Property Section felt there was a fundamental flaw with relying upon appraisals to establish the equity/no equity distinction because appraisals are simply opinions which vary greatly from appraiser to appraiser. As well, the proposed system would require that the cost of an independent appraisal be incurred. This would further increase the borrower's up-front costs which is inconsistent with other government policies designed to encourage home ownership, particularly for first time home buyers.

There were many other comments on appraisals. One commentator said that appraisals are more reliable in the residential, not the commercial context. Another commentator said that the qualifications required of appraisers need to be specified. Other commentators were critical of relying on appraisals to establish the rights of the parties although one commentator did like having different routes depending on whether there is equity in the property. They also felt that the system would not work for complicated properties such as those involving collateral liabilities, different types of security or if parts of a property were secured by different lenders.

Another commentator felt that if appraisals become public record and can be accessed by anyone, potential bidders can perform simple calculations to determine when a lender will stop bidding. This will guarantee that bids will be at, or just slightly above, the amount owed. There was also concern that the Commission's proposed process will create a new category of litigation: the battle of the appraisers. One commentator noted that it is common to see a 20% decrease in fair market value of a property over a two year period. Such a decrease may be blamed on the appraisers, as opposed to changes in the market, and litigation may result. As well, if an appraiser is asked to explain any differences in appraisals done at the time of default and at the time of placing the mortgage, the cost of obtaining an appraisal will increase dramatically.

One commentator noted that, in many cases, an appraisal may not be prepared at the time of placing the mortgage. This is because Canada Mortgage and Housing Corporation (CMHC) is using a new system for processing applications for Mortgage Loan Insurance.[20] The system, known as "emili" is an on-line electronic mortgage underwriting system that is used by lenders to assess risk and determine whether CMHC insurance should be provided. If a mortgage is approved by this system, an appraisal may not be necessary. As a result, there will be no way of determining whether there are any discrepancies between the appraised value at the time of

[20] CMHC provides Mortgage Loan Insurance under the *National Housing Act*, R.S.C. 1985, c. N-11. Designed to encourage home ownership, CMHC provides insurance for home buyers who wish to make a down payment in an amount less than the conventional 25%. If, for example, a home buyer pays 5% of the purchase price as a down payment, CMHC will insure the remaining 95%. The home buyer will pay insurance premiums either up front or through their mortgage payments.

default and at the time of placing the mortgage.

Another significant problem with the proposed system is the increased existence of "high ratio mortgages". High ratio mortgages are mortgages in which the home buyer makes a small down payment and the balance is insured by CMHC. As a result of the smaller down payment, borrowers build up very little equity in the first few years of the mortgage. The number of insured mortgages has increased dramatically over the last few years, while the number of conventional mortgages (mortgages with a down payment of at least 25%) has decreased. As the following table shows,[21] the number of insured mortgages increased from 24% to 43% from 1992 to 1996 while the number of conventional mortgages decreased form 76% to 57% in the same period.

Year	Insured		Conventional		Total
	#	%	#	%	
1992	254,903	24%	793,016	76%	1,047,919
1993	286,817	32%	596,362	68%	883,179
1994	306,288	40%	457,804	60%	764,092
1995	276,358	43%	367,214	57%	643,572
1996	361,951	43%	485,470	57%	847,421

Most properties will therefore have little or no equity at the time of foreclosure and the "equity approach" suggested by the Commission will rarely be used. Any equity that does exist would be eaten up very quickly by resale costs and associated expenses.[22] The number of insured mortgages will likely increase even more in the next few years because the program was expanded on May 11, 1998 from first time home buyers to all home buyers.[23]

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[21] Statistics Canada, CANSIM, Matrix 999.

[22] This was a concern expressed by many attendees at the November 15, 1997, Canadian Bar Association (Nova Scotia branch) Legislation and Law Reform Conference at which the Commission's suggestions for reform were outlined.

[23] Canada Mortgage and Housing Corporation, Press Release, "Five Per Cent Downpayment Expands Home Buying Options for Canadians" (31 March 1998).

Some commentators also felt that the proposed system, while intending to simplify foreclosure procedure, was in fact complicating it. One commentator urged the Commission to keep the law reform initiative simple. Other commentators suggested that perhaps the current system could be improved by modifying the advertisement used to publicize Sheriff's auctions. This could be a simple, yet effective improvement.

Not all comments, however, were critical of the Commission's suggestions. One commentator said the proposed process seems fair to both parties while another liked having a different route depending on whether there is equity in the property. All commentators appeared to agree with the Commission's suggestion that the borrower receive a plain language notice advising them of their rights. Many commentators questioned why the Commission did not consider more fully another process of responding to the borrower's default known as "power of sale". As a result of these and other comments about the Commission's initial suggestions, the Commission further studied power of sale in the four provinces that use it. The Commission concluded that power of sale is the best process, a version of which it recommends below in Section V. In the next section of this paper, the power of sale systems in Newfoundland, Prince Edward Island, New Brunswick and Ontario are reviewed.

IV POWER OF SALE

1. Introduction

As discussed above, the mortgage foreclosure system used in Nova Scotia is by foreclosure and sale, more accurately described as judicial sale. Judicial sale is a sale conducted under the supervision and authority of the court. In a judicial sale system, the lender must apply to the court to get the court's permission to sell the property. If permission is granted, the sale of the property is supervised by the court.

Power of sale is another method by which a lender can sell property should a borrower default under the terms of a mortgage. Under power of sale, a lender sells the property without the involvement of the court. The lender gets the right to sell the property from the mortgage document and/or provincial legislation which authorizes power of sale in that province. Power of sale is used as the lender's primary remedy in Newfoundland, Prince Edward Island, New Brunswick and Ontario. In what follows, the system in each of these provinces is outlined.[24] As will become obvious, the primary differences between the Nova Scotia system and the power of sale provinces are:

(1) The extent of court involvement - there is virtually no court involvement in the power of sales provinces while the court in Nova Scotia is extensively involved in ordering that the property be sold, confirming the sale procedure after it occurs, and hearing any application for a deficiency judgment.

(2) The way in which the process is started - in power of sale provinces, the process is started very simply by sending a notice to the borrower and current owner of the property. In Nova Scotia, the process is started by commencing a lawsuit against the borrower and any others who may be liable.

(3) The way in which a deficiency judgment is sought - in power of sale provinces, a lender seeking a deficiency judgment must start an action against the borrower after the property is sold and the deficiency is calculated. In Nova Scotia, since an action has already been started to initiate the foreclosure proceedings, a lender seeking a deficiency judgment must make an application before the court, as part of the main action that was started against the borrower.[25]

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[24] In addition to reviewing the legislation, rules and leading case law in each province, additional information was obtained by speaking with lawyers practising in this area in each province. Names of lawyers were provided by the National Real Property Section of the Canadian Bar Association. The Commission wishes to thank the Canadian Bar Association and the individual lawyers for their assistance.

[25] See Section II.2.(vi), above.

2. Newfoundland

In Newfoundland, when borrowers default under a mortgage, lenders can resort to power of sale, judicial sale or foreclosure, to recover the funds owed. Power of sale is used virtually exclusively because it is easier to implement.[26] It is governed by the *Conveyancing Act*[27] while judicial sale and foreclosure are authorized by the Rules of the Supreme Court.[28] The power of sale system is fairly simple and is started by notice, not by commencing an action. There is no specific period of default before the lender can start the power of sale process. As a matter of practice, lawyers in the province advise that lenders usually wait until the mortgage is two to three months in arrears before sending the power of sale notice.

The wording or form of the notice is not set out in the *Conveyancing Act*. As a result, lenders' lawyers develop their own notices which may resemble the demand letter used in Nova Scotia. Some lawyers use a notice that is slightly more formal and technical. In any event, the lender cannot take steps to sell the property unless default continues for 30 days after the notice is given. The notice is therefore commonly referred to as the "30 day notice". While the legislation simply requires that notice be "given", it does not specify how it is to be given. Practice in the province is to personally serve it on the borrower.

In Newfoundland, borrowers do not have the right to "reinstate" the mortgage, which is a right of borrowers in Nova Scotia.[29] If default continues for 30 days after the notice is given, the lender can set the date of the sale and start advertising. Although the *Conveyancing Act* only requires that the sale be advertised twice for two consecutive weeks, common practice is to advertise for four weeks to meet the requirements of the federal *Bank Act*.[30] As a result, the sale does not occur until at least two months after the date on which the 30-day notice is given. If a lender allows default to occur for two months before issuing the 30-day notice, the total time between default and the sale is four months.

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[26] J.E. Roach, *The Canadian Law of Mortgages of Land* (Toronto: Butterworths, 1993) and Robertson (1987), *supra* note 13 at 681-2.

[27] R.S.N. 1990, c. C-34.

[28] Primarily Rules 5, 16.04 and 26 of the Rules of the Supreme Court, 1986.

[29] Borrowers in Nova Scotia can ask the court to discontinue the foreclosure action upon the borrower paying all arrears and costs incurred by the lender as a result of the default. See Section II.2.(iii), above.

[30] The *Bank Act*, S.C. 1991, c. 46, s. 433, states that a bank may purchase real property that it is offering for sale under a power of sale, if notice of the sale by auction is published for four weeks in a newspaper in the area where the property is located.

The lender must obtain a written appraisal of the property prior to the sale.[31] The *Conveyancing Act* requires that the appraisal be prepared by a "qualified appraiser". If no qualified appraiser is available in the area where the property is located, the *Act* permits the lender to obtain a statement of the fair market value of the property from a licensed real estate agent familiar with property values in the area.

Although "power of sale" may suggest the property is listed for sale with a real estate agent, in Newfoundland, attempts must first be made to sell the property by public auction or public tender. The auction or tender is conducted in the offices of the lender's solicitors although it can also be conducted on the premises of the mortgaged property. Under the *Conveyancing Act*, the property cannot be sold for less than 75% of the appraised value unless a judge approves the sale at that price.[32] If there are no offers to purchase the property at the public auction or public tender, or if the offers are unreasonably low, the property can then be sold by "private contract". To sell by private contract, property is listed for sale with a real estate agent. Again, the property cannot be sold by private contract for less than 75% of the appraised value unless a judge approves the sale at that price.

In Newfoundland, a lender is permitted to buy the property. If no one attends at the auction or no one purchases the property by tender, the lender may, instead of listing the property for sale with a real estate agent, purchase the property itself. Because any sale must be for at least 75% of the appraised value, the lender often purchases the property for 75% of the appraised value plus $1.00. The lender then conveys the property to itself. Because the lender has purchased the property, the borrower is not liable for any costs after that point in time. If, however, the lender does not buy the property but lists it for sale with a real estate agent, the borrower continues to be responsible for costs incurred up to the time of a sale to a third party.

After a sale by any method, the lender must provide an accounting to the borrower, guarantors and any registered encumbrancers. It must be provided within 30 days from the date of the completion of the "sale". The *Conveyancing Act* does not specify whether this is 30 days from the auction or tender or from a sale to a third party. In any event, if the borrower is dissatisfied with the accounting, it can make an application to the court.[33]
The *Conveyancing Act* also states that if the lender fails to comply with certain requirements set out in the *Act* (including the notice, advertising and accounting requirements), the borrower and

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[31] The *Conveyancing Act*, *supra* note 27, s. 8(1), states that the appraisal must be obtained "before the date on which a sale" is to take place. Some lenders claim this is vague and imprecise and question whether an appraisal that is a few months old will meet the requirements of the *Act*. They suggest that the *Act* be clarified to require that an appraisal be conducted within a specified number of days or months prior to the sale.

[32] In order to seek the judge's approval, the lender must make an application to the court and give notice of the application to interested parties, such as the borrower (*Conveyancing Act*, *supra* note 27, s. 9). The borrower can appear before the judge and dispute the right of the lender to sell the property at that price.

[33] Upon such an application, a judge can grant whatever relief the judge thinks is "appropriate in the circumstances" (*Conveyancing Act*, *supra* note 27, s. 11).

others are not liable for a deficiency judgment. As a result, there are many attempts by borrowers or guarantors to find non-compliance with these requirements. If the lender is found not to have complied with these sections, it loses its entitlement to any deficiency, regardless of the impact of the noncompliance.[34] That means that even if the noncompliance was found to have no negative impact on the borrower, the lender would still lose its right to a deficiency judgment.

The *Conveyancing Act* sets out how the proceeds of sale are to be applied. The proceeds are first to be used to discharge any prior encumbrances to which the sale was not subject. They are then to be applied to pay the costs of the sale, followed by any amounts owing under the mortgage.

If the lender wishes to claim a deficiency because the sale proceeds were not enough to cover the debt and costs of sale, an action is started in the Supreme Court, by a Statement of Claim personally served on the borrower and any others who may be liable. There are no practice memoranda or guidelines regarding calculation of the deficiency. If the lender purchased the property at the auction or by tender, the amount paid by the lender is used as the sale proceeds to calculate whether a deficiency exists. Because the lender purchased the property, the borrower is not liable for any costs after that point. If the lender did not buy the property and it is placed on the market, the borrower would continue to be responsible for costs incurred to the time of a sale to a third party. There are no restrictions on how long the property can be on the market. In terms of any surplus, the system is similar to Nova Scotia in that the lender must account for any surplus if it arises after the property is sold to a third party by auction or tender. If the property is unsold at the auction or tender and is listed for sale and sold at a surplus, the lender must also account for the surplus. If, however, the lender purchases the property at the auction or tender and later resells it at a surplus, the lender does not have to account for any surplus. The lender's obligation to account ended when it became owner of the property.

3. Prince Edward Island

Power of sale is the main remedy available to lenders in Prince Edward Island[35] although the province's legislation and rules also provide for judicial sale and foreclosure. Power of sale is provided for by the *Real Property Act*[36] where a power of sale clause is included in the mortgage deed attached in a schedule to the *Act*.[37] Foreclosure is provided for by the *Real Property Act*[38]

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[34] *Roynat Inc.* v. *Lester* (1994), 129 Nfld. & P.E.I.R. 271 at 291 (Nfld. T.D.).

[35] Roach, *supra* note 26 at 131 and Robertson, *supra* note 13 at 681-2.

[36] R.S.P.E.I. 1988, c. R-3.

[37] *Ibid*. at Covenant 12 of the Second Schedule (Deed of Mortgage).

[38] *Ibid*., ss. 72-77.

and Rules of Court.[39] Judicial sale is also provided for by the Civil Procedure Rules.[40] Despite these provisions, power of sale is used exclusively. In 1985, the province's Court of Appeal was asked to clarify the law relating to foreclosure and sale in the province.[41] While the Court declined to provide such clarification,[42] it noted the legal and judicial confusion that exists as a result of the introduction of practice from other provinces without supporting legislation.[43] It concluded that the "time-honoured practice" in the province was to proceed under the power of sale provisions in the mortgage, as provided for in the schedule to the *Real Property Act*.[44] As in Newfoundland, the system is fairly simple and is not governed tightly by legislation. In fact, there are no specific legislative provisions, rules or practice memoranda dealing with power of sale other than the covenant contained in the schedule to the *Real Property Act*. The power of sale process is started by notice, not by commencing an action. No period of default is required before a notice can be sent, although lawyers in the province advise that the practice is to proceed after three months default. The form of notice is not specified by legislation and lenders' lawyers therefore develop their own notices.

As in Nova Scotia, Prince Edward Island law permits borrowers to reinstate the mortgage by paying all arrears and costs outstanding. There are no guidelines regarding the right to reinstate the mortgage although it is also contained in the schedule to the *Real Property Act*.[45] If the mortgage is not reinstated or the debt paid, the lender can sell the property by "public auction or private contract".[46] As in Newfoundland, while "power of sale" may suggest the property is listed for sale with a real estate agent, attempts must first be made to sell the property by auction

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[39] Prince Edward Island, Civil Procedure Rules, r. 64.03.

[40] *Ibid*., r. 64.04.

[41] *Federal Business Development Bank* v. *Group Plus One Ltd. et al* (1985), 54 Nfld. & P.E.I. R. 267 (P.E.I.C.A.).

[42] The Court held that it lacked jurisdiction to give a judicial opinion by a declaratory judgment where clarification and simplification of the system was being sought but the parties would not be bound by the court's judgment (the property had already been sold and the claim against the guarantor released).

[43] For example, the Prince Edward Island Civil Procedure rules, *supra* note 39, appear to have been taken from the Ontario Rules of Civil Procedure. In Ontario Rules 64.03 and 64.04 also provide for Foreclosure and Sale Actions.

[44] *Supra* note 40 at 268.

[45] *Supra* note 36. Covenant 14 of the Second Schedule (Deed of Mortgage) allows reinstatement in that a borrower can "be relieved from the consequences of non-payment" by payment of arrears and costs "at any time before any judgment" or "within such time as, by the practice of equity, relief therein could be obtained".

[46] *Real Property Act*, *supra* note 36. Covenant 12 of the Second Schedule (Deed of Mortgage) states that sale may occur by "public auction or private contract, or partly by public auction and partly by private contract". Holding the sale "partly" by auction or contract does not usually occur but appears to refer to the ability to carve up large parcels of land and sell them separately.

(Newfoundland also allows tender to be used). The lender's lawyer schedules an auction. Notice of the auction is sent by registered mail or personally served on the borrower, spouse and any guarantors. It contains the conditions of sale set by the lender. The same notice is published in the newspaper. The wording or form of the notice or newspaper advertisement is not set out in the *Real Property Act*. The *Act* simply states that notice shall be given in some newspaper published in Prince Edward Island or by personally serving it on the borrower or by leaving it at the borrower's last known place of abode or by addressing it to their last known address. Practice is to publish the advertisement in the newspaper for four consecutive weeks and hold the sale the following week. The lender normally obtains an appraisal at this time.

The property is sold by public auction held at the court house with the Sheriff acting as an auctioneer in his or her capacity as bailiff (i.e., this is not a normal part of the Sheriff's statutory duties). There is, however, no requirement that the auction be conducted by the Sheriff. Trained auctioneers can also conduct the auction. At the auction, the bidding is opened and the notice of the sale is read, as well as the conditions of sale imposed by the lender. The conditions often require that a purchaser pay a 10% deposit by certified cheque, conclude the sale within 30 days and raise objections to title within 10 days. The lender usually sets a reserve bid which is the lowest amount for which the property can be sold. The fact that a reserve bid exists is announced as a condition of sale but the amount of the reserve bid is not disclosed. The floor is then opened for bids. If no bids are received, the property is withdrawn from the auction and listed privately with a real estate agent, as any other property would be. The only distinguishing feature is that the lender is listed as the seller. The lender cannot purchase the property at the auction, as a lender in Nova Scotia is permitted to do. This is seen as inappropriate because a lender cannot purchase property from itself.

If there are bids at the auction, the bidding continues until the highest bid is reached. If the highest bid is lower than the reserve bid, the amount of the reserve bid is announced and the floor is again opened up for bids. Usually, the highest bidder will bid just above the reserve bid and will purchase the property. The property is purchased in accordance with the conditions of sale contained in the notice of sale and read prior to the start of the auction. As a matter of practice, the conditions of sale usually become the terms of any Agreement of Purchase and Sale entered into by the lender and purchaser. The lender has the power to convey the property to the purchaser. This is done by a "Deed under Power of Sale". The *Real Property Act* gives the lender the power "to sell and absolutely dispose of the said lands".[47] The ability to give a deed is also usually authorized by the mortgage.

The *Real Property Act*[48] sets out how the proceeds of sale are to be applied. The proceeds are first to be used to pay the costs of sale, followed by other expenses incurred by the lender (such as taxes, rent, insurance and repairs). Any remaining balance is to be paid toward the mortgage debt remaining.

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[47] *Ibid*., Covenant 12.

[48] *Ibid*.

If the lender wishes to claim a deficiency judgment because the sale proceeds were not enough to cover the debt and costs of sale, an action is started in the Supreme Court using a Statement of Claim. There are no practice memoranda or guidelines regarding calculation of the deficiency. If the property is sold at the auction, the lender can claim all expenses of the sale to the time the property is conveyed to the purchaser. If the property is not sold at the auction and is put on the market, the lender can claim expenses to the time of a sale to a purchaser. There are no restrictions on how long the property can be on the market. In any event, the lender is entitled to charge interest at the mortgage rate up to the date of the claim for deficiency judgment. In terms of any surplus, the lender must account for any surplus and pay it to the borrower or any other party that may be entitled to it.

4. New Brunswick

In New Brunswick, the lender's sole remedy is power of sale. Foreclosure and foreclosure and sale previously existed but were not included in the Rules of Civil Procedure that were adopted in 1982.[49] No law was passed to abolish them but they were removed from the Rules because they were no longer used. Technically, an action for foreclosure could still be brought but it is unlikely because power of sale is now used exclusively.[50] Lenders in New Brunswick rely on power of sale, as provided for in the mortgage, in conjunction with the power of sale provisions in the *Property Act*.

The power of sale system is fairly simple and is started by notice, not by commencing an action. There is no period of default specified before the lender can start the power of sale process. As a matter of practice, lawyers in the province advise that lenders generally wait until the mortgage is three months in arrears. The borrower does not have a right to reinstate the mortgage by paying all arrears and costs outstanding, as in Nova Scotia and Prince Edward Island.

The *Property Act* does not require that any notice, other than a notice of the sale, be sent. As in the other provinces, however, lenders send a demand letter to the borrower advising them of the default and that the lender may take steps to sell the property if the payments are not brought up to date. The *Act* does, however, require that a notice be personally served on or sent to the borrower by registered mail four weeks prior to the sale. The notice is also posted in the registry office and a public place in the area where the property is located and is published for four consecutive weeks in a newspaper circulated in the area where the property is located. As a matter of practice, the sale is often published once in the *Royal Gazette*,[51] although there is no requirement to do so.

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[49] Roach, *supra* note 26 at 83 and 131 and J.T. Robertson, "Foreclosure By Power of Sale: Securing a Proper Price in New Brunswick" (1983) 32 U.N.B.L.J. 83 at 83-4 [hereinafter Robertson (1983)].

[50] Robertson (1983), *ibid*. at 84. The *Property Act*, R.S.N.B. 1973, c. P-19, s. 47(5), however, still states that the power of sale conferred by the *Act* "does not affect the right of foreclosure".

[51] The *Royal Gazette* is the provincial government's official newspaper. It contains various notices including notices of properties being sold under power of sale.

As in Newfoundland and Prince Edward Island, power of sale does not mean that the property is immediately listed for sale with a real estate agent. The *Property Act* states that the sale can occur "by public auction or by private contract".[52] It usually proceeds by auction and a professional auctioneer is retained by the lender. The auction takes place in a public building, often the court house. At the start of the auction, the auctioneer reads the "bidding papers" that have been prepared by the lender's lawyer. While the content of the bidding papers is not set out in the legislation, they usually contain the terms and conditions of sale, including any required deposit, how many days a purchaser has to search title and the requirement that a purchaser enter into an agreement to complete the sale within 30 days. The bidding papers may or may not contain the lender's reserve bid. If third parties attend and bid at the auction, the lender participates either by having the reserve bid as the opening bid or by bidding the property up. If no one else attends or bids the reserve bid amount, the property is sold to the lender and the lender purchases the property for the total of the auctioneer's fees[53] and any outstanding property taxes and other expenses. A Mortgagee's Deed is prepared and the property is conveyed to the lender. If a third party buys the property at the auction, a Mortgagee's Deed is also used to convey the property.

If the property is sold to the lender, it is then listed for sale with a real estate agent. Normal marketing techniques are used to sell the property. Potential purchasers would be aware, however, that the vendor is a bank or financial institution and that the property is therefore being sold as a result of default under a mortgage.

The *Property Act* sets out how the proceeds of sale are to be applied. The proceeds are first to be used to pay all costs of the sale. They are then to be applied to pay any amounts still owing under the mortgage.

If the lender wishes to claim a deficiency because the sale proceeds were not enough to cover the debt and costs of sale, the lender starts an action in the Court of Queen's Bench. Often, borrowers do not file a Defence to the action and the lender gets judgment as a "default judgment". The amount must, however, be confirmed by a judge who determines whether the expenses and other calculations are reasonable. There are no practice memoranda or guidelines regarding calculation of the deficiency. Many lenders do not seek deficiency judgments because the process is seen as rather cumbersome. A deficiency judgment can be sought if the property is sold to a third party at the auction, or if it is later resold to a third party after the lender purchases the property at the auction. In either case, the lender claims expenses to the time of a resale to a third party. If a surplus arises from a sale to a third party at the auction, it must be distributed to those entitled. If those entitled cannot agree on how the funds are to be distributed, the lender pays the surplus funds into court and those interested can appear before the court to argue their entitlement to the funds. There is no statutory requirement for a formal accounting, as there is in Newfoundland. If a surplus arises after the lender purchases the property at the

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[52] *Supra* note 50, s. 44(1)(a).

[53] Approximately $100 to $150.

auction and resells it to a third party, the lender does not have any duty to account for the surplus.[54]

5. Ontario

In Ontario, lenders may realize on security by power of sale, judicial sale or foreclosure. Power of sale is used in 90% to 99% of the foreclosures in Ontario.[55] It is preferred because it is usually speedier and less costly than foreclosure or judicial sale. It is a self-help remedy that generally does not involve the courts.[56] A lender may prefer judicial sale if it wishes to have the court supervise the process. This may be desired, for example, if the property is unusual, complex or difficult to sell.[57]

Power of sale was initially developed in Ontario by lenders who wanted a faster way to dispose of property and recover debt than was possible under foreclosure and judicial sale. As a result, they began to include power of sale provisions in mortgages that would allow them to dispose of property upon the borrower's default and without having to resort to the courts. While the validity of such a power was questioned, it came to be accepted and was eventually included in Ontario's legislation. As a result, power of sale is now part of the Ontario *Mortgages Act*.[58]

The *Mortgages Act* refers to two types of power of sale: contractual and statutory. Contractual power of sale is the power of sale that exists when it has been provided for in the mortgage document. If power of sale has been included in the mortgage, some provisions in Part III of the *Mortgages Act* also apply to the power of sale. The lender and borrower are not permitted to change these provisions or state that they do not apply.[59] Statutory power of sale is very rare but is used when the mortgage does not provide for power of sale.[60] In that case, the lender can still

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[54] The lender has, however, the right to claim any deficiency in the same circumstances because that is authorized by the mortgage.

[55] Ontario Law Reform Commission, *Report on The Law of Mortgages* (Toronto: Ontario Law Reform Commission, 1987) [hereinafter Ontario Law Reform Commission Report] at 156; Roach, *supra* note 26 at 131; Robertson (1987), *supra* note 13 at 678, footnote 25.

[56] F. Bennett, *Bennett on Power of Sale*, 1987 ed. (Toronto: Carswell, 1987) at 4 and Robertson (1987), *supra* note 13 at 678.

[57] Bennett, *ibid*. at 4.

[58] R.S.O. 1990, c. M.40.

[59] The *Mortgages Act*, *supra* note 58, s. 38, states that sections 31 to 36 apply to any power of sale in a mortgage "despite any agreement to the contrary or any provision contained in any mortgage".

[60] Roach, *supra* note 26 at 133. Statutory power of sale does not apply, however, to a mortgage that contains a power of sale or to a mortgage that specifically states that it does not apply (*Mortgages Act*, *supra* note 58, s. 30).

exercise power of sale by following the provisions in Part II of the *Mortgages Act*.[61] There does not appear to be a significant difference between the two types of power of sale although under statutory power of sale, the lender cannot sell the property until the payments are three months in arrears.[62] As well, statutory power of sale can only be used if there is default in paying on the principal or in paying insurance premiums under the mortgage. As a result, other types of default, such as failing to pay property taxes or allowing the property to deteriorate, do not allow the lender to use statutory power of sale.[63]

Both types of power of sale are started by a notice which may be given after the borrower is 15 days in default. The notice must be given to anyone having an interest in the property. This includes subsequent encumbrancers, statutory lien holders or people who have advised the lender, in writing, that they have an interest in the property.[64] The notice does not need to be served personally and the parties can specify, in the mortgage, how notice is to be given. The *Mortgages Act* sets out how parties other than the borrower are to receive the notice.[65] Because power of sale is considered a self-help measure that has serious consequences, courts have required that lenders strictly comply with the form of notice and method of service. If it is incomplete or inaccurate, it may be fatal to the proceedings. This will not occur, however, because of minor irregularities.[66]

The form of the notice is attached to the *Mortgages Act* and is called a "Notice of Sale under Mortgage". It advises of the lender's intention to exercise the power of sale. It consists of four paragraphs and includes the details of the mortgage (including the date it was made, the parties to the mortgage and the property mortgaged), the amounts owing and a warning that if the amounts owing are not paid by a specified date, the lender will sell the property. If the power of sale is contractual, the borrower has 35 days to pay unless the parties have provided for a longer period in the mortgage. If the power of sale is statutory, the borrower has 45 days to pay.[67] The lender cannot do anything further during this "redemption" period. The borrower can, however,

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[61] *Supra* note 58. As section 38 indicates, some sections of Part III also apply to statutory power of sale.

[62] *Mortgages Act*, *supra* note 58, s. 24.

[63] Roach, *supra* note 26 at 133.

[64] *Mortgages Act*, *supra* note 58, s. 31(1).

[65] *Mortgages Act*, *supra* note 58, s. 33.

[66] Ontario Law Reform Commission Report, *supra* note 55 at 147-8. As well, section 35 of the *Mortgages Act*, *supra* note 58, protects people who may have purchased a property after the borrower was given incorrect or incomplete notice of the exercise of the power of sale. Unless the lender failed completely to give the requisite notice, the sale to the purchaser will not be set aside.

[67] There does not, however, appear to be any valid reason for requiring a longer notice period for statutory power of sale. Roach, *supra* note 26 at 133, calls for the legislator to "intervene in order to standardize the notice requirements for all powers of sale", and thereby avoid the confusion that sometimes results.

redeem the mortgage by paying the amounts owing during this period.

In Ontario, borrowers have the right to "reinstate"[68] the mortgage, a right also enjoyed by borrowers in Nova Scotia and Prince Edward Island (but not in Newfoundland or New Brunswick). Under section 22(1) of the *Mortgages Act*, the borrower may stop the sale process by paying all arrears and costs incurred by the lender as a result of the default. This must be done before any sale of the property or before the lender starts an action against the borrower.[69] Under Section 23(1) of the *Act*, the borrower may still have the action dismissed if an action has been started but the lender has not yet obtained a judgment against the borrower.[70]

Once the redemption period expires and the borrower has failed to correct the default, the lender can sell the property. Under power of sale, the property can be sold by auction, private contract or tender.[71] Public auction is rarely used. When it is, a standard auction format is used, using a professional auctioneer. Otherwise, property is listed with a real estate agent and placed on the market for sale. The lender may get an appraisal of the property at this time in order to establish an approximate sale price. There is no period of time within which the lender must sell the property. Price reductions and other techniques can be used until the property is sold. The *Mortgages Act* does not specify the manner in which the sale must be conducted. As a result, borrowers often go before the court to complain that the lender has acted inappropriately in selling the property. Courts have attempted to set a standard of reasonable conduct for the lender.[72] While the courts have not provided clear guidelines, a key test in Ontario is whether the lender acted *bona fide* in attempting to realize the fair market value of the property. This includes the requirement that the lender take steps to ensure the sale comes to the attention of a wide segment of the market for such property (such steps to include advertising, placing a sign on the property, listing it with a multiple listing service, obtaining appraisals and ensuring the listing is for the usual period for such properties).[73]

Once the property is sold, if there is any surplus, the lender must account to the borrower and

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[68] Although in Ontario it is referred to in the *Mortgages Act*, *supra* note 58, as "relief before action" or "relief after action commenced".

[69] Ontario Law Reform Commission Report, *supra* note 55 at 155-6; Bennett, *supra* note 56 at 15; Roach, *supra* note 26 at 140.

[70] Ontario Law Reform Commission Report, *supra* note 55 at 156; Bennett, *supra* note 56 at 16; Roach, *supra* note 26 at 149.

[71] Under statutory power of sale, property can be sold by public auction or private contract (*Mortgages Act*, *supra* note 58 at s. 24). Under contractual power of sale, the parties can include the method of sale in the mortgage (Bennett, *supra* note 56 at 13).

[72] Ontario Law Reform Commission Report, *supra* note 55 at 149-152; Roach, *supra* note 26 at 139-143; Robertson (1983), *supra* note 49 at 85-101. See also Section V.4(b), below.

[73] Ontario Law Reform Commission Report, *supra* note 55 at 152; Robertson (1983), *supra* note 49 at 101.

subsequent encumbrancers. The *Mortgages Act* requires that the proceeds of sale be first applied to the cost of conducting the sale, then to interest and costs owing under the mortgage, then to principal money owing under the mortgage, next to pay any amounts due to subsequent encumbrancers and finally to pay tenants' security deposits.[74] If there is a deficiency, the lender may seek a deficiency judgment by commencing an action.[75] The borrower can defend and the matter continues as any other civil action. If the borrower does not defend, the lender will obtain a default judgment.

Judicial sale and foreclosure are started by commencing an action using a Statement of Claim. There is no requirement to wait 15 days, as with power of sale. If the borrower does not pay the amount outstanding, it may defend the action and the matter then proceeds like any other civil lawsuit. If the borrower does nothing, the lender can get a default judgment for the amount it is claiming (in judicial sale, the sale proceeds are deducted so the amount of any judgment is the amount claimed by the lender less any sale proceeds). The borrower can also file a request to redeem the property and can redeem by paying the amount due. Otherwise, the borrower can file a request to sell the property (if the action was started as a foreclosure, it can then be converted to a judicial sale process). Overall, judicial sale and foreclosure are largely supervised by the court. In judicial sale, the lender must get court approval for the list price, marketing arrangements, sale price, etc., and the lender is entitled to a deficiency judgment. With foreclosure, however, the lender accepts the property in full satisfaction of the debt. Judicial sale and foreclosure are not favoured by lenders in Ontario as they are seen as being too cumbersome and time-consuming.

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[74] *Mortgages Act*, *supra* note 58, s. 27.

[75] The lender may, however, not be required to start an action for deficiency judgment if there was initial difficulty in getting possession of the premises and the lender was forced to start an action for possession. In such an action, the lender will also claim the full amount owing and any sale proceeds will be deducted to determine the amount of any deficiency judgment. In these circumstances, the lender will not be required to start another action as it will have, in effect, obtained it in advance.

V RECOMMENDATIONS

1. A reformed system

(a) Power of sale and foreclosure

As discussed in the preceding section, power of sale is used in four Canadian Provinces: Newfoundland, Prince Edward Island, New Brunswick and Ontario. In each of these provinces, power of sale is preferred by lenders and has become the primary vehicle for recovering money owed under a mortgage. In fact, among the "traditional remedies",[76] power of sale is generally seen as the best way to achieve the objective of allowing the lender to recover the mortgage debt in the most expeditious way but at the least possible cost.[77] The Commission is therefore recommending that a power of sale process be adopted in Nova Scotia. In making this recommendation, however, the Commission is aware of the limitations in the power of sale process used in some of the other provinces. As the above review of the power of sale provinces showed, only Ontario provides for the property to be immediately listed for sale with a real estate agent. The system in the other three provinces has been criticized:

> *...the fact is that New Brunswick, Prince Edward Island and Newfoundland adhere to a process which would not meet any standard of reasonableness. In Ontario, there is sufficient case law from which to draw some conclusions on the precautions necessary to ensure the reasonableness of sale price.*[78]

In Newfoundland, Prince Edward Island and New Brunswick, the marketing precautions required of a lender are not specified but are left to the lender's discretion:

> *Notwithstanding the provincial variations ranging from a contractual to a statutory and to a short form power of sale, it is common to all that no reference is made to the scope of the marketing precautions to be adopted, other than to provide for a sale either by public auction or by private contract. The foreclosing creditor must decide which is more appropriate. Excepting Ontario, the standard practice limits advertising to the publication of notices of the impending auction.*[79]

To overcome these deficiencies, the Commission is recommending that the reformed system place greater emphasis on the marketing techniques to be used by lenders in selling property.

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[76] Which include foreclosure, judicial sale, suing under the mortgage for the debt (i.e., without seizing the property) and possession.

[77] Roach, *supra* note 26 at 129, footnote 1.

[78] Robertson (1987), *supra* note 13 at 682.

[79] *Ibid*. at 682.

This will be discussed further below.[80] The Commission is also recommending that there be three ways of selling property within power of sale: private sale, tender, and auction. This recognizes the need for different options, depending on the nature of the property. For example, private sale may be the best way to sell standard residential property. Tender may be desired for properties that are industrial and likely to be of interest to a very specific type of purchaser. Auction may be preferred when selling undeveloped land or other commercial property.[81] The tender and auction options would not, however, be required to be the first method of sale as in Newfoundland, Prince Edward Island and New Brunswick. Rather, either option could be chosen as the preferred way of selling the property. As lenders gain experience with the process they may use the method that they feel yields the best results for the particular type of property.

The Commission also recognizes that in some circumstances an alternative to power of sale may be desired. The Commission is therefore recommending that foreclosure be available as an alternative to power of sale. In some circumstances, for example, the parties may recognize that there is no chance of the lender recovering any deficiency from the borrower[82] and it is best to convey the property to the lender, without the need for court proceedings and without the passage of time during which the borrower is responsible for expenses incurred. This would be true foreclosure in that the lender would accept the property in *full* satisfaction of the debt. That is, regardless of the price at which the lender later sold the property, the lender would not have the right to claim a deficiency and the borrower would not be entitled to any surplus. The Commission is of the view that foreclosure should remain an alternative under a new power of sale regime.[83]

The Commission recommends that:

- A power of sale process be adopted in Nova Scotia that would allow property to be sold by private sale, tender or auction.
- Foreclosure remain as an alternative to power of sale. Foreclosure would be in full satisfaction of the debt in that the lender would not have a right to claim any deficiency from the borrower and the borrower would not have a right to claim any surplus from the lender.

(b) Lender's choice and borrower's right to object

[80] See Section V.4.a, below.

[81] Robertson (1987), *supra* note 13 at 722.

[82] Because the borrower has no assets or is an individual who has declared bankruptcy.

[83] While the Commission is suggesting that foreclosure remain as an alternative, the balance of this Paper focuses on power of sale because it is the most significant reform being recommended.

In the Discussion Paper, the Commission noted that one of the problems with the current system is that the process is totally within the lender's control. Borrowers rarely retain a lawyer to represent them and virtually all applications for foreclosure and sale are undefended.[84] For the most part, the process unfolds without the borrower's participation and in the absence of information about their rights or about the foreclosure process itself.[85] The Commission, through its suggestions in the Discussion Paper, attempted to balance the diverse interests of lenders and borrowers. It recognized the need for borrowers to have access to credit in order to enable them to purchase property. It also recognized the need of lenders to be able to profitably provide such credit while having access to remedies should the borrower default.

In the other provinces, the lender chooses how to proceed when a borrower defaults. This appears to be necessary and appropriate given that the lender may lose the money loaned to the borrower. The lender must therefore react if it wishes to use the property (that the borrower pledged to secure the mortgage debt) to recover the money lent. It does not therefore seem appropriate to allow the borrower to choose the option to be used. This must remain the choice of the lender.

The process should not, however, remain totally out of the borrower's control. One solution is to more fully advise borrowers of their options upon default. The Commission is recommending that this be done through a plain language notice of default.[86] The Commission is also recommending that while the lender chooses the option to be used, the borrower must have the right to object in certain circumstances. This may be necessary, for example, if the property is worth significantly more than the mortgage debt.[87] If a lender chose to foreclose (that is, accept the property in full satisfaction of the debt), it may result in a windfall to the lender should it later sell the property for more than the amount owed:

> *As the final order of foreclosure vests the mortgagee absolutely with title to the mortgaged property, he or she may sell the property by private sale, and thereby not only recover the full amount of the loan, but even realize a surplus if the purchase money is greater than the sum owing under the mortgage, since no accounting is required from the mortgagee in those circumstances. It is worth noting that the possibility of realizing such a gain by means of a private sale after foreclosure is very rarely the reason why the mortgagee chooses the action for*

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[84] In one commentator's experience, approximately 5% of the foreclosure actions in which he was involved were defended.

[85] One commentator disagreed and noted that the process is closely supervised by the court with an application required to obtain an order, even when the borrower does not dispute the lender's claim. He noted that the sale is conducted by the Sheriff (as an officer of the court), with separate and additional applications required to confirm the sale and obtain a deficiency judgment.

[86] See Section V.3, below.

[87] While this is unlikely to occur in the current economic climate, the protection must still exist.

foreclosure.[88]

The borrower must therefore have a right to object if the lender chooses foreclosure. In Ontario, if a lender is proceeding by foreclosure but the borrower wishes the property to be sold, the borrower can file a "request for sale".[89] The borrower must file such a request within the time it has to file a Defence to the foreclosure action (in Nova Scotia, 20 days) or before it is found by the court to be in default (in Nova Scotia, at the time the Order for Foreclosure Sale and Possession is granted). If the borrower's request for sale is granted, the property is sold under the judicial sale system that is also part of the mortgage foreclosure system in Ontario. The property is sold as directed by the court and any surplus is returned to the borrower.[90] The Commission recommends that borrowers in Nova Scotia have a similar right to apply to the court to order that a lender who has chosen foreclosure be required to proceed instead under power of sale.

The Commission also recognizes the need for some flexibility if power of sale is chosen. The lender may start the power of sale process but later need to convert the proceedings to foreclosure. This may occur, for example, if the borrower is unable to respond to any deficiency claim and the lender does not want to have to continue to account for its expenses or have a duty to be reasonable in the sale of the property. In these circumstances, the lender may want to accept the property, sell it quickly, recover some portion of the debt and write the balance off as not collectable. It would not then be required to continue to incur expenses (in maintaining and managing the property) that it would not be able to later recover from the borrower. If the lender chose foreclosure, however, it would be in *full* satisfaction of the debt. The lender would not have a right to claim any deficiency from the borrower, whether it arose from a shortfall after selling the property or whether it arose from the costs incurred by the lender as a result of the borrower's default. The borrower would also not have the right to claim any surplus that might arise if the property was later sold for an amount greater than the debt. As discussed above, the borrower would still have the right to disagree with the lender's decision to convert from power of sale to foreclosure. In these circumstances, the borrower could apply to the court to require that the lender continue under the power of sale process.

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[88] Roach, *supra* note 26 at 80.

[89] Ontario Rules of Civil Procedure, r. 64.03 (17). See also Roach, *supra* note 26 at 79.

[90] In Ontario, subsequent encumbrancers (those having a lien, judgment or mortgage against the property, that was recorded against the property after the date of the mortgage being foreclosed) also have the right to convert from a foreclosure to a judicial sale upon payment of $250 into court as security for the costs of the lender (Rule 64.03 (18)). See also Roach, *supra* note 26 at 79.

The Commission recommends that:

- The lender continue to choose the option to be followed (power of sale or foreclosure) if a borrower defaults under a mortgage.
- If the lender chooses foreclosure, that the borrower have the right to apply to the court to request that power of sale be used instead.
- If the lender chooses power of sale, that the lender be permitted to convert the process to foreclosure.
- If the lender chooses power of sale and wishes to convert it to foreclosure, that the borrower have the right to apply to the court to request that power of sale continue to be used.

2. Borrowers' rights

(a) Right to reinstate

One of the most significant rights of borrowers in Nova Scotia is the right to "reinstate" the mortgage. This right is set out in section 42 of the *Judicature Act*.[91] The right to reinstate gives the borrower relief from the "acceleration clause" in the mortgage. The acceleration clause permits a lender, upon the borrower's default, to require that the borrower pay the full amount owing under the mortgage. The lender has this right even if the borrower has missed only one mortgage payment. Section 42, however, gives the borrower a "second chance". It allows the borrower to apply to the court to discontinue the proceedings started by the lender.[92] The borrower must do this, however, before the court grants the Order for Foreclosure, Sale and Possession. The court will only allow the discontinuance if the borrower pays all arrears (or corrects the covenant in default) and pays the costs incurred by the lender as a result of the default.[93] The court will only allow the same mortgage to be reinstated once.[94] Presumably, this is to deal with repeat defaulters and avoid the potential for abuse by borrowers.

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[91] *Supra* note 1, as discussed in Section II.2.(iii), above.

[92] Two lawyers who provided feedback on the Discussion Paper, *supra* note 1, and who routinely act for lenders, indicated that their practice is to offer to make this application on behalf of borrowers. If a borrower is able to pay the arrears, this avoids the need for the lender to continue with the foreclosure. The costs of making the application are charged back to the borrower.

[93] *Judicature Act*, *supra* note 1, s. 42(3).

[94] *Judicature Act*, *supra* note 1, s. 42(4).

The right to reinstate the mortgage must not be confused with the borrowers "right to redeem". Under the right to redeem,[95] the borrower has the right, on paying the *full* amount of the loan (i.e., as opposed to just paying arrears) to claim back the property from the lender. This right exists until the moment in time when the Sheriff declares a successful bidder at the auction.[96] If the borrower pays the loan off and *redeems* the property, the mortgage becomes null and void (i.e., is at an end) and the borrower is released from any further obligations under the mortgage. If the borrower pays the arrears and *reinstates* the mortgage, the mortgage continues to exist as if the default had not occurred.

The borrower's right to reinstate exists in Ontario and Prince Edward Island but not in Newfoundland or New Brunswick. In Ontario, a borrower may reinstate the mortgage by paying the arrears outstanding (or performing the covenant in default) and paying the lender's costs and expenses.[97] This must be done before the property is sold or before the lender starts an action against the borrower (i.e., sues) to enforce its rights under the mortgage. If the lender has already started an action against the borrower, but no judgment has been obtained, the borrower may still get the action dismissed by paying $100 into court and by paying the arrears and costs of the lender.[98] The borrower's right to reinstate in Prince Edward Island is very vague. While it is contained in a schedule to the *Real Property Act*,[99] there are no guidelines regarding the exercise of this right. The reinstatement clause does indicate, however, that a borrower can "be relieved from the consequences of non-payment" by payment of arrears and costs "at any time before any judgment" or "within such time as, by the practice of equity, relief therein could be obtained".

The right to reinstate does not exist in Newfoundland or New Brunswick. The Department of Justice in New Brunswick has, however, received a suggestion that a borrower who has been served with a notice of default be given the right to bring the debt up to date and thus avoid disposal by the lender.[100] It was suggested that this right could be exercised no more than twice in any year. This suggestion has not been implemented, although the Department of Justice's initial comment was that the suggestion seemed reasonable.

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[95] See Section II.1, above.

[96] C.W. MacIntosh, *Nova Scotia Real Property Practice Manual* (Toronto: Butterworths, 1988) at 12-86 to 12-87.

[97] *Mortgages Act*, *supra* note 58, s. 22(1) and Ontario Law Reform Commission Report, *supra* note 55 at 155-6.

[98] *Mortgages Act*, *supra* note 58, s. 23(1)(a). Even if the lender has obtained judgment against the borrower, as long as the property has not been sold, the court can stay further proceedings until the borrower pays the arrears and costs of the lender. See Ontario Law Reform Commission Report, *supra* note 55 at 156.

[99] *Supra* note 36.

[100] New Brunswick Department of Justice, 7 Law Reform Notes (November 1996), at 4.

The Commission has not received any feedback indicating dissatisfaction with the right to reinstate the mortgage, as it currently exists in Nova Scotia. It therefore seems appropriate to retain this right. The Commission questions, however, whether there should be a change to the number of times the right can be exercised. Currently, the right to reinstate can be exercised once per mortgage. The Commission feels that the New Brunswick suggestion that the right could be exercised twice in any year is somewhat excessive. It would conceivably allow reinstatement ten times during the term of a five year mortgage. The Commission is therefore recommending that a borrower be permitted to exercise the right once per year. The Commission recognizes that this may be viewed negatively by lenders as allowing borrowers too many "second chances". If that occurs, the lender could choose not to renew the borrower's mortgage upon expiry of the current term.

Another issue is when the borrower would be considered to have "used" its right to reinstatement. Would the borrower be considered to have exercised its right to reinstatement if it paid arrears *before* the lender formally started the process by giving a Notice of Default?[101] The Commission recommends that this should not be included as an exercise of the right to reinstate because it arose from informal negotiations between the parties. As a result, reinstatement should only be considered to have occurred after the Notice of Default is given.

Finally, the right to reinstate a mortgage in Nova Scotia is contained in the *Judicature Act*. To ensure that lenders and borrowers are aware of this right, it should be included in any mortgage or foreclosure legislation that results from this reform effort.

The Commission recommends that:

- Borrowers continue to have the right to reinstate a mortgage but that the right be exercisable once per year.
- The right to reinstate a mortgage be considered to have been exercised if arrears are paid *after* the Notice of Default is given.
- The right to reinstate a mortgage be included in any mortgage or foreclosure legislation.

(b) Right to redeem

As described above,[102] the borrower's interest in a mortgage is known as the "equity of

[101] See Section V.3, below.

[102] See Section II.1, above.

redemption". This means that the borrower has the right, on paying the full amount of the mortgage loan, to claim back or "redeem" the property from the lender. The mortgage is then considered to be at an end and the borrower is released from any further obligations under the mortgage.

The right of the borrower to redeem cannot, however, continue indefinitely. If it did, the lender might be prevented from selling the property because of uncertainty regarding the legal title to the property. Purchasers would be reluctant to purchase the property from the lender, knowing that the borrower might raise funds to pay off the loan and then require that the property be reconveyed to it. In Nova Scotia, the borrower's right to redeem currently ends when the Sheriff declares the successful bidder at the auction.[103] Until that point in time, the borrower may pay the amount owing, plus the costs incurred by the lender as a result of the foreclosure, and redeem the property. This is set out in paragraph 3 of the standard Order for Foreclosure, Sale and Possession granted by courts in Nova Scotia:

> *AND IT IS ORDERED that all the interest and equity of redemption of the Defendant [borrower] and of all persons claiming through the Defendant in the lands described in the mortgage are forever barred and foreclosed, and shall be sold by the Sheriff at a public auction conducted in accordance with the standard procedure for Sheriff's sales authorized by the Civil Procedure Rules, which is incorporated by reference except only to the extent varied by this or further order of the Court, unless before the time of sale the amount due, together with costs, are paid to the Plaintiff [lender].*[104] [Emphasis added]

The Commission's empirical study of foreclosure files shows that the time between the granting of the Order for Foreclosure, Sale and Possession and the Sheriff's auction varied from 10 days to 539 days, for an average of six weeks.[105] The majority of sales took place between 30 and 50 days after the Order was granted. The borrower could therefore redeem up to that time.

In Ontario, the right to redeem under foreclosure or judicial sale is set by statute. Previously, borrowers could redeem six months after filing a request to redeem.[106] When the Ontario Rules of Civil Procedure were revised in 1985, the time period was shortened from six months to 60

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[103] MacIntosh, *supra* note 96 at 12-86 and *Pew* v. *Zinck*, [1953] 1 S.C.R. 285.

[104] Practice Memorandum No. 13, *supra* note 3.

[105] Discussion Paper, *supra* note 1 at 19-22.

[106] In Ontario, a borrower must make a specific request to allow it to redeem. A borrower must do so within the time it has to file a Defence to the foreclosure action, currently 20 days (Ontario Rules of Civil Procedure, rs. 64.03(6) and 64.04(5)).

days.[107]

Under power of sale in Ontario, the right to redeem is usually extinguished by the lender's valid exercise of the power of sale:

> *The case-law indicates that the valid exercise of a power of sale by the mortgagee extinguishes forever the mortgagor's equity of redemption. In other words, if the mortgagee, in exercising his or her power of sale, follows the terms of the mortgage and the provisions of the* Mortgages Act*, the loss of the right to redeem is in principle irrevocable.*[108]

The Ontario Law Reform Commission recommended that the right to redeem continue to be extinguished upon the sale of the property to a purchaser, as long as the sale was made in good faith and for adequate value. It suggested that a sale be considered to have occurred at the moment the lender accepts a written offer to purchase the property. If the sale was not later completed, the right to redeem would be revived. The lender would be required to immediately advise the borrower that its right to redeem has been revived. While these recommendations have not been adopted in Ontario, the Ontario Law Reform Commission drafted provisions which could be used to implement these change:

> *Effect of Sale*
>
> *6.12 (1) The sale of the secured property extinguishes the security agreement of the lender making the sale and, if the sale is made to a purchaser who purchases in good faith for value, also extinguishes the interest of the borrower and subsequent encumbrancers in the secured property.*
>
> *(2) For the purpose of subsection (1), the sale takes place at the moment the lender accepts a written offer to purchase the secured property.*
>
> *(3) Subsection (2) applies despite the fact that the written offer to purchase the secured property is subject to a condition that is not fulfilled at the moment the lender accepts the offer.*
>
> *(4) Where the agreement referred to in subsection (2) is terminated before the secured property is transferred to the purchaser, the interests extinguished under subsection (1) and the rights under section 6.9 are revived.*

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[107] There may, however, be a right to redeem beyond this point and after the sale of the property, depending on whether there were irregularities in the sale and whether prejudice was caused to the borrower. See Roach, *supra* note 26 at 48-55.

[108] *Ibid.* at 55-56.

(5) On the termination of an agreement referred to in subsection (2), the lender shall immediately advise the borrower and serve a written notice of the termination on the borrower and subsequent encumbrancers.[109]

This Commission recognizes that the right to redeem is a fundamental right that is not to be interfered with lightly. It is therefore recommending that the right to redeem under the power of sale continue to exist until the lender, in validly exercising the power of sale, conveys the property to a third party purchaser. The Commission feels it would be useful to explicitly set out this right in any reformed system. This would clarify the right to redeem for the benefit of both the borrower and the lender. The right to redeem should also be explicitly included in the Notice of Default to be given to borrowers.[110]

The Commission recommends that:

- The right to redeem under power of sale exist until the lender, in validly exercising the power of sale, conveys the property to a third party purchaser.
- The right to redeem be explicitly stated in any mortgage or foreclosure legislation.
- The right to redeem be clearly explained in the Notice of Default given to borrowers.

(c) Other rights

Legislation in Newfoundland and Ontario specifically sets out various rights of borrowers. In Newfoundland and Ontario, a borrower is entitled (when it is entitled to redeem the mortgage), to require the lender to instead assign the debt and convey the property to a third party.[111] A borrower may wish to do this when the mortgage term expires and the borrower has found another lender who is willing to provide the mortgage financing. The borrower can then require the original lender to convey the property to the new lender. Another right stated in both Newfoundland and Ontario is the right (when the borrower is entitled to redeem), to inspect and make copies of title documents in the lender's possession.[112] In Newfoundland, the borrower is also given the right to inspect and make copies of appraisal reports in the possession of the lender. In Ontario, the borrower is also entitled to a copy of the mortgage within thirty days after

[109] As contained in the draft *Land Security Act*, Ontario Law Reform Commission Report, *supra* note 55 at 178 and 346.

[110] See Section V.3, below.

[111] Newfoundland *Conveyancing Act*, *supra* note 27, s. 20; Ontario *Mortgages Act*, *supra* note 58, s. 2.

[112] Newfoundland *Conveyancing Act*, *supra* note 27, s. 21; Ontario *Mortgages Act*, *supra* note 58, s. 3.

a request is received by the lender.[113] Finally, in Ontario a lender is required to provide the borrower with a written statement of the amount and nature of any default. Failure to provide this information within fifteen days of the borrower's request suspends the lender's rights until it complies.[114] Newfoundland legislation also gives the borrower the right to an accounting of the sale and a copy of the appraisal conducted at the time of the sale.[115] The lender must provide an accounting within thirty days of the sale.

With the exception of the right to reinstatement,[116] these rights are not currently included in the Nova Scotia Rules or in Practice Memorandum No. 13. The Commission feels, however, that there is merit in introducing such rights in Nova Scotia and in including them in any legislation or rules. This would ensure that the system is more fairly balanced (as between lenders and borrowers) and that borrowers are more fully aware of their rights.

The Commission recommends that:

- Specific rights of borrowers be included in mortgage or foreclosure legislation or rules.
- The rights of borrowers include:
  - if entitled to redeem, the right to require the lender to assign the mortgage debt and convey the property to a third party.
  - if entitled to redeem, to inspect and make copies of title documents and appraisal reports in the lender's possession.
  - the right to a copy of the mortgage within thirty days after it is signed.
  - the right to a written statement of the amount and nature of default.

3. Notice of default

(a) Notice versus Action

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[113] *Mortgages Act*, *supra* note 58, s. 4.

[114] *Ibid*. at s. 22(2)(3).

[115] *Conveyancing Act*, *supra* note 27, s. 10. See Section V.5(b), below.

[116] See Section V.2.a., above.

Power of sale is a very different remedy from foreclosure or judicial sale. One of the primary differences is the fact that it is a self-help remedy that is started by the lender giving the borrower a notice of default under the mortgage. The court is not involved in the giving of this notice. In fact, the court is not initially involved unless the borrower attempts to stop the sale.[117] The court may become involved at a later stage if the lender starts an action to claim a deficiency judgment or if the borrower brings an action against the lender for improperly selling the property. However, the court does not normally become involved, if at all, until the property has been sold.

In contrast, the court is extensively involved if the lender chooses to proceed by foreclosure or judicial sale. As described above, in the judicial sale system in Nova Scotia, the court is involved from the beginning, initially as the recipient of documents filed by the lender. The lender must first start an action (i.e., sue) by preparing an Originating Notice (Action) and Statement of Claim and filing them with the court. After these documents are served on the borrower (and any others who may be liable), the lender must make an application to the court to get the right to sell and possess the property. The sale of the property is supervised by the court in that the auction is conducted by a court official (the Sheriff) who must later file a report with the court outlining what occurred at the auction. The lender must then obtain another order from the court confirming the sale. Finally, if the lender wishes to recover any shortfall from the borrower, an application for deficiency judgment must be made to the court.

The Commission is recommending that the power of sale process in Nova Scotia be started by notice, as in the other power of sale provinces. The Commission recognizes that this removes the matter from the supervision of the courts and may therefore cause alarm for those concerned about borrowers' rights. The Commission feels that these concerns can largely be addressed by introducing new notice requirements and by requiring strict compliance with these requirements. This appears to have worked well in Ontario:

> *The exercise of the power of sale is considered a self-help measure, with serious consequences for all persons having an interest in the property. Accordingly, the courts have required strict compliance with both the form of the notice and the method of service. Unless the details of Form 1, under the* Mortgages Act*, are complete and accurate, the notice will be considered a nullity. Failure to state the amount of principal, interest, and costs, or to include the signature of the lender or his or her agent, has been held to be fatal to sale proceedings.*
>
> *The rationale for this requirement of strict compliance appears to be that a properly completed and signed notice alerts the recipient to the fact that there has been personal authorization and approval by the lender of both the form and content of the notice, thereby emphasizing the seriousness of the consequences that flow from the notice. It has been observed, however, that a notice should not*

[117] The borrower, could, for example, apply to the court for an injunction to prevent the lender from selling the property.

be held inoperative because of minor irregularities, as long as it meets the purpose for which it is required.[118]

This Commission is also recommending that a plain language Notice of Default be developed. The Notice should fully advise borrowers of their rights so they are aware of the significance of the action taken by the lender and that their property may be sold if they do not correct the default. The form of this notice is discussed more fully in the next section.

The Commission recommends that:

- The power of sale process in Nova Scotia be started by notice.
- A plain language Notice of Default be used to initiate power of sale proceedings in Nova Scotia.

(b) Form of notice

As discussed above, power of sale in each of the four power of sale provinces is started by the lender giving the borrower notice of the default. Only Ontario legislation, however, sets out the form of the notice and the wording that must be used.[119] In the other provinces, lenders (or their lawyers) develop their own notices. The notices used in each of the provinces appear to contain the same information. The notices advise that default has occurred and that if payment is not made by a certain date, the lender will sell the property. The notices also provide details of the mortgage including the date it was made, the parties to the mortgage, the address of the property that was mortgaged and the amount owing.

In the Discussion Paper, the Commission indicated a need to make the mortgage foreclosure process clearer to borrowers. To help accomplish this goal, the Commission suggested that reform include introduction of a plain language Notice of Default that would, among other things, outline the rights and obligations of the borrower and the steps necessary to remedy the default. The commission recommended that the notice also advise that: (a) the mortgage could be reinstated by the borrower paying arrears and related expenses prior to the court order being granted; and, (b) the property could be redeemed by paying the total amount owed under the mortgage, prior to a sale to a third party.

Not all commentators provided feedback on the introduction of a Notice of Default. Those that did, however, agreed with the introduction of such a notice and felt it would benefit both lenders and borrowers. Two commentators disagreed with the suggestion that all borrowers are unaware of what will happen upon default. They acknowledged that borrowers may not know the process

[118] Ontario Law Reform Commission Report, *supra* note 55 at 147.

[119] *Mortgages Act, supra* note 58, Form 1.

but they know that they will lose the property if they do not make the mortgage payments. They agreed, however, that borrowers should be advised of their right to apply to reinstate the mortgage under section 42 of the *Judicature Act*.[120]

The Commission feels that introduction of a standard form Notice of Default would serve to standardize the process and ensure that borrowers receive complete and consistent information in a plain language format. The Commission reviewed the notices used by two different lenders in Newfoundland and found that while the information provided was essentially the same, the format and language used was significantly different. One notice was in letter form and consisted of three paragraphs. The other notice was in a more legal format and consisted of five paragraphs using much more formal, legal language. It is clear that consistency is desired and would be beneficial for both lenders and borrowers.

Attached as Appendix C is a plain language Notice of Default that could be used to initiate power of sale proceedings in Nova Scotia. In addition to the rights outlined above, the notice also advises borrowers of their rights to attempt to sell the property prior to the lender taking steps to sell it. This would not be prejudicial to the lender as it would have to consent to any sale given the existence of the mortgage.

The Commission recommends that:

- The draft Notice of Default contained in Appendix C be used to initiate power of sale proceedings in Nova Scotia.

(c) Thirty day notice

For the most part, lenders in other power of sale provinces do not have to wait any particular period of time after default before starting the power of sale process. The only exception is statutory power of sale in Ontario where payments must be three months in arrears before the lender is permitted to act.[121] As well, under either statutory or contractual power of sale in Ontario, the lender is not permitted to send the notice until default has continued for 15 days.[122] Otherwise, the lender can proceed upon the borrower's default (assuming there is no clause in the mortgage preventing the borrower form doing so). The Commission has learned that the practice of lenders in other provinces is to wait two to three months before proceeding. During

[120] These lawyers advise that it is their practice, when acting for lenders, to advise borrowers of the right to reinstate the mortgage and to offer to handle the application on the borrower's behalf (assuming the borrower is able to pay the arrears and the costs incurred by the lender). The cost of making the application is charged back to the borrower.

[121] *Mortgages Act*, *supra* note 58, s. 24.

[122] *Mortgages Act*, *supra* note 58, ss. 26(2), 32.

this time, the lender and its lawyers write to the borrower and request that payment be made. There may be informal negotiations while the borrower attempts to raise funds to pay the arrears or to pay the balance of the mortgage. These negotiations, however, are optional and take place at the discretion of the lender.

The Commission considered recommending the introduction, by legislation, of a period after default during which the lender would be prohibited from taking any action against the borrower. This would reflect the current practice of lenders. The Commission was concerned, however, that legislating current practice might cause lenders to send notices out earlier and thereby formalize the process at an earlier stage. Lenders may then be less inclined to informally negotiate with borrowers in an attempt to correct the default.

The Commission is therefore recommending that there be no specific period of default before a lender is permitted to start the power of sale process. The Commission is further recommending the adoption of a system similar to that in Newfoundland and Ontario where the lender cannot take any further action for a period of time after the giving of the Notice of Default. This would not, however, prevent the lender from taking action if it was necessary to preserve the property from being damaged or devalued. In Newfoundland, the lender cannot do anything for 30 days. In Ontario, the lender is prohibited from acting for 35 or 45 days (depending on whether the power of sale is statutory or contractual). The Commission discussed at length whether the appropriate period should be 30 or 60 days. There was some concern that 60 days would be necessary in order to allow borrowers adequate time to arrange their affairs,[123] refinance the debt, or sell the property. On the other hand, there was concern that allowing a period of 60 days would cause lenders to send out notices sooner. The Commission is therefore recommending that lenders not be permitted to take any action for a period of 30 days after the Notice of Default is given, unless such action is necessary to protect or preserve the property. A 30 day period would not likely cause lenders to change their current practice and would still allow opportunity for parties to attempt to negotiate a resolution. There is no such notice period in New Brunswick or Prince Edward Island and lenders still wait two to three months before proceeding. The 30 day notice period appears to work well in Newfoundland and has not caused lenders to change their practice of waiting two to three months before proceeding.

The Commission recommends that:

- Lenders not be permitted to take any action for thirty days after the Notice of Default is given. Lenders should, however, be permitted to take action if it is necessary to protect or preserve the property.

[123] For example, in some cases default may be caused by the breakdown of a spousal relationship. The borrowers may require time to negotiate how the mortgage payments will be made and may have to go before a court to have the matter decided for them. One commentator specifically mentioned spousal separation as a significant concern.

(d) Service of the notice

Currently, in the foreclosure process in Nova Scotia, the lender must have the borrower and current owner of the property (usually the same person) as Defendants and personally serve them with the documents used to start a foreclosure action (if there is a guarantor, that person is also named and personally served). After the Order for Foreclosure, Sale and Possession is granted, the lender must give notice of the date and place of the Sheriff's auction. While the lender is required to advertise the auction, it is also required to notify subsequent encumbrancers. A subsequent encumbrancer is a person or company who has an encumbrance (such as a judgment, lien or mortgage) against the mortgaged property that was recorded subsequent to the mortgage being foreclosed. Lenders must give notice to subsequent encumbrancers by registered mail at least 20 days before the Sheriff's auction.

If the power of sale process is to be started by notice and the property is to be advertised,[124] it must be determined who is to receive the notice and how they are to receive it. In Newfoundland, the borrower, other registered encumbrancers and any guarantors receive the initial notice which starts the process (the 30 day notice). It is often personally served even though the legislation does not state that this is a requirement (it states that the notice must be "given"). In Prince Edward Island, the notice is sent by registered mail to the borrower, the borrower's spouse and any guarantors. It may be personally served but that is not required by the legislation. New Brunswick legislation requires that notice be sent by registered mail or served on the borrower. In Ontario, the power of sale notice is personally served or sent by registered mail to a specific list of those who may have an interest in the property, such as those who have registered an interest in the property under the *Land Titles Act*.

The notice is the only formal notification under the power of sale process. While properties will be advertised for sale, this may not come to the attention of all those with an interest in the property. The Commission therefore feels it is necessary to ensure full and complete notice be given to all those with an interest in the property. It is recommending that the notice continue to be personally served on the parties on whom the foreclosure documents are now served (the borrower, the current owner of the property and any guarantors). It should be sent by registered mail to subsequent encumbrancers. These requirements are essentially the same as the current Nova Scotia requirements and should therefore be readily accepted by lenders.

[124] See Section V.4.a, below.

The Commission recommends that:

- The Notice of Default:
  - be personally served on the borrower, the current owner of the property and any guarantors.
  - be sent by registered mail to subsequent encumbrancers.

4. Selling the property

(a) Advertising

In the judicial sale system used in Nova Scotia, the Sheriff's auction is advertised by two advertisements placed in newspapers sold in the county where the land is located. The advertisements must be placed at least 20 days and not more than 10 days prior to the auction. They are not placed in a classified section of the newspaper but are inserted separately as legal notices. The form of the advertisement is set out in Practice Memorandum No. 13. It uses very technical, legal language and does not describe the property except to include a legal description (known as a "metes and bounds description") indicating the location of the property. The first paragraph of the notice reads as follows:

> ***TO BE SOLD AT PUBLIC AUCTION*** *pursuant to an Order for Foreclosure, Sale and Possession granted by the Court, unless before the time of sale the amount due to the plaintiff on the mortgage foreclosed, plus costs to be taxed, are paid...*[125]

Of the provinces using judicial sale, only British Columbia and Ontario are seen to market property appropriately. Most of the provinces that use judicial sale do not require that lenders advertise property in the way that properties are usually advertised for sale:

> *Apart from British Columbia and Ontario, all of the provinces using the judicial sale ignore the reality that exposing property improperly to the market place and over an insufficient period of time fails to meet the primary objective of a forced sale. In practice, the time allocated for effecting a sale is that which is necessary for inserting legal notices of sale in a local newspaper. Generally, the notices are brief and are distinctively legal both in format and content. Rarely do they contain references to the marketable features of the property, although some*

[125] Practice Memorandum No. 13, *supra* note 3.

efforts are made to replace the metes and bounds description with a civic address.[126]

In British Columbia, courts can grant orders requiring that property be listed with a real estate agent. They can also specify the price at which the property is to be sold and any terms of the sale that are subject to court approval. The court can also direct that signs be posted on the property and that it be available for viewing during daytime hours.[127]

In three of the power of sale provinces (Newfoundland, Prince Edward Island and New Brunswick), advertising is required by legislation to be conducted for two or four weeks although practice in each province is to advertise for four weeks. The advertisements use legal language and resemble legal notices as opposed to advertisements. The advertisements specified in the legislation are, however, only for the auction, not for a resale to a third party:

> *Notwithstanding the provincial variations ranging from a contractual to a statutory and to a short form power of sale, it is common to all that no reference is made to the scope of the marketing precautions to be adopted, other than to provide for a sale either by public auction or by private contract. The foreclosing creditor must decide which is more appropriate. Excepting Ontario, the standard practice limits advertising to the publication of notices of the impending auction.*[128]

In Ontario, standard practice is to list property with a real estate agent and normal marketing techniques are used in an attempt to sell the property. The Ontario legislation does not, however, contain any requirements as to the advertising to be conducted or the marketing techniques to be used.

The Commission recommends that specific reference be made, in any reformed system, to the duration and content of the advertisement by which the properties are offered for sale. With the introduction of a power of sale system that uses real estate agents, commercially reasonable advertising is likely to result. While real estate agents are motivated to market and sell property and have experience in preparing and placing advertisements, the Commission recommends that any legislation or rules specifically require lenders to advertise property in a manner that is commercially reasonable, given the nature of the property. This recommendation was also made by the Ontario Law Reform Commission.[129] This Commission also recommends that advertising

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[126] Robertson (1987), *supra* note 13 at 678.

[127] British Columbia Rules of Court, r. 43(4).

[128] Robertson (1987), *supra* note 13 at 682.

[129] Ontario Law Reform Commission Report, *supra* note 55 at 188.

be conducted for a minimum of four weeks to ensure that property is adequately exposed to the market. In many cases, real estate agents will market property for even longer than four weeks. This would, however, be subject to any agreement of purchase and sale executed prior to the expiration of the four week period.

The Commission recommends that:

- Lenders be required to advertise property in a manner that is commercially reasonable given the nature of the property.
- Advertising be conducted for a minimum of four weeks to ensure adequate exposure to the market. This would be subject to any agreement of purchase and sale executed prior to the expiration of the four week period.

(b) Conduct of the sale

The courts in Nova Scotia have commented numerous times on the standard of care required by lenders when selling property under the judicial sale system. This usually arises when a lender applies to the court for an Order for deficiency judgment after the property is sold. In some cases, a borrower may claim that the lender acted inappropriately and failed to obtain a reasonable resale price or one that reflects fair market value. The Nova Scotia Court of Appeal recently reviewed the law in this area[130] and reiterated the comments it made in *Canadian Imperial Bank of Commerce* v. *England's (R.) Warehouse Ltd*[131] where it stated that the obligation of a lender is to achieve a reasonable price, which may not be fair market value:

> Rule 47.10(2) *requires only that the mortgagee obtain a reasonable price on a resale. The onus of proof on this issue is on the mortgagee. The mortgagee should not be adjudged to have failed the duty unless the price obtained on the resale is clearly unreasonable in the circumstances. This must be so because the mortgagor's default put the mortgagee in the position that action to realize on the security was required.*
>
> ...
>
> *The obligation on the mortgagee on a resale is to take reasonable care to see that a reasonable price is obtained.*[132]

[130] *Royal Bank of Canada* v. *Marjen Investments Ltd*. (1998), 164 N.S.R. (2d) 293 (C.A.).

[131] (1996), 147 N.S.R. (2d) 321 (C.A.).

[132] *Supra* note 130 at 299-300.

One of the most serious criticisms of power of sale relates to the conduct of the sale. Because there is no review by a court, there is concern that this result in properties being sold at an undervalue. As discussed previously, this concern also exists in the judicial system in Nova Scotia.

The lender's conduct in the exercise of the power of sale, and the standard of care that must be exercised by a lender, has been the subject of numerous commentaries.[133] One leading authority on the standard expected of a lender was set out by the English Court of Appeal:

> *It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realize his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor.*[134]

The Ontario Law Reform Commission concluded that in Ontario, the key test is whether the lender acted *bona fide* in the attempt to realize the fair market value of the property. Furthermore, the duties of the lender are to take any steps ordinarily taken to ensure that the power of sale comes to the attention of a wide segment of the market for that property:

> *Such steps include advertising, placing a sign on the property, listing the property with a multiple listing service, obtaining appraisals, and ensuring that the listing lasts for whatever is the usual time period for the sale of such properties.*[135]

There have been various attempts to include, in legislation, standards by which to judge the conduct of lenders when selling property in a system that does not normally subject the lenders conduct to judicial review. They include the following:

> *...every aspect of the sale including the method of sale, advertising, time, place and terms must be as reasonable as a person selling for his own account might*

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[133] See, for example, Robertson (1987), *supra* note 13 at 693-707 and 781-725; Ontario Law Reform Commission Report, *supra* note 55 at 149-152 and 187.

[134] *Cuckmere Brick Corp. Ltd.* v. *Mutual Finance Ltd., [1971] 2 All* E.R. 633 (C.A.), as noted in Ontario Law Reform Commission Report, *supra* note 55 at 149.

[135] Ontario Law Reform Commission Report, *supra* note 55 at 152.

utilize.[136]

...every aspect of the sale, including the method advertising, time, place and terms, must be reasonable.[137]

...at any time and place and on any terms so long as every aspect of the disposition is commercially reasonable.[138]

...act honestly and in good faith [by dealing] with a property in a timely and appropriate manner.[139]

The Ontario Law Reform Commission made the following recommendation:

(1) The standard of care required of a lender in the conduct of a sale should be that of commercially reasonable care, requiring the lender to obtain the highest realizable price possible under the existing market conditions, taking account of the fact that the property is being disposed of at a forced sale. The standard should be imposed by statute.

(2) The lender should be entitled to sell the secured property by tender, public sale, private sale, by one or more contracts, as a unit or in parcels, at any time of day and place and on any terms, including sale on credit, but, subject to paragraph (3), every aspect of the sale, including advertising, time of day, place, and terms should be commercially reasonable, having regard to the nature of the secured property and the circumstances of the sale.

(3) In determining whether a sale is reasonable, the exact timing of the sale should not be considered a factor.[140]

The Commission feels that it would be beneficial, for both the borrower and lender, to incorporate a provision regarding the conduct of the sale into any legislation or rules by which the power of sale system is introduced in Nova Scotia. The Commission recommends, at the

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[136] From a 1984 draft *Real Property Security Act*, commissioned for discussion by the Alberta Institute of Law Research and Reform, as quoted in the Ontario Law Reform Commission Report, *supra* note 55 at 161.

[137] *The Uniform Land Transactions Act* as reported in the Ontario Law Reform Commission Report, *supra* note 55 at 161.

[138] The Ontario *Personal Property Security Act,* R.S.O. 1980, c. 375, s. 59(3), as reported in the Ontario Law Reform Commission Report, *supra* note 55 at 162.

[139] Banks and Banking Law Revisions Act, Robertson (1987), *supra* note 13 at 719.

[140] Ontario Law Reform Commission Report, *supra* note 55 at 187.

very least, that the standard of care to be exercised by the lender be that of commercially reasonable care, requiring the lender to obtain the highest possible sale price under existing market conditions and taking account of the fact the property is being disposed of at a forced sale.

The Commission recommends that:

- At the very least, that the standard of care to be exercised by the lender be that of commercially reasonable care, requiring the lender to obtain the highest possible sale price under existing market conditions and taking account of the fact the property is being disposed of at a forced sale.

(c) No purchase by lender

Lenders in Nova Scotia are permitted to purchase the property at the Sheriff's auction. The Commission's empirical study of foreclosure files showed that the lender purchased the property at 84% of the auctions studied. The property is conveyed, from the Sheriff to the lender, and the lender lists the property for sale with a real estate agent.

Under judicial sale in Ontario, a lender may not bid on property if it is the party that is conducting the sale.[141] The lender may, however, bid and purchase the property if it does not have carriage of the sale.

There is inconsistency in the power of sale regimes in the other provinces. Both Prince Edward Island and Ontario prohibit the lender from purchasing property under power of sale while Newfoundland and New Brunswick allow it. In Prince Edward Island, it is seen as inappropriate because a lender is not able to purchase from itself.[142] If the property does not sell at the auction, the property is withdrawn from the auction and must be sold privately to a third party before the lender can seek any deficiency.

In Ontario, a lender selling property by contractual power of sale is not permitted to purchase the property. The rationale commonly provided is from an old English Court of Appeal decision:

> *A sale by a person to himself is not a sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a*

[141] Ontario Rules of Civil Procedure, r. 55.06(5).

[142] Lawyers in P.E.I. report that for a period of time, lenders' lawyers in one part of the province adopted a practice of conveying the property to themselves by a Trustee's Deed. The property would then be conveyed to the lender. This practice was seen as improper, however, and has ended.

> *transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction.*[143]

The lender is, however, permitted to purchase the property if it is selling the property by auction under statutory power of sale.[144] In light of the English Court of Appeal decision noted above, some authors claim that a lender purchasing property at an auction is doing so not for its own benefit but to resell the property.[145]

The provinces of New Brunswick and Newfoundland both permit a lender to purchase property at the auction under power of sale. The legislation authorizing this practice is very similar in each province.[146] In both provinces, property is usually sold by auction. If no one else purchases at the auction, the lender purchases and the property is conveyed to it. In Newfoundland, the lender is subject to the requirement that the sale cannot be for less than 75% of the appraised value. A review of the standard deeds used in each province reveals slightly different practice in how the property is conveyed. In New Brunswick, the property is conveyed *from* the borrower and lender *to* the lender. In Newfoundland, it is conveyed *from* the lender *to* the lender.

The Commission agrees with the approach taken in Prince Edward Island and Ontario that it is inappropriate to allow a lender to purchase property from itself. The Commission recommends that this be adopted as part of the new power of sale system in Nova Scotia. The Commission is concerned, however, that some properties may not sell. If property is being sold by auction or tender, for example, no one may bid on the property and it will remain unsold. In that case, the Commission suggests it would be appropriate to continue, under the power of sale process, to list the property for sale with a real estate agent. Alternatively, the lender could convert to foreclosure, as discussed above. The Commission is concerned, however, that in some cases property may be considered unsaleable. For example, the property may be considered an environmental risk and no one may be willing to purchase it, regardless of the marketing efforts undertaken. In that case, the lender should be permitted to apply to the court for directions as to how to deal with the property.

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[143] *Farrar* v. *Farrars Ltd.* (1888), 40 Ch. D. 395 (C.A.), at 409.

[144] *Mortgages Act*, *supra* note 58, s. 24.

[145] Roach, *supra* note 26 at 149.

[146] New Brunswick *Property Act*, *supra* note 50, s. 44(1)(a); Newfoundland *Conveyancing Act*, *supra* note 27, s. 5(1)(a).

The Commission recommends that:

- A lender in Nova Scotia not be permitted to purchase property offered for sale under power of sale.
- If a lender initially tries to sell property by tender or auction but the property remains unsold, that the lender be permitted to either list the property for sale with a real estate agent under the power of sale or be permitted to foreclose on the property. Any foreclosure would be in full satisfaction of the debt.
- If the property remains unsold and the lender does not wish to foreclose on the property, that the lender have the option of applying to the court for directions as to how to dispose of the property.

5. Proceeds of sale

(a) Applying the proceeds of sale

In Nova Scotia, when property is sold at the Sheriff's auction, the sale proceeds are first used to pay Sheriff's fees and any outstanding property taxes.[147] Remaining funds are then used to pay the lender the amount due on the mortgage and the costs incurred by the lender in foreclosing. If there is any surplus, it is paid into court. Those who feel they are entitled to the surplus can apply to the court to determine their entitlement to the funds. There may be, for example, others with liens or judgments recorded against the property after the mortgage that was foreclosed. They can appear before the court and argue that they are entitled to the surplus funds.

Legislation in each of the power of sale provinces sets out how the sale proceeds are to be applied.[148] While there are some differences, for the most part the legislation indicates that funds are first applied to the costs of the sale and are next paid to the lender to cover money owing under the mortgage.[149] Any residue is to be paid to the borrower. Ontario legislation adds two categories of expenses that must be paid prior to distributing any residue to the borrower: (1) amounts due to encumbrancers registered after the mortgage in question; and, (2) security deposits paid by the borrower's tenants that was not used to pay rent.

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[147] Practice Memorandum No. 13, *supra* note 3, Instructions to Sheriff, paragraph 4.

[148] Newfoundland *Conveyancing Act*, *supra* note 27, s. 14(3); P.E.I. *Real Property Act*, *supra* note 36, Covenant 12;, New Brunswick *Property Act*, *supra* note 50, s. 47(3); Ontario *Mortgages Act*, *supra* note 58, s. 27.

[149] Newfoundland legislation indicates that funds are first to be used to discharge prior encumbrances to which the sale was not subject. Prince Edward Island legislation indicates that taxes, rent, insurance, repairs and other costs of the lender are to be paid before any money is paid toward the amount owing under the mortgage.

This Commission recommends that a priority list similar to that used in the other provinces be adopted in Nova Scotia. It should indicate that sale proceeds should first be paid toward the costs of the sale, followed by payment of funds owing under the mortgage. Any remaining proceeds should be paid to subsequent encumbrancers with the residue going to the borrower.

The Commission recommends that:

- Proceeds of sale should be applied first to the costs of sale, then to money owing under the mortgage, then to subsequent encumbrancers. Any residue should be returned to the borrower.

(b) Deficiency judgment and surplus

In each of the power of sale provinces, the right of a lender to a deficiency and its obligation to return any surplus, are handled somewhat differently. As discussed previously, only Ontario allows for property to be immediately listed for sale with a real estate agent. The existence of a deficiency or surplus is determined once the property is sold to a third party. In the other power of sale provinces, attempts are first made to sell the property in another manner, usually by auction. The property may or may not be sold to a third party at the auction.

If the property is sold to a third party at the auction, the sale proceeds are distributed according to the priority list set out in the legislation, as described in the preceding section. If there is a surplus after the costs of sale and the mortgage are paid, it is paid to the subsequent encumbrancers and any residue goes to the borrower. If the sale proceeds are not enough to pay the costs of sale and the money owing under the mortgage, lenders can try to recover the shortfall by starting an action against (i.e., by suing) the borrower and any others who may be liable. In calculating whether a shortfall exists, the lender usually claims expenses up to the time the property is conveyed to the third party (usually 30 days after the auction). None of the power of sale provinces have issued rules or guidelines about the calculations of the deficiency, or the expenses which can be charged back to the borrower.

If the property is not sold to a third party at the auction (which usually occurs, according to lawyers in the other provinces), lenders in Newfoundland and New Brunswick may purchase the property and list it for sale with a real estate agent.

In Newfoundland, if the lender purchases the property at the auction, it must calculate any deficiency using the price it paid for the property. It can only claim its expenses to the time it purchased the property. The situation is somewhat different in New Brunswick. If a lender purchases the property at the auction, and lists it for sale and later sells it to a third party, it can use the sale price to the third party in calculating whether a deficiency exists. As well, it can

claim expenses up to the time of the resale to the third party. It can then seek to recover any shortfall from the borrower. This is seen to be authorized by the mortgage contract. If, however, a surplus arose from the sale to the third party,[150] there is no duty to return this surplus to the borrower as this is not required by the mortgage or the legislation.[151]

Lenders in Prince Edward Island are not permitted to purchase the property so if it is not sold at the auction, it is then listed for sale with a real estate agent. The lender is entitled to claim a deficiency and is obliged to return any surplus arising from a sale to a third party. The lender can claim expenses up to the time of a resale to a third party.

The Commission has recommended that in a reformed power of sale system, property be immediately listed for sale with a real estate agent. In the Discussion Paper, the Commission asked whether a deficiency judgment should continue to be available. Most of the commentators felt strongly that deficiency judgments should continue to be available in Nova Scotia (although it should be noted that only one submission was received from a borrower). Many commentators felt that abolishing deficiency judgments would adversely impact credit in the province (particularly mortgage credit) and that it would be unfair to deny deficiency judgments simply because a loan is secured by real estate instead of some other type of security (or in some cases, by no security at all). Commentators indicated that there was no strong reason for abolishing deficiency judgments and that their existence may cause borrowers to attempt to deal with the property responsibly and, if possible, find a seller before default occurs.

The Commission therefore recommends that deficiency judgments continue to be available in Nova Scotia.

The Commission recommends that:

- Deficiency judgments continue to be available in Nova Scotia.

The next issue is how deficiency judgments are to be obtained and surplus amounts returned. The Commission feels that there is a need, at some point in the process, to have the power of sale proceedings reviewed by the court. In the reformed system recommended by the Commission, there is no court involvement unless one of the parties asks the court to resolve a dispute that the parties have not been able to resolve themselves. The Commission therefore recommends that lenders be required to provide an accounting to the borrower within 30 days of a sale to a third

[150] The Commission acknowledges, however, that this scenario is unlikely to result given current economic conditions.

[151] The *Conveyancing Act*, *supra* note 27, s. 47(3) refers to the return of any residue arising from "the sale". This refers to the initial sale of the property at the auction not the resale to a third party after the auction.

party. If the lender fails to do so, it would lose its right to claim any deficiency against the borrower. The lender may, in some cases, decide not to prepare an accounting and give up its right to any deficiency. This may be problematic if a surplus arose from the sale. As a result, there must be a way for the borrower to appear before the court if it believes a surplus exists which the lender has failed to return. In order to know whether a surplus potentially exists, the borrower must be notified that the property was sold and the price for which it was sold. The Commission thus recommends that the lender be required to advise the borrower of the sale and the sale price, within 30 days of a sale. If the lender does not also provide an accounting at that time, the borrower would have the right to request an accounting from the court within 30 days from the date it was notified of the sale. The borrower would be advised of these rights in the Notice of Default, discussed in Section V.3., above.

The Commission recommends that:

- Lenders be required, within 30 days of a sale, to advise borrowers that the property was sold and the price at which is was sold. If the lender wishes to claim a deficiency judgment, the lender must also provide the borrower with an accounting.
- If the lender does not provide an accounting within 30 days of the sale, the borrower be able to require an accounting by applying to the court within 30 days from the date it was notified of the sale.

The next issue is how the parties would come before the court. Currently, in Nova Scotia, an action is started at the beginning of the process when the lender sues the borrower. A deficiency judgment application is made as an "interlocutory application" (i.e., an application to decide a matter that is part of an existing action). In the reformed system proposed by the Commission, no action is started at the beginning and the lender cannot therefore make an interlocutory application to claim a deficiency judgment.

In the other power of sale provinces, lenders must start an action after the property is sold in order to claim a deficiency judgment. The Commission believes that starting a separate and new action should not be necessary. In Nova Scotia, parties can come before the court using a document known as an Originating Notice (Application). The procedure for using such notices are covered by Rule 9.02(b). It can be used when the sole or principal question is a question of law and there is not likely to be a substantial dispute of fact. The Commission suggests that this would be an appropriate mechanism to allow lenders or borrowers to come before the court if they feel there are still issues to be resolved after the property is sold. The lender may come before the court to claim a deficiency. The borrower may come before the court to request that the lender provide an accounting of the sale.

The Commission recommends that:

- After the property is sold, lenders be required to apply to the court to claim a deficiency judgment. Borrowers can also apply to the court to require that the lender provide an accounting of the sale. Either party can apply to the court using an Originating Notice (Application).

6. Legislation

The Commission believes changes should be made through legislation. Changes to the law of foreclosure in recent years have taken place by way of amendments to the Civil Procedure Rules and Practice Memorandum. It is perceived these changes do not receive the kind of scrutiny and public debate that precedes the adoption of legislation. It is also believed it is inappropriate to make major changes to substantive law by way of amendments to the Rules. Amendments to the Rules may be made in conjunction with legislation but should not be a substitute for legislation.

The Commission recommends that:

- Reform should be accomplished through legislation although amendments to the Civil Procedure Rules and Practice Memorandum may also be required.

VI LIST OF RECOMMENDATIONS

1. A reformed system [pages 32-36]

(a) Power of sale and foreclosure

- A power of sale process be adopted in Nova Scotia that would allow property to be sold by private sale, tender or auction.

- Foreclosure remain as an alternative to power of sale. Foreclosure would be in full satisfaction of the debt in that the lender would not have a right to claim any deficiency from the borrower and the borrower would not have a right to claim any surplus from the lender.

(b) Lender's choice and borrower's right to object

- The lender continue to choose the option to be followed (power of sale or foreclosure) if a borrower defaults under a mortgage.

- If the lender chooses foreclosure, that the borrower have the right to apply to the court to request that power of sale be used instead.

- If the lender chooses power of sale, that the lender be permitted to convert the process to foreclosure.

- If the lender chooses power of sale and wishes to convert it to foreclosure, that the borrower have the right to apply to the court to request that power of sale continue to be used.

2. Borrower's rights [pages 36-43]

(a) Right to reinstate

- Borrowers continue to have the right to reinstate a mortgage but that the right be exercisable once per year.

- The right to reinstate a mortgage be considered to have been exercised if arrears are paid *after* the Notice of Default is given.

- The right to reinstate a mortgage be included in any mortgage or foreclosure legislation.

(b) Right to redeem

- The right to redeem under power of sale exist until the lender, in validly exercising the

power of sale, conveys the property to a third party purchaser.

- The right to redeem be explicitly stated in any mortgage or foreclosure legislation.

- The right to redeem be clearly explained in the Notice of Default given to borrowers.

(c) Other rights

- Specific rights of borrowers be included in mortgage or foreclosure legislation or rules.

- The rights of borrowers include:
  - if entitled to redeem, the right to require the lender to assign the mortgage debt and convey the property to a third party.
  - if entitled to redeem, to inspect and make copies of title documents and appraisal reports in the lender's possession.
  - the right to a copy of the mortgage within thirty days after it is signed.
  - the right to a written statement of the amount and nature of default.

3. Notice of default [pages 43-48]

(a) Notice versus Action

- The power of sale process in Nova Scotia be started by notice.

- A plain language Notice of Default be used to initiate power of sale proceedings in Nova Scotia.

(b) Form of notice

- The draft Notice of Default contained in Appendix C be used to initiate power of sale proceedings in Nova Scotia.

(c) Thirty day notice

- Lenders not be permitted to take any action for thirty days after the Notice of Default is given. Lenders should, however, be permitted to take action if it is necessary to protect or preserve the property.

(d) Service of the notice

- The Notice of Default:

- be personally served on the borrower, the current owner of the property and any guarantors.
- be sent by registered mail to subsequent encumbrancers.

4. Selling the property [pages 49-56]

(a) Advertising

- Lenders be required to advertise property in a manner that is commercially reasonable given the nature of the property.

- Advertising be conducted for a minimum of four weeks to ensure adequate exposure to the market. This would be subject to any agreement of purchase and sale executed prior to the expiration of the four week period.

(b) Conduct of sale

- At the very least, that the standard of care to be exercised by the lender be that of commercially reasonable care, requiring the lender to obtain the highest possible sale price under existing market conditions and taking account of the fact the property is being disposed of at a forced sale.

(c) No purchase by lender

- A lender in Nova Scotia not be permitted to purchase property offered for sale under power of sale.

- If a lender initially tries to sell property by tender or auction but the property remains unsold, that the lender be permitted to either list the property for sale with a real estate agent under the power of sale or be permitted to foreclose on the property. Any foreclosure would be in full satisfaction of the debt.

- If the property remains unsold and the lender does not wish to foreclose on the property, that the lender have the option of applying to the court for directions as to how to dispose of the property.

5. Proceeds of sale [pages 56-60]

(a) Applying the proceeds of sale

- Proceeds of sale should be applied first to the costs of sale, then to money owing under the mortgage, then to subsequent encumbrancers. Any residue should be returned to the borrower.

(b) Deficiency judgment and surplus

- Deficiency judgments continue to be available in Nova Scotia.

- Lenders be required, within 30 days of a sale, to advise borrowers that the property was sold and the price at which is was sold. If the lender wishes to claim a deficiency judgment, the lender must also provide the borrower with an accounting.

- If the lender does not provide an accounting within 30 days of the sale, the borrower be able to require an accounting by applying to the court within 30 days from the date it was notified of the sale.

- After the property is sold, lenders be required to apply to the court to claim a deficiency judgment. Borrowers can also apply to the court to require that the lender provide an accounting of the sale. Either party can apply to the court using an Originating Notice (Application).

6. Legislation [page 60]

- Reform should be accomplished through legislation although amendments to the Civil Procedure Rules and Practice Memorandum may also be required.