

MORTGAGES – DRAFTING

INTRODUCTION

This checklist is designed to be used with the *Mortgages – Procedure* checklist (RE-6). It relates primarily to a conventional first mortgage on residential property, where express mortgage terms are to be added to filed or prescribed standard mortgage terms, or where you are creating a set of standard mortgage terms to be filed. This checklist is not exhaustive, and must be considered in relation to the particular facts in the matter at hand and augmented or revised as appropriate.

LIST OF AUTHORITIES

Kleisinger, E., “Commercial Mortgages” (May 2001), *Real Estate Seminar*, Saskatchewan Legal Education Society Inc.

Acts

Bank Act

The Builders’ Lien Act

The Business Corporations Act

The Homesteads Act, 1989

Interest Act

The Land Contracts (Actions) Act

The Land Titles Act, 2000

The Limitation of Civil Rights Act

The Personal Property Security Act, 1993

The Saskatchewan Farm Security Act

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Notes:

CHECKLIST

A. DATE

1. Consider using reference date for identification purposes.

B. INTRODUCTORY CLAUSES

1. Whether made under *The Land Titles Act, 2000*.
2. Recitals setting out special features of transaction.
3. Consideration clause.

C. IDENTIFICATION OF PARTIES

1. Mortgagor/borrower (as registered owner of land).
2. Mortgagee/lender (with address).
3. Guarantor or covenantor. Consider provisions of *The Limitation of Civil Rights Act* or *The Saskatchewan Farm Security Act*.

D. DESCRIPTION OF PROPERTY

1. Surface Parcel Number and remaining legal from title including extension number and old world title number (if disclosed on title).
2. Mineral parcel included or excluded?
3. Consider interest being mortgaged: fee simple, leasehold, mineral, etc.?

Notes:

E. REPAYMENT OF PRINCIPAL AND INTEREST

1. Promise to repay and charging clause.
2. Principal sum secured.
3. Conditions under which mortgage is discharged.
4. Calculation of interest and date of commencement (ensure compliance with *Interest Act* and *Bank Act* disclosure requirements; ensure no violation of *Criminal Code*).
5. Interest on overdue payments.
6. When, where and how payments are to be made.
7. Acceleration clause (see paragraph H.1).
8. Right to prepay part or all prior to maturity date; prepayment penalties. See *Interest Act*, s. 10.
9. Right of mortgagee to deduct interest adjustment from advance.

**F. MORTGAGOR'S REPRESENTATIONS
AND COVENANTS**

1. Accuracy of representations.
2. Mortgagor has done nothing to encumber land except as specified.
3. To pay principal and interest when due.
4. To pay all costs relating to:
 - 4.1 Creation, registration and discharge of mortgage.
 - 4.2 Mortgagee's costs in event of default, including Mortgagee's legal fees on a solicitor and client basis.
 - 4.3 Other costs of mortgagee in relation to maintenance of security, inspection, etc.
5. Title to mortgaged property:
 - 5.1 Mortgagor has title and right to convey land.
 - 5.2 Mortgagor will defend title.
6. Release of all claims on land subject to payment proviso.
7. To maintain property and keep it in good repair and to make all repairs reasonably required by mortgagee.
8. Not to abandon or leave property unoccupied for more than 30 days.

Notes:

9. Not to commit acts of waste upon land.
10. Insurance:
 - 10.1 To maintain insurance against fire and other risks, with loss payable to mortgagee.
 - 10.2 To deliver policies to mortgagee.
 - 10.3 To furnish proofs of loss to mortgagee, and to do all things necessary to enable mortgagee to obtain payment.
11. To pay real property taxes or to pay tax money to mortgagee.
12. To grant collateral security to mortgagee on request.
13. To permit entry and inspection by mortgagee.
14. To furnish specified information to mortgagee.
15. Further assurances (e.g., environmental).
16. To pay all sums due on any prior encumbrances and keep in good standing.
17. To comply with all laws, rules, etc.
18. Mortgagor saves harmless mortgagee from liability.
19. Assignment of rents (to ensure ability to collect rents if all, or part, of property is leased at any time) if mortgagor rents out property.
20. In event property is sold, to pay mortgage in full.

G. MORTGAGEE'S COVENANTS

1. Mortgagor to have quiet possession until default.
2. To apply payments made on account of taxes in payment of taxes when due, so long as mortgagor is not in default.
3. To provide a discharge; mortgagor to pay costs.

H. DEFAULT

1. Effect (e.g., acceleration at option of mortgagee).
2. Events of default:
 - 2.1 Non-payment of principal or interest when it becomes due and payable.
 - 2.2 Breach of covenant of mortgage.

Notes:

- 2.3 Representation made to secure mortgage loan is found to be untrue.
 - 2.4 Non-payment of or default under prior charge.
 - 2.5 Insolvency or bankruptcy.
 - 2.6 Property sold or further encumbered or if liquidator or receiver appointed.
 - 2.7 Default under another mortgage or loan agreement with mortgagee.
 - 2.8 If mortgagor is corporation and is not corporation duly organized.
3. The mortgagee may waive any breach or default, but this does not affect rights arising from subsequent breaches or defaults.

I. REMEDIES ON DEFAULT

1. Specify circumstances in which mortgagee may use various measures set out in mortgage.
2. Power to enter, take possession of and use property.
3. Power to preserve, maintain and repair property.
4. Power to lease or sell, with proceeds of sale applied as set out in mortgage.
5. Power to have receiver or receiver-manager appointed and list powers of receiver.
6. Power to make principal sum become immediately due and owing.
7. Power to foreclose or sell property by judicial sale.

J. OTHER RIGHTS OF MORTGAGEE

1. To do anything mortgagor is required to do, if mortgagor fails to do so. Costs to be added to debt and bear interest and to be immediately payable by mortgagor.
2. To pay monies to preserve, protect or repair property. Costs to be added to debt and bear interest and to be immediately payable by the mortgagor.
3. To discharge any unregistered encumbrances having priority, of which mortgagee is unaware upon making advance.
4. To deduct from advances, unpaid taxes, taxes to become due in that year, or interest to adjustment date.

Notes:

5. To release one guarantor or covenantor without releasing the others or prejudicing the security.
6. To apply insurance proceeds to repair or reinstatement of property or on monies owing.
7. Borrower gives up any statutory right to require insurance proceeds to be applied in any particular manner.
8. Rights and remedies set out in mortgage are cumulative and additional to any other remedies. The mortgagee may realize on all securities in any order.

K. SECURITY PROVISIONS

1. Mortgagor to grant security agreement to mortgagee on personal property on mortgaged premises with waiver of *The Limitation of Civil Rights Act* (if a corporation).
2. Security is additional to any other security held by mortgagee. No merger.
3. Obligation to pay is not extinguished by judgment.

L. MISCELLANEOUS

1. Mortgagee has no obligation to advance monies.
2. Conditions to be satisfied for redemption.
3. Mortgagee's right to assign. Mortgagor has no right to assign without consent of Mortgagee. Assigns are bound by provisions of mortgage.
4. Relationship between commitment letter and mortgage (e.g., non-merger of commitment letter, with mortgage prevailing in event of inconsistency).
5. Renewal provisions.
6. Subdivision clauses.
7. Environmental Clause, if required.
8. Expropriation Clauses, if required.
9. Discharge provisions.
 - 9.1 Right to partially discharge without prejudicing balance of security.
 - 9.2 Right to recovery of discharge fees.
10. Guarantor's or covenantor's clause.

Notes:

M. WAIVER

1. *The Land Contracts (Actions) Act.*
2. *The Limitation of Civil Rights Act.*

N. INTERPRETATION AND GENERAL PROVISIONS

1. Definitions.
2. Principles that govern interpretation of mortgage (e.g., use of masculine form, insertion of headings for convenience only).
3. Severability.
4. Time is of essence.
5. Notices.
6. Enurement.
7. Amendment.
8. Appendixes.

O. SIGNING CONSIDERATIONS

1. If applicable, ensure Affidavit of Execution is prepared.
2. If applicable, ensure compliance with *The Homesteads Act, 1989.*

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