

# Can't Pay Your Mortgage?



July 2009

## What you can do if you're facing foreclosure



Legal  
Services  
Society

British Columbia  
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This booklet explains the law in general. It is not intended to give you legal advice on your particular problem. Because each person's case is different, you may need to get legal help. *Can't Pay Your Mortgage?* is up to date as of **July 2009**.

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# Introduction

This booklet is only about residential mortgage foreclosures when the borrower lives in the home or rents it out. If your foreclosure involves a farm, a mortgage you took on assignment, or a mortgage on a commercial property, please see a lawyer for legal advice.

## Who this booklet is for

This booklet is for you if:

- you're about to miss a mortgage payment,
- you've already missed one or more mortgage payments,
- the lender has sent you a reminder letter or a demand letter, *or*
- you've received a foreclosure Petition.

If any of the above applies to you, this booklet explains what you can do when the lender tries to take your property because you haven't paid your mortgage (the process is called foreclosure). The lender (the mortgagee) is usually a bank or credit union, but could be an insurance company, a private individual, or a loan company.

If you own property jointly with your spouse or someone else, each of you is usually responsible for the whole amount owed. If one of you can't pay, the lender will try to collect all of it from the other person. If you signed a document legally guaranteeing mortgage payments for someone else, you are responsible if that person misses payments.

As soon as a payment is missed, most lenders act quickly. They often send a reminder letter first. If they don't hear from you or don't receive the missed payment after that, their next step is to send you a "demand letter." In BC, the lender must send you a demand letter before going to court to ask for foreclosure. The demand letter must say exactly what you owe, and that:

- you have to pay a certain amount by a certain date to catch up on what you owe and put your mortgage back in good order (to **reinstate** your mortgage), *or*
- you have to pay the whole amount you borrowed plus daily interest and other expenses (to **redeem** your mortgage).

The exact requests in the demand letter depend on the wording in your mortgage and what the lender wants to do. If you don't do what the demand letter asks, the lender can start foreclosure proceedings by filing a Petition at the court registry (and serving you with a copy).

### When to talk to a lawyer

If you think the lender misled or deceived you about the terms of the loan, or took advantage of your situation, it is very important that you talk to a lawyer right away.

### Is the lender's math correct?

Check the arithmetic and the terms of your mortgage to make sure that the lender has the terms, the interest rate, and the total amount right. Make sure you have been properly credited for all your payments.

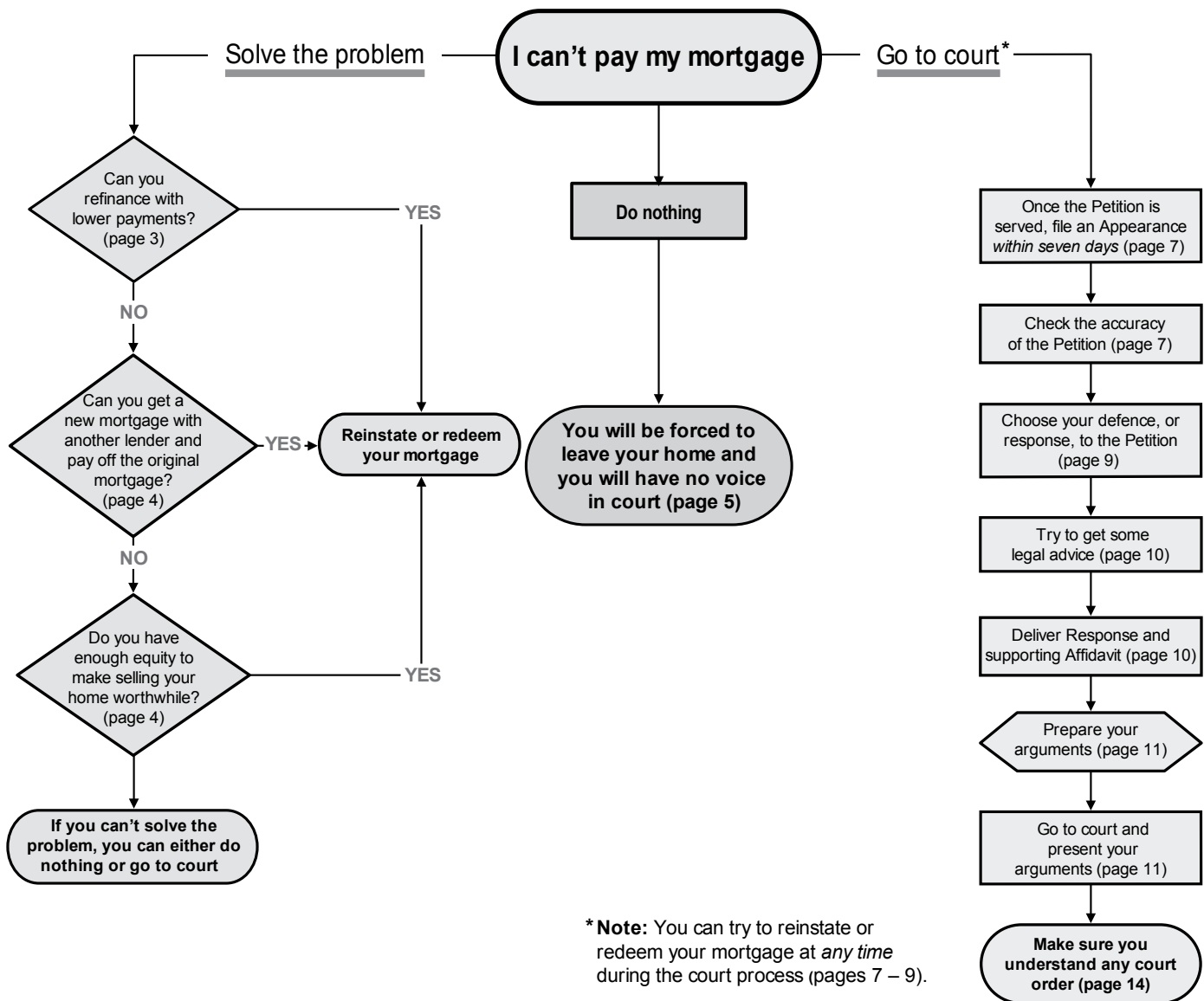
## What your options are

Your response to a reminder or a demand letter might be one of the following:

- A. Solve the problem (by reinstating or redeeming the mortgage)
- B. Do nothing (and lose your home)
- C. Go to court (after you receive the Petition — to fight the foreclosure, to get more time, or to cooperate)

The rest of this booklet discusses these three options.

## What you can do if you're facing foreclosure



# A. Solve the Problem

If you've missed some payments, you may be able to reinstate or redeem your mortgage as follows:

## Reinstate the mortgage

If you've missed some payments, but think you can manage them in the future, call the lender right away and try to work out a way to reinstate your mortgage. Most lenders don't want to own buildings. They'd rather have you keep your home and keep paying them.

Tell the lender how and when you can catch up on your payments. Ask what your options are for making payments so you can keep your home. The lender may be willing to change the terms of your mortgage (**refinance**) so that your monthly mortgage payments become smaller, but you pay them over a longer period of time.

Be sure to ask what the total cost of reinstating your mortgage will be. When you fall behind, the money you owe adds up quickly because interest builds up on unpaid amounts.

You'll also be charged for anything it costs the lender to collect from you, including legal fees.

If you can't reinstate the mortgage informally, you can try to get a court-ordered reinstatement, but you'll need legal help to do this.

## Redeem the mortgage

If the term of the mortgage has ended, and you have to pay off the whole amount you borrowed plus daily interest and other costs, you can either:

- get a new mortgage from another lender, *or*
- sell your house yourself,

and pay the lender. But first you should know what those costs might include.

### What you have to pay

The total amount you owe consists of:

- **the principal** still unpaid on the mortgage;
- **the interest**, which builds up daily;
- **the lender's costs** of collecting from you;
- **other mortgages**, builders' liens, and judgments against the property (Because second and third mortgage lenders are paid last, they're often the ones who start foreclosure proceedings. They do this to try to control the sale of your home so they will get back at least some of their money);
- **property taxes**; *and*
- for condominiums, **maintenance fees and any special assessments** you owe.

## Get a new mortgage from another lender

You can pay off your whole mortgage with one lender by getting another mortgage from another lender (this is called refinancing). The new mortgage has to be big enough to pay the other mortgage plus any costs that you owe.

**Note:** If there are other mortgages and/or judgments registered against the property, refinancing may not be practical.

You may not find it easy to find a new lender, but shop around. Sometimes mortgage brokers can help you find a new mortgage at a reasonable interest rate, but check their references and prices carefully. Be cautious of any offers of help you didn't request, including those from real estate agents.

If refinancing is possible, make sure you understand exactly what it will cost you. You want to know:

- the monthly payment amount,
- how many years you'll pay this amount,
- what the interest rate is,
- what the costs are, *and*
- what you'll own in the end.

If you are at all unsure, ask for a copy of the mortgage documents to show someone else before you sign. If the new lender won't let you do that or if the new mortgage sounds too good to be true, beware.

## Sell your home to pay the lender

You may want to sell your home right away if:

- you can't reinstate your mortgage;
- your home is in good condition and can be sold;
- your home is worth at least as much as the amount you owe the lender (plus any other mortgage or judgment registered against your title); *and*
- you don't want to or can't get a new mortgage.

You reduce the legal costs and interest you have to pay if you sell as soon as possible. This option may be more attractive if you have **equity** in your home. Equity is the money that is left for you to keep after you pay the mortgage, real estate commission, and any other costs.

### Can the lender sell my home without my consent?

Mortgage contracts usually contain a clause that gives the lender the right to take possession and sell your home as soon as you break the mortgage contract by missing a payment (this is called the "power of sale"). But no matter what the mortgage contract says, in BC, the lender can't sell your house without either your consent or a court order.

## B. Do Nothing

You may want to just ignore the demand letter, but be sure you know what the consequences are first.

### What will happen if you do nothing

Doing nothing is the easiest way to respond to foreclosure, but it has serious consequences. You can live in your home without making mortgage payments while the foreclosure proceedings are going on, which could be up to six months. But it also means that:

- you don't get any say in the court proceedings, which will go ahead without you;
- you may get little or no notice if the house is sold, or if you have to move; *and*
- you may have to leave your home much earlier than if you'd appeared in court.

In short, doing nothing is not a good option.

## C. Go to Court

If you can't reinstate or redeem your mortgage, you should follow the court process. This section describes what steps you can take to prepare for and appear in court, including how to choose the most appropriate actions or responses at each stage of the proceedings.

### What happens after the demand letter

If you haven't been able to reinstate or redeem your mortgage, the lender can start a court action to foreclose on your mortgage. This usually happens after you've missed three months of payments, but can happen sooner.

To start the court action, the lender's lawyer files a Petition at the local court registry and then files it in the land district where your property is registered.

### What is in the Petition

The Petition contains a list of what the lender wants the judge to do, including the following:

- Confirm that the mortgage and the debt exist.
- Confirm the amount you owe, including principal plus daily interest, legal costs, and other costs.
- Set the length of time you have to redeem or apply to reinstate your mortgage (usually the same as the length of time that you can keep living in your home).
- Grant a judgment against you and any guarantors.
- If there is a dispute over how much you owe, refer the file to a registrar (a court official) for an accounting (a calculation backed up with evidence).
- In some circumstances, give the lender control of the sale of your property.

- Issue an order that says how much you'll owe, in total, at the end of the redemption period.

Attached to the Petition is at least one **Affidavit** (a written statement, usually from a lawyer, swearing that the list of facts is correct) with attachments such as a copy of your mortgage, the title search, tax bills, and other related documents.

### Redemption period

This is the length of time you're allowed to stay in your home and try to redeem your mortgage before the lender either sells your home or gets title to it. The court usually sets this period at six months, though the trend recently is to set a shorter period, particularly when the amount owed to the lender is roughly equal to or more than the value of the property.

The courts will almost always set a very short redemption period if:

- the lender can show you're unnecessarily damaging the property, *or*
- you've abandoned the house and it is empty.

The Petition generally must be served on you in person by a process server. If the process server has trouble finding you, the court rules may allow the Petition to be served by a combination of mailing it and having it served on an adult at your residence. The lender can add the cost of service to what you already owe.

The Petition is also served on anybody else who has a "registered charge" against your home for money you owe them, which would be paid to them out of the sale proceeds of your home.

At this point, you can either try to fight or delay the foreclosure, or accept it and co-operate with the lender.

## What you can do after receiving the Petition

Read it. The more you know about what is in the Petition, the better your response to the foreclosure action will be. Also, there may be some explanatory information at the end of the Petition.

After you receive the Petition, you can help your case by taking the following steps:

1. File an **Appearance** in the court registry.
2. Study the Petition carefully.
3. Choose your line of defence or response to the Petition (depending on what is in the Petition).
4. Try to get some legal advice.
5. Prepare and deliver a Response document and a supporting Affidavit.
6. Go to court, listen carefully to the proceedings, and present your arguments.
7. Study any order the court makes to ensure you know what will happen next or what you should do.

## 1. File an Appearance

It is very important for you to file an Appearance *within seven days* of receiving the Petition. An Appearance is a one-page court form that, when filed, gives notice to all parties to the proceeding that you want to have copies of all subsequent court documents sent to you.

You can get an Appearance form (Form 8) at the court registry, which is named on the top right-hand corner of the Petition, or you can get one from the Supreme Court website at [www.courts.gov.bc.ca/supreme\\_court/](http://www.courts.gov.bc.ca/supreme_court/) (click Practice & Procedure → Acts, Rules, and Forms).

Fill in the form and give it to the registry clerk. If you can't get to the registry before the seven-day deadline, you can fax your Appearance. Call the court registry named on the Petition and ask for their fax number, or get it through Enquiry BC at 1-800-663-7867 (call no charge). If your fax arrives at the registry after 4:00 p.m., it will not be filed until the next business day. This means that if you fax your Appearance at 4:05 p.m. on a Friday, it will not be filed until the following Monday.

Get an extra filed copy (a copy with a registry date stamp on it) and send it right away to the Petitioner, whose "Address for Delivery" appears in the Petition.

**See the next page for a sample of the Appearance Form.**

## 2. Study the Petition

Your next steps will depend on your situation and what the lender is asking for in the Petition. Study the Petition and your mortgage documents carefully so you can decide on your strategy.

Double-check the arithmetic and the terms of your mortgage to make sure that the lender has the terms, the interest rate, and the total amount right. If you find errors, you can show them to the judge when you go to court.

### Penalties or fines

In BC, a lender can't charge a penalty or fine for late payment. After you've defaulted, the lender is entitled to be paid the entire amount borrowed plus interest to the day it is paid off, but the lender can't simply increase the amount you owe or increase the interest rate because you've defaulted. The lender is also entitled to the cost of collecting from you.

If you refinance, the lender can't demand payment of all the interest that would have been due by the time the mortgage matured.

### Stopping the foreclosure action

You can still stop a foreclosure by doing either of the following:

#### a. Redeem the mortgage

If, at any stage of the foreclosure proceedings before the court approves the sale of your home, you find yourself able to pay the lender in full what you owe on the

Sample Appearance (Form 8):

	No. _____ _____ Registry
<b>IN THE SUPREME COURT OF BRITISH COLUMBIA</b>	
<b>BETWEEN:</b>	<b>PETITIONER(S)</b>
<b>AND:</b>	<b>RESPONDENT(S)</b>
<b>APPEARANCE</b>	
Enter an appearance on behalf of	
_____	
(Respondent's name)	
_____	
(Address)	
_____	
(Address for delivery)	
Fax number for delivery (if any):	
Dated .....	
Respondent [ <i>or respondent's solicitor</i> ]	

mortgage, or you've arranged a new mortgage to pay off the old one, tell the lender right away and provide one or more of the following as proof that you can pay off the mortgage:

- A letter from a new lender saying the money is available to you
- A letter from your banker confirming that the money is in a trust account
- A letter from your lawyer confirming that the money is in the lawyer's trust account

If the lender doesn't accept your offer, go to court to ask that the foreclosure be stopped. You'll need to give the court proof (written evidence) that you have the money.

## b. Reinstate the mortgage

If you can at least come up with your missed payments, you may be able to have your mortgage reinstated. This means that you pay the arrears and then resume your payments. To reinstate, you'll need to have the tax payments up to date, and you may have to pay a legal fee for the foreclosure being started against you.

**Note:** A mortgage can only be reinstated if the term of the mortgage (usually between six months and five years) has not expired. If the renewal date has passed, reinstatement will not be an option unless the lender agrees to new terms.

## 3. Choose your line of defence or response to the Petition

Here are some of the most common demands made by lenders and your possible responses to them:

If the Petition asks for:	You need to show:
<p>an <b>Order for Conduct of Sale</b> to sell your home right away because:</p>	
<ul style="list-style-type: none"> <li>• the property has been abandoned or is being damaged,</li> <li>• you are unlikely to be able to reinstate your mortgage, <i>or</i></li> <li>• you are unlikely to be able to redeem your mortgage</li> </ul>	<ul style="list-style-type: none"> <li>• that you're taking good care of the property and that you're living there.</li> <li>• that there's a chance you'll have the money to keep your home.</li> <li>• what the present value of the property is. The best way to do this is with a proper appraisal (not just a letter from a real estate agent), <i>and/or</i></li> <li>• that you've listed your property with a real estate agent to demonstrate that you're trying to get the money to pay the lender.</li> </ul>
<p>a <b>redemption period shorter than six months</b> on the basis that:</p>	<p>that the six-month redemption period should be retained because:</p>
<ul style="list-style-type: none"> <li>• your financial prospects are hopeless or your debts are more than your home is worth,</li> <li>• repairs won't increase the value of your home,</li> <li>• you're not maintaining the home,</li> <li>• you're not paying taxes, strata dues, or levies for repairs, <i>and/or</i></li> <li>• the lender wants to get their money quickly</li> </ul>	<ul style="list-style-type: none"> <li>• it's possible you or your family can reinstate the mortgage or arrange refinancing. (This means you can live in your home while you try to find a financial solution.)</li> <li>• the building is currently being repaired and it will be worth more when the work is done.</li> <li>• the house is in good shape.</li> <li>• you are paying what you can towards these costs.</li> <li>• the present value of the property is higher than the estimate given by the lender and the longer period would allow time to get the highest possible price.</li> </ul>

*Continued on next page*

If the Petition asks for:	You need to show:
<ul style="list-style-type: none"> <li>• <b>legal costs</b> for the court action at any level higher than the normally allowed level</li> </ul>	<ul style="list-style-type: none"> <li>• that these costs have been unreasonably claimed. The court will deal with this under special rules for foreclosure costs.</li> </ul>
<p>See page 12 for the kinds of evidence you might need to prove any of these arguments.</p>	

**Note:** If the value of your home will not cover the amount owing on your mortgage, the Petition may ask for a personal judgment against you and any guarantors involved in the mortgage transaction. If this is the case, ask for an adjournment (postponement) of the application for a judgment. A judgment against you will badly reduce your credit rating and you will not be able to refinance.

#### 4. Try to get some legal advice

A lawyer can help you prepare the necessary court documents, gather your supporting documents, and present your evidence in court. Even if you can't afford to pay a lawyer for the whole court process, you may still be able to get some legal advice to help you prepare for court. For example, you could call the Lawyer Referral Service. The service can give you the name of a lawyer who'll see you for 30 minutes for \$25 (plus taxes). If you want to hire this lawyer, ask what his or her rates are. (See **Who can help** on page 17 for more information about this and other services.)

You can get information about all the forms that have to be filed, and blank copies of the forms, from any Supreme Court registry or on the Courts of British Columbia website at [www.courts.gov.bc.ca/supreme\\_court](http://www.courts.gov.bc.ca/supreme_court). Click Practice & Procedure → Acts, Rules, and Forms.

The lender's lawyer can't give you legal advice, but at or before court, he or she may be willing to answer your questions and listen to your concerns about the terms in the foreclosure Petition.

#### 5. Prepare and deliver a Response document and supporting Affidavit

In addition to preparing and filing an Appearance, you must prepare a document called a Response (Form 124). This document must be delivered to the lender (along with supporting Affidavits) *within eight days* of filing your Appearance. In a Response, you must state which parts of the relief asked for in the Petition (by the lender) you oppose and which parts you don't oppose. Your Response must also list all supporting Affidavits and other documents you intend to rely on at the hearing of the Petition. **See page 12 for a sample of the Response form.**

A Response must also contain an estimate of how long the hearing will take. Court time estimates are difficult to predict, even for lawyers. Most lawyers expect the average foreclosure hearing to take only a few minutes. If you have any arguments to make, the hearing may take 10 to 15 minutes. If you believe the hearing

will take much longer, it is important to get legal advice, as hearings that take more than 30 minutes require additional court documents to be filed.

If you don't prepare and deliver a Response, the lender can go ahead and set a court hearing date without notifying you.

You should also prepare an Affidavit and deliver it as early as possible to the lender's lawyer. This is a sworn statement that sets out the facts of your case. See page 19 for examples of what to include in your Affidavit.

Attach copies of your documents as evidence to support your statements in the Affidavit. (Always keep originals of documents so you can show them to the judge at the hearing.) You can have the Affidavit sworn by a lawyer, a notary public, a justice of the peace, or anyone else who has a commission to take oaths.

You don't have to file the Response and any Affidavit at the court registry until just before the hearing. The important thing is to get copies to the lender's lawyer in time. Once the lender's lawyer has received your documents, he or she will prepare a Notice of Hearing and possibly an Affidavit that responds to the evidence in your Affidavit. The Notice of Hearing sets out the date and time of the court hearing. It must be delivered to you at least two working days before the date that the lender's lawyer has picked.

Before attending the hearing, the last thing you must do is file the original copies of your Response and Affidavit at the court registry. You can actually do this any time between the date you first deliver them to the lender and the date of the court hearing.

## **6. Go to court, listen carefully to the proceedings, and present your arguments**

You must attend the hearing if you want to speak to the judge. If you don't show up at scheduled court hearings, the legal action goes on without you. If you need more time, go to the first hearing and ask the judge for more time to prepare your case. It may help to phone the lender's lawyer before the hearing to tell him or her that you need more time.

Although having a lawyer is helpful, you can represent yourself at the court hearing. Judges are more receptive if you are well-organized, reasonable, and polite.

If you can, go to the court a few days in advance to watch other foreclosure proceedings. It will help you feel more at ease if you see how things are done at a hearing. For your case, get to court at least 15 minutes before the hearing time. Tell the court clerk you are there and are acting on your own.

The lender's lawyer speaks first and tells the judge what the lender is asking for — the items listed in the Petition — and why. The lawyer reviews the lender's evidence with the judge, who may ask questions. You can make notes on any points the lawyer makes that you want to reply to.

When the lender's lawyer is finished, the judge will tell you it is your turn.

## Sample Response form (Form 124):

*[Style of Proceeding (names of parties)]*

**RESPONSE OF *[name of respondent]***

The respondent does not oppose the granting of the relief set out in the following paragraphs of the Petition (or Notice of Motion): *[set out paragraph numbers]*.

The respondent opposes the granting of the relief set out in the following paragraphs of the Petition (or Notice of Motion): *[set out paragraph numbers]*.

The respondent consents to the granting of relief set out in the following paragraphs of the Petition (or Notice of Motion) on the following terms: *[set out paragraph numbers and any proposed terms]*.

The respondent will rely on the following Affidavits and other documents: *[set out Affidavits delivered with this response and any other Affidavits or other documents already in the court file on which the respondent will rely]*.

The respondent estimates that the application will take ..... minutes.

Dated: .....

Respondent (or respondent's solicitor)

### What you can say to the judge

Prepare an outline of what you need to tell the judge and what Affidavits, letters, or other papers you want to show him or her as evidence. You can make notes of what you want to say, but it is best to speak directly to the judge. The judge will ask you questions about your situation and the information you've supplied.

If you didn't file an Affidavit, review the lender's Petition and Affidavits before the hearing, make a list of the points you want to tell the judge, and organize your supporting evidence in the same order. Make enough copies of the papers you're using to support your arguments to give to the judge and the other parties at the hearing.

You must, of course, say only what is true. Below are some examples of the kind of evidence you can use in court.

If, in the Petition, the lender asks for:	You can present evidence such as the following to fight the demand:
an <b>Order for Conduct of Sale</b> to sell your home	<ul style="list-style-type: none"> <li>• A letter from your employer to show you now have enough income to make payments</li> <li>• A commitment letter from a new lender who has agreed to refinance your home</li> <li>• A real estate listing agreement to show that you've listed the property and are trying to sell</li> </ul>
a <b>shorter redemption period</b>	<ul style="list-style-type: none"> <li>• A letter from a real estate agent to help convince the judge that prices are not likely to go down, or better, a formal appraisal of the property</li> <li>• Information about why you should be allowed to stay longer in your home (showing that you're taking care of the home)</li> </ul>

If, in the Petition, the lender asks for:	You can present evidence such as the following to fight the demand:
<p><b>access to the property</b> to make repairs and secure the property to preserve its real estate value because you're allowing the property to deteriorate or have abandoned it</p>	<ul style="list-style-type: none"> <li>• Proof that you've been maintaining the property (repair bills, photographs)</li> </ul>

### Co-operating with the lender to sell your home

Under some circumstances, it may be in your best financial interest to agree to sell your home early in the foreclosure process. This may be wise if:

- your home is in good shape;
- there is a good real estate market for your home at a reasonable price;
- you have enough equity in your home to cover your debts, including any property tax or (condominium) strata arrears and the real estate commission from the net sale proceeds; *and*
- you can't or don't want to arrange refinancing.

You could agree to a court order allowing the lender to manage the sale and simply give you notice when it is time to move.

To do this, you would file an Appearance and a Response and then co-operate with the lender and his or her lawyer. You can negotiate to stay in your home while it is being sold, but remember that interest will keep adding up while you stay.

#### **If you've abandoned your home**

If you've abandoned your home, the court may order that the lender can send in a security guard or do whatever is necessary to make the home secure. These costs are deducted from the sale proceeds.

Even when you agree to the sale and an offer is accepted, the lender needs a court order to clear other charges from the title to your home and to transfer the title. If you're consenting to the sale, the lender's lawyer will give you a Consent Order that states all the sale terms you've agreed to with the lender. Before signing it, make sure the terms are what you agreed to.

### Early transfer of title

In some cases, you may want to transfer the title to your home to the lender right away. After the lender has title (given in an Order Absolute), your mortgage contract no longer exists and neither does your obligation to pay any shortfall. This may be wise if:

- your home is in good shape;
- you have no equity in your home; *and*
- property values are likely to rise, so the lender may find it worthwhile to take title to your home.

The lender is normally entitled to apply for an Order Absolute after the redemption period has ended, but could ask for an immediate Order Absolute at the Order Nisi stage (see the next section) if you have no equity and the lender doesn't intend to try to collect the shortfall from you. Most lenders never ask for the Order Absolute because they want to keep the right to collect the shortfall from you after they eventually sell your home.

## 7. Study any order the court makes

When the judge has heard from everyone, he or she decides what must be done next. These decisions are listed in an **Order Nisi**. An Order Nisi is the main order in the proceedings. If the conditions set by the judge haven't been met by the end of a certain time, the lender will be able to apply to court for subsequent orders to complete the foreclosure process. For example, the order could say that if you haven't paid off the mortgage by the end of the redemption period (six months or shorter), the lender will have the right to come back to court to ask for an order to sell your home or an Order Absolute (giving the lender formal title to the property).

The Order Nisi always includes:

- the length of the redemption period (usually six months), *and*
- a judgment against you for the amount you owe under the mortgage, including daily interest, legal, and other costs. (But see the note on page 10 about asking for a postponement of this part of the Order Nisi.)

Depending on the circumstances, the Order Nisi might also include:

- an Order for Conduct of Sale, giving the lender the right to be in control of the sale;
- an Order setting out how any tenants (renters) are to pay their rent during the foreclosure; *and*
- the terms for the real estate listing agreement.

Read the order carefully. If you disagree with anything in the order, try to get some legal advice on how to proceed. The lender's lawyer will usually send you a copy, but it is a good idea to ask them to do so.

Remember that you have the right to try to sell your home during the redemption period unless the judge has made an Order for Conduct of Sale for the lender. If you can't sell your home, the lender's lawyer will probably eventually apply to the court to get conduct of the sale. Even so, your right to redeem or reinstate your mortgage continues after an Order for Conduct of Sale.

If you don't reinstate or redeem and the lender doesn't get initial control of the sale, there'll be another hearing.

If the court orders that the lender be given conduct of sale at the original hearing, or, at any later time, you'll receive a copy of an Affidavit that says what the appraised value of your home is.

When a sale order is requested, the lender's lawyer asks the judge to include in the order certain terms for the real estate listing agreement, such as the rate of

commission. The judge also sets the times when you have to let a real estate agent in to show your home. If you don't give the real estate agent access to your home, you could be cited for contempt of court.

If your home is not in saleable condition, the court may give the lender an order allowing its agents to have the property fixed up. These costs are deducted from the proceeds of the sale.

## What happens when your home is sold

After the initial court hearing at which an Order for Conduct of Sale is made, there must be a second hearing to confirm the terms of the sale. The order made at the second hearing is called an Order Approving Sale. If you've filed an Appearance and a Response to the Petition, you are entitled to receive a document notifying you of the second hearing. You'll receive a Notice of Motion, along with one or more Affidavits.

If you wish to contest the application by arguing, for example, that the proposed selling price is too low, you must file a Response document again and one or more supporting Affidavits. You must have those documents delivered to the Petitioner *within seven days* of your receiving the Notice of Motion. The lender will then deliver a Notice of Hearing and any responding Affidavits. Finally, you must file the original of the Response and any Affidavit at the court registry before the hearing.

When a home is sold under an Order Approving Sale, the proceeds of the sale are used to pay the real estate commission, the mortgage and other amounts owed to the lender, other mortgages, judgments, and items such as property tax, strata dues, or builders' liens still owing. You get anything left after all the debts registered against the property have been paid.

If the sale proceeds don't cover all that is owed, the lender still has a judgment against you for the remaining amount. They can try to collect this from you for up to 10 years; after that, they can renew the judgment.

The sale order will set a date by which you have to move out. This will usually be the possession date proposed in the sale contract that will be part of the lender's Affidavit. Courts usually give respondents around 30 days to move after the date that the Order Approving Sale takes effect, but it can be sooner.

## Important information for condominium owners

Special rules apply to mortgage payments for condominiums. To keep the mortgage in good standing or to reinstate or redeem it, you have to pay the strata dues and any "special assessment" condominium repair costs you owe. You can't sell your condominium unit without paying these charges because title to your property can't be transferred without a "Certificate of Full Payment" from the strata corporation.

If you are unwilling or unable to pay special condominium assessments — for example, for leaky condo repairs — your strata council is entitled to bring a type of "foreclosure" proceeding against you, even if there are disagreements about who is responsible for leaks, water damage, or other problems with your unit. You can't

wait for the outcome of legal action against the builder (or others) before paying your share. This “foreclosure” by the strata council is separate from any foreclosure a lender may bring against you for not making your condominium mortgage payments.

If you don’t pay, the strata corporation will take legal action against you. It will be able to file a lien against the title to your property. Also, you and the other owners are legally required to limit the amount of damage to the property, no matter who caused it.

## Important information for tenants

If you’re renting a property that is under foreclosure, you will be directly affected by the foreclosure, especially if you’re living in a house. The notice periods set out in the Residential Tenancy Act no longer apply. For example, if the courts approve an Order for Conduct of Sale, you will have to move out of the home by a stated “possession date,” unless the buyer agrees to allow you to continue renting the home. You will also have to move if the courts make an Order Absolute.

Unfortunately, you can do very little to change the foreclosure proceeding. You don’t have any say in the redemption period or the terms of a sale under an Order for Conduct of Sale.

If you’re living in the home when a foreclosure starts, the lender will want to make you a respondent in the foreclosure action. This means that the orders, such as an Order Approving Sale, will apply to you. You will be served with the usual Petition and Affidavits. If you rent a home after the foreclosure has started, the lender doesn’t have to serve you with the foreclosure documents; however, the foreclosure orders will still apply to you. You can still file an Appearance and should do so.

A lender may also ask the court to make a Receivership Order. This is a special order directed to you. This order will say that you have to pay your rent to the receiver rather than the landlord.

If you’re involved in (made a party to) a foreclosure, you will have to obey any of the terms in an Order for Conduct of Sale. For example, if the order says that the property can be shown by a real estate agent between 9 a.m. and 7 p.m. upon reasonable notice, you will have to let the agent show the property whenever the agent gives you notice.

The law isn’t clear about when the lender has to make you a party to the foreclosure. The lender will usually do this when it starts the foreclosure, but sometimes courts will allow the lender to add tenants as parties as late as when an Order for Conduct of Sale is being made.

# Who Can Help

## To get more information about foreclosure

### Dial-A-Law

Dial-A-Law is a service provided by the Canadian Bar Association, BC Branch. It is a library of scripts that give you information about the law in BC. For example, script #415 (“Foreclosure” — also available in Chinese) gives useful information about foreclosure. You can listen to this script at any time by calling the following numbers:

In the Lower Mainland: 604-687-4680

Outside the Lower Mainland: 1-800-565-5297 (call no charge)

Hours: 8:30 a.m. – 4:30 p.m., Monday – Friday

Website: [www.cba.org](http://www.cba.org) (click Public/Media → Dial-A-Law → Housing)

## To find legal help

### Lawyer Referral Service

If you don’t know a lawyer, try calling the Lawyer Referral Service. They will give you the name of a lawyer you can call for a half-hour appointment that costs \$25 (plus taxes). This service isn’t available in all areas of the province.

Ask for a lawyer who specializes in foreclosures. Lawyer Referral will give you a lawyer’s name, but you make the appointment. If the first referral doesn’t work out, you can call Lawyer Referral back and get another name.

The lawyer can give you some idea of what’s involved in solving your problem, and you can decide if you want to hire this lawyer. Ask the lawyer what the charge will be, and how he or she wants you to pay. You could ask what it would cost for him or her to just give you some help with preparing or reviewing your documents, without going to court.

In the Lower Mainland: 604-687-3221

Outside the Lower Mainland: 1-800-663-1919 (call no charge)

### Pro bono legal clinics

The following pro bono (free) programs offer brief help to people who can’t afford a lawyer.

#### Civil Chambers Duty Counsel Project

If you live in the Lower Mainland, you may qualify for assistance from a volunteer lawyer who is participating in the Civil Chambers Duty Counsel Project. Call 604-603-5797 or e-mail [chambers@probononet.bc.ca](mailto:chambers@probononet.bc.ca).

Pro Bono Law of British Columbia

Website: [www.probononet.bc.ca](http://www.probononet.bc.ca)

Salvation Army British Columbia Pro Bono Lawyer Consultation Program

In the Lower Mainland: 604-694-6647

Website: [www.probono.ca](http://www.probono.ca) (check their website to find clinics outside of the Lower Mainland)

Western Canada Society to Access Justice

In the Lower Mainland: 604-878-7400

Outside the Lower Mainland: 1-877-762-6664 (call no charge)

Website: [www.accessjustice.ca](http://www.accessjustice.ca)

# How to Draft an Affidavit

The top part of an Affidavit usually looks like this:

	J. Doe #1 [date Affidavit was made] [Court file number] No. S0000 [Your city/town] Registry
<b>IN THE SUPREME COURT OF BRITISH COLUMBIA</b>	
<b>BETWEEN:</b>	
	FINANCIAL INSTITUTION
	<b>PETITIONER</b>
<b>AND:</b>	
	Jean Doe and John Doe XXX CREDIT CORPORATION
	<b>RESPONDENTS</b>
<b>AFFIDAVIT</b>	
<p>I, Jean Doe, Homemaker, of the City of _____ in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:</p> <p>1. I am one of the Respondents in this matter. I have personal knowledge of the facts and matters sworn to in this Affidavit except where they are stated to be on information and belief. In that case, I do believe the facts and matters to be true.</p>	

1. Copy the information that is at the top of the Petition into the top of the Affidavit.
2. Set out your case in numbered paragraphs (starting from paragraph #1, as in the sample) in the rest of your Affidavit.
3. Include the following kinds of information:
  - Who you are
  - How old you are
  - Who lives in the home and how long you've lived there
  - What you paid for the home and how much your down payment was
  - Where you work or, if you are unemployed, how long you've been unemployed and why
  - Why you haven't been able to make payments on the mortgage
  - If you have health problems, what they are
  - What your financial circumstances are (Do you have any assets, pensions, RRSPs? Are you supporting anyone, including children?)
  - If your financial problems are temporary, when you think they may improve and how
  - What you are doing to try and pay off the mortgage
  - Your best information about the value of the home

The bottom part of an Affidavit usually looks like this:

SWORN BEFORE ME at the )	
city of _____, in )	
the Province of British )	
Columbia, this ____th day )	
of [Month], [Year]. )	
)	
)	
)	
_____ )	_____
	J. Doe

A Commissioner for taking  
Affidavits within British Columbia

4. When you've finished setting out the details, put the information shown in the sample above at the bottom of the Affidavit.
5. Have the Affidavit sworn (signed) by a lawyer, a notary public, or a justice of the peace at the courthouse. You must sign the Affidavit in front of this person. There may be a small fee for this. The person who signs the Affidavit must print/type/stamp his or her name above or below the signature, or the court registry may not accept the Affidavit.
6. Make enough copies for everyone listed in the Petition (plus one for the court registry).
7. Follow the instructions in this booklet about when you need to deliver your Affidavit to the lender and other respondents, and when you'll need to file the original copy.

See also "Drafting your own Affidavit" at [www.clasbc.net/publications/?CategoryID=5](http://www.clasbc.net/publications/?CategoryID=5).







Legal  
Services  
Society

British Columbia  
www.legalaid.bc.ca

October 2009

## Consumer Law and Credit / Debt Law



### Consumer Law and Credit / Debt Law

This manual is for paralegals, legal information counsellors, and lawyers with clients who have consumer or debt problems. It covers 45 topics, including bankruptcy, creditors, debtors, fraud, harassment, leases, mortgages and foreclosure, prepayment rights, recovery of goods, and torts of assault and trespass. It also includes consumer and debtor statutes, case citations, and consumer and debtor resources. Available online only at [www.lss.bc.ca/publications](http://www.lss.bc.ca/publications).