



**PRACTICE MEMORANDUM #1  
MORTGAGE SALE DEFICIENCY ACTIONS**

**Suggested Affidavits to be filed with respect to assessments of damages for mortgage sale deficiency actions**

Lender's Affidavit

1. The first affidavit should be an affidavit of a New Brunswick employee of the lender (unless the lender has no office in New Brunswick) with knowledge of the file relating to the mortgage in question (the 'mortgage') setting forth details of the original mortgage approval including a summary of any appraisal reports obtained by the lender or the insurer of the mortgage (the 'insurer') [for example CMHC or Genworth Financial] with respect to the market value of the mortgaged property at the time of the approval of the mortgage application. If no appraisal was obtained at that point in time, then the affidavit should set forth the value which was then assigned to the property by the lender and/or the insurer and the basis on which that value was determined (for example, if an electronic database of values was used). The lender's affidavit should also deal with any appraisal obtained by the lender either before or after the mortgage sale; as well as any 'opinion of value' from the listing real estate agent; along with the listing agreement and the determination of the list price. If the market value set forth in any opinion of value, new appraisal or the amount at which the property is listed for sale subsequent to the public auction is greater than 30% less than the original value assigned to the mortgaged property, an explanation for such decrease in value is to be set forth in the lender's affidavit. A copy of the listing agreement and any opinion of value of the property as well as any new appraisal should be attached to the lender's affidavit. The affidavit should provide a statement showing the calculation of the deficiency being claimed including a list of protective disbursements. Information should be provided to demonstrate the

necessity for incurring the protective disbursements. In the event the property was not sold to a third party at the public auction, the lender's affidavit should set forth the steps subsequently taken to sell the property by private sale.

#### Lawyer's Affidavit

2. The second affidavit should be an affidavit of the lawyer acting for the lender with respect to the power of sale proceedings. This affidavit should provide details relating to the demanding of payment and the conducting of the power of sale proceedings including issuing the demand letter and notice of mortgage sale in compliance with section 44 of the *Property Act*; conducting the public auction (including details of the highest bid, whether accepted or not) and conducting the resulting sale process including the closing of the sale of the property. Copies of the demand for payment; notice of sale; bidding papers; auctioneer's affidavit; deed and statement of adjustments from the closing of the sale of the property are to be attached to the lawyer's affidavit. In the event the property was withdrawn from the public auction the lawyer's affidavit should provide an explanation for such withdrawal.

NOTE: 1. The deponents of these affidavits should be available for cross-examination if required.

2. Confirmation is to be provided to the Court that copies of the above two affidavits have been forwarded to the insurer of the mortgage (for example CMHC or Genworth Financial).

**EFFECTIVE DATE: JANUARY 1, 2012**