Subject: **MORTGAGES, DEBENTURES AND ENCUMBRANCES**

BACKGROUND

The Land Titles Act defines a “mortgage” as "a charge on land created merely for securing a debt or loan." (1) Although at common law a mortgage operates as a transfer of the estate to the mortgagee, in the Torrens system a mortgage has effect as security only and does not operate as a transfer of the land charged.(2) A debenture, which usually creates a charge on all of a corporation's assets, or a trust deed, which usually creates a charge on assets to secure a variety of creditors acting through a trustee, is accepted for registration as a mortgage if land is specifically mortgaged in the document. As these instruments generally deal with assets in addition to land and assets that are located in various jurisdictions, very broad wording is used in the charging clauses (e.g., transfer, convey, assign, mortgage and charge) to cover all situations, however they are accepted as mortgages only.

The word "encumbrance" is used in the Land Titles Act in both a broad and a narrow sense. In its broad sense, it is defined as meaning "any charge on land created or effected for any purpose whatever, inclusive of mortgage, mechanics' or builders' liens, when authorized by statute, and executions against land, unless expressly distinguished." (3) In its narrow sense, an encumbrance is a specific type of instrument granted in the prescribed form "whenever the land is intended to be charged or made security for the payment of an annuity, rent charge or sum of money".(4)

A mortgage or encumbrance providing for the delivery of grain to the mortgagee or encumbrancee is registrable in the same manner as any other mortgage or encumbrance if it sets out the amount of grain of any specified description and grade as being the amount of grain deliverable pursuant to the instrument.(5)

REGISTRATION PROCEDURE

1. The following information must be provided in the mortgage:

a) the name of the mortgagor, which must be consistent with that of the registered owner, (6)

b) a description of the nature of the estate owned by the mortgagor (e.g., fee simple, leasehold or life) which must be consistent with the estate shown on the certificate of title,

c) a proper legal description,

d) the name and post office address of the mortgagee (a corporate mortgagee must comply with section 27 of the Land Titles Act) (7) (if the mortgage is being held under joint account, the tenancy field on ALTA should be endorsed with an “A”),

e) the principal amount secured or alternatively an unlimited or unknown amount with an affidavit of value of the land, and

f) the rate of interest, and
g) repayment provisions and special covenants, if any
h) the date of execution should be indicated but it is not necessary to reject if the omission of the date is the only defect.

An undefined interest of a tenant in common can be mortgaged provided the mortgagor states that they are mortgaging all of their interest and the mortgage does not purport to specify the proportionate share.

The interest of one joint tenant can also be mortgaged. Severance of the joint tenancy would not occur unless the interest was foreclosed. (8) Dower compliance is required if only one owner is mortgaging their interest.

As long as the registered owners have signed as mortgagors, a mortgage is not to be rejected if additional parties, such as guarantors, are named.

A mortgage that deals with more than one parcel, each of which is owned by a different registered owner, may be registered if all registered owners have signed the mortgage.

If a mortgage deals with more than one parcel and the mortgagor is not the registered owner of all the parcels, it can be registered against the parcels of which they are the registered owner if it indicates that they have an interest in the other parcels and it is accompanied by caveats against the other parcels. Otherwise, it should be rejected for clarification as the legal description may be in error. If the mortgagor subsequently becomes the registered owner of the other parcels, another copy or a Land Titles certified copy of the mortgage must be registered before a memorandum of the mortgage can be endorsed against the certificates of title for the newly acquired land.

If a mortgage deals with titled land and untitled grazing lease land, it may be registered. The mortgage is endorsed against the titled lands only. If the grazing lease lands are titled the supporting caveat mentioned above must accompany the mortgage.

2. Every mortgage must contain a charging clause, which is usually found at the end of the document. The charging clause prescribed in (FORM 15) is as follows:

> "And for better securing to the mortgagee the repayment in the manner set out above of the principal sum and interest (and other amount hereby secured), I hereby mortgage to E.F. all my estate and interest in the land described above."

3. The registered owner(s) must execute the mortgage.

4. Attestation requirements must be complied with.(9)

5. Dower requirements must be complied with.(10) If several parcels are included in the mortgage and the owners are not the same on each title, the required dower evidence may be different in respect of each title.

6. The approvals required under Part 17 of the Municipal Government Act and the Irrigation Act must be obtained if only part of a parcel is being mortgaged.

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Mortgage

The code used for registration at Land Titles is: MORT

7. **Special Instructions** - The D.R.R. may specify a last permitted encumbrance subject to which registration may proceed. If no special instructions are given, the mortgage is registered subject to all existing registrations. It is not necessary to review the list of permitted encumbrances in the mortgage.

8. If, in the process of examining a mortgage, it is noticed that schedules referred to have not been attached, the document is to be rejected. This usually occurs when a mortgage is given as collateral security to a promissory note.

9. **Land in National Parks** - Mortgages of leasehold estates in the National Parks must be consented to by an official of the federal department responsible for the National Parks. Consent is not required for sub-leasehold titles in the Town of Banff.

10. **Special Powers of Attorney for Mortgages** - If the mortgage has been executed under a special power of attorney, which only permits the attorney to execute one specific mortgage, the power of attorney may be discharged immediately following registration of the mortgage or at a later time on request by the registered owner or a subsequent registrant. Tariff item 11(5) is charged.

11. **Debentures and Trust Deeds** - As indicated in the Background, these documents are accepted if they meet the requirements of a mortgage.

12. **Encumbrances** - The Land Titles Act prescribes the use of (FORM 16) when registering an encumbrance. The form provides the following charging clause:

> "I, A.B., ... desiring to render the land available for the purpose of securing to and for the benefit of C.D., ... the (sum of money, annuity, or rent charge) hereinafter mentioned, do hereby encumber the land described above for the benefit of C.D. with the (sum, annuity or rent charge of ...)".

The procedures outlined for mortgages are to be followed.

If the encumbrance relates to an annuity or rent charge, no reference is made to the amount secured.

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Encumbrance

The code used for registration at Land Titles is: ENCU

13. **Conditional Sales Agreements** - No mortgage, charge or encumbrance on land, and no caveat founded thereon, that is contained in, endorsed on or annexed to a written order, contract or agreement for the purchase of a chattel is registrable under the Land Titles Act.(11)

14. **Fees** - Fees are based on the principal amount secured, subject to the exceptions listed in items 16, 17 and 18. Where the amount secured is expressed in other than Canadian funds, a letter from the lending institution or the solicitor specifying the equivalent value in Canadian funds based on the current exchange rate is required for fee calculation purposes. The endorsement of the amount on title is to be in foreign funds (e.g., $100,000 (U.S. FUNDS)).

15. **Land in Alberta Forming Only Part of Security** - Where the amount secured by a mortgage or encumbrance is greater than the value of the land or interests in land against which it is to be registered, the fee may be based upon the value of the land or interests in land. This usually occurs when the security includes additional assets such as personal property, land in another jurisdiction or untitled land. The value must be established by way of a statutory declaration that incorporates the wording of s.102(1) concerning the value of any improvements, which are intended to be made to form part of the security. The endorsement on title must indicate the principal amount secured not the value in the statutory declaration.

16. **Supplemental Mortgage or Encumbrance** – A supplemental mortgage is a mortgage or encumbrance in which the mortgagee or encumbrancee is the same party as the mortgagee, encumbrancee or transferee under a subsisting registered or caveated mortgage or encumbrance and it is established that the mortgage or encumbrance is supplemental or collateral to the registered or caveated mortgage or encumbrance.

A supplemental mortgage must:

a) be made by the same mortgagee(s) or encumbrancee(s) as the original mortgage(s) or encumbrance(s), and
b) meet all the requirements of a mortgage (see above), and
c) contain the legal description(s) of the supplemental or additional land(s), and
d) have attached to it a statutory declaration for reduced fees stating that the mortgage or encumbrance is supplemental or collateral to the registered or caveated mortgage and include the registration number(s) of the previously registered mortgage(s) or encumbrance(s) to which it is supplemental. The minimum registration fee will be charged prescribed in s.102(1). (Use Fee Calc on mortgage). If fees were originally paid prescribed in s.102(1) (i.e.,

based on the value of the land), the greater of the minimum registration fee or the fees prescribed in s.102(1) less the fees originally paid will be charged. If the statutory declaration for reduced fees is not attached at the time of registration, full fees will be charged.

If the principal amount given in the supplemental mortgage has increased from the original principal amount of the previously registered mortgage(s) or encumbrance(s), the registrant must also provide fully executed mortgage amending agreement(s) for each of the original mortgage(s) or encumbrance(s) reflecting the increased principal amount and any changes to the terms (if applicable). Fees for the first mortgage amending agreement will be charged on the additional amount secured prescribed in s.102(1). A statutory declaration for reduced fees is required for each additional mortgage amending agreement, (if any) for the minimum registration fees to be charged prescribed in s.102(1). The order of registration of the documents listed on the Document Registration Request (D.R.R.) must reflect the amending agreement(s) to the original mortgage(s) first followed by the supplemental mortgage.

For a supplemental mortgage only *(no increase in the amount or change in the terms)*:

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Mortgage

The code used for registration at Land Titles is: MORT

For a supplemental mortgage and amending agreement(s) for the original mortgage(s) or encumbrance(s):

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is:

- Amending Agreement (list one for each amending agreement to be registered)
- Mortgage

The code used for registration at Land Titles is:

- AMEA (one for each amending agreement submitted)
- MORT

17. **Replacement Mortgages or Encumbrances –** A previously registered mortgage or encumbrance can be replaced by the registration of a fully executed new mortgage or encumbrance. The new mortgage or encumbrance must:

a) be made by the same mortgagee(s) or encumbrancee(s) as the original mortgage(s) or encumbrance(s) it is to replace, and

b) meet all the requirements of a mortgage (see above), and

c) contain all the legal descriptions of the original mortgage as well as any supplemental or additional lands, and

d) have attached to it a statutory declaration for reduced fees stating that the mortgage or encumbrance is a substitution of the previously registered or caveated mortgage(s) or encumbrance(s) and that the previously registered mortgage(s) or encumbrance(s) will be discharged. The minimum registration fee will be charged if there is no increase in the principal amount pursuant to s.102(1). If the principal amount has increased, the fees are calculated on the additional amount secured pursuant to s.102(1). (Use Fee Calc on mortgage). If fees were originally paid pursuant to s.102(1) (i.e., based on the value of the land), the greater of the minimum registration fee or the fees prescribed in s.102(1) less the fees originally paid will be charged. If the statutory declaration for reduced fees is not attached at the time of registration of the replacement mortgage, full fees will be charged.

The registration of a replacement mortgage establishes a new priority on title. It does not maintain the same priority of the original mortgage.

18. **Registration in Both Offices** -If a mortgage or encumbrance charges land in both the North and South Land Titles Districts, it may be registered. Full registration fees are charged on the first registration and the registration fee specified in s.102(1) and, if applicable, extra endorsement fees prescribed in Tariff item 13 are charged on the second registration.

19. **Encumbrance Fees** - If an encumbrance secures an annuity, rent charge, vendor's lien or purchaser's lien, s.102(1) is charged. However, if it secures an amount where the maximum amount of the encumbrance is not known or ascertainable, the fee is based on the value of the land or interest in land being encumbered or an amount declared by the encumbrances to be a maximum amount in respect of which security will be claimed.

20. **Postponement** - A registered mortgage or encumbrance may be postponed to a subsequently registered instrument or caveat. (12)

21. **Transfer of a Mortgage or Encumbrance** - Mortgages and encumbrances may be transferred by the use of a transfer in the prescribed form (FORM 18). If the transfer contains additional covenants and conditions that are not included in the prescribed form, it is to be rejected. Attestation requirements must be complied with. (13)

A transfer of mortgage, which has the effect of transferring from the current mortgagee

to themselves, is not registrable at the Land Titles Office. (i.e., CIBC MORTGAGES INC TO CIBC MORTGAGES INC IN TRUST FOR RRSP NO. ...). Alternatively, if a portion of the mortgage is transferred to a current mortgagee those interests should be consolidated.

A mortgagee may transfer part of the sum secured by the mortgage. The part transferred continues to be secured by the mortgage and may be given **priority** over the remaining part, **deferred** or continue to rank **equally** with the remaining part under the security of the original mortgage as specified in the transfer. (14) Thus, the transfer must state the ranking of the part being transferred before it can be registered (FORM 19). Use "PF16" to include ranking in the endorsement:

"RANKS _____ WITH THE REMAINING SUM"

Check for any amending agreements that may have been registered increasing the principal amount and adjust calculations for mortgagees accordingly.

A mortgagee may also transfer a specified undivided interest in the mortgage. However, a transfer, which refers to only part of the land charged by the mortgage, will not be accepted for registration.

22. **Mortgage Amending Agreement** – An agreement amending the terms of a mortgage (or encumbrance), which is executed by the registered owner and by the mortgagee, meeting attestation requirements can be registered. (15)

Dower requirements must be complied with. The amending agreement must refer to the registration number of the mortgage and be endorsed against all lands secured by the original mortgage.

Legal descriptions are not required, all titles the mortgage is against will be amended. The endorsement is as follows:

"AMENDING AGREEMENT RE MORTGAGE 852123456".

If the amount of the mortgage has been increased / decreased, the new principal amount is included in the endorsement.

Separate amending agreements are required for <u>each</u> mortgage or encumbrance being amended. If the mortgage being amended is supplemental or collateral to another mortgage(s) or encumbrance(s) and the principal amount is being increased, statutory declaration for reduced fees is required for each additional amending agreement after the first. S.102(1) is charged for the first amending agreement and s.102(1) is charged for each additional amending agreement. When an amending agreement is amending terms only, s.102(1) is to be charged.

An amending agreement, which adds new land to the mortgaged premises, cannot be registered, as the mortgagee is not the owner of a registered interest in the new land as required by section 129 of the Land Titles Act.

23. **Seizure of Mortgages** - Section 51 of the Civil Enforcement Act, S.A. 2000, c. C-15 provides for seizure of mortgages. The Civil Enforcement Agency may register a notice of seizure for an instrument. The writ of enforcement must be registered against the instrument prior to the notice.

A notice of seizure is discharged upon receipt of written direction from the applicable Civil Enforcement Agency, and the usual attestation requirements apply.

24. **Discharge of Mortgage or Encumbrance** - The Land Titles Act prescribes a form of discharge (FORM 7), which may be used for the discharge of the whole or part of the instrument, either as to land or monies. (16) A discharge as to the interest of a mortgagee or an encumbrancee may be accepted for registration. The discharge must state the registration number of the instrument and, in the case of a partial discharge, must provide current legal descriptions for the land from which the instrument is being discharged. If the mortgage is being discharged in full, no legal descriptions should be provided in the discharge document. A discharge can be registered even though it does not contain an acknowledgment of receipt of the money as there can be circumstances where the mortgagee is prepared to release their security but the loan has not been paid in full.

25. The discharge must be executed by the mortgagee or transferee of the mortgage or an attorney pursuant to a power of attorney. See procedure under POA-1 for the requirements with respect to use of a power of attorney. Attestation requirements must be complied with. (17) If the mortgage is held on "joint account", only one of the mortgagees is required to sign the discharge; this does not apply where the mortgagees are described in the mortgage as joint tenants.

26. A mortgage must be transmitted to the personal representative of a deceased mortgagee before a discharge of the mortgage executed by the personal representative is registrable. (18) The formal application to transmit the instrument is not required when the instrument is subsequently being discharged, a certified copy of probate will suffice to transmit the instrument. If the mortgagees are joint tenants, a discharge by the surviving joint tenant can be registered if it is accompanied by acceptable evidence of death. (19)

27. If the mortgage is discharged by a judge's certificate (20) or a judge's order, section 191 must be complied with. (21)

28. A discharge of mortgage discharges the mortgage and all transfers, amending agreements and postponements of it whether or not they are referred to in the discharge. It does not discharge any caveat in respect of the mortgage unless the caveat registration number is expressly included in the discharge document.

29. **Fees** - Tariff item 11(5) is charged for a discharge.

STATUTE AND CASE REFERENCES

Statute references are to the Land Titles Act, R.S.A. 2000, c. L-4, unless otherwise indicated.

1. s. 1(o)
2. s. 103
3. s. 1(e)
4. s. 102(1)(2)
5. s. 102(3)
6. see No. 5 in procedure on Transfers TRF-1
7. see procedure on Corporations - Acquisition & Disposition of Interests COR-1
8. V. DiCastri, *Registration of Title to Land*, Vol. 1, at paragraph 258
9. see procedures on Attestation AFF-1, AFF-2 and COR-1
10. see procedure on Dower DOW-1
11. s. 105
12. s. 107
13. see procedures on Attestation AFF-1, AFF-2 and COR-1
14. s. 109
15. s. 129
16. s. 106(1)
17. see procedures on Attestation AFF-1, AFF-2 and COR-1
18. see procedure on Transmission on Death TRA-1
19. see procedure on Deceased Joint Tenant - Transfer of Interest TEN-1
20. s. 106(1)(b) and (c)
21. see procedure on Court Orders - Certificate of No Appeal ORD-1