Law Reform
Commission of
Saskatchewan

Reform of *The Land Contracts (Actions) Act*

Consultation Paper

March 2013

This consultation paper:

- considers the content and history of *The Land Contracts (Actions) Act*;
- reviews the mortgage remedies available in other Canadian common law provinces;
- reviews the recommendations respecting mortgage remedies made by other Canadian law reform agencies;
- presents the need for reform of the Act; and,
- offers possible approaches to reform the Act.

YOUR COMMENTS AND OPINIONS ARE WELCOME.

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission*, proclaimed in force in November, 1973, and began functioning in February, 1974.

The Commission is incorporated by an Act of the Saskatchewan Legislature. Commissioners are appointed by Order in Council. The Commission's recommendations are independent, and are submitted to the Minister of Justice and Attorney General of Saskatchewan for consideration.

Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice and Attorney General. After preliminary research, the Commission usually issues background or consultation papers to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister of Justice and Attorney General as final proposals.

At present, the Commission is funded by grants from the Law Foundation of Saskatchewan and the Ministry of Justice.

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CALL FOR RESPONSES

The Law Reform Commission of Saskatchewan is interested in your response to this consultation paper. Your comments and opinions on the topic are welcome. Please allow the following questions to guide you in your response:

1. Is *The Land Contracts (Actions) Act* in need of reform? Why? (Refer to Part 6.)
2. Should *The Land Contracts (Actions) Act* be repealed? (Refer to Part 7.1.)
3. Which functions of *The Land Contracts (Actions) Act* should be maintained and which are no longer necessary? (Refer to Part 7.2.)
4. Should *The Home Owners' Protection Act* be repealed? (Refer to Part 7.3.1.)
5. Should *The Agreements of Sale Cancellation Act* be repealed? (Refer to Part 7.3.2.)

How to Respond

Responses may be sent **no later than October 31, 2013**:

By email - director.research@sasklawreform.com
By fax - (306) 966-5900
By mail - Law Reform Commission of Saskatchewan
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All responses will be treated as public documents, unless you expressly state that your response is confidential. Respondents may be identified by name in the final report for the project, unless they expressly advise to keep their names confidential.

1. INTRODUCTION

This consultation paper on *The Land Contracts (Actions) Act*[1] (the *LCAA*) is the first part of a larger project to review and update the law of mortgages in Saskatchewan. The project was undertaken by request of the Minister of Justice and Attorney General pursuant to clause 6(c) of *The Law Reform Commission Act*.[2]

A mortgage is created when a person borrows money and gives an interest in real property as security. If the borrower[3] (the mortgagor) fails to make the mortgage payments as required, the lender (the mortgagee) may start foreclosure proceedings to recover the money still owing under the mortgage. When a lender successfully completes foreclosure proceedings, the lender becomes the owner of the property.[4] The lender may then sell the property to recoup the money it lent to the borrower.

Foreclosure involves lengthy legal proceedings taken in the Court of Queen's Bench and is governed by several statutes, including the *LCAA*. As the Court of Queen's Bench for Saskatchewan noted recently, "*The Land Contracts (Actions) Act* is consumer protection legislation intended to provide mortgagors with a degree of protection by requiring mortgagees to first seek leave of the court before they are permitted to commence foreclosure proceedings."[5] The *LCAA* is 70 year old legislation, having been enacted in 1943.[6] This consultation paper considers the steps required by the *LCAA* for residential mortgages and whether they are still necessary or desirable.

2. WHAT THE ACT DOES

2.1. Application of Act

The *LCAA* defines "action" as:

(i) an action by a mortgagee or his personal representatives or assigns for:
  (A) foreclosure of an equity of redemption;
  (B) sale or possession of mortgaged premises; or

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[1] RSS 1978, c L-3 [*LCAA*].
[2] RSS 1978, c L-8.
[3] While this paper refers only to "the borrower," the term will frequently include all those parties that have an interest in the property, including subsequent encumbrancers and guarantors.
[4] The lender may choose to apply for judicial sale rather than foreclosure, and the property will be sold to a third party through a judicially-supervised sale process.
[5] *Resmor Trust Company v MacDonald*, 2010 SKQB 198 at para 15.
[6] *The Land Contracts (Actions) Act,* SS 1943, c 17, s 5 [*LCAA 1943*].

(C) the recovery of any moneys payable under a mortgage; or

(ii) an action by a vendor of land or his personal representatives or assigns for:

(A) specific performance or cancellation of;

(B) sale or possession of land sold under; or

(C) any other relief that may be granted under;

an agreement for sale of land.[7]

The *LCAA* provides that an action, as defined, may only be commenced by obtaining leave of the court.[8] An action commenced without obtaining leave as required by the Act is a nullity.[9] Parties, except for corporate bodies, cannot waive the application of the Act.[10] Therefore, all actions must follow the *LCAA*, except for actions on:

(a) farm land;[11]

(b) Industrial Development Bank mortgages;[12]

(c) Federal Business Development Bank and Business Development Bank of Canada mortgages;[13]

(d) mortgages and agreements of sale made under *The Saskatchewan Housing Corporation Act*,[14] *The Housing and Urban Renewal Act, 1966*,[15] the *National Housing Act* (Canada),[16] or the *National Housing Act, 1954* (Canada),[17] securing loans made with respect to low income, cooperative housing, urban renewal and student housing projects, as well as general housing assistance;[18] and

(e) corporate mortgages and agreements of sale, where the corporation has agreed in writing to waive the application of the *LCAA*.[19]

2.2. Notice of intention to Provincial Mediation Board

Before starting an action, the lender must first serve a notice of intention on the Provincial Mediation Board, advising that the lender intends to start an action against the borrower.[20] The

[7] *Supra* note 1, s 2.
[8] *Ibid*, s 3(1).
[9] *Ibid*, s 3(2).
[10] *Ibid*, s 5(1).
[11] *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1 [*SFSA*].
[12] *LCAA*, *supra* note 1, s 6.
[13] *Ibid*, s 7 (only on those mortgages granted on or after October 2, 1975).
[14] RSS 1978, c S-24.
[15] SS 1966, c 53.
[16] RSC 1985, c N-11.
[17] SC 1953-54, c 23.
[18] *The Saskatchewan Housing Corporation Act*, *supra* note 14, s 46(1).
[19] *LCAA*, *supra* note 1, s 5(2).

Provincial Mediation Board notifies the borrower that the lender intends to start an action, and offers the opportunity to attempt to mediate a settlement.[21] The Provincial Mediation Board has no power to stop the proceedings.[22]

2.3. Application for an appointment

Thirty days after the notice of intention has been served on the Provincial Mediation Board, the lender may apply to a judge, without notice to the borrower, for an appointment to hear an application for leave to commence the action.[23] Once the judge has set the date of the hearing, notice must be served on the borrower and any other interested parties, as set out in subsection 3(4) of the *LCAA*, at least 15 days before the date of the hearing.[24] The hearing may proceed without notice and the application for leave to commence may be disposed of without notice to the borrower or interested parties if:

a) there is no person to serve as described in subsection 3(4) of the *LCAA;*
b) the borrower has consented to the application; or
c) the borrower has abandoned the land and does not reside in the province.[25]

At the hearing, the lender will appear before the court and ask the court's permission to start an action by issuing a statement of claim against the borrower. The application for an appointment must be made at the judicial centre nearest to which the land or any part of the land is situated.[26]

2.4. Hearing for leave to commence

At the hearing for leave to commence an action, the judge has broad discretion to request information, grant adjournments, or grant or refuse the application to start an action.[27] The judge at a hearing may request the following information from the parties:

(a) the value of the land;
(b) the state of cultivation of the land;

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[20] *Ibid*, s 3(2)-(3).
[21] *The Provincial Mediation Board Act*, RSS 1978, c P-33, s 6 [*PMB Act*].
[22] Government of Saskatchewan, *Facts about the Provincial Mediation Board* (1970).
[23] *LCAA*, *supra* note 1, s 3(2).
[24] *Ibid*, s 3(4), (5), (7).
[25] *Ibid*, s 3(4).
[26] *Ibid*, s 3(6).
[27] *Ibid*, s 3(9)-(11).

(c) the state of the borrower's account with the lender;
(d) the income and assets of the parties;
(e) prevailing conditions of a local or temporary nature; and
(f) all other matters that may appear relevant.[28]

Normally, the judge at the hearing will consider how much equity the borrower has in the property (the difference between the property's value and the mortgage debt), how many payments have been missed, whether the borrower can make up the payments, and the reason the borrower has fallen behind on payments.

Based on this information, the judge may decide to adjourn the hearing to a later date, which commonly occurs if the borrower has indicated that he or she will try to make up the payments, or has a plan to sell the property. If the hearing is adjourned, when the parties appear on the next hearing date, a judge will consider the same information as at the earlier hearing date and decide whether to grant or refuse the application, or whether to adjourn again. The application may be adjourned an unlimited number of times, but the application may not be adjourned for longer than eight months in total.[29]

If, at a hearing, a judge grants the application, the lender may issue a statement of claim against the borrower to start the action. If a judge dismisses the application, the lender may not issue a statement of claim against the borrower, but the lender is not barred from beginning the process again by serving a notice of intention.[30]

In deciding how to dispose of the application for leave to commence, the *LCAA* provides that "the judge shall have and exercise discretion in each case and shall act upon his own view of the proper order to be made having regard to all the facts."[31] The judge is also given broad discretion to order any party to the application to pay all or a portion of the costs of the application.[32] The *LCAA* does not list any specific considerations for the judge when exercising his or her discretion, which caused the Saskatchewan Court of Appeal in 1943 to comment: "I do not think that the Court should attempt to set out any principles to be followed in the

[28] *Ibid*, s 3(9). "The state of cultivation of the land" is likely no longer required since farm mortgages were excluded from the requirements of the *LCAA* (see Part 5.3).
[29] *Ibid.* Although the *LCAA* states that an application may only be adjourned eight months, most practitioners take this restriction to mean that if the application *is* adjourned beyond eight months, the lender must start the process all over again with a notice of intention to the Provincial Mediation Board.
[30] *Ibid*.
[31] *Ibid*, s 3(10).
[32] *Ibid*, s 3(11)

exercise of the discretion provided by *The Land Contracts (Actions) Act, 1943*; the discretion provided is very wide and its exercise must depend on the circumstances of each case."[33]

2.5. Starting a foreclosure action

If a judge allows the lender's application for leave to commence, the lender may begin a foreclosure action against the borrower. The *LCAA* does not provide any guidance on the requirements to start or carry on an action in the Court of Queen's Bench. Those details are left to *The Queen's Bench Rules* and the practice of the court.[34]

To begin a foreclosure action, the lender prepares a statement of claim describing how the mortgage payments are in arrears or the mortgage is otherwise in default. In the statement of claim the lender asks the court for an order to foreclose on the mortgage or for judicial sale. The court clerk issues the statement of claim which the lender serves on the borrower, giving the borrower an opportunity to file a statement of defence. If a defence is filed, normal litigation procedures follow. If the defendant does not file a defence, the lender will apply for an order nisi for foreclosure or judicial sale. The court usually grants an order nisi including a redemption period, a length of time within which the foreclosure action will be terminated if the borrower pays the arrears and costs. The redemption period in Saskatchewan is usually three months, although it may be shortened or extended at the discretion of the court.[35]

If the borrower does not pay the arrears or the full amount of the debt owed within the redemption period, the judge may, upon the lender's further application at the expiry of the redemption period, grant a final order for foreclosure or, if an order nisi for judicial sale, the lender may sell the property. A final order for foreclosure passes title in the property to the lender, making the lender the owner of the property, and requires the borrower to vacate the property. An order confirming sale passes ownership of a property sold by judicial sale to the purchaser. Following foreclosure or judicial sale, the borrower no longer has any right to the

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[33] *Huron & Erie Mortgage Corp v Chambers*, 1943 CarswellSask 5 at para 14, [1944] 1 D.L.R. 131 (CA).

[34] Saskatchewan, *The Queen's Bench Rules* [*QB Rules*]; see especially Part Thirty-Seven "Foreclosure and Cancellation Proceedings." New rules of court will come into effect on July 1, 2013: *2011 Queen's Bench Rules* [*new QB Rules*], online: Law Society of Saskatchewan <http://www.lawsociety.sk.ca>; see especially Part 10 - Division 5 "Foreclosure and Cancellation Proceedings." For more general information describing a foreclosure action in Saskatchewan, see *Debts and Credit*, online: Public Legal Education Association <http://www.plea.org>.

[35] Grant A Richards, "Section 5 Foreclosure Actions" in Saskatchewan CPLED Program, *Debtor Creditor* (2009) at 5-17; Yens Pedersen, "Orders Nisi and Final Orders: Selected Issues" in Saskatchewan Legal Education Society Inc, *Foreclosure Proceedings* (April 2003) at 7.

property.[36] If the mortgage was given to secure all or part of the purchase price of the land, the lender may not pursue the borrower for any deficiency on the mortgage debt following foreclosure or judicial sale.[37]

2.6. Discretion of the court in an action

On an application for order nisi or final order, the *LCAA* again gives the judge broad discretion to request information and to grant or refuse orders. The judge in an action may require the parties to provide information respecting:

(a) the value of the land;
(b) the state of cultivation of the land;
(c) the state of the borrower's account with the lender;
(d) the income and assets of the parties;
(e) prevailing conditions of a local or temporary nature; and
(f) all other matters that may appear relevant.[38]

The judge may make any inquiries regarding the matters listed above as the judge deems necessary. Based on the information, the judge may:

(a) grant or refuse to grant an order, including an order nisi for foreclosure or judicial sale and a final order for foreclosure or judicial sale;
(b) prescribe any terms or conditions to an order, vary or extend an order from time to time, and give any direction as to costs;
(c) postpone the payment of money due to the lender;
(d) stay the action.[39]

The judge's discretion in an action is described in subsection 4(1) of the *LCAA*:

> in disposing of an application the court or judge shall have and exercise discretion in each case and shall act upon its or his own view of the proper order to be made having regard to all the facts.[40]

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[36] Some extremely limited exceptions to this principle exist, but need not be discussed within the confines of this paper: see e.g. *Alexanian v Dolinski*, [1968] SCR 473, 67 DLR (2d) 646; *Petranik v Dale*, [1977] 2 SCR 959, 69 DLR (3d) 411; Joseph E Roach, *The Canadian Law of Mortgages*, 2d ed (Markham, ON: LexisNexis, 2010) at 75-87.
[37] *The Limitation of Civil Rights Act*, RSS 1978, c L-16, s 2.
[38] *Supra* note 1, s 4(1). "The state of cultivation of the land" is likely no longer required since farm mortgages were excluded from the requirements of the *LCAA* (see Part 5.3). This list is the same as in section 3(9) for a hearing for leave to commence.
[39] *Ibid*.

2.7. Appeal of judgments or orders under the LCAA

An appeal may be taken to the Court of Appeal on any order made on an application for leave to commence, or any judgment or order made in an action.[41] The *LCAA* provides for an appeal procedure that differs from the procedure outlined in *The Court of Appeal Act, 2000* and *The Court of Appeal Rules*, at least for appeals on leave to commence.[42] The appellant must file a written notice of appeal with the Registrar of the Court of Appeal within 15 days after the order, indicating "with reasonable certainty the fiat or order complained of."[43] After the Court of Appeal fixes the date of the appeal hearing, the appellant must serve the respondent with a copy of the notice of appeal four clear days before the return date, although the time for service may be abridged by the court on an application without notice.[44] Any person who did not appear on the application does not need to be served with a notice of appeal.[45] The notice of appeal is served in the same manner as the notice of the hearing for leave to commence, or may be served on the respondent's lawyer if the respondent was represented by a lawyer on the application.[46]

If an appeal is taken on a leave to commence application or on an action, the Queen's Bench judge must provide a certificate to the Court of Appeal disclosing what, if any, inquiry the judge made and provide all the information on which the judge acted. This certificate forms part of the record before the Court of Appeal.[47] If the Queen's Bench judge is absent, ill, or deceased, the Court of Appeal may hear and dispose of the appeal without a certificate.[48] The Court of Appeal has discretion similar to that of the Court of Queen's Bench: the Court of Appeal may draw inferences of fact, and it may make the order that, in its judgment, the Queen's Bench judge ought to have made.[49] An order of the Court of Appeal on a leave to commence application may not be appealed except on a question of law.[50]

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[40] *Ibid*.
[41] *Ibid*, s 3(12)-(13), 4(1).
[42] *The Court of Appeal Act, 2000*, SS 2000, c C-42.1; Saskatchewan, *The Court of Appeal Rules* [*CA Rules*].
[43] *LCAA*, *supra* note 1, s 3(14).
[44] *Ibid*, s 3(14.1), (14.2), (14.4).
[45] *Ibid*, s 3(14.3).
[46] *Ibid*, s 3(14.2). The *QB Rules*, *supra* note 34, apply with respect to service of a notice of appeal: *CA Rules*, *supra* note 42, s 3(15).
[47] *Ibid*, s 3(16), 4(2)-(3).
[48] *Ibid*, s 3(16.1), 4(3).
[49] *Ibid*, s 3(17), 4(3).
[50] *Ibid*, s 3(18).

3. OTHER JURISDICTIONS

A table summarizing the foreclosure procedures in the nine common law provinces follows as Appendix 1.

As in Saskatchewan, British Columbia, Alberta, and Nova Scotia primarily use court-directed foreclosure, also known as judicial sale and foreclosure. In Ontario, New Brunswick, Prince Edward Island, and Newfoundland and Labrador, "power of sale" is the primary method of foreclosure, also known as extra-judicial sale. Power of sale is permitted when the lender is empowered by the mortgage document, and in some cases enabling legislation, to sell the mortgaged property without judicial oversight if the mortgage payments are not made. In Manitoba, with rare exceptions, foreclosure proceedings are handled by an administrative procedure through the Land Titles Office.

Foreclosure in Saskatchewan varies greatly from foreclosure in the other common law provinces. Saskatchewan is the only common law province that requires any pre-action process for foreclosure like that mandated by the *LCAA*. In the other judicial sale and foreclosure provinces, the lender begins foreclosure by serving and filing the statement of claim or equivalent originating document with the court. In those provinces where power of sale is the primary method, the process begins when the lender serves the borrower with a notice of sale. In Manitoba, the Land Titles foreclosure method begins when the lender files at the Land Titles Office, and serves on the borrower, a notice of exercising power of sale.

3.1. Judicial sale and foreclosure

3.1.1. British Columbia

In British Columbia, the steps for foreclosure are largely set out in rule 21-7 of the *Supreme Court Civil Rules*,[51] a rule described as a "mini-code."[52] A foreclosure proceeding is commenced by serving and filing a petition in court. The *Supreme Court Civil Rules* allow foreclosures to be heard in a fairly summary manner. The first hearing is usually held within three weeks to a month after the petition is served on the borrower.[53] The court may: make a final order for foreclosure; set a redemption period after which, if the borrower has not paid what is due, the

[51] British Columbia, *Supreme Court Civil Rules* [*BC Rules*].
[52] Roach, *supra* note 36 at 137.
[53] Allan Parker, *Consumer Law and Credit/Debt Law*, 3d ed (BC: Legal Services Society, October 2009) at 143, online: Legal Services Society <http://lss.bc.ca>.

court will grant a final order of foreclosure; or, order a sale of the property.[54] The redemption period must be six months unless a shorter or longer period is justified.[55] If the court has ordered a sale, the lender may apply for an order confirming sale even though the redemption period has not expired.[56] In such a situation, the borrower does not have the opportunity to continue living in the mortgaged property throughout the redemption period. Following the final order for foreclosure or the order confirming sale, the lender may pursue a deficiency judgment against the borrower.

3.1.2. Alberta

In Alberta, foreclosure is governed by Part 5 of the *Law of Property Act*.[57] Following default, a lender may begin a foreclosure proceeding by serving and filing a statement of claim. The order nisi will fix a six month redemption period, although this period may be extended or decreased on application to the court.[58] If the borrower is unable to reinstate or redeem the mortgage within the redemption period, the order nisi provides that the mortgaged property must be offered for judicial sale. Judicial sale must be attempted before the court will grant a final order of foreclosure, unless:

1) the borrower consents to foreclosure;
2) the mortgaged property was transferred while the mortgage was in default or within four months prior to default; or,
3) the land is abandoned, or undeveloped land other than farm land.

If the property is sold by judicial sale for more than the amount owed and costs, the borrower may receive some sale funds. If a judicial sale is unsuccessful, the lender may apply for foreclosure. The lender may not pursue a deficiency judgment against an individual borrower.[59]

[54] *BC Rules*, *supra* note 51, r 2-7(5): this subrule lists additional powers of the court in a foreclosure proceeding.
[55] *Law and Equity Act*, RSBC 1996, c 253, s 16(2).
[56] *Supra* note 51, r 21-7(9).
[57] RSA 2000, c L-7.
[58] *Ibid*, s 41.
[59] *Law of Property Act*, *supra* note 57, s 40, 43. The prohibition on deficiency judgments against individuals is not restricted to purchase-money mortgages.

3.1.3. Nova Scotia

In Nova Scotia, foreclosure is dealt with by several different statutes[60] and the *Nova Scotia Civil Procedure Rules*.[61] The court has issued a practice memorandum to provide further guidance in foreclosure and sale matters.[62] The simplified procedure outlined in the practice memorandum is used in most foreclosure proceedings. Following default in payment, the lender may serve and file a notice of action with attached statement of claim on the borrower. If the borrower does not defend, or if the defence is set aside, the lender may apply by notice of motion for an order for foreclosure, sale and possession.

Under an order for foreclosure, sale and possession, the property must be sold by the sheriff at a public auction, unless a person has made an offer to the lender and several conditions have been met.[63] At least 15 days' notice of the sale must be provided to the borrower and the auction must be advertised in a local newspaper twice (once at least 15 days before, the second time no more than seven days before the sale). On average, six weeks elapse between the order for foreclosure, sale and possession and the date of the public auction.[64] The borrower's right to redeem ends when the sheriff declares the successful bidder at the public auction.[65] Following the sale, the lender will apply for an order confirming sale, confirming that the provisions of the order for foreclosure, sale and possession were carried out. The lender may apply for a deficiency judgment against the borrower to repay any part of the debt that was not paid from the sale proceeds of the property.

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[60] See e.g. *Judicature Act*, RSNS 1989, c 240; *Real Property Act*, RSNS 1989, c 385; *Conveyancing Act*, RSNS 1989, c 97; *Registry Act*, RSNS 1989, c 392. See also Law Reform Commission of Nova Scotia, *Discussion Paper: Mortgage Foreclosure and Sale* (July 1997) at 7-9 [LRCNS, *Discussion Paper*].

[61] [*NS Rules*]. Rule 72 establishes the procedure for the remedies of foreclosure, sale and possession. See LRCNS, *Discussion Paper*, *ibid* at 9-11 for a discussion of how the old rules (new *NS Rules* came into effect January 1, 2009) related to mortgage foreclosure and sale.

[62] Supreme Court of Nova Scotia, Practice Memorandum No 1, "Foreclosure Proceedings," online: The Courts of Nova Scotia <http://www.courts.ns.ca>.

[63] *Nova Scotia Rules*, *supra* note 61, r 72.08.

[64] Law Reform Commission of Nova Scotia, *Final Report: Mortgage Foreclosure and Sale* (September 1998) at 38 [LRCNS, *Final Report*].

[65] *Ibid* at 38.

3.2. Power of sale

3.2.1. Ontario

In Ontario, lenders have the option of proceeding by power of sale, or by judicial sale or foreclosure. When the Ontario Law Reform Commission produced their *Report on The Law of Mortgages* in 1987, power of sale was used in 90% to 99% of the foreclosures in Ontario.[66] A general review of the literature indicates that this is still the case. Judicial sale and foreclosure is rare.

The *Mortgages Act* governs the power of sale procedure in Ontario, providing two types of powers: contractual and statutory.[67] The process is started by the lender sending a notice to the borrower instead of commencing an action in court. Contractual power of sale exists when included in the mortgage (which is usual), allowing Part III of the Act to apply. The lender and borrower are not permitted to change or waive these provisions.[68] For contractual power of sale, the lender must give notice of the sale to the borrower at least 15 days after default, and at least 35 days before the date of the sale.[69] In practice, lenders frequently wait two to three months before beginning power of sale or foreclosure proceedings.

The statutory power of sale is used very rarely, but is available when the mortgage does not provide for power of sale.[70] Under section 24 of the *Mortgages Act*, the lender may sell the mortgaged property at any time three months after default in payment, provided that notice of the sale has been given to the borrower at least 15 days after default, and at least 45 days before the date of the sale.[71] A lender using either type of power of sale may seek a deficiency judgment against the borrower.

Given the general ease and speed of the two types of power of sale, coupled with the availability of deficiency judgments, not surprisingly lenders in Ontario rarely resort to judicial sale and foreclosure. When used, the steps are set out in rule 64 of the *Rules of Civil*

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[66] Ontario Law Reform Commission, *Report on The Law of Mortgages* (Ontario Ministry of the Attorney General, 1987) at 156 [OLRC].
[67] RSO 1990, c M.40.
[68] *Ibid*, s 38.
[69] *Ibid*, s 32.
[70] LRCNS, *Final Report*, *supra* note 64 at 27.
[71] *Mortgages Act*, *supra* note 67, s 26.

Procedure.[72] Following service of the statement of claim, the borrower must file a request to redeem within the time allowed to file a defence in order to have the opportunity to redeem the mortgage.[73] If a request to redeem is filed, the borrower has 60 days following the taking of accounts to redeem the mortgage.[74] A foreclosure action may be converted to judicial sale on the application of any party, or by service of a request for sale by the borrower in certain circumstances. [75] An action so converted may be converted back to foreclosure on the application of any party if it is apparent that the sale proceeds will not satisfy the debt.[76] A lender may seek a deficiency judgment against the borrower following a judicial sale.[77]

3.2.2. New Brunswick

In New Brunswick, the lender's sole remedy is power of sale: conferred by section 44 of the *Property Act*, varied or extended by the terms of the mortgage, and only applied as far as a contrary intention is not expressed in the mortgage.[78] Although no specific period of default is required before the lender can enforce the power of sale, in practice lenders frequently wait three months.[79] The lender must have a notice personally served on or sent by registered mail to the borrower at least four weeks prior to the sale, and must publish notice of the sale weekly for at least four weeks in a local newspaper and post a notice in the registry office and another public place.[80] The borrower does not have the option to reinstate the mortgage by paying all arrears and costs outstanding, as is available in all other provinces except Newfoundland and Labrador.[81] The lender may seek a deficiency judgment against the borrower by action in the Court of Queen's Bench.

3.2.3. Prince Edward Island

In Prince Edward Island, the *Real Property Act*[82] and *Civil Procedure Rules*[83] provide for foreclosure and judicial sale. However, the power of sale found in a schedule to the *Real Property Act* and included as a clause in the mortgage is exclusively used.[84]

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[72] RRO 1990, Reg 194, r 64.03 (foreclosure actions), 64.04 (sale actions).
[73] *Ibid*, r 64.03(6).
[74] *Ibid*, r 64.03(8).
[75] *Ibid*, r 64.03(17)-(22).
[76] *Ibid*, r 64.03(23).
[77] *Ibid*, r 64.04(14).
[78] Roach, *supra* note 36 at 189. *Property Act*, RSNB 1973, c P-19.
[79] LRCNS, *Final Report*, *supra* note 64 at 25.
[80] *Property Act*, *supra* note 78, s 45.
[81] LRCNS, *Final Report*, *supra* note 64 at 25.
[82] RSPEI 1988, c R-3, s 72-77.

No specific legislative provisions, rules or practice memoranda deal with power of sale other than the covenant contained in the schedule to the *Real Property Act*.[85] No specific period of default is required before the lender can enforce the power of sale, but in practice lenders frequently wait three months before giving the borrower notice of sale. Borrowers may reinstate their mortgage by paying all arrears and costs outstanding.[86] If the mortgage is not reinstated or redeemed, the lender must first attempt to sell the property by public auction. Notice of sale must be served on the borrower, but the *Real Property Act* does not specify any minimum amount of time before the sale. A notice of sale is also published in a local newspaper, typically for four consecutive weeks prior to the sale.[87] If not sold at the auction, the mortgaged property is then listed for private sale through a realtor. The lender may seek to obtain a deficiency judgment against the borrower by action in the Supreme Court.

3.2.4. Newfoundland and Labrador

In Newfoundland and Labrador, lenders may elect to proceed under power of sale, judicial sale, or foreclosure to recover the funds owed on a mortgage.[88] Lenders almost exclusively elect power of sale due to its ease of implementation.[89] The power of sale is conferred by section 5 of the *Conveyancing Act*, and may be varied or extended by the terms of the mortgage, and only applies as far as a contrary intention is not expressed in the mortgage.[90]

Before publishing a notice of sale, the lender must give the borrower a written notice requiring payment of the mortgage money, and default must continue for another 30 days following the notice.[91] The borrower does not have the right to reinstate the mortgage by paying only the arrears and costs.[92] Following the 30 day notice, the lender is required to publish a notice of sale in a local newspaper at least once a week for two consecutive weeks before the date of the sale. The lender must first attempt to sell the property by public auction or public tender. The

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[83] Prince Edward Island, *Civil Procedure Rules*, r 64.03-64.04.
[84] *Supra* note 82, Covenant 12 of the Second Schedule (Deed of Mortgage). Regarding exclusive use, see Roach, *supra* note 36 at 189; LRCNS, *Final Report*, *supra* note 64 at 22; *Federal Business Development Bank v Group Plus One Ltd* (1985), 54 Nfld & PEIR 267 at 268 (PEICA).
[85] LRCNS, *Final Report*, *supra* note 64 at 23.
[86] *Real Property Act*, *supra* note 82, Covenant 14 of the Second Schedule (Deed of Mortgage).
[87] LRCNS, *Final Report*, *supra* note 64 at 24.
[88] Judicial sale and foreclosure are provided for in the *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Schedule D, r 26.
[89] Roach, *supra* note 36 at 189; LRCNS, *Final Report*, *supra* note 64 at 20.
[90] RSNL 1990, c C-34, s 5.
[91] *Ibid*, s 6-7.
[92] LRCNS, *Final Report*, *supra* note 64 at 20.

property may not be sold on the auction or tender for less than 75 percent of its appraised value, unless the sale price is approved by the court.[93] If the property cannot be sold by public auction or tender, the lender may list the property for sale by private contract with a realtor. Again, the property may not be sold for less than 75 percent of its appraised value, unless the sale price is approved by the court.[94] The lender may seek to obtain a deficiency judgment against the borrower by filing a statement of claim with the court; however, if the lender has not complied with certain provisions in the *Conveyancing Act*, the borrower is not liable on a deficiency judgment.[95]

3.3. Land Titles Office sale and foreclosure

In Manitoba, with rare exceptions, foreclosure proceedings are an administrative process through the Land Titles Office.[96] If the default is something other than failure to make payment or to insure the property, the lender must first apply to the court for permission to begin foreclosure, governed by the *Real Property Act*.[97]

To begin, the lender must serve on the borrower and register in the Land Titles Office a notice of exercising power of sale (NEPS). [98] If default continues for a month following service of the NEPS, the lender may apply to the district registrar of the Land Titles Office for permission to sell the land and use the proceeds of sale to pay the debt. The property may be sold privately, through a realtor, or by public auction.[99] If default has continued for at least six months and the property is unsold after an auction, the lender may apply to the district registrar to foreclose.[100] Following this application, a notice will be served on the borrower advising of the application and informing the borrower of the redemption period set by the district registrar, a minimum of one month from service of the notice.[101] The redemption period may be extended by the district registrar on application by any "person appearing to be interested in the land."[102]

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[93] *Conveyancing Act*, *supra* note 90, s 9.
[94] *Ibid*.
[95] *Ibid*, s 12.
[96] "Mortgage Sale and Foreclosure" in *Definitions*, online: The Property Registry, Province of Manitoba <http://www.gov.mb.ca/tpr>; Peter Sim, "Mortgage Foreclosure Proceedings in Manitoba" (2 March 2012), online: Thompson Dorfman Sweatman LLP, *The Law Blog*, <http://www.tdslaw.com>.
[97] *Real Property Act*, CCSM R-30, s 134.
[98] *Ibid*, s 134.
[99] *Ibid*, s 135.
[100] *Ibid*, s 138(2). In order to make an application for foreclosure, the land must have been offered for sale at public auction.
[101] *Ibid*, s 138(3).
[102] *Ibid*, s 138(5).

Following the expiry of the redemption period, if the property has not been redeemed or sold, the district registrar may issue a final order of foreclosure.[103]

If the final order of foreclosure is registered in the Land Titles Office, the lender may not pursue a deficiency judgment. However, if the property was sold following service of the NEPS, or if a final order of foreclosure was issued but not registered, the lender may commence a court action to pursue a deficiency judgment against the borrower.[104]

4. OTHER LAW REFORM AGENCIES

4.1. British Columbia

The Law Reform Commission of British Columbia released a *Report on Personal Liability under a Mortgage or Agreement for Sale* in 1985, specifically focused on the availability of a deficiency judgment following foreclosure and sale.[105] The Law Reform Commission recommended that the action on the personal covenant be retained in British Columbia law, continuing the availability of a deficiency judgment to the lender against the borrower for any shortfall following a judicial sale. The Law Reform Commission did not recommend additional protection to borrowers in foreclosure with respect to collection of the deficiency. The Law Reform Commission made several recommendations limiting the liability of the borrower upon the transfer of the mortgaged property to a new owner. Many of these were implemented in the *Property Law Act*.[106]

4.2. Alberta

The Alberta Law Reform Institute (ALRI) released its final report, *Mortgage Remedies in Alberta*, in 1994, considering mortgage remedies available for all types of properties, including commercial and agricultural.[107] ALRI recommended that Alberta retain court-directed foreclosure and sale. It felt that judicial supervision ensured the fair treatment of all the parties involved in the foreclosure. ALRI posited that the key to fair treatment is sale of the land at a fair value and that judicial supervision is necessary to ensure price adequacy in foreclosure

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[103] *Ibid*, s 139(2).
[104] "Mortgage Sale and Foreclosure," *supra* note 96; Sim, *supra* note 96.
[105] Law Reform Commission of British Columbia, *Report on Personal Liability Under a Mortgage or Agreement for Sale* (LRC 84)(September 1985) [LRCBC].
[106] *Property Law Act*, RSBC 1996, c 377, s 20-24.
[107] Alberta Law Reform Institute, *Mortgage Remedies in Alberta* (Report No 70) (Edmonton, AB: June 1994) [ALRI].

sales in times of fluctuating land prices.[108] Alberta, like Saskatchewan, has a resource-based economy, resulting in more drastically fluctuating land prices than in other parts of the country.[109]

ALRI recommended that deficiency judgment protection continue for homeowners and farmers, but not for other borrowers. Its review found that:

> [W]hile deficiency judgment protection has some negative effects (i.e. walk-aways and dollar dealers), it generally protects thousands of homeowners who, through no fault of their own, lose their jobs and homes at a time when land values are substantially reduced by recessionary forces. Whether one finds this desirable or not depends on one's philosophical views, but the political choice and policy of providing deficiency judgment protection for homeowners and farmers has prevailed in Alberta continuously since 1939. Protection of homeowners and farmers is legitimate public policy and does not harm essential Alberta interests.[110]

To broadly summarize ALRI's recommendations respecting residential foreclosures, it found that borrowers are protected in a judicial sale and foreclosure by judicial supervision to ensure price adequacy. Home-owner borrowers are further protected by the inability of a lender to obtain a deficiency judgment. ALRI did not recommend any additional protections.

4.3. Ontario

The Ontario Law Reform Commission (OLRC) released its *Report on the Law of Mortgages* in 1987.[111] OLRC articulated its goal of law reform in this area as "a careful balancing of interests — control of potential abuse by the lender, coupled with an efficient remedial procedure."[112] OLRC thought that this goal would best be achieved by abolishing the largely unused foreclosure and judicial sale procedures and improving the safeguards for borrowers in the power of sale procedure.[113] The improvements would include an expansion of the delay period after default and before sale, to give the borrower enough time to refinance or to sell the

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[108] *Ibid* at 3.
[109] "Comparing the advantages and disadvantages of a power of sale regime and a judicial supervision regime is meaningless unless done in the context of the economy in which it is going to operate. A power of sale regime is best suited for an economy which is stable and where land prices do not fluctuate with frequency. Judicial sale seems to be the preference for the western Canadian provinces, which have economies that experience wide fluctuations in land values": ALRI, *supra* note 107 at 146
[110] *Ibid* at 4.
[111] *Supra* note 66.
[112] *Ibid* at 157.
[113] *Ibid* at 164. As was noted earlier in the review of Ontario's foreclosure processes (see Part 3.2.1), an estimated 90 to 99 percent of the time lenders elect to proceed by way of power of sale: *ibid* at 156.

property privately, and a clarification of the standard of conduct required of a lender in any sale following the expiration of the delay period.[114]

Specifically, OLRC recommended reforming the power of sale to include a statutory "notice of default" to be served on the borrower at least ten business days after default, setting out, in plain language, the details of the borrower's default, the rights and remedies of the lender and the borrower, and any other information prescribed. The borrower would then have 10 business days to reinstate or redeem the mortgage before the lender commenced power of sale proceedings by serving the borrower with a notice of sale.[115]

The borrower would have at least an additional two months after the notice of sale, and a total of at least four months after default, before the lender would be permitted to sell the mortgaged property.[116] The parties would be free to abridge or exclude the post-notice of sale delay period.[117] The lender could apply to the court at any time (before or after service of the notice of sale), without notice to the borrower, for leave to sell the mortgaged property, but the court would have no discretion to extend the delay period without the consent of all parties.[118] OLRC described the length of the delay from default to sale as follows:

> The appropriate length of the delay period prior to sale must, therefore, balance the borrower's concern that sufficient time be allowed to reinstate the agreement, redeem the property, or sell it privately, with the lender's concern about possible losses due to unwarranted delay. The delay should not be longer than is necessary for the borrower to obtain a real benefit.[119]

OLRC did not recommend a complete abolition of foreclosure, but would continue to allow foreclosure in circumstances where an attempted sale of the property is unsuccessful or where the appraised value of the property clearly indicates that a sale of the property would not satisfy the lender's debt.[120] OLRC recommended retaining the lender's right to obtain a deficiency judgment.[121]

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[114] *Ibid* at 165.
[115] *Ibid* at 166-167.
[116] *Ibid* at 169.
[117] *Ibid* at 170.
[118] *Ibid* at 171-72.
[119] *Ibid* at 168.
[120] *Ibid* at 180.
[121] *Ibid* at 199.

4.4. Nova Scotia

The Law Reform Commission of Nova Scotia published *Final Report: Mortgage Foreclosure and Sale* in 1998, considering court-directed foreclosure and sale in Nova Scotia and recommending a drastic change - that power of sale be adopted as the primary remedy.[122] It recommended that foreclosure remain as an alternative to power of sale and be in full satisfaction of the debt (no deficiency judgment available). Maximum flexibility would be ensured by allowing the parties to apply to change from one process to the other. The borrower's right to reinstate would continue, with the right available once per year. Borrowers would have the right to redeem a mortgage at any time before the lender conveys the property to a third party purchaser.[123]

The Commission recommended that power of sale be started by the lender giving a plain language notice of default to the borrower. A 30 day period following service of the notice would have to elapse before the lender could take any further action, unless such action was necessary to protect or preserve the mortgaged property. Once a lender was permitted to sell the property, it would be required to advertise the property in a commercially reasonable manner for a minimum of four weeks. The lender would be required to exercise a commercially reasonable standard of care in selling the property.[124]

The Commission recommended that deficiency judgments continue to be available if the sale proceeds were inadequate to pay the mortgage debt and costs. This recommendation was largely in response to the consultation comments they received: "Most commentators felt strongly that deficiency judgments should continue to be available in Nova Scotia. …Generally, commentators felt that eliminating deficiency judgments would adversely impact credit in the province, particularly mortgage credit."[125]

In summary, the Law Reform Commission of Nova Scotia suggested that there be less judicial supervision in the primary method of foreclosure by recommending the adoption of the power of sale. It did, however, allow for additional protection for the borrower by providing for judicial foreclosure to be available as an alternative, by election of the lender or on application by the borrower.

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[122] LRCNS, *Final Report*, *supra* note 64 at ii.
[123] *Ibid*.
[124] *Ibid* at iii.
[125] *Ibid* at 15.

5. HISTORY

5.1. Enactment

The *LCAA* was proclaimed on May 15, 1943,[126] following closely on the heels of the "dirty thirties" and the Great Depression, which were at least as severe in Saskatchewan as anywhere else in North America. The depression resulted in a total collapse of the market for both commodities and land. Legislation was enacted federally and by all the provinces attempting to delay, suspend, adjust, compromise or postpone the rights of lenders and creditors, and keep people in their homes and on their farms. The enactment of the *LCAA* was a legislative response to "give relief to the debt-oppressed farmers" of Saskatchewan following the Great Depression.[127] The *LCAA* was described, during debate on the bill, as part of "a system that would meet the conditions of alternating moisture and drought."[128] The Court of Appeal for Saskatchewan described the purpose of the legislation in a 1984 decision:

> During the "Great Depression of the Thirties" and for some years following, purchasers and mortgagors in this province were visited with a series of misfortunes over which they had no control – economic stagnation with its elements of drought, depressed prices for primary products and massive unemployment. With no legislative protection from creditors, property owners, both urban and rural, faced the prospect of losing their homes and their potential source of livelihood from farming and other occupations. Some were in fact forced from their homes to join the ranks of the itinerant or migratory unemployed. The Legislature finally intervened to stem this tide and extended protection to prevent further disaster at the hands of aggressive financial institutions and creditors…Our Legislature introduced and passed numerous legislative programmes to grapple with the perils of the depression and its aftermath.[129]

The Legislature introduced the package of "legislative programmes" in part to replace Saskatchewan's *Debt Adjustment Act*, similar in principle to the Alberta Act that was declared *ultra vires* by the Privy Council early in 1943.[130] The *LCAA* was part of a series of six bills considered by the Legislature in April 1943. The series also included:

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[126] *LCAA 1943*, *supra* note 6.
[127] FC Cronkite, "The Judicial Committee and the Farm Debt Problem" (1943) 9:4 The Canadian Journal of Economics and Political Science 557 at 557.
[128] "Debt Bills Start Talk Marathon", *Regina Leader Post* (5 April 1943).
[129] *Lozinski v Mayoh* (1984), 32 Sask R 312 at para 13 (CA). See also *Rochdale Mall Corp v Damon Developments Ltd*, [1986] 2 WWR 719, 26 DLR (4th) 158 at para 5 (Sask CA): "The purpose of the *Land Contracts (Actions) Act* is to delay or defer in certain cases actions by mortgagees or vendors of land."
[130] *AG Alberta v AG Canada*, [1943] 1 WWR 378, 24 CBR 129 (PC); "Province's New Debt Legislation Outlined", *Regina Leader Post* (3 April 1943).

1) *The Provincial Mediation Board Act*, to replace the creditor-debtor negotiation role of the *ultra vires* Debt Adjustment Board;
2) A bill to amend *The Limitations of Civil Rights Act*, giving district court judges the power to vary their own orders and grant further extensions of time for payment on seizures under lien agreements;
3) A bill to amend *The King's Bench Act*, giving judges the power to make an order applying a payment installment plan to debtors against whom judgment had been obtained on notes or open accounts;
4) A bill to amend *The District Court Act* in a manner similar to the amendments to *The King's Bench Act;* and
5) *The Moratorium Act*, reaffirming the power of the lieutenant-governor in council to declare a moratorium on debts for a period of not more than two years.[131]

All six of the bills received Royal Assent on April 12, 1943.[132] *The Moratorium Act* was found to be *ultra vires* by the Supreme Court of Canada in 1955.[133]

5.2. Amendments

The *LCAA* has been amended 20 times over its 70 year history.[134] Many of the amendments clarified the language and updated references when the court structure changed, but didn't make any substantive difference to the application of the Act. Others made more significant changes. The purpose of this section is not to review every amendment made to the *LCAA*, but rather to highlight the more notable of those amendments.

In 1957, the *LCAA* was amended to require service of a notice of intention on the Provincial Mediation Board 30 days before applying for an appointment for leave to commence.[135] Before

[131] "Province's New Debt Legislation Outlined", *ibid*; "Legislature Winds Up Session at Midnight", *Regina Leader Post* (13 April 1943).
[132] *Re Moratorium Legislation Act* (1955), 35 CBR 135 at para 19 (SCC); "Legislature Winds Up Session at Midnight", *supra* note 131.
[133] *Re Moratorium Legislation Act*, *supra* note 132.
[134] SS 1944, c 22; SS 1951, c 31; RSS 1953, c 96; SS 1957, c 34; SS 1959, c 34; SS 1965, c 18; RSS 1965, c 104; SS 1966, c 12; SS 1969, c 25; SS 1970, c 67, s 6; SS 1976-77, c 37; RSS 1978, c L-3; SS 1979-80, c 92, s 46; SS 1980-81, c 83, s 42(3); SS 1982-83, c 16, s 49(3); SS 1983-84, c 42; SS 2001, c 8, s 10; SS 2001, c 50, s 8; SS 2004, c L-16.1, s 53; SS 2009, c 7, s 5.
[135] *An Act to amend The Land Contracts (Actions) Act*, SS 1957, c 34.

this amendment, any of the parties interested in the action could apply to the Provincial Mediation Board, but applications were not required.[136]

In 1959, the Act was amended to permit corporate mortgagors to waive the application of the Act.[137] Anecdotally, following this amendment to the *LCAA* lenders began to require borrowers on commercial mortgages, such as mortgages charging multi-unit residential rental properties and non-residential properties such as hotels, stores, office buildings, garages, theatres, warehouses, industrial plants and vacant land, to incorporate.[138] The Court of Queen's Bench for Saskatchewan described the purpose of this section as "to facilitate corporate financing that otherwise may not be available if lenders could not realize upon their security on default by a corporate borrower."[139]

The court's discretion in awarding costs on an application for leave to commence was expanded in 1965.[140] Since its enactment, the Act had only allowed for payment of costs by the applicant to be ordered if, in the opinion of the court, the application had been made without proper justification.[141] The 1965 amendment allows the court in its discretion to "order any party to an application to pay the whole or any portion of the costs of the application."[142]

The *LCAA* was amended in 1969 to except mortgages securing loans made under the *Industrial Development Bank Act* (Canada) by the Industrial Development Bank, from the application of the *LCAA*.[143] The Act was amended in 1977 to add a section excepting mortgages, given after October 2, 1975, securing loans made under the *Federal Business Development Bank Act* (Canada) by the Federal Business Development Bank.[144] This section was amended in 2001 to include loans made by the Bank's successor, the Business Development Bank of Canada, under the *Business Development Bank of Canada Act*.[145]

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[136] Provincial Mediation Board, *A Review of Debt and Protective Legislation in the Province of Saskatchewan* (Regina, SK: July 1945) at 6.
[137] *LCAA*, *supra* note 1, s 5(2); *An Act to amend The Land Contracts (Actions) Act*, SS 1959, c 34, s 3.
[138] This was also the case in Alberta: ALRI, *supra* note 107 at 124.
[139] *Disney Farms Ltd v. CIBC*, [1984] 5 WWR 285 at 287-88 (Sask QB), Malone J.
[140] *An Act to amend The Land Contracts (Actions) Act*, SS 1965, c 18 [*LCAA 1965*].
[141] *LCAA 1943*, *supra* note 6, s 3(9); *The Land Contracts (Actions) Act*, RSS 1953, c 96, s 3(10).
[142] *LCAA 1965*, *supra* note 140, s 1.
[143] *An Act to amend The Land Contracts (Actions) Act*, SS 1969, c 25 [*LCAA Amendment Act 1969*].
[144] *An Act to amend The Land Contracts (Actions) Act*, SS 1976-77, c 37 [*LCAA Amendment Act 1976-77*].
[145] *An Act to amend the Statute Law*, SS 2001, c 8, s 10 [*Statute Amendment Act 2001*].

In 1984, two significant amendments were made to the *LCAA*. The first was the addition of subsection 3(1.1):

> An action that is commenced without obtaining leave pursuant to this section is a nullity.[146]

The second amendment was the addition to section 5 of a prohibition on agreements purporting to waive the application of the Act, except for corporate bodies.[147] These amendments were in response to the Court of Appeal for Saskatchewan's decision in *Canadian Imperial Bank of Commerce Mortgage Corp v Manson* that a lender's failure to obtain leave did not render the action a nullity.[148] The court's reasoning was that leave to commence an action under the *LCAA* was not of the essence of the cause of action but rather an additional formality superimposed on the common law.[149] The court found that leave to commence was a condition precedent to commencing an action and could only be contested if non-performance of the condition was specifically pleaded in defence. The court used the lack of a specific prohibition on agreements to waive the Act in the *LCAA* to support its finding.

5.3. Farm foreclosures

Agricultural and residential foreclosures continued to be governed by the *LCAA* until *The Family Farm Protection Act* came into force in 1971.[150] *The Family Farm Protection Act* replaced the *LCAA* with respect to pre-action procedures for farm land foreclosures. *The Family Farm Protection Act* was replaced by *The Farm Land Security Act*[151] in 1984, which was replaced by *The Saskatchewan Farm Security Act*[152] in 1988. *The Saskatchewan Farm Security Act* continues to require "strongly pro-mortgagor foreclosure proceedings" with the goal "to afford protection to farmers against loss of their farm land."[153] As farm foreclosures are now regulated by *The Saskatchewan Farm Security Act*, the *LCAA* is effectively restricted to residential foreclosures.

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[146] *An Act to amend The Land Contracts (Actions) Act*, SS 1983-84, c 42, s 3.
[147] *Ibid*, s 4.
[148] *Debates and Proceedings of the Legislative Assembly of Saskatchewan*, 20th Leg, 3rd Sess (31 May 1984) (Hon Mr Lane).
[149] *Canadian Imperial Bank of Commerce Mortgage Corp v Manson,* [1984] 4 WWR 171, 32 Sask R 303 (CA).
[150] SS 1971 (2nd Sess), c 3.
[151] SS 1984-85-86, c F-8.01.
[152] SS 1988-89, c S-17.1 [*SFSA*].
[153] Donald H Layh, *A Legacy of protection:* The Saskatchewan Farm Security Act: *History, commentary & case law* (Langenburg, SK: Twin Valley Books, 2009) at 56.

6. NEED FOR REFORM

6.1. Statistics

Comparing the prevalence of foreclosures in 1943, when the *LCAA* was enacted, to foreclosures today is not possible. Foreclosure statistics from the early 1940s are not available.[154]

A table outlining the number of notices of intention received by the Provincial Mediation Board from 1977 through 2012 is attached as Appendix 2. The number of notices peaked from the mid-1980s through the early 1990s, reaching a high of 1,921 in the 1990-1991 reporting year. The number of notices then unsteadily declined to a low of 428 in 2008-2009. In the most recent reporting year, 2011-2012, 688 notices of intention were filed with the Provincial Mediation Board.

6.2. National picture

Saskatchewan is the only common law province that requires any pre-action process for foreclosure.[155] In the other judicial sale and foreclosure provinces, the lender begins foreclosure by serving and filing the statement of claim or equivalent originating document with the court. Service of a statement of claim in Saskatchewan may only happen, at the earliest, about two months after the process has started, and possibly much later. This delay, in some cases up to a year, may not benefit either party. ALRI explained the situation as follows:

> It is in the interest of every member of a given jurisdiction that there should be a suitably liberal extension of credit at relatively low interest rates and on reasonably lengthy terms. Such credit is necessary to finance homes, farms and factories. If lenders find that it is particularly difficult because of artificial legal restrictions to recover loans secured against land, equity ratios may be altered, interest rates may rise and lenders may take legal action immediately upon default. The supply of credit to individuals will then be affected, and ultimately, if wide spread defaults occur, a whole property market may itself be affected.[156]

When compared to provinces using power of sale as the primary method of foreclosure, the addition of the *LCAA* to standard judicial sale and foreclosure proceedings may appear

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[154] SM Lipset, *Agrarian Socialism* (Berkeley: University of California Press, 1950) at 176, suggests that the Saskatchewan Debt Adjustment Board permitted 1,753 foreclosures in 1940, 830 foreclosures in 1941, and 741 foreclosures in 1942, but the source of this information is not cited.

[155] See Part 3.

[156] ALRI, *supra* note 107 at 11-12. Commenters responding to the Law Reform Commission of Nova Scotia had similar concerns: LRCNS, *Final Report*, *supra* note 64 at 15

particularly arduous. The interprovincial variation, even from other judicial sale and foreclosure provinces, may cause confusion to lenders operating in multiple jurisdictions.

6.3. Trends in law reform

Generally speaking, no law reform agency recommended any additional protections for residential mortgage borrowers.[157] Specifically, no law reform agency recommended the adoption of a process similar to the *LCAA*, potentially indicating that they do not believe the additional protection of the *LCAA* for home-owners is required.

If deficiency judgments against the borrower were allowed in a province, the law reform agency for that province recommended their retention.[158] However, in Alberta, where deficiency judgments are not permitted against individuals, ALRI recommended that this protection be restricted to home-owners.

ALRI found that borrowers are protected in a judicial sale and foreclosure by judicial supervision to ensure price adequacy. Home-owner borrowers are further protected by the inability of a lender to obtain a deficiency judgment. ALRI did not recommend any additional borrower protections.[159] Alberta's system is likely the most similar to Saskatchewan's of those investigated by law reform agencies.

OLRC believed that a minimum four month delay between the date of default and the date of sale would be sufficient for a borrower to refinance or sell the property privately. It suggested that a four month delay coupled with a statutory commercially reasonable standard of conduct would protect a borrower.[160] This finding is in contrast to the current law in Saskatchewan, where borrowers may experience a delay of up to 10 months or more before a foreclosure action is commenced, and then will obtain a three to six month redemption period between the order nisi and final order of foreclosure or judicial sale. As the law in Ontario currently stands, borrowers may only have 50 days, so the difference is even greater.

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[157] See Part 4.
[158] LRCBC, *supra* note 105; OLRC, *supra* note 66 at 199; LRCNS, *Final Report*, *supra* note 64 at 15.
[159] See Part 4.2.
[160] *Supra* note 66 at 164-65, 180. As was noted earlier in the review of Ontario's foreclosure processes (see Part 3.2.1), an estimated 90 to 99 percent of the time lenders elect to proceed by way of power of sale: *ibid* at 156.

The Law Reform Commission of Nova Scotia suggested that there be less judicial supervision in the primary method of foreclosure by recommending the adoption of the power of sale. It did, however, allow for additional protection for the borrower by providing for judicial foreclosure to be available as an alternative, by election of the lender or on application by the borrower.

In summary, the general trend in the law reform agency recommendations is toward less process and speedier resolution. The agencies indicate that the balance between lender and borrower rights should be more even, and that a minimum amount of process will still provide the necessary protection to the borrower.

Call for Responses: (1) Is* The Land Contracts (Actions) Act *in need of reform? Why?

7. POSSIBLE APPROACHES TO REFORM

The purpose of the *LCAA* when it was enacted in 1943 was "to prevent further disaster at the hands of aggressive financial institutions and creditors" during the Great Depression and its aftermath, particularly with respect to farm properties.[161] The *LCAA* no longer applies to farm land, and Canadians, in general, are managing their mortgages responsibly.[162] The purpose of the *LCAA* has more recently been described as "to provide mortgagors with a degree of protection."[163] The "degree of protection" provided by the *LCAA* is time: time to bring the mortgage up to date, refinance, or sell the property before foreclosure or judicial sale or, if that is not possible, time to find alternative accommodation. The possible approaches for reform discussed in this Part explore the question of whether the purpose of the Act can be better met through reform of the *LCAA*.

7.1. Repeal *The Land Contracts (Actions) Act*

The first approach is a complete repeal of the *LCAA*, removing any foreclosure procedures before a statement of claim is issued and served on the borrower, and bringing Saskatchewan practice in line with the practice in other judicial sale and foreclosure provinces. By reducing the amount of process and judicial oversight, repeal of the *LCAA* would also bring Saskatchewan foreclosure practice closer to the practice in the extra-judicial sale provinces.

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[161] *Lozinski v Mayoh*, *supra* note 129 at para 13.
[162] "*Household Borrowing in Canada*" (August 2012), online: Canadian Bankers Association <http://www.cba.ca>.
[163] *Resmor Trust Company v MacDonald*, 2010 SKQB 198 at para 15.

Repealing the *LCAA* and making the foreclosure practice in Saskatchewan more similar to the practice in other provinces may have advantages for both borrowers and lenders. Limiting interprovincial variation in a foreclosure action and opting for a less confusing process may make mortgage-secured credit more available to borrowers. The costs savings inherent in a more rationalized and expedited foreclosure process, while preserving borrowers' legitimate need to seek relief arising from temporary hardships, should, in theory, lessen the cost of mortgage lending and create a benefit for both borrower and lender.[164]

The purpose of the *LCAA* could still be achieved by other means:

7.1.1. Notice of default

Repealing the *LCAA* entirely would mean eliminating the notice of intention and the two months from service of the notice to the hearing for leave to commence, and the possible eight months of adjournments before leave to commence an action is granted.[165] Repeal would reduce the time available before an action was started for the borrower to bring the mortgage up-to-date.

The Law Reform Commission of Nova Scotia considered recommending a statutory pre-action delay period, but was concerned that legislating such a delay might actually cause lenders to start the formalized proceedings earlier than if left to the informal practice of allowing two to three months of default before starting an action.[166] An additional concern was that mandating a pre-action delay would make lenders "less inclined to informally negotiate with borrowers in an attempt to correct the default."[167] The Law Reform Commission of Saskatchewan will be exploring, in the consultation process, whether lenders in Saskatchewan start court proceedings earlier and undertake less informal negotiation as a result of the *LCAA*. However, none of the law reform agencies in the other jurisdictions expressed any concern with lenders' pre-action practices. All of the agencies indicated that lenders allowed default to continue for two to three months before beginning foreclosure, to permit informal negotiations.

[164] ALRI, *supra* note 107 at 149.
[165] If the *LCAA* were repealed, and a borrower was not satisfied with informal negotiations with the lender, the borrower could still contact the Provincial Mediation Board and request its services: *PMB Act*, *supra* note 21, s 6.
[166] LRCNS, *Final Report*, *supra* note 64 at 45.
[167] *Ibid*.

If, despite the repeal of the *LCAA*, some pre-action delay was considered desirable, a statutory "notice of default" could be required, as recommended by OLRC for Ontario's power of sale.[168] OLRC suggested that the notice of default:

- be in a form prescribed by regulation;
- set out, in plain language, the details of the borrower's default, the rights and remedies of the lender and the borrower, and such other information as may be prescribed, including a statement of account;
- be served on the borrower no sooner than 10 business days after default; and,
- allow the borrower 10 business days to reinstate or redeem the mortgage before the lender commences power of sale proceedings by serving the borrower with a notice of sale.[169]

7.1.2. Fixed redemption period

Another option for addressing the concern that the borrower be allowed enough time to bring the mortgage up to date, refinance, sell the property before foreclosure or judicial sale, or find alternative accommodation, is a statutory redemption period. For example, both Alberta and British Columbia have statutorily-set redemption periods of six months.[170] In both provinces, unless the court finds a justifiable reason to extend or reduce the redemption period, it remains at six months. The Legislature in both provinces saw six months as a reasonable amount of time to give to the borrower to find funds to pay the lender.[171] OLRC, in recommending an extension to the amount of time between default and sale of the property under power of sale, recommended a minimum of four months for borrowers to get their affairs in order.[172]

Saskatchewan could implement a fixed redemption period if the *LCAA* were repealed. The length of the fixed redemption period could be set at three months, the average redemption period currently set in the province, or it could be set at six months, as has been done in Alberta and British Columbia. Although a fixed three month redemption period may seem short, it would meet the four months from default to sale suggested by OLRC: there would be at least 20 days from serving the statement of claim on the borrower before an application for order nisi could be made, and at least 14 days from the service of the application on the

[168]OLRC, *supra* note 66 at 166-167.
[169] *Ibid*.
[170] Alberta: *Law of Property Act*, *supra* note 57, s 41; British Columbia: *Law and Equity Act*, *supra* note 55, s. 16(2).
[171] ALRI, *supra* note 107 at 265.
[172] OLRC, *supra* note 66 at 169.

borrower to the hearing for order nisi.[173] These required delay periods, in addition to a fixed three month redemption period, would exceed four months.

With a fixed redemption period, parties would likely be best protected if the court had discretion to extend or reduce the redemption period for justifiable reasons, as in British Columbia and Alberta.[174] A borrower could also be permitted to waive a fixed redemption period, when the borrower's circumstances are such that no chance of redemption exists.

7.1.3. Court's discretion

If the *LCAA* were repealed and legislating a set redemption period was not attractive, Saskatchewan could choose to rely on the discretion currently available to the court. The average redemption period in Saskatchewan is three months, however, the court has the discretion to fix whatever period is just.[175] The length of the redemption period is not restricted, so if the *LCAA* were repealed and, at an application for order nisi, the court believed that the borrower could redeem the mortgage within ten months, the court could grant a redemption period of ten months, or longer if necessary. Under this option, borrowers would rely on the court to exercise its discretion in their favour, where appropriate. [176] As David Goldenberg noted in *Mortgages and Foreclosure: Know Your Rights:* "The courts know that they are dealing with a very sensitive and, at times, emotional problem. They will bend over backwards to assist the homeowner."[177]

If the *LCAA* were repealed, borrowers would benefit from appearing before a judge sooner in the foreclosure process. Under the *LCAA*, once the notice of intention is served, close to two months pass before the parties appear in court on the application for leave to commence. If the *LCAA* were repealed, once the statement of claim was issued and served and the time for service of a statement of defence had expired, the lender could immediately serve an application for order nisi. Given the service rules in the new *Queen's Bench Rules of Court*, the parties could appear in court 34 days after service of the statement of claim. The judges of the Court of Queen's Bench have significant experience with foreclosures, and will often have practical and useful suggestions for borrowers. Earlier access to judges' experience may allow

[173] *New QB Rules*, *supra* note 34, r 6-9.
[174] Alberta: *Law of Property Act*, *supra* note 57, s 41; British Columbia: *Law and Equity Act*, *supra* note 55, s. 16(2).
[175] Richards, *supra* note 35 at 5-17.
[176] Roach, *supra* note 36 at 33: "[T]he mortgagor's right to an equity of redemption…is perceived as a fundamental right and it is jealously guarded by the courts."
[177] David M Goldenberg, *Mortgages and Foreclosure: Know Your Rights* (Vancouver: Self-Counsel Press, 1989) at 53.

borrowers to more clearly understand their options and how their actions may benefit them, resulting in less emotional stress, and minimizing the legal costs.

If the *LCAA* were repealed, consideration would need to be given to the issue of whether section 4 should be retained. Section 4 provides for the discretionary powers of the court in an action.

Call for Responses: (2) Should* The Land Contracts (Actions) Act *be repealed?

7.2. Restrict the *LCAA* to primary residences, repeal notice of intention and application for appointment

The second approach is a collection of reforms that, together, would restrict the application of the *LCAA* to primary residences and remove all of the pre-action procedures except for the actual application for leave to commence. Although presented here as a collection, these reforms could be implemented independently or in some other combination.

7.2.1. Primary residence

The first possible reform would amend the *LCAA* to only require leave to commence when seeking to foreclose on a primary residence. As discussed in Part 2, although section 3(1) of the *LCAA* provides that no action may be commenced without leave of the court, many actions are excepted from the application of the Act.[178] Corporate bodies are excepted under section 5(2).[179] Mortgages to secure loans made under the *Industrial Development Bank Act* are excepted under section 6,[180] and mortgages given to secure a loan made under the *Federal Business Development Bank Act* or the *Business Development Bank of Canada Act* are excepted under section 7.[181] Finally, *The Saskatchewan Farm Security Act* provides that the *LCAA* does not apply to farm land.[182] Effectively, applying for leave to commence an action under the *LCAA* is required for residential and unincorporated business premises. Some of the residential

[178] *LCAA*, supra note 1, s 3(1). See *LCAA*, *ibid*, s 2(a), or Part 2.2.1 of this paper, for the definition of an "action."
[179] Although the Act says only that corporate bodies *may* waive the Act in writing, in practice all corporations are required to: ALRI, *supra* note 107 at 124.
[180] This amendment was enacted by *LCAA Amendment Act 1969*, *supra* note 143, s 1.
[181] The exception for the Federal Business Development Bank was added in 1977 by *LCAA Amendment Act*, *supra* note 144, s 1. The addition of the Business Development Bank of Canada was made by *Statute Amendment Act 2001*, *supra* note 145, s 10.
[182] *SFSA*, *supra* note 11, s 9(1)(a). Farm land is defined in the Act as "real property in Saskatchewan that is situated outside a city, town, village, hamlet or resort village and that is used for the purposes of farming": *ibid*, s 2(1)(f).

premises caught by the Act, rental properties and secondary residences (e.g. cottages at the lake), are not primary residences.

If the purpose of the *LCAA* is to protect home owners by allowing them time to arrange retention of their current residence or to find new accommodation, limiting the application of the Act to primary residences is an option that could be explored. Such a limitation is not without precedent. When *The Home Owners' Protection Act* was enacted in the early 1980s to provide additional protection to home owners (over and above the protection of the *LCAA*) in response to a high level of interest rates, the protection was limited to primary residences.[183] If the leave to commence procedure was no longer required for actions on secondary residences, rental properties, or business properties, court time and resources would be freed up, and legal costs on the excepted actions would be reduced. However, the public policy of allowing home owners time to arrange retention of their current residence or to find new accommodation would still be met.

Limiting the application of the Act based on use of the property may be challenging. For example, the borrower may occupy the property as his or her primary residence for many years, and then choose to rent it out. The opposite is also possible: a borrower may purchase a property as a rental property, and then occupy it as a residence. If the specific use of the property as a primary residence is a condition of the application of the *LCAA*, at what point in the life of the mortgage must the property be a primary residence? When the loan is made and secured by the mortgage? When the borrower defaults on the mortgage? How long must the property be a primary residence before or after those points? Would a change in use from or to a primary residence affect whether the lender would have agreed to the mortgage in the first place? If the application of the *LCAA* is restricted to primary residences, these questions must be considered.

ALRI considered similar challenges in making its recommendation on the availability of deficiency judgment protection in Alberta. ALRI set out four different methods of creating protection for borrowers based on use of the property:

1. Original use: protection will arise from the use the borrower intends to make of the property.

2. Use at default: protection will arise from use made of the property at the time of default.

[183] *The Home Owners' Protection Act*, SS 1981-82, c H-4.2, ss 3,4,6.

> 3. Use at any time: protection will arise if at any time during the term of the mortgage, as extended from time to time, the borrower puts the property to a protected use.
>
> 4. Exclusive use: protection will be extended if during the term of the mortgage, as extended from time to time, the borrower always puts the property to a protected use.[184]

ALRI recommended that the third method be applied for protection from deficiency judgments in Alberta.[185] It added two refinements to the third method:

1) that protection not arise unless the borrower or a family member establishes a *bona fide* residence on the residential land. The element of *bona fides* would prevent the borrower from moving into the house near the time of default only to obtain the protection of the Act; and,
2) that family members could trigger the protection of the Act. This broader protection of the family serves the public policy behind the Act.[186]

These refinements and their reasoning could apply equally to the application of the *LCAA* to primary residences.

The Saskatchewan Farm Security Act limits its Part III homestead protection based on the use of the land. Subsection 44(1) provides that:

> The operation of:
> (a) a final order of foreclosure; and
> (b) an order for possession contained in an order mentioned in clause (a);
> insofar as it affects a homestead, is stayed for as long as the homestead continues to be a homestead.

Subsections 44(16) and (17) further clarify:

> (16) This Part does not apply to a mortgage where:
> (a) the mortgage is executed after the coming into force of this subsection; and
> (b) at the time when the mortgage is executed, the farm land that is subject to the mortgage is not a homestead.
>
> (17) Where farm land that is the subject of a mortgage is not a homestead when this subsection comes into force, this Part does not apply to the mortgage.[187]

[184] ALRI, *supra* note 107 at 173.
[185] *Ibid* at 175.
[186] *Ibid* at 176.
[187] *SFSA*, *supra* note 11.

Referring back to ALRI's four methods of creating protections for borrowers based on use, *The Saskatchewan Farm Security Act*'s method is a combination of method one and method two. In order to receive protection, the land must be a homestead at the time the mortgage is executed and at the time of default (final order of foreclosure). The *LCAA* could adopt a similar method to *The Saskatchewan Farm Security Act* for consistency within the province.

One final consideration if the *LCAA* was amended to apply only to primary residences is the definition of "primary residence." Similar definitions in other legislation in the province and other jurisdictions should be considered to find the most appropriate definition. For example, *The Home Owners' Protection Act* defines "principal residence" as land:

> (i) that is subject to a mortgage; and
> (ii) on which a home owner, his spouse or his wholly dependant children reside;
> and that is:
> (iii) a house, including the land appurtenant to the house and consisting of not more than 65 hectares; or
> (iv) a unit as defined in *The Condominium Property Act, 1993*, including the owner's share in the common property.[188]

7.2.2. Notice of Intention

The second possible reform would amend the *LCAA* to remove the obligation to serve a notice of intention on the Provincial Mediation Board before seeking leave to commence, by implication removing the obligation to wait 30 clear days following the service of the notice of intention before making an application to the court.

As discussed in Part 2, subsection 3(2) of the *LCAA* requires that the lender serve a notice of intention on the Provincial Mediation Board 30 clear days before filing an application for an appointment for leave to commence with the court.[189] The purpose of, and service offered by, the Provincial Mediation Board is described in subsection 6(1) of *The Provincial Mediation Board Act*:

> Upon receipt of an application in writing by or on behalf of a debtor or any of his creditors, the board shall confer with and advise the debtor or his creditor and shall endeavour to bring about an amicable arrangement for payment of the debtor's indebtedness without recourse being had to legal proceedings, and for that purpose the board shall inquire into the validity of claims made against the debtor and his

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[188] *Supra* note 183, s 2(f).
[189] *LCAA*, *supra* note 1, s 3(2).

> ability to pay his just debts, either presently or in the future, and shall endeavour to effect an agreement between the debtor and his creditors to provide for the settlement of the said debts, either in full or by a composition.[190]

In effect, the Provincial Mediation Board provides a neutral third party to negotiate a settlement of the mortgage debt without requiring court proceedings. As is apparent from section 6 of *The Provincial Mediation Board Act*, the services of the board are available to any debtor or creditor who applies to the board. The board's services are not limited to foreclosures and cancellation of agreements of sale, and they would be available to assist borrowers in default on their mortgages even if not required to by subsection 3(2) of the *LCAA*. In fact, serving a notice of intention on the board was not required by the Act when it was enacted. Prior to 1957, the parties to an action were left to choose whether or not to engage the services of the Provincial Mediation Board.

The negotiation service offered by the board is useful, but requiring an application to the board as a prerequisite to commencing an action may not be the best approach. The Provincial Mediation Board has no power to stop the proceedings under the *LCAA*, and no power to make a lender consider or accept a borrower's proposal, or vice versa.[191] The negotiation service offered may duplicate an earlier attempt at negotiation. In practice, a lender will send at least one letter, if not several letters, to the borrower alerting the borrower to the default on the mortgage. These letters ask the borrower to contact the lender, or the lender's lawyer, to make arrangements to bring the mortgage payments current.[192] The lender has an interest in getting the borrower's mortgage back in good standing: if the mortgage is in good standing, the lender will continue to receive interest payments, and will not be required to pay the legal costs of a foreclosure. On the other hand, if, for some reason, the lender did not attempt to initiate negotiations, *The Provincial Mediation Board Act* allows the debtor to apply for its assistance.

No other common law jurisdiction in Canada has a pre-action requirement to contact a mediation board. Amending the *LCAA* to remove the notice of intention requirement would bring foreclosure in Saskatchewan closer in line with the practices in the rest of the country. Removing the notice of intention from the *LCAA* may not negatively affect the parties' ability to negotiate a settlement prior to an action being commenced. If bringing the services of the Provincial Mediation Board to the attention of the borrower is a concern, the Act or *The Queen's Bench Rules of Court* could require that a notice advising the borrower of the board be

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[190] *PMB Act*, *supra* note 21, s 6.
[191] *Facts about the Provincial Mediation Board*, *supra* note 22.
[192] Richards, *supra* note 35 at 5-2; "Foreclosure", online: Canadian Bar Association British Columbia branch <http://www.cba.org/bc>.

included in the first application served on the borrower. The notice of intention could be replaced with the notice of default discussed in Part 7.1.1, and a reference to the board's services included.

When post-pleading, mandatory mediation was introduced in Saskatchewan by *The Queen's Bench Act, 1998,* actions under the *LCAA* were excepted by regulation, undoubtedly because mediation was available to the parties through the Provincial Mediation Board.[193] If the notice of intention is removed from the *LCAA*, amendments to the regulations to *The Queen's Bench Act* could allow a borrower faced with an action to request mandatory mediation, either after entering a statement of defence or before the expiration of the time for delivery of a defence.[194]

7.2.3. Application for appointment

The third possible reform would amend the *LCAA* to remove the requirement of the lender to apply for an appointment for a hearing for leave to commence. As a result, a lender could start an action by applying to the court for leave to commence, without first making an application for an appointment. As an independent reform, this would mean that on the expiry of 30 clear days following service of the notice of intention, the lender would apply directly for leave to commence an action, without first applying for an appointment.

The *LCAA* came into force at a time when Chambers dates were not set.[195] Not only were Chambers dates not standardly set, but when there was a Chambers date, parties had no option but to appear in Chambers in person. There was no ability, as now, for parties to appear by telephone or by video conference.[196] The absence of set Chambers dates and the obligation to appear in person seem likely reasons that the Legislature included the application for an appointment. If a specific hearing date was not set by the court the lender would have been unable to advise the borrower of the date of the hearing for leave to commence. Now that Chambers are regularly held in all judicial centres, the lender is able to enter a date on its application for leave to commence and be confident that Chambers will be held at that date

[193] SS 1998, c Q-1.01, s 42. The exception is found in *The Queen's Bench Regulations*, c Q-1.01, Reg 1, s 5(2)(e).
[194] *QB Rules*, *supra* note 34, r 100; *new QB Rules*, *supra* note 34, r 3-15.
[195] *The revised rules of court of the province of Saskatchewan* (Regina: King's Printer, 1942). Although rule 450 provided for regular Chambers sitting by a judge in Regina, Saskatoon, and Moose Jaw, in 1943, *LCAA* applications were made to a local master. Rule 487 provided only that "Sittings in chambers shall be held by local masters at least one day in each week except during vacation."
[196] *QB Rules*, *supra* note 34, r 460A: *new QB Rules*, *supra* note 34, r 6-17.

and time.[197] With this change in court procedure, the application for an appointment step is no longer necessary. If the application for an appointment step was removed from the *LCAA*, the lender's first application to the court would be its application for leave to commence.

Eliminating the application for appointment step would bring Saskatchewan's foreclosure law more in line with the law in the rest of Canada. The money and time required of the parties by the foreclosure process would be reduced. Parties would appear sooner before a judge and sooner benefit from the judge's experience and advice: preserving the borrower's equity by either reinforcing the importance of making mortgage payments or making an early decision to sell. An earlier appearance before a judge could save a borrower from losing the equity in their home.

Call for Responses: (3) Which functions of The Land Contracts (Actions) Act should be maintained and which are no longer necessary?

7.3. Related Acts

While the reforms discussed in this section do not deal directly with the *LCAA*, the Acts are sufficiently related that reform in concert with the *LCAA* should be considered.

7.3.1. The Home Owners' Protection Act

The Home Owners' Protection Act was enacted effective December 31, 1981.[198] It had the effect of staying any applications for leave to commence or any actions started under the *LCAA* from December 31, 1981 to December 31, 1982.[199] It also prohibited any action or applications for leave to commence being commenced in the same period.[200] The Act covers very similar ground to the *LCAA*, but it was intended to be temporary legislation:

> *[T]he Home Owners' Protection Act* was enacted in response to the then (and current) high level of interest rates. Support for this conclusion can also be gleaned from the temporary nature of this legislation. In my view, this Act was primarily designed and passed to deal with those situations where the homeowner had, prior to December 31, 1981, renewed the mortgage at a rate of interest that was

[197] *QB Rules*, *ibid*, r 442-445; *new QB Rules*, *ibid*, r 6-7 - 6-8.
[198] *Supra* note 183.
[199] *Ibid*, s 7.
[200] *Ibid*.

> substantially higher than the old rate or was faced with the prospect of such a renewal in 1982.[201]

The expressed purpose of *The Home Owners' Protection Act* is "to afford protection to home owners against loss of their principal residences," a broader purpose than the now-effective purpose of the *LCAA*.[202] The additional protection was likely thought to be necessary as lenders became more aggressive in pursuing defaults in the mid-1980s as the recession took hold.[203] Given that the time period for the protection offered under *The Home Owners' Protection Act* has passed, it may no longer be necessary to have this Act "on the books."

Call for Responses: (4) Should* The Home Owners' Protection Act *be repealed?

7.3.2. The Agreements of Sale Cancellation Act

The Agreements of Sale Cancellation Act is a very brief, four section Act.[204] Section 1 is the short title. Section 1.1 is the interpretation section, defining "contract or agreement for the sale of land". The definition is the same as the definition of "agreement for sale of land" in section 2(a.1) of the *LCAA*. Section 2 provides that notwithstanding anything in the agreement for sale, "all proceedings by a vendor to determine or put an end to or rescind or cancel the contract or agreement shall be had and taken by proceedings in a court of competent jurisdiction."[205] The *LCAA* requires that leave of the court be obtained for an action by a vendor for:

> (A) specific performance or cancellation of;
> (B) sale or possession of land sold under; or
> (C) any other relief that may be granted under;
> an agreement for sale of land.[206]

The Agreements of Sale Cancellation Act and the *LCAA* significantly overlap in terms of when they require the court to be involved. Two Acts requiring the vendor to commence proceedings in court to terminate an agreement for sale of land are likely unnecessary.

The final section of *The Agreements of Sale Cancellation Act* excepts agreements for sale of under $250 from the requirement in section 2 to involve the court in the determination

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[201] *Toronto-Dominion Bank v Butler* (1982), 24 RPR 129 at para 13 (Sask QB).
[202] *Supra* note 183, s 3.
[203] ALRI, *supra* note 107 at 123.
[204] RSS 1978, c A-7.
[205] *Ibid,* s 2.
[206] *LCAA*, *supra* note 1, s 2(a.1).

or cancellation of the agreement. This is the only practical difference between *The Agreements of Sale Cancellation Act* and the *LCAA.* As such, it may be reasonable to repeal *The Agreements of Sale Cancellation Act* and amend the *LCAA* (if it continues) to include this exception, if the exception is still desirable.

Eliminating *The Agreements of Sale Cancellation Act* will simplify the cancellation process by reducing the number of Acts to refer to, decreasing the possibility that a cancellation procedure is incorrectly commenced, saving the parties' money, and the court time. The *LCAA* requires a vendor to apply to the court in order to cancel an agreement for sale – replicating this requirement in *The Agreements of Sale Cancellation Act* is unnecessary.

If the *LCAA* were repealed, and legislation specifically requiring a vendor to cancel an agreement for sale through the court was still found to be necessary, *The Agreements of Sale Cancellation Act* could be updated and modernized.

Call for Responses: (5) Should **The Agreements of Sale Cancellation Act** ***be repealed?***

INVITATION TO RESPOND

What reforms to *The Land Contracts (Actions) Act* and related Acts do you endorse? Please refer to our Call for Responses on page 1 to guide your thinking and for information on how to submit your response.

APPENDIX 1 – JURISDICTIONAL COMPARISON

	REMEDIES AVAILABLE	**Notice of intention to proceed**	**Leave of court to proceed**	**Proceeding**	**Interim order**	**Right to reinstate**	**Average redemption period**	**Final order**	**Sale**	**Superior court jurisdiction**	**Legislation**
British Columbia	Judicial sale and foreclosure ** Deficiency judgment available			Petition	Order nisi (may include Order for conduct of sale)	Yes	6 months (statutory, unless shorter or longer period justified)	Order approving sale or final order of foreclosure	Judicial sale (also available during redemption period of order for conduct of sale)	Yes	*Law and Equity Act, Supreme Court Civil Rules*
Alberta	Judicial sale and foreclosure ** No deficiency judgment against individuals			Statement of claim	Order nisi	Yes	6 months (statutory, may be decreased or extended on application to court)	Foreclosure order available *if* unable to make judicial sale or if borrower consents	Mortgagor must *first* attempt to sell at public action, unless borrower consents	Yes	*Law of Property Act; Alberta Rules of Court*
Saskatchewan	Foreclosure and sale ** No deficiency judgment if purchase-money mortgage	Notice to Provincial Mediation Board	Leave required	Statement of claim	Order nisi	Yes	3-6 months	Foreclosure order or order confirming sale	Judicial Sale	Yes	*The Land Contracts (Actions) Act; Queen's Bench Rules of Court*

	REMEDIES AVAILABLE	Notice of intention to proceed	Leave of court to proceed	Proceeding	Interim order	Right to reinstate	Average redemption period	Final order	Sale	Superior court jurisdiction	Legislation
Manitoba *Primary*	Extra-judicial sale through Land Titles Office ** Deficiency judgment available		Leave is required if default is other than failing to pay principal, interest, taxes, or to insure	Notice Exercising Power of Sale (NEPS)		Yes	1 month from NEPS to order for sale	Order for sale	Public auction or private contract	District Registrar of Land Titles Office	*Real Property Act*
Manitoba *Secondary*	Foreclosure and sale ** No deficiency judgment if final order foreclosure registered in Land Titles Office			If, following NEPS, default continues for 6 months and property was not sold at auction, apply to LTO for foreclosure		Yes	6 months	Foreclosure order available if unable to sell at auction	Mortgagor must first attempt to sell at public action	District Registrar of Land Titles Office	*Real Property Act*
Ontario *Primary*	Power of sale (contractual or statutory) ** Deficiency judgment available			Notice of sale under mortgage (15 days after default if contractual; 3 months if statutory)		Yes	35 days from notice to sale if contractual; 45 days from notice to sale if statutory		Public auction, private contract, or tender	No	*Mortgages Act*

	REMEDIES AVAILABLE	Notice of intention to proceed	Leave of court to proceed	Proceeding	Interim order	Right to reinstate	Average redemption period	Final order	Sale	Superior court jurisdiction	Legislation
Ontario *Secondary*	Foreclosure and sale ** Deficiency judgment available			Statement of claim (may follow immediately on default)		Yes	Request to redeem must be filed within time to file a defence. Then, 60 days after the taking of account.	Foreclosure order	Judicial Sale	Yes	*Rules of Civil Procedure*
Nova Scotia	Judicial sale ** Deficiency judgment available			Notice of action and statement of claim	Order for foreclosure and sale	Yes	6 weeks (between order and sale)	Confirmatory order	Judicial sale (by public auction unless otherwise ordered)	Yes	*Judicature Act; Real Property Act; Nova Scotia Civil Procedure Rules; Practice Memorandum No 1*
New Brunswick	Power of sale ** Deficiency judgment available			Notice filed four weeks prior to sale		No			Public auction or private sale	No	*Property Act*

	REMEDIES AVAILABLE	**Notice of intention to proceed**	**Leave of court to proceed**	**Proceeding**	**Interim order**	**Right to reinstate**	**Average redemption period**	**Final order**	**Sale**	**Superior court jurisdiction**	**Legislation**
Prince Edward Island	Power of sale ** Deficiency judgment available			Notice to borrower at any point after default		Yes			Public auction or private contract	No	*Real Property Act*
Newfoundland and Labrador *Primary*	Power of sale ** Deficiency judgment available			"30 day" Notice to borrower		No	If default continues for 30 days after notice, lender may advertise sale		Public auction or tender (minimum 75% value). If unsuccessful, private contract.	No	*Conveyancing Act*
Newfoundland and Labrador *Rare*	Judicial sale			Statement of claim				Order for sale		Yes	*Rules of the Supreme Court*

* Thank you to Sonya Lalli, student-at-law, for her assistance in compiling this table.

APPENDIX 2 – PROVINCIAL MEDIATION BOARD NOTICES OF INTENTION

Reporting Year	Number of Notices	Source†
2011-12	688	*Annual Report 2011-12*
2010-11	659	*Annual Report 2011-12*
2009-10	577	*Annual Report 2011-12*
2008-09	428	*Annual Report 2008-09*
2007-08	462	*Annual Report 2008-09*
2006-07	700	*Annual Report 2008-09*
2005-06	732	*Annual Report 2005-06*
2004-05	799	*Annual Report 2005-06*
2003-04	967	*Annual Report 2005-06*
2002-03	850	*Annual Report 2002-03*
2001-02	812	*Annual Report 2002-03*
2000-01	723	*Annual Report 2002-03*
1999-2000	619	*Annual Report 1999-2000*
1998-99	620	*Annual Report 1999-2000*
1997-98	556	*Annual Report 1997-98*
1996-97	609	*Annual Report 1997-98*
1995-96	679	*Annual Report 1997-98*
1995	657	Email from PMB
1994	761	Email from PMB
1993	963	Email from PMB
1992	1,292	Email from PMB
1991-92	1,872	*Annual Report 1991-92*
1990-91	1,921	*Annual Report 1991-92*
1989-90	1,639	*Annual Report 1991-92*
1988-89	1, 196	*Annual Report 1989-90*
1987-88	1,035	*Annual Report 1989-90*
1986-87	1,030	*Annual Report 1986-87*
1985-86	1,184	*Annual Report 1985-86*
1984-85	1,421	*Annual Report 1984-85*
1983-84	1,605	*Annual Report 1983-84*
1982-83	988	*Annual Report 1982-83*
1981-82	795	*Annual Report 1981-82*
1980-81	955	*Annual Report 1980-81*
1979-80	864	*Annual Report 1980-81*

1978-79	845	*Annual Report 1980-81*
1977-78	509	*Annual Report 1977-78*

†Sources (in reverse chronological order):

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