Law Reform Commission of Saskatchewan

Reform of *The Land Contracts (Actions) Act*

Final Report

July 2014

Foreclosure involves lengthy legal proceedings taken in the Court of Queen's Bench and is governed by several statutes, including *The Land Contracts (Actions) Act* (the *LCAA*). The *LCAA* is consumer protection legislation intended to protect borrowers by requiring lenders to obtain leave of the court before starting foreclosure. The protection is provided as 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 *LCAA* is 70 year old legislation, having been enacted in 1943. This Final Report considers the steps required by the *LCAA* for non-farm land mortgages and recommends reforms to better protect borrowers in current conditions.

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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.

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SUMMARY OF RECOMMENDATIONS

The Land Contracts (Actions) Act serves an important purpose in allowing borrowers time to sort out their lives before having an action started against them: 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. However, the current regime required by the Act, involving a number of steps before the application for leave to commence an action, does not serve borrowers well. The many steps may confuse borrowers and cause unnecessary expense to the lender that may be passed on to the borrower. Respondents to the consultation were concerned with maintaining the time and notice provided by the Act, while reducing the cost. The Commission has addressed these concerns with the recommendations that follow.

1) *The Land Contracts (Actions) Act* should not be repealed, but should be revised as further set out in this Final Report.
2) *The Land Contracts (Actions) Act* should not apply to properties used for solely commercial purposes at the time of default.
3) The notice of intention as a preliminary and separate step through the Provincial Mediation Board should be removed from *The Land Contracts (Actions) Act*.
4) The application for an appointment should be removed from *The Land Contracts (Actions) Act*.
5) The first step in a reformed *Land Contracts (Actions) Act* should be a plain language notice of application for leave to commence a foreclosure action, in a legislated form, served on the borrower and the Provincial Mediation Board at least 60 days before the hearing date, containing the following information:
    a. the date and location of the hearing;
    b. information explaining the role of the Provincial Mediation Board and stating that a borrower may contact the Board for assistance;
    c. notice that the borrower may appear at the hearing and speak to the court;
    d. information on the possible decisions that the court may make at the hearing (adjourn application, grant leave, dismiss application);
    e. notice that legal costs incurred by the lender between the notice of application and the grant of leave to commence cannot be recovered by the lender from the borrower, if the borrower behaves reasonably, in the court process; and,
    f. a contact name and number of an individual employed at the lender, empowered to deal with the borrower's mortgage, whom the borrower may contact to discuss the mortgage arrears and application.

6) The notice of application should be a form prescribed in the regulations to the *LCAA*, and a notice of application should be invalid unless it substantially complies with the prescribed form and the relevant information has been conveyed to the borrower in some other way.
7) A copy of the mortgage or agreement of sale and an appraisal of the property should be attached to the notice of application for leave to commence a foreclosure action.
8) A second document containing updated arrears information should be served on the borrower and filed with the court at least five days before the hearing for leave to commence a foreclosure action.
9) The court should continue to be limited to eight months of adjournments on an application for leave to commence a foreclosure action.
10) An education package describing the new *LCAA* procedure should be prepared and distributed to lawyers, the courts, and local registrars and legal assistance clinics for access by borrowers.
11) *The Home Owners' Protection Act* should be repealed.
12) *The Agreements of Sale Cancellation Act* should be repealed. Cancellation of agreements of sale should be treated in the same manner as foreclosures under a reformed *LCAA*.

1. INTRODUCTION

A mortgage is created when a person borrows money and gives an interest in real property as security. If the borrower (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.[1] When a lender successfully completes foreclosure proceedings, the lender becomes the owner of the property.[2] 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 Land Contracts (Actions) Act*[3] (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."[4] The *LCAA* is 70 year old legislation, having been enacted in 1943.[5] This Final Report considers the steps required by the *LCAA* for non-farm land mortgages and whether they are still necessary or desirable.[6]

Reform of 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*.[7] The *Consultation Paper*[8] was released in March 2013, and invited response to five questions:

1. Is the *LCAA* in need of reform? Why?
2. Should the *LCAA* be repealed?
3. Which functions of the *LCAA* should be maintained and which are no longer necessary?
4. Should *The Home Owners' Protection Act* be repealed?
5. Should *The Agreements of Sale Cancellation Act* be repealed?

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[1] In certain circumstances, section 2 of *The Limitation of Civil Rights Act*, RSS 1978, c L-16, and section 25 of *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1 [*SFSA*], restrict a lender's recovery to the mortgaged land and prevent an action on the promise to pay in the mortgage.

[2] 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.

[3] RSS 1978, c L-3 [*LCAA*].

[4] *Resmor Trust Company v MacDonald*, 2010 SKQB 198 at para 15.

[5] *The Land Contracts (Actions) Act,* SS 1943, c 17, s 5 [*LCAA 1943*].

[6] The *SFSA*, *supra* note 1, governs farm land mortgages and foreclosures.

[7] RSS 1978, c L-8.

[8] Law Reform Commission of Saskatchewan, *Reform of The Land Contracts (Actions) Act: Consultation Paper* (March 2013) [*Consultation Paper*].

A number of lenders and mortgage insurers responded in writing to the *Consultation Paper*. The Commission also consulted with lawyers for borrowers and lenders, family law lawyers, and the Provincial Mediation Board. The Commission reviewed foreclosure court files and observed *LCAA* applications in Chambers. Several borrowers who had appeared on an application for leave to commence were contacted, and notices were posted in Saskatoon's Local Registrar's office and in several debt consolidation and trustee in bankruptcy offices, inviting borrower response. Only one borrower consented to provide a response to the Commission. The Commission relied on the feedback provided by lawyers who represent borrowers in foreclosure actions to supplement the borrower perspective.

This Final Report draws on the responses to the Consultation Paper and the Commission's independent research to recommend reform to the *LCAA*.

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
> (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.[9]

The *LCAA* provides that an action, as defined, may only be commenced by obtaining leave of the court.[10] An action commenced without obtaining leave as required by the Act is a nullity.[11] Borrowers, except for corporate bodies, cannot waive the application of the Act.[12] Therefore, all actions must follow the *LCAA*, except for actions on:

(a) farm land;[13]

[9] *Supra* note 3, s 2.
[10] *Ibid*, s 3(1).
[11] *Ibid*, s 3(2).
[12] *Ibid*, s 5(1).
[13] *SFSA*, *supra* note 1.

(b) Industrial Development Bank mortgages;[14]

(c) Federal Business Development Bank and Business Development Bank of Canada mortgages;[15]

(d) mortgages and agreements of sale made under *The Saskatchewan Housing Corporation Act*,[16] *The Housing and Urban Renewal Act, 1966*,[17] the *National Housing Act* (Canada),[18] or the *National Housing Act, 1954* (Canada),[19] securing loans made with respect to low income, cooperative housing, urban renewal and student housing projects, as well as general housing assistance;[20] and

(e) corporate mortgages and agreements of sale, where the corporation has agreed in writing to waive the application of the *LCAA*.[21]

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.[22] The Provincial Mediation Board notifies the borrower that the lender intends to start an action, and offers the opportunity to attempt to mediate a settlement.[23] The Provincial Mediation Board has no power to stop the proceedings.[24]

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.[25] 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.[26] 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:

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[14] *LCAA*, *supra* note 3, s 6.
[15] *Ibid*, s 7 (only on those mortgages granted on or after October 2, 1975).
[16] RSS 1978, c S-24.
[17] SS 1966, c 53.
[18] RSC 1985, c N-11.
[19] SC 1953-54, c 23.
[20] *The Saskatchewan Housing Corporation Act*, *supra* note 16, s 46(1).
[21] *LCAA*, *supra* note 3, s 5(2).
[22] *Ibid*, s 3(2)-(3).
[23] *The Provincial Mediation Board Act*, RSS 1978, c P-33, s 6 [*PMB Act*].
[24] Government of Saskatchewan, *Facts about the Provincial Mediation Board* (1970).
[25] *LCAA*, *supra* note 3, s 3(2).
[26] *Ibid*, s 3(4), (5), (7).

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.[27]

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 borrower may appear to argue against the court granting leave or to request an adjournment. 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.[28]

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.[29] 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;
(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.[30]

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

[27] *Ibid*, s 3(4).
[28] *Ibid*, s 3(6).
[29] *Ibid*, s 3(9)-(11).
[30] *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 6.3, below).

may be adjourned an unlimited number of times, but the application may not be adjourned for longer than eight months in total.[31]

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.[32]

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."[33] 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 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."[34] 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.[35]

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.[36]

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 certain relief, including 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

[31] *LCAA*, *supra* note 3, s 3(9). 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 over again with a notice of intention to the Provincial Mediation Board.
[32] *Ibid*.
[33] *Ibid*, s 3(10).
[34] *Huron & Erie Mortgage Corp v Chambers*, 1943 CarswellSask 5 at para 14, [1944] 1 DLR 131 (CA).
[35] *LCAA*, *supra* note 3, s 3(11). However, except in "chronic offender" situations, the court will not award costs to the lender occasioned before leave is granted: *Saskatoon Credit Union Ltd. v MacKay* (1988), [1989] 1 WWR 178, 73 Sask R 31 (QB).
[36] Saskatchewan, *The Queen's Bench Rules* [*QB Rules*]; 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>.

defence is filed, normal litigation procedures follow. If the defendant does not file a defence, the lender will note the borrower for default and 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.[37]

A borrower may choose to redeem or reinstate the mortgage during the redemption period. To redeem the mortgage, the borrower must pay the entire amount owing on the mortgage, plus costs. To reinstate the mortgage, the borrower must pay the arrears and costs. Although they are distinct remedies, they are often jointly referred to as "redeeming the mortgage."

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 property.[38] If the mortgage was given to secure all or part of the purchase price of the land, the lender may not be able to pursue the borrower for any deficiency on the mortgage debt following foreclosure or judicial sale.[39]

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;

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[37] 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.

[38] 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.

[39] *The Limitation of Civil Rights Act*, *supra* note 1, s 2.

(e) prevailing conditions of a local or temporary nature; and

(f) all other matters that may appear relevant.[40]

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.[41]

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.[42]

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,[43] or any judgment or order made in an action.[44] 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.[45] 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."[46] 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.[47] Any person who did

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[40] *Supra* note 3, 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 6.3). This list is the same as in section 3(9) for a hearing for leave to commence.

[41] *Ibid*.

[42] *Ibid*.

[43] Appeals of orders respecting leave to commence are rare, but have occurred. See e.g. *Royal Bank v Anderson*, 2008 SKCA 153; *Royal Bank v Lachapelle*, 2006 SKCA 125; *Household Realty Corp. of Canada v Lee* (1984), 33 Sask R 162 (CA) (lenders appealing denial of leave to commence); *Rochdale Mall Corp. v Damon Developments Ltd.*, [1986] 2 WWR 719, 26 DLR (4th) 158 (Sask CA) (borrower appealing grant of leave to commence).

[44] *LCAA*, *supra* note 3, s 3(12)-(13), 4(1).

[45] *The Court of Appeal Act, 2000*, SS 2000, c C-42.1; Saskatchewan, *The Court of Appeal Rules* [*CA Rules*].

[46] *LCAA*, *supra* note 3, s 3(14).

[47] *Ibid*, s 3(14.1), (14.2), (14.4).

not appear on the application does not need to be served with a notice of appeal.[48] 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.[49]

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.[50] 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.[51] 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.[52] An order of the Court of Appeal on a leave to commence application may not be appealed except on a question of law.[53]

2.8. From the borrower's perspective

Most lenders follow similar procedures when a borrower defaults in payment on a mortgage. Some exceptions may occur, particularly if the borrower has chronically defaulted on the mortgage. Following is the sequence of events, from a borrower's perspective, for a "normal" foreclosure.

A borrower will first be notified of his or her default in mortgage payment by the lender, usually by letter. Several letters are commonly sent by the lender to the borrower requesting a payment arrangement following default.

If the borrower does not contact the lender to make a payment arrangement, or if the borrower defaults on a payment arrangement made, the next notification received is a letter from the Provincial Mediation Board with the notice of intention attached. This letter advises the borrower to contact the Board or the lender's lawyer to discuss a repayment plan, and offers information on the process. If the borrower contacts either the Board or the lawyer, correspondence will be exchanged for the purposes of negotiating a payment plan. While these negotiations are ongoing, the lender may continue with the steps in the *LCAA* process.

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[48] *Ibid*, s 3(14.3).
[49] *Ibid*, s 3(14.2). The *QB Rules*, *supra* note 36, apply with respect to service of a notice of appeal: *LCAA*, *supra* note 3, s 3(15).
[50] *Ibid*, s 3(16), 4(2)-(3).
[51] *Ibid*, s 3(16.1), 4(3).
[52] *Ibid*, s 3(17), 4(3).
[53] *Ibid*, s 3(18).

No sooner than 30 days after receiving the notice of intention, an appointment for leave to commence an action and an affidavit of default will be served on the borrower. The appointment provides the date (at least 15 days after service of the appointment), time, location, and remedy requested of the first court appearance in the process.[54] The affidavit of default sets out the details of the mortgage, default, and arrears. If the borrower appears at the appointment, he or she will have the opportunity to present information to the court about plans to bring the mortgage current or sell the property. If the court orders an adjournment, the lender's lawyer may send a letter to the borrower reminding him or her of the next court date. This pattern of hearings and adjournments will continue until the court grants or denies leave to commence. If the court denies leave to commence, the borrower will not receive anything further in the process, unless the lender begins again with the notice of intention.

If the court grants leave to commence an action, the borrower will be served with a statement of claim.[55] If the borrower files a statement of defence, usual litigation procedure will follow. If the borrower does not file a statement of defence, the lender will note the borrower for default[56] and serve a notice of application for an order nisi on the borrower. The notice of application advises the borrower that he or she may appear in court to state his or her side of the matter on the date and time noted, and that if the borrower or his or her lawyer does not appear for the application hearing, that the court may give the lender what it has requested in the borrower's absence.[57]

If the court grants an order nisi, it will be served on the borrower. The order nisi provides the amount due from the borrower to the lender and the date by which the amount must be paid or the property will be foreclosed or sold.[58] If the borrower does not redeem or reinstate his or her mortgage during the time provided, he or she will then be served with a notice of application for a final order of foreclosure or order confirming sale, depending on the process chosen. The borrower again has the opportunity to appear before the court to present his or her side of the matter. If the order sought is granted by the court, the borrower will be served with a copy of the order, and the matter will be ended by the property passing to the lender or the purchaser.

In summary, the borrower will be served with documents on at least seven separate occasions:

- the notice of intention,
- the appointment for leave to commence,

[54] *QB Rules*, *supra* note 36, Form 10-39.
[55] *Ibid*, Form 10-40A.
[56] *Ibid*, r 3-21.
[57] *Ibid*, Form 6-5.
[58] *Ibid*, Form 10-43A, 10-45A.

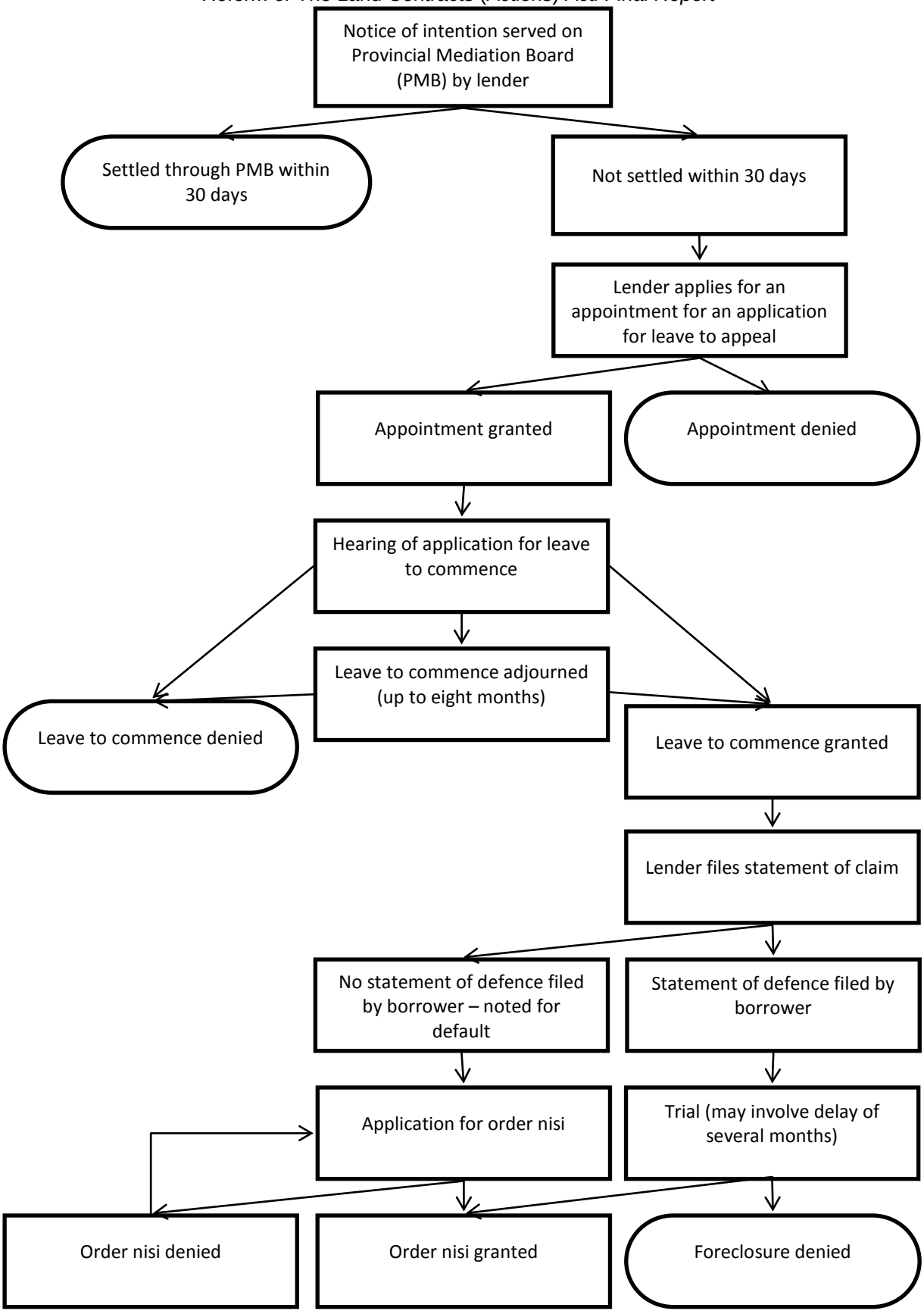
- the statement of claim,
- the application for order nisi,
- the order nisi,
- the application for a final order of foreclosure or order confirming sale, and
- the final order of foreclosure or order confirming sale.

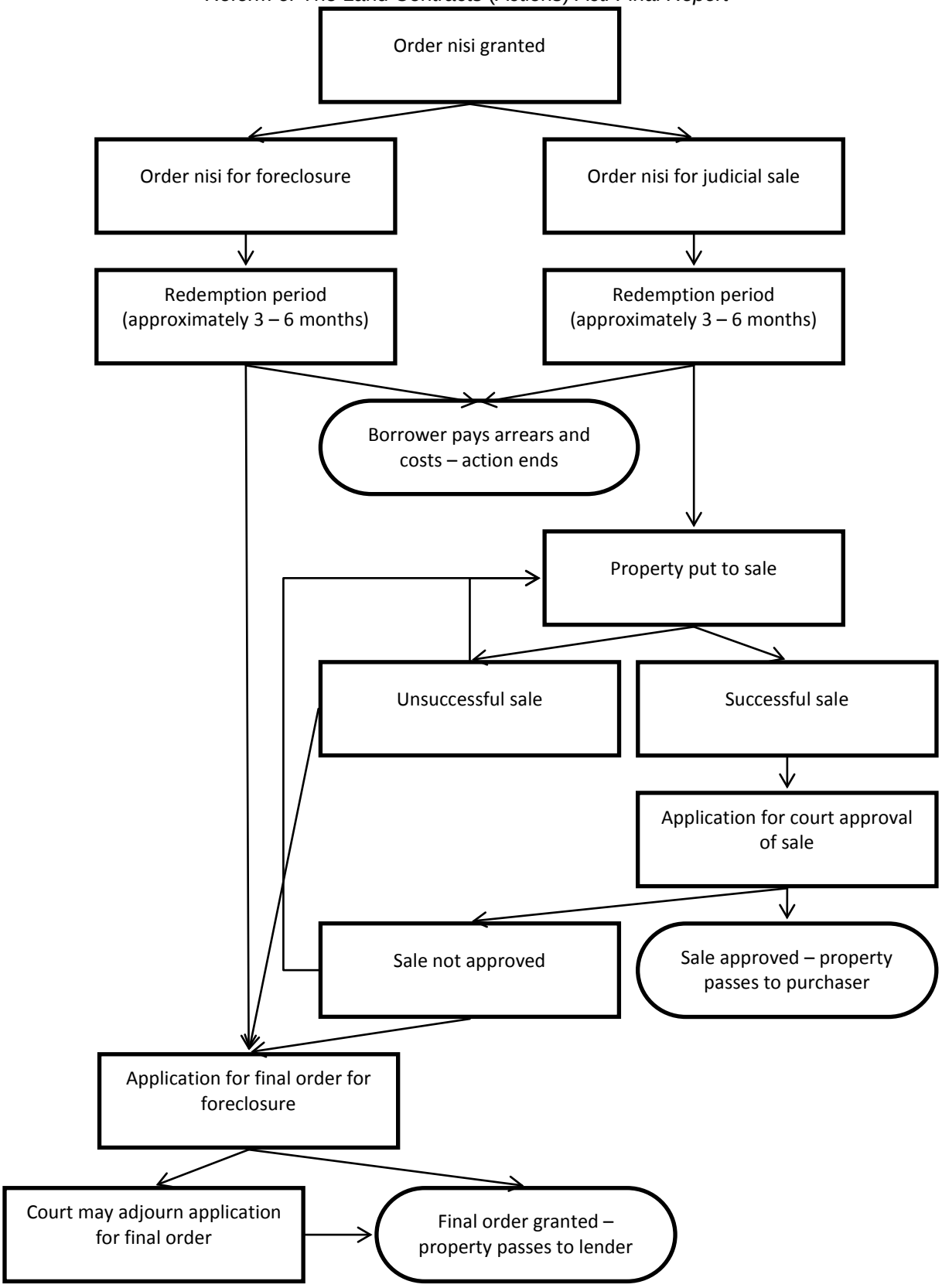
The borrower will have at least three opportunities to present his or her side of the matter to the court:

- at the application for leave to commence,
- at the application for order nisi, and
- at the application for final order of foreclosure or order confirming sale.

2.9. Flowchart of LCAA process

(Next page.)


Notice of intention served on Provincial Mediation Board (PMB) by lender
Settled through PMB within 30 days
Not settled within 30 days
Lender applies for an appointment for an application for leave to appeal
Appointment granted
Appointment denied
Hearing of application for leave to commence
Leave to commence adjourned (up to eight months)
Leave to commence denied
Leave to commence granted
Lender files statement of claim
No statement of defence filed by borrower – noted for default
Statement of defence filed by borrower
Application for order nisi
Trial (may involve delay of several months)
Order nisi denied
Order nisi granted
Foreclosure denied


Order nisi granted
Order nisi for foreclosure
Order nisi for judicial sale
Redemption period (approximately 3 – 6 months)
Redemption period (approximately 3 – 6 months)
Borrower pays arrears and costs – action ends
Property put to sale
Unsuccessful sale
Successful sale
Application for court approval of sale
Sale not approved
Sale approved – property passes to purchaser
Application for final order for foreclosure
Court may adjourn application for final order
Final order granted – property passes to lender

3. COSTS

Most mortgages provide that the borrower is responsible for any expenses the lender must incur in order to maintain and enforce its security. For example, CIBC's *Consumer General Collateral Mortgage - Additional Terms and Conditions* provides:

> **4. Costs**
>
> You must pay us, when we demand, all of our costs related to this mortgage, your property, or any agreement. These amounts are payable immediately to us. You must pay interest on these costs from the date they are paid by us until you repay them.
>
> If you do not pay them, we may declare you in default on this mortgage. We may also add these amounts to the debt and charge you interest on them until you repay them.
>
> You must pay us these costs even if we have not advanced you any money under this mortgage or any agreement.
>
> Examples of these costs include:
>
> - investigating the title to your property;
> - preparing, signing and registering this mortgage and any related documents;
> - lawyer's fees and disbursements, charged on a "solicitor and client" basis;
> - appraising, inspecting, protecting, repairing, or insuring your property;
> - enforcing any of our rights (including taking possession of your property) under this mortgage;
> - preparing your property for sale or lease and selling or leasing it; and
> - legal expenses, expenses of our agents, and any other costs of protecting our rights, including a reasonable allowance for the time and services of our employees.[59]

Although mortgages include "lawyer's fees and disbursements" and "legal expenses" as costs a borrower is responsible for reimbursing, courts in Saskatchewan have held that borrowers are not responsible for the lender's legal costs under the *LCAA* before leave to commence is granted. As explained by the Court of Queen's Bench in 1988,

> The argument that a mortgagor ought to pay all the costs occasioned by the mortgagee in having to comply with consumer protection legislations such as *The Land Contracts (Actions) Act* is, with respect, a pernicious one. The whole purpose of the legislation is to give a defaulting mortgagor time to order his or her affairs before being caught up in the extremely costly and potentially disastrous process of actual foreclosure. Most respondents in proceedings under *The Land Contracts (Actions) Act* are individual homeowners who have gotten into financial difficulty. The suggestion that they must pay for the protection assured them as of right fails to recognize the philosophy behind the legislation. After all, if the mortgagor could pay, he or she would not be in default. To cast upon the financially troubled mortgagor the additional burden of solicitor and client costs would do violence to

[59] Canadian Imperial Bank of Commerce, *6213 Consumer General Collateral Mortgage - Additional Terms and Conditions* (Saskatchewan: 2008/09), online: CIBC <http://www.cmidocs.com>.

> this statute and would constitute a bizarre misapplication of the principles set down in cases such as *Mayhew v. Adams*, [[1930] 3 WWR 539 (Sask CA)].[60]

However, the court found that in certain circumstances, such as "the 'chronic offender' who repeatedly falls into arrears when capable of making the payments or at least arrangements with the mortgagee to retire the arrears," a borrower may be required to pay pre-leave costs,[61] which could be solicitor and client costs in some cases.[62] In 2012, the court reiterated that a lender may claim pre-leave costs, and that "such claims must be dealt with on a case-by-case basis through the proper and judicial exercise of this court's discretion."[63]

Setting out precisely what each step in the *LCAA* costs a lender is difficult. The amount depends on a number of factors including the difficulty of serving documents on the borrower and the number of times the hearing is adjourned. However, courts have often considered what realistic pre-leave costs are.

In *Toronto Dominion Bank v Schweigert*, the lender sought pre-leave costs of $1,333.05, detailed in its lawyer's affidavit:

Legal Fees:	
> Demand letter	$ 150.00
> Notice on Provincial Mediation Board	$ 150.00
> Application for leave to foreclose	$ 500.00
> Attendance in Court Chambers Feb 1/05	$ 225.00
Sub-total:	$1,025.00
+ 7% GST	71.75
+ 7% PST	71.75
Total Legal Fees and Applicable Taxes	**$1,168.50**

Legal Disbursements:	
> Court fees — file application for leave	$100.00
> Land Registry fees and miscellaneous	$60.33
Sub-total:	$160.33
+ 7% GST	4.22
Total Legal Disbursements and Applicable taxes	**$164.55**[64]

In this case, the court awarded pre-leave costs of $400.00 plus disbursements of $164.55 to the lender, because of the borrower's history of delinquent payments.[65] The court did not order

[60] *Saskatoon Credit Union Ltd. v MacKay* (1988), 73 Sask R 31, [1989] 1 WWR 178 (QB) at para 11.
[61] "Pre-leave costs" are the costs associated with the application for leave: *Toronto-Dominion Bank v Huot*, 2008 SKQB 345 at para 2. These are the legal costs incurred by the lender between the notice of intention and the grant of leave to commence.
[62] *Ibid* at para 8.
[63] *Bridgewater Bank v Haines*, 2012 SKQB 357 at para 6.
[64] *Toronto Dominion Bank v Schweigert*, 2005 SKQB 95.
[65] *Ibid* at para 11.

solicitor and client costs as there was no evidence that the borrower was able to make his payments on the mortgage when it fell into arrears, or that he was able to make arrangements with the lender.[66] The costs sought and amount awarded in *Canada Trust Co. v Hoover* are very similar.[67] The lender sought pre-leave costs of $1,156.10 and the court awarded $400 plus disbursements of $135, for the same reason as in *Schweigert*.[68]

Respecting costs of the entire foreclosure proceeding, in 2006, the court noted that a standard foreclosure costs between $3,500 and $3,700, and that this amount could be fairly broken down into equal amounts for each of the four stages of foreclosure (pre-leave, commencement, order nisi, final order).[69] In the circumstances of the case, the court awarded $900 for each of the commencement stage and the order nisi stage, plus taxes and post-leave disbursements. In 2012, the court allowed for a small escalation in costs to approximately $1,000 per stage and noted that in this case, the amount of time expended on the pre-leave stage was roughly equivalent to the one-quarter allocated to it.[70] Because it was a slightly more complicated proceeding, the court awarded $1,000 per stage for the last three stages, an additional $1,000 for the increased work required for a judicial sale over a foreclosure, and $500 for the lender's negotiations through the Provincial Mediation Board and with the municipality, for a total of $4,500.[71] Disbursements of $4,445.56 were ordered.[72]

In another complicated proceeding, *Royal Bank v Lafond*, the lender claimed $14,900 in legal fees and over $2,000 in disbursements.[73] The court commented that the action took "some time" to advance and that the lender had directed considerable attention to the proceeding. However, the amount claimed far exceeded "the average foreclosure action" and, in this case, approached the amount of the mortgage.[74] Following a review of the proceedings, the court set the solicitor-and-client costs payable by the borrower at $5,000 plus taxes, and ordered the

[66] *Ibid* at para 12.
[67] *Canada Trust Co v Hoover*, 2006 SKQB 121.
[68] *Ibid* at 1, 7-8.
[69] *Royal Bank v Millsap*, 2006 SKQB 464 at para 17. In 2003, the Court of Queen's Bench for Saskatchewan commented that "a typical foreclosure proceeding involves $3,000.00 solicitor/client costs plus GST": *Royal Bank v Murdoch Professional Golf Services Inc.*, 2003 SKQB 492 at para 5.
[70] *Royal Bank v Leschinski*, 2012 SKQB 286 at para 7-8.
[71] *Ibid* at para 9.
[72] *Ibid* at para 10.
[73] *Royal Bank v Lafond*, 2009 SKQB 346 at para 6.
[74] *Ibid* at para 11.

$2,700 in disbursements to be paid.[75] This appears to be a common amount for fees for more complicated foreclosure actions.[76]

4. OTHER JURISDICTIONS

British Columbia, Alberta, and Nova Scotia primarily use court-directed foreclosure, also known as judicial sale and foreclosure.[77] 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.

4.1. Judicial sale and foreclosure

4.1.1. British Columbia

In British Columbia, the steps for foreclosure are largely set out in rule 21-7 of the *Supreme Court Civil Rules*,[78] a rule described as a "mini-code."[79] 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

[75] *Ibid* at para 12.
[76] See also *Royal Bank v Murdoch Professional Golf Services Inc.*, *supra* note 69 at para 5, where the lender claimed $11,166 in fees. The court reduced the fees to $5,000 plus taxes and ordered payment of disbursements of $3,823.62.
[77] A table summarizing the foreclosure procedures in the nine common law provinces is found in the *Consultation Paper*, *supra* note 8 at Appendix 1.
[78] British Columbia, *Supreme Court Civil Rules* [*BC Rules*].
[79] Roach, *supra* note 38 at 137.

month after the petition is served on the borrower.[80] 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 court will grant a final order of foreclosure; or, order a sale of the property.[81] The redemption period must be six months unless a shorter or longer period is justified.[82] If the court has ordered a sale, the lender may apply for an order confirming sale even though the redemption period has not expired.[83] 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.

4.1.2. Alberta

In Alberta, foreclosure is governed by Part 5 of the *Law of Property Act*.[84] 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.[85] 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 net proceeds of the judicial sale exceed the amount owed, the borrower will receive the surplus sale funds, subject to the rights of encumbrance holders. If a judicial sale is unsuccessful, the lender may apply for foreclosure. The lender may not pursue a deficiency judgment against an individual borrower unless the mortgage is a high-ratio mortgage.[86]

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[80] 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>.
[81] *BC Rules*, *supra* note 78, r 2-7(5): this subrule lists additional powers of the court in a foreclosure proceeding.
[82] *Law and Equity Act*, RSBC 1996, c 253, s 16(2).
[83] *Supra* note 78, r 21-7(9).
[84] RSA 2000, c L-7.
[85] *Ibid*, s 41.
[86] *Law of Property Act*, *supra* note 84, s 40, 43. The prohibition on deficiency judgments against individuals is not restricted to purchase-money mortgages. A "high ratio mortgage" is defined as "a mortgage of land given to secure a loan under which the specific principal sum of the mortgage, together with the specific principal sum of any existing encumbrance on or mortgage of the same land, exceeds 75 percent of the market value of the land at the time the mortgage is given": *Law of Property Regulation*, Alta Reg 89/2004, s 1(2).

4.1.3. Nova Scotia

In Nova Scotia, foreclosure is dealt with by several different statutes[87] and the *Nova Scotia Civil Procedure Rules*.[88] The court has issued a practice memorandum to provide further guidance in foreclosure and sale matters.[89] 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.[90] 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.[91] The borrower's right to redeem ends when the sheriff declares the successful bidder at the public auction.[92] Following the sale, the lender will apply for an order confirming sale that confirms 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.

4.2. Power of sale

4.2.1. 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*

[87] 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*].

[88] [*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.

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

[90] *Nova Scotia Rules*, *supra* note 88, r 72.08.

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

[92] *Ibid* at 38.

Mortgages in 1987, power of sale was used in 90 to 99 percent of the foreclosures in Ontario.[93] A general review of the literature indicates that this is still the case. Judicial sale and foreclosure are rare.

The *Mortgages Act* governs the power of sale procedure in Ontario, providing two types of powers: contractual and statutory.[94] 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.[95] 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.[96] In practice, lenders frequently wait two to three months before beginning power of sale proceedings.

The statutory power of sale is used very rarely, but is available when the mortgage does not provide for power of sale.[97] 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.[98] 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, 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 Procedure*.[99] 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.[100] If a request to redeem is filed, the borrower has 60 days following the taking of accounts to redeem the mortgage.[101] 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. [102] An action so converted may be converted back to foreclosure on the

[93] Ontario Law Reform Commission, *Report on the Law of Mortgages* (Ontario Ministry of the Attorney General, 1987) at 156 [OLRC].
[94] RSO 1990, c M.40.
[95] *Ibid*, s 38.
[96] *Ibid*, s 32.
[97] LRCNS, *Final Report*, *supra* note 91 at 27.
[98] *Mortgages Act*, *supra* note 94, s 26.
[99] RRO 1990, Reg 194, r 64.03 (foreclosure actions), 64.04 (sale actions).
[100] *Ibid*, r 64.03(6).
[101] *Ibid*, r 64.03(8).
[102] *Ibid*, r 64.03(17)-(22).

application of any party if it is apparent that the sale proceeds will not satisfy the debt.[103] A lender may seek a deficiency judgment against the borrower following a judicial sale.[104]

4.2.2. 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.[105] Although no specific period of default is required before the lender can enforce the power of sale, in practice lenders frequently wait three months.[106] 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.[107] 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.[108] The lender may seek a deficiency judgment against the borrower by action in the Court of Queen's Bench.

4.2.3. Prince Edward Island

In Prince Edward Island, the *Real Property Act*[109] and *Civil Procedure Rules*[110] 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.[111]

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*.[112] 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.[113] If the mortgage is not reinstated or redeemed, the lender must first attempt to sell the property by public auction.

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[103] *Ibid*, r 64.03(23).
[104] *Ibid*, r 64.04(14).
[105] Roach, *supra* note 38 at 189; *Property Act*, RSNB 1973, c P-19.
[106] LRCNS, *Final Report*, *supra* note 91 at 25.
[107] *Property Act*, *supra* note 105, s 45.
[108] LRCNS, *Final Report*, *supra* note 91 at 25.
[109] RSPEI 1988, c R-3, s 72-77.
[110] Prince Edward Island, *Civil Procedure Rules*, r 64.03-64.04.
[111] *Supra* note 109 at Covenant 12 of the Second Schedule (Deed of Mortgage). Regarding exclusive use, see Roach, *supra* note 38 at 189; LRCNS, *Final Report*, *supra* note 91 at 22; *Federal Business Development Bank v Group Plus One Ltd* (1985), 54 Nfld & PEIR 267 at 268 (PEICA).
[112] LRCNS, *Final Report*, *supra* note 91 at 23.
[113] *Real Property Act*, *supra* note 109 at Covenant 14 of the Second Schedule (Deed of Mortgage).

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.[114] 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.

4.2.4. 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.[115] Lenders almost exclusively elect power of sale due to its ease of implementation.[116] 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.[117]

Before publishing a notice of sale, the lender must give the borrower a written notice demanding payment of the mortgage, and default must continue for another 30 days following the notice.[118] The borrower does not have the right to reinstate the mortgage by paying only the arrears and costs.[119] 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 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.[120] If the property cannot be sold by public auction or tender, the lender may list the property for sale by 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.[121] 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.[122]

[114] LRCNS, *Final Report*, *supra* note 91 at 24.
[115] Judicial sale and foreclosure are provided for in the *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Schedule D, r 26.
[116] Roach, *supra* note 38 at 189; LRCNS, *Final Report*, *supra* note 91 at 20.
[117] RSNL 1990, c C-34, s 5.
[118] *Ibid*, s 6-7.
[119] LRCNS, *Final Report*, *supra* note 91 at 20.
[120] *Conveyancing Act*, *supra* note 117, s 9.
[121] *Ibid*.
[122] *Ibid*, s 12.

4.3. Land Titles Office sale and foreclosure

In Manitoba, with rare exceptions, foreclosure proceedings are an administrative process through the Land Titles Office.[123] Only if the default is something other than failure to make payment or to insure the property must the lender first apply to the court for permission to begin foreclosure, governed by the *Real Property Act*.[124]

To begin, the lender must serve on the borrower and register in the Land Titles Office a notice of exercising power of sale (NEPS). [125] 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.[126] 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.[127] 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.[128] The redemption period may be extended by the district registrar on application by any "person appearing to be interested in the land."[129] 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.[130]

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.[131]

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[123] "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>.
[124] *Real Property Act*, CCSM R-30, s 134.
[125] *Ibid*, s 134.
[126] *Ibid*, s 135.
[127] *Ibid*, s 138(2). In order to make an application for foreclosure, the land must have been offered for sale at public auction.
[128] *Ibid*, s 138(3).
[129] *Ibid*, s 138(5).
[130] *Ibid*, s 139(2).
[131] "Mortgage Sale and Foreclosure," *supra* note 123; Sim, *supra* note 123.

5. OTHER LAW REFORM AGENCIES

5.1. 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.[132] The 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 Commission did not recommend additional protection to borrowers in foreclosure with respect to collection of the deficiency. The 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*.[133]

5.2. 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.[134] 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 sales in times of fluctuating land prices.[135] ALRI noted that Alberta, like Saskatchewan, has a resource-based economy, resulting in more drastically fluctuating land prices than in other parts of the country.[136]

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

[132] Law Reform Commission of British Columbia, *Report on Personal Liability Under a Mortgage or Agreement for Sale* (LRC 84)(September 1985) [LRCBC].
[133] *Property Law Act*, RSBC 1996, c 377, s 20-24.
[134] Alberta Law Reform Institute, *Mortgage Remedies in Alberta* (Report No 70) (Edmonton, AB: June 1994) [ALRI].
[135] *Ibid* at 3.
[136] "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": *ibid* at 146

> 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.[137]

ALRI did not recommend any additional protections.

5.3. Ontario

The Ontario Law Reform Commission (OLRC) released its *Report on the Law of Mortgages* in 1987.[138] 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."[139] 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.[140] 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 property privately, and a clarification of the standard of conduct required of a lender in any sale following the expiration of the delay period.[141]

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.[142]

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.[143] The parties would be free to abridge or exclude the post-notice of sale delay period.[144] 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

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[137] *Ibid* at 4.
[138] *Supra* note 93.
[139] *Ibid* at 157.
[140] *Ibid* at 164. As was noted earlier in the review of Ontario's foreclosure processes (see Part 4.2.1), an estimated 90 to 99 percent of the time lenders elect to proceed by way of power of sale: *ibid* at 156.
[141] *Ibid* at 165.
[142] *Ibid* at 166-167.
[143] *Ibid* at 169.
[144] *Ibid* at 170.

the court would have no discretion to extend the delay period without the consent of all parties.[145] 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.[146]

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.[147] OLRC recommended retaining the lender's right to obtain a deficiency judgment.[148]

5.4. 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.[149] 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.[150]

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.[151]

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[145] *Ibid* at 171-72.
[146] *Ibid* at 168.
[147] *Ibid* at 180.
[148] *Ibid* at 199.
[149] LRCNS, *Final Report*, *supra* note 91 at ii.
[150] *Ibid*.
[151] *Ibid* at iii.

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."[152]

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. The Commission's recommendations have not been implemented.

6. HISTORY

6.1. Enactment

The *LCAA* was proclaimed on May 15, 1943,[153] 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.[154] The *LCAA* was described, during debate on the bill, as part of "a system that would meet the conditions of alternating moisture and drought."[155] 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

[152] *Ibid* at 15.
[153] *LCAA 1943*, *supra* note 5.
[154] FC Cronkite, "The Judicial Committee and the Farm Debt Problem" (1943) 9:4 The Canadian Journal of Economics and Political Science 557 at 557.
[155] "Debt Bills Start Talk Marathon", *Regina Leader Post* (5 April 1943).

> 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.[156]

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.[157] The *LCAA* was part of a series of six bills considered by the Legislature in April 1943. The series also included:

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.[158]

All six of the bills received Royal Assent on April 12, 1943.[159] *The Moratorium Act* was found to be *ultra vires* by the Supreme Court of Canada in 1955.[160]

6.2. Amendments

The *LCAA* has been amended 20 times over its 70 year history.[161] Many of the amendments clarified the language and updated references when the court structure changed, but did not

[156] *Lozinski v Mayoh* (1984), 32 Sask R 312 at para 13 (CA). See also *Rochdale Mall Corp v Damon Developments Ltd*, *supra* note 43 at para 5: "The purpose of the *Land Contracts (Actions) Act* is to delay or defer in certain cases actions by mortgagees or vendors of land."
[157] *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).
[158] "Province's New Debt Legislation Outlined", *ibid*; "Legislature Winds Up Session at Midnight", *Regina Leader Post* (13 April 1943).
[159] *Re Moratorium Legislation Act* (1955), 35 CBR 135 at para 19 (SCC); "Legislature Winds Up Session at Midnight", *supra* note 158.
[160] *Re Moratorium Legislation Act*, *supra* note 159.
[161] 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

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.[162] Before this amendment, any of the parties interested in the action could apply to the Provincial Mediation Board, but applications were not required.[163]

In 1959, the Act was amended to permit corporate mortgagors to waive the application of the Act.[164] 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.[165] 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."[166]

The court's discretion in awarding costs on an application for leave to commence was expanded in 1965.[167] 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.[168] 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."[169]

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*.[170] 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*

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.

[162] *An Act to amend The Land Contracts (Actions) Act*, SS 1957, c 34.

[163] Provincial Mediation Board, *A Review of Debt and Protective Legislation in the Province of Saskatchewan* (Regina, SK: July 1945) at 6.

[164] *LCAA*, *supra* note 3, s 5(2); *An Act to amend The Land Contracts (Actions) Act*, SS 1959, c 34, s 3.

[165] This was also the case in Alberta: ALRI, *supra* note 134 at 124.

[166] *Disney Farms Ltd v CIBC*, [1984] 5 WWR 285 at 287-88 (Sask QB), Malone J.

[167] *An Act to amend The Land Contracts (Actions) Act*, SS 1965, c 18 [*LCAA 1965*].

[168] *LCAA 1943*, *supra* note 5, s 3(9); *The Land Contracts (Actions) Act*, RSS 1953, c 96, s 3(10).

[169] *LCAA 1965*, *supra* note 167, s 1.

[170] *An Act to amend The Land Contracts (Actions) Act*, SS 1969, c 25 [*LCAA Amendment Act 1969*].

(Canada) by the Federal Business Development Bank.[171] 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*.[172]

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.[173]

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.[174] 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.[175] 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.[176] 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 *LCAA*'s lack of a specific prohibition on agreements waiving the *LCAA* to support its finding.

6.3. Farm foreclosures

Agricultural and residential foreclosures continued to be governed by the *LCAA* until *The Family Farm Protection Act* came into force in 1971.[177] *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*[178] in 1984, which was replaced by *The Saskatchewan Farm Security Act*[179] in 1988. *The Saskatchewan Farm Security Act* continues to require "strongly pro-mortgagor foreclosure proceedings" with the goal "to afford protection

[171] *An Act to amend The Land Contracts (Actions) Act*, SS 1976-77, c 37 [*LCAA Amendment Act 1976-77*].
[172] *An Act to amend the Statute Law*, SS 2001, c 8, s 10 [*Statute Amendment Act 2001*].
[173] *An Act to amend The Land Contracts (Actions) Act*, SS 1983-84, c 42, s 3.
[174] *Ibid*, s 4.
[175] *Debates and Proceedings of the Legislative Assembly of Saskatchewan*, 20th Leg, 3rd Sess (31 May 1984) (Hon Mr Lane).
[176] *Canadian Imperial Bank of Commerce Mortgage Corp v Manson,* [1984] 4 WWR 171, 32 Sask R 303 (CA).
[177] SS 1971 (2nd Sess), c 3.
[178] SS 1984-85-86, c F-8.01.
[179] *Supra* note 13.

to farmers against loss of their farm land."[180] As farm foreclosures are now regulated by *The Saskatchewan Farm Security Act*, the *LCAA* is effectively restricted to residential foreclosures.

7. NEED FOR REFORM

7.1. 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;[181] however, statistics from 1977 to present are available.[182] The number of notices of intention received by the Provincial Mediation Board peaked from the mid-1980s through the early 1990s, reaching a high of 1,921 in the 1990-1991 reporting year.[183] The number of notices then unsteadily declined to a low of 428 in 2008-2009.[184] In the most recent reporting year, 2011-2012, 688 notices of intention were filed with the Provincial Mediation Board.[185]

7.2. National picture

Saskatchewan is the only common law province that requires any pre-action process for foreclosure.[186] 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

[180] Donald H Layh, *A Legacy of protection:* The Saskatchewan Farm Security Act: *History, commentary & case law* (Langenburg, SK: Twin Valley Books, 2009) at 56.
[181] 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.
[182] A table outlining the number of notices of intention received by the Provincial Mediation Board from 1977 through 2012 is found in the *Consultation Paper*, *supra* note 8 at Appendix 2.
[183] Saskatchewan Justice, *Annual Report 1991-92* (Regina, SK: Government of Saskatchewan, 1992).
[184] Ministry of Justice and Attorney General, *Annual Report 2008-09* (Regina, SK: Government of Saskatchewan, 2009).
[185] Ministry of Justice and Attorney General, *Annual Report 2011-12* (Regina, SK: Government of Saskatchewan, 2012).
[186] See Part 4.

credit to individuals will then be affected, and ultimately, if wide spread defaults occur, a whole property market may itself be affected.[187]

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

7.3. Trends in law reform

Generally speaking, no law reform agency recommended any additional protections for residential mortgage borrowers.[188] Specifically, no law reform agency recommended the adoption of a process similar to the *LCAA*, potentially indicating that the agencies 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.[189] However, in Alberta, where deficiency judgments were not permitted against individuals, ALRI recommended that this protection be restricted to home-owners. (Several years after ALRI's report, deficiency judgments were permitted against borrowers with high ratio loans.)

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.

8. 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.[190] The *LCAA* no longer applies to farm land. The purpose of the *LCAA* has more recently been described as "to provide mortgagors with a degree of protection."[191] 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

[187] ALRI, *supra* note 134 at 11-12. Commenters responding to the Law Reform Commission of Nova Scotia had similar concerns: LRCNS, *Final Report*, *supra* note 91 at 15
[188] See Part 5.
[189] LRCBC, *supra* note 132; OLRC, *supra* note 93 at 199; LRCNS, *Final Report*, *supra* note 91 at 15.
[190] *Lozinski v Mayoh*, *supra* note 156 at para 13.
[191] *Resmor Trust Company v MacDonald*, *supra* note 4 at para 15.

sale or, if that is not possible, time to find alternative accommodation. In this Part, the possible approaches to reform raised in the *Consultation Paper* are reviewed, and recommendations are made to better meet the purpose of the Act in modern times.

8.1. 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.

Repealing the *LCAA* and making the foreclosure practice in Saskatchewan more similar to the practice in other provinces could 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.[192]

Repealing the *LCAA* assumes that its purpose could still be achieved by other means:

8.1.1. 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.[193] 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.[194] An additional concern was that mandating a pre-action delay would make lenders "less inclined to informally negotiate with borrowers in

[192] ALRI, *supra* note 134 at 149.
[193] 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 23, s 6.
[194] LRCNS, *Final Report*, *supra* note 91 at 45.

an attempt to correct the default."[195] Based on the Law Reform Commission of Saskatchewan's consultation for this project, this concern does not appear to be founded. Anecdotally, lenders in Saskatchewan do not start court proceedings earlier or undertake less informal negotiation as a result of the *LCAA*. No other law reform agency expressed any concern with lenders' pre-action practices. All of the agencies indicate that lenders allow default to continue for two to three months before beginning foreclosure, to permit informal negotiations. This is also the case in Saskatchewan.

If, despite the repeal of the *LCAA*, some legislated pre-action delay was considered desirable, a statutory "notice of default" could be required, as recommended by OLRC for Ontario's power of sale.[196] 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.[197]

8.1.2. Fixed redemption period

Another option for addressing the concern that the borrower be allowed enough time to bring the mortgage up to date, refinance, find alternative accommodation or sell the property before foreclosure or judicial sale is a statutory redemption period. For example, both Alberta and British Columbia have legislated redemption periods of six months, unless the court finds a justifiable reason to extend or reduce the redemption period.[198] The legislatures in both provinces saw six months as a reasonable amount of time to give to the borrower to find funds to pay the lender.[199] 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.[200]

Saskatchewan could implement a fixed redemption period if the *LCAA* were repealed. Comparing the average redemption period currently set in Saskatchewan with the fixed

[195] *Ibid*.
[196] OLRC, *supra* note 93 at 166-167.
[197] *Ibid*.
[198] Alberta: *Law of Property Act*, *supra* note 84, s 41; British Columbia: *Law and Equity Act*, *supra* note 82, s 16(2).
[199] ALRI, *supra* note 134 at 265.
[200] OLRC, *supra* note 93 at 169.

redemption period in Alberta and British Columbia, however, does not provide a complete picture. Although the redemption period in Saskatchewan is often set at three months, borrowers have already experienced a pre-leave "redemption period" including up to eight months of adjournments. If a redemption period were fixed, 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.[201] However, such discretion would not be as broad as borrowers currently benefit from in the *LCAA* process, and so would not provide the same level of protection.

8.1.3. 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.[202] 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.[203] 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."[204]

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

[201] Alberta: *Law of Property Act*, *supra* note 84, s 41; British Columbia: *Law and Equity Act*, *supra* note 82, s 16(2).
[202] Richards, *supra* note 37 at 5-17.
[203] Roach, *supra* note 38 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."
[204] 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.

8.1.4. Discussion

Following consultation, the Commission has determined that the *LCAA* should not be repealed. Although lender and insurer respondents strongly support repeal of the Act, only one other respondent supports repeal (to be replaced with a statutory redemption period). All other respondents generally agree that the *LCAA* serves an important purpose in allowing borrowers time to sort out their lives before having an action started against them. For some respondents, the inability of a lender to claim costs for pre-leave proceedings (with few exceptions) makes retention of the *LCAA* attractive. In many situations, if pre-leave costs are added to the debt owed by the borrower to the lender, the borrower will not be able to reinstate the mortgage.

Recommendation

1) *The Land Contracts (Actions) Act* should not be repealed, but should be revised as further set out in this Final Report.

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

The second approach presented in the *Consultation Paper* 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 as a collection, these reforms were considered independently throughout the consultation.

8.2.1. 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.[205] Corporate bodies are excepted under section 5(2).[206] Mortgages to secure loans made under the *Industrial Development Bank Act* are excepted under section 6,[207] and mortgages given to secure a loan made under the *Federal*

[205] *LCAA*, supra note 3, s 3(1). See *LCAA*, *ibid*, s 2(a), or Part 2.1 of this paper, for the definition of an "action."
[206] Although the Act says only that corporate bodies *may* waive the Act in writing, in practice all corporations are required to: ALRI, *supra* note 134 at 124.
[207] This amendment was enacted by *LCAA Amendment Act 1969*, *supra* note 170, s 1.

Business Development Bank Act or the *Business Development Bank of Canada Act* are excepted under section 7.[208] Finally, *The Saskatchewan Farm Security Act* provides that the *LCAA* does not apply to farm land.[209] Effectively, applying for leave to commence an action under the *LCAA* is required for residential and unincorporated business premises. Some of the residential 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. 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.[210] 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.

[208] The exception for the Federal Business Development Bank was added in 1977 by *LCAA Amendment Act*, *supra* note 171, s 1. The addition of the Business Development Bank of Canada was made by *Statute Amendment Act 2001*, *supra* note 172, s 10.
[209] *SFSA*, *supra* note 1, 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).
[210] *The Home Owners' Protection Act*, SS 1981-82, c H-4.2, ss 3,4,6.

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.
>
> 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.[211]

ALRI recommended that the third method be applied for protection from deficiency judgments in Alberta.[212]

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.[213]

[211] ALRI, *supra* note 134 at 173.
[212] *Ibid* at 175. ALRI 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: *ibid* at 176.
[213] *SFSA*, *supra* note 1.

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).

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.[214]

The consultation responses did not generally support a restriction to primary residences. Reasons included the challenge of determining what is a primary residence, particularly with the limited information about use that lenders sometimes have; possible confusion arising from global mortgages which may cover a primary residence and other properties; and, the complications that follow if a property is incorrectly identified. At least one respondent defended the workability of a restriction based on use, suggesting that identifying properties to which the *LCAA* protection applies would be similar to identifying homesteads under *The Saskatchewan Farm Security Act*, which is something to which lenders and lawyers in Saskatchewan are accustomed.

Narrowing the application of the *LCAA* would allow the Act to achieve its purpose of protecting home owners by allowing them time to arrange retention of their current residence or to find new accommodation, without unnecessarily providing the same protection to commercial properties. The Commission suggests that identifying and excluding properties that are used for solely commercial purposes will be more straightforward than determining whether a property is a primary residence. No definition of "solely commercial purposes" is required. If a property may be used for other than commercial purposes, the lender would have to follow the *LCAA* process; however, any solely commercial properties should be excluded as the purpose of the *LCAA* is not to support commercial enterprise.

[214] *Supra* note 210, s 2(f).

The exclusion of properties used solely for commercial purposes should be based on the use of the property at default. As the protection of the *LCAA* is intended to give homeowners time to sort out their living situations, if a property is only being used commercially at the time of default, the protection is not required.

Recommendation

2) *The Land Contracts (Actions) Act* should not apply to properties used for solely commercial purposes at the time of default.

8.2.2. 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.[215] 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 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.[216]

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

[215] *LCAA*, *supra* note 3, s 3(2).
[216] *PMB Act*, *supra* note 23, s 6.

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 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.[217] The negotiation service offered may duplicate an earlier attempt at negotiation. In practice, a lender will send at least one letter or email, if not several, to the borrower alerting the borrower to the default on the mortgage. These communications ask the borrower to contact the lender, or the lender's lawyer, to make arrangements to bring the mortgage payments current. [218] 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 provide notice to 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 included in the first application served on the borrower. The notice of intention could be replaced with the notice of default discussed in Part 8.1.1, 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.[219] If the notice of intention is removed from the *LCAA*, amendments to *The Queen's Bench Regulations* could allow a borrower faced with an action to participate in mandatory mediation, either after entering a statement of defence or after the expiration of the time for delivery of a defence.[220]

Borrowers contact the Provincial Mediation Board to get general information about the foreclosure process, to make a payment proposal, and to get information from the lender. The

[217] *Facts about the Provincial Mediation Board*, *supra* note 24.
[218] Richards, *supra* note 37 at 5-2; "Foreclosure", online: Canadian Bar Association British Columbia branch <http://www.cba.org/bc>.
[219] 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).
[220] *QB Rules*, *supra* note 36, r 3-15.

Board does not normally draft payment proposals with borrowers, but will advise what goes into a reasonable proposal and then assess whether the proposal provided is reasonable. At the Commission's request, the Provincial Mediation Board reviewed its files from January 1, 2013 through June 17, 2014. Of the 942 files opened when a notice of intention was received, 27 percent of borrowers contacted the Board, six percent made proposals through the Board, and two percent had their proposals accepted by the lender. The Board is of the view that some of the 27 percent who contacted it would have been able to resolve the arrears directly with the lender after obtaining information from the Board.[221]

Responses from lenders to payment proposals sent through the Board vary greatly. A staff member commented that, in replying to payment proposals, many lenders are requiring borrowers to pay pre-leave legal costs in addition to arrears to reinstate the mortgage. Including pre-leave costs makes reinstatement or redemption impossible in some cases, and would not be permitted if the parties appeared before the court. A borrowers' lawyer suggested that lenders often do not cooperate with the payment plans provided by a borrower through the Board because the lender is not required to. Because of the other delays included in the *LCAA* process, the lender does not want to lose time at this initial step.

The general perception of consultation respondents was that most borrowers do not avail themselves of the Board's resources and, when they do, the Board's intervention is rarely effective. The notice of intention is seen as a hoop to jump through, a step that is necessary but not productive. One lender indicated that dealing with the borrower directly was more efficient than dealing through the Provincial Mediation Board. A lawyer who frequently represents borrowers suggested that the 30 days' notice of the impending application for leave was a benefit of the notice of intention, but that such notice need not come through the Board. However, the lawyer suggested that providing the services of the Board to interested borrowers was important, and that borrowers should be notified. The Board provides the borrowers who contact it with assistance they would not otherwise receive.

All lender and insurer respondents supported the elimination of the notice of intention. One insurer suggested that a statutory notice of default would be preferable to the notice of intention. A borrowers' lawyer commented that the involvement of the Provincial Mediation Board is absolutely not necessary.

The Provincial Mediation Board is a valuable resource available at no cost to borrowers. All borrowers should be made aware of the Board, how to reach it, and what it may do. However, requiring the Board to receive notices of intention from lenders and forward the notices on to borrowers with a brief letter describing the process is not necessary to achieve this aim. The

[221] Email from Provincial Mediation Board to Law Reform Commission of Saskatchewan (June 18, 2014).

services of the Provincial Mediation Board may be brought to the attention of a borrower in the first document served on him or her by the lender in the process (see 8.2.4, below). The borrower will then have an equal or greater amount of time to contact the Board before appearing in court.

One function of the notices of intention flowing through the Provincial Mediation Board will be lost with the implementation of the Commission's recommendation. Currently, the Board occupies a record-keeping function in addition to its mediation function. The Board tracks the number of notices of intention received each year and publishes this number in its Annual Report. If the notices of intention are no longer received by the Board, the publication of this number will cease. If keeping a record of the number of notices of intention served is considered valuable, consideration must be given to how this number will be kept. The simplest way to do so would be to serve a copy of the notice of application (discussed in 8.2.4, below) on the Provincial Mediation Board at the same time it is served on the borrower. The Board would have a record of the number of notices of intention served, but would not be required to follow up with a borrower unless contacted.

Recommendation

3) The notice of intention as a preliminary and separate step through the Provincial Mediation Board should be removed from *The Land Contracts (Actions) Act*.

8.2.3. 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.[222] 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.[223] The absence of set Chambers dates and the obligation to appear in person seem likely reasons that the Legislature included the application for an

[222] *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."

[223] *QB Rules*, *supra* note 36, r 6-17.

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 and time.[224] 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.

Elimination of the application for appointment step of the *LCAA* was unanimously supported by consultation respondents. Modern court practice is such that a lender can confidently insert a Chambers date in its notice of application for leave to commence, knowing that Chambers will be held on that date. The application for appointment is an unnecessary step in the *LCAA* process that adds cost for the lender, but no additional protection for the borrower except time. Respondents commented that, if the added time is desirable, finding a straight-forward way to achieve the delay is preferable to maintaining the application for appointment step.

Recommendation

4) The application for an appointment should be removed from *The Land Contracts (Actions) Act*.

8.2.4. Application for leave to commence

Having recommended that the *LCAA* be reformed, not repealed, and having recommended the elimination of the notice of intention and the application for appointment, the Commission must consider how the remaining step, the application for leave to commence, is best carried out. The primary concerns articulated by the respondents were maintaining the time and notice provided by the *LCAA*, while reducing the cost.

With the elimination of the first two steps, the notice of application for leave to commence will be the first document to be served on the borrower in the *LCAA* process. A group of

[224] *QB Rules*, *ibid*, r 6-7 - 6-8.

respondents commented that people, generally, don't take a proceeding seriously until they get a notice that says, "You must be in court on this day." Communications before a notice of application are largely ignored. Serving the notice of application as the first document in the legislated process will have the benefit of bringing the importance of the situation to bear on the borrower, who may then act more quickly to remedy his or her financial or living situation than if receiving a notice of intention.

8.2.4.1. Language

To ensure that borrowers understand what they are being served with, attention should be paid to the language and structure of the notice of application for leave to commence. Dr. Julie Macfarlane, in her report on the National Self-Represented Litigants Project, noted that self-represented litigants (most borrowers in an *LCAA* proceeding) are often "unable to properly participate due to the unfamiliar language, procedures and customs" of a legal proceeding.[225] Many self-represented litigants in her study commented on the effect of legal language, which they felt distanced them from the proceedings.[226] To allow borrowers to fully understand and participate in the legal proceeding both before and after the first hearing, the notice of application should be written in plain language at an appropriate reading level.

8.2.4.2. Notice period

Many respondents commented, and the Commission's research supports, that the time provided by the *LCAA* process is the borrower's best protection:[227] 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 time between the notice of intention and the hearing allows the borrower to negotiate a payment plan with the lender, to put the property up for sale, to find a lawyer, or to prepare for the reality of appearing in court.

Now, at least 46 days, but often more, pass between service of the notice of intention and the first hearing for leave to commence.[228] The borrowers' lawyers who responded suggested that 30 to 60 days between a first notice and the hearing for leave to commence would be sufficient and preferable over the multiple steps that currently take up that time. Certainty of timing is a

[225] Dr Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report* (May 2013) at 97, online: The National Self-Represented Litigants Project <http://representingyourselfcanada.com>.
[226] *Ibid*.
[227] *Resmor Trust Company v MacDonald*, *supra* note 4 at para 15.
[228] Included in the 46 days are: at least 30 days between service of the notice of intention and making the application for appointment, at least one day for the application for appointment and service of the appointment on the borrower, and at least 15 days between service of the appointment and the hearing for leave to commence.

benefit to both parties. To address the overarching concern of most respondents to allow a borrower time to sort out his or her affairs and to remain consistent with the current pre-hearing time in the process, the Commission recommends that a notice of application provide at least 60 days' notice of the hearing for leave to commence.

8.2.4.3. Legislated form

All respondents who commented on the form of a notice suggested that the notice of application should be a legislated form to ensure that all the information required by the court and information to assist the borrower be included. A borrowers' lawyer noted that a set form of notice that is brief and direct will be easier for a borrower to understand than the multiple documents that are served on borrowers currently.

The notice of application form should include the following information, discussed in more detail below:

- the date and location of the hearing;
- details of the borrower's default, and a statement of account certified by the lender;
- information explaining the role of the Provincial Mediation Board and stating that a borrower may contact the Board for assistance;
- notice that the borrower may appear at the hearing and speak to the court;
- information on the possible decisions that the court may make at the hearing (adjourn application, grant leave, dismiss application);
- notice that legal costs incurred by the lender between the notice of application and the grant of leave to commence cannot be recovered by the lender from the borrower, if the borrower behaves reasonably, in the court process; and,
- a contact name and number of an individual employed at the lender whom the borrower may contact to discuss the mortgage arrears and application.

The form of the notice of application should be prescribed in the regulations to the *LCAA*, rather than in the Act itself, so that the prescribed form may be more easily changed if difficulties are encountered. The *LCAA* should provide that a notice of application is invalid unless it substantially complies with the prescribed form and the relevant information has been conveyed to the borrower in some other way.[229]

[229] See e.g. *The Builders' Lien Act*, SS 1984-85-86, c B-7.1, s 100(1): "No certificate of substantial performance, written notice of a lien, claim of lien or any other prescribed form is invalidated by reason only of a failure to comply strictly with the prescribed forms or subsection 50(2) unless, in the opinion of the court, a person has been prejudiced thereby and then only to the extent of the prejudice suffered."

Date and location of the hearing

The date and location of the hearing is vital information, and is required on all notices of application.[230] The hearing is an opportunity for the usually self-represented borrower to stand before the judge to tell his or her story, to explain how the mortgage went into default and what the borrower is doing to remedy the situation. Lawyers consulted at the Canadian Bar Association Saskatchewan Mid-Winter Meeting felt strongly that borrowers losing the opportunity to appear in court and make their case otherwise than in writing would be unfortunate. The respondent lawyers noted that notices and documents may be more intimidating to a borrower than standing in front of the judge, which is also intimidating, but provides a forum for the borrower to make his or her case. Ensuring that the borrower is aware of when this opportunity to speak to the court occurs is important.

Details of the borrower's default, and a statement of account certified by the lender

OLRC suggested in its report that a notice of default be in a form prescribed by regulation and 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.[231] If the details of the borrower's default and a statement of account were included in the notice of application, an accompanying affidavit of default may not be necessary. The lender could provide a certification on the notice that the amounts were accurate. A copy of the mortgage and an appraisal could be attached to the notice of application so that all information required by the court is served on the borrower at one time.

Because the notice of application will be served 60 days before the hearing, the court will likely require updated information respecting the arrears just before the hearing date. A second notice should be served on the borrower and filed with the court at least five days before the hearing.

Information explaining the role of the Provincial Mediation Board and stating that a borrower may contact the Board for assistance

As discussed in 8.2.2, the Provincial Mediation Board is a valuable resource available at no cost to borrowers. Information about the Board, how to reach it, and what it may do should be included in a notice of application for leave to commence. When considering what information

[230] QB Rules, *supra* note 36, Form 6-5.
[231] *Supra* note 93 at 166-167.

should be included respecting the role of the Provincial Mediation Board, the current Board letter that is delivered to the borrower with the notice of intention may be used as a starting point.

Notice that the borrower may appear at the hearing and speak to the court, and information on the possible decisions that the court may make at the hearing

A borrowers' lawyer commented that the emotion around losing a house sometimes prevents borrowers from appearing on leave applications because they feel helpless. He suggested that if the notice made clear that the borrower could appear and speak to the court at the hearing, and that adjournments and arrangements were possible, borrowers would feel more empowered and would be more likely to appear. His observation about the mental state of borrowers appears to be supported by Dr. Macfarlane's research. Self-represented litigants appearing in court have very high anxiety levels, in part because they don't know what to expect.[232] She notes:

> It is clear from interviews that anxiety is a natural consequence of the fact that SRL's [self-represented litigants] generally have less understanding of the hearings process than trained lawyers or judges. However, this anxiety has a very significant impact on the hearings process itself (including how a SRL feels when the hearing is over, a feeling that is often carried into subsequent hearings), as well as the overall SRL experience of "access to justice". SRL appearance anxiety needs to be carefully analyzed in order to explore its multiple causes to enable consideration of ways in which it might be reduced, in the interests of all parties (including members of the judiciary).[233]

Therefore, including concise information on what will happen at the hearing, what the borrower must do and may do to present appropriate information to the court, and the possible decisions the court may make, will benefit all parties to the hearing.

Notice that legal costs incurred by the lender between the notice of application and the grant of leave to commence cannot be recovered by the lender from the borrower, if the borrower behaves reasonably, in the court process

At least one borrower lawyer felt that the inability of the lender to recover legal costs from the borrower before the grant of leave to commence, unless a borrower behaves unreasonably, was one of the primary borrower benefits of the *LCAA*. As the limitation is based on common law, and not legislated, it is unlikely to come to the attention of a borrower preparing for a

[232] Macfarlane, *supra* note 225 at 53.
[233] Macfarlane, *supra* note 225 at 96.

hearing or negotiating a payment plan. If borrowers are aware that, if they act reasonably, lenders cannot recover legal costs from them between the notice of application and the grant of leave to commence without a court order in the *LCAA* process, they will be better able to advocate for themselves if redeeming or reinstating a mortgage after receiving the notice of application, but before appearing at the hearing.

Contact name and number of an individual employed at the lender whom the borrower may contact to discuss the mortgage arrears and application

The Commission observed that many borrowers struggle to speak with the right person at their lender to discuss mortgage arrears and payment plans. The Commission recommends that a contact name and direct line to someone at the lending institution authorized to deal with the borrower's mortgage be included on the notice of application. The name and phone number may go some way to reducing the number of hearings for leave to commence, and increasing satisfactory outcomes for both parties.

Recommendations

5) The first step in a reformed *Land Contracts (Actions) Act* should be a plain language notice of application for leave to commence a foreclosure action, in a legislated form, served on the borrower and the Provincial Mediation Board at least 60 days before the hearing date, containing the following information:

a. the date and location of the hearing;

b. information explaining the role of the Provincial Mediation Board and stating that a borrower may contact the Board for assistance;

c. notice that the borrower may appear at the hearing and speak to the court;

d. information on the possible decisions that the court may make at the hearing (adjourn application, grant leave, dismiss application);

e. notice that legal costs incurred by the lender between the notice of application and the grant of leave to commence cannot be recovered by the lender from the borrower, if the borrower behaves reasonably, in the court process; and,

f. a contact name and number of an individual employed at the lender, empowered to deal with the borrower's mortgage, whom the borrower may contact to discuss the mortgage arrears and application.

6) The notice of application should be a form prescribed in the regulations to the *LCAA*, and a notice of application should be invalid unless it substantially complies with the prescribed form and the relevant information has been conveyed to the borrower in some other way.

7) A copy of the mortgage or agreement of sale and an appraisal of the property should be exhibited to the notice of application for leave to commence a foreclosure action.

8) A second document containing updated arrears information should be served on the borrower and filed with the court at least five days before the hearing for leave to commence a foreclosure action.

8.2.4.4. Adjournment

The Commission discussed the ability of the court to adjourn the application for leave to commence for up to eight months and whether this was an invitation or a limitation. The Commission agreed that it was a limitation: if the words "not exceeding eight months in all" were not included in the section, the court could adjourn the application for an unending length of time, subject only to claims of fairness and the efficient administration of justice. Borrower lawyers appreciated the possible eight months of adjournments, commenting that the court usually only adjourns one to three months at a time, which is a good way to ensure that progress is being made by borrower. Limiting adjournments to eight months provides some certainty to the process for both parties.

Recommendation

9) The court should continue to be limited to eight months of adjournments on an application for leave to commence a foreclosure action.

8.2.5. Education

The Commission has recommended a number of significant changes to the *LCAA* in this report, each of which will affect how lenders, borrowers, their lawyers, and the courts experience foreclosure. To improve the speed and the ease of transition to the new *LCAA* procedure, the Commission recommends the preparation and distribution of an educational package. The package should review the requirements and timing of each step in the new procedure, and should be distributed to lawyers, the courts, and local registrars and legal assistance clinics for access by borrowers. The Courts of Saskatchewan may consider including the education package as a resource on its website. Broad distribution of the package will reduce the time required to fully implement the changes to the *LCAA* procedure in practice, and may result in less litigation over errors in its implementation.

Recommendation

10) An education package describing the new *LCAA* procedure should be prepared and distributed to lawyers, the courts, and local registrars and legal assistance clinics for access by borrowers.

8.3. The Home Owners' Protection Act

The Home Owners' Protection Act was enacted effective December 31, 1981.[234] 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.[235] It also prohibited any action or applications for leave to commence being commenced in the same period.[236] 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 substantially higher than the old rate or was faced with the prospect of such a renewal in 1982.[237]

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*.[238] 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.[239] Given that the time period for the protection offered under *The Home Owners' Protection Act* has passed, it is no longer necessary to have this Act "on the books."

Repeal of *The Home Owners' Protection Act* was uniformly supported by respondents, as the Act is duplicative and no longer applies. One group of respondents noted that if high interest rates become a problem again, the Act would have to be significantly amended. They suggested that repealing the Act now, and enacting a new Act if necessary, would be a cleaner approach than maintaining the Act "just in case."

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[234] *Supra* note 210.
[235] *Ibid*, s 7.
[236] *Ibid*.
[237] *Toronto-Dominion Bank v Butler* (1982), 24 RPR 129 at para 13 (Sask QB).
[238] *Supra* note 210, s 3.
[239] ALRI, *supra* note 134 at 123.

Recommendation

11) *The Home Owners' Protection Act* should be repealed.

8.4. The Agreements of Sale Cancellation Act

The Agreements of Sale Cancellation Act is a very brief, four section Act.[240] The Act was intended to address the unequal bargaining positions of sellers who could provide financing and less sophisticated buyers by protecting buyers who, by virtue of the agreement for sale, had established equity in the land through payments, but had not yet obtained title to the land.[241] The Act was first introduced in 1917 and was amended in 1919 to include the current section 3 (then section 2), and in 2009 to add section 1.1.[242] These are the only amendments in the Act's 90 year history, with the exception of minor amendments of language as it was reproduced in each of the Revised Statutes of Saskatchewan from 1920 through 1978.[243]

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."[244] 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.[245]

The Agreements of Sale Cancellation Act and the *LCAA* significantly overlap in terms of when they require the court to be involved. It is not clear why *The Agreements of Sale*

[240] RSS 1978, c A-7.
[241] Saskatchewan, Legislative Assembly, *Debates and Proceedings*, 26th Leg, 2nd Sess, No 9A (5 November 2008) at 1598 (Hon Mr Morgan). The Act originated from a proclamation of the Lieutenant Governor in Council of November 5, 1914 (renewed by proclamation of March 23, 1916) to protect, due to the First World War, "the property and interest of persons who have joined as volunteers the forces raised by the government of Canada for the defence and security of Canada or to assist in military or naval operations in or beyond Canada, or who have left Canada to join the British, French, Belgian, Russian or Servian armies either as volunteers or reservists, and of other persons whose interest may be jeopardised by a situation caused by the above state of war."
[242] *An Act to provide for the Cancellation of Agreements of Sale*, SS 1917, c 31; *An Act to amend An Act to provide for the Cancellation of Agreements of Sale*, SS 1918-19, c 78; *The Agreements of Sale Cancellation Amendment Act, 2009*, SS 2009, c 7.
[243] RSS 1920, c 72; RSS 1930, c 86; RSS 1940, c 104; RSS 1953, c 114; RSS 1965, c 121; RSS 1978, c A-7.
[244] *Supra* note 240*,* s 2.
[245] *LCAA*, *supra* note 3, s 2(a.1).

Cancellation Act was not repealed when the *LCAA* came into force, as the overlap has existed since that time. There was no discussion of the overlap between the two Acts when the 2009 amendments were made.[246] Two Acts requiring the vendor to commence proceedings in court to terminate an agreement for sale of land are unnecessary. 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.

Repeal of *The Agreements of Sale Cancellation Act* was uniformly supported by respondents, provided that cancellation of agreements for sale is treated in the same manner as foreclosures under a reformed *LCAA*.

The final section of *The Agreements of Sale Cancellation Act* excepts agreements for sale under $250 from the requirement in section 2 to involve the court in the determination or cancellation of the agreement. This is the only practical difference between *The Agreements of Sale Cancellation Act* and the *LCAA.* Respondents did not address the role or necessity of this exception. The section does not appear to have been considered at any time by Saskatchewan courts since its inclusion in 1919, nor has the value changed since that time. The exception could likely be repealed without consequence.

Recommendation

12) *The Agreements of Sale Cancellation Act* should be repealed. Cancellation of agreements of sale should be treated in the same manner as foreclosures under a reformed *LCAA*.

[246] Saskatchewan, Legislative Assembly, Standing Committee on Intergovernmental Affairs and Justice, *Hansard Verbatim Report*, No 17 (20 April 2009) at 330-334.

Addendum to Reform of *The Land Contracts (Actions) Act: Final Report* (July 2014)

In *Reform of the Land Contracts (Actions) Act: Final Report* (July 2014), the Commission recommended that The Agreements of Sale Cancellation Act be repealed on the basis that it overlaps *The Land Contracts (Actions) Act*. On further study and reflection, the Commission has decided to withdraw this recommendation. It has concluded that the role of *The Agreements of Sale Cancellation Act* in requiring an application to the court in all cases for cancellation of an agreement for sale should be retained. *The Agreements of Sale Cancellation Act* gives to the court broad equitable jurisdiction with respect to the remedies of vendors. It is under this jurisdiction that the court makes an order nisi directly equivalent to an order nisi in mortgage foreclosure proceedings. Repeal of *The Agreements of Sale Cancellation Act* would deny to the court this power where contractual rescission is involved.